

1 Theodore J. Boutrous, Jr. (SBN 132099)
tboutrous@gibsondunn.com
2 Andrea E. Neuman (SBN 149733)
aneuman@gibsondunn.com
3 William E. Thomson (SBN 187912)
wthomson@gibsondunn.com
4 Ethan D. Dettmer (SBN 196046)
edettmer@gibsondunn.com
5 Joshua S. Lipshutz (SBN 242557)
jlipshutz@gibsondunn.com
6 GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
7 Los Angeles, CA 90071
Telephone: 213.229.7000
8 Facsimile: 213.229.7520

Neal S. Manne (SBN 94101)
nmanne@susmangodfrey.com
Johnny W. Carter (*pro hac vice*)
jcarter@susmangodfrey.com
Erica Harris (*pro hac vice*)
eharris@susmangodfrey.com
Steven Shepard (*pro hac vice*)
sshepard@susmangodfrey.com
SUSMAN GODFREY LLP
1000 Louisiana, Suite 5100
Houston, TX 77002
Telephone: 713.651.9366
Facsimile: 713.654.6666

9 Herbert J. Stern (*pro hac vice*)
hstern@sgklaw.com
10 Joel M. Silverstein (*pro hac vice*)
jsilverstein@sgklaw.com
11 STERN & KILCULLEN, LLC
325 Columbia Turnpike, Suite 110
12 Florham Park, NJ 07932-0992
Telephone: 973.535.1900
13 Facsimile: 973.535.9664

14 *Attorneys for Defendant Chevron Corporation*

15
16 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
17 **SAN FRANCISCO DIVISION**

18 THE PEOPLE OF THE STATE OF
CALIFORNIA, acting by and through Oakland
19 City Attorney BARBARA J. PARKER,

20 Plaintiff and Real Party in
Interest,

21 v.

22 BP P.L.C., a public limited company of
23 England and Wales, CHEVRON
CORPORATION, a Delaware corporation,
24 CONOCOPHILLIPS COMPANY, a Delaware
corporation, EXXONMOBIL
25 CORPORATION, a New Jersey corporation,
ROYAL DUTCH SHELL PLC, a public
26 limited company of England and Wales, and
DOES 1 through 10,

27 Defendants.
28

First Filed Case: No. 3:17-cv-6011-WHA
Related Case: No. 3:17-cv-6012-WHA

**DEFENDANTS' RESPONSE TO REQUEST
FOR SUPPLEMENTAL BRIEFING (ECF
128)**

Case No. 3:17-cv-6011-WHA

1 THE PEOPLE OF THE STATE OF
2 CALIFORNIA, acting by and through the San
3 Francisco City Attorney DENNIS J.
4 HERRERA,

5
6 Plaintiff and Real Party in
7 Interest,

8 v.

9 BP P.L.C., a public limited company of
10 England and Wales, CHEVRON
11 CORPORATION, a Delaware corporation,
12 CONOCOPHILLIPS COMPANY, a Delaware
13 corporation, EXXONMOBIL
14 CORPORATION, a New Jersey corporation,
15 ROYAL DUTCH SHELL PLC, a public
16 limited company of England and Wales, and
17 DOES 1 through 10,

18 Defendants.

Case No. 3:17-cv-6012-WHA

19
20
21
22
23
24
25
26
27
28
[Additional Counsel Listed on Signature Page]

TABLE OF CONTENTS

1

2

3 A. The court cannot determine whether any remedy is available without

4 interpreting the statutes and regulations governing the Army Corps of

5 Engineers..... 2

6 B. Plaintiffs’ claims are a collateral attack on federal regulatory decisions

7 pertaining to the “navigable waters of the United States” 4

8 C. Plaintiffs’ theory of causation, which hinges on effects to the “navigable

9 waters of the United States,” necessarily implicates uniquely federal issues 6

10 D. Plaintiffs’ claims are removable under admiralty jurisdiction because the

11 alleged tort involves vessels engaged in maritime commerce on “navigable

12 waters” 6

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

TABLE OF AUTHORITIES

Cases

Bader Farms, Inc. v. Monsanto Co.,
2017 WL 633815 (E.D. Mo. Feb. 16, 2017).....5

Barker v. Hercules Offshore, Inc.,
713 F.3d 208 (5th Cir. 2013).....8

Bd. of Comm’rs of Se. La. Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co., L.L.C.,
850 F.3d 714 (5th Cir. 2017).....5

Demette v. Falcon Drilling Co., Inc.,
280 F.3d 492 (5th Cir. 2002).....8

Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.,
545 U.S. 308 (2005).....2, 6

Herb’s Welding v. Gray,
470 U.S. 414 (1985).....8

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,
513 U.S. 527 (1995).....6, 7, 8, 9

Lu Junhong v. Boeing Co.,
792 F.3d 805 (7th Cir. 2015).....9, 10

Martinez v. Pac. Bell,
225 Cal. App. 3d 1557 (1990).....6

McKay v. City and Cty. of San Francisco,
2016 WL 7425927 (N.D. Cal. Dec. 23, 2016).....5

Michigan v. U.S. Army Corps of Eng’rs,
667 F.3d 765 (7th Cir. 2011).....1

In re Mission Bay Jet Sports, LLC,
570 F.3d 1124 (9th Cir. 2009).....8

In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010,
808 F. Supp. 2d 943 (E.D. La. 2011).....7, 8, 9

Pet Quarters, Inc. v. Depository Trust and Clearing Corp.,
559 F.3d 772 (8th Cir. 2009).....5

Red Shield Ins. Co. v. Barnhill Marina & Boatyard, Inc.,
2009 WL 1458022 (N.D. Cal. May 21, 2009).....7

1 *Shell Offshore, Inc. v. Greenpeace, Inc.*,
 2 2012 WL 1931537 (D. Alaska May 29, 2012)8

3 *Taghadomi v. United States*,
 4 401 F.3d 1080 (9th Cir. 2005).....8

5 *Tenn. Gas Pipeline v. Houston Cas. Ins. Co.*,
 6 87 F.3d 150 (5th Cir. 1996).....10

7 *Theriot v. Bay Drilling Corp.*,
 8 783 F.2d 527 (5th Cir. 1986).....9

9 **Statutes**

10 28 U.S.C. § 13331, 9, 10

11 28 U.S.C. § 14411, 9, 10

12 33 U.S.C. § 4032, 4

13 33 U.S.C. § 4084

14 33 U.S.C. § 426i.....2

15 46 U.S.C. § 301017

16 Cal. Civ. Code § 34792

17 Water Resource Development Act of 2007, § 4027(a)(1), Pub. L. 110-1142

18 **Regulations**

19 33 C.F.R. § 320.44

20 **Constitutional Provisions**

21 U.S. Const. Art. III, § 26

22

23

24

25

26

27

28

DEFENDANTS' SUPPLEMENTAL BRIEF

1
2 Preserving all defenses, Defendants file this supplemental brief in response to the Court's or-
3 der directing the parties to address "the 'navigable waters of the United States' as that concept relates
4 to the removal jurisdiction in this case." ECF No. 128. Plaintiffs' claims are inextricably intertwined
5 with the navigable waters of the United States, and that close relationship confirms that Plaintiffs'
6 claims (to the extent they exist) arise under federal common law, which governs interstate water dis-
7 putes. As courts have recognized, the standards of the federal common law of public nuisance gener-
8 ally extend to cases involving "environmental and economic destruction" of navigable waters by any
9 means. *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 771–72 (7th Cir. 2011) (federal com-
10 mon law governed nuisance claim alleging that defendant's operation of the Chicago Area Waterway
11 System would allow invasive non-native species of carp to enter the Great Lakes). Here, Plaintiffs
12 claim that Defendants "extract, manufacture, deliver, market, and sell fossil fuels," which has caused
13 the navigable waters of the United States to rise, thereby injuring Plaintiffs' property. To the extent
14 that such a nuisance claim exists, it is governed by federal common law.

15 The close connection between Plaintiffs' claims and the "navigable waters of the United
16 States" supports removal for several additional reasons. First, Plaintiffs' claims implicate the author-
17 ity of the U.S. Army Corps of Engineers ("Corps") because the Corps has exclusive jurisdiction to
18 grant permits for the type of building projects Plaintiffs propose as part of their abatement remedy.
19 The Court cannot decide whether any remedy is available (or what it might be) without first resolving
20 substantial federal issues involving construction impacting navigable waters. Second, because the
21 Corps already has taken substantial steps to respond to rising sea levels, Plaintiffs' claims directly im-
22 pact and risk undermining the Corps' decision-making. Third, the protracted chain of causation
23 Plaintiffs allege necessarily involves the "navigable waters of the United States" and federal issues
24 pertaining thereto. Finally, because the first step of the allegedly tortious conduct at issue in this
25 case—fossil fuel extraction—involves vessels engaged in traditional maritime activities, this Court
26 has admiralty jurisdiction under 28 U.S.C. § 1333. Plaintiffs' claims are thus within this Court's
27 "original jurisdiction" and removable under 28 U.S.C. § 1441(a).

1 **A. The court cannot determine whether any remedy is available without interpreting the**
2 **statutes and regulations governing the Army Corps of Engineers**

3 Since the early 1800s, the Supreme Court has recognized federal jurisdiction over the naviga-
4 ble waters of the United States as a necessary outgrowth of the Commerce Clause and the fear that
5 patchwork regulation by the States would disrupt the flow of people, goods, and services over water.
6 Pursuant to that authority, Congress enacted 33 U.S.C. § 403, which gives exclusive jurisdiction over
7 construction and dredging activities in navigable waters to the Army Corps of Engineers. Here,
8 Plaintiffs' claims based on their allegation that sea level rise will harm the California coastline di-
9 rectly implicate that exclusive jurisdiction. As a result, Plaintiffs' claims present federal issues that
10 are (1) "necessarily raise[d]," (2) "actually disputed," (3) "substantial," and (4) capable of resolution
11 in federal court "without disturbing any congressionally approved balance of federal and state judicial
12 responsibilities." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314
13 (2005).

14 A critical element of Plaintiffs' public nuisance cause of action is injury, defined as obstruc-
15 tion and interference. *See* Cal. Civ. Code § 3479. But numerous federal statutes and regulations au-
16 thorize the Corps to regulate the "navigable waters of the United States," and such federal action will
17 have to be evaluated to determine whether it may preemptively forestall any injury to Plaintiffs. The
18 Court must construe all of these statutes and regulations and evaluate their application here to deter-
19 mine whether Plaintiffs will in fact suffer cognizable future injury.

20 Most notably, the Rivers and Harbors Act ("RHA") authorizes the Corps "to investigate,
21 study, plan, and implement structural and nonstructural measures for the prevention or mitigation of
22 shore damages." 33 U.S.C. § 426i. Congress has also expressly authorized the Corps to deal with the
23 effects of climate change in California, instructing it to "conduct a study of the feasibility of carrying
24 out a project for," among other things, "flood damage reduction along the South San Francisco Bay
25 shoreline, California." Water Resource Development Act of 2007, § 4027(a)(1), Pub. L. 110-114. In
26 fact, the "Army Corps of Engineers' San Francisco District ha[s] proposed a nearly \$175 million plan
27 to help protect" the area against the "significant risk of flooding because of climate change and pre-
28 dicted sea level rise." Nicholas Simeone, *Army Corps of Engineers Presents Plan to Reduce Threat*
of Flooding Triggered by Climate Change Along San Francisco Bay (U.S. Army Corps of Engineers

1 Sept. 16, 2015), *available at* <https://tinyurl.com/y7habowz> (last visited Feb. 14, 2018). The proposal
2 recommends “construction of approximately 3.8 miles of [a 15.2-foot high] levee to provide a more
3 reliable form of tidal [flood risk management]” and “restoration of a total of about 2,900 acres . . . be-
4 tween the [flood risk management] levee and the San Francisco Bay.” U.S. Army Corps of Engi-
5 neers, *South San Francisco Bay Shoreline Phase I Study: Final Integrated Document 9-2* (Sept.
6 2015).

7 This active federal involvement in the precise issues on which Plaintiffs purport to base their
8 claims only underscores the federal questions and policies the Court will need to evaluate in consider-
9 ing Plaintiffs’ assertions regarding present and future injury, including whether Plaintiffs’ requested
10 remedies conflict with federal action or are necessary in light of such action. For example, the South
11 San Francisco Bay Shoreline Project employed “hydrologic modeling provid[ing] information on the
12 forecasted tidal exchange in the South Bay, with allowances for climate change,” *id.* at 1-41, leading
13 the Corps to predict that the Project “would manage flood risk for a population at risk of approxi-
14 mately 6,000 residents and people working in the area,” with only “1,140 structures . . . in the 0.2-
15 percent Annual Chance of Exceedance (ACE) floodplain under the USACE High sea level change
16 (SLC) scenario,” *id.* at 9-7. And the South San Francisco Bay Shoreline Proposal “recommended
17 that the USACE project . . . be authorized for implementation, as a Federal project, with such modifi-
18 cations thereof as at the discretion of the Commander, U.S. Army Corps of Engineers, San Francisco
19 District, may be advisable.” *Id.* at 10-2. Determining whether (and to what extent) Plaintiffs will
20 suffer injury—and evaluating the remedies they seek in light of this direct federal intervention—will
21 also require interpretation of federal law. And because the Proposal (like all Corps’ projects) ex-
22 pressly accounts for the risks posed by climate change, the court cannot find for Plaintiffs without
23 evaluating the Corps’ determination regarding how best to curb the effects of climate change. *See id.*
24 at 4-37 (“This report identifies progress and future priorities and includes an overarching agency pol-
25 icy statement about [climate] change that calls for integrating climate change adaptation into all that
26 the USACE does. This includes building adaptation into all USACE activities based on the best
27 available and actionable science when undertaking long-term planning, setting priorities, and making
28 decisions.” (citation omitted)).

1 Substantial and disputed federal issues also arise with respect to Plaintiffs’ requested reme-
2 dies. Plaintiffs ask this Court to issue “an order of abatement requiring Defendants to fund a climate
3 change adaptation program for Oakland consisting of the building of sea walls,” among other things.
4 Oak. Compl. ¶ 98. Plaintiffs claim that Oakland is already planning “significant flood protection in-
5 frastructure,” including “improvements to the existing, 4.5-mile Airport Perimeter Dike” and a “Sea
6 Level Vulnerability and Assessment Improvement Plan for the Port of Oakland,” which they want
7 Defendants to fund. *Id.* ¶ 88. But the RHA states that “it shall not be lawful to build or commence
8 the building of any wharf pier, dolphin, boom, weir, bulkhead, jetty, or other structures in any . . . wa-
9 ter of the United States . . . except on plans recommended by the Chief of Engineers and authorized
10 by the Secretary of the Army.” 33 U.S.C. § 403. Thus, Plaintiffs will have to show that the remedy
11 they seek is consistent with federal action and will be authorized by the Corps. This will require in-
12 terpretation of an extensive web of federal regulations. For example, before approving a project
13 “[t]he benefits which reasonably may be expected to accrue from the proposal must be balanced
14 against its reasonably foreseeable detriments.” 33 C.F.R. § 320.4(a)(1). And “in the evaluation of
15 every application” to undertake a project in navigable waters, the Corps must also assess “the practi-
16 cability of using reasonable alternative locations and methods to accomplish the objective of the pro-
17 posed structure or work.” *Id.* § 320.4(a)(2). Even attempts by Plaintiffs to modify or alter existing
18 flood-mitigation structures require approval of the Corps, which the Corps *cannot* grant if it will be
19 “injurious to the public interest.” 33 U.S.C. § 408(a).

20 In short, because Plaintiffs’ claims hinge on alleged effects in the navigable waters of the
21 United States, over which the Corps has exclusive jurisdiction, this case presents numerous substan-
22 tial and disputed federal issues that provide a basis for federal jurisdiction.

23 **B. Plaintiffs’ claims are a collateral attack on federal regulatory decisions pertaining to the**
24 **“navigable waters of the United States”**

25 Plaintiffs’ claims also require the Court to evaluate the exercise of federal authority over
26 many prior decades. Much of the seawall system surrounding Oakland and San Francisco was con-
27 structed—and federal erosion control and levee projects were undertaken—pursuant to permits issued
28 by the Corps under the RHA during the very decades when Defendants’ allegedly injurious conduct

1 took place. *See, e.g.*, San Francisco Airport Flood Protection, *available at* <http://www.spn.usace.army.mil/Missions/Projects-and-Programs/Projects-by-Category/Projects-for-Flood-Risk-Management/San-Francisco-Airport-Flood-Protection/> (the “shoreline protection features, consisting of soil berms, concrete seawalls, and vinyl sheet piles” at San Francisco Airport were “constructed between 1983 and 2006” under Section 10 permits); Levee Safety, *available at* <http://www.spn.usace.army.mil/Missions/Projects-and-Programs/Levee-Safety/> (noting that the Corps completed a survey of “federal levees in the San Francisco area in 2006” including those that are “Federally owned and maintained”); San Francisco Waterfront Seawall, *available at* <http://www.spn.usace.army.mil/Missions/Projects-and-Programs/Projects-A-Z/San-Francisco-Waterfront-Seawall/> (joint federal-state two-year study pursuant to Section 103 to investigate erosion in the San Francisco seawall and “investigate feasible alternatives to develop a seawall repair project to limit damage to public and private infrastructure from erosion,” cited at SF Compl. ¶ 89(a)).

13 Plaintiffs’ nuisance claims are based on alleged past and future “sea level rise in San Francisco Bay and the adjacent ocean,” SF Compl. ¶ 86; Oak. Compl. ¶ 85, which Plaintiffs allege will require “improv[ing], protect[ing], mov[ing], and build[ing] infrastructure to adapt now to past and ongoing sea level rise,” SF Compl. ¶ 89; *see also* Oak. Compl. ¶ 89. Because Plaintiffs allege that past federal activity to deal with these very issues, including levee and seawall projects, failed to prevent their injuries, their complaints challenge, and necessarily require evaluation of, the adequacy of past federal decision making. This also gives rise to federal question jurisdiction. *See Bd. of Comm’rs of Se. La. Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co., L.L.C.*, 850 F.3d 714, 724 (5th Cir. 2017) (in the context of comprehensive regulatory scheme, nuisance claims amount to “a collateral attack . . . premised on the notion that the scheme provides inadequate protection” (brackets omitted)); *Pet Quarters, Inc. v. Depository Trust and Clearing Corp.*, 559 F.3d 772, 779 (8th Cir. 2009) (complaint “presents a substantial federal question because it directly implicates actions taken by” a federal agency); *McKay v. City and Cty. of San Francisco*, 2016 WL 7425927, at *4 (N.D. Cal. Dec. 23, 2016) (denying remand and ruling that federal jurisdiction lies under *Grable* because state-law claims were “tantamount to asking the Court to second guess the validity of the FAA’s decision”); *Bader Farms, Inc. v. Monsanto Co.*, 2017 WL 633815, at *3 (E.D. Mo. Feb. 16, 2017).

1 **C. Plaintiffs’ theory of causation, which hinges on effects to the “navigable waters of the**
 2 **United States,” necessarily implicates uniquely federal issues**

3 To succeed on their public nuisance claim, Plaintiffs will be required to prove causation. *See*
 4 *Martinez v. Pac. Bell*, 225 Cal. App. 3d 1557, 1565 (1990) (nuisance liability “extends to damage
 5 which is proximately or legally caused by the defendant’s conduct” (citing Cal. Civ. Code § 3333)).
 6 As the Court points out in its request for supplemental briefing, “a necessary and critical element” of
 7 Plaintiffs’ theory of causation “is the rising sea level along the Pacific coast and in the San Francisco
 8 Bay, both of which are navigable waters of the United States.” ECF No. 128. More specifically, the
 9 attenuated chain of causation contemplated by Plaintiffs’ Complaints is as follows: (1) Defendants
 10 extract, manufacture, deliver, market, and sell fossil fuels (*e.g.*, Oak. Compl. ¶¶ 2, 5, 32); (2) the
 11 combustion of those fuels around the globe causes the release of greenhouse gases (*e.g.*, *id.* ¶ 38); (3)
 12 released greenhouse gases then “trap atmospheric heat and increase global temperatures” (*e.g.*, *id.*);
 13 (4) increased temperatures cause thermal expansion of “navigable waters” and the melting of land-
 14 based ice therein (*e.g.*, *id.* ¶ 1); (5) such phenomena cause the accelerated rise of “navigable waters”
 15 (*e.g.*, *id.*); (6) Plaintiffs’ current infrastructure is inadequate to address the rising waters (*e.g.*, *id.*
 16 ¶ 11); and (7) “navigable waters” will encroach upon on Plaintiffs’ land, causing damage (*e.g.*, *id.*
 17 ¶¶ 8–9). Every link in this chain is inextricably intertwined with federal issues, including, as relevant
 18 here, the movement and impact of “navigable waters” and second-guessing of federal infrastructure.
 19 *See supra*. This illustrates that, as explained in Defendants’ Opposition brief, Plaintiffs’ claims, nom-
 20 inally asserted under state law, should stay in federal court under *Grable*’s “common sense accom-
 21 modation.” 545 U.S. at 312–13.

22 **D. Plaintiffs’ claims are removable under admiralty jurisdiction because the alleged tort**
 23 **involves vessels engaged in maritime commerce on “navigable waters”**

24 Plaintiffs’ claims are also removable because they fall within the Court’s original admiralty
 25 jurisdiction. The Constitution extends the federal judicial power “to all Cases of admiralty and mari-
 26 time Jurisdiction.” U.S. Const. Art. III, § 2. “Congress has embodied that power in a statute giving
 27 federal district courts ‘original jurisdiction [over] . . . [a]ny civil case of admiralty or maritime juris-
 28 diction[.]’” *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 531 (1995)
 (alterations in original) (citing 28 U.S.C. § 1333(1)). “The admiralty and maritime jurisdiction of the

1 United States extends to and includes cases of injury or damage, to person or property, caused by a
2 vessel on navigable waters, *even though the injury or damage is done or consummated on land.*” 46
3 U.S.C. § 30101(a) (emphasis added).

4 In *Grubart*, the Supreme Court set forth a two-part test for determining admiralty and mari-
5 time jurisdiction. The first question is whether the alleged “injury suffered on land was caused by a
6 vessel on navigable water” or the alleged “tort occurred on navigable water” (the “location” test).
7 513 U.S. at 534. The second question is whether the alleged tort is connected to maritime activity
8 (the “connection” test). *Id.* Both are satisfied here.

9 Plaintiffs’ claims meet the “location” test because the tort, as alleged, occurred on navigable
10 waters. As an initial matter, the alleged injuries have occurred “on the navigable waters of the San
11 Francisco Bay[.]” *Red Shield Ins. Co. v. Barnhill Marina & Boatyard, Inc.*, 2009 WL 1458022, at *1
12 (N.D. Cal. May 21, 2009) (concluding that tort occurring in a marina “falls under our admiralty juris-
13 diction”). Beyond that, Plaintiffs allege that the tort arises from production of fossil fuels, including
14 worldwide extraction, a significant portion of which takes place on “mobile offshore drilling unit[s]”
15 that operate in navigable waters. *See In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of*
16 *Mexico, on April 20, 2010*, 808 F. Supp. 2d 943, 949 (E.D. La. 2011). For example, Chevron’s “Jack
17 and St. Malo fields were co-developed with subsea completions flowing back to a single host floating
18 production unit (semisubmersible) located between the fields.” [https://www.chevron.com/pro-](https://www.chevron.com/projects/jack-stmalo)
19 [jects/jack-stmalo](https://www.chevron.com/projects/jack-stmalo). The other Defendants’ subsidiaries similarly operate floating drilling platforms at
20 various locations around the world. *See, e.g., Atlantis Field: Fact Sheet 1*, [https://www.bp.com/con-](https://www.bp.com/content/dam/bp-country/en_us/PDF/Atlantis_Fact_Sheet_6_14_2013.pdf)
21 [tent/dam/bp-country/en_us/PDF/Atlantis_Fact_Sheet_6_14_2013.pdf](https://www.bp.com/content/dam/bp-country/en_us/PDF/Atlantis_Fact_Sheet_6_14_2013.pdf) (BP’s Atlantis Field is a
22 “Floating Offshore Installation”); Offshore Technology, *Magnolia Deepwater Oil and Gas Field,*
23 *Gulf of Mexico*, <http://www.offshore-technology.com/projects/magnolia/> (ConocoPhillips’ “Magnolia
24 field was developed by a tension leg platform (TLP), installed in 4,700 ft of water, a record depth for
25 this type of floating structure”); *Safety and Security*, [http://corporate.exxonmobil.com/en/commu-](http://corporate.exxonmobil.com/en/community/corporate-citizenship-report/safety-and-health-and-the-workplace/safety-and-security)
26 [nity/corporate-citizenship-report/safety-and-health-and-the-workplace/safety-and-security](http://corporate.exxonmobil.com/en/community/corporate-citizenship-report/safety-and-health-and-the-workplace/safety-and-security) (Exx-
27 onMobil’s Hoover-Diana field “was the first floating drilling and production platform to develop two
28 fields simultaneously at a depth of 4,800 feet of water”); *Auger: From Deep-Water Pioneer to New*

1 *Energy Giant*, <https://www.shell.com/about-us/major-projects/cardamom/auger-from-deep-water-pioneer-to-new-energy-giant.html> (Shell’s Auger “was the first to float in water, moored to the sea floor
2 830 metres (2,720 feet) below”).
3

4 “Under clearly established law,” a floating drilling platform is “a vessel, not a fixed plat-
5 form.” *In re Oil Spill*, 808 F. Supp. 2d at 949; *see also Barker v. Hercules Offshore, Inc.* 713 F.3d
6 208, 215 (5th Cir. 2013) (“[J]ack-up drilling platforms . . . are considered vessels under maritime
7 law.”); *Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492, 498 n.18 (5th Cir. 2002) (noting that
8 “[t]his circuit has repeatedly held that special-purpose movable drilling rigs, including jack-up rigs,
9 are vessels within the meaning of admiralty law.”), *overruled in part, on other grounds by Grand Isle*
10 *Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778 (5th Cir. 2009) (en banc); *Herb’s Welding v.*
11 *Gray*, 470 U.S. 414, 417 n.2 (1985) (“Offshore oil rigs are of two general sorts: fixed and floating.
12 Floating structures have been treated as vessels by the lower courts.”). Indeed, even fixed drilling
13 platforms are considered “vessels” while they “are underway to a drilling operation.” *Shell Offshore,*
14 *Inc. v. Greenpeace, Inc.*, 2012 WL 1931537, at *3 (D. Alaska May 29, 2012). Accordingly, the al-
15 legedly tortious conduct at issue satisfies the “location” test for maritime jurisdiction.

16 Plaintiffs’ claims also have the requisite “connection” to maritime activity. “A court, first,
17 must assess the general features of the type of incident involved to determine whether the incident
18 has a potentially disruptive impact on maritime commerce. Second, a court must determine whether
19 the general character of the activity giving rise to the incident shows a substantial relationship to mar-
20 itime activity.” *In re Mission Bay Jet Sports, LLC*, 570 F.3d 1124, 1126 (9th Cir. 2009) (quoting
21 *Grubart*, 513 U.S. at 534). Under the *Grubart* test, “‘virtually every activity involving a vessel on
22 navigable waters would be a traditional maritime activity sufficient to invoke maritime jurisdiction.’”
23 *Taghadomi v. United States*, 401 F.3d 1080, 1087 (9th Cir. 2005) (quoting *Grubart*, 513 U.S. at 542).
24 The test is satisfied where, as here, “one of the arguably proximate causes of the incident originated
25 in maritime activity” and “one of the putative tortfeasors was engaged in traditional maritime activ-
26 ity.” *Id.* (quoting *Grubart*, 513 U.S. at 541).

27 Accepting the Complaints as true, Defendants’ fossil fuel extraction has the “potential to dis-
28 rupt maritime commerce” because one of the “potential effects” of that conduct is damage to ports.

1 *Grubart*, 513 U.S. at 538; *see id.* (noting that courts “focus[] not on the specific facts at hand but on
2 whether the general features of the incident were likely to disrupt commercial activity” (quotations
3 omitted)). Indeed, Plaintiffs allege that all of the earth’s seas are or will be dramatically impacted by
4 the alleged tort (Oak. Compl. ¶ 1), and the City of Oakland specifically alleges that the Port of Oak-
5 land will be damaged by rising sea levels (*id.* ¶ 9). For this reason, the City “plans to complete a \$2
6 million Sea Level Vulnerability and Assessment Improvement Plan for the Port of Oakland.” *Id.*
7 ¶ 88. Rising sea levels could also disrupt maritime commerce by damaging coastal airports such as
8 those in Oakland and San Francisco. *See Lu Junhong v. Boeing Co.*, 792 F.3d 805, 815 (7th Cir.
9 2015) (“[J]udges have concluded that airplanes over navigable waters should be treated the same as
10 vessels—when a connection to maritime activity exists.”); Oak. Compl. ¶¶ 87–88, 95 (alleging that
11 rising seas threatens to injure the Oakland Airport). Plaintiffs’ claims thus fall “within a class of inci-
12 dents that pose more than a fanciful risk to commercial shipping.” *Grubart*, 513 U.S. at 539.

13 Second, “there is no question that the activity” “giving rise to the incident” is “substantially
14 related to traditional maritime activity,” *id.* at 540, because “[o]il and gas drilling on navigable waters
15 aboard a vessel is recognized to be maritime commerce,” *Theriot v. Bay Drilling Corp.*, 783 F.2d
16 527, 538–39 (5th Cir. 1986). Plaintiffs’ claims therefore satisfy the “connection test” for admiralty
17 jurisdiction. *See In re Oil Spill*, 808 F. Supp. 2d at 951 (concluding that “the operations of the DEEP-
18 WATER HORIZON bore a substantial relationship to traditional maritime activity”).

19 Because Plaintiffs’ claims satisfy *Grubart*’s two-part test, they “fall[] within the Court’s ad-
20 miralty jurisdiction.” *In re Oil Spill*, 808 F. Supp. 2d at 951. The claims are thus removable under 28
21 U.S.C. § 1441, as recently amended by the Federal Courts Jurisdiction and Venue Clarification Act of
22 2011 (“VCA”), Pub. L. No. 112-63. Section 1441(a) provides: “Except as otherwise expressly pro-
23 vided by Act of Congress, any civil action brought in a State court of which the district courts of the
24 United States have *original jurisdiction*, may be removed by the . . . defendants.” (emphasis added).
25 In turn, Section 1333 provides: “The district courts shall have *original jurisdiction*, exclusive of the
26 courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in
27 all cases all other remedies to which they are otherwise entitled[.]” (emphasis added).

28 The effect of these two provisions is straightforward. Civil actions are removable when U.S.

1 district courts have original jurisdiction, and § 1333 provides original jurisdiction for maritime
2 claims. Although it is true that § 1441 once required complete diversity to remove maritime claims,
3 the VCA eliminated that requirement. As the plain language of the statute demonstrates, Section
4 1441(a) allows removal of all claims that fall within the federal court’s original jurisdiction, notwith-
5 standing the citizenship of the parties. The Seventh Circuit recognized as much in *Lu Junhong*, 792
6 F.3d at 817, when it held that the VCA “limits the ban on removal by a home-state defendant to suits
7 under the diversity jurisdiction.”

8 Section 1333’s saving-to-suitors clause does not alter this conclusion. That provision cannot
9 logically be read to guarantee maritime plaintiffs a state-court forum. Section 1333 states that “[t]he
10 district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) any civil
11 case of admiralty or maritime jurisdiction, saving to suitors in all cases all other *remedies* to which
12 they are otherwise entitled.” 28 U.S.C. § 1333(1) (emphasis added). The jurisdictional charge of this
13 provision is clear: federal courts have original jurisdiction over maritime claims. Indeed, it would be
14 nonsensical to confer “original” and “exclusive” jurisdiction over maritime cases to federal courts,
15 but then, without expressly saying so, also guarantee plaintiffs a state-court forum. Both the Seventh
16 and the Fifth Circuits have endorsed this interpretation of § 1333. *See Lu Junhong*, 792 F.3d at 818
17 (“[A saving-to-suitors argument is not] the sort of contention about subject-matter jurisdiction that a
18 federal court must resolve even if the parties disregard it.”); *Tenn. Gas Pipeline v. Houston Cas. Ins.*
19 *Co.*, 87 F.3d 150, 153 (5th Cir. 1996) (holding that “saving to suitors’ clause does no more than pre-
20 serve the right of maritime suitors to pursue nonmaritime *remedies*”).

21 Because this Court has admiralty jurisdiction over Plaintiffs’ public nuisance claims, it may
22 properly exercise jurisdiction over the case under §§ 1441 and 1333.

23 CONCLUSION

24 For these reasons and those enumerated in Defendants’ Notice of Removal and Opposition
25 brief, Plaintiffs’ motion to remand should be denied.

1 February 16, 2018

Respectfully submitted,

2
3 By: **/s/ Jonathan W. Hughes

By: /s/ Theodore J. Boutrous

4 Jonathan W. Hughes (SBN 186829)
ARNOLD & PORTER KAYE SCHOLER
LLP
5 Three Embarcadero Center, 10th Floor
San Francisco, California 94111-4024
6 Telephone: (415) 471-3100
Facsimile: (415) 471-3400
7 E-mail: jonathan.hughes@apks.com

Theodore J. Boutrous, Jr. (SBN 132099)
Andrea E. Neuman (SBN 149733)
William E. Thomson (SBN 187912)
Ethan D. Dettmer (SBN 196046)
Joshua S. Lipshutz (SBN 242557)
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
Telephone: (213) 229-7000
Facsimile: (213) 229-7520
E-mail: tboutrous@gibsondunn.com
E-mail: aneuman@gibsondunn.com
E-mail: wthomson@gibsondunn.com
E-mail: edettmer@gibsondunn.com
E-mail: jlipshutz@gibsondunn.com

8 Matthew T. Heartney (SBN 123516)
John D. Lombardo (SBN 187142)
9 ARNOLD & PORTER KAYE SCHOLER
LLP
10 777 South Figueroa Street, 44th Floor
Los Angeles, California 90017-5844
11 Telephone: (213) 243-4000
Facsimile: (213) 243-4199
12 E-mail: matthew.heartney@apks.com
E-mail: john.lombardo@apks.com

Herbert J. Stern (*pro hac vice*)
Joel M. Silverstein (*pro hac vice*)
STERN & KILCULLEN, LLC
325 Columbia Turnpike, Suite 110
Florham Park, NJ 07932-0992
Telephone: (973) 535-1900
Facsimile: (973) 535-9664
E-mail: hstern@sgklaw.com
E-mail: jsilverstein@sgklaw.com

13 Philip H. Curtis (*pro hac vice*)
14 Nancy Milburn (*pro hac vice*)
ARNOLD & PORTER KAYE SCHOLER
15 LLP
250 West 55th Street
16 New York, NY 10019-9710
Telephone: (212) 836-8383
17 Facsimile: (212) 715-1399
E-mail: philip.curtis@apks.com
18 E-mail: nancy.milburn@apks.com

Neal S. Manne (SBN 94101)
Johnny W. Carter (*pro hac vice*)
Erica Harris (*pro hac vice*)
Steven Shepard (*pro hac vice*)
SUSMAN GODFREY LLP
1000 Louisiana, Suite 5100
Houston, TX 77002
Telephone: (713) 651-9366
Facsimile: (713) 654-6666
E-mail: nmanne@susmangodfrey.com
E-mail: jcarter@susmangodfrey.com
E-mail: eharris@susmangodfrey.com
E-mail: sshepard@susmangodfrey.com

19 *Attorneys for Defendant*
20 *BP P.L.C.*

Attorneys for Defendant
CHEVRON CORPORATION

1 By: **/s/ Megan R. Nishikawa

By: **/s/ Dawn Sestito

2 Megan R. Nishikawa (SBN 271670)
3 KING & SPALDING LLP
4 101 Second Street, Suite 2300
5 San Francisco, California 94105
6 Telephone: (415) 318-1200
7 Facsimile: (415) 318-1300
8 Email: mnishikawa@kslaw.com

M. Randall Oppenheimer (SBN 77649)
Dawn Sestito (SBN 214011)
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, California 90071-2899
Telephone: (213) 430-6000
Facsimile: (213) 430-6407
E-Mail: roppenheimer@omm.com
E-Mail: dsestito@omm.com

6 Tracie J. Renfroe (*pro hac vice*)
7 Carol M. Wood (*pro hac vice*)
8 KING & SPALDING LLP
9 1100 Louisiana Street, Suite 4000
10 Houston, Texas 77002
11 Telephone: (713) 751-3200
12 Facsimile: (713) 751-3290
13 Email: trenfroe@kslaw.com
14 Email: cwood@kslaw.com

Theodore V. Wells, Jr. (*pro hac vice*)
Daniel J. Toal (*pro hac vice*)
Jaren E. Janghorbani (*pro hac vice*)
PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019-6064
Telephone: (212) 373-3000
Facsimile: (212) 757-3990
E-Mail: twells@paulweiss.com
E-Mail: dtoal@paulweiss.com
E-Mail: jjanghorbani@paulweiss.com

11 Justin A. Torres (*pro hac vice*)
12 KING & SPALDING LLP
13 1700 Pennsylvania Avenue, NW
14 Suite 200
15 Washington, DC 20006-4707
16 Telephone: (202) 737 0500
17 Facsimile: (202) 626 3737
18 Email: jtorres@kslaw.com

Attorneys for Defendant
EXXON MOBIL CORPORATION

Attorneys for Defendant
CONOCOPHILLIPS COMPANY

1 By: **/s/ Daniel P. Collins

2 Daniel P. Collins (SBN 139164)
3 MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue
4 Fiftieth Floor
Los Angeles, California 90071-3426
5 Telephone: (213) 683-9100
Facsimile: (213) 687-3702
6 E-mail: daniel.collins@mto.com

7 Jerome C. Roth (SBN 159483)
Elizabeth A. Kim (SBN 295277)
8 MUNGER, TOLLES & OLSON LLP
560 Mission Street
9 Twenty-Seventh Floor
San Francisco, California 94105-2907
10 Telephone: (415) 512-4000
Facsimile: (415) 512-4077
11 E-mail: jerome.roth@mto.com
E-mail: elizabeth.kim@mto.com

12 *Attorneys for Defendant*
13 *ROYAL DUTCH SHELL PLC*

14 ** Pursuant to Civ. L.R. 5-1(i)(3), the elec-
15 tronic signatory has obtained approval from
this signatory