United States District Court
Northern District of California
United States Courthouse
450 Golden Gate Avenue
San Francisco, California 94102

Chambers of
William Alsup
United States District Judge

June 25, 2020



Molly Dwyer, Clerk of Court
United States Court of Appeals
for the Ninth Circuit
James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103

Re: No. 18-16663, *City of Oakland v. BP PLC*

Dear Ms. Dwyer,

The district court respectfully seeks, under General Order 12.10, to correct a mistake in the Court of Appeals' May 26 opinion in *City of Oakland v. BP PLC*, 960 F.3d 570 (9th Cir. 2020). In Footnote 12, the panel declined to address the extent to which the complaints' dependence on the navigable waters of the United States afforded removal jurisdiction, finding "the Energy Companies waived any argument related to admiralty jurisdiction by not invoking it in their notices of removal," which "cannot be amended to add a separate basis for removal jurisdiction after the thirty day period." "Thus," the panel concluded, "the district court should confine its analysis to the bases for jurisdiction asserted in the notices of removal."

But the district court *did not* rely on admiralty jurisdiction to sustain removal. Instead, the district court expressly relied on federal-question (and only federal-question) jurisdiction, which the Energy Companies specifically *did raise* in their notices of removal. It appears counsel led the panel astray in re-characterizing the reasoning of the district court as "admiralty jurisdiction."

* * *

San Francisco and Oakland's public nuisance complaints recite a simple causal chain. The Energy Companies distribute fossil fuels whose combustion emits carbon which raises global temperatures. This warms the oceans and melts the polar ice. The resultant ever-rising tides will flood Oakland and San Francisco. The rising Pacific Ocean and San Francisco Bay — the very instrumentality of the alleged nuisance — are navigable waters of the United States, an instrumentality at the core of the federal commerce power.

The district court sustained removal on the first ground stated explicitly in the notices of removal, that the nuisance claim "implicates uniquely federal interests and is governed by federal common law." Contrary to Footnote 12, *the order did not invoke*

*admiralty jurisdiction*. Yet on review, the panel declined to address whether jurisdiction arises from the fact that the very instrument of the alleged nuisance comprises the navigable waters of the United States. Instead, Footnote 12 only stated, as had been argued by the Cities, that the Energy Companies had waived "admiralty jurisdiction by not invoking it in their notices of removal."

Respectfully, Footnote 12 confused federal-question jurisdiction arising out of the navigable waters of the United States with admiralty jurisdiction. Admiralty jurisdiction does arise on the navigable waters, but extends only to conduct bearing a "substantial relationship to traditional maritime activity." *Ali v. Rogers*, 780 F.3d 1229, 1235 (9th Cir. 2015). On the other hand, the broader federal commerce power involving the navigable waters dates to the founding of our nation and spans activity such as the Army Corps of Engineers' infrastructure oversight (*e.g.*, wharves, piers, levies, dams, and bridges) and the EPA's water-pollution regulation. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189–99 (1824); *see, e.g.*, 33 U.S.C. §§ 401, 403, 1251 *et seq*.

"There is no federal general common law," but there is federal common law. *Erie* left to the states what ought to be theirs, and kept for federal law what ought to be federal. *See generally*, Friendly, J., *In Praise of Erie — And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405 (1964). The United States Supreme Court has long recognized that "[e]nvironmental 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." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) (quotation marks omitted). In the modern seminal case addressing the pollution of Lake Michigan, the Supreme Court explained that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." Though that case undoubtedly arose on navigable water, the Supreme Court ignored admiralty jurisdiction, instead holding the nuisance claims, "founded on federal common law," arose "under the 'laws' of the United States within the meaning of § 1331[]." *Illinois v. City of Milwaukee*, 406 U.S. 91, 99, 103 (1972).

So too here. The navigable waters of the United States serve as a bedrock of federal common law and federal-question jurisdiction, not just of admiralty jurisdiction. Even if the Energy Companies could and did waive admiralty jurisdiction as a ground for removal, the district court did not sustain removal under (and did not mention) admiralty jurisdiction. Rather, the district court found the complaints' necessary dependence on the navigable waters as the instrumentality of the alleged nuisance raised a federal question based in federal common law, grounds expressly stated in the notices of removal.

Last, because the notices of removal raised federal-question jurisdiction, the post-removal supplemental briefing in the district court properly reinforced those grounds. Expiration of the "thirty day period" bars "amend[ment] to add a *separate* basis for removal jurisdiction." But it does not bar amendment to remedy previously-raised, though defective, grounds. *ARCO Envtl. Remed. v. Dep't of Health & Envtl. Qual. of Mont.*, 213 F.3d 1108, 1117 (9th Cir. 2000) (emphasis added); *Barrow Dev. Co. v. Fulton Ins. Co.*, 418 F.2d 316, 317–18 (9th Cir. 1969). That the parties' post-removal supplemental briefing did partially address admiralty jurisdiction is beside the point

because, as noted, the district court *did not invoke admiralty jurisdiction*. The Energy Companies also argued, and the district court found, that the navigable waters of the United States implicated federal common law. Rather than impermissibly raising (potentially waived) new grounds for removal, this post-removal supplemental briefing appropriately *elaborated on* the previously-raised first ground for removal.

Thus, the district court respectfully requests that the panel withdraw Footnote 12 and address the merits of the ground on which removal jurisdiction was actually sustained below.

Respectfully,

William Alsup
United States District Judge
Northern District of California

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