Nos. 18-_____, 18-_____, 18-_____

IN THE

United States Court of Appeals for the Ninth Circuit

COUNTY OF SAN MATEO, Plaintiff-Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants-Appellants.	No. 18-_____ No. 17-cv-4929-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
CITY OF IMPERIAL BEACH, Plaintiff-Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants-Appellants.	No. 18-_____ No. 17-cv-4934-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding
COUNTY OF MARIN, Plaintiff-Appellee, v. CHEVRON CORPORATION, *et al.*, Defendants-Appellants.	No. 18-_____ No. 17-cv-4935-VC N.D. Cal., San Francisco Hon. Vince Chhabria presiding

DEFENDANTS' PETITION FOR INTERLOCUTORY REVIEW PURSUANT TO 28 U.S.C. § 1292(b)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendants submit the following statement:

Anadarko Petroleum Corporation is a publicly traded corporation that has no corporate parent. No corporation owns 10% or more of Anadarko's stock.

Apache Corp. does not have a parent corporation, and there is no publicly-held corporation that owns 10% or more of Apache Corp's stock.

Arch Coal, Inc. has no parent corporation, and there is no publicly held corporation that owns 10% or more of Arch Coal, Inc.'s stock.

BP p.l.c., a publicly traded corporation organized under the laws of England and Wales, has no parent corporation, and there is no publicly held corporation that owns 10% or more of BP p.l.c.'s stock. BP America Inc. is a 100% wholly owned indirect subsidiary of BP p.l.c., and no intermediate parent of BP America Inc. is a publicly traded corporation.

Chevron Corporation has no parent corporation, and there is no publicly held corporation that owns 10% or more of Chevron Corporation's stock. Chevron U.S.A. Inc. is a wholly owned subsidiary of Chevron Corporation.

CITGO Petroleum Corporation's ("CITGO") parent corporation is CITGO Holding, Inc., which is a wholly-owned subsidiary of PDV Holding, Inc., which is a wholly-owned subsidiary of Petróleos de Venezuela S.A. No publicly held

corporation owns 10% or more of CITGO's stock;

ConocoPhillips has no parent corporation, and there is no publicly held corporation that owns 10% or more of ConocoPhillips's stock. ConcocoPhillips Company is a wholly owned operating subsidiary of ConocoPhillips.

Devon Energy Corporation has no parent corporation, and there is no publicly held corporation that owns 10% or more of Devon Energy Corporation's stock. Devon energy Production Company, L.P. is a wholly owned subsidiary of Devon Energy Corporation.

Encana Corporation, a publicly traded corporation incorporated under the Canada Business Corporations Act, has no parent corporation, and there is no publicly held corporation that owns 10% or more of Encana Corporation's stock.

Exxon Mobil Corporation is a publicly traded corporation and it has no corporate parent. No publicly held corporation owns 10% or more of Exxon Mobil Corporation's stock.

Eni Oil & Gas Inc. is a wholly-owned subsidiary whose ultimate parent corporation is Eni S.p.A. Eni S.p.A. is a company incorporated and headquartered in Italy. Eni S.p.A. has no parent corporation and there is no publicly traded company that owns 10% or more of Eni S.p.A.'s stock.

Hess Corporation has no parent corporation, and there is no publicly held corporation that owns 10% or more of Hess Corporation's stock.

Marathon Oil Corporation has no parent corporation, and there is no publicly held corporation that owns 10% or more of Marathon Oil Corporation's stock. Marathon Oil Company is a wholly owned subsidiary of Marathon Oil Corporation.

Marathon Petroleum Corporation has no parent corporation, and there is no publicly held corporation that owns 10% or more of Marathon Petroleum Corporation's stock.

Occidental Petroleum Corporation, a publicly traded company, has no parent company, and no publicly held company owns more than 10% of its stock. Occidental Chemical Corporation is wholly owned by Occidental Chemical Holding Corporation.

Peabody Energy Corporation has no parent corporation and is not aware of any publicly held corporation that owns 10% or more of its stock.

Phillips 66 does not have a parent corporation, and there is no publicly-held corporation that owns 10% or more of Phillips 66's stock.

Repsol Energy North America Corp. is a subsidiary whose ultimate parent corporation is Repsol, S.A. Repsol Trading USA Corp. is a subsidiary whose ultimate parent corporation is also Repsol, S.A. Repsol S.A. is a company incorporated and headquartered in Spain. Repsol S.A. has no parent corporation and there is no publicly traded company that owns 10% or more of Repsol S.A.'s stock.

Rio Tinto plc has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock. Rio Tinto Ltd. has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock. Rio Tinto Minerals Inc. is a wholly-owned subsidiary whose ultimate parent corporation is Rio Tinto plc, a publicly held corporation. Rio Tinto Energy America Inc. is a wholly-owned subsidiary whose ultimate parent corporation is Rio Tinto plc, a publicly held corporation. Rio Tinto Services Inc. is a wholly-owned subsidiary whose ultimate parent corporation is Rio Tinto plc, a publicly held corporation.

Royal Dutch Shell plc, a publicly held UK company, has no parent corporation, and there is no publicly held corporation that owns 10% or more of Royal Dutch plc's stock. Shell Oil Products Company LLC is a wholly owned indirect subsidiary of Royal Dutch Shell plc.

TOTAL E&P USA ("TEPUSA") states that TOTAL Delaware, Inc. owns 76.39% of the stock of TEPUSA, and Elf Aquitaine, Inc. owns the remaining 23.61% of the stock of TEPUSA. TOTAL Delaware, Inc. owns 100% of the stock of Elf Aquitaine, Inc. TOTAL Holdings USA, Inc. owns 100% of the stock of TOTAL Delaware, Inc. TOTAL GESTION USA owns 100% of the stock of TOTAL Holdings USA, Inc. TOTAL, S.A. owns 100% of the stock of TOTAL GESTION USA. TOTAL, S.A. is a publicly held corporation that indirectly holds more than

10% of TEPUSA's stock.

TOTAL Specialties USA, Inc. ("Total Specialties") states that TOTAL MARKETING SERVICES S.A. owns 100% of the stock of Total Specialties. TOTAL S.A. owns 100% of the stock of TOTAL MARKETING SERVICES S.A. TOTAL, S.A. is a publicly held corporation that indirectly holds more than 10% of Total Specialties' stock.

I. QUESTION PRESENTED[1]

Defendants removed these actions from state court under 28 U.S.C. §§ 1331, 1334, 1441(a), 1442, 1452, and 1367(a), and 43 U.S.C. § 1349(b). *See*, *e.g.*, *Cty. of San Mateo v. Chevron Corp.*, *et al.*, No. 17-cv-4929 (N.D. Cal.) ("*San Mateo*"), ECF No. 1 at 3–5 ("Notice of Removal"). On March 16, 2018, the district court issued an order granting Plaintiffs' motion to remand the cases to state court. Ex. A ("Remand Order").

The question presented is whether these actions are removable under any or all of the grounds set forth in Defendants' Notice of Removal. Because Defendants have already appealed the Remand Order under 28 U.S.C. §§ 1291 and 1447(d), *see* Nos. 18-15499, 18-15502, and 18-15503, Defendants request that the motions panel refer this petition to the merits panel adjudicating Defendants' appeal of the Remand Order and consolidate the actions.

II. STATEMENT OF JURISDICTION

On April 9, 2018, the district court issued an order staying the Remand Order pending appellate review. In addition, notwithstanding the pending appeal, the

[1] As with all papers in the proceedings below, this petition is submitted subject to and without waiver of any defense, affirmative defense, or objection, including personal jurisdiction, insufficient process, or insufficient service of process.

district court certified all of the issues addressed in the Remand Order for interlocutory appeal under 28 U.S.C. § 1292(b), "in case it's necessary." Ex. B at 1–2 ("Certification Order"). Defendants timely filed this petition within ten days of the Certification Order. *See* 28 U.S.C. § 1292(b); Fed. R. App. P. 5(a)(3).

III. ARGUMENT

Plaintiffs in these three related actions, and in several other actions currently pending in the Northern District of California,[2] seek to reshape the Nation's longstanding economic and foreign policies by holding a selected group of energy companies liable for the alleged impacts of global warming. Although these actions go to the heart of federal energy and environmental policies, the plaintiffs have endeavored to deprive Defendants of a federal forum by artfully pleading their claims under state law and filing their complaints in state court. Defendants removed all the cases to federal court, where they were divided into two groups and assigned to two different judges in the Northern District of California. Those judges then

[2] *See Cty. of San Mateo v. Chevron Corp., et al.*, No. 17-cv-4929 (N.D. Cal.); *City of Imperial Beach v. Chevron Corp., et al.*, No. 17-cv-4934 (N.D. Cal.); *Cty. of Marin v. Chevron Corp., et al.*, No. 17-cv-4935 (N.D. Cal.); *California v. BP P.L.C., et al.*, No. 17-cv-6011 (N.D. Cal.); *California v. BP P.L.C., et al.*, No. 17-cv-6012 (N.D. Cal.); *Cty. of Santa Cruz v. Chevron Corp., et al.*, No. 18-cv-450 (N.D. Cal.); *City of Santa Cruz v. Chevron Corp., et al.*, No. 18-cv-458 (N.D. Cal.); *City of Richmond v. Chevron Corp., et al.*, No. 18-cv-732 (N.D. Cal.).

reached different conclusions as to the propriety of removal—with *both* judges emphasizing the need for immediate appellate review.

In one set of cases, Judge Alsup held that the plaintiffs' claims—nuisance claims alleging that the worldwide extraction of fossil fuels causes global warming and rising sea levels—necessarily arise under federal common law and therefore were properly removed to federal court. *See California v. BP P.L.C.*, No. 17-cv-4929-WAH, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018), attached as Exhibit C (the "Alsup Order"). Although Judge Alsup certified his order for interlocutory appeal under Section 1292(b), the plaintiffs in those cases elected not to seek this Court's review. Thus, those cases are presently being litigated in federal court. Judge Alsup recently held a "tutorial" in which both sides made extensive presentations on the science of climate change, and the parties are in the midst of briefing motions to dismiss that Judge Alsup will hear on May 24, 2018.

In the second set of cases, Judge Chhabria expressly "disagree[d] with [Judge Alsup]" and ordered that the cases be remanded to state court because he did not believe Plaintiffs' putative state-law claims could be squeezed into "one of a handful of small boxes" justifying removal. Ex. A at 2, 5. As a result, two nearly indistinguishable sets of cases—each seeking to extract billions of dollars from

Defendants for engaging in lawful business activities—are set to proceed in different court systems under different substantive law.

Review under Section 1292(b) is warranted because the Remand Order decided numerous controlling issues of law that will determine whether these cases are litigated in state court or federal court—a critical jurisdictional question that could have a substantial impact on the outcome of the litigation. *See*, *e.g.*, *Roberts v. United States*, 498 F.2d 520, 522 (9th Cir. 1974) (resolution of "close jurisdictional question" warranted review under § 1292(b)). Moreover, as evidenced by the fact that two judges in the same district have already disagreed on the threshold jurisdictional question, and the fact that both judges certified their orders for interlocutory appeal, there are plainly substantial grounds for disagreement on these issues.

However, because Defendants have already appealed the Remand Order, Defendants ask that this petition be consolidated with their pending appeals, Nos. 18-15499, 18-15502, and 18-15503, and decided by the merits panel assigned to those cases. *See*, *e.g.*, *Chan Healthcare Grp., PS v. Liberty Mut. Fire Ins. Co.*, 844 F.3d 1133 (9th Cir. 2017) (merits panel deciding whether to grant a discretionary petition seeking appellate review of a remand order under 28 U.S.C. § 1453(c)(1), which had been referred by a motions panel and consolidated with the merits of an

appeal as-of-right of the same remand order); *Chan Healthcare Grp., PS v. Liberty Mut. Fire Ins. Co*., No. 16-80019, ECF No. 12 (referring petition for interlocutory appeal to the merits panel).

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully ask the Court to consolidate this petition with Nos. 18-15499, 18-15502, and 18-15503 and refer it to the merits panel to which those cases will be assigned, and request that that merits panel grant Defendants' petition if it concludes that such an order is "necessary" and appropriate. Ex. B at 2.

Dated: April 19, 2018

Respectfully submitted,

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** Pursuant to Ninth Circuit L.R. 25-5(e), counsel attests that all other parties on whose behalf the filing is submitted concur in the filing's contents

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STATEMENT OF RELATED CASES

Defendants are aware of the following related cases: (1) *County of San Mateo v. Chevron Corporation, et al.*, No. 18-15499, District Court No. 3:17-cv-4929-VC; (2) *City of Imperial Beach v. Chevron Corporation, et al.*, No. 18-15502, District Court No. 4:17-cv-4934-VC; and (3) *County of Marin v. Chevron Corporation, et al.*, No. 18-15503, District Court No. 4:17-cv-4935-VC.

Dated: April 19, 2018

/s/ *Theodore J. Boutrous, Jr.*
Theodore J. Boutrous, Jr.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rules of Appellate Procedure 5(c) and 32(a), (c)(2) and Ninth Circuit Rules 5-2(b) and 32-3, this petition has a typeface of 14 point and contains 1,007 words, excluding the parts of the petition exempted by Federal Rule of Appellate Procedure 32(f).

/s/ *Theodore J. Boutrous, Jr.*
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CERTIFICATE OF SERVICE

I, Robert Dunn, declare as follows:

I am employed in the County of Santa Clara, State of California, I am over the age of eighteen years and am not a party to this action; my business address is 1881 Page Mill Road, Palo Alto, CA 94304-1211, in said County and State. On April 19, 2018, I served the following document:

DEFENDANTS' PETITION FOR INTERLOCUTORY REVIEW UNDER 28 U.S.C. § 1292(b)

on the parties stated below, by the following means of service:

☑ **BY ELECTRONIC AND OVERNIGHT DELIVERY**: On the above-mentioned date, I sent the above-mentioned document via electronic mail to the Plaintiffs-Respondents listed below. I also enclosed the documents in an envelope or package provided by overnight delivery carrier and addressed to the Plaintiffs-Respondents at the addresses shown below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier with delivery fees paid or provided for.

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

Dated: April 19, 2018 By: */s/ Robert Dunn*
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Exhibit A

"Remand Order"

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

COUNTY OF SAN MATEO, Plaintiff, v. CHEVRON CORP., et al., Defendants.	Case No. 17-cv-04929-VC Re: Dkt. No. 144
CITY OF IMPERIAL BEACH, Plaintiff, v. CHEVRON CORP., et al., Defendants.	Case No. 17-cv-04934-VC Re: Dkt. No. 140
COUNTY OF MARIN, Plaintiff, v. CHEVRON CORP., et al., Defendants.	Case No. 17-cv-04935-VC **ORDER GRANTING MOTIONS TO REMAND** Re: Dkt. No. 140

The plaintiffs' motions to remand are granted.

1. Removal based on federal common law was not warranted. In *American Electric Power Co., Inc. v. Connecticut*, the Supreme Court held that the Clean Air Act displaces federal common law claims that seek the abatement of greenhouse gas emissions. 564 U.S. 410, 424 (2011). Far from holding (as the defendants bravely assert) that state law claims relating to

global warming are superseded by federal common law, the Supreme Court noted that the question of whether such state law claims survived would depend on whether they are preempted by the federal statute that had displaced federal common law (a question the Court did not resolve). *Id.* at 429. This seems to reflect the Court's view that once federal common law is displaced by a federal statute, there is no longer a possibility that state law claims could be superseded by the previously-operative federal common law.

Applying *American Electric Power*, the Ninth Circuit concluded in *Native Village of Kivalina v. ExxonMobil Corp.* that federal common law is displaced by the Clean Air Act not only when plaintiffs seek injunctive relief to curb emissions but also when they seek damages for a defendant's contribution to global warming. 696 F.3d 849, 857-58 (9th Cir. 2012). The plaintiffs in the current cases are seeking similar relief based on similar conduct, which means that federal common law does not govern their claims. In this respect, the Court disagrees with *People of the State of California v. BP P.L.C.*, Nos. C 17-06011 WHA, C 17-06012 WHA (N.D. Cal. Feb. 27, 2018), which concluded that San Francisco and Oakland's current lawsuits are materially different from *Kivalina* such that federal common law could play a role in the current lawsuits brought by the localities even while it could not in *Kivalina*. Like the localities in the current cases, the *Kivalina* plaintiffs sought damages resulting from rising sea levels and land erosion. Not coincidentally, there is significant overlap between the defendants in *Kivalina* and the defendants in the current cases. 696 F.3d at 853-54 & n.1. The description of the claims asserted was also nearly identical in *Kivalina* and the current cases: that the defendants' contributions to greenhouse gas emissions constituted "a substantial and unreasonable interference with public rights." *Id.* at 854. Given these facts, *Kivalina* stands for the proposition that federal common law is not just displaced when it comes to claims against domestic sources of emissions but also when it comes to claims against energy producers' contributions to global warming and rising sea levels. *Id.* at 854-58. Put another way, *American Electric Power* did not confine its holding about the displacement of federal common law to particular sources of emissions, and *Kivalina* did not apply *American Electric Power* in such a

limited way.

Because federal common law does not govern the plaintiffs' claims, it also does not preclude them from asserting the state law claims in these lawsuits. Simply put, these cases should not have been removed to federal court on the basis of federal common law that no longer exists.

2. Nor was removal warranted under the doctrine of complete preemption. State law claims are often preempted by federal law, but preemption alone seldom justifies removing a case from state court to federal court. Usually, state courts are left to decide whether state law claims are preempted by federal law under principles of "express preemption," "conflict preemption" or "field preemption." And state courts are entirely capable of adjudicating that sort of question. *See, e.g., Smith v. Wells Fargo Bank, N.A.*, 38 Cal. Rptr. 3d 653, 665-73 (Cal. Ct. App. 2005), *as modified on denial of reh'g* (Jan. 26, 2006); *Carpenters Health & Welfare Trust Fund for California v. McCracken*, 100 Cal. Rptr. 2d 473, 474-77 (Cal. Ct. App. 2000). A defendant may only remove a case to federal court in the rare circumstance where a state law claim is "completely preempted" by a specific federal statute – for example, section 301 of the Labor Management Relations Act, section 502 of the Employment Retirement Income Security Act, or sections 85 and 86 of the National Bank Act. *See Sullivan v. American Airlines, Inc.*, 424 F.3d 267, 271-73 (2d Cir. 2005). The defendants do not point to any applicable statutory provision that involves complete preemption. To the contrary, the Clean Air Act and the Clean Water Act both contain savings clauses that preserve state causes of action and suggest that Congress did not intend the federal causes of action under those statutes "to be exclusive." 42 U.S.C. §§ 7604(e), 7416; 33 U.S.C. §§ 1365(e), 1370; *Beneficial National Bank v. Anderson*, 539 U.S. 1, 9 n.5 (2003); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 194-97 (3d Cir. 2013). There may be important questions of ordinary preemption, but those are for the state courts to decide upon remand.

3. Nor was removal warranted on the basis of *Grable* jurisdiction. The defendants have not pointed to a specific issue of federal law that must necessarily be resolved to adjudicate the

state law claims. *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005); *see also Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 700 (2006). Instead, the defendants mostly gesture to federal law and federal concerns in a generalized way. The mere potential for foreign policy implications (resulting from the plaintiffs succeeding on their claims at an unknown future date) does not raise the kind of actually disputed, substantial federal issue necessary for *Grable* jurisdiction. Nor does the mere existence of a federal regulatory regime mean that these cases fall under *Grable*. *See Empire Healthchoice*, 547 U.S. at 701 ("[I]t takes more than a federal element 'to open the "arising under" door.'" (quoting *Grable*, 545 U.S. at 313)). Moreover, even if deciding the nuisance claims were to involve a weighing of costs and benefits, and even if the weighing were to implicate the defendants' dual obligations under federal and state law, that would not be enough to invoke *Grable* jurisdiction. On the defendants' theory, many (if not all) state tort claims that involve the balancing of interests and are brought against federally regulated entities would be removable. *Grable* does not sweep so broadly. *See Empire Healthchoice*, 547 U.S. at 701 (describing *Grable* as identifying no more than a "slim category" of removable cases); *Grable*, 545 U.S. at 313-14, 319.

4. These cases were not removable under any of the specialized statutory removal provisions cited by the defendants. Removal under the Outer Continental Shelf Lands Act was not warranted because even if some of the activities that caused the alleged injuries stemmed from operations on the Outer Continental Shelf, the defendants have not shown that the plaintiffs' causes of action would not have accrued *but for* the defendants' activities on the shelf. *See In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014). Nor was federal enclave jurisdiction appropriate, since federal land was not the "locus in which the claim arose." *In re High-Tech Employee Antitrust Litigation*, 856 F. Supp. 2d 1103, 1125 (N.D. Cal. 2012) (quoting *Alvares v. Erickson*, 514 F.2d 156, 160 (9th Cir. 1975)); *see also Ballard v. Ameron International Corp.*, No. 16-CV-06074-JSC, 2016 WL 6216194, at *3 (N.D. Cal. Oct. 25, 2016); *Klausner v. Lucas Film Entertainment Co, Ltd.*, No. 09-03502 CW, 2010 WL 1038228, at *4 (N.D. Cal. Mar. 19,

2010); *Rosseter v. Industrial Light & Magic*, No. C 08-04545 WHA, 2009 WL 210452, at *2 (N.D. Cal. Jan. 27, 2009). Nor was there a reasonable basis for federal officer removal, because the defendants have not shown a "causal nexus" between the work performed under federal direction and the plaintiffs' claims, which are based on a wider range of conduct. *See Cabalce v. Thomas E. Blanchard & Associates, Inc.*, 797 F.3d 720, 727 (9th Cir. 2015); *see also Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142, 157 (2007). And bankruptcy removal did not apply because these suits are aimed at protecting the public safety and welfare and brought on behalf of the public. *See City & Cty. of San Francisco v. PG & E Corp.*, 433 F.3d 1115, 1123-24 (9th Cir. 2006); *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1108-09 (9th Cir. 2005). To the extent two defendants' bankruptcy plans are relevant, there is no sufficiently close nexus between the plaintiffs' lawsuits and these defendants' plans. *See In re Wilshire Courtyard*, 729 F.3d 1279, 1287 (9th Cir. 2013).

* * *

As the defendants note, these state law claims raise national and perhaps global questions. It may even be that these local actions are federally preempted. But to justify removal from state court to federal court, a defendant must be able to show that the case being removed fits within one of a small handful of small boxes. Because these lawsuits do not fit within any of those boxes, they were properly filed in state court and improperly removed to federal court. Therefore, the motions to remand are granted. The Court will issue a separate order in each case to remand it to the state court that it came from.

At the hearing, the defendants requested a short stay of the remand orders to sort out whether a longer stay pending appeal is warranted. A short stay is appropriate to consider whether the matter should be certified for interlocutory appeal, whether the defendants have the right to appeal based on their dubious assertion of federal officer removal, or whether the remand orders should be stayed pending the appeal of Judge Alsup's ruling. Therefore, the remand orders are stayed until 42 days of this ruling. Within 7 days of this ruling, the parties must submit a stipulated briefing schedule for addressing the propriety of a stay pending appeal. The

parties should assume that any further stay request will be decided on the papers; the Court will schedule a hearing if necessary.

IT IS SO ORDERED.

Dated: March 16, 2018

VINCE CHHABRIA
United States District Judge

Exhibit B

"Certification Order"

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

COUNTY OF SAN MATEO, Plaintiff, v. CHEVRON CORP., et al., Defendants.	Case No. 17-cv-04929-VC Re: Dkt. No. 234
CITY OF IMPERIAL BEACH, Plaintiff, v. CHEVRON CORP., et al., Defendants.	Case No. 17-cv-04934-VC Re: Dkt. No. 218
COUNTY OF MARIN, Plaintiff, v. CHEVRON CORP., et al., Defendants.	Case No. 17-cv-04935-VC **ORDER GRANTING MOTIONS TO STAY** Re: Dkt. No. 219

The motions to stay the remand orders in these three cases pending appeal are granted.

Additionally, in case it's necessary, the Court certifies for interlocutory appeal all the issues addressed by the Court in its order – namely, whether the defendants could remove these cases to federal court on the basis of any of the grounds asserted in their initial notices of removal. The Court finds that these are controlling questions of law as to which there is

substantial ground for difference of opinion and that their resolution by the court of appeals will materially advance the litigation. 28 U.S.C. § 1292(b).

IT IS SO ORDERED.

Dated: April 9, 2018

VINCE CHHABRIA
United States District Judge

Exhibit C

"Alsup Order"

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

BP P.L.C., *et al.*,

Defendants.
/

No. C 17-06011 WHA
No. C 17-06012 WHA

ORDER DENYING MOTIONS TO REMAND

INTRODUCTION

In these "global warming" actions asserting claims for public nuisance under state law, plaintiff municipalities move to remand. For the following reasons, the motions are **DENIED**.

STATEMENT

Oakland and San Francisco brought these related actions in California Superior Court against defendants BP p.l.c, Chevron Corporation, ConocoPhillips Company, Exxon Mobil Corporation, and Royal Dutch Shell plc. Defendants are the first (Chevron), second (Exxon), fourth (BP), sixth (Shell) and ninth (ConocoPhillips) largest cumulative producers of fossil fuels worldwide (Compls. ¶ 10).

Burning fossil fuels adds carbon dioxide to that already naturally present in our atmosphere. Plaintiffs allege that the combustion (by others) of fossil fuels produced by defendants has increased atmospheric levels of carbon dioxide and, as a result, raised global

temperatures and melted glaciers to cause a rise in sea levels, and thus caused flooding in Oakland and San Francisco (Oakl. Compl. ¶¶ 38, 48, 50; SF Compl. ¶¶ 38, 49, 51).

The complaints do not seek to impose liability for direct emissions of carbon dioxide, which emissions flow from combustion in worldwide machinery that use such fuels, like automobiles, jets, ships, train engines, powerplants, heating systems, factories, and so on. Rather, plaintiffs' state law nuisance claims are premised on the theory that — despite long-knowing that their products posed severe risks to the global climate — defendants produced fossil fuels while simultaneously engaging in large scale advertising and public relations campaigns to discredit scientific research on global warming, to downplay the risks of global warming, and to portray fossil fuels as environmentally responsible and essential to human well-being (Oakl. Compl. ¶¶ 11, 62–83; SF Compl. ¶¶ 11, 63–84).

The complaints further allege that accelerated sea level rise has and will continue to inundate public and private property in Oakland and San Francisco. Although plaintiffs (and the federal government through the Army Corps of Engineers) have already taken action to abate the harm of sea level rise, the magnitude of such actions will continue to increase. The complaints stress that a severe storm surge, coupled with higher sea levels, could result in loss of life and extensive damage to public and private property (Oakl. Compl. ¶¶ 84–92; SF Compl. ¶¶ 85–93).

Based on these allegations, each complaint asserts a single cause of action under California public nuisance law. As relief, such complaints seek an abatement fund to pay for seawalls and other infrastructure needed to address rising sea levels (Oakl. Compl. ¶¶ 93–98; SF Compl. ¶¶ 94–99, Relief Requested ¶ 2).

Defendants removed these actions. Plaintiffs now move to remand to state court. This order follows full briefing and oral argument.[1]

[1] Six similar actions, filed by the County of San Mateo, City of Imperial Beach, County of Marin, County of Santa Cruz, City of Santa Cruz and City of Richmond, respectively, are pending in this district before Judge Vince Chhabria (Case Nos. 17-cv-4929, 17-cv-4934, 17-cv-4935, 18-cv-0450, 18-cv-0458, 18-cv-0732). In comparison to the instant cases, these actions assert additional claims (including product liability, negligence, and trespass) against additional defendants.

ANALYSIS

Plaintiffs' nuisance claims — which address the national and international geophysical phenomenon of global warming — are necessarily governed by federal common law. District courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States," including claims brought under federal common law. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) (citing 28 U.S.C. § 1331). Federal jurisdiction over these actions is therefore proper.

Federal courts, unlike state courts, do not possess a general power to develop and apply their own rules of decision. *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) ("*Milwaukee II*"). Federal common law is appropriately fashioned, however, where a federal rule of decision is "necessary to protect uniquely federal interests." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). While not all federal interests fall into this category, uniquely federal interests exist in "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations." *Id.* at 641. In such disputes, the "nature of the controversy makes it inappropriate for state law to control." *Ibid.*

In *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 n.9 (1972) ("*Milwaukee I*"), for example, the Supreme Court applied federal common law to an interstate nuisance claim, explaining that:

> Federal common law and not the varying common law of the individual States is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain. The more would this seem to be imperative in the present era of growing concern on the part of a State about its ecological conditions and impairments of them. In the outside sources of such impairment, more conflicting disputes, increasing assertions and proliferating contentions would seem to be inevitable. Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights.

The Supreme Court has continued to affirm that, post–*Erie*, federal common law includes the general subject of environmental law and specifically includes ambient or interstate air and water pollution. *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 421 (2011) ("*AEP*").

Both our court of appeals and the Supreme Court have addressed the viability of the federal common law of nuisance to address global warming. The parties sharply contest the import of these decisions.

The plaintiffs in *AEP* brought suit against five domestic emitters of carbon dioxide, alleging that by contributing to global warming, those defendants had violated the federal common law of interstate nuisance, or, in the alternative, state tort law. 564 U.S. at 418. The Supreme Court recognized that environmental protection "is undoubtedly an area within national legislative power, one in which federal courts may fill in statutory interstices, and, if necessary, even fashion federal law." *Id.* at 421 (internal quotes and citations omitted). It held, however, that because the Clean Air Act "[spoke] directly" to the issue of carbon-dioxide emissions from domestic power-plants, the Act displaced any federal common law right to seek an abatement of defendants' emissions. *Id.* at 424–25. *AEP* did not reach the plaintiffs' state law claims. Instead, Justice Ginsburg explained that "the availability *vel non* of a state lawsuit depend[ed], *inter alia*, on the preemptive effect of the federal Act," and left the matter open for consideration on remand. *Id.* at 429.

Our court of appeals addressed similar claims in *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) ("*Kivalina*"). Citing to *AEP*, the appellate court held that the Clean Air Act also displaced federal common law nuisance claims for *damages* caused by global warming. *Id.* at 856. *Kivalina* underscored that "federal common law can apply to transboundary pollution suits," and that most often such suits are — as here — founded on a theory of public nuisance. *Id.* at 855. But *Kivalina* also failed to reach the plaintiffs' state law claims, which the district court had dismissed without prejudice to their re-filing in state court. *Id.* at 858; *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 882–83 (N.D. Cal. 2009) (Judge Saundra Brown Armstrong).

Here, as in *Milwaukee I*, *AEP*, and *Kivalina*, a uniform standard of decision is necessary to deal with the issues raised in plaintiffs' complaints. If ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints, a problem centuries in the making (and studying) with causes ranging from volcanoes, to wildfires,

to deforestation to stimulation of other greenhouse gases — and, most pertinent here, to the combustion of fossil fuels. The range of consequences is likewise universal — warmer weather in some places that may benefit agriculture but worse weather in others, *e.g.*, worse hurricanes, more drought, more crop failures and — as here specifically alleged — the melting of the ice caps, the rising of the oceans, and the inevitable flooding of coastal lands. Taking the complaints at face value, the scope of the worldwide predicament demands the most comprehensive view available, which in our American court system means our federal courts and our federal common law. A patchwork of fifty different answers to the same fundamental global issue would be unworkable. This is not to say that the ultimate answer under our federal common law will favor judicial relief. But it is to say that the extent of any judicial relief should be uniform across our nation.

Plaintiffs raise three primary arguments in seeking to avoid federal common law. None are persuasive.

First, plaintiffs argue that — in contrast to earlier transboundary pollution suits such as *AEP* and *Kivalina* — plaintiffs' nuisance claims are brought against *sellers* of a product rather than direct *dischargers* of interstate pollutants. Extending federal common law to the current dispute, plaintiffs caution, would extend the scope of federal nuisance law well beyond its original justification. To be sure, plaintiffs raise novel theories of liability. And it is also true, of course, that the development of federal common law is necessary only in a "few and restricted instances." *Milwaukee II*, 451 U.S. at 313. As explained above, however, the transboundary problem of global warming raises exactly the sort of federal interests that necessitate a uniform solution. This is no less true because plaintiffs assert a novel theory of liability, nor is it less true because plaintiffs' theory mirrors the sort of state-law claims that are traditionally applied to products made in other states and sold nationally.[2]

[2] Notably, in support of their theory of liability plaintiffs cite decisions where the alleged nuisance was caused by a product's use *in California*. In *People v. ConAgra Grocery Products Company*, 17 Cal. App. 5th 51 (2017), the plaintiffs sued producers and manufacturers of lead paint, arguing that the defendants deceptively minimized its dangers and promoted its use. The plaintiffs there, however, sought abatement only with respect to products used in California buildings. Similarly, the claims in *Ileto v. Glock Inc.*, 349 F.3d 1191 (9th Cir. 2003), concerned the manufacture and marketing of firearms but stemmed from the shooting of six individuals

Plaintiffs' reliance on *National Audubon Society v. Department of Water*, 869 F.2d 1196 (9th Cir. 1988), is also misplaced. There, our court of appeals held that federal nuisance law did not extend to claims concerning a California agency's diversion of water from a lake wholly within the state. Although the water diversion may have led to air pollution in both California and Nevada, our court of appeals found that it was "essentially a domestic dispute" in which application of state law would not be inappropriate. *Id.* at 1204–05. The court underscored, however, that the Supreme Court does consider the application of state law inappropriate (and the application of federal law appropriate) in "those interstate controversies which involve a state suing sources outside of its own territory." *Id.* at 1205.

Second, plaintiffs contend that — even if their claims are tantamount to the interstate pollution claims raised in *AEP* and *Kivalina* — the Clean Air Act displaces such federal common law claims. Moreover, they argue, *International Paper Company v. Ouellette*, 479 U.S. 481 (1987), held that once federal common law is displaced, state law once again governs.

This order presumes that when congressional action displaces federal common law, state law becomes available to the extent it is not preempted by statute. *AEP*, 564 U.S. at 429. But while *AEP* and *Kivalina* left open the question of whether nuisance claims against *domestic emitters* of greenhouse gases could be brought under state law, they did not recognize the displacement of the federal common law claims raised here. Emissions from domestic sources are certainly regulated by the Clean Air Act, but plaintiffs here have fixated on an earlier moment in the train of industry, the earlier moment of production and sale of fossil fuels, not their combustion.

Through the Clean Air Act, Congress established a comprehensive state and federal scheme to control air pollution in the United States. 42 U.S.C. § 7401 *et seq*. The central elements of this comprehensive scheme are (1) the Act's provisions for uniform national standards of performance for new stationary sources of air pollution, § 7411, (2) the Act's provisions for uniform national emission standards for certain air pollutants, § 7412, (3) the

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in Los Angeles. Plaintiffs' claims here, by contrast, are not localized to California and instead concern fossil fuel consumption worldwide.

Act's promulgation of primary and secondary national ambient air quality standards, §§ 7408–09, and (4) the development of national ambient air quality standards for motor vehicle emissions, § 7521. The Clean Air Act displaced the nuisance claims asserted in *Kivalina* and *AEP* because the Act "spoke directly" to the issues presented — *domestic* emissions of greenhouse gases. The same cannot be said here.

Plaintiffs' nuisance claims center on an alleged scheme to produce and sell fossil fuels while deceiving the public regarding the dangers of global warming and the benefits of fossil fuels. Plaintiffs do not bring claims against emitters, but rather bring claims against defendants for having put fossil fuels into the flow of international commerce. Importantly, unlike *AEP* and *Kivalina*, which sought only to reach domestic conduct, plaintiffs' claims here attack behavior worldwide. While some of the fuel produced by defendants is certainly consumed in the United States (emissions from which are regulated by the Clean Air Act), greenhouse gases emanating from overseas sources are equally guilty (perhaps more so) of causing plaintiffs' harm. Yet these foreign emissions are out of the EPA and Clean Air Act's reach.

For displacement to occur, "[t]he existence of laws generally applicable to the question is not sufficient; the applicability of displacement is an issue-specific inquiry." *Kivalina*, 696 F.3d at 856. In *Milwaukee I*, the Supreme Court considered multiple statutes potentially affecting the federal question but ultimately concluded that no statute directly addressed the question and accordingly held that the federal common law public nuisance claim had not been displaced. 406 U.S. at 101–03. Here, the Clean Air Act does not provide a sufficient legislative solution to the nuisance alleged to warrant a conclusion that this legislation has occupied the field to the exclusion of federal common law.

Third, the well-pleaded complaint rule does not bar removal of these actions. Federal jurisdiction exists in this case if the claims necessarily arise under federal common law. *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002). Plaintiffs concede that our court of appeals recognized this rule, but contend that it should be ignored as dicta. To the contrary, in support *Wayne* cited *Milwaukee I*, where the Supreme Court explained that a claim

"'arises under' federal law if the dispositive issues stated in the complaint require the application of federal common law." 406 U.S. at 100.[3]

Plaintiffs' claims for public nuisance, though pled as state-law claims, depend on a global complex of geophysical cause and effect involving all nations of the planet (and the oceans and atmosphere). It necessarily involves the relationships between the United States and all other nations. It demands to be governed by as universal a rule of apportioning responsibility as is available. This order does not address whether (or not) plaintiffs have stated claims for relief. But plaintiffs' claims, if any, are governed by federal common law. Federal jurisdiction is therefore proper.

The foregoing is sufficient to deny plaintiffs' motions for remand. It is worth noting, however, that other issues implicated by plaintiffs' claims also demonstrate the proprietary of federal common law jurisdiction. Importantly, the very instrumentality of plaintiffs' alleged injury — the flooding of coastal lands — is, by definition, the navigable waters of the United States. Plaintiffs' claims therefore necessarily implicate an area quintessentially within the province of the federal courts. *See Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 772 (7th Cir. 2011). This issue was not waived, as defendants timely invoked federal common law as a grounds for removal.

CONCLUSION

For the foregoing reasons, plaintiffs' motions for remand are **DENIED**.

CERTIFICATION UNDER 28 U.S.C. § 1292(b)

The district court hereby certifies for interlocutory appeal the issue of whether plaintiffs' nuisance claims are removable on the ground that such claims are governed by federal common law. This order finds that this is a controlling question of law as to which there is substantial

[3] Plaintiffs' remaining authorities on this point are inapposite. Contrary to plaintiffs, our court of appeals found that it lacked subject-matter jurisdiction over the state-law claims asserted in *Patrickson v. Dole Food Company* because it was merely possible that "the federal common law of foreign relations *might* arise as an issue." 251 F.3d 795, 803 (9th Cir. 2001) (emphasis added). Similarly, the complaint in *Provincial Government of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1090 (9th Cir. 2009), did not raise federal law on its face, but rather implicated it "only defensively."

ground for difference of opinion and that its resolution by the court of appeals will materially advance the litigation. (This certification, however, is not itself a stay of proceedings.)

IT IS SO ORDERED.

Dated: February 27, 2018.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE