UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

BOARD OF COMMISSIONERS OF THE SOUTHEAST LOUISIANA FLOOD PROTECTION AUTHORITY – EAST, INDIVIDUALLY AND AS THE BOARD GOVERNING THE ORLEANS LEVEE DISTRICT, THE LAKE BORGNE BASIN LEVEE DISTRICT, AND THE EAST JEFFERSON LEVEE DISTRICT,	*	**Civil action no. 2:13-cv-05410**
	*	**Section: N**
	*	**Division: 3**
	*	**Judge: Kurt D. Engelhardt**
	*	**Magistrate: Daniel E. Knowles, III**
Plaintiff	*	
v.	*	
TENNESSEE GAS PIPELINE COMPANY, LLC, ET AL.,	*	
Defendants.	*	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO REMAND

Plaintiff, the Board of Commissioners of the Southeast Louisiana Flood Protection Authority – East ("the Authority"), submits this memorandum in support of its Motion to Remand. The Authority moves to remand this matter to the Civil District Court for the Parish of Orleans because the Authority's state-court petition does not offer any basis for this Court to exercise jurisdiction.

SUMMARY OF ARGUMENT

None of the extensive jurisprudence on removal under federal question jurisdiction supports removal of the Authority's case.[1] As a general rule, the propriety of removal depends on whether a case originally could have been filed in federal court. *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163 (1997) (citing *Caterpillar Inc. v. Williams*,

[1] Removing Defendant Chevron USA, Inc. ("Chevron") has not, and cannot, assert federal diversity jurisdiction, 28 U.S.C. §1332, as a basis for removal of this matter because multiple Defendants share identity of citizenship with the Authority.

482 U.S. 386, 392 (1987)). Here, the Authority brought its action under Louisiana law to impel Defendants to provide a remedy for their oil and gas-related exploration and production activities that have destroyed Louisiana's coastal lands and forced the Authority to shoulder an increasingly larger financial burden for providing flood protection in southeast Louisiana. Contrary to Chevron's assertions, this action could not have been originally filed in federal court because:

(1) **The Authority's claims are not created by federal law.** Chevron asserts that jurisdiction is proper in this Court because the Authority's claims are created by federal law. This is not so because each of the Authority's claims is specifically pleaded as a cause of action under Louisiana law. Chevron points to federal statutes and permits that the Authority references in its Petition, but the Authority has not asserted that any of those statutes or permits creates any of its causes of action. Indeed, the referenced statutes do not provide a private cause of action. Chevron's claim that the Authority's claims are created by federal law is baseless.

(2) **The Authority's claims do not raise a substantial question of federal law.** Chevron alternatively asserts that jurisdiction is proper in this Court by arguing that the Authority's state-law causes of action necessarily implicate a substantial question of federal law. Chevron again points to the federal statutes that the Petition references, but there is no substantial issue of federal law to be resolved under any of those statutes. The referenced statutes set forth prohibited conduct and required acts, providing guidance as to whether Defendants' acts and omissions violated the standard of care under Louisiana law. Under well-settled law, the use of a federal statutory regime to determine whether a state law standard of care has been met does not provide a basis for jurisdiction.

(3) **Maritime law does not apply to the Authority's claims.** Chevron argues that the Authority's claims arise under general maritime law and that such claims are removable. Chevron is wrong on both counts. The Petition does not state a claim under maritime law because the Authority does not allege a nexus with traditional maritime activity, nor does it allege any negative impact upon the navigability of waterways or maritime commerce. Moreover, even if the Petition did state a claim under maritime law, general maritime cases are not removable from state court absent an independent basis for federal court jurisdiction. The authorities that Chevron cites to the contrary conflict with well-established precedent.

(4) **CAFA does not apply to the Authority's claims.** Chevron argues that the Class Action Fairness Act ("CAFA") provides a basis to remove the Authority's case to federal court. But the Authority's case does not meet CAFA's numerosity requirement of 100 or more plaintiffs. Although Chevron argues that the numerosity requirement is met here because there are over 100 residents of New Orleans that stand to benefit from the Authority's suit, this is an overbroad interpretation of CAFA's numerosity requirement. There is only one true party in interest in this matter – the Authority, which seeks relief from the results of Defendants' acts and omissions.

(5) **OCSLA does not apply to the Authority's claims.** Chevron argues that the case is removable under Outer Continental Shelf Lands Act ("OCSLA"). This, too, is incorrect because none of the alleged conduct occurred on the outer continental shelf, which is a threshold requirement for removal under OCSLA.

(6) **Federal enclave jurisdiction does not apply to the Authority's claims.** Finally, Chevron also argues that the Authority's case is removable under federal enclave jurisdiction. Chevron has failed to establish the presence of a federal enclave sufficient to confer jurisdiction in this case. Moreover, federal enclave jurisdiction does not apply here because there are no

allegations that a tort occurred on a federal enclave or that the Authority sustained damages on a federal enclave.

For these reasons and those more fully discussed below, the Authority respectfully requests that this Court grant its Motion to Remand.

FACTUAL BACKGROUND

The Authority is a unit of local government that is responsible for providing flood protection to the greater New Orleans region. Petition, ¶¶4.2-4.3. Defendants, including Removing Defendant Chevron USA, Inc. ("Chevron"), are oil and gas exploration and production companies whose concerted conduct has caused and continues to cause the degradation of the coastal lands of south Louisiana. *Id.*, ¶¶2.1, 6.1-6.14. In furtherance of its duty to provide flood protection to greater New Orleans, the Authority filed a petition in the Civil District Court for the Parish of Orleans on July 24, 2013 ("Petition"). In its Petition, the Authority named Chevron and 96 other oil and gas exploration and production companies, all of which are listed in Exhibit B to Chevron's Notice of Removal. The Petition alleges six causes of action, all of which arise solely under Louisiana law: (1) Negligence; (2) Strict Liability; (3) Natural Servitude of Drain; (4) Public Nuisance; (5) Private Nuisance; and (6) Third Party Beneficiary Breach of Contract. *Id.*, ¶¶12-42.

On August 13, 2013, Chevron filed a Notice of Removal, asserting that this Court has jurisdiction over the Authority's claims because those claims: (i) are created by federal law; (ii) raise a substantial question of federal law; (iii) assert a general maritime claim; (iv) are subject to the Class Action Fairness Act ("CAFA"); (v) are subject to the Outer Continental Shelf Lands Act ("OCSLA"); and (vi) are subject to federal enclave jurisdiction. Notice of Removal, ¶6. Chevron's arguments are not supported by the well-established federal law on removability.

ARGUMENT

"Federal courts are courts of limited jurisdiction," possessing "only that power authorized by Constitution and statute." *Gunn v. Minton*, --- U.S. ---, 133 S. Ct. 1059, 1064 (2013) (citation omitted). Federal courts "must presume that a suit lies outside this limited jurisdiction, and the burden of establishing federal jurisdiction rests on the party seeking the federal forum." *Id.* The party removing an action from state court bears the burden of demonstrating that the federal court's jurisdiction over the removed suit is proper. *Manguno v. Prudential Prop. and Cas. Ins. Co.,* 276 F.3d 720, 723 (5th Cir. 2002). Because the federal removal statute should be strictly construed in favor of remand, any ambiguities in the state court petition are construed against removal. *Id.* (citing *Acuna v. Brown & Root, Inc.,* 200 F.3d 335, 339 (5th Cir. 2000)).

Congress has authorized this Court to exercise "original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331. A case can "arise under" federal law in two ways. First, "a case arises under federal law when federal law creates the cause of action asserted." *Gunn*, 133 S.Ct. at 1064. Second, the Supreme Court has "identified a 'special and small category' of cases in which arising under jurisdiction still lies" even when the "claim finds its origins in state rather than federal law." *Id*. Chevron claims this court has "arising under" jurisdiction on both grounds. Chevron also claims that general maritime law, CAFA, OCSLA, and federal enclaves each provide a unique basis for jurisdiction. As discussed below, Chevron's analysis is incorrect.

I. Federal Law Does Not Create Any of the Authority's Claims.

A plaintiff is the master of its complaint. *Caterpillar*, 482 U.S. at 392. Accordingly, the plaintiff may assert state-law claims exclusively, even though it may have federal law claims under the same facts, and thereby avoid federal jurisdiction. *Id*. A plaintiff's ability to rely

exclusively on state-law claims is known as the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question appears on the face of the plaintiff's complaint. *Id*. In general, whether a cause of action presents a federal question solely depends on the allegations of the plaintiff's well-pleaded complaint. *International College of Surgeons*, 522 U.S. at 163 (citing *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987) (internal quotations omitted)) ("It is long settled law that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law."). A plaintiff is therefore able to prevent removal of a case to federal court by exclusively asserting state-law claims. *Avitt v. Amoco Production Company*, 53 F.3d 690, 693 (5th Cir. 1995).

Here, the Authority has exclusively asserted state law claims; none of the Authority's causes of action is created by federal law. *See* Pet., ¶¶12-42. Chevron argues that the Authority's references in its Petition to federal statutes and permits creates federal question jurisdiction. Rem. Not., ¶¶13-18. But none of those statues or permits supplies the Authority with federal private right of action.[2] Jurisdiction based upon federal law claims cannot attach where none of the causes of action is created by federal law. *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 817 (1986). Because the Authority does not assert any claims created by federal law, this case should be remanded.

II. The Authority's Claims Do Not Raise a Substantial Question of Federal Law.

As noted above, although removal generally requires a federal claim stated on the face of the plaintiff's complaint, courts have also allowed removal where a substantial federal question is "an element, and an essential one, of the plaintiff's cause of action." *Gully v. First Nat'l Bank*

[2] *See California v. Sierra Club*, 451 U.S. 287 (1986) (no private right of action under Rivers and Harbor Act); *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981) (no private right of action under Clean Water Act); *State of N.J. , Dept. of Envtl. Prot v. Long Island Power Auth.*, 30 F.3d 403 (3d Cir. 1994) (no private right of action under Coastal Zone Management Act); *Coastal Habitat Alliance v. Patterson,* 601 F.Supp.2d 868 (W.D. Tex. 2008) (same).

in Meridian, 299 U.S. 109, 112 (1936). This is a narrow exception to the well-pleaded complaint rule. *See Gunn*, 133 S.Ct. at 1064-65 (noting that such cases are a "special and small category" and constitute a "slim category"). Even where a plaintiff's claims require reference to federal law, the "mere need to apply federal law in a state-law claim will [not] suffice to open the 'arising under' door." *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313 (2005). Instead, "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 133 S.Ct. at 1065. Because none of these four elements is present here, the case must be remanded.

Chevron claims that the Petition necessarily raises a federal issue by citing to the Petition's references to federal statutes. Rem. Not., ¶¶21-22. Although Chevron faithfully recites these statutes, it fails to specify any issue of federal law that the Petition necessarily raises and fails to detail how any such legal issue would be actually disputed. As the Petition explains, the references in the Petition to federal statues and permits are designed to demonstrate that Defendants failed to adhere to the proper standard of care under Louisiana law. Pet., ¶¶8-9, 10-11. Those permits and statutes called for Defendants to engage, or refrain from engaging, in certain conduct. Whether or not Defendants acted (or omitted to act) in accordance with the requirements of those statutes and permits is a factual determination, not a legal one. If the disputed federal issue is one of *fact* rather than *law*, federal court jurisdiction will not attach. *See Singh v. Duane Morris LLP*, 538 F.3d 334, 339 (5th Cir. 2008) (where plaintiff asserted a malpractice action on an underlying federal trademark claim, court held that "this case involves no important issue of federal law. Instead the federal issue is predominantly one of fact . . .").

Adjudication of the Authority's claims under Louisiana law will not require the resolution of any federal law issue, much less a substantial one sufficient to confer jurisdiction. Courts have repeatedly recognized that state-law claims, such as those the Authority asserts in its Petition, that rest in part on the defendant's violation of a federal law do not provide a basis for federal jurisdiction. *Moore v. Chesapeake & Ohio Ry*., 291 U.S. 205 (1934) (no federal question where violation of federal standard was element of state tort suit); *Merrell Dow Pharm.*, 478 U.S. at 817 (state tort claim based on violation of federal misbranding prohibition); *Grable*, 545 U.S. at 319 (recognizing that using violation of federal law as basis for state tort claim does not create basis for federal question jurisdiction); *MSOF Corp. v. Exxon Corp.*, 295 F.3d 485 (5th Cir. 2002) (state tort claims alleging violation of federal regulations did not suffice as basis for federal jurisdiction).

Moreover, the Notice of Removal reflects a fundamental misunderstanding of the requirement that the federal issue be "substantial."[3] It is not sufficient (as Chevron argues) that the federal issue be simply material to the litigation or that the issue is of importance to the parties before the court:

> [I]t is not enough that the federal issue be significant to the particular parties in the immediate suit; that will always be true when the state claims "necessarily raise[s]" a disputed federal issue, as *Grable* separately requires. The substantiality inquiry under *Grable* looks instead to the importance of the issue to the federal system as a whole.

Gunn, 133 S.Ct. at 1066. The exercise of "substantial federal question" jurisdiction is rare; indeed, the Supreme Court has found this exception to be applicable in only two instances: *Smith*

[3] Chevron fails to cite a single appellate decision upholding an exercise of federal jurisdiction over state law claims. In fact, Chevron cites only one, unpublished district court case that has upheld such jurisdiction since the Supreme Court attempted "to bring some order to this unruly doctrine" in *Grable*. *See Gunn*, 133 S.Ct. at 1065. The case cited, *Clauer v. Heritage Lakes Homeowners Ass'n, Inc*, 2010 WL 446545 (W.D.Tex. 2010), applied an erroneous standard in evaluating whether the federal issue was substantial; a standard specifically rejected by the U.S. Supreme Court in *Gunn*.

v. Kansas City Title & Trust Co., 255 U.S. 180 (1921); and *Grable,* 545 U.S. at 310. In *Smith*, the federal question was found to be "substantial" because the issue was whether federal bonds were issued unconstitutionally, and hence of no validity. 255 U.S. at 213. In *Grable*, the federal issue was the power and reach of the IRS in its collection of delinquent taxes. 545 U.S. at 314.

Here, whether or not Defendants complied with the requirements of the Clean Water Act or Rivers and Harbors Act does not rise to a similar level of significance as the federal issues in *Grable* and *Smith* because it does not require this Court to examine any issues of constitutionality or determine the reach and power of a federal agency. Indeed, the fact that Congress has not provided a private right of action under the laws cited by Chevron weighs heavily against Chevron's claim that the federal interest is sufficiently substantial to justify the exercise of federal jurisdiction. *Merrell Dow Pharm.*, 478 U.S. at 814 ("We simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction."); *Singh*, 538 F.3d at 338-39 ("the fact that violation of the statute is an element of a state tort claim is insufficient to establish a substantial federal interest); *Budget Prepay, Inc. v. AT&T Corp*, 605 F.3d 273, 280 (5th Cir. 2010) (applying *Merrell Dow Pharm.* in holding that "Congress's failure to provide a private cause of action for violation of a federal statute suggested that the federal right at issue was not substantial").

Finally, allowing the Authority's case to proceed in state court will not jeopardize the balance of state and federal judicial responsibilities because it will not require the state courts to engage in a detailed analysis or interpretation of federal law. The Authority's case will turn primarily on facts and science: did the Defendants engage in the alleged acts and omissions (yes)

and did those acts and omissions occasion the alleged damages (yes). Defendants have not shown that Congress meant to bar state courts from hearing the Authority's claims. *Malbrough v. Hensley R. Lee Contracting, Inc.*, CIV.A. 12-1166, 2013 WL 160280, at *4 (E.D. La. Jan. 15, 2013) (Engelhardt, D.J.) (concluding that defendant failed to satisfy its burden of showing federal issue was substantial, and that exercising federal jurisdiction over it would not disturb the balance of federal and state judicial responsibilities). Further, there is no basis to claim that the experience of federal judges weighs in favor of federal jurisdiction in such a dispute. Therefore, the Authority's claims do not meet the requirements for this Court's exercise of jurisdiction under "substantial federal question" jurisdiction and its case should be remanded accordingly.

III. No Other Basis for Removal Applies in this Case.

In addition to its mistaken attempt to read generalized federal claims and substantial federal issues into the Authority's Petition, Chevron also attempts to cramp and distort the Authority's allegations to fit four other specific grounds for jurisdiction: (1) general maritime law; (2) CAFA; (3) OCSLA; and (4) federal enclave jurisdiction. As discussed below, none of these cited bases confers jurisdiction in this matter.

A. The Authority's Case Cannot Be Removed Under General Maritime Law.

The Authority's claims do not constitute general maritime claims, and even if they did, general maritime claims are not removable without a separate basis for federal court jurisdiction.

1. The Petition Does Not Allege General Maritime Claims.

Chevron asserts that the Authority's claims here sound in maritime tort because the allegations of land loss due to the failure to maintain oil and gas industry canals are allegations of a disruption of navigability in connection with maritime activity. Rem. Not., ¶¶25-31. But this is incorrect because the Petition does not allege that Defendants caused any impediments to

navigability or maritime activities. In light of the standard resolving all doubts regarding jurisdiction in favor of remand, Chevron's arguments should be rejected. *See Manguno,* 276 F.3d at 723.

There is a two-part test for determining whether a maritime nexus sufficient to establish admiralty jurisdiction exists: (1) first, a court must assess the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce; and (2) second, the court must examine the general conduct from which the incident arose to determine whether there is a substantial relationship between the activity giving rise to the incident and traditional maritime activity. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,* 513 U.S. 527, 115 S.Ct. 1043, 130 L.Ed.2d 1024 (1995). "This test is designed to operate as a policy-based filter that allows courts flexibility in screening out unusual fact situations that are not maritime in nature, but happen to occur in navigable waters." *Ward v. Boyd Gamin Corp. in Personam*, CIV.A. 04-0060, 2004 WL 422012, at *3 (E.D. La. Mar. 4, 2004) (citing Thomas J. Schoenbaum, *Admiralty and Maritime Law,* § 3-5 at 96 (3d ed.2001)).

As a threshold matter, as discussed above, the plaintiff is the master of its own complaint, and here has not asserted that its claims are raised under general maritime law. *Avitt*, 53 F.3d at 693. It is clear under this Court's removal standard that the Authority's claims do not involve "a potentially disruptive impact on maritime commerce" because neither the impairment of navigability nor impact upon maritime commerce forms any part of the Authority's allegations. The Petition's focus is the degradation of coastal ***lands***, not coastal waterways, through Defendants' oil and gas production activities. *See* Pet., ¶6.4 ("Continuous oil and gas activity has scarred Louisiana's coast . . ."); ¶6.7 ("Oil and gas activities continue to transform what was once a stable ecosystem . . ."); ¶6.8 (listing "oil and gas activities contributing to land loss").

Claims for damages related to oil and gas production activities, even though they might occur on navigable waters, have been held to be insufficiently connected to traditional maritime activity to support jurisdiction under general maritime law. *Texaco Exploration & Prod., Inc. v. AmClyde Engineered Products Co., Inc.*, 448 F.3d 760, 771 *amended on reh'g,* 453 F.3d 652 (5th Cir. 2006). In *AmClyde*, the plaintiff sued the manufacturer and designer off an offshore platform crane for the crane's failure, asserting jurisdiction under general maritime law. *Id.* at 766. The court held that general maritime jurisdiction had not been properly invoked because the plaintiff's complaint arose "not from traditional maritime activities but from the development of [oil and gas] resources]." *Id.* at 771. Similarly here, the Authority's claims arise not from traditional maritime activity but from Defendants' oil and gas production activities. Further, Chevron has failed to demonstrate, as it must, how the allegations of the "incident at issue … have the potential to disrupt maritime commerce." *La. Crawfish Producers Ass'n—West v. Amerada Hess Corp.*, No. 10-CV-348, 2012 WL 6929427, at *11 (W.D. La. Aug. 1, 2012) (Hanna, Mag.) ("*Crawfish Producers I*"). Here, the "incident[s] at issue" are Defendants' oil and gas exploration and production activities. Pet., ¶¶6.3-6.14. Nowhere does the Petition allege that those activities pose a threat to maritime commerce. Again, the focus of the Petition is how those activities have caused land loss and related damage to the Authority. Without a sufficient connection to traditional maritime activities and without a showing of disruption to maritime commerce, the Authority's case must be remanded.

The Authority has alleged that Defendants' acts and omissions have caused land to convert to open water; thus, quite apart from disrupting navigability, Defendants' conduct may have actually enhanced navigability, though at the devastating cost of the loss of the natural land buffer. This critical distinction between enhancement and disruption of navigability formed the

basis for the court's holdings in the *Crawfish Producers* case, a matter that involved the impact of the dredging of oil and gas canals on the fishing industry. *See Crawfish Producers I*; *La. Crawfish Producers Ass'n—West v. Amerada Hess Corp.*, 919 F. Supp. 2d 756 (W.D. La. 2013) (Doherty, J.) ("*Crawfish Producers II*").

In the *Crawfish Producers* cases, a group of fishermen plaintiffs brought suit against numerous oil and gas and pipeline entities for actions taken by the defendants in the Atchafalaya basin in dredging canals and building associated spoil banks, and for subsequent failure to maintain these canals and banks to specified permit conditions. *Crawfish Producers I*, 2012 WL 6929427 at *1. The case, originally filed in Louisiana state court, had been removed pursuant to federal question jurisdiction by an insurer defendant. *Id*. at *3. In *Crawfish Producers*, Magistrate Judge Hanna examined the dredging-related claims:

> [I]t is not the fact of simply dredging by a vessel to which the court must look, but rather, per *Grubart*, the court must look to the "general character of Defendant's activity." *In re Katrina Canal Breaches Litig.*, 324 Fed. App'x 370, 379 (5th Cir. 2007).
>
> The status of "connection" test requires, first, that the general features of the incident at issue, considered at "an intermediate level of generality," must have the potential to disrupt maritime commerce. *Grubart*, 513 U.S. at 538-39.

Crawfish Producers I, 2012 WL 6929427 at *11. Applying this standard, Magistrate Judge Hanna concluded that, as to defendants that the pleadings only alleged had acquired a pipeline or pipeline canal and had failed to maintain according to permits, the allegations "fall short of any connection to traditional maritime activity." *Id*. at *13. Judge Doherty adopted the recommendations in Magistrate Judge Hanna's opinion. *Crawfish Producers II*, 919 F. Supp. 2d at 767-68. Similarly here, the Authority's claims rely substantially on allegations that Defendants' failure to abide by permit conditions triggered the causes of action—an allegation

that was insufficient to support maritime jurisdiction in *Crawfish Producers*, even where obstruction of navigation otherwise was alleged.

Because the Authority's case does not involve traditional maritime activities, negative impact upon navigability, or disruption of maritime commerce, and resolving all doubts in favor of remand, general maritime law does not apply to the Authority's claims.

2. General Maritime Claims Are Not Removable Absent an Independent Basis for Jurisdiction.

Even adopting Chevron's erroneous contention that the Petition asserts general maritime claims, that alone would not suffice to support this Court's exercise of jurisdiction. Chevron acknowledges the long-standing rule that bars removal of maritime claims from state courts in the absence of some other basis for federal jurisdiction, but it argues that a 2011 amendment of 28 U.S.C. § 1441 changed that rule. Rem. Not., ¶¶30-31. Chevron lacks sound support for its legal premise that the long-standing rule regarding non-removability of maritime claims has been abrogated.

A plaintiff may elect to bring maritime claims in state rather than federal court under the "saving-to-suitors" clause. 28 U.S.C. § 1333(1) ("The district courts shall have original jurisdiction, exclusive of the courts of the States, of ... [a]ny civil case of admiralty or maritime jurisdiction, **saving to suitors in all cases all other remedies to which they are otherwise entitled**.") (emphasis added). The traditional rule regarding maritime claims brought in state court is that such claims cannot be removed unless "there exists some basis for jurisdiction other than admiralty." *In re Eckstein Marine Serv. L.L.C.*, 672 F.3d 310, 315-16 (5th Cir. 2012) (citing *Poirrier v. Nicklos Drilling Co.,* 648 F.2d 1063, 1066 (5th Cir.1981)). In *Baris v. Sulpicio*, the court explained:

> [The plaintiff filed a maritime] action . . . in state court pursuant to the so-called "saving to suitors" clause of section 1333(1). That provision has been construed to permit admiralty and maritime actions, otherwise exclusively within the jurisdiction of the federal district courts, to be brought in state court as well.

932 F.2d 1540, 1542 (5th Cir.1991) (citing 1 S. Friedell, *Benedict on Admiralty* § 122 (6th ed. 1991)). In *Baris*, there was no diversity of citizenship, prompting the *Baris* court to further explain that "where plaintiffs have exercised their 'historic option' to bring an action in state court under the saving to suitors clause, the matter cannot be removed in the absence of diversity." *Id*. at 1543. Thus, the non-removability of a maritime claim, absent diversity of citizenship (or some other basis for federal court jurisdiction) is founded upon the saving-to-suitors clause of 28 U.S.C. § 1333.

Chevron cites two recent, unpublished decisions from the Southern District of Texas that have held that the recent amendment of 28 U.S.C. § 1441 has undermined the long-standing prohibition on removal. Rem. Not., ¶30 (citing *Wells v. Abe's Boat Rentals Inc.*, No. H-13-1112, 2013 WL 3110322 (S.D. Tex. June 18, 2013); *Ryan v. Hercules Offshore, Inc.*, No. H-12-3510, 2013 WL 1967315 (S.D. Tex. May 13, 2013)). These Texas cases examine the effect of the Federal Courts Jurisdiction and Venue Clarification Act of 2011, P.L. 112-63, which was passed in December 2011 and became effective on January 6, 2012. *See* 28 U.S.C. § 1441, Hist. & Stat. Notes.[4] *Wells* and *Ryan*, however, offer a faulty analysis because they fail to recognize that the

[4] The previous version of section 1441 stated:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

saving-to-suitors clause has long provided the basis for the non-removability of maritime claims and they fail to address how the amendment of § 1441 alters the traditional rule. These cases are anomalies within this Circuit and misconstrue the reasoning upon which maritime claims have long been held non-removable in the absence of an independent basis for the exercise of jurisdiction.

The courts in this District, by contrast, have continued to adhere to the long-standing rule regarding non-removability of maritime claims, even in the wake of the amendment of § 1441. In *Int'l Transp. Workers Fed. v. Mi-Das Line, SA*, the plaintiff brought maritime claims in state court, post-amendment of § 1441, and the defendants removed the case to federal court. No. 12-2503, 2012 WL 5398470, *1 (E.D. La. Nov. 2, 2012). Citing *Baris*, the court explained that the saving-to-suitors clause of § 1333 permits the plaintiff to bring admiralty claims in state court. *Id*. The court further explained that under the saving-to-suitors clause, "a plaintiff may elect to bring admiralty and maritime claims in state rather than federal court. These [claims] 'cannot be removed in the absence of diversity' unless 'there exists some basis for jurisdiction other than admiralty.'" *Id*. (quoting *In re Eckstein*, 672 F.3d at 315–16). Because the plaintiff invoked the saving-to-suitors clause, the court concluded that:

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28 U.S.C. § 1441 (2006). The current version states:

> (a) **Generally.**—Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
> (b) **Removal based on diversity of citizenship.**—
>> (1) In determining whether a civil action is removal on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.
>> (2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendant is a citizen of the State in which such action is brought.

28 U.S.C. § 1441(a) & (b) (2012).

> [Plaintiff] has the right to pursue state law remedies in State Court, regardless of original admiralty jurisdiction under § 1331(1), unless independent federal subject matter jurisdiction exists based on diversity or some other basis.

Id; *see also*, *Duet v. Am. Commercial Lines LLC*, No. 12-3025, 2013 WL 1682988, at *6 (E.D. La. April 17, 2013) (where plaintiff's claim was filed after the amendment of § 1441, the court nonetheless held that "general maritime claims under 28 U.S.C. § 1333 do not constitute federal questions for purposes of removal jurisdiction"). Thus, even post-amendment of § 1441, the courts in this District have continued to recognize that the non-removability of maritime claims is based upon the saving-to-suitors clause of 28 U.S.C. § 1333(1), rather than the pre-amendment language in § 1441. At least two post-amendment decisions of the Fifth Circuit dealing with cases filed pre-amendment support the continued viability of the traditional rule as based upon § 1333. *See Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 219 (5th Cir. 2013) ("[E]ven though federal courts have original jurisdiction over maritime claims under 28 U.S.C. § 1333, they do not have removal jurisdiction over maritime cases which are brought in state court. Instead, such lawsuits are exempt from removal by the 'saving-to-suitors' clause of the jurisdictional statute governing admiralty claims, and therefore may only be removed when original jurisdiction is based on another jurisdictional grant, such as diversity of citizenship."); *see also In re Eckstein*, 672 F.3d at 315-16 (same).

At most, the *Ryan* and *Wells* cases cited by Chevron suggest a conflict between the courts in the Southern District of Texas and the courts in this District. Unless and until that conflict is resolved by the Fifth Circuit in favor of *Ryan* and *Wells*, which are outliers, this Court must apply the rule as stated in *Barker* and *In re Eckstein*. Accordingly, even if this Court were to find that the Authority's Petition states a general maritime claim, it must nonetheless find that removal is improper based upon the saving-to-suitors clause.

B. The Authority's Case Cannot Be Removed under CAFA.

Chevron asserts that this case is also removable as a "mass action" within the meaning of CAFA. Rem. Not., ¶¶32-39. This argument is foreclosed by the plain language of the statute.

By definition a "mass action" is a civil action "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common question of law or fact." 28 U.S.C. § 1332(D)(11)(B)(i). "[T]he term 'mass action' shall not include any civil action in which . . . all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action." 28 U.S.C. § 1332(D)(11)(B)(ii)(III).

The Authority is the only Plaintiff in this case. This is not a civil action "in which monetary relief claims of 100 or more persons are proposed to be tried jointly" on any grounds. This is a case in which all of the claims are asserted by a single public body pursuant to a state statute that specifically authorizes that body to sue. The Authority was created by La. Rev. Stat. § 38:330.2, pursuant to powers granted under Article VI, Section 44(2) of the Louisiana Constitution of 1974. La. Rev. Stat. § 38:309(B) specifically grants it the authority to file suit.

Chevron ignores these clear limits on the application of CAFA. Instead, it invites this Court to adopt a novel interpretation of CAFA's numerosity requirement by treating this action as if it were an action to obtain monetary relief for each of the residents and businesses in the greater New Orleans area. Rem. Not., ¶35-36. There is no authority for such a construction of CAFA and the two cases that Chevron cites – *Louisiana ex rel. Caldwell v. Allstate Ins. Co.* and *Mississippi ex rel. Hood v. AU Optronics Corp.* – do not support its argument.

In *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418 (5th Cir. 2008), Louisiana's attorney general filed an action against a number of insurers and others seeking treble damages for injuries suffered by individual policyholders. The court held that the individual policyholders were the real parties in interest because they were the parties for whom damages were sought (and to whom they would be paid). 536 F.3d at 419. Thus, CAFA's numerosity requirement was met damages were sought for more than 100 persons. *Id.*

Mississippi ex rel. Hood v. AU Optronics Corp., 701 F.3d 796 (5th Cir. 2012) was filed by Mississippi's attorney general under the state consumer protection act and state antitrust act against the manufacturers of liquid crystal display panels. The claim was that the defendants artificially inflated prices which harmed consumers – private citizens – by forcing them to pay higher prices. 701 F.3d at 800. The suit sought to recover for both harm to the State and harm to the individual consumers. *Id.* The court held that the consumers were real parties in interest because damages were sought for each consumer's individual injury. *Id.* Because there were more than 100 consumers, the action qualified as a "mass action" under CAFA. *Id.*

Neither case applies to the Authority's action because the Authority is the only real party in interest in this litigation. As noted by the court in *Caldwell:* "a party is a real party in interest when it is directly and personally concerned in the outcome of the litigation to the extent that his participation therein will insure 'a genuine adversary issue between the parties.'" 436 F.3d at 428. There is no credible argument that the individual businesses and residents of the greater New Orleans area are the real parties in interest in this litigation because damages are not sought for injuries to each resident and/or business. Certainly, the residents and businesses stand to benefit from this litigation in the sense that they will enjoy the flood protection that the Authority was established to provide. But here, the Authority, which seeks remedies to ameliorate the

damages that *it* has sustained and will continue to sustain, is the real party in interest as the lone Plaintiff in this action. Thus, CAFA does not provide a basis for removal because its numerosity requirement is not met.

C. The Authority's Case Cannot Be Removed Under OCSLA.

Chevron asserts that this case is removable as an action under OCSLA. Rem. Not., ¶¶40-47. Because none of the acts and omissions that form the basis for the Authority's claims involves an operation on the outer continental shelf, OCSLA cannot provide a basis for jurisdiction in this matter.

OCSLA "confers upon the federal district courts jurisdiction to hear and determine certain disputes which Congress anticipated that oil and gas leases on the OCS and operations thereunder might generate." *Amoco Production Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1206 (5th Cir. 1988). Here, the Authority's Petition does not allege that any conduct on the outer continental shelf forms a part of its claims. Although "the jurisdictional grant in OCSLA is broad," that grant is limited to "activity occurring beyond the territorial waters of the states." *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 213 (5th Cir. 2013). In this case, there is simply no reference in the Petition to any activity occurring beyond the territorial waters of the states. Indeed, the acts and omissions at issue center on Louisiana's coastal *lands*, rather than waters.

Chevron's removal notice suggests that the connectivity of certain pipelines at issue to rigs on the outer continental shelf is sufficient to confer jurisdiction under OCSLA. First, as a factual matter, Chevron provides no support for the proposition that any of the pipelines identified in the Petition are connected to operations on the outer continental shelf. But even if Chevron did make such a showing, it still would be insufficient to confer jurisdiction under

OCSLA.[5] Chevron has failed to cite any case law in support of its argument that a case is removable under the OCSLA where: (1) none the acts or omissions at issue occurred on the outer continental shelf; (2) no injury was sustained away on the outer continental shelf; (3) and the only connection to the outer continental shelf is that there is an attenuated commercial relationship between the acts and omissions complained of and activity that occurs on the outer continental shelf. Indeed, that argument is contravened by the test for whether a cause of action arises under OCSLA. That test asks whether: (1) the facts underlying the complaint occurred on the outer continental shelf; (2) the acts were in furtherance of mineral development on the outer continental shelf; and (3) the injury would have occurred but for the actions on the outer continental shelf. *See Demette v. Falcon Drilling Co.*, 280 F.3d 492, 496 (5th Cir. 2002). Here, none of these elements are met. Accordingly, the Authority's claims do not arise under OCSLA and OCSLA cannot provide a basis for removal.

D. Federal Enclave Jurisdiction Does Not Apply to the Authority's Case.

Chevron's final assertion of federal jurisdiction is based on a subspecies of federal question jurisdiction known as "federal enclave" jurisdiction. Federal enclave jurisdiction does not attach in this case because Chevron has failed factually to demonstrate that there is any federal enclave at issue. In addition, the Authority, as master of its own complaint, has not alleged a federal cause of action or made any claim that any federal enclave is relevant to its case. Finally, the Authority has not alleged that any acts occurred, or injuries were sustained, on a federal enclave. For each of these reasons, enclave jurisdiction does not apply here.

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[5] Additionally, OCSLA does not displace general maritime law if general maritime law is applicable. *Hufnagel v. Omega Serv. Indus., Inc.*, 182 F.3d 340, 350 (5th Cir. 1999). So if this Court were to accept Chevron's erroneous contention that general maritime law applies to the Authority's claims, then it must reject the assertion that OCSLA applies, too. And because general maritime claims are not removable—*see* Section III.A.2, *supra*—this matter should be remanded.

A federal enclave is an area over which the federal government has assumed exclusive legislative jurisdiction through the application of Art. I, Section 8 of the U.S. Constitution. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 182 n.4 (1988). Article I, Section 8 grants Congress the power:

> [t]o exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings[.]

U.S. Const. art I, §8, cl.17. From the fact that the United States Congress has exclusive legislative jurisdiction over federal enclaves, courts have reasoned that federal courts have subject matter jurisdiction to adjudicate controversies arising on federal enclaves. *See Mater v. Holley,* 200 F.2d 123, 124-125 (5th Cir.1953) ("It would be incongruous to hold that although the United States has exclusive sovereignty in the area here involved, its courts are without power to adjudicate controversies arising there."). Federal enclave jurisdiction is thus part of a court's federal question jurisdiction under 28 U.S.C. § 1331. *Akin v. Ashland Chemical Co.,* 156 F.3d 1030, 1034 (10th Cir.1998) ("Personal injury actions which arise from incidents occurring in federal enclaves may be removed to federal district court as a part of federal question jurisdiction"); *Celli v. Shoell,* 40 F.3d 324, 328 (10th Cir.1994) (stating that "federal enclave jurisdiction [is] a form of federal question jurisdiction"). Thus, as a general rule, "[f]ederal courts have federal question jurisdiction over tort claims that arise on 'federal enclaves.'" *Durham v. Lockheed Martin Corp.,* 445 F.3d 1247, 1250 (9th Cir. 2006) (citation omitted); *see also Mater*, 200 F.2d at 123-24.

In order to establish the presence of a "federal enclave" sufficient to confer jurisdiction, there is a three-prong test: (1) the United States must purchase land from a state for the purpose of erecting forts, magazines, arsenals, dock-yard, or other needful buildings, (2) the state

legislature must consent to the jurisdiction of the federal government; and (3) the federal government must accept jurisdiction "by filing a notice of acceptance with the Governor of the State or in another manner prescribed by the laws of the State where the land is situated." *Wood v. Amer. Crescent Elevator Corp.*, 2011 WL 1870218, at *3 (E.D. La. May 16, 2011) (citing 40 U.S.C. § 3112(b)).

Here, Chevron has failed to demonstrate that prongs (1) and (3) apply to the Authority's claims. Although Chevron lists, without support, a dozen supposed "federal enclaves" in southeast Louisiana, Rem. Not., ¶58, Chevron has failed to show how any fort, magazine, arsenal, dock-yard or other needful building erected by the United States was the location of any of the Defendants' acts or omissions, or the injuries suffered by the Authority, as alleged in the Petition. Without this threshold showing, there is no federal enclave involved in this matter and this Court cannot exercise jurisdiction. Further, Chevron simply states, without any support, that the federal government has accepted exclusive jurisdiction over each of the federal enclaves it lists. Rem. Not., ¶58. Chevron offers no support for the third prong of the test for federal enclave jurisdiction and without such support, this Court cannot exercise jurisdiction.[6] *See Lawler v. Miratek*, 2010 WL 743295, at *1 (W.D. Tex. Mar. 2, 2010) (concluding that mere suggestion that events underlying tort action occurred on a federal enclave "was insufficient to sustain federal enclave jurisdiction").

[6] Chevron also argues that the final requirement that the federal government accept jurisdiction only applies to property acquired after 1940. The statute upon which Chevron's reasoning is based provides that "the obtaining of exclusive jurisdiction . . . over lands . . . *which have been* or shall hereafter be acquired by it shall not be required." 40 U.S.C. § 255 (emphasis added). However, that statute was replaced by 40 U.S.C. § 3112 in 2002. The statute now provides that it is "conclusively presumed that jurisdiction has not been accepted until the Government accepts jurisdiction over land as provided in this section." This presumption contains no temporal limitation. Thus, even as to lands acquired before 1940 there is a conclusive presumption of no jurisdiction absent acceptance by the government, which Chevron has failed to demonstrate.

Even assuming, *arguendo*, that Chevron could establish the presence of a federal enclave sufficient to confer jurisdiction, nothing in the allegations in the Petition or in the Notice of Removal alleges a federal cause of action or demonstrates that any of the acts or omissions occurred on a federal enclave or that the Authority's injury was sustained on a federal enclave. As discussed in Section I, *supra*, whether a claim arises under federal law must be determined by referring to the "well-pleaded complaint." *Merrell Dow Pharm.*, 478 U.S. at 808 (*citing Franchise Tax Bd. v. Constr. Laborers Vacation Trust,* 463 U.S. 1, 9-10 (1983)). The complaint must state a cause of action created by federal law. *Torres v. Southern Peru Copper Corp.,* 113 F.3d 540, 542 (5th Cir. 1997). This means that the federal question must appear on the face of the complaint. *Id.* "[S]ince the plaintiff is 'the master of the complaint,' the well-pleaded-complaint rule enables him, 'by eschewing claims based on federal law, … to have the cause heard in state court." *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 831 (2002). The Authority's complaint makes clear that it is stating only causes of action created by Louisiana law. Even if it is assumed that the Authority could have elected to state a claim under federal law applicable within a "federal enclave," it chose not to do so.

Finally, this Court should reject Chevron's novel interpretation of federal enclave jurisdiction. Under Chevron's view, the mere tangential relation of a federal enclave to a plaintiff's cause of action suffices to confer jurisdiction. *See* Rem. Not., ¶¶48-58. But even in the cases that Chevron cites in support of its argument, the courts have required a close relationship between the federal enclave at issue, the conduct that occurred, and the injury sustained. *Id.*, ¶¶48-49. Those cases recognize that federal enclave jurisdiction has been limited to personal injury and other tort claims that occur on federal enclaves. *Lawler*, 2010 WL 743925 (federal question jurisdiction for defamation claims where defamation occurred on Fort Bliss);

Wood, 2011 WL 1870218 (fall into elevator shaft at NASA Michoud Facility)[7]; *Corley v. Long-Lewis, Inc*., 688 F.Supp.2d 1315 (N.D.Ala. 2010) (personal injury action arising from exposure to asbestos while working on federal enclaves); *Reed v. Fina Oil & Chemical Co*., 995 F.Supp. 705 (E.D.Tex. 1998) (personal injury claim arising out of exposure to chemical while working on federal enclave).

In contrast to the cases that Chevron cites, the Authority is suing for the increased costs that it, and the levee districts that it governs, will bear in carrying out the responsibilities imposed upon them. Pet., ¶7. It is not a suit for injuries that the Authority sustained on a "federal enclave." Chevron is unable to cite to any case that suggests that federal enclave jurisdiction should apply here, where the injuries are distinct to the Authority and its property interests. In sum, federal enclave jurisdiction does not apply either factually or legally to the Authority's case and cannot provide a basis for removal here.

CONCLUSION

As discussed above, there is no Constitutional, statutory, or jurisprudential basis for the exercise of federal court jurisdiction over the Authority's state-law claims. Therefore, the Authority respectfully requests that this Court remand this matter back to the Civil District Court for the Parish of Orleans. And under 28 U.S.C. § 1447(c), the Authority also requests that this Court award it "just costs and any actual expenses, including attorney fees" incurred as a result of this improper removal.

[7] And even in *Wood*, where the claims concerned an injury sustained in an elevator shaft at NASA's Michoud facility, jurisdiction did not attach because the removing defendant failed to demonstrate that the federal government had accepted jurisdiction over the Michoud facility. 2011 WL 1870218, at *8-9.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2013, I electronically filed the foregoing with the Clerk of court by using the CM/ECF system, which will send a notice of the electronic filing to the counsel of record for Defendants

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