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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

The COUNTY OF SANTA CRUZ, individually and on behalf of THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. CHEVRON CORP., et al., Defendants.	First Filed Case: No. 3:18-cv-00450-VC Related Case: No. 3:18-cv-00458-VC Related Case: No. 3:18-cv-00732-VC **MARATHON PETROLEUM CORP.'s OPPOSITION TO PLAINTIFFS' MOTION TO REMAND IN RESPONSE TO ADDITIONAL NOTICE OF REMOVAL** CASE NO. 18-CV-00450-VC
The CITY OF SANTA CRUZ, a municipal corporation, individually and on behalf of THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. CHEVRON CORP., et al., Defendants.	CASE NO. 18-CV-00458-VC

The CITY OF RICHMOND, a municipal corporation, individually and on behalf of THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. CHEVRON CORP., et al., Defendants.	CASE NO. 18-CV-00732-VC

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I. INTRODUCTION

Defendant Marathon Petroleum Corporation ("MPC") submits this Opposition to Plaintiffs' Reply in Support of Motion to Remand; Motion to Remand in Response to Defendant Marathon Petroleum Corp.'s Additional Notice of Removal ("Reply / Motion to Remand") (ECF No.* 109).[1] In their Reply / Motion to Remand, Plaintiffs refute MPC's proffered "navigable waters" ground for removal and its assertion of admiralty jurisdiction. The purpose of this Opposition is to address these specific issues raised in Plaintiffs' Reply / Motion to Remand.

II. ARGUMENT

In addition to the reasons laid out in Defendants' Joint Opposition to Motion to Remand (ECF No. 91), Plaintiffs' claims are removable under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), because they are a collateral attack on the federal regulatory scheme for protecting and preserving the navigable waters of the United States and depend on the resolution of substantial, disputed issues regarding that federal regulatory scheme, including (but not limited to): whether Defendants' conduct is unlawful under the comprehensive federal regulatory scheme Congress created to protect and preserve the navigable waters of the United States, and whether Defendants' conduct can be found to have caused the alleged sea level rise and increased flooding (which necessarily requires resolution of specific issues of federal laws governing the navigable waters).

*Except as noted otherwise, all ECF docket numbers herein refer to the docket in Lead Case No. 3:18-cv-00450-VC.

[1] Plaintiffs note in their Reply / Motion to Remand the parties' agreement that their brief serves both as "Plaintiffs' reply in support of their original remand motion *and* Plaintiffs' motion to remand in response to Marathon's Additional Notice of Removal." *See* Reply / Motion to Remand at n. 1 (emphasis added). MPC submits this opposition in accordance with Local Rule 7-3(a), which provides for the filing of an "opposition . . . to a motion" within 14 days after the motion was filed. Civil L. R. 7-3(a).

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In addition, Plaintiffs' claims are removable because they fall within the Court's admiralty jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1441, despite Plaintiffs' arguments to the contrary. At their core, Plaintiffs' claims are founded upon Defendants' production of fossil fuels, an activity that, in significant part, takes place on vessels operating in navigable waters and thus satisfies the "location" requirement for admiralty jurisdiction Further, Plaintiffs' claims meet the "connection" requirement for admiralty jurisdiction because they primarily concern activities that derive from traditional maritime activity and have the potential to disrupt maritime commerce.

A. Plaintiffs' Claims Raise Substantial Disputed Issues Regarding the Federally Regulated Navigable Waters of the United States.

In their Complaints, Plaintiffs allege that rising levels of navigable waters of the United States were caused by Defendants' extraction, processing, promotion, and consumption of global energy resources. In their Reply / Motion to Remand, however, Plaintiffs attempt to walk back their collateral attack on the entire regulatory scheme for federally protected navigable waters by recasting their claims as resting solely on allegations that Defendants engaged in "improper promotion and marketing of their products" and they try to make much of the fact that their Complaints "do not use the term 'navigable waters.'" Reply / Motion to Remand at 14. But Plaintiffs "may not avoid federal jurisdiction by omitting from the complaint allegations of federal law that are essential to the establishment of the claim." *Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1040 (9th Cir. 2003) (citation omitted). Plaintiffs' alleged injury is the "flooding of coastal lands," Order Den. Mots. to Remand at 8, *City Attorney of San Francisco v. BP p.l.c. et al.*, Case No. 3:17-cv-06012, ECF No. 116 (Feb. 27, 2017), and they allege throughout their Complaints that Defendants' production and promotion of fossil fuels caused sea level rise and increased flooding. *See, e.g., Cty. of Santa Cruz* Compl. ¶¶ 10, 13, 204, 205, 248, 249 (ECF No. 1-2); Order Granting Mots. to Remand at 2, *Cty. of San Mateo v. Chevron Corp., et al*. Case No. 3:17-cv-04929-VC,

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(Mar. 16, 2018) (ECF No. 223) (characterizing Plaintiffs' claims as "claims against energy producers' contributions to global warming and rising sea levels.").

At the same time that Plaintiffs attempt to downplay the substantial questions of federal law raised by their claims, they seek to supplant the federal regulatory scheme for the protection and preservation of navigable waters to hold Defendant energy producers liable for the alleged consequences of rising sea levels in coastal areas of California. They claim that Defendants extract, manufacture, deliver, market, and sell fossil fuels, which has caused sea level rise along the coast of the Pacific, in the San Francisco and Monterey Bays and the San Lorenzo River—all navigable waters of the United States subject to federal protections—thereby injuring Plaintiffs' property. *See, e.g.*, *Cty. of Santa Cruz* Compl. ¶¶ 2-3, 8, 53, 55, 59. These claims fall squarely within the category of claims removable under *Grable* because they "necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable*, 545 U.S. at 314.

Jurisdiction under *Grable* is proper here, not merely because there is federal oversight of navigable waters, but because Plaintiffs' claims require resolution of issues of federal law to adjudicate the state law claims. Specifically, for example, Plaintiffs' claims raise substantial disputed issues as to whether Defendants' conduct is unlawful under the comprehensive federal regulatory scheme Congress created to protect and preserve the navigable waters of the United States. In addition, Plaintiffs' claims will require a showing that, despite federal laws and protections for the navigable waters, Defendants' conduct can be found to have caused the alleged sea level rise and increased flooding.

1. Plaintiffs Must Demonstrate That Defendants' Conduct Was Unlawful Under the Federal Regulatory Scheme for Protecting Navigable Waters.

To succeed on their claims, Plaintiffs must demonstrate that Defendants' conduct was unlawful under the federal regime for the protection of navigable waters. Plaintiffs bring suit under California Civil Code sections 3479, 3480, 3491, and 3494, "to abate the nuisance

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caused by sea level rise and changes to the hydrologic regime, including, but not limited to, increased frequency and magnitude of drought, increased frequency and magnitude of extreme precipitation events . . . and the consequences of those physical and environmental changes in the City's jurisdiction." Cty. of Santa Cruz Compl. ¶ 13. California Civil Code § 3479 defines the nuisance claim in part as "[a]nything which . . . *unlawfully* obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway." Cal. Civ. Code § 3479 (emphasis added). Therefore, Plaintiffs are wrong that "proof of federal statutory violations is not an element of any of Plaintiffs' claims." *See* Reply / Motion to Remand at 14. Under § 3479, proving unlawfulness is part of Plaintiffs' cause of action.

California law further provides that "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance," Cal. Civ. Code § 3482, including under federal regulations promulgated under federal statutes. *Jones v. Union Pac. R.R. Co.*, 79 Cal. App. 4th 1053, 1067-68 (2000). Assessing whether the activities alleged to constitute a nuisance are authorized by statute or regulations "requires a particularized assessment of each authorizing statute in relation to the act which constitutes the nuisance." *Friends of H St. v. City of Sacramento*, 20 Cal. App. 4th 152, 160-61 (1993), *as modified on denial of reh'g* (Nov. 18, 1993). Therefore, adjudication of Plaintiffs' nuisance claims would require a determination of whether Defendants' production and promotion of fossil fuels, which Plaintiffs claim has caused sea level rise and changes to the hydrologic regime, was done in violation of the federal statutes and regulations governing the protection and preservation of the navigable waters of the United States.

It is not simply the existence of a federal regime to preserve and protect navigable waters that demonstrates that these cases fall under *Grable*. Whether the Defendants' conduct was lawful—that is, whether Defendants complied with the statutory and regulatory requirements for activities in navigable waters—will actually be in dispute and will involve evaluation of, among other things, whether Defendants' fossil fuel production activities and

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supporting infrastructure that are the subject of the Complaints were authorized by the Rivers and Harbors Act (RHA), Clean Water Act (CWA), National Environmental Policy Act (NEPA), and the implementing regulations for those environmental statutes. These issues are not merely issues that "arise under" or abstractly relate to federal law. They are the kind of actually disputed, substantial federal issues necessary for *Grable* jurisdiction.

As in *Tennessee Gas Pipeline*, therefore, "the scope and limitations of a complex regulatory framework are at stake in this case," and removal under *Grable* is appropriate. *See Bd. of Comm'rs of the Se. La. Flood. Prot. Auth.-E v. Tenn. Gas Pipeline Co.*, 850 F.3d 714, 725 (5th Cir. 2017). The similarities between this case and *Tennessee Gas Pipeline* only further reinforce *Grable*'s applicability and Plaintiffs' efforts to distinguish *Tennessee Gas Pipeline Co.* fall short.[2] There, a plaintiff sought damages and injunctive relief against ninety-two oil and gas companies whose actions allegedly caused erosion of coastal lands, leaving south Louisiana more vulnerable to hurricanes and tropical storms. 850 F.3d at 720-21. The Fifth Circuit affirmed the district court's finding that the substantiality test under *Grable* is satisfied because the plaintiff's claims amounted to a "collateral attack on an entire regulatory

[2] Likewise, the cases cited by Plaintiffs to support their argument that there is no "arising under" jurisdiction are inapposite. *See* Reply / Motion to Remand at n. 8. *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold*, 524 F.3d 1090 (9th Cir. 2008) concerned whether a narrow provision of the federal Natural Gas Act (NGA)—which allows a federal court to "to enforce any liability or duty created by" the NGA—gave the district court jurisdiction over the Plaintiff's state law claims to enforce a duty created by the NGA. The reason for the Court finding no "arising under" jurisdiction in that case was that the Plaintiff's state law claims did not fall within the specific NGA jurisdictional provision invoked by the Plaintiff, which is not a concern in the instant case. *See* 524 F. 3d at 1101 ("Section 717u does not provide federal jurisdiction for a state law claim against a party whose obligations or duties under the NGA are not at issue."). *Bennett v. Sw. Airlines Co.*, 484 F.3d 907 (7th Cir. 2007) is also distinguishable because in that case, as the court observed, "defendants [did] not contend, nor did the district court find, that resolution of this suit revolves around any particular disputed issue of federal law." 484 F. 3d at 909. Rather, resolution of the Plaintiff's allegations depended upon "fact-bound question[s]" for which "[t]he meaning of federal statutes and regulations [was expected to] play little or no role." *Id*. The opposite is true here, where the numerous federal statutes and regulations that govern Defendants' conduct at issue must be interpreted and assessed in order to determine whether Plaintiffs in these cases are entitled to relief.

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scheme . . . premised on the notion that [the scheme] provides inadequate protection," particularly because the relevant federal statutes, including the RHA and CWA, "plainly regulate issues of national concern" and "the case affects an entire industry rather than a few parties." *Id.* at 724 (internal quotations omitted). The court noted that the validity of the plaintiff's claims "would require that conduct subject to an extensive federal permitting scheme is in fact subject to implicit restraints that are created by state law." *Id.* Likewise, as explained *supra*, federal law is "required" here to establish a basis for liability under Plaintiffs' state nuisance claims. That the negligence and nuisance claims alleged in *Tennessee Gas Pipeline* more explicitly relied on a breach of duty that arose under federal statutes does not alter the applicability of the *Tennessee Gas Pipeline* court's reasoning to strikingly similar claims in these cases.

2. Plaintiffs' Alleged Chain of Causation Requires Consideration of the Federal Regulatory Regime for the Protection of Navigable Waters.

In addition to proving unlawfulness, to succeed on their nuisance claims, Plaintiffs must prove that their injuries—here, that navigable waters have and will continue to encroach upon Plaintiffs' land, causing damage—are proximately or legally caused by the Defendants' production and promotion of fossil fuels. *See Martinez v. Pac. Bell*, 225 Cal. App. 3d 1557, 1565 (1990) (nuisance liability "extends to damage which is proximately or legally caused by the defendant's conduct, not to damage suffered as a proximate result of the independent intervening acts of others"). Under the familiar doctrine of proximate cause, "courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004) (citing *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U. S. 766, 774, n.7 (1983)).

The rising levels of the navigable waters of the United States are a "necessary and critical element" of Plaintiffs' theory of causation. In evaluating whether Defendants' extraction, processing, promotion, and consumption of global energy resources is the

proximate or legal cause of the alleged sea level rise and increased flooding, this Court will have to evaluate the adequacy of the federal protections and infrastructure to protect navigable waters and protect against sea level rise and the underlying legislative intent and policy of those federal protections. This will require the Court to resolve substantial, disputed questions over whether intervening actions taken by or in partnership with the U.S. Army Corps of Engineers to protect the waters at issue under federal statutory authority, including (but not limited to) the RHA, CWA, and Water Resources Development Act appropriations, *see* Marathon Additional Notice of Removal at 8-10 (ECF No. 90), sever Plaintiffs' attenuated chain of causation.

As these specific examples of issues demonstrate, the close connection between Plaintiffs' claims and the navigable waters of the United States supports removal of this case to federal court.

B. Admiralty Jurisdiction Provides a Basis for Removal.

Plaintiffs have alleged claims that fall squarely within the admiralty jurisdiction of this Court and are removable under 28 U.S.C. §§ 1331 and 1441. As articulated by the Supreme Court, "a party seeking to invoke federal admiralty jurisdiction pursuant to 28 U.S.C. § 1333(1) over a tort claim must satisfy conditions of both location and of connection with maritime activity." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995). The claims meet both the "location" and "connection" tests and are thus within this Court's original jurisdiction. Plaintiffs in their Reply / Motion to Remand attempt to downplay the nature the claims in this suit, which makes them removable under admiralty jurisdiction—namely, that Defendants' production of fossil fuels, a significant portion of which takes place on vessels that operate in navigable waters, both have a substantial relationship to traditional maritime activity and, via their alleged impacts on navigable waters, have the potential to disrupt maritime commerce.

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1. Plaintiffs' Claims Meet the Location Test.

Both parties agree that **"**[a] court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water." *Grubart*, 513 U.S. at 534. Even though meeting either prong of the location test is sufficient, both prongs are in fact met here. First, the tort alleged occurred "on navigable water" for the purposes of the location test. As Judge Alsup noted, Plaintiffs' alleged injury is the "flooding of coastal lands," and the "very instrumentality" of this alleged injury is navigable waters. Order Den. Mots. to Remand at 8, *City Attorney of San Francisco v. BP p.l.c. et al.*, Case No. 3:17-cv-06012, ECF No. 116 (Feb. 27, 2017).

Second, as an essential element of their claims, Plaintiffs will have trace the injuries alleged to be suffered on land (*i.e*. coastal flooding, erosion, saltwater intrusion, and the like) to their origin, which in many cases is a "vessel" on navigable water. Plaintiffs do not dispute that a floating (or fixed) drilling platform is a vessel. Reply / Motion to Remand at 16. Thus, the causal inquiry, a necessary element of the torts alleged, implicates the admiralty jurisdiction of this Court. Plaintiffs attempt to disclaim the protracted chain of causation that underlies their claims, stating that "the proximate cause of Plaintiffs' injuries arises from the nature of the products themselves and from Defendants' promotion of those products with knowledge of their dangers, not from any Defendants' [*sic*] operation of an [*sic*] MODU." Reply / Motion to Remand at 17. The first link is this causal chain, however, *is* the drilling and extraction of fossil fuels which, in many cases, takes place on a drilling platform on navigable waters. *See Cty. of Santa Cruz*, Compl. ¶ 3 (noting that "[t]he primary source" of the greenhouse gas pollution causing the impacts complained of is "the extraction, production, and consumption" of fossil fuel products). As Plaintiffs have pleaded them, the injuries alleged here were thus "caused by a vessel on navigable water," and the location test is satisfied.

2. Plaintiffs' Claims Meet the Connection Test.

The connection test raises two issues. "A court, first, must 'assess the general features of the type of incident involved' . . . to determine whether the incident has 'a potentially

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disruptive impact on maritime commerce.' . . . Second, a court must determine whether 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'" *Grubart*, 513 U.S. at 534 (internal citations omitted). Plaintiffs do not dispute in their Reply / Motion to Remand that the activity giving rise to their claims—namely, the extraction, promotion, and sale of fossil fuel products—has the potential to disrupt maritime commerce. Indeed, Plaintiffs' Complaints list a number of harmful effects allegedly caused by Defendants' activities, from sea level rise to flooding to climatological events such as increased frequency and severity of extreme precipitation events. *See Cty. of Santa Cruz*, Compl. ¶¶ 208-228. All of these could possibly disrupt maritime commerce, by potentially causing damage to ports, shipping delays, harm to vessels, and a number of other adverse impacts.

Plaintiffs erroneously assert that oil and gas production from mobile drilling units is not a "traditional maritime activity" for the purposes of the connection test for admiralty jurisdiction. In support of this assertion, Plaintiffs cite *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 425 (1985) for the notion that oil and gas production is not "traditional maritime activity." Reply / Motion to Remand at 17. At issue in *Herb's Welding* was the proper construction of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) to determine whether a welder on a fixed platform in state waters was entitled to LHWCA benefits, and not whether the case fell within the Court's admiralty jurisdiction. Indeed, the specific passage cited by Plaintiffs concerns whether a welder on a fixed offshore rig was engaged in "maritime commerce" so as to be engaged in "maritime employment" for the purpose of worker's compensation under the LHWCA. 470 U.S. at 421. This case is thus not dispositive on the question of whether Defendants' fossil fuel production activities are substantially related to traditional maritime activity for the purposes of establishing admiralty jurisdiction. *See id.* at 433-34 (Marshall, J. et al. dissenting) (noting that "LHWCA Amendments were intended to expand LHWCA coverage well beyond the bounds of traditional admiralty law").

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Plaintiffs attempt to disguise the maritime nature of Defendants' activities that form the basis for their claims by characterizing the "critical conduct at issue in Plaintiffs' cases" as the "marketing and promotion of fossil fuels," opining that such "conduct has "nothing to do with navigable waters." Reply / Motion to Remand at 18. This characterization is an attempt by Plaintiffs to shift focus away from a fundamental aspect of their complaints—*i.e.* that the allegations are rooted in the "extract[ion]" of "fossil fuel products." *See, e.g.*, *Cty. of Santa Cruz* Compl. ¶ 245.a. This activity, to the extent that it takes place on vessels operating in navigable waters, *does* in fact bear a substantial relationship to traditional maritime activities. *See Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538-39 (5th Cir. 1986) ("Oil and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce").

3. The Claims are Removable Under 28 U.S.C. § 1441.

Because Plaintiffs' claims arise in admiralty, they are removable to this Court in their own right, and other jurisdictional bases—such as diversity or federal question—are not required. Plaintiffs offer a tortured reading of the otherwise plain language of 28 U.S.C. §§ 1333 and 1441, which together provide for removal of any civil action—such as this one—over which the district courts have original jurisdiction. *See Lu Junhong v. Boeing Co.*, 792 F.3d 805, 817 (7th Cir. 2015) (characterizing the effect of the Federal Courts Jurisdiction and Venue Clarification Act of 2011, § 103, Pub.L. No. 112–63, 125 Stat. 759 as "limit[ing] the ban on removal by a home-state defendant to suits under . . . diversity jurisdiction"). Thus, Plaintiffs' claims are removable under Section 1441(a) notwithstanding the citizenship of the parties. As previously asserted, Section 1333's saving-to-suitors clause does not alter this conclusion.

III. CONCLUSION

For the foregoing reasons, and those set forth in Defendants' Joint Opposition to Motion to Remand as well as Defendants' previous briefing in these and the related cases, the Court should deny Plaintiffs' Motion to Remand.

Dated: March 20, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, M. Clare Ellis, declare as follows:

I am employed in the City of San Francisco, CA, I am over the age of eighteen years and am not a party to this action; my business address is 50 California Street, Suite 1700, San Francisco, CA 94111.

I hereby certify that on March 20, 2018, the foregoing OPPOSITION TO PLAINTIFFS' MOTION TO REMAND IN RESPONSE TO ADDITIONAL NOTICE OF REMOVAL was filed with the Clerk of the Court via CM/ECF. Notice of this filing will be sent by email to all registered parties by operation of the Court's electronic filing systems.

I further certify that on March 20, 2018, the foregoing OPPOSITION TO PLAINTIFFS' MOTION TO REMAND IN RESPONSE TO ADDITIONAL NOTICE OF REMOVAL was served on the following parties by the means described below:

BY FIRST CLASS U.S. MAIL: On the above-mentioned date, I enclosed the documents by placing a true copy thereof in an enclosed sealed envelope, with first class postage prepaid, and depositing said envelope in a United States Post Office mailbox in San Francisco, CA. I am employed in the office of Hunton & Williams LLP, a member of the bar of this court, and the foregoing document was printed on recycled paper.

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(Federal) I declare under penalty of perjury that the foregoing is true and correct.

I declare under penalty of perjury under the law of the State of California that the above is true and correct.

Executed on March 20, 2018, San Francisco, CA

/s/ M. Clare Ellis
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