No. 17-

IN THE

Supreme Court of the United States

BOARD OF COMMISSIONERS OF THE SOUTHEAST LOUISIANA FLOOD PROTECTION AUTHORITY—EAST; ORLEANS LEVEE DISTRICT; LAKE BORGNE BASIN LEVEE DISTRICT; EAST JEFFERSON LEVEE DISTRICT,

Petitioners,

v.

TENNESSEE GAS PIPELINE COMPANY, L.L.C., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under *Grable & Sons Metal Prods. v. Darue Engineering & Manufacturing*, 125 S. Ct. 2363, 2368 (2005), and succeeding cases, a state-law claim may be said to "arise under federal law" for federal jurisdictional purposes in the exceptionally rare case in which the state-law claim "[1] necessarily raise[s] a stated federal issue, [2] actually disputed and [3] substantial, [4] which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." The substantiality inquiry under *Grable* looks not to "significan[ce] to the particular parties in the immediate suit," but "instead to the importance of the issue to the federal system as a whole." *Gunn v. Minton*, 133 S. Ct. 1059, 1066 (2013).

The questions presented are:

1. Whether the "substantial[ity]" and "federal-state balance" requirements of *Grable* are satisfied whenever a federal law standard is referenced to inform the standard of care in a state-law cause of action, so long as the parties dispute whether federal law embodies the asserted standard.

2. Whether a federal court applying *Grable* to a case removed from state court must accept a colorable, purely state-law claim as sufficient to establish that the case does not "necessarily raise" a federal issue, even if the court believes the state court would ultimately reject the purely state-law basis for the claim on its merits.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Fifth Circuit.

The Petitioners here and appellants below are the 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. The Board is a state constitutionally and statutorily created Board established to govern the Southeast Louisiana Flood Protection Authority – East and its constituent levee districts, which are independent political subdivisions of the State of Louisiana.

The Respondents here and appellees below are Tennessee Gas Pipeline Company, L.L.C.; Alta Mesa Services, L.P.; Anadarko E&P Onshore, L.L.C.; Apache Corporation; Atlantic Richfield Company; BEPCO, L.P.; Boardwalk Pipeline Partners, L.P.; BOPCO, L.P.; BP America Production Company; BP Oil Pipeline Company; BP Pipelines North America, Inc.; Callon Offshore Production, Inc.; Callon Petroleum Company; Caskids Operating Company; Centerpoint Energy Resources Corporation; Chevron Pipe Line Company; Chevron USA, Inc.; Clayton Williams Energy, Inc.; Clovelly Oil Company, L.L.C.; Coastal Exploration and Production, L.L.C.; Collins Pipeline Company; ConocoPhillips Company; Continental Oil Company; Cox Operating, L.L.C.; Crawford Hughes Operating Company; Dallas Exploration, Inc.; Davis Oil Company; Devon Energy Production Company, L.P.; Energen

Resources Corporation; Enlink LIG, L.L.C.; Enterprise Intrastate, L.L.C.; EOG Resources, Inc.; EP Energy Management, L.L.C.; Estate of William G. Helis; Exxon Mobil Corporation; Exxon Mobil Pipeline Company; Flash Gas & Oil Northeast, Inc.; Graham Royalty, Limited; Greka AM, Inc.; Gulf Production Company, Inc.; Gulf South Pipeline Company, L.P.; Helis Energy, L.L.C.; Helis Oil & Gas Company, L.L.C.; Hess Corporation, A Delaware Corporation; Hilliard Oil & Gas, Inc.; HKN, Inc.; Integrated Exploration & Production, L.L.C.; J.C. Trahan Drilling Contractor, Inc.; J.M. Huber Corporation; Kaiser-Francis Oil Company; Kenmore Oil Company, Inc.; Kewanee Industries, Inc.; Koch Exploration Co., L.L.C.; Koch Industries, Inc.; Liberty Oil & Gas Corporation; LLOG Exploration Company; Louisiana Land and Exploration Company, L.L.C. Maryland; Manti Operating Company; Marathon Oil Company; Meridian Resources & Exploration, L.L.C.; Moem Pipeline, L.L.C.; Mosbacher Energy Company; Natural Resources Corporation of Texas; Newfield Exploration Gulf Coast, L.L.C.; Noble Energy, Inc.; O'Meara, L.L.C.; Pickens Company, Inc.; Placid Oil Company; Plains Pipeline, L.P.; Republic Mineral Corporation; Ripco, L.L.C.; Rozel Operating Company; Murphy Exploration and Production Company, USA; Shell Oil Company; Southern Natural Gas Company, L.L.C.; Sun Oil Company; Sundown Energy, L.P.; Union Oil Company of California; Whiting Oil & Gas Corporation; Williams Exploration Company; and Yuma Exploration and Production Company, Inc.

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JURISDICTION

The judgment of the court of appeals was entered on March 3, 2017, and a petition for rehearing en banc was denied on April 12, 2017 (App. D, *infra*, 209a-212a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 1331 and 1441 of Title 28 of the United States Code, the bases for the removal of this case to federal court, and the Louisiana regulatory provisions on which the complaint in this case is based are reprinted in an appendix to this brief. App. E, *infra*, 213a-231a.

STATEMENT OF THE CASE

As a general matter, a case "arises under federal law" for federal jurisdictional purposes "when federal law creates the cause of action asserted." *Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013). Under an "extremely rare" exception to that rule, however, "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." *Id.* at 1065 (citing *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313-14 (2005)).

In this case, the Board of Directors of the Southeast Louisiana Flood Protection Authority—East ("the Authority," whose governing Board of Directors is referred to herein as "the Board"), an independent political subdivision of the State of Louisiana, filed a complaint in Louisiana state court that raised only Louisiana state-law claims. The court of appeals nonetheless held, after the case was removed to federal court, that this case falls within the extremely rare category of cases in which federal jurisdiction still lies, because, as is common, the complaint relies on a federal law to inform the standard of care, the application of which to respondents' conduct was in dispute. Moreover, the court of appeals held that the federal issue was "necessarily raised" despite the presence of alternative, colorable state-law sources to establish the standard of care; the court viewed those alternative state-law sources as invalid on their merits. Having held that it had jurisdiction because the case arose under federal law, the court without apparent irony proceeded to hold that this entire case must be dismissed on the merits based almost entirely on the court's interpretation of Louisiana—*not* federal—law.

The court of appeals' decision deprives the Board of the ability to obtain authoritative state-court resolution of its state-law claims. There are no countervailing federal interests that support federal jurisdiction. The court's decision thus fundamentally upsets the federal-state

balance that Congress intended. It directly conflicts with this Court's decisions in *Merrell Dow Pharmaceuticals v.* Thompson, 478 U.S. 804 (1986), *Grable*, and subsequent cases; creates two distinct conflicts in the circuits; and opens up the federal court to numerous state-law claims that will hinge overwhelmingly on state-law issues and that belong in the state system.

1. The Authority is an independent political subdivision of the State that owns and operates the flood and hurricane protection system that guards millions of people and billions of dollars in property in Greater New Orleans and southeast Louisiana. Complaint ¶¶ 4.5-4.5.3.3. It is mandated by statute to "devise and adopt rules and regulations for the carrying into effect and perfecting of a comprehensive levee system, having for its object the protection of the entire territory of the authority from overflow." La. R.S. § 38:330.2(G). A crucial premise of the Authority's work is that in southeast Louisiana, "[t]he coastal landscapes and levee systems … work in harmony, with the former acting as a natural first line of defense in abating the flood threat, and the latter serving as the last line of defense against the widespread inundation of inhabited areas." Complaint ¶ 5.3.[1]

2. On July 24, 2013, the Board filed the complaint (a "Petition" in Louisiana practice) in this matter in the Civil District Court for the Parish of Orleans against 97 defendants, of whom 17 were subsequently voluntarily

1. For a comprehensive review of the historical background of oil and gas activities and the attendant coastal loss issues specific to Louisiana, see Oliver A. Houck, "The Reckoning: Oil and Gas Development in the Louisiana Coastal Zone," 28 Tul. Envtl. L.J. 185 (Summer 2015).

dismissed. The complaint alleges that each oil, gas, and pipeline defendant dredged, and thereafter failed to maintain, access and pipeline canals cutting across the coastal land area, causing saltwater intrusion into coastal wetlands. That intrusion in turn has predictably led to vegetation die-off, sedimentation inhibition, erosion, and submergence, which has caused the loss of lands in a defined wetlands "Buffer Zone" adjacent to the Board's levees. Complaint ¶¶ 5.3, 6.6. "[C]oastal lands that have historically protected New Orleans … have been reduced *by more than half* in recent decades, and the rest is rapidly disappearing." Complaint ¶ 5.6. As a result, "the levees will be rendered *de facto* sea walls, a stress that the levee system was not designed to withstand." Complaint ¶ 5.10. The conduct of each respondent "comprises a highly effective system of coastal landscape degradation." Complaint ¶¶ 6.3-6.7.4, 6.12. That degradation makes it difficult—and may eventually make it impossible—to protect the cities, people, and businesses of southeast Louisiana from hurricane storm surges. Complaint at 3, ¶¶ 5.10, 5.11, 7.3.9.

3. The complaint includes only Louisiana state-law claims, including negligence under Louisiana Civil Code article 2315, strict liability under Louisiana Civil Code articles 2317 and 2317.1, breach of the natural servitude of drain under Louisiana Civil Code articles 655 and 656, and public and private nuisance under Louisiana Civil Code articles 667, *et seq.*[2] Supporting those state-law causes of action, the complaint alleges that the "[respondents']

2. The Board also brought breach of contract claims as third-party beneficiaries of various permits, but did not appeal the district court's dismissal of those claims.

dredging and maintenance activities at issue in this action are governed by a longstanding and extensive framework under both federal and state law specifically aimed at protecting against the deleterious effects of dredging activities." Complaint ¶ 8. The complaint alleges that those federal and state regulations "buttress the Authority's claims, all of which arise and are alleged herein under Louisiana law." Complaint ¶ 9.

Specifically, the federal regulatory programs cited include the federal Rivers and Harbors Act of 1899 ("RHA"), 33 U.S.C. § 408, Clean Water Act of 1972 ("CWA"), 33 U.S.C. §§ 1251 *et seq.*, and Coastal Zone Management Act of 1972 ("CZMA"), 16 U.S.C. §§ 1451 *et seq.* The state programs include "Louisiana coastal zone regulations bearing directly on oil and gas activities" and "[r]egulations related to rights-of-way granted across state-owned lands and water bottoms administered by the Louisiana Office of State Lands." Complaint ¶ 9.1-9.4.

The Louisiana coastal zone statute declares the state policy "[t]o support sustainable development in the coastal zone that accounts for potential impacts from hurricanes and other natural disasters and avoids environmental degradation resulting from damage to infrastructure caused by natural disasters." La. R.S. § 49:214.22(8). The Louisiana implementing regulations require all coastal uses be operated and maintained

> to avoid to the maximum extent practicable significant … detrimental changes in existing salinity regimes; detrimental changes in littoral and sediment transport processes; adverse effect of cumulative impacts; … land loss,

> erosion, and subsidence; [and] increases in the potential for flood, hurricane and other storm damage, or increases in the likelihood that damage will occur from such hazards[.]

43 La. Admin. Code Part I, § 701(G)(8), (9), (10), (19), (20); *see also* App. E, *infra*, 222a-223a. The regulations "[s]et forth maximum right-of-way widths"; "[r]equire [respondents] to minimize the environmental effect of their activities"; and "[m]andate that [respondents] indemnify the State in the event of damages inflicted on a third party." Complaint ¶ 9.4.

All permits issued by Louisiana's Department of Natural Resources after about 1980 are subject to provisions regarding avoidance of land loss, requirements for coastal restoration, and related requirements under 43 La. Admin. Code Part I, §§ 701.G.10, 12, 17, 19, and 20 (App. E, *infra*, 222a-223a); 705.I, J, and K (App. E, *infra*, 227a); and 719.D, J, and M (App. E, *infra*, 229a-231a). The complaint alleges that "[t]his regulatory framework establishes a standard of care under Louisiana law that [respondents] owed and knowingly undertook when they engaged in oil and gas activities … , and which [respondents] have breached." Complaint ¶ 10.

4. Respondents removed the case to the United States District Court for the Eastern District of Louisiana. The district court denied the Board's motion to remand, rejecting all of the respondents' asserted jurisdictional grounds except those based on *Grable*. The district court recognized that the Board's claims were "not created by federal law," App. C, *infra*, 181a, but nonetheless held that the case was properly removed under *Grable*. App. C, *infra*, 184a-208a.

After the district court's denial of the Board's motion to remand, the court granted respondents' Rule 12(b)(6) motions to dismiss the case. App. B, *infra*, 31a-98a. That court had ruled in its jurisdictional decision under *Grable* that the claims asserted would turn on necessarily raised and disputed substantial issues of federal law. Nonetheless, the district court's decision dismissing the complaint on the merits was based on a Louisiana-law *Erie* exercise, grounded in state-law standards articulated by the Louisiana Supreme Court. App. B, *infra*, 57a-92a.[3]

5. The Fifth Circuit affirmed. The court recognized that "[n]one of the individual claims relies on a cause of action created under federal law, and the negligence, strict liability, and natural servitude of drain claims explicitly rely on state law causes of action." App. A, *infra*, 6a. The court nevertheless held under *Grable*'s four-part test that the Board's complaint necessarily raised federal issues, which were actually disputed and "substantial," and that the exercise of federal jurisdiction would not upset the federal-state balance.

a. With respect to the "necessarily raised" issue, the complaint alleges that respondents' conduct violated a standard of care informed in part by three federal regulatory programs—the Rivers and Harbors Act, the Clean Water Act, and the Coastal Zone Management Act—and also by Louisiana law. Complaint ¶¶ 9.1, 9.4, 13.1, 21. The complaint relies, *inter alia*, on a Louisiana regulatory requirement, separate from any federal

3. The "Analysis" portion of its opinion used the phrase "Louisiana Supreme Court" 15 times and the phrase "under Louisiana law" an additional eight times.

requirements, that "[m]ineral exploration and production sites shall be cleared, revegetated, detoxified, and otherwise restored as near as practicable to their original condition upon termination of operations to the maximum extent practicable." 43 La. Admin. Code Part I, § 719(M) (App. E, infra, 231a).

The court of appeals did not question that the cited Louisiana regulation provided a *colorable* state-law basis for the relief requested. Instead, it appeared to examine Louisiana law to rule on whether the state courts would find the state-law ground to be *valid* on the merits. The court stated that "[n]o Louisiana court has used this or any related provision as the basis for the tort liability that the Board would need to establish." App. A, *infra*, 11a. It also stated that the Louisiana Supreme Court had rejected the proposition that a different statute requires oil and gas lessees to restore the surface of dredged land. *Id*. On that basis, the court concluded that Louisiana state courts would not recognize tort liability based on the cited regulations. Having rejected a state-law basis for the standard of care, the court held that the standard of care in this case necessarily relies on the cited federal regulatory regimes.

b. Regarding substantiality—*i.e.*, the importance of the federal issue to the federal system— the court stated that this case does not concern merely "whether [respondents] *breached* duties created by federal law," which the court correctly recognized would not be sufficient to support federal jurisdiction, but instead "concerns whether federal law *creates* such duties." App. A, *infra*, 14a (emphasis added). In the court's view, "the validity of the Board's claims would require that conduct

subject to an extensive federal permitting scheme is in fact subject to implicit restraints that are created by state law." *Id.* The court did not identify what those "restraints" would be, since the complaint attempts to enforce, not restrain, federal requirements. Nonetheless, on that basis, the court held that "[t]he implications for the federal regulatory scheme of the sort of holding that the Board seeks would be significant, and thus the issues are substantial." *Id.*

c. Regarding the federal-state balance, the court held that the fact "that each of the three federal statutes" cited by the complaint "contains a savings clause" is of no consequence. App. A, *infra*, 15a. The court relied instead on its view that this case involves not only a dispute about whether respondents violated a federally-based standard of care, but that "one of the primary subjects of dispute between the parties is whether the federal laws in question may properly be interpreted to [create duties] at all"—apparently the same factor that drove its "substantiality" inquiry. App. A, *infra*, 16a-17a. The court concluded that there were no "threatening structural consequences" of recognizing federal jurisdiction here. App. A, *infra*, 16a.[4]

d. The court also affirmed the district court's dismissal of the case on the merits, concluding that Louisiana law would not recognize the Board's claims. For example, the Fifth Circuit opened its negligence and nuisance analysis by acknowledging that "[t]he extent of a duty [under

4. Because the court found "arising under" jurisdiction under *Grable*, it did not reach respondents' contention that the district court erred in rejecting their claim of maritime jurisdiction. App. A, *infra*, 17a.

Louisiana law] is 'a question of policy as to whether [a] particular risk falls within the scope of the duty.'" App. A, *infra*, 18a (quoting *Roberts v. Benoit*, 605 So. 2d 1032, 1044 (La. 1991)). The court explained that among the factors that Louisiana courts consider in making that policy determination are

> whether the imposition of a duty would result in an unmanageable flow of litigation; ease of association between the plaintiff's harm and a defendant's conduct; economic, social, and moral implications on similarly situated parties; the nature of defendant's activity; the direction in which society and its institutions are evolving; and precedent.

App. A, *infra,* 18a-19a (quoting *Cormier v. T.H.E. Ins. Co.*, 745 So. 2d 1, 7 (La. 1999)). The court then analyzed those factors, concluding that "neither federal law nor Louisiana law creates a duty that binds [respondents] to protect the Board from increased flood protection costs that arise out of the coastal erosion allegedly caused by [respondents'] dredging activities." App. A, *infra*, 21a. The court held that the strict liability claim triggered the same analysis. App. A, *infra*, 25a. Similarly, the court concluded that Louisiana law would not recognize the Board's natural servitude of drain claims. App. A, *infra*, 27a-28a. In short, having held that this case arose under federal law, the court dismissed the complaint based on its understanding of Louisiana law.

REASONS FOR GRANTING THE PETITION

This Court has repeatedly rejected jurisdictional theories that would "radically expand the class of removable cases." *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 832 (2002) (internal quotation marks omitted). The Court "ha[s] reiterated the need to give '[d]ue regard [to] the rightful independence of state governments'—and more particularly, to the power of the States 'to provide for the determination of controversies in their courts.'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1573 (2016) (quoting *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 380 (1959)).

The Fifth Circuit's decision in this case violates those principles; conflicts with this Court's decisions in *Merrell Dow*, *Grable*, and subsequent cases; creates two distinct conflicts in the circuits; and opens up the federal courts to numerous state-law claims that will hinge overwhelmingly on state-law issues and that belong in the state system. Indeed, that result is graphically on display in this case. The court of appeals ruled that this is one of the "extremely rare" cases, *Gunn*, 133 S. Ct. at 1064, in which the federal issues are so substantial, the federal interest so great, and the harm to the federal-state balance so minimal that federal jurisdiction is warranted. The court then proceeded, on the merits, to affirm the dismissal of the case based on its improbable conclusion that under *Louisiana* law, the Board—the political subdivision expressly charged by the Louisiana Legislature with flood protection and operation of levees in the affected area—was not within the scope of the respondents' *state-law* duty not to cause increased flooding risks through degradation of the wetlands.

The Board filed this case in state court, and it was entitled to litigate it there, where it could obtain an authoritative ruling on the quintessentially state-law questions the Fifth Circuit decided. Insofar as questions about the applicability or content of federally-based standards of care are at issue in this case, the state courts are fully competent to resolve them. It is unlikely that state law in this case would conflict in any way with federal law, since the purpose of this action is to enforce, not challenge, the federal regulatory regimes invoked in the complaint. But if the question of such a conflict arose, the state courts are also fully competent to resolve such preemption issues. Indeed, the possibility that there will be disputed preemption issues could not support federal jurisdiction in any event. Had this case arisen in any of at least four other courts of appeals, it would have been remanded to state court. Further review is warranted.

A. The Fifth Circuit's Decision is Inconsistent with This Court's "Arising Under" Decisions

As a general matter, a case "arises under federal law" for federal jurisdictional purposes "when federal law creates the cause of action asserted." *Gunn*, 133 S. Ct. at 1064. In cases not involving a federal cause of action, however, "[t]here is … [a] longstanding, if less frequently encountered, variety of federal 'arising under' jurisdiction" in which "state-law claims … implicate significant federal issues." *Grable*, 545 U.S. at 312. A four-part test governs the availability of federal jurisdiction in such cases: "[D]oes a state-law claim [1] necessarily raise a stated federal issue, [2] actually disputed and [3] substantial, which [4] a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.* at 314. As

the Court later explained in *Gunn*, "[t]he substantiality inquiry under *Grable* looks" not to the "significan[ce] to the particular parties in the immediate suit," but "instead to the importance of the issue to the federal system as a whole." 133 S. Ct. at 1066.

1. The bar to this unusual variety of "arising under" jurisdiction is high. As this Court has increasingly emphasized since *Grable*, such cases are a "special and small" category, *Empire Healthchoice Assur. v. McVeigh*, 547 U.S. 677, 699 (2006), that is and should be "extremely rare," *Gunn*, 568 U.S. at 1064. The Fifth Circuit disregarded several limiting principles from this Court's cases in concluding that federal jurisdiction was proper here. This case does not satisfy three of the four *Grable* criteria.

2. "*Necessarily raised*." The court of appeals concluded that the case "necessarily raise[s]" a federal issue only after rejecting the alternative state-law bases for relief on their merits. But at the jurisdictional stage, if a colorable pure state-law claim is pleaded that could result in complete relief, no federal issue is "necessarily raised." That follows from the well-pleaded complaint rule, and from settled principles of federal jurisdiction. *See, e.g.*, *Bell v. Hood*, 327 U.S. 678, 682 (1946) ("Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy."). The complaint in this case pleaded pure state-law claims that were colorable (to say the least). The fact that the court of appeals believed that those claims would fail on their merits should have been of no consequence to the jurisdictional inquiry. See pp. 20-22, *infra*.

3. *Substantiality* and *federal-state balance.* Even if this case does "necessarily raise" a federal issue, this Court's cases establish that federal jurisdiction is nonetheless lacking because the federal claim is not "substantial" under *Grable.* It is also lacking because finding jurisdiction here would upset the "federal-state balance."

Before *Grable*, *Merrell Dow* had addressed a case in which, as here, federal law provided the basis for the state-law standard of care. The case involved state-law suits against a pharmaceutical manufacturer, in which the manufacturer's alleged misbranding of a drug under the federal Food, Drug, and Cosmetic Act provided "a rebuttable presumption of negligence" for the plaintiffs' state-law negligence claims. 478 U.S. at 806. Congress, however, had not created a federal cause of action for misbranding. *Merrell Dow* concluded from that failure that "the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system." 478 U.S. at 813; accord *id.* at 812, 817.

Grable further elaborated on the rationale of *Merrell Dow.* It explained that the lack of a federal remedy was of importance for two distinct reasons. First, it "was worth some consideration in the assessment of substantiality." 545 U.S. at 318. Congress's failure to create a federal remedy suggests that suits charging misbranding are insufficiently "importan[t] … to the federal system" as a whole. *Gunn*, 133 S. Ct. at 1066.

Second, and of "primary importance" was "the combination of no federal cause of action and no preemption of state remedies for misbranding." 545 U.S. at 318. That

combination provided "an important clue to Congress's conception of the scope of jurisdiction to be exercised under § 1331." *Id.* The Court noted that in "garden-variety state tort law[,] … [t]he violation of federal statutes and regulations is commonly given negligence per se effect." *Id.* (internal quotation marks omitted). Congress could not have intended that all such cases should have access to federal court; that would mark "a potentially enormous shift of traditionally state cases into federal courts." *Id.* To the contrary, it was "improbable that Congress, having made no provision for a federal cause of action, would have meant to welcome any state-law tort case implicating federal law." *Id.* at 319. "In this situation, no welcome mat meant keep out." *Id.*

4. *Merrell Dow* and *Grable* control the result here. Just as in *Merrell Dow* and as discussed in *Grable*, Congress created no cause of action for violation of the federal statutes, regulations, and permits cited in the complaint here.[5] Just as in *Merrell Dow* and as discussed in *Grable*, each of the federal regulatory schemes invoked in the complaint includes a savings clause that expressly preserves state rights and remedies.[6]

The conclusion is thus inescapable. Just as in *Merrell Dow* and discussed in *Grable*, Congress's preservation

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5. *See California v. Sierra Club*, 451 U.S. 287, 295-97 (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, 16-18 (1981) (no private right of action under Clean Water Act); *N.J. Dept. of Envtl. Prot v. Long Island Power Auth.*, 30 F.3d 403, 422-23 (3d Cir. 1994) (no private right of action under Coastal Zone Management Act).

6. *See* 33 U.S.C. § 1365(e) (CWA); 33 U.S.C. § 1416(g) (RHA); 16 U.S.C. § 1456(e) (CZMA).

of state remedies and failure to provide a federal cause of action here means that it saw no "substantial" federal interest in litigating cases like this in federal court. Moreover, finding federal jurisdiction here would upset Congress's intended federal-state balance. "Congress's conception of the scope of jurisdiction," *Grable*, 545 U.S. at 318, was that state courts could adequately address state-law causes of action that assert a violation of federal statutes as the basis for the standard of care. The court of appeals' decision deprived the Board of the state-law forum to which it was entitled, and with which Congress was fully satisfied, for resolution of the quintessentially state-law issues involved in this case. The Fifth Circuit's decision cannot be reconciled with *Merrell Dow* and *Grable*.

5. The court of appeals gave no specific reason for disregarding the significance under *Grable* and *Merrell Dow* of the lack of a federal cause of action and Congress's express preservation of state law. But the reasons the Fifth Circuit did give for its application of what this Court has termed the "substantiality-plus," *Merrill Lynch*, 136 S. Ct. at 1570 n.4, and federal-state balance factors were mistaken.

a. First, the court of appeals based both its "substantiality" and "federal-state balance" analyses on the proposition that this case does not concern only "whether [respondents] breached duties created by federal law," which the court correctly recognized would not be sufficient to support federal jurisdiction. App. A, *infra*, 14a. Instead, it also "concerns whether federal

law creates such duties." *Id.* (discussing substantiality).[7] To be sure, the court of appeals' premise that this case concerns whether *federal* law creates duties is wrong, because the complaint cites federal law only as one basis for the standard of care; the question whether any duties based on that standard run to the Board is squarely a question of Louisiana, not federal, law. But even if the court's premise were correct, the distinction the court attempted to draw is mistaken. There is no basis—and the court of appeals offered none—for distinguishing between (a) cases in which a defendant disputes whether it violated a federally-based standard and (b) cases in which a defendant disputes whether the asserted federally-based standard exists or applies. Either type of dispute may, or may not, *necessarily* raise a federal issue, and either variety may (although only very rarely and only if some other overriding federal interest is present) support federal jurisdiction.

Indeed, *Merrell Dow* rejected virtually the same distinction adopted by the court of appeals. The removing party in that case argued that there was a dispute not merely over whether its conduct complied with the FDCA. The sales at issue in *Merrell Dow* took place in Canada and Scotland, and the parties also disputed "whether the FDCA applies to sales in Canada and Scotland" at all. 478 U.S. at 816. That issue was "a novel federal question relating to the extraterritorial meaning of the Act." *Id.* at

7. Similarly, in considering the federal-state balance, the court of appeals stated that "where, as here, one of the primary subjects of dispute … is whether the federal laws in question may properly be interpreted" to "create duties and obligations under the laws of various states," "the implications for the federal docket are less severe." App. A, *infra*, 16a.

817. Yet the Court squarely "reject[ed] th[e] argument" of the removing party that questions about the applicability of federal law would support federal jurisdiction where questions about whether federal law was violated would not. *Id.* at 817. The Court did "not believe the question whether a particular claim arises under federal law depends on the novelty of the federal issue." *Id.* The same conclusion follows here.

The Fifth Circuit's decision thus opens the door wide to litigation of many state-law claims that rely on a federally-based duty. The borderline between a dispute over whether the defendant violated a federally-based standard of care and whether that standard exists or applies to the plaintiff is a thin one, and parties may frequently characterize their claims either way. Accordingly, the Fifth Circuit's decision would, contrary to *Grable*'s warning, "herald[] a potentially enormous shift of traditionally state cases into federal court." 545 U.S. at 319.

b. Second, the court of appeals stated that "the scope and limitations of a complex federal regulatory framework are at stake in this case, and disposition of the question whether that framework may give rise to state claims as an initial matter will ultimately have implications for the federal docket." App. A, *infra*, 16a-17a. This case is not a broad attack on a federal regulatory scheme or an attempt to impose "limitations" on it that could trigger unique federal interests. No federal regulatory or other action is challenged or at risk.[8] This case does involve a

8. For that reason, the Fifth Circuit's unelaborated comment that the Board's claims "would require that conduct subject to an extensive federal permitting scheme is in fact subject to implicit

large number of defendants who are among the oil and gas lessees and pipeline operators in a particular area of Louisiana's coast. But with respect to each individual defendant, the Board alleges that it has engaged in specific conduct that violated Louisiana law (including a federal- and state-law-based standard of care). The Board alleges that, in the context of the unique geology of that area, respondents' conduct caused and continues to cause massive injury to the Board's ability to maintain the levees that protect residents and businesses of southeast Louisiana. The case thus involves whether *Louisiana* law provides a remedy for that conduct—a question that is of overwhelming importance to Louisiana and its people and of very limited importance to other States, other cases, and the federal system as a whole. The large number of defendants has no bearing on any federal interest.

Moreover, even if the success of the Board's claims could have any effect on a federal regulatory program, that would at most give respondents a preemption defense. It has been a premise of this Court's federal jurisdiction cases since at least *Louisville & Nashville R. Co. v. Mottley,* 211 U.S. 149 (1908), that state courts are fully competent to adjudicate federal preemption defenses. "A defense that raises a federal question is inadequate to confer federal jurisdiction." *Merrell Dow*, 478 U.S. at 808.

c. Finally, the court of appeals' decision on the merits perhaps unwittingly illustrates how the court's jurisdictional decision upset, rather than reinforced, the

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restraints that are created by state law" is wrong. App. A, *infra*, 14a. This suit attempts to enforce, not restrain, the federal permitting scheme.

appropriate federal-state jurisdictional balance. The court's decision on the merits addressed the question whether respondents had a duty enforceable by a court *under Louisiana law* to comply with federal- and state-based standards and thereby avoid or remedy the respondents' destruction of Louisiana's coastal lands. See pp. 9-10, *supra*. That is the kind of state-law question that should be decided by the Louisiana courts in which this case was originally brought, not by a federal court (mis)reading state law. The court of appeals' decision is inconsistent with settled jurisdictional principles and upsets the federal-state balance that Congress intended.

B. The Fifth Circuit's Decision Conflicts with the Third Circuit and with Settled Jurisdictional Principles

1. The complaint alleges that aside from the federal bases for the standard of care, Louisiana law provides its own bases that would govern this case. The Board argued below that federal and state law "set[] forth apparently similar requirements." *See* App. A, *infra*, 10a. If so, and if the Board could obtain all its relief solely under Louisiana law, the federal issues in this case would not be "necessarily raised," and federal jurisdiction would be lacking.

The court of appeals rejected the Board's argument, but it did so only by adjudicating the merits of the Board's interpretation of Louisiana law, which should be decided by a state court under *Merrill* and *Grable*. For example, one Louisiana provision requires restoration of mineral exploration and production sites "as near as practicable to their original condition upon termination of operations to

the maximum extent practicable." App. A, *infra*, 10a-11a (quoting 43 La. Admin. Code. Part I, § 719(M)). The court of appeals believed that Louisiana law would not permit the Board to enforce that provision. But that was simply the court's judgment on the merits of the Board's state-law claim, as the court's reasoning made clear. The court stated two reasons for its conclusion: that "[n]o Louisiana court has used this or any related provision as the basis for tort liability," and that the Louisiana Supreme Court "has explicitly rejected" the proposition that a different statute regarding the surface of dredged land should be so used. App. A, *infra*, 11a. Neither reason suggests that the Board's claims are not (at least) colorable under Louisiana law or could not be accepted by the Louisiana courts under existing law. The court erred in converting what should have been a threshold, jurisdictional inquiry concerning whether the Board's claims are colorable into a merits inquiry. Yet the whole point of the *Grable* framework is to determine whether the federal court may reach the merits of the suit.

The court of appeals' ruling conflicts with the Third Circuit's decision in *Manning v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 772 F.3d 158 (3d Cir. 2014), aff'd on other grounds, 136 S. Ct. 1562 (2016). In that case, investors sued a broker in state court on state-law causes of action, alleging a scheme to manipulate the price of a company's stock. The conduct alleged could, however, also be prohibited by SEC regulations. The case was removed to federal district court, which held that a federal issue was necessarily raised because "[p]laintiffs do not point to a [state] law or regulation which similarly prohibits the type of alleged conduct at issue here." *Id.* at 163.

The Third Circuit reversed, holding that no federal issue was necessarily raised. The court held that "it was improper for the District Court to foreclose the possibility that particular state causes of action could permit recovery solely under state law." 772 F.3d at 163. Although the State's securities laws were admittedly "not as robust as federal laws," the Third Circuit explained that "even where there may be some basis to agree with defendants that plaintiffs' view of the state law is incorrect and will be so found, it is for the state court to make the determination as to the applicability of its state law." *Id.* at 163-164 (internal alterations and ellipses omitted) (quoting *U. Jersey Banks v. Parell*, 783 F.2d 360, 367 (3d Cir. 1986)).

The Fifth Circuit's decision here is inconsistent with *Manning*. The Fifth Circuit looked closely into the merits of the alternative state-law bases for the standard of care asserted in the complaint here. It reached the (improbable) conclusion that the Board—the independent political subdivision created by the state legislature to be responsible for flood protection and operation of levees—was outside the scope of the duty created by state law to restore mineral sites to avoid risks to the levee system and prevent increased flooding. On those grounds, it held that the federal bases for the standard of care were "necessarily raised" by the complaint. The Third Circuit in *Manning*, by contrast, held that at least so long as the complaint's allegations were colorable, "it is for the state court to make the determination as to the applicability of its state law." 772 F.3d at 164. Under that rule, this case would have been remanded.

C. The Court of Appeals' Decision Conflicts with Decisions of the First, Eighth, and Federal Circuits

The court of appeals' decision also conflicts with decisions of the First, Eighth, and Federal Circuits.

1. In *Municipality of Mayaguez v. Corporacion Para el Desarrollo del Oeste, Inc.*, 726 F.3d 8 (1st Cir. 2013), the plaintiff municipality brought a state-law claim that a local development corporation had breached a contract by failing to comply with federal HUD regulations. *Id.* at 9-10. The First Circuit found that the *Grable* "substantiality" element is satisfied in two circumstances: (a) "[W]here the outcome of the claim could turn on a new interpretation of a federal statute or regulation which will govern a large number of cases," rather than "an issue that is 'fact-bound and situation-specific.'" *Id.* at 14 (quoting *Empire Healthchoice*, 547 U.S. at 700-701); and (b) Where there is a federal interest "in the availability of a federal forum to vindicate [the federal government's] own administrative action" or where the private suit "though based on state law, directly challenges the propriety of an action taken by 'a federal department, agency, or service.'" *Mayaguez*, 726 F.3d at 14 (quoting *Empire Healthchoice*, 547 U.S. at 700)).

The First Circuit concluded that the federal question in the case before it—whether the defendant had complied with HUD regulations—did not fall within either of those two categories. While the dispute arose from a claimed failure to comply with federal regulations, it was unlikely "to have any impact on the development of federal law." 726 F.3d at 14. Moreover, the actions of the federal entity were not being challenged: "[T]here were never allegations that HUD itself acted inappropriately in any way. … HUD's performance was never at issue, and hence,

unlike in *Grable*, the outcome of this case could not call into question thousands of other actions undertaken by a federal agency." *Id.* at 15.

The Fifth Circuit's decision here conflicts with *Mayaguez*. Aside from possible federal preemption issues that may become relevant later in this case and that could not provide the basis for "arising under" jurisdiction anyway, the issues here are not pure issues of federal law. The federal waters are only ankle-deep; at the high mark, they involve measuring each defendant's specifically alleged conduct in a discrete region of Louisiana's geologically unique coastal zone against federal regulatory and permit requirements that are spelled out in black and white, and then, in each instance where the specific conduct falls short of the requirement, applying principles of Louisiana tort law to determine liability. The fact that the defendants are numerous does not alter the fact that each of them is charged with engaging in specific liability-generating conduct in a specific (and geologically unique) setting. Moreover, the Board's claims in no way challenge the propriety of any federal action, rule, or requirement.[9] Under *Mayaguez*, the claims here would not satisfy the "substantiality" test, and the case would have to be remanded. *Cf. MHA LLC v. HealthFirst*, 629 Fed. Appx. 409, 414 (3d Cir. 2015) (holding that case "does not present the unusually strong federal interest required for the federal forum" because suit "does not call into question the validity of a federal statute or the conduct of a federal actor").

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9. *Cf. One and Ken Valley Housing Group v. Maine State Housing Auth.*, 716 F.3d 218, 225 (1st Cir. 2013) (finding jurisdiction under *Grable* where complaint alleged breach of contract "only because the contractor was *following* the federal agency's explicit instructions") (emphasis added).

2. In *Great Lakes Gas Transmission L.P. v. Essar Steel Minnesota LLC*, 843 F.3d 325 (8th Cir. 2016), the Eighth Circuit held that it had no subject-matter jurisdiction over a pipeline company's claims against a customer for breach of an agreement that required payment in accordance with the terms of a tariff on file with FERC under the Natural Gas Act. The dispute concerned clauses—a *force majeure* clause and a limitation-of-liability clause—that were apparently common in such tariffs. *Id.* at 327, 332. The Eighth Circuit nonetheless noted that "the district court did not interpret the [tariff] clauses in accordance with federal law," but instead correctly "interpreted the Tariff provisions in accordance with Michigan law." *Id.* The court concluded that "there is little national interest in having a federal court interpret tariff provisions if it will merely apply state law[.]" *Id.*

Similarly here, the question before the Fifth Circuit was whether Louisiana law, not federal law, recognizes a duty owed to the Board based on violation of certain requirements in the RHA, CWA, and CZMA. The Fifth Circuit's analysis, both in the jurisdictional and merits portions of its opinion, hinged on the effect that the federal laws at issue have on the duties owed by respondents *under Louisiana law.* Under the Eighth Circuit's ruling in *Great Lakes Transmission*, that could not give rise to a "substantial" federal issue.

3. In *NeuroRepair, Inc. v. The Nath Law Group*, 781 F.3d 1340 (Fed. Cir. 2015), the Federal Circuit held that it could not sustain removal jurisdiction over a California-law legal malpractice claim against a patent attorney. The Federal Circuit reiterated *Gunn*'s holding in a related setting and looked first for any federal issue that was a "'pure issue of law' that is 'dispositive of the case.'" *Id.* at 1346 (quoting *Empire Healthchoice*, 547 U.S. at 700)).

The court noted that, although the case involved a ruling on federal patent law, that ruling would not be controlling over later federal litigation on the issue, and would not make any subsequent actions by the U.S. Patents and Trademarks Office difficult, such that the USPTO did not have a "direct interest" in the dispute's outcome. *Id.* at 1346-47.

The Fifth Circuit's decision would not stand under the Federal Circuit's analysis. As discussed above, the Board's claims present mixed issues of federal and state law, not a pure issue of federal law. *See* pp. 9-10, 25, *supra*. The resolution of the federal issues could not dispose of this case without application to the particular facts of respondents' conduct and an analysis under a Louisiana state-law duty framework. Also, a finding that respondents' conduct breached a Louisiana state-law duty in part due to violation of federal-law requirements would not be binding in other contexts, involving other defendants and the laws of other States.[10] Because this case seeks to enforce, not challenge, federal administrative actions, a ruling on the federal issues in this case would not make any subsequent action by federal administrative authorities difficult. Accordingly, under the Federal Circuit's standard, this case would have been remanded.

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10. Indeed, because Louisiana's civilian system does not recognize *stare decisis*, it is highly doubtful that a state-court decision on the duty questions here could be said to be "binding" at all in the traditional federal jurisprudential sense. *See In re Orso*, 283 F.3d 686, 695 (5th Cir. 2002) ("Because Louisiana stands alone among the 50 states as a hybrid Civil Law/common law jurisdiction, its situation is unique: The State's constitution, its codes and its statutes, are the primary sources of law; court decisions are treated as secondary sources of law, without *stare decisis* precedential effect.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 11, 2017

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, DATED MARCH 3, 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-30162

BOARD OF COMMISSIONERS OF THE SOUTHEAST LOUISIANA FLOOD PROTECTION AUTHORITY — EAST; ORLEANS LEVEE DISTRICT; LAKE BORGNE BASIN LEVEE DISTRICT; EAST JEFFERSON LEVEE DISTRICT,

Plaintiffs-Appellants,

v.

TENNESSEE GAS PIPELINE COMPANY, L.L.C.; ALTA MESA SERVICES, L.P.; ANADARKO E&P ONSHORE, L.L.C.; APACHE CORPORATION; ATLANTIC RICHFIELD COMPANY; BEPCO, L.P.; BOARDWALK PIPELINE PARTNERS, L.P.; BOPCO, L.P.; BP AMERICA PRODUCTION COMPANY; BP OIL PIPELINE COMPANY; CALLON OFFSHORE PRODUCTION, INCORPORATED; CALLON PETROLEUM COMPANY; CASKIDS OPERATING COMPANY; CENTERPOINT ENERGY RESOURCES CORPORATION; CHEVRON PIPELINE COMPANY; CHEVRON USA, INCORPORATED; CLAYTON WILLIAMS ENERGY, INCORPORATED; CLOVELLY OIL

Appendix A

COMPANY, L.L.C.; COASTAL EXPLORATION AND PRODUCTION, L.L.C.; COLLINS PIPELINE COMPANY; CONOCOPHILLIPS COMPANY; CONTINENTAL OIL COMPANY; COX OPERATING, L.L.C.; CRAWFORD HUGHES OPERATING COMPANY; DALLAS EXPLORATION, INCORPORATED; DAVIS OIL COMPANY; DEVON ENERGY PRODUCTION COMPANY, L.P.; ENERGEN RESOURCES CORPORATION; ENTERPRISE INTRASTATE, L.L.C.; EOG RESOURCES, INCORPORATED; EP ENERGY MANAGEMENT, L.L.C.; EXXON MOBIL CORPORATION; EXXON MOBIL PIPELINE COMPANY; FLASH GAS & OIL NORTHEAST, INCORPORATED; GRAHAM ROYALTY, LIMITED; GREKA AM, INCORPORATED; GULF PRODUCTION COMPANY, INCORPORATED; GULF SOUTH PIPELINE COMPANY, L.P.; HELIS ENERGY, L.L.C.; HELIS OIL & GAS COMPANY, L.L.C.; HESS CORPORATION, A DELAWARE CORPORATION; HILLIARD OIL & GAS, INCORPORATED; HKN, INCORPORATED; INTEGRATED EXPLORATION & PRODUCTION, L.L.C.; J.C. TRAHAN DRILLING CONTRACTOR, INCORPORATED; J.M. HUBER CORPORATION; KENMORE OIL COMPANY, INCORPORATED; KEWANEE INDUSTRIES, INCORPORATED; KOCH EXPLORATION COMPANY, L.L.C.; KOCH INDUSTRIES, INCORPORATED; LIBERTY OIL; GAS CORPORATION; LLOG EXPLORATION COMPANY; MANTI OPERATING COMPANY; MARATHON OIL COMPANY;

Appendix A

MOEM PIPELINE, L.L.C.; MOSBACHER ENERGY COMPANY; NATURAL RESOURCES CORPORATION OF TEXAS; NEWFIELD EXPLORATION GULF COAST, L.L.C.; NOBLE ENERGY, INCORPORATED; O'MEARA, L.L.C.; P. R. RUTHERFORD; PLACID OIL COMPANY; PLAINS PIPELINE, L.P.; REPUBLIC MINERAL CORPORATION; RIPCO, L.L.C.; ROZEL OPERATING COMPANY; MURPHY EXPLORATION & PRODUCTION COMPANY, USA; SHELL OIL COMPANY; SOUTHERN NATURAL GAS COMPANY, L.L.C.; SUN OIL COMPANY; SUNDOWN ENERGY, L.P.; UNION OIL COMPANY OF CALIFORNIA; WHITING OIL & GAS CORPORATION; WILLIAMS EXPLORATION COMPANY; YUMA EXPLORATION AND PRODUCTION COMPANY, INCORPORATED; MERIDIAN RESOURCE & EXPLORATION, L.L.C.; PICKENS COMPANY, INCORPORATED; ESTATE OF WILLIAM G. HELIS; LOUISIANA LAND AND EXPLORATION COMPANY, L.L.C. MARYLAND; KAISER-FRANCIS OIL COMPANY; BP PIPELINES NORTH AMERICA, INCORPORATED; VINTAGE PETROLEUM, L.L.C., DELAWARE; ENLINK LIG, L.L.C.,

Defendants-Appellees.

March 3, 2017, Filed

Appeal from the United States District Court
for the Eastern District of Louisiana.

Appendix A

Before STEWART, Chief Judge, and OWEN and COSTA, Circuit Judges.

PRISCILLA R. OWEN, Circuit Judge:

The Board of Commissioners of the Southeast Louisiana Flood Protection Authority—East filed a lawsuit in Louisiana state court against various companies involved in the exploration for and production of oil reserves off the southern coast of the United States. The Board alleged that Defendants' exploration activities caused infrastructural and ecological damage to coastal lands overseen by the Board that increased the risk of flooding due to storm surges and necessitated costly flood protection measures. Defendants removed the case to federal court, and the district court denied the Board's motion to remand, on the ground that the Board's claims necessarily raise a federal issue. Defendants also moved to dismiss the case for failure to state a claim on which relief can be granted, and the district court granted the motion. We affirm.

I

In July 2013, the Board of Commissioners of the Southeast Louisiana Flood Protection Authority—East (the Board) filed a lawsuit in Louisiana state court against ninety-seven entities (the Defendants) involved in the exploration for and production of oil reserves off the southern coast of the United States. The Board, whose purpose is "regional coordination of flood protection,"[1]

1. La. Stat. Ann. § 38:330.1(F)(2)(a).

alleges that since the 1930s, coastal landscapes that serve as a "first line of defense" against flooding (the Buffer Zone) have been suffering from rapid land loss. The Board alleges that replacement of land in the Buffer Zone with water threatens the existing levee system and imperils coastal communities. It further asserts that Defendants' oil and gas activities—primarily the dredging of an extensive network of canals to facilitate access to oil and gas wells—has caused "direct land loss and increased erosion and submergence in the Buffer Zone, resulting in increased storm surge risk." Attached to the complaint was a list of Defendants' names, agents, and addresses; a map depicting the levee districts under the Board's purview; a list of the names and location information of wells operated by Defendants; a list of the locations in the relevant levee districts subject to dredging permits and the permittees benefitting thereunder; and a list of the locations and grantees of rights of way in the relevant levee districts.

The Board's asserted bases for recovery from Defendants include negligence, strict liability, natural servitude of drain, public nuisance, private nuisance, and breach of contract as to third-party beneficiaries. The Board describes the "highly costly but necessary remedial measures" that it has undertaken or will undertake to protect against the increased storm surge risk. These measures include "abatement and restoration of the coastal land loss at issue," including backfilling and revegetating each canal dredged by Defendants; the joint state-federal Hurricane and Storm Damage Risk Reduction System, some of the cost of which has been borne by the Board;

investigation and remediation of defects in the local levee systems to comply with relevant certification standards; and "additional flood protection expenses," including the construction of "safe houses" for use by employees during dangerous flooding conditions.

The complaint describes "a longstanding and extensive regulatory framework under both federal and state law" that protects against the effects of dredging activities and establishes the legal duties by which Defendants purportedly are bound. It enumerates four main components of this framework, including the Rivers and Harbors Act of 1899 (RHA);[2] the Clean Water Act of 1972 (CWA);[3] "[r]egulations related to rights-of-way granted across state-owned lands and water bottoms administered by the Louisiana Office of State Lands"; and the Coastal Zone Management Act of 1972 (CZMA)[4] "and related Louisiana coastal zone regulations bearing directly on oil and gas activities." None of the individual claims relies on a cause of action created under federal law, and the negligence, strict liability, and natural servitude claims explicitly rely on state law causes of action.

The Board seeks "[a]ll damages as are just and reasonable under the circumstances," as well as injunctive relief requiring the backfilling and revegetating of canals, "wetlands creation, reef creation, land bridge construction,

2. 33 U.S.C. §§ 401-467.

3. 33 U.S.C. §§ 1251-1388.

4. 16 U.S.C. §§ 1451-1466.

hydrologic restoration, shoreline protection, structural protection, bank stabilization, and ridge restoration."

Defendants removed the case to federal court, asserting five separate grounds for federal jurisdiction. The Board moved to remand, and the district court denied the motion, concluding that the Board's state law claims "necessarily raise a federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing the congressionally approved balance of federal and state judicial responsibilities." Defendants moved to dismiss the case pursuant to Federal Rule of Civil Procedure 12(b)(6) as preempted by federal law and barred under state law. The district court granted the motion with respect to all of the Board's claims, concluding that none of the Board's stated grounds for relief constituted a claim upon which relief could be granted under state law. The Board appealed.

II

We review an order denying remand to state court de novo.[5] A federal court may exercise federal question jurisdiction over any civil action that "arises under the federal constitution, statutes, or treaties."[6] A federal question exists only where "a well-pleaded complaint establishes either that federal law creates the cause of

5. *See Davoodi v. Austin Indep. Sch. Dist.*, 755 F.3d 307, 309 (5th Cir. 2014).

6. *Energy Mgmt. Servs., LLC v. City of Alexandria*, 739 F.3d 255, 258-59 (5th Cir. 2014).

action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."[7] However, "[t]he fact that a substantial federal question is necessary to the resolution of a state-law claim is not sufficient to permit federal jurisdiction."[8] Only in a "'special and small category' of cases" will federal jurisdiction exist when state law creates the cause of action.[9] That limited category of federal jurisdiction only exists where "(1) resolving a federal issue is necessary to resolution of the state-law claim; (2) the federal issue is actually disputed; (3) the federal issue is substantial; and (4) federal jurisdiction will not disturb the balance of federal and state judicial responsibilities."[10] "[I]f a plaintiff files suit in state court alleging both federal and state claims arising out of the same controversy, the entire action may be removed to federal court."[11]

The district court concluded that three of the Board's claims necessarily raise federal issues: the negligence claim, which purportedly draws its requisite standard

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7. *Singh v. Duane Morris LLP*, 538 F.3d 334, 337-38 (5th Cir. 2008) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 27-28, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)).

8. *Id.* at 338.

9. *Gunn v. Minton*, 133 S. Ct. 1059, 1064, 185 L. Ed. 2d 72 (2013) (quoting *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699, 126 S. Ct. 2121, 165 L. Ed. 2d 131 (2006)).

10. *Singh*, 538 F.3d at 338.

11. *Halmekangas v. State Farm Fire & Cas. Co.*, 603 F.3d 290, 293 (5th Cir. 2010).

of care from three federal statutes; the nuisance claims, which rely on that same standard of care; and the third-party breach of contract claim, which purportedly is based on permits issued pursuant to federal law.

A

The Board argues that the district court was incorrect to conclude that the nuisance and negligence claims necessarily raise a federal issue, because although the state law claims "*could* turn to federal law for support, federal law is not *necessary* for their resolution." It points to this court's holding in *MSOF Corp. v. Exxon Corp.* that an allegation that a facility was maintained "in violation of federal regulations *as well as* in violation of state and local regulations" was not enough for the action to arise under federal law.[12]

Defendants dispute the Board's contention that the negligence or nuisance claims could be resolved solely as a matter of state law; they note that although the negligence claim draws its cause of action from a Louisiana statute, the "sole basis" for any standard of care is found in the federal regulatory scheme. Unlike in *MSOF*, the Board is seeking a remedy—the backfilling of canals—that could not be required under any state law-based conception of negligence, and accordingly the claim of necessity has a "federal substance." Similarly, Defendants argue that the nuisance claims posit an obligation not to make "unauthorized" changes or alterations to levee systems—

12. 295 F.3d 485, 490 (5th Cir. 2002).

an imperative that they argue could only exist under federal law.

The Board's negligence claim in fact requests relief for multiple distinct injuries and refers to multiple sources of law that might establish a duty of care, and it is not the case that just because some of these sources are drawn from state law and some from federal law that the two sources are redundant and therefore "alternative." The claims for negligence and strict liability in *MSOF* arose out of the alleged contamination of plaintiffs' land with toxic chemicals, which undisputedly gave rise to a cause of action under state law.[13] Here, however, Defendants correctly point out that the Board's complaint draws on federal law as the exclusive basis for holding Defendants liable for some of their actions, including for the "unauthorized alteration" of federal levee systems and for dredging and modifying lands away from their "natural state." Unless Louisiana state law requires persons engaged in oil and gas activities to restore dredged or modified areas to their "natural state" to the identical extent that the CWA purportedly does, then a court would not be able to establish the magnitude of any potential liability without construing that Act. The same is true of the alleged obligation not to alter levee systems built by the United States, which the complaint draws from the RHA. The Board points out that Louisiana law sets forth apparently similar requirements, such as the provision stating that "[m]ineral exploration and production sites shall be cleared, revegetated, detoxified, and otherwise

13. *Id.*

restored as near as practicable to their original condition upon termination of operations to the maximum extent practicable."[14] But the "maximum extent practicable" in turn is defined as a regulatory determination that entails "a systematic consideration of all pertinent information regarding the use, the site and the impacts of the use . . . and a balancing of their relative significance."[15] No Louisiana court has used this or any related provision as the basis for the tort liability that the Board would need to establish, and the Louisiana Supreme Court has explicitly rejected the prospect that a statutory obligation of "reasonably prudent conduct" could require oil and gas lessees to restore the surface of dredged land.[16]

The absence of any state law grounding for the duty that the Board would need to establish for the Defendants to be liable means that that duty would have to be drawn from federal law. Supreme Court precedent is clear that a case arises under federal law where "the vindication of a right under state law necessarily turn[s] on some construction of federal law,"[17] and the Board's negligence

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14. La. Admin. Code tit. 43, § 719(M).

15. *Id.* § 701(H)(1).

16. *See Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 893 So. 2d 789, 801 (La. 2005) ("[W]e hold that, in the absence of an express lease provision, Mineral Code article 122 does not impose an implied duty to restore the surface to its original, pre-lease condition absent proof that the lessee has exercised his rights under the lease unreasonably or excessively.").

17. *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 9, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983).

and nuisance claims thus cannot be resolved without a determination whether multiple federal statutes create a duty of care that does not otherwise exist under state law.

B

The Board argues that even if its claims necessarily raise federal issues, those issues are not "actually disputed." But its argument draws entirely on district court cases in which the parties did not disagree with respect to the proper interpretation of federal statutes unrelated to those raised in the Board's complaint.[18] Defendants refute this argument by pointing out that they do not concede, for example, that the RHA establishes liability for otherwise permitted activity that might have the effect of altering United States-built levee systems; that the CWA requires them to restore dredged canals to their "natural state"; or that they are required to backfill canals that they have dredged pursuant to federal permits. These are legal, not factual, questions, and the parties dispute them.

C

For a federal issue to give rise to federal jurisdiction, "it is not enough that the federal issue be significant to the particular parties in the immediate suit . . . . The

18. *See, e.g., Cooper v. Int'l Paper Co.*, 912 F. Supp. 2d 1307, 1316-17 (S.D. Ala. 2012) ("The plaintiffs' complaint . . . does not place in dispute the meaning of any provisions of federal law, and [the defendant] has not shown that a state court will be called upon to do more than apply a settled federal framework to the facts of this case." (citation omitted)).

substantiality inquiry under *Grable* looks instead to the importance of the issue to the federal system as a whole."[19] The Supreme Court has suggested that an issue can be important for many reasons: because state adjudication would "undermine 'the development of a uniform body of [federal] law'";[20] because the case presents "a nearly pure issue of law" that would have applications to other federal cases;[21] or because resolution of the issue has "broad[] significance" for the federal government.[22] "The absence of any federal cause of action . . . [is] worth some consideration in the assessment of substantiality."[23]

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19. *Gunn v. Minton*, 133 S. Ct. 1059, 1066, 185 L. Ed. 2d 72 (2013); *see also Smith v. Kan. City Title & Tr. Co.*, 255 U.S. 180, 198-202, 41 S. Ct. 243, 65 L. Ed. 577 (1921) (holding substantial the question in a state-law shareholder lawsuit whether the statute pursuant to which certain federal bonds were issued was constitutionally valid).

20. *Gunn*, 133 S. Ct. at 1067 (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162, 109 S. Ct. 971, 103 L. Ed. 2d 118 (1989)).

21. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 700, 126 S. Ct. 2121, 165 L. Ed. 2d 131 (2006) (internal quotation marks omitted); *cf. Gunn*, 133 S. Ct. at 1066-67 (holding insubstantial the federal question whether patent lawyers being sued for malpractice could have succeeded in a prior federal patent suit by timely raising a particular argument, because "[n]o matter how the state courts resolve that hypothetical 'case within a case,' it w[ould] not change the real-world result of the prior federal patent litigation. [Plaintiff's] patent w[ould] remain invalid.").

22. *Gunn*, 133 S. Ct. at 1066.

23. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 318, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005).

The district court concluded that the substantiality requirement was met in this case, both because the relevant federal statutes plainly regulate "issues of national concern" and because the case affects "an entire industry" rather than a few parties. Moreover, it called the lawsuit "a collateral attack on an entire regulatory scheme . . . premised on the notion that [the scheme] provides inadequate protection." The Board disagrees and argues that it raises that regulatory scheme "to *support* the obligations created under state law."

The Board is correct that the federal regulatory scheme is only relevant to its claims insofar as the scheme provides the underlying legal basis for causes of action created by state law. But of course Defendants dispute whether the federal scheme provides such basis at all. The dispute between the parties does not just concern whether Defendants breached duties created by federal law; it concerns whether federal law creates such duties. As Defendants point out, the validity of the Board's claims would require that conduct subject to an extensive federal permitting scheme is in fact subject to implicit restraints that are created by state law.[24] The implications for the federal regulatory scheme of the sort of holding that the Board seeks would be significant, and thus the issues are substantial.

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24. *See* 33 U.S.C. § 404 (allowing the Secretary of the Army to grant permits "to make deposits in any tidal harbor or river of the United States beyond any harbor lines established under authority of the United States"); 33 U.S.C. § 403 (requiring federal permission to "excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any . . . canal").

D

In *Singh*, we considered whether the area of law relevant to the plaintiff's claims "has traditionally been the domain of state law," and in that case we concluded that "federal law rarely interferes with the power of state authorities to regulate" that area of law.[25] The Supreme Court has held that the balance of federal and state judicial responsibilities would be disturbed by the exercise of federal jurisdiction where such exercise would "herald[] a potentially enormous shift of traditionally state cases into federal courts."[26] Here, the district court held that no such shift would arise, noting that the Board relies on federal law to establish liability and that resolution of its claims could affect coastal land management in multiple states as well as the national oil and gas market.

The Board points out that each of the three federal statutes that forms the basis of its claims contains a savings clause, which it argues supports an inference that exercising federal jurisdiction would disrupt the balance struck by Congress.[27] But as Defendants point out, these savings clauses act to preserve existing state law claims; they do not confine consideration of lawsuits based on federal law to state courts. They also argue that the relief sought by the Board would require federal approval to be

25. *Singh v. Duane Morris LLP*, 538 F.3d 334, 339 (5th Cir. 2008).

26. *Grable*, 545 U.S. at 319.

27. *See* 33 U.S.C. §§ 1365(e), 1416(g); 16 U.S.C. § 1456(e).

implemented, and thus it cannot be that the lawsuit is a matter only of state concern.[28]

In *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, the Supreme Court explicitly rejected "[a] general rule of exercising federal jurisdiction over state claims resting on federal . . . statutory violations," and it also rejected the proposition that "any . . . federal standard without a federal cause of action" is enough to support federal jurisdiction over a lawsuit.[29] However, the Court nonetheless held that federal jurisdiction was proper in the state quiet title action before it, because "it is the rare state quiet title action that involves contested issues of federal law," and thus "jurisdiction over actions like Grable's would not materially affect, or threaten to affect, the normal currents of litigation."[30]

The *Grable* Court was persuaded that "the absence of threatening structural consequences" was relevant to its inquiry, and the same logic militates in favor of federal jurisdiction here.[31] If the federal statutes at issue in this case do create duties and obligations under the laws of various states, then it might be inappropriate for federal question jurisdiction to obtain every time a state-law claim is made on that basis. But where, as here, one of the

28. *See* 33 U.S.C. § 403; 33 C.F.R. § 322.3(a).

29. 545 U.S. at 318-19.

30. *Id.* at 319.

31. *Id.*

primary subjects of dispute between the parties is whether the federal laws in question may properly be interpreted to do that at all, the implications for the federal docket are less severe.[32] Relatedly, the scope and limitations of a complex federal regulatory framework are at stake in this case, and disposition of the question whether that framework may give rise to state law claims as an initial matter will ultimately have implications for the federal docket one way or the other.

E

Because we conclude that the Board's negligence and nuisance claims necessarily raise federal issues sufficient to justify federal jurisdiction, we do not reach the question whether the third-party breach of contract claim also does so. We also do not reach the question whether maritime jurisdiction provides an independent basis for federal jurisdiction in this case.

III

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to

32. *See id.* at 318-19 (noting that even though "[t]he violation of federal statutes and regulations is commonly given negligence per se effect in state tort proceedings," federal jurisdiction is not always proper in such proceedings (quoting RESTATEMENT (THIRD) OF TORTS § 14, Reporter's Note, cmt. a (AM. LAW INST., Tentative Draft No. 1, 2001))).

'state a claim to relief that is plausible on its face.'"[33] "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[34]

A

To state a claim for negligence under Louisiana law, the Board must establish, *inter alia*, that Defendants "had a duty to conform [their] conduct to a specific standard."[35] The extent of a duty is "a question of policy as to whether [a] particular risk falls within the scope of the duty."[36] A court must determine "whether the enunciated rule or principle of law extends to or is intended to protect *this plaintiff* from *this type of harm* arising in *this manner*."[37] Louisiana courts consider various factors to ascertain the scope of this protection, including "whether the imposition of a duty would result in an unmanageable flow of litigation; ease of association between the plaintiff's

33. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

34. *Id.*

35. *Audler v. CBC Innovis Inc.*, 519 F.3d 239, 249 (5th Cir. 2008) (quoting *Lemann v. Essen Lane Daiquiris, Inc.*, 923 So. 2d 627, 633 (La. 2006)).

36. *Roberts v. Benoit*, 605 So. 2d 1032, 1044 (La. 1991).

37. *Id.* at 1044-45 (citation omitted).

harm and a defendant's conduct; economic, social, and moral implications on similarly situated parties; the nature of defendant's activity; the direction in which society and its institutions are evolving; and precedent."[38]

The district court held that the requirements imposed by the RHA, the CWA, and the CZMA "do not extend to the protection of [the Board]." It stated that (1) the primary purpose of the RHA is to ensure that waterways remain navigable, and the provision therein that makes it illegal for any person to damage a levee did not impose a duty to protect the Board; (2) the CWA is meant to restore and maintain the integrity of the United States water supply, and the issuance of permits for the discharge of dredged or fill materials under it does not establish private duties; and (3) the issuance of permits licensing oil and gas exploration activities under the CZMA does not impose private duties to prevent environmental damage. The district court also denied that Louisiana state law creates a duty of care by which the Board is bound, because in the Fifth Circuit case that arguably suggested as much, *Terrebonne Parish School Board v. Columbia Gulf Transmission Co.*,[39] at issue was whether "a direct loss of acreage . . . due to erosion" breached "[t]he duty of two specific pipeline companies to maintain canals on specific property *vis a vis* a specific lessor."

The Board argues that because the three federal statutes "set forth clear standards of care relevant to the

38. *Cormier v. T.H.E. Ins. Co.*, 745 So. 2d 1, 7 (La. 1999).

39. 290 F.3d 303 (5th Cir. 2002).

defendants' conduct," and because the complaint points to the content of those statutes, the Board has stated a claim. It also points to Louisiana statutes that require coastal uses "to avoid to the maximum extent practicable" detrimental changes to sediment transport processes and coastal erosion, as well as "increases in the potential for flood, hurricane and other storm damage, or increases in the likelihood that damage will occur from such hazards."[40]

Defendants note both that the Board has not explained how the federal statutes it enumerates serve to create a duty of care under state law and that the Board does not appear to allege that Defendants have caused any actual loss, because the Board states only that Defendants' dredging activities have weakened coastal lands such that "flood protection costs" have increased. They also point to *Terrebonne Parish School Board v. Castex Energy, Inc.*, in which the Louisiana Supreme Court found no implied duty for a mineral right lessee to restore coastline, even where the lessee was obligated by statute to "develop and operate the property leased as a reasonably prudent operator for the mutual benefit of himself and his lessor."[41] Finally, they argue that the line of Louisiana Supreme Court cases suggesting that imposing liability for any indirect

40. La. Admin. Code tit. 43, § 701(G).

41. 893 So. 2d 789, 796-97 (La. 2005); *see also Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 692 (E.D. La. 2006) ("If the Louisiana Supreme Court refused to read an implied duty to restore the surface on the facts of *Terrebonne Parish*, it would almost certainly decline to do so when remote parties seek to impose a general duty that has no basis in their relationship or controlling law.").

economic harm caused by a wrongful act "could create liability 'in an indeterminate amount for an indeterminate time to an indeterminate class'"[42] means that here, where the damaged party has incurred only additional costs and has not suffered any loss to property it owns, Defendants could not have been bound to protect the Board from the losses it sustained.

The district court was correct that neither federal law nor Louisiana law creates a duty that binds Defendants to protect the Board from increased flood protection costs that arise out of the coastal erosion allegedly caused by Defendants' dredging activities. Although it is true that this court "has often held that violation of a Federal law or regulation can be evidence of negligence,"[43] it has declined to do so where the "principal purpose" of the relevant statutes was not to protect the plaintiff.[44] The Supreme Court's determination that the RHA "was

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42. *PPG Indus., Inc. v. Bean Dredging*, 447 So. 2d 1058, 1061 (La. 1984) (quoting *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441, 444 (N.Y. 1931)); *see MAW Enters., LLC v. City of Marksville*, 149 So. 3d 210, 220 (La. 2014) (limiting damages owed by city to lessor whose lessee was denied a retail alcoholic beverage permit); *Bean Dredging*, 447 So. 2d at 1061-62 ("Because the list of possible victims and the extent of economic damages might be expanded indefinitely, the court necessarily makes a policy decision on the limitation of recovery of damages.").

43. *Lowe v. Gen. Motors Corp.*, 624 F.2d 1373, 1379 (5th Cir. 1980).

44. *Audler v. CBC Innovis Inc.*, 519 F.3d 239, 252 (5th Cir. 2008) (quoting *Till v. Unifirst Fed. Sav. & Loan Ass'n*, 653 F.2d 152, 159 (5th Cir. 1981)).

obviously intended to prevent obstructions in the Nation's waterways" and that "a principal beneficiary of the Act, if not the principal beneficiary, is the Government itself"[45] indicates that the Board's asserted ground for relief on the basis of the RHA—that the Act makes it unlawful to impair in any manner, *inter alia*, a levee built by the United States—may not properly be brought to bear on private parties by a municipal authority.

Similar logic applies in the context of the CWA. That the CWA, its attendant regulations, and permits issued thereunder might require Defendants to maintain canals and to mitigate the environmental impact of their dredging activities might bear some relation to the general purpose of the Act, which is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[46] But with respect to the permits issued pursuant to the CWA that purportedly impose various maintenance requirements on Defendants, the few federal regulatory provisions that the Board cites as evidence of the contents of such permits do nothing to extend the reach of any implied duty to the protection of local government entities.

The Board's claims with respect to the CZMA are more non-specific, and even if the Board is correct to

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45. *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 201, 88 S. Ct. 379, 19 L. Ed. 2d 407 (1967) (holding that the United States may maintain a civil action against the owner of an allegedly negligently sunken vessel to recover government expenses incurred in removing the vessel).

46. 33 U.S.C. § 1251(a).

state in its complaint that the Act imposes "a litany of duties and obligations expressly designed to minimize the adverse . . . environmental effects associated with" Defendants' activities, those duties do not protect the Board, in light of the Supreme Court's acknowledgment that the Act "has as its main purpose the encouragement and assistance of States in preparing and implementing management programs to preserve, protect, develop and whenever possible restore the resources of the coastal zone of the United States."[47] The Act also states that one of its policies is to provide for "the management of coastal development to minimize the loss of life and property caused by improper development" in vulnerable areas.[48] But the Board has not pointed to any wrong committed by Defendants that even arguably serves as a basis for liability.

The complaint is equally vague in its references to applicable state regulations, and although the Board now notes that certain state statutes have the declared policy of serving ends similar to those supported by the above federal statutes, there is little evidence that any of the cited provisions create private liability. The best source of law for the proposition is *Terrebonne Parish*, in which the Fifth Circuit denied summary judgment to defendants who allegedly had breached a private duty to

47. *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 592, 107 S. Ct. 1419, 94 L. Ed. 2d 577 (1987) (quoting S. Rep. No. 92-753, at 1 (1972)).

48. 16 U.S.C. § 1452(2)(B).

protect canals against breaches and widening.[49] But that case was heavily dependent on the relationship between the litigants as parties to a servitude agreement.[50]

That case did not involve a negligence claim and certainly did not purport to extract a general duty of care from state or federal regulatory law. Additionally, as Defendants point out, *Terrebonne Parish* addressed whether a company that had dredged a canal was liable to the owners of adjacent land for the erosion caused by the widening of the canal;[51] it did not address the indirect effects that the canal had on other land in the region by virtue of its effects on the ecosystem. The Board thus has failed to establish that Defendants breached a duty of care to it under the facts alleged, and accordingly the district court properly dismissed the negligence claim.

B

Under Louisiana law, a claim for strict liability requires that a duty of care was breached, just as a

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49. *Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303, 325 (5th Cir. 2002); *see also Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 692 (E.D. La. 2006) (holding that oil and gas companies owed no duty, in the absence of a contractual relationship, to protect landowners from "hurricane damage from storm surge allegedly magnified by coastal erosion caused by" dredging).

50. *Terrebonne Parish*, 290 F.3d at 313-19.

51. *Id.* at 308-09.

negligence claim does.[52] There is essentially no difference between the two types of claim under Louisiana law,[53] and to the extent any difference existed during the time period relevant to this lawsuit, that difference was only that recovery on a theory of strict liability before 1996 did not require that the defendant had knowledge of its breach of duty.[54] Because the Board has not stated a claim that Defendants owed it a duty of care, its strict liability claim fails along with its negligence claim.

C

The complaint alleges that the lands dredged by Defendants constitute "dominant estates" under the Louisiana Civil Code that carry a natural servitude of drain over the "servient estates" owned by the Board, because "water naturally flows" from Defendants'

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52. *See Oster v. Dep't of Transp. & Dev.*, 582 So. 2d 1285, 1288 (La. 1991) ("In essence, the only difference between the negligence theory of recovery and the strict liability theory of recovery is that the plaintiff need not prove the defendant was aware of the existence of the 'defect' under a strict liability theory.").

53. *Burmaster v. Plaquemines Parish Gov't*, 982 So. 2d 795, 799 n.1 (La. 2008) ("[T]he Legislature [has] effectively eliminated strict liability . . . turning it into a negligence claim." (quoting *Lasyone v. Kan. City S. R.R.*, 786 So. 2d 682, 689 n.9 (La. 2001))).

54. La. Civ. Code art. 2317.1 (noting that a strict liability claim requires "a showing that [defendant] knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care.").

property to the Board's property.[55] It further alleges that "Defendants have rendered the natural servitude of drain more burdensome in violation of Louisiana Civil Code article 656."[56] The district court dismissed the claim on the ground that there is no basis in law for "finding that a natural servitude of drain may exist between nonadjacent estates with respect to coastal storm surge."

The Board argues that this conclusion was incorrect, noting that Louisiana Civil Code article 648 provides that "[n]either contiguity nor proximity of the two estates is necessary for the existence of a . . . servitude. It suffices that the two estates be so located as to allow one to derive some benefit from the charge on the other." The Board points to the allegations in its complaint that state that Defendants' actions have "directly altered and continue to alter the natural course, flow, and volume of water" from Defendants' lands to coastal lands. Defendants respond that the Board's allegations do not amount to a claim that Defendants' property is "situated above" the Board's property, as would be required for the existence of a servitude of drain under Louisiana Civil Code Article 655. Moreover, even though the complaint need not allege that the properties are adjacent or near to each other, Defendants point out that there need at least

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55. *See id.* art. 655 ("An estate situated below is bound to receive the surface waters that flow naturally from an estate situated above unless an act of man has created the flow.").

56. *See id.* art. 656 ("The owner of the servient estate may not do anything to prevent the flow of the water. The owner of the dominant estate may not do anything to render the servitude more burdensome.").

be some allegation that the properties are "close enough that surface water naturally flows from one to another." Even more problematic, Defendants note, is the fact that "storm surge is not surface water," and thus the fact that the Board is most concerned with damage caused by storms and hurricane-related flooding belies its claim that damage is being caused by the flow of water onto its property from some other particular property.

The explanation of the natural servitude claim contained in the complaint does little more than recite the legal requirements of such a claim. It does not name or describe the location of any of the relevant properties, and it does not explain the properties' relation to each other, other than by way of reciting the circumstances of any natural servitude claim. It does not specify which properties constitute the servient and dominant estates, and it therefore cannot allege that any particular property receives naturally flowing surface waters from any other. The Board says that Exhibits B through G to its claim exhibit a "wealth of specificity" on these questions, but the exhibits merely comprise a map indicating the location of the levee districts of the Southeast Louisiana Flood Protection Authority; the names and serial numbers of wells operated by Defendants; descriptions of the locations of wells subject to Defendants' dredging permits; and descriptions of the locations subject to Defendants' right-of-way permits. Because the Board does not argue that every single one of the hundreds of listed locations constitutes a dominant estate, it must intend only to allege that some of those locations are dominant estates. However, it has not made such an allegation. Another

possibility is that its argument is that Defendants' actions have altered the flow of water into certain bodies of water, which in turn poses a storm surge risk to the lands the Board oversees. But this would hardly constitute "[a]n estate situated below . . . receiv[ing] the *surface waters* that flow naturally from an estate situated above,"[57] and thus the district court properly dismissed the servitude of drain claim.

D

Below and here, the parties analyzed both the public and private nuisance claims as arising under Louisiana Civil Code article 667, which provides that "[a]lthough a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him."[58] For actions accruing after 1996, such proprietor "is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known that his works would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care."[59] The district court held that the Board's claims brought under this statute fail because the Board did not sufficiently allege in its complaint that it is a "neighbor" of any of

57. *Id.* art. 655 (emphasis added).

58. *Id.* art. 667.

59. *Id.*

Defendants' property. The Fifth Circuit has noted that to bring an action under Article 667, "[a] plaintiff must have some interest in an immovable near the defendant-proprietor's immovable."[60]

The lack of specificity that plagues the Board's servitude claim also makes its nuisance claim little more than a restatement of Louisiana law. The complaint states generally that Defendants have "dredged a network of canals to access oil and gas wells," and that this and other oil and gas activity have damaged Louisiana's coast. Although the Board is correct to point out that "there is no rule of law compelling 'neighbor' to be interpreted as requiring a certain physical adjacency or proximity,"[61] the Fifth Circuit has established that a complaint nonetheless must establish *some* degree of propinquity, so as to substantiate the allegation that activity on one property has caused damage on another.[62] The Board is

60. *Roberts v. Cardinal Servs., Inc.*, 266 F.3d 368, 386 (5th Cir. 2001) (emphasis removed).

61. *See id.* at 385 ("To be a 'neighbor' one need not be an adjoining landowner . . . 'it suffices that they [the lands] be sufficiently near, for one to derive benefit from the servitude on the other.'" (quoting Ferdinand Fairfax Stone, *Tort Doctrine in Louisiana: The Obligations of Neighborhood*, 40 TUL. L. REV. 701, 711 (1966))).

62. *Id.* at 387 ("To show that he is a 'neighbor,' and thus legally entitled . . . to maintain [a nuisance] action, a plaintiff must show some type of ownership interest in immovable property *near* that of the proprietor." (emphasis added)); *see also TS & C Invs., LLC v. Beusa Energy, Inc.*, 637 F. Supp. 2d 370, 383 (W.D. La. 2009) (dismissing class action nuisance claim because "plaintiffs have not demonstrated whose property is physically adjacent, closely adjacent or remote

thus incorrect to interpret the relevant law to require nothing more than a "causal nexus" between the offending property and the damage done, and in the absence of allegations that the relevant properties were near to each other, the Board has not stated a claim for nuisance.

* * *

For the foregoing reasons, the district court's dismissal of the Board's claims is AFFIRMED.

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from the well site"); *In re Katrina Canal Breaches Consol. Litig.*, 647 F. Supp. 2d 644, 734 (E.D. La. 2009), *rev'd on other grounds*, 696 F.3d 436 (5th Cir. 2012) ("Although there is a paucity of guidance in the law as to the proximity required so as to be a 'neighbor' for purposes of [a nuisance claim], the Court finds that [three miles] is too attenuated for these plaintiffs to be so considered.").

APPENDIX B — DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, DISMISSING ACTION, DATED FEBRUARY 13, 2015

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION CASE NO. 13-5410 SECTION: "G"(3)

BOARD OF COMMISSIONERS OF THE SOUTHEAST LOUISIANA FLOOD PROTECTION AUTHORITY — EAST *et al.*,

VERSUS

TENNESSEE GAS PIPELINE COMPANY, LLC *et al.*

February 13, 2015, Decided
February 13, 2015, Filed

ORDER

Before the Court is Defendants' "Joint Motion to Dismiss for Failure to State a Claim Under Rule 12(b)(6)."[1] Having considered the motion, the memoranda in support, the memoranda in opposition, the statements at oral argument, the Petition, and the applicable law, the Court will grant the motion with respect to each of Plaintiff's claims.

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1. Rec. Doc. 427.

Appendix B

I. Background

A. Factual Background

Plaintiff in this matter is the 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.[2] The Southeast Louisiana Flood Protection Authority (the "Authority") was created by statute in 2006 to further "regional coordination of flood protection."[3] According to Plaintiff, the Authority's "mission is to ensure the physical and operational integrity of the regional flood risk management system, and to work with local, regional, state and federal partners to plan, design and construct projects that will reduce the probability and risk of flooding of the residents within the Authority's jurisdiction."[4]

Defendants are eighty-eight oil and gas companies operating in what Plaintiff refers to as the "Buffer Zone."[5] The Buffer Zone "extends from East of the Mississippi River through the Breton Sound Basin, the Biloxi Marsh,

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2. Rec. Doc. 1-2 at p. 2.

3. 2006 La. Sess. Law. Serv. 1st Ex. Sess. Act 1 (S.B. 8) (West) (codified at LA.REV.STAT. §38:330.1(F)(2)(a)).

4. Rec. Doc. 1-2 at p. 5.

5. Plaintiff initially named 149 defendants. *See id.* at pp. 25-34. However, only 88 defendants remain in this litigation.

and the coastal wetlands of eastern New Orleans and up to Lake St. Catherine."[6]

Plaintiff alleges that Defendants' oil and gas operations have led to coastal erosion in the Buffer Zone, making south Louisiana more vulnerable to severe weather and flooding. According to Plaintiff, "[c]oastal lands have for centuries provided a crucial buffer zone between south Louisiana's communities and the violent wave action and storm surge that tropical storms and hurricanes transmit from the Gulf of Mexico."[7] However, "[h]undreds of thousands of acres of coastal lands that once protected south Louisiana are now gone as a result of oil and gas activities."[8] Specifically, Plaintiff asserts that Defendants have "dredged a network of canals to access oil and gas wells and to transport the many products and by-products of oil and gas production."[9] This canal network, in conjunction with "the altered hydrology associated with oil and gas activities," has caused vegetation die-off, sedimentation inhibition, erosion, and submergence—all leading to coastal land loss.[10] In addition to the initial dredging, Plaintiff maintains that Defendants "exacerbate direct land loss by failing to maintain the canal network and banks of the canals that Defendants have dredged,

6. *Id.* at p. 7.

7. *Id.* at p. 2.

8. *Id.*

9. *Id.* at p. 9.

10. *Id.*

used, or otherwise overseen."[11] This failure has "caused both the erosion of the canal banks and expansion beyond their originally permitted widths and depths of the canals comprising that network."[12] Looking beyond the alleged effects of the canal network, Plaintiff identifies ten other oil and gas activities that, it claims, "drastically inhibit the natural hydrological patterns and processes of the coastal lands"—road dumps, ring levees, drilling activities, fluid withdrawal, seismic surveys, marsh buggies, spoil disposal/dispersal, watercraft navigation, impoundments, and propwashing/ maintenance dredging.[13]

B. Procedural Background

On July 24, 2013, Plaintiff filed suit in Civil District Court for the Parish of Orleans, State of Louisiana.[14] In its petition, Plaintiff asserts six causes of action: (1) negligence,[15] (2) strict liability,[16] (3) natural servitude of drain,[17] (4) public nuisance,[18] (5) private nuisance,[19] and

11. *Id.* at p. 11.

12. *Id.*

13. *Id.* at p. 10.

14. *Id.* at p. 1.

15. *Id.* at p. 17.

16. *Id.* at p. 18.

17. *Id.* at p. 19.

18. *Id.* at p. 20.

19. *Id.* at p. 21.

(6) breach of contract—third party beneficiary.[20] Plaintiff requests both damages and injunctive relief

> . . . in the form of abatement and restoration of the coastal land loss at issue, including, but not limited to, the backfilling and revegetating of each and every canal Defendants dredged, used, and/or for which they bear responsibility, as well as all manner of abatement and restoration activities determined to be appropriate, including, but not limited to, wetlands creation, reef creation, land bridge construction, hydrologic restoration, shoreline protection, structural protection, bank stabilization, and ridge restoration.[21]

While Plaintiff's six causes of action are all ostensibly state-law claims, Plaintiff contends that "Defendants' dredging and maintenance activities at issue in this action are governed by a longstanding and extensive regulatory framework under both federal and state law specifically aimed at protecting against the deleterious effects of dredging activities."[22] According to Plaintiff, "the relevant components of this regulatory framework . . . buttress the Authority's claims."[23] Specifically, Plaintiff points to the Rivers and Harbors Act of 1899, which "grants to the [Army Corps of Engineers] exclusive authority to permit

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20. *Id.* at p. 22.

21. *Id.* at p. 23.

22. *Id.* at p. 16.

23. *Id.*

modification of navigable waters of the United States and prohibits the unauthorized alteration of or injury to levee systems and other flood control measures built by the United States."[24] Plaintiff also cites the Clean Water Act of 1972 and accompanying regulations, which require Defendants to "[m]aintain canals and other physical alterations as originally proposed; [r]estore dredged or otherwise modified areas to their natural state upon completion of their use or their abandonment; and [m] ake all reasonable efforts to minimize the environmental impact of the Defendants' activities."[25] Further, Plaintiff references the Coastal Zone Management Act of 1972 and related Louisiana coastal zone regulations that "impose . . . a litany of duties and obligations expressly designed to minimize the adverse ecological, hydrological, topographical, and other environmental effects" associated with oil and gas activities.[26] Finally, Plaintiff cites "[r]egulations and rights-of-way granted across state-owned lands and water bottoms administered by the Louisiana Office of State Lands."[27] According to Plaintiff, "[t]his regulatory framework establishes a standard of care under Louisiana law that Defendants owed and knowingly undertook when they engaged in oil and gas activities."[28] Additionally, Plaintiff avers that these "permitting schemes created numerous individual

24. *Id.*

25. *Id.*

26. *Id.* at p. 17.

27. *Id.* at p. 16.

28. *Id.* at p. 17.

obligations under Louisiana law between Defendants and governmental bodies of which Plaintiff is the third-party beneficiary."[29]

On August 13, 2013, Defendant Chevron U.S.A. Inc. ("Chevron") removed the case to federal court.[30] On September 10, 2013, Plaintiff filed a "Motion to Remand."[31] All Defendants filed a "Joint Response in Opposition to the Motion to Remand,"[32] and Defendant Tennessee Gas Pipeline Company, LLC, Gulf South Pipeline Co. LP, Southern Natural Gas Company, and Boardwalk Pipeline Partners, LP filed an additional "Response in Opposition to Motion to Remand"[33] addressing jurisdictional issues specific to certain natural gas producers. The Court also received supplemental briefs from HKN, Inc.,[34] White Oak Operating, LLC,[35] Liberty Oil and Gas Corporation,[36] Manti Operating Company,[37] Mosbacher Energy

29. *Id.*

30. Rec. Doc. 1.

31. Rec. Doc. 70.

32. Rec. Doc. 260.

33. Rec. Doc. 254.

34. Rec. Doc. 258.

35. Rec. Doc. 262.

36. Rec. Doc. 263.

37. Rec. Doc. 264.

Company,[38] Coastal Exploration & Production, LLC,[39] and Flash Gas & Oil Northeast, Inc.[40] On November 13, 2013, Plaintiff filed an "Omnibus Reply Memorandum in Support of Its Motion to Remand."[41]

The Court denied Plaintiff's Motion to Remand on June 27, 2014.[42] In its Order, the Court explained that federal question jurisdiction exists in this case under an exception to the "well-pleaded complaint" rule providing that 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.[43]

Applying this test, the Court determined that Plaintiff's claims for negligence under Louisiana Civil Code Article 2315, public nuisance under Louisiana Civil Code Article 667, and breach of contract as a third-party beneficiary necessarily raise a federal issue.[44] First, the Court found that Plaintiff's claim "necessarily raises" what duties the Rivers and Harbors Act, the Clean Water Act, and the Coastal Zone Management Act impose upon

38. Rec. Doc. 265.

39. Rec. Doc. 266.

40. Rec. Doc. 268.

41. Rec. Doc. 292.

42. Rec. Doc. 363.

43. *Id.* at p. 83.

44. *See id.* at pp. 66-75.

Defendants. The Court determined that these three federal statutes do not merely present "one of multiple theories" that could support Plaintiff's negligence claim; rather, they are the only specific sources of the duty Plaintiff must establish in order to prevail. Next, the Court determined that Plaintiff's claim for public nuisance necessarily involves the application of federal law because, as with the negligence claim, Plaintiff "necessarily raises" what conduct constitutes "unreasonable interference" under the three federal statutes listed above. Finally, with respect to Plaintiff's claim as a third-party beneficiary for breach of contract, the Court determined that federal law applies to nonparty breach of contract claims where the contract implicated a federal interest, the United States was a party to the contract, and the contract was entered into pursuant to federal law. Accordingly, the Court stated that federal common law applies to the interpretation of the alleged contracts at issue, and, therefore, Plaintiff's breach of contract claim necessarily raises an issue of federal law.

The Court then determined that the federal issues identified above are all disputed[45] and substantial.[46] Specifically, the Court found that the disputed issues implicate coastal land management, national energy policy, and national economic policy—all vital federal interests. The Court additionally noted that Plaintiff's claims amount to a collateral attack on an entire regulatory scheme. Finally, the Court determined that exercising jurisdiction will not disturb the balance of federal and

45. *See id.* at p. 75.

46. *See id.* at pp. 76-82.

state judicial responsibilities because Plaintiff's claims look to federal law to impose liability on an entire industry for the harms associated with coastal erosion.[47] Accordingly, the Court found that it has jurisdiction over the pending matter because Plaintiff's state law claims for negligence, public nuisance, and breach of contract necessarily raise a federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing the congressionally approved balance of federal and state judicial responsibilities.[48]

On September 5, 2014, Defendants filed the pending "Joint Motion to Dismiss for Failure to State a Claim under Rule 12(b)(6)."[49] Plaintiff filed a memorandum in opposition on October 1, 2014,[50] and Defendants filed a reply memorandum in further support of their motion on October 15, 2014.[51] Plaintiff filed a supplemental memorandum on November 21, 2014,[52] and Defendants filed a supplemental response on December 5, 2014.[53] The Court heard oral arguments with respect to this motion on November 12, 2014.[54]

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47. *See id.* at pp. 82-83.

48. *See id.*

49. Rec. Doc. 427.

50. Rec. Doc. 446.

51. Rec. Doc. 469.

52. Rec. Doc. 487.

53. Rec. Doc. 490.

54. Rec. Doc. 482.

Appendix B

II. Parties' Arguments

A. Defendants' Arguments in Support

Defendants first argue that Plaintiff has failed to allege a cause-in-fact connecting any act by any Defendant to the alleged damages, "instead alleging that an entire industry is liable for its 'oil and gas activities.'"[55] According to Defendants, the petition alleges enterprise, or market share, liability, which has been rejected under Louisiana law.[56]

Defendants next contend that each of Plaintiff's six causes of action fail to state a claim upon which relief may be granted.[57] First, Defendants argue that Plaintiff cannot state viable negligence or strict liability claims[58] because Defendants do not owe a legal duty under state or federal law to protect Plaintiff against a storm, to restore marshland, or to protect Plaintiff from any increased cost of maintaining levees.[59] Defendants distinguish this case

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55. Rec. Doc. 427-1 at p. 12.

56. *Id.* at pp. 13-14 (citing, e.g., *Barasich v. Columbia Gulf Transmission Co.*, 467 F.Supp.2d 676 (E.D. La. 2006) (Vance, J.)).

57. *Id.* at p. 15.

58. Defendants do not conduct separate analyses for Plaintiff's negligence and strict liability claims.

59. Rec. Doc. 427-1 at p. 17-18 (citing *Barasich*, 467 F.Supp.2d at 691-92; *Terrebonne Parish School Bd. v. Castex Energy, Inc.*, 2004-0968 (La. 1/19/05), 893 So.2d 789; *Caldwell v. Let the Good Times Roll Festival*, 30-800, 717 So. 2d 1263, (La. App. 2d Cir. 1998), *writ. denied*, 729 So. 2d 566 (La. 1998)).

from *Terrebonne Parish School Bd. v. Castex Energy, Inc.* and *Barasich v. Columbia Gulf Transmission Co.*, where "plaintiffs at least complained that the defendants' activities had caused, in however attenuated a fashion, damage to plaintiffs' own property."[60] Here, in contrast, Defendants argue, Plaintiff "is suing solely for indirect economic losses—the alleged increased cost of flood control—caused by alleged damage to the property of others."[61] Defendants aver that both Louisiana courts and the United States Court of Appeals for the Fifth Circuit have refused to find a legal duty in a claim of indirect economic injury arising from physical harm to another's property. Additionally, Defendants contend that the three federal statutes implicated by Plaintiff's claims—the Rivers and Harbors Act, the Clean Water Act, and the Coastal Zone Management Act—do not impose a statutory duty on Defendants to protect Plaintiff from indirect economic losses.[62] It is Defendants' position, therefore, that a duty to protect Plaintiff does not arise under either state or federal law.

Next, Defendants argue that, under Louisiana law, claims for natural servitude of drain and nuisance[63] require that the plaintiff and defendant own adjacent property,

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60. *Id.* at p. 19.

61. *Id.*

62. *Id.* at pp. 23-24.

63. Defendants do not conduct separate analyses for Plaintiff's private nuisance and public nuisance claims, but rather refer to both claims as "nuisance."

making them neighbors.[64] Here, according to Defendants, Plaintiff has not stated a viable claim under natural servitude of drain or nuisance because it does not own property adjacent to property owned by any Defendant.[65] Defendants also argue that Plaintiff's natural servitude of drain claim fails for several independent reasons. First, Defendants contend that Plaintiff has not alleged with the requisite specificity that it owns a servient estate and that Defendants own dominant estates, "nor could it when Defendants' rights to access canals are personal servitude rights of use, insusceptible of creating a predial servitude."[66] Additionally, according to Defendants, a natural servitude of drain applies only to the natural flow of water from a higher estate to a lower estate, whereas here, Plaintiff's claims involve the failure of coastal lands to impede storm surges coming from the Gulf.[67]

Finally, Defendants argue that Plaintiff has not stated a claim for breach of contract because it is not a third-party beneficiary to any contract with Defendants.[68] According to Defendants, a license or permit is not a contract under Louisiana law.[69] Moreover, "the permits

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64. *Id.* at pp. 25-26.

65. *Id.* at p. 25.

66. *Id.* at p. 30 (citing La. Civ Code arts. 646, 650).

67. *Id.* (citing *Poole v. Guste*, 261 LA. 1110, 262 So.2d 339, 348 (La. 1972) (Summers, J., dissenting)).

68. *Id.* at p. 31.

69. *Id.* (citing *Toye Bros. Yellow Cab Co. v. Coop. Cab Co.*, 199 LA. 1063, 7 So.2d 353, 354 (La. 1942)).

predate the Board, were issued irrespective of the Board, and were not created to discharge an obligation owed by the permitting authority to the Board."[70] It is Defendants' position that even if the permits constitute contracts, Plaintiff is, at most, an incidental beneficiary without legal authority to sue for alleged non-compliance.[71] Defendants contend that Plaintiff cannot allege any specific permit or right-of-way provision that reflects an intent to benefit the Board.[72]

B. Plaintiff's Arguments in Opposition

Plaintiff argues first that its claims do not rely on enterprise liability theory because:

> The Petition contains extensive details about the defendants, including more than 120 pages about each defendant's activities in the Buffer Zone, including permit numbers, locations, dates, and other information identifying where and when each defendant was involved; the referenced permits and rights-of-way contain detailed information about each defendant's obligations.[73]

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70. *Id.* at p. 32.

71. *Id.*

72. *Id.* (citing *City of Shreveport v. Gulf Oil Corp.*, 431 F.Supp.1 (W.D. La. 1975), *aff'd*, 551 F.2d 93 (5th Cir. 1977); *Joseph*, 939 So.2d at 1214)).

73. Rec. Doc. 446 at pp. 10-11.

According to Plaintiff, the petition is sufficiently pled to survive dismissal at this stage in the litigation.[74]

First, Plaintiff contends that it has stated viable negligence and strict liability claims[75] against Defendants based on both the general legal rule of duty found in Louisiana Civil Code Article 2315 and on specific standards of care found in "permits, rights-of-way, and statutory and regulatory obligations."[76] According to Plaintiff, "the rule of law imposed is highly specific to duties and obligations to maintain the defendants' permitted and regulated works within prescribed metes and bounds, and to otherwise operate reasonably, specifically in order to avoid land loss and the resultant increase in storm surge."[77] Plaintiff argues that this duty extends to damages alleged in this lawsuit because "[t]he increased storm surge that results from the defendants' breach of their duties impacts *directly* on the hurricane protection and flood control structures owned and operated by the plaintiffs here."[78] It is Plaintiff's position that the impact of Defendants' conduct on the Plaintiff's storm protection assets is direct,

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74. *Id.* at p. 13 (citing *Moore v. BASF Corp.*, No. 11-1001, 2011 U.S. Dist. LEXIS 134848, 2011 WL 5869597 (E.D. La. 11/21/11) (Vance, J.)).

75. Plaintiff does not conduct separate analyses for its negligence and strict liability claims.

76. *Id.* (distinguishing *Caldwell v. Let the Good Times Roll Festival*, 30-800, 717 So.2d 1263 (La. App. 2 Cir. 1998)).

77. *Id.* at p. 18.

78. *Id.* at p. 17.

and there is accordingly an ease of association between the alleged negligent conduct of Defendants and the alleged injury suffered by Plaintiff.[79]

Next, Plaintiff argues that natural servitude of drain and nuisance[80] are predial servitudes, and neither adjacency nor ownership of property are necessary to assert such claims under Louisiana law.[81] According to Plaintiff, "[n]either contiguity nor proximity of the two estates is necessary for the existence of a predial servitude. It suffices that the two estates be so located as to allow one to derive some benefit from the charge on the other."[82] Plaintiff further argues that "Louisiana courts have long recognized that the adjacency requirement in Article 667 depends on the ability of one proprietor's actions to effect another proprietor's property, not on a

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79. *Id*. at pp. 18-19 (citing *PPG Industries, Inc. v. Bean Dredging*, 447 So. 2d 1058, 1062 (La. 1984); *Gulf Production Co. v. Hoover Oilfield Supply, Inc.*, No. 08-5016, 2011 U.S. Dist. LEXIS 113043, 2011 WL 4572688, *4-5 (E.D. La. 9/30/11) (Lemelle, J.); *Virgin Oil Co. v. Tenn. Gas Pipeline Co.*, No. 11-01521, 2012 U.S. Dist. LEXIS 24328, 2012 WL 652037, at *3 (W.D. La. 2/27/12); *Cleco Corp. v. Johnson*, 2001-175 (La. 9/18/11), 795 So. 2d 302, 306-07)).

80. Plaintiff does not conduct separate analyses for its private nuisance and public nuisance claims, but rather refers to both claims as "nuisance."

81. *See id*. at pp. 20-21.

82. *Id*. at p. 20 (citing La. Civ. Code art. 648; *Id*. (citing *Young v. International Paper Co.*, 179 La. 803, 805, 155 So. 231 (1934); *Maddox v Int'l Paper Co.*, 47 F.Supp. 829, 831 (W.D. La. 1942)).

bright-line test dependent on physical proximity."[83] With respect to ownership of the property, Plaintiff argues that Defendants possess or have possessed temporary ownership rights over dominant estates, which have carried a natural servitude of drain over Plaintiff's property, the servient estate.[84] The extent of ownership rights that each Defendant possesses over the relevant area in which it operated, Plaintiff argues, is a fact-intensive inquiry that is not susceptible to determination on a motion to dismiss.[85] Plaintiff additionally argues that a servitude has been found to exist on tidal lands, and that accordingly a servitude of drain claim may apply to the failure of coastal lands to impede storm surges coming from the Gulf.[86]

Finally, Plaintiff avers that it has stated a viable claim for breach of contract as a third-party beneficiary of the obligations undertaken by Defendants in more than 200 permits issued by the Corps and more than 50

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83. *Id.* at p. 26 (citing *Gulf Ins. Co. v. Employers Liab. Assurance Corp.*, 170 So.2d 125, 129 (La. App. 4 Cir. 1964); *Roberts*, 266 F.3d at 386; *Craig v. Montelepre Realty Co.*, 252 LA. 502, 211 So. 2d 627, 631 n.3 (La. 1968); *Brister v. Gulf C. Pipeline Co.*, 684 F. Supp 1373, 1385 (W.D. La. 1988)).

84. *Id.* at p. 21 (citing Petition at ¶ 22) (citing *Tool House, Inc. v. Tynes*, 564 So.2d 720, 721 (La. App. 2 Cir. 1990) *writ denied*, 568 So. 2d 1087 (La.1990)).

85. *Id.* at p. 22.

86. *Id.* at pp. 22-23 (citing *Poole v. Guste*, 261 LA. 1110, 262 So.2d 339 (La. 1972)).

right-of-way agreements.[87]It is Plaintiff's position that the permits, rights-of-way, and regulatory framework impose obligations upon Defendants, and that these obligations manifest an intent to confer a benefit in favor of third parties, constituting stipulations *pour autrui* under Louisiana law.[88] Plaintiff additionally argues that Louisiana courts have rejected the argument that there can be no stipulation *pour autrui* unless the third-party beneficiary is named or determinable.[89] Instead, according to Plaintiff, it is permissible to stipulate for undetermined persons as long as those persons are "determinable" on the day on which the agreement is to have effect for their benefit.[90]

C. Defendants' Arguments in Reply

In response to Plaintiff's memorandum in opposition, Defendants reaver that Plaintiff's claims impermissibly

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87. Rec. Doc. 446 at p. 27.

88. *Id.* at pp. 28-29 (citing LA.CIV.CODE art. 1756; *Hargroder v. Columbia Gulf Transmission Co.*, 290 So. 2d 874 (La. 1974); *Duck v. Hunt Oil Co.*, No. 13-628, 134 So.3d 114 (La. App. 3 Cir. 2014), *writ denied*, 140 So. 3d 1189 (2014); *Cooper v. La. Dep't of Public Works*, No. 03-10745, 870 So.2d 315 (La. App. 3 Cir. 2004)).

89. *Id.* at pp. 30-31 (citing *Andrepont v. Acadia Drilling Co.*, 255 LA. 347, 231 So. 2d 347 (La. 1969)).

90. *Id.* (citing *Andrepont v. Acadia Drilling Co.*, 255 LA. 347, 231 So. 2d 347 (La. 1969); *Lawson v. Shreveport Waterworks Co.*, 111 LA. 73, 35 So. 390 (La. 1903); *Duck v. Hunt Oil Co.*, No. 13-628, 134 So.3d 114 (La. App. 3 Cir. 3/5/14), *writ denied*, 140 So. 3d 1189 (2014); *Lemon v. Bossier Parish Sch. Bd.*, 240 F. Supp. 709 (W.D. La. 1965)).

rely on enterprise liability.[91] Defendants argue that Plaintiff has failed to plead facts supporting breach of duty based on the permits because "it has provided merely a 'sampling' of permits and, in fact, many of the permittees are not even Defendants."[92]

Defendants reaver that they do not owe any legal duty that extends so far as protecting Plaintiff from the risk of storm surge or indirect economic injury.[93] They contend that it is "settled jurisprudence" that a federal statute can create a duty only if its purpose is to impose a duty upon the defendant to protect the plaintiff from the particular risk at issue.[94] According to Defendants, neither the Rivers and Harbors Act, nor the Clean Water Act, nor the Coastal Zone Management Act were intended by Congress to impose a duty on Defendants to protect Plaintiff from the increased costs of flood protection.[95]

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91. Rec. Doc. 469 at p. 7.

92. *Id.* at p. 8.

93. *Id.* at pp. 9-10 (citing *Maw Enterprises, L.L.C. v. City of Marksville*, No. 2014-0090, 149 So.3d 210 (La. 9/13/14); *PPG Industries, Inc. v. Bean Dredging*, 447 So.2d 1058 (La. 1984)).

94. *Id.* at p. 11 (citing *Hill v. Lundin & Assoc.*, Inc., 260 LA. 542, 256 So.2d 620 (La. 1972); *Cormier v. T.H.E. Ins. Co.*, No. 98-2208, 745 So.2d 1 (La. 1999); *Lazard v. Foti*, No. 2002-2888, 859 So.2d 656 (La. 2003)).

95. *Id.* at p. 12 (citing *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 201, 88 S. Ct. 379, 19 L. Ed. 2d 407 (1967); *California v. Sierra Club*, 451 U.S. 287, 294, 101 S. Ct. 1775, 68 L. Ed. 2d 101 (1981)).

Defendants additionally argue that, while adjacency of estate is not required for some predial servitudes, servitudes arising under Article 667 apply only to "neighbors."[96] Defendants reaver that the "neighbors" requirement is not met in this case.[97] Defendants additionally contend that "[a]lthough Articles 655 and 656 do not include the word 'neighbors,' they require that the properties be sufficiently close that water flows from a higher estate to another that is lower."[98] Defendants reaver that Article 655 concerns only surface waters that "flow naturally from a dominant estate (the estate 'situated above') to a servient estate (the estate 'situated below')," and that Plaintiff has not alleged that Defendants have any property, let alone property "situated above" Plaintiff's property.[99] According to Defendants, Plaintiff seeks to create a new obligation requiring a coastal property owner to preserve a buffer zone to slow storm surge, and such an obligation is not cognizable under a natural servitude of drain cause of action.[100]

Finally, Defendants reaver that the permits and rights-of-way at issue do not create contractual rights, and that Plaintiff has failed to allege any contract with the requisite "clear intention" to benefit Plaintiff.[101] According

96. *Id.* at pp. 12-13.

97. *Id.* at p. 13.

98. *Id.* at p. 14.

99. *Id.*

100. *Id.* at p. 15.

101. *Id.* at p. 16.

to Defendants, Louisiana law requires that a stipulation *pour autrui* be in writing if the contract itself must be in writing, and Plaintiff has neither identified any express written stipulation nor suggested that a writing is not required.[102]

D. Plaintiff's Supplemental Memorandum in Opposition

Following oral argument on the pending motion, Plaintiff submitted a supplemental memorandum in further opposition to Defendants' motion to dismiss.[103] Plaintiff argues first that the Fifth Circuit has recognized that the exact type of conduct alleged here—the widening of oilfield canals due to erosion and failure to maintain the canals used by oil, gas, and pipeline companies—implicates an Article 2315 duty.[104] Plaintiff reavers that Defendants' duty extends from Article 2315, but that the standard of care is "delineated" from federal statutes; namely, the Rivers and Harbors Act, the Clean Water Act, and the Coastal Zone Management Act.[105] Plaintiff argues that the Fifth Circuit and Louisiana courts have recognized that a defendant's standard of care with

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102. *Id.* at n. 29.

103. Rec. Doc. 487.

104. *Id.* at p. 3 (citing *Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303, 325 (5th Cir. 2002)).

105. *Id.* at p. 4 (citing *Langlois v. Allied Chemical Corp.*, 258 LA. 1067, 249 So. 2d 133, 137 (La. 1971), *abrogated by statute on other grounds, as recognized in Murray v. Ramada Inns, Inc.*, 521 So.2d 1123 (La. 1988)).

respect to a state law cause of action may be determined by reliance on federal statutes.[106]

Plaintiff next argues that it is owed a duty of care by Defendants because it, or its predecessors, have operated, maintained, and controlled the levees for more than 100 years.[107] According to Plaintiff, this demonstrates "a clear 'ease of association' between the [D]efendants' duty not to impair the usefulness of the levees through activities that cause the loss of coastal wetlands and [Plaintiff's] harm resulting directly from the impairment of the usefulness of the levees under its charge." [108] Further, Plaintiff contends that it has the express "statutory charge" specifically regarding the levees, the coastal erosion, and marsh management issues that are the subject of the Defendants' duty.[109]

Finally, Plaintiff argues that the United States Supreme Court's recent decision in *Johnson v. City of Shelby, Miss.* "made clear that courts are not to apply the strictures of *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, beyond questions of fact alleged, in motions to dismiss claims based on allegations of the legal basis.[110]

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106. *Id.* (citing *Lowe v. General Motors Corp.*, 624 F.2d 1373, 1378 (5th Cir. 1980); *Manchack v. Willamette Indus.*, 621 So. 2d 649, 652-53 (La. App. 2 Cir. 1993)).

107. *Id.* at p. 6.

108. *Id.* at p. 7.

109. *Id.* at pp. 7-8 (citing La. Rev. Stat. § 38:330.1(F)(2)(a)).

110. *Id.* at p. 8 (citing *Johnson v. City of Shelby, Miss.*, 135 S.Ct. 346, 190 L. Ed. 2d 309 (2014)).

According to Plaintiff, *Johnson* held that *Twombly* and *Iqbal* apply only to factual allegations. Plaintiff argues that questions of the existence of duty and the analysis of standards of care and ease of association under Louisiana law are issues of law, not fact.[111]

E. Defendants' Arguments in Further Support

Defendants first contend that *Johnson* does not alter the pleading standard set forth in *Twombly* and *Iqbal*, but rather reaffirms that to "stave off threshold dismissal, a plaintiff must plead facts sufficiently to show that her claim has substantive plausibility."[112] Defendants reaver that because Plaintiff has failed to allege facts of wrongful acts by any one Defendant, and instead relies on allegations against an entire industry, the Complaint must be dismissed.[113] Defendants argue, additionally, that Plaintiff never entered into a contract with any Defendant, nor does Plaintiff own the land on which any Defendant dredged canals.[114]

Defendants reaver that the Fifth Circuit in *Audler* held that in order for a federal statute to create a duty

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111. *Id.*

112. Rec Doc. 488-2 at p. 1 (citing *Johnson v. City of Shelby, Miss.*, 135 S.Ct. 346, 190 L. Ed. 2d 309 (2014)).

113. *Id.* at p. 2 (citing *Barasich*, 467 F.Supp. 2d 676 (E.D. La. 2006)).

114. *Id.* (distinguishing *Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303, 325 (5th Cir. 2002)).

in favor of a plaintiff against a defendant, the plaintiff must be the intended beneficiary — not simply an incidental beneficiary — of the statute.[115] The Rivers and Harbors Act, the Clean Water Act, and the Coastal Zone Management Act, according to Defendants, are intended to create a duty in favor of the federal government, not the Plaintiff.[116] Defendants argue that even if Plaintiff could establish that it was the intended beneficiary, the harm is too attenuated to establish an "ease of association" between Plaintiff's harm and Defendants' conduct.[117]

III. Legal Standards

A. Standard on a Motion to Dismiss Under Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) provides that an action may be dismissed "for failure to state a claim upon which relief can be granted."[118] "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'"[119] "Factual allegations must

115. *Id.* (citing *Audler v. CBC Innovis Inc.*, 519 F.3d 239, 252 (5th Cir. 2008)).

116. *Id.*

117. *Id.* (citing *Cormier v. T.H.E. Ins. Co.*, No. 98-2208, 745 So.2d 1, 7 (La. 1999)).

118. Fed. R. Civ. P. 12(b)(6).

119. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S.

be enough to raise a right to relief above the speculative level."[120] A claim is facially plausible when the plaintiff has pleaded facts that allow the court to "draw a reasonable inference that the defendant is liable for the misconduct alleged."[121]

On a motion to dismiss, asserted claims are liberally construed in favor of the claimant, and all facts pleaded are taken as true.[122] However, although required to accept all "well-pleaded facts" as true, a court is not required to accept legal conclusions as true.[123] "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."[124] Similarly, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" will not suffice.[125] The complaint need not contain detailed factual

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544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2008); *see also Johnson v. City of Shelby, Miss.*, 135 S.Ct. 346, 347, 190 L. Ed. 2d 309 (2014) ("A plaintiff . . . must plead facts sufficient to show that her claim has substantive plausibility.").

120. *Twombly*, 550 U.S. at 556.

121. *Id.* at 570.

122. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007).

123. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

124. *Id.* at 679.

125. *Id.* at 678.

allegations, but it must offer more than mere labels, legal conclusions, or formulaic recitations of the elements of a cause of action.[126] That is, the complaint must offer more than an "unadorned, the defendant-unlawfully-harmed-me accusation."[127] From the face of the complaint, there must be enough factual matter to raise a reasonable expectation that discovery will reveal evidence as to each element of the asserted claims.[128] If factual allegations are insufficient to raise a right to relief above the speculative level, or if it is apparent from the face of the complaint that there is an "insuperable" bar to relief, the claim must be dismissed.[129]

Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law.[130] "Nothing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable. On the contrary, if as a matter of law it is clear that no relief could be granted under any set of facts that could be proved consistent with the

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126. *Id.*

127. *Id.*

128. *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 257 (5th Cir. 2009).

129. *Moore v. Metropolitan Human Serv. Dist*, No. 09-6470, 2010 U.S. Dist. LEXIS 34808, 2010 WL 1462224, at * 2 (E.D. La. Apr. 8, 2010) (Vance, J.) (citing *Jones v. Bock*, 549 U.S. 199, 215, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007)); *Carbe v. Lappin*, 492 F.3d 325, 328, n.9 (5th Cir. 2007).

130. *Neitzke v. Williams*, 490 U.S. 319, 326, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989) (citations omitted).

allegations, a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one."[131]

B. Applying Louisiana Law

When a federal court interprets a state law, it must do so according to the principles of interpretation followed by that state's highest court.[132] In Louisiana, "courts must

131. *Id.* (internal citation and quotation marks omitted). The Court notes that Plaintiff asserts that the United States Supreme Court's recent decision in *Johnson v. City of Shelby, Miss.*, 135 S.Ct. 346, 190 L. Ed. 2d 309 (2014) "made clear that courts are not to apply the strictures of *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, beyond questions of fact alleged, in motions to dismiss claims based on allegations of the legal basis." (Rec. Doc. 487 at p. 8). In *Johnson*, the Supreme Court reversed the Fifth Circuit's decision affirming the dismissal of a civil rights claim for failure to expressly invoke 42 U.S.C. § 1983. The Court noted that the Federal Rules of Civil Procedure "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." Contrary to Plaintiff's position, this Court does not read *Johnson* to prohibit a district from dismissing a claim on the basis of a dispositive issue of law, or to alter the long-standing rule that dismissal is appropriate as a matter of law it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Here, Plaintiff has not submitted an "imperfect statement" of the legal theories upon which it relies. Rather, for the reasons stated below, Plaintiff has not stated a claim for negligence, strict liability, natural servitude of drain, private nuisance, public nuisance, or breach of contract upon which relief may be granted.

132. *Am. Int'l Specialty Lines Ins. Co. v. Rentech Steel LLC*, 620 F.3d 558, 564 (5th Cir. 2010); *Gen. Elec. Capital Corp. v. Se. Health Care, Inc.*, 950 F.2d 944, 950 (5th Cir. 1991).

begin every legal analysis by examining primary sources of law: the State's Constitution, codes, and statutes."[133] These authoritative or primary sources of law are to be "contrasted with persuasive or secondary sources of law, such as [Louisiana and other civil law] jurisprudence, doctrine, conventional usages, and equity, that may guide the court in reaching a decision in the absence of legislation and custom."[134] To make a so-called "*Erie* guess" on an issue of Louisiana law, the Court must "employ the appropriate Louisiana methodology" to decide the issue the way that it believes the Supreme Court of Louisiana would decide it.[135] With respect to issues of federal law, however, "[i]t is beyond cavil that [federal courts] are not bound by a state court's interpretation of federal law regardless of whether our jurisdiction is based on diversity of citizenship or a federal question."[136] Accordingly, "the *Erie* doctrine does not apply [. . .] in matters governed by the federal Constitution or by acts of Congress."[137]

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133. *Shaw Constructors v. ICF Kaiser Engineers, Inc.*, 395 F.3d 533, 547 (5th Cir. 2004).

134. *Id.* (quoting LA. CIV. CODE. art. 1).

135. *Id.* (citation omitted).

136. *Id.* (citations omitted).

137. *Grantham v. Avondale Indus., Inc.*, 964 F.2d 471, 473 (5th Cir. 1992) (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)).

Appendix B

IV. Analysis

Defendants move this Court to dismiss each and every claim asserted by Plaintiff in this action. As stated above, Plaintiff brings the following claims: (1) negligence pursuant to Article 2315; (2) strict liability pursuant to Articles 2317 and 2317.1; (3) natural servitude of drain pursuant to Article 656; (4) public nuisance pursuant to Article 667; (5) private nuisance pursuant to Article 667; and (6) breach of contract as a third party beneficiary.[138] The Court will address each claim in turn.

A. Negligence

Article 2315 of the Louisiana Civil Code establishes a general cause of action for negligence: "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."[139] In determining whether to impose liability under Article 2315, Louisiana courts employ a duty-risk analysis, whereby a plaintiff must establish the following five elements: "(1) the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) the defendant's conduct failed to conform to the appropriate standard (the breach element); (3) the defendant's substandard conduct was a cause in fact of the plaintiff's injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of liability or scope of protection element); and (5) the actual

138. *See* Rec. Doc. 1-2 at pp. 17-23.

139. La. Civ. Code art. 2315.

damages (the damages element)."[140] "A negative answer to any of the inquiries of the duty-risk analysis results in a determination of no liability."[141]

Literally interpreted, a tortfeasor may be held liable under Article 2315 for any damage remotely caused by his or her fault.[142] However, "[a]s a matter of policy, the courts, under the scope of duty element of the duty-risk analysis, have established limitations on the extent of damages for which a tortfeasor is liable."[143] Under Louisiana law, determining the scope of a duty is "ultimately a question of policy as to whether the particular risk falls within the scope of the duty."[144] There "must be an 'ease of association' between the rule of conduct, the risk of injury, and the loss sought to be recovered."[145] That inquiry typically requires consideration of the facts of each case, and dismissal is therefore only proper "where no duty exists as a matter

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140. *Audler v. CBC Innovis Inc.*, 519 F.3d 239, 249 (5th Cir. 2008); *Lemann v. Essen Lane Daiquiris*, No. 2005-1095, 923 So.2d 627, 633 (La. 2006); *Long v. State ex rel. Dept. of Transp. and Dev.*, No. 2004-0485, 916 So.2d 87, 101 (La. 2005).

141. *Mathieu v. Imperial Toy Corp.*, 646 So.2d 318, 321 (La. 1994).

142. *Severn Place Associates v. Am. Bldg. Servs., Inc.*, 05-859, 930 So.2d 125, 127 (La. App. 5 Cir. 4/11/06).

143. *Id.* (citations omitted).

144. *Roberts v. Benoit*, 605 So. 2d 1032, 1044 (La. 1991).

145. *Severn*, 930 So.2d at 127 (citation omitted).

of law and no factual or credibility disputes exist."[146] In deciding whether to impose a duty in a particular case, Louisiana courts examine "whether the plaintiff has any law (statutory, jurisprudential, or arising from general principles of fault) to support the claim that the defendant owed him a duty."[147] Accordingly, the Court must determine whether a statute or rule of law imposes a duty on Defendants, for the benefit of Plaintiff, to prevent the loss of coastal lands in the Buffer Zone, mitigate storm surge risk and/or prevent the attendant increased flood protection costs incurred by Plaintiff.

This Court has already opined that "oil and gas companies do not have a duty under Louisiana law to protect members of the public 'from the results of coastal erosion allegedly caused by [pipeline] operators that were physically and proximately remote from plaintiffs or their property.'"[148] Since the general duty articulated by Article 2315 is insufficient to satisfy Plaintiff's burden under the duty-risk analysis, Plaintiff turns to the Rivers and Harbors Act, the Clean Water Act, and the Coastal Zone Management Act to establish the requisite standard of care. Defendants do not dispute that these statutes may

146. *Ellison v. Conoco*, Inc., 950 F.2d 1196, 1205 (5th Cir. 1992); *Parish v. L.M. Daigle Oil Co.*, 98-1716, 742 So.2d 18, 25 (La. Ct. App. 3 Cir. 1999).

147. *Audler v. CBC Innovis Inc.*, 519 F.3d 239, 249 (5th Cir. 2008) (citation omitted).

148. Rec. Doc. 363 at pp. 67-68 (citing *Barasich*, 467 F. Supp. 2d 676, 693 (Vance, J.)).

impose some type of duty upon them.[149] Instead, they argue that where, as here, no legal duty arises under state law, one does not arise under those statutes because Congress did not intend Plaintiff to benefit from them.[150] Accordingly, the Court must determine the scope of the duties set forth in the federal statutes at issue.

The relevant inquiry under Louisiana law is "whether the enunciated rule or principle of law extends to or is intended to protect *this plaintiff* from *this type of harm* arising in *this manner*."[151] *Cormier v. T.H.E. Ins. Co.* is instructive on this point. There, the plaintiff was injured on an amusement park ride and brought a negligence claim against the Department of Public Safety and Corrections, a governmental agency, for failure to inspect the ride pursuant to Louisiana's "Amusement Ride Safety Law."[152]

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149. *See* Rec. Doc. 427-1 at pp. 24-25 ("[E]ven if the Rivers and Harbors Act of 1899 imposes some duty on Defendants, it is not owed to the Board to protect it from indirect economic losses;" "[E]ven if the Clean Water Act of 1972 imposes some duty on Defendants, it is not to protect a levee board from indirect economic losses;" "[T]he CZMA does not create a statutory duty owed by Defendants to protect the Board from indirect economic losses").

150. *Id.*

151. *Roberts v. Benoit*, 605 So. 2d 1032, 1044-45 (La. 1991), *on reh'g* (May 28, 1992) (emphasis in original) (distinguishing between the duty inquiry and the scope of protection (or scope of liability) inquiry: "[w]hile the former questions the existence of a duty, the latter assumes a duty exists and questions whether the injury the plaintiff suffered is one of the risks encompassed by the rule of law that imposed the duty.").

152. *Cormier v. T.H.E. Ins. Co.*, 98-2208 (La. 9/8/99); 745 So.2d 1.

Appendix B

In determining whether the Department owed a duty to the plaintiff, the Louisiana Supreme Court articulated the following test:

> When a duty is imposed by statute, the court must attempt to interpret the legislative intent as to the risk contemplated by the legal duty, often resorting to the court's own judgment of the scope of protection intended by the legislature. The same policy considerations which would motivate a legislative body to impose duties to protect from certain risks are applied by the court in making its determination. Courts consider various policy factors that the legislature might consider, such as whether the imposition of a duty would result in an unmanageable flow of litigation; ease of association between the plaintiff's harm and a defendant's conduct; economic, social, and moral implications on similarly situated parties; the nature of defendant's activity; the direction in which society and its institutions are evolving; and precedent.[153]

The Louisiana Supreme Court held that although the Amusement Ride Safety Law imposed various duties upon the Department, the duty to inspect rides is only activated once a ride operator requests an inspection. Where an inspection is not requested, the Department's duty is limited to the issuance and adoption of rules for

153. *Id.* (citations omitted).

amusement rides. Therefore, because no inspection was requested, the Department owed no duty to the plaintiff.[154]

The Fifth Circuit has also examined the applicability of a statute in defining the scope of duty under a state law negligence claim. In *Audler v. CBC Innovis Inc.*, a Louisiana homeowner whose property was damaged by floodwaters from Hurricane Katrina brought negligence and negligent misrepresentation claims against CBC Innovis, Inc., the company that provided flood zone determinations to the homeowner's lender.[155] The primary issue on appeal was whether, under Louisiana law, CBC owed the homeowner a duty under the National Flood Insurance Act (the "NFIA") to provide accurate information with regard to the flood zone determination.[156] The Fifth Circuit held that a flood determination company retained by the lender to perform a flood zone determination on a borrower's property does not owe a duty to the borrower because:

> Although Congress intended to help borrowers damaged by flooding, the principal purpose in enacting the [NFIA] was to reduce, by implementation of adequate land use controls and flood insurance, the massive burden on the federal fisc of the ever increasing federal flood disaster assistance. Therefore, the purpose

154. *Id.*

155. *Audler v. CBC Innovis Inc.*, 519 F.3d 239 (5th Cir. 2008).

156. *Id.* at 249.

> of the requirement that a lender obtain a flood zone determination is not to inform the borrower of the home's flood zone status, but rather to protect the lender and the federal government from the financial risk that is posed by uninsured homes located in flood zones. [157]

Concluding that the Louisiana Supreme Court would find that the homeowner had not stated a claim for negligence or negligent misrepresentation under Louisiana law, the Fifth Circuit affirmed the district court's dismissal of those claims.

In this case, as in *Cormier* and *Audler*, Plaintiff attempts to demonstrate as a matter of law that the Rivers and Harbors Act, the Clean Water Act, and the Coastal Zone Management Act impose a duty upon Defendants to protect Plaintiff from the harm alleged. However, like in *Cormier* and *Audler*, the duties imposed upon Defendants pursuant to those statutes do not extend to the protection of Plaintiff. Although, like the homeowner in *Cormier* and the plaintiff in *Audler*, Plaintiff may derive some benefit from Defendants' compliance with those statutes, Plaintiff is not an intended beneficiary under any of them.

First, the principal purpose in enacting the Rivers and Harbors Act was to facilitate the federal government's ability to ensure that navigable waterways, like any other routes of commerce over which it has assumed control,

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157. *Id.* at 252 (citations omitted).

remain free of obstruction.[158] "The coverage of the Rivers and Harbors Act is broad, and its principal beneficiary is the United States government."[159] Section 408 of the Rivers and Harbors Act makes it illegal for any person to damage or impair a public work built by the United States to prevent floods.[160]

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158. *See Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 201, 88 S. Ct. 379, 19 L. Ed. 2d 407 (1967). Plaintiff argues that *Wyandotte* is inapposite because it addresses section 409 of the Rivers and Harbors Act, not section 408. However, Plaintiff fails to cite any other authority suggesting that the Act was enacted for a purpose other than that stated in *Wyandotte*, nor can the Court locate any such authority. Accordingly, the Court finds Plaintiff's arguments on this point unpersuasive. (*See* Rec. Doc. 446 at pp. 14-15).

159. *In re S. Scrap Material Co., L.L.C.*, 713 F.Supp.2d 568, 575 (E.D. La. 2010) (Feldman, J.) (citing *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 201, 88 S. Ct. 379, 19 L. Ed. 2d 407 (1967)).

160. 33 U.S.C.A. § 408 states:

> It shall not be lawful for any person or persons to take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, or any piece of plant, floating or otherwise, used in the construction of such work under the control of the United States, in whole or in part, for the preservation and improvement of any of its navigable waters or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks, nor remove for ballast or other purposes any stone or other material

Plaintiff argues that a levee operator is a member of the class for whose benefit § 408 was enacted. The only authority that Plaintiff cites for this argument is *U.S. and City of Dallas v. City of Irving*, a 1979 decision from the Northern District of Texas that is not binding authority on this Court. In that case, the United States and the City of Dallas brought a lawsuit against the City of Irving, alleging that Irving's landfill operations violated section 408. The court held, without further explanation, that "Dallas, as the owner and operator of levees built by the United States to prevent floods, is a member of the class for whose benefit Section 408 was enacted."[161] No subsequent case cites *Dallas* for the proposition that the duties imposed by any section of the Rivers and Harbors Act extend to the protection of a levee owner or operator, and this Court will not be the first to do so.[162] In the absence

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> composing such works: *Provided*, That the Secretary of the Army may, on the recommendation of the Chief of Engineers, grant permission for the temporary occupation or use of any of the aforementioned public works when in his judgment such occupation or use will not be injurious to the public interest: *Provided further*, That the Secretary may, on the recommendation of the Chief of Engineers, grant permission for the alteration or permanent occupation or use of any of the aforementioned public works when in the judgment of the Secretary such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work.

161. *United States v. City of Irving, Tex.*, 482 F.Supp. 393, 396 (N.D. Tex. 1979).

162. The only case citing *Dallas* does so in a footnote for the proposition that no cause of action lies under 33 U.S.C. § 701c in favor

of any controlling or persuasive authority similar to the rule proposed by Plaintiff, the Court cannot conclude that section 408 of the Rivers and Harbors Act imposes a duty upon Defendants for the protection of Plaintiff.

Similarly, Plaintiff has not demonstrated that Congress intended the Clean Water Act to create a legal duty in favor of Plaintiff or its predecessor levee districts. The Clean Water Act is a comprehensive statutory regime designed "to restore and maintain the chemical, physical, and bio logical integrity of the Nation's waters."[163] The Clean Water Act prohibits, among other things, the "discharge of any pollutant" into "navigable waters" unless authorized by a permit.[164] It defines navigable waters as "the waters of the United States."[165] Under Section 404 of the Clean Water Act, the Corps has authority to issue permits— termed 404 permits—for the discharge of dredged or fill materials into navigable waters.[166]

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of the City of Dallas because such an action "would be inconsistent with the scheme of federal enforcement evident in the regulations." *See Creppel v. United States Army Corps of Eng'rs*, 670 F.2d 564, 575, n. 15 (5th Cir. 1982).

163. *Atchafalaya Basinkeeper v. Chustz*, 682 F.3d 356, 358 (5th Cir. 2012) (citing 33 U.S.C. § 1251(a)).

164. *Belle Co., L.L.C. v. U.S. Army Corps of Engineers*, 761 F.3d 383, 386 (5th Cir. 2014) (citing 33 U.S.C. §§ 1311(a), 1344).

165. *Id.* (citing 33 U.S.C. § 1362(7)).

166. *Id.* (citing 33 U.S.C. § 1344).

Plaintiff alleges that these permits impose upon Defendants a duty to "[m]aintain canals and other physical alterations as originally proposed; [r]estore dredged or otherwise modified areas to their natural state upon completion of their use or their abandonment; and [m]ake all reasonable efforts to minimize the environmental impact of Defendants' activities."[167] Plaintiff does not argue that Defendants were negligent in failing to obtain permits; rather, Plaintiff argues that the § 404 permitting provisions were intended to protect a levee and flood control system that is alleged "to be integrated with the very the [sic] coastal wetlands to which that permitting program applies."[168] However, as with the Rivers and Harbors Act, Plaintiff points to no legal authority supporting its argument that the permits issued pursuant to the Clean Water Act impose a standard of care upon Defendants for the benefit of a levee board.

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167. Rec. Doc. 1-2 ¶9.2. The grammatical construction of paragraph 9.2, including the inconsistent placement of punctuation, suggests either that Plaintiff is attributing the duties listed in 9.2.1, 9.2.2, and 9.2.3 to the CWA, or that those duties stem from regulations promulgated by the Corps in "Part 209 — Rules Relating to Administrative Procedure." Plaintiff's briefing with respect to the pending motion does not address these "general duties," or cite to Corps regulations. Accordingly, the Court interprets paragraph 9.2 to mean that Plaintiffs believe the Clean Water Act creates a regulatory framework specifically aimed at protecting against the deleterious effects of dredging activities (*see* ¶8), but that the specific duties listed in paragraph 9.2 derive from the permits, not from the Clean Water Act itself.

168. Rec. Doc. 446 at p. 16.

Finally, Plaintiff has not demonstrated that the Coastal Zone Management Act imposes a duty upon Defendants for the benefit of Plaintiff. The United States Supreme Court has stated that "[The Coastal Zone Management Act] has as its main purpose the encouragement and assistance of States in preparing and implementing management programs to preserve, protect, develop and whenever possible restore the resources of the coastal zone of the United States."[169] Plaintiff alleges that the Coastal Zone Management Act "impose[s], in conjunction with the issuance of permits licensing the oil and gas exploration and production activities at issue here, a litany of duties and obligations expressly designed to minimize the adverse ecological, hydrological, topographical, and other environmental effects associated with such activities in the state's coastal region."[170] However, Plaintiff does not point to a specific provision of the Coastal Zone Management Act wherein specific duties or obligations are imposed on Defendants for the benefit of Plaintiff, nor can the Court locate any.

Plaintiff cites a number of cases purporting to establish that Louisiana courts have found a duty under state law by applying standards of care articulated in federal statutes and regulations.[171] These cases do not overcome the problems stated above, however, because

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169. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 592, 107 S. Ct. 1419, 94 L. Ed. 2d 577 (1987) (citing S.Rep. No. 92-753, supra, at 1, U.S.Code Cong. & Admin.News 1972, p. 4776).

170. Rec. Doc. 1-2 at ¶ 9.4.

171. Rec. Doc. 487 at p. 4, n. 2.

the plaintiff in each is an intended beneficiary of the federal statute at issue.[172] In contrast, Plaintiff here has not demonstrated that it is the intended beneficiary of any duties imposed upon Defendants under the Rivers and Harbors Act, the Clean Water Act, or the Coastal Zone Management Act.

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172. *See, e.g., Lowe v. Gen. Motors Corp.*, 624 F.2d 1373 (5th Cir. 1980) (holding that a violation of the federal Motor Vehicle Safety Act, which creates a duty upon the automobile manufacturer to construct his product to be "reasonably" safe, may be used by survivors of two women killed in automobile accident as evidence of the manufacturer's negligence *per se*); *Manchack v. Willamette Indus., Inc.*, 621 So.2d 649 (La. Ct. 2 App.1993) writ denied, 629 So. 2d 1170 (La.1993) (holding that violations of the Occupational Safety and Health Act, which sets out workplace safety standards, can be used by injured employees or non-employees as nonconclusive evidence that the workplace is unreasonably dangerous); *Reyes v. Vantage S.S. Co., Inc.*, 609 F.2d 140 (5th Cir. 1980) (holding that the Jones Act, which imposes an affirmative duty on a ship to use every reasonable means to retrieve a seaman from the water, imposes that duty even where the seaman deliberately jumps overboard); *Manning v. M/V "Sea Road"*, 417 F.2d 603 (5th Cir. 1969) (negligence arising from a breach of the Longshoremen's Act—namely, failure to cover a manhole—created a condition that made the vessel unseaworthy, and "[v]iolation of the statutory regulations only makes it worse"); *Simmons v. Wichita River Oil Corp.*, No. 01-0050, 2002 U.S. Dist. LEXIS 17629, 2002 WL 31098544, at *3 (E.D. La. Sept. 19, 2002) (Vance, J.) ("In the Fifth Circuit, federal regulations governing *maritime conduct* establish the applicable standard of care if the plaintiff belongs to the class of persons the regulation is designed to protect and the statute intends to protect against the risk of harm that occurred.") (emphasis added); *Tidewater Marine, Inc. v. Sanco Int'l, Inc.*, 113 F.Supp.2d 987, 990 (E.D. La. 2000) (Mentz, J.) (same).

Plaintiff additionally relies on *Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co.* for the argument that the failure to maintain oilfield canals implicates an Article 2315 duty.[173] In that case, which was before the Fifth Circuit on appeal of a grant of a motion for summary judgment, a school board brought suit against two companies that owned gas pipelines built on servitudes over property owned by the school board, alleging that the companies failed to maintain the canals in which the pipelines were located or their banks.[174] The school board, unlike Plaintiff here, claimed a direct loss of acreage of its own property due to erosion caused by the two defendants. The Fifth Circuit determined that the contract between the parties did not impose a duty to maintain the canals, but remanded the case to the district court to determine whether Louisiana's suppletive rules of property law might impose such a duty.

The Court does not read *Columbia Gulf Transmission* to stand for the broad proposition that Plaintiff advances. The duty of two specific pipeline companies to maintain canals on specific property *vis a vis* a specific lessor, combined with Louisiana's suppletive rules of property law,[175] provide a much firmer basis for implying a duty than the general pronouncement of Article 2315 that a tortfeasor is liable for any damage caused by his or her fault. Moreover, the plaintiff in *Columbia Gulf Transmission* did not rely on federal statutes to supply

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173. *See* Rec. Doc. 487 at p. 3 (citing *Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303 (5th Cir. 2002)).

174. *Columbia Gulf Transmission Co.*, 290 F.3d at 306.

175. *Id.*

the relevant standard of care. Here, in contrast, Plaintiff has expressly and repeatedly argued that the standard of care applicable in this case is supplied by the federal regulatory regime, not by Louisiana law. Finally, as this Court and another section of this district have already held, "oil and gas companies do not have a duty under Louisiana law to protect members of the public 'from the results of coastal erosion allegedly caused by [pipeline] operators that were physically and proximately remote from plaintiffs or their property.'"[176]

It is not enough for Plaintiff to assert that it is a beneficiary of the federal statutes at issue.[177] Rather, under *Audler*, Plaintiff must demonstrate as a matter of law that Defendants owe a specific duty to protect Plaintiff from the results of coastal erosion allegedly caused by Defendants' oil and gas activities in the Buffer Zone. Plaintiff has not and cannot make that showing under the Rivers and Harbors Act, the Clean Water Act, or the Coastal Zone Management Act. Accordingly, the Court is compelled to conclude that Plaintiff has not stated a viable claim for negligence.

B. Strict Liability

Plaintiff seeks injunctive relief and damages under a theory of strict liability pursuant to Articles 2317 and 2317.1.[178] Aside from two sentences located in a footnote in

176. Rec. Doc. 363 at pp. 67-68 (citing *Barasich*, 467 F. Supp. 2d 676, 693 (Vance, J.)).

177. Rec. Doc. 485 at 43:16-18.

178. *See* Rec. Doc. 1-2 at pp. 18-19.

Defendants' motion to dismiss,[179] neither party addresses or analyzes this claim directly. Rather, both Plaintiff and Defendants appear to urge the Court to apply their negligence arguments to Plaintiff's strict liability claim.[180]

Under Louisiana Civil Code article 2317, "[w]e are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody." In 1996, the Louisiana legislature adopted Article 2317.1, which significantly modified Article 2317's imposition of liability by providing in pertinent part that:

> [t]he owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care.[181]

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179. Rec. Doc. 427-1 at p. 16, n. 6 (stating that the duty-risk analysis "applies both to negligence ans strict liability claims. As the Louisiana Supreme Court has explained, the question of scope of duty or legal cause under duty-risk analysis is the same as whether a risk is unreasonable under La. C.C. art. 2317") (citing *Entrevia v. Hood*, 427 So.2d 1146, 1149 (La. 1983)).

180. *See, e.g.*, Rec. Doc. 427-1 at p. 15; Rec. Doc. 446 at p. 13.

181. La. Civ. Code art. 2317.1.

Appendix B

The adoption of Article 2317.1 appears to have eliminated the distinction between strict liability under Article 2317 and negligence under Article 2315.[182] In 1991, the Louisiana Supreme Court distinguished between strict liability and negligence as follows:

> In essence, the only difference between the negligence theory of recovery and the strict liability theory of recovery is that the plaintiff need not prove the defendant was aware of the existence of the "defect" under a strict liability theory. Under the negligence theory, it is the defendant's *awareness* of the dangerous condition of the property that gives rise to a duty to act. Under a strict liability theory, it is the defendant's *legal relationship* with the property containing a defect that gives rise to the duty. Under both theories, the absence of an unreasonably dangerous condition of the thing implies the absence of a duty on the part of the defendant.[183]

After the adoption of Article 2317.1, the Louisiana Supreme Court reiterated that "the sole distinction between the burden of proof necessary to recover under a negligent action based on La. Civ. Code arts. [sic] 2315 versus a strict liability action based on La. Civ. Code art. 2317 was that in the former the plaintiff had the additional

182. *Dupree*, 765 So.2d at 1007.

183. *Oster v. Dept. of Trans. & Development*, 582 So.2d 1285 (La. 1991).

burden of proving the defendant's scienter, i.e., that the defendant 'knew or should have known' of the defect."[184] It appears well settled under Louisiana law that by requiring knowledge or constructive knowledge under Article 2317.1, the Louisiana legislature effectively eliminated strict liability under Article 2317, turning causes of action arising under Article 2317 into negligence claims.[185]

Further demonstrating the application of Article 2317.1, the Louisiana Supreme Court appears to analyze actions arising under Articles 2317 and 2317.1 under the same duty-risk analysis as is used with respect to negligence claims arising under Article 2315. For example, in *Bufkin v. Felipe's Louisiana, LLC*, the Louisiana Supreme Court applied Articles 2317 and 2317.1 to determine whether a building contractor breached any legal duty owed to a pedestrian crossing a street next to the contractor's dumpster, who was struck by an oncoming bicycle.[186] The Supreme Court stated that "the threshold issue in any negligence action is whether the defendant owed the plaintiff a duty, and whether a duty is owed is a

184. *Dupree*, 765 So.2d at 1007 (citations omitted).

185. *See Jackson v. Brumfield*, 2009-2142, 40 So.3d 1242, 1243 (La. App. 1 Cir. 6/11/10) ("The 1996 amendment enacting [article 2317.1] abolished the concept of strict liability governed by prior interpretation of [article 2317]."); *Dufrene v. Gautreau Family, LLC*, 980 So.2d 68, 80 (La. App. 5 Cir. 2008); *Ruschel v. St. Amant*, 11-78, 66 So.3d 1149, 1153 (La. App. 5 Cir. 2011); *Riggs v. Opelousas Gen. Hosp. Trust Auth.*, 2008-591, 997 So.2d 814, 817 (La. App. 3 Cir. 11/5/08); *Reitzell v. Pecanland Mall Associates, Ltd.*, 852 So.2d 1229, 1232, (La.App. 2 Cir. 8/20/03).

186. 2014-288 (La. 10/15/14), 171 So. 3d 851, 2014 La. LEXIS 2257, 2014 WL 5394087.

question of law."[187] After determining that the contractor had effectively assumed custody of the sidewalk, the Supreme Court performed a duty-risk analysis and determined that any visual obstruction caused by the dumpster was obvious, apparent, and reasonably safe for persons exercising ordinary care and prudence, and did not create an unreasonable risk of harm.[188] Therefore, the Supreme Court held that the construction company had no legal duty to warn the pedestrian of the obstruction.[189]

This Court has already determined that Defendants do not owe a legal duty to Plaintiff, arising under either Louisiana law or the federal regulatory regime upon which Plaintiff relies, to protect Plaintiff from the results of coastal erosion allegedly caused by Defendants' oil and gas activities in the Buffer Zone. Accordingly, for the same reasons stated above with respect to Plaintiff's claim arising under Article 2315, the Court finds that Plaintiff has not stated a viable claim for strict liability under Articles 2317 and 2317.1.

C. Natural Servitude of Drain

Plaintiff next alleges that Defendants have interfered with a natural servitude of drain in violation of Article 656.[190] A natural servitude of drain is a type of predial servitude, which is "a charge on a servient estate for the

187. 2014 La. LEXIS 2257, [WL] at * 5 (citation omitted).

188. 2014 La. LEXIS 2257, [WL] at *10.

189. *Id.*

190. Rec. Doc. 1-2 at ¶ 24.

benefit of a dominant estate, and requires that the two estates must belong to different owners."[191] There can be no predial servitude without an identified dominant estate and an identified servient estate.[192] The word "estate" means a distinct corporeal immovable, such as a tract of land or a building.[193] The estate burdened with a predial servitude is designated as "servient"; the estate in whose favor the servitude is established is designated as "dominant."[194] There is no predial servitude if the charge imposed cannot be reasonably expected to benefit the dominant estate.[195]

Additionally, in general, the two immovables that constitute the two estates need not be contiguous or within any given proximity.[196] However, they must be located "as to allow one to derive some benefit from the

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191. La. Civ. Code art. 646.

192. *Id.*; *see also* 2007 Revision Comment (b) to LA. CIV. CODE art. 646; A.N. Yiannopoulos, 4 La. Civ. L. Treatise: Predial Servitudes § 9 (2004).

193. 2007 Revision Comment (b) to La. Civ. Code art. 646 and A.N. Yiannopoulos, 4 La. Civ. L. Treatise: Predial Servitudes § 7 (2004) (stating that "[t]he word "estate" is a translation of "héritage," which the Code Civil reserved exclusively for lands and buildings and stated that only these immovables were capable of being burdened with a predial servitude").

194. La. Civ. Code art. 646, Revision Comments—1977, comment (d).

195. La. Civ. Code. art. 647.

196. *Roberts v. Cardinal Servs., Inc.*, 266 F.3d 368, 385 (5th Cir. 2001) (citing La. Civ. Code art. 648).

charge on the other."[197] Predial servitudes are considered derogations of public policy because they form restraints on the free disposal and use of property.[198] Therefore, predial servitudes are not viewed with favor by the law and can never be sustained by implication.[199] Any doubt as to the existence, extent, or manner of exercise of a predial servitude must be resolved in favor of the servient estate.[200]

A natural servitude of drain is established under Louisiana Civil Code articles 655 and 656. According to Article 655, an estate situated below "is bound to receive the surface waters that flow naturally from an estate situated above unless an act of man has created the flow."[201] Article 656 states that "[t]he owner of the servient estate may not do anything to prevent the flow of the water, and the owner of the dominant estate may not do anything to render the servitude more burdensome."[202] According to A.N. Yiannopoulos' treatise on predial servitudes:

> The person who claims a servitude of drain has the burden of proving by a preponderance

197. La. Civ. Code art. 648.

198. *F.E. Palomeque v. Prudhomme*, 664 So.2d 88, 93 (La. 1995).

199. *Id. See also Buras Ice Factory, Inc. v. Department of Highways*, 235 LA. 158, 103 So. 2d 74, 80 (La. 1958).

200. La. Civ. Code. art. 730, *Palomeque*, 664 So.2d at 93. *See also McGuffy v. Weil*, 240 LA. 758, 125 So. 2d 154, 158 (La. 1960).

201. La. Civ. Code art. 655.

202. La. Civ. Code art. 656.

> of the evidence that his estate is higher than that of his neighbor. However, Article 655 does not require that the dominant estate be overall higher than the servient estate. The natural servitude of drain follows individual patterns along particular points of the boundary, namely, it attaches to points at which one estate is higher than the other.[203]

The question of whether an estate is dominant or servient is one of fact and can be established by all means of evidence, including expert testimony.[204]

Defendants argue that Plaintiff's natural servitude of drain claim fails as a matter of law because Plaintiff has not alleged that it owns property adjacent to property owned by any Defendants, or that the dominant and servient estates are "sufficiently close that water flows from a higher estate to another that is lower."[205] In response, Plaintiff contends that, pursuant to Louisiana Civil Code Article 648, neither contiguity nor proximity of estates are requirements of a natural servitude of drain, and that, in fact, "[c]ourts interpret article 648's allowance liberally in finding servitudes of drain between properties miles apart."[206]

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203. A.N. Yiannopoulos, 4 La. Civ. L. Treatise: Predial Servitudes, § 2:2.

204. *Id.*

205. Rec. Doc. 469 at p. 14.

206. Rec. Doc. 446 at p. 20.

Plaintiff cites only two cases in support of its argument that the servient and dominant estates need not be contiguous.[207] First, in *Young v. International Paper Co.*, decided by the Louisiana Supreme Court in 1934, a landowner sued a paper mill operator located approximately eight miles upstream for emptying waste water "into Stalkinghead creek [sic] — the chief medium of drainage for the city of Bastrop — [which] then enters Black bayou [sic], which traverses plaintiff's land."[208] As a result, the plaintiff's land was flooded and some of his timber was destroyed.[209] The legal basis for the lawsuit is not apparent from the opinion, which neither cites nor mentions the codal articles for natural servitude of drain. However, *Young* has been cited by scholars for the principle that damages due to interference with a natural servitude of drain are subject to a one year prescriptive period.[210]

In *Maddox v. Int'l Paper Co.*, decided by the Western District of Louisiana in 1942, the owner of a fishing business filed a lawsuit pursuant to Article 2315 against a mill operator located thirty miles away for releasing waste material into a stream that fed directly into

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207. *Id.*

208. *Young v. Int'l Paper Co.*, 179 La. 803, 155 So. 231, 232 (La. 1934).

209. *Id.*

210. *See* A.N. Yiannopoulos, 4 La. Civ. L. Treatise: Predial Servitudes § 2:7.

Bodcaw Bayou.[211] Although the opinion suggests that the plaintiff's claim was for negligence, the *Maddox* court applied Article 660 and found, without further analysis, that the mill operator rendered a natural servitude of drain more burdensome on the plaintiff's estate. To reach this conclusion, the court cited the Louisiana Supreme Court's 1907 decision in *McFarlain v. Jennings-Heywood Oil Syndicate*, which involves a claim for interference of a natural servitude of drain between contiguous estates.[212]

Both *Young* and *Maddox* are distinguishable from the instant case. First, there was no question in either case as to the relative positions of the dominant and servient estates because, in both cases, the plaintiff's estate was located downstream from the defendant mill operator. Here, in contrast, it is unclear whether the Defendants' estates are "situated above" the Plaintiff's estate, and Plaintiff does not so allege.[213] Moreover, the plaintiffs in *Young* and *Maddox* suffered direct economic harm as a result of the upstream mill operators' activities. Here, Plaintiff alleges indirect economic harm to flood control structures over which it has a "usufructory" type of interest.[214] The alleged harm at issue here is far more

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211. *Maddox v. Int'l Paper Co.*, 47 F.Supp. 829 (W.D. La. 1942).

212. *McFarlain v. Jennings Heywood Oil Syndicate*, 118 La. 537, 538, 43 So. 155 (1907).

213. However, even if Plaintiff did allege the relative positions of the estates, the claim would nevertheless fail because, as discussed *infra*, Plaintiff has not established that a servitude of drain claim includes "violent wave action and storm surge that tropical storms and hurricanes transmit from the Gulf of Mexico."

214. *See* Rec. Doc. 485 at p.65:6-11.

attenuated than the loss of physical property suffered by the landowner in *Young*, or the revenue loss suffered by the fisherman in *Maddox*. Additionally, as stated above, the plaintiff in *Maddox* appears to have sued for negligence, not natural servitude of drain, and the legal basis for the complaint in *Young* is unclear from the opinion. Moreover, in addition to the distinctions between *Maddox* and this case as noted above, *Maddox* is a decision from another federal district court and is therefore not binding on this Court.

Plaintiff additionally relies on *Poole v. Guste* to support its argument that a natural servitude of drain may exist on tidal lands.[215] In *Poole*, the Louisiana Supreme Court was presented with the issue of whether a dominant estate had a servitude of drain into and through a canal constructed on the adjacent servient estate.[216] Prior to 1916, surface water, including rainwater and "tidal overflow water" from a bordering canal and creek, flowed southeasterly across the dominant estate and into the servient estate.[217] In 1916, a canal was constructed on the servient estate, and until 1965 the surface water flowed into and down that canal.[218] In 1965, however, the owners of the servient estate constructed a levee that obstructed that flow of water through the canal.[219] The Louisiana

215. Rec. Doc. 446 at p. 22 (citing *Poole v. Guste*, 261 LA. 1110, 262 So.2d 339 (La. 1972)).

216. *Poole v. Guste*, 261 LA. 1110, 262 So.2d 339 (La. 1972).

217. *Id.* at 340.

218. *Id.* at 341.

219. *Id.*

Supreme Court determined that the servitude of drain at issue was "in part a natural servitude of drain, and in part a 'conventional' servitude of drain acquired by acquisitive prescription."[220] The Supreme Court explained that a conventional servitude of drain is the right of passing water collected in pipes or canals through the estate of one's neighbor,[221] and held that the servient estate was required to remove the levee so that the surface water from the dominant estate could, once again, flow into and through the canal.[222] In so holding, the Supreme Court expressly did not determine "[t]o what extent the servitude of drain from the [dominant estate] onto the [servient] estate at the bridge site is a natural servitude of drain under Article 660 . . ."[223]

Plaintiff contends that *Poole* establishes that a servitude may exist on tidal lands because, in that case, the drainage over the dominant estate included "tidal overflow" from a canal to the south and a natural creek to the west of the property.[224] However, *Poole* does not assist the Court in determining whether a natural servitude of drain may exist with respect to "the violent wave action and storm surge that tropical storms and hurricanes transmit from the Gulf of Mexico."[225] Moreover, as stated above, the Supreme Court did not address or analyze

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220. *Id.* at 342.

221. *Id.* (citing La. Civ. Code art. 714).

222. *Id.* at 344.

223. *Id.* at 343-344.

224. Rec. Doc. 446 at p. 22; *Poole*, 262 So.2d at 341.

225. Rec. Doc. 1-2 at p. 2.

the extent to which the servitude at issue was a natural servitude of drain. In fact, it appears that the holding in *Poole* is directed at reinstating the right of passing water collected in a canal through the neighboring servient estate, i.e. a conventional servitude of drain. The Court notes, additionally, that *Poole* involved a dispute between contiguous estates, whereas here, the alleged dominant and servient estates are not adjacent.

Plaintiff cites no case law, nor can the Court locate any, where the Louisiana Supreme Court has found a natural servitude of drain under similar facts as the instant case. Plaintiff essentially urges this Court to expand Louisiana law by finding that a natural servitude of drain may exist between non-adjacent estates with respect to coastal storm surge. However, neither the codal articles nor the case law supports such a finding. If Articles 655 and 656 are to be expanded to include the circumstances presented in the instant case, such an undertaking must come from the legislature as the primary source of Louisiana law or from the Louisiana Supreme Court as a secondary source of law, not from a federal district court.[226] Having found no guidance from the civil code or the case law in support of Plaintiff's position, the Court is compelled to conclude that Plaintiff has not and cannot state a viable claim for natural servitude of drain.

D. Public and Private Nuisance

Neither party addresses or analyzes Plaintiff's public and private nuisance claims separately. Rather, both

226. *See Jefferson v. Lead Indus. Ass'n, Inc.*, 106 F.3d 1245, 1248 (5th Cir. 1997).

Plaintiff and Defendants appear to urge the Court to apply their Article 667 arguments to both claims.[227] Defendants argue that both claims fail because Plaintiff has not alleged that its property is adjacent to property owned by any Defendant, such that the parties are "neighbors."[228] Plaintiff argues that neither contiguity nor proximity of estates is necessary for the viability of a nuisance claim.[229]

Under Louisiana law, the owner of immovable property, or a person deriving rights from the owner, generally has the right to use the property as he or she pleases.[230] However, "the owner's right may be limited if the use causes damage to neighbors (and others)."[231] The "obligations of neighborhood" set forth in Louisiana Civil Code Articles 667-669[232] are the source of nuisance actions in Louisiana.[233]

Before 1996, Article 667 provided that: "[a]lthough a proprietor may do with his estate what he please, still he

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227. *See, e.g.*, Rec. Doc. 427-1 at p. 26; Rec. Doc. 446 at p. 25.

228. Rec. Doc. 427-1 at p. 26.

229. Rec. Doc. 446 at p. 25 (citing La. Civ. Code art. 648).

230. *Inabnett v. Exxon Corp.*, 93-0681, 642 So. 2d 1243, 1250 (La. 9/6/94).

231. *Id.*

232. Article 668 permits uses which merely cause neighbors some inconvenience. Article 669 allows suppression of certain inconveniences, if excessive under local ordinances and customs, and requires tolerance of lesser inconveniences."

233. *Hogg v. Chevron USA, Inc.*, 09-2632, 45 So.3d 991, 1003 (La. 7/6/10).

can not [sic] make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him." Louisiana courts interpreted Article 667 to impose strict liability — that is, liability without fault — on defendants for damage caused by an activity deemed "ultrahazardous."[234] In 1996, however, the Louisiana legislature amended Article 667 to require a showing of negligence in any claim for damages under Article 667 other than those caused by pile driving or blasting with explosives.[235] Article 667 now states:

> Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him. However, if the work he makes on his estate deprives his neighbor of enjoyment or causes damage to him, he is answerable for damages *only upon a showing that he knew or, in the exercise of reasonable care, should have known* that his works would cause damage, that the damage could have been prevented by the exercise of

234. *Bartlett v. Browning-Ferris Indus., Chem. Servs., Inc.*, 683 So. 2d 1319, 1321 (La. Ct. App. 3 Cir. 1996).

235. A.N. Yiannopoulos, 4 La. Civ. L. Treatise: Predial Servitudes § 3:15; *Alford v. Anadarko E&P Onshore LLC*, No. 13-5457, 2015 U.S. Dist. LEXIS 13389, 2015 WL 471596, at *8 (E.D. La. Feb. 4, 2015) (Vance, J.); *Vekic v. Wood Energy Corp.*, No. 03-1906, 2004 U.S. Dist. LEXIS 21383, 2004 WL 2367732, at *4 (E.D.La. Oct. 20, 2004) (Vance, J.); *accord Yokum v. 615 Bourbon St., L.L.C.*, 07-1785, (La. 2/26/08) 977 So.2d 859, 874.

> reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case. Nonetheless, the proprietor is answerable for damages without regard to his knowledge or his exercise of reasonable care, if the damage is caused by an ultrahazardous activity. An ultrahazardous activity as used in this Article is strictly limited to pile driving or blasting with explosives.[236]

The Louisiana Supreme Court has held that the 1996 amendments to Article 667 "shift[] the absolute liability standard to a negligence standard similar to that set forth in La. C.C. art. 2317.1."[237] According to the Louisiana Supreme Court,

> The 1996 amendments to article 667 did not change *who* could be held liable under the article, namely, the "proprietor"; rather, it changed the theory of liability under which the proprietor could be held responsible. As a result, in order for a proprietor/landowner to be held responsible for damages allegedly caused by works or actions on his property, it must be shown that the proprietor/landowner knew or should have known that the "works"

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236. See La. Civ. Code art. 667, as amended by La. Acts 1996, No. 1 (1st Extraordinary Session) (emphasis added).

237. *Yokum*, 977 So.2d at 874.

> on his property would cause damage, and that the damage could have been prevented by the exercise of reasonable care.[238]

In *Brown v. Olin Chemical Corp.*, the United States Court of Appeals for the Fifth Circuit opined that the 1996 amendment to Article 667 applies to Articles 668 and 669 as well, "so that stating a claim under one or more of these articles now requires a showing of negligence."[239]

Accordingly, as another court in this district has stated, "liability under article 667 has always required three elements: (1) a proprietor (2) who conducts 'work' on his property (3) that causes damage to his neighbor. For actions accruing after 1996, a fourth element — negligence — must also be shown, except for damages resulting from pile driving or blasting with explosives."[240] Plaintiff has not alleged that Defendants engaged in pile driving or blasting with explosives. Therefore, insofar as Plaintiff seeks redress for actions accruing after 1996, Plaintiff's claim against Defendants under Article 667 must be dismissed because, once again, Plaintiff has failed to state a claim for negligence upon which relief may be granted.[241]

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238. *Id.*

239. *Brown v. Olin Chem. Corp.*, 231 F.3d 197, 200 (5th Cir. 2000).

240. *Alford v. Anadarko E&P Onshore LLC*, No. 13-5457, 2015 U.S. Dist. LEXIS 13389, 2015 WL 471596, at *9 (E.D. La. Feb. 4, 2015) (Vance, J.)

241. *See Hogg v. Chevron USA, Inc.*, 09-2632, 45 So.3d 991, 1003 (La. 7/6/10) (equating the concepts of continuing tort, continuing trespass, and continuing nuisance).

Plaintiff's public and private nuisance claims, including those, if any, that accrued before 1996, fail for the additional reason that Plaintiff has not sufficiently alleged that it is a "neighbor," within any conventional sense of the word, to any property of Defendants. Louisiana courts have interpreted "neighbor," as articulated in Article 667, to contemplate estates that are physically close to one another. Similarly, the Fifth Circuit has determined that "[a]lthough courts and commentators disagree about the nature of the interest that a plaintiff must have to bring an action under art. 667, all appear to agree that the plaintiff must have some interest in an immovable near the defendant-proprietor's immovable."[242] The Fifth Circuit has described Article 667 as "applicable to legal servitudes and covers such obligations of neighborhood as keeping buildings in repair, building projections across property lines, building encroachments on adjoining property, common walls, and right of passage to and from an enclosed estate."[243]

In *Barasich*, which was before another court in this District on a Rule 12(b)(6) motion to dismiss, the court stated that "[p]laintiffs' Article 667 claim fails because they do not demonstrate that the 'neighbor' referred to in Article 667 could be a party whose property is

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242. *Roberts v. Cardinal Servs., Inc.*, 266 F.3d 368, 386 (5th Cir. 2001) (finding that plaintiffs injured on an offshore oil platform have no right of action under Article 667, which "clearly requires that activity on the defendant's premises must damage the neighbor or the neighboring 'estate'"); *see also Barasich*, 467 F.Supp.2d at 690 (listing Louisiana cases).

243. *Roberts*, 266 F.3d at 385 (citations omitted).

physically remote from that of the defendants."[244] Another court applying Louisiana law has found that properties located three miles apart do not constitute "neighbors" as contemplated by Article 667.[245] Accordingly, and despite Plaintiff's arguments to the contrary,[246] although "neighbor" does not strictly require contiguity between the servient and dominant estates, it does require some level of physical proximity between them.[247]

In this case, Plaintiff alleges that Defendants' oil and gas operations have led to coastal erosion in the "Buffer Zone," which "extends from East of the Mississippi River through the Breton Sound Basin, the Biloxi Marsh, and the coastal wetlands of eastern New Orleans and up to Lake St. Catherine."[248] Plaintiff alleges that "oil and gas activity has scarred Louisiana's coast with an extensive network of thousands of miles of oil and gas access and pipeline canals."[249] In the Buffer Zone, Plaintiff alleges that Defendants "bear responsibility for the network of access canals and pipelines throughout 20-plus inland oil

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244. *Barasich*, 467 F.Supp.2d at 690.

245. *In re Katrina Canal Breaches Consol. Litig.*, 647 F.Supp.2d 644, 734 (E.D. La. 2009) *rev'd on other grounds*, 696 F.3d 436 (5th Cir. 2012).

246. Rec. Doc. 446 at p. 20.

247. *See Butler v. Baber*, 529 So.2d 374, 377 (La.1988) *holding modified by Inabnett v. Exxon Corp.*, 93-0681, 642 So. 2d 1243 (La. 9/6/94).

248. Rec. Doc. 1-2 at p. 7.

249. *Id.* at ¶ 6.4.

and gas fields."[250] Although Plaintiff appears to sufficiently allege that the parties in this matter derive ownership rights from the owners of the properties at issue,[251] Plaintiff has not alleged physical proximity of the servient and dominant estates. In fact, as noted above, Plaintiff states that neither adjacency nor ownership of property is necessary to establish a cause of action for public or private nuisance pursuant to Article 667. However, considering that both Louisiana courts and the United States Court of Appeals for the Fifth Circuit appear to agree that the plaintiff must have some interest in an immovable "near" the defendant proprietor's immovable to recover under Article 667, Plaintiff's public and private nuisance claims must be dismissed.[252]

E. Breach of Contract - Third Party Beneficiary

As this Court has previously determined, federal common law controls the interpretation of the permits at issue, which were granted by the United States to

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250. *Id.* at ¶ 6.10.

251. *See, e.g.*, Rec. Doc. 1 at ¶ 1.3; ¶ 22.

252. In its Order denying remand, the Court noted that Plaintiff's Petition alleges that the unreasonable interference alleged is in violation of the standard of care as prescribed in the regulatory framework, and that accordingly Plaintiff necessarily raises what conduct constitutes "unreasonable interference" under the Rivers and Harbors Act, the Clean Water Act, and the Coastal Zone Management Act. Since Plaintiff has failed to state a claim for which relief may be granted pursuant to Louisiana law, the Court need not examine the federal regulatory framework at this point.

Defendants pursuant to federal law.[253] To make a third-party beneficiary determination under federal common law, courts use the considerations set forth in the Restatement of Contracts.[254] Section 302 of the Restatement (Second) of Contracts provides that: "a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and ... (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." A plaintiff claiming to be the intended third-party beneficiary of a government contract must show that he was intended to benefit from the contract and that third-party beneficiary claims are consistent with the terms of the contract and the policy underlying it.[255]

Plaintiff characterizes at least some of the dredging permits at issue as "contracts" between Defendants and the United States Army Corps of Engineers, but fails to

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253. *See* Rec. Doc. 363 at p. 74 (holding that federal law applies to nonparty breach of contract claims where the contract implicates a federal interest, the United States is a party to the contract, and the contract was entered into pursuant to federal law).

254. *See, e.g., Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 355 (5th Cir. 2003) (interpreting an arbitration contract under federal common law); *McCarthy v. Azure*, 22 F.3d 351, 355 (1st Cir. 1994) (noting that federal common law "dovetails precisely with general principles of contract law," and "the judicial task in construing a contract is to give effect to the mutual intentions of the parties"); *Grand Manor Health Related Facility, Inc. v. Hamilton Equities Inc.*, 941 F. Supp. 2d 406 (S.D. N.Y. 2013).

255. 17A Am. Jur. 2d Contracts § 429; *see also Hamilton Equities Inc.*, 941 F.Supp.2d at 418.

present any authority suggesting that a dredging permit issued by the federal government is a contract. Plaintiff nevertheless asks the Court to conclude that the permits constitute an obligation between a promisee (Defendants) and a promisor (the United States Government through the Corps) to "maintain and restore," and that Plaintiff is a third-party beneficiary of that obligation.[256] Plaintiff cites no authority, however, for the proposition that the third party beneficiary doctrine applies outside of a contractual relationship.

According to Black's Law Dictionary, a permit is "[a] certificate evidencing permission; a license."[257] A license, in turn, is defined as "[a] permission, usually revocable, to commit some act that would otherwise be unlawful . . ."[258] Courts have consistently held that neither a permit nor a license are contracts.[259] Based on this authority, the Court

256. Rec. Doc. 485 at pp. 65:19 — 66:2; p. 68:11-17.

257. Black'S Law Dictionary 1255 (9th ed. 2009).

258. Black's Law Dictionary 1002 (9th ed. 2009).

259. *See, e.g., California Pub. Interest Research Grp. v. Shell Oil Co.*, 840 F.Supp. 712, 716 (N.D. Cal. 1993) (An NPDES permit is not a contract; rather it is a legally enforceable rule drafted by a regulatory agency.); *Chance Mgmt., Inc. v. State of S.D.*, 97 F.3d 1107 (8th Cir. 1996) (holding that "[p]ublic licensure is not generally contractual in nature: a license neither grants the licensee a property right nor creates a mutual obligation"); *Lichterman v. Pickwick Pines Marina, Inc.*, No. 1:07-256, 2010 U.S. Dist. LEXIS 40382, 2010 WL 1709980, at *2 (N.D. Miss. Apr. 23, 2010) (finding that a license is "[a] permit, granted by an appropriate governmental body, generally for a consideration, to a person, firm or corporation to pursue some occupation or to carry on some business subject

cannot find that the dredging permits at issue constitute contracts, such that the third party beneficiary doctrine is applicable.

Even if the permits were construed as contracts, however, Plaintiff has not and cannot establish that it is an intended third party beneficiary under the terms of the permits. To enforce a contract under federal common law, a third party must be an intended, rather than an incidental, beneficiary.[260] Federal courts apply the Restatement (Second) of Contracts to determine whether a third party

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to regulation under the police power. A license is not a contract between the [granting governmental body] and the licensee, but is a mere personal permit."); *Toye Bros. Yellow Cab Co. v. Coop. Cab Co.*, 199 LA. 1063, 7 So.2d 353, 354 (La. 1942) ("A license is not a contract nor property in any constitutional sense.") (citation omitted). The Court notes that some courts employ contract interpretation principles when tasked with interpreting the terms of a permit. *See, e.g., NRDC v. County of L.A.*, 725 F.3d 1194, 1204 (9th Cir. 2013); *Meadow Green Wildcat Corp. v. Hathaway*, 936 F.2d 601, 605 (1st Cir. 1991) (declining to determine whether the permit at issue "'is' a contract, or that courts should always consider it as such, we shall treat it like a contract for purposes of deciding how much weight to give the interpretation one party (here the agency) offers for one of its nontechnical terms").

260. Louisiana law also requires that the third party be an intended beneficiary in order to enforce the contract. *See, e.g., Joseph v. Hosp. Serv. Dist. No. 2 of Parish of St. Mary*, 2005-2364 (La. 10/15/06, 9); 939 So.2d 1206, 1212 ("The most basic requirement of a stipulation *pour autrui* is that the contract manifest a clear intention to benefit the third party; absent such a clear manifestation, a party claiming to be a third party beneficiary cannot meet his burden of proof.").

is an intended beneficiary of a contract.[261] "Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested."[262] Section 313 of the Restatement provides that a party is an intended third-party beneficiary to a government contract only if:

> (a) the terms of the promise provide for such liability; or (b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.[263]

Therefore, where neither prong of the Restatement test is met, any beneficiaries of a government contract are merely incidental beneficiaries.

Plaintiff has not pointed to any language within the permits indicating that it was intended to benefit from

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261. *Speleos v. BAC Home Loans Servicing, L.P.*, 755 F.Supp.2d 304, 308 (D. Mass. 2010) (*citing Davis v. United Air Lines, Inc.*, 575 F.Supp. 677, 680 (E.D.N.Y. 1983)).

262. Restatement (Second) of Contracts § 313 cmt. a. *See also Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999), *opinion amended on denial of reh'g*, 203 F.3d 1175 (9th Cir. 2000) (stating that there is a presumption that beneficiaries of government contracts are incidental beneficiaries).

263. *Id.*

the contract.[264] To the contrary, the permits indicate that they were issued for the purpose of complying with federal regulatory schemes.[265] Plaintiff essentially asks the Court to erase the legal distinction between intended and incidental beneficiaries, which would create numerous third-party beneficiaries under the so-called contracts.[266] The Court declines Plaintiff's invitation to expand the law. Considering that any benefit that might flow to Plaintiff pursuant to the permits is merely incidental, the Court finds that Plaintiff fails to state a claim upon which relief may be granted for breach of contract as a third party beneficiary.

VI. Conclusion

Accordingly,

IT IS HEREBY ORDERED that Defendants' "Joint Motion to Dismiss for Failure to State a Claim Under Rule 12(b)(6)"[267] is **GRANTED**.

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264. *See id.*

265. For example, Plaintiff's Petition identifies the "Lake Borgne 59" permit issued to Chevron Oil Company on December 23, 1975. Rec. Doc. 1-2 at p. 113. As this Court stated in its Order denying Plaintiff's motion to remand, this permit was issued by the Department of the Army pursuant to the Rivers and Harbors Act and the Federal Water Pollution Control Act. *See* Rec. Doc. 260-6 at pp. 2-18; Rec. Doc. 363 at p. 69, n. 394.

266. *Kane Enterprises v. MacGregor (USA) Inc.*, 322 F.3d 371, 376 (5th Cir. 2003).

267. Rec. Doc. 427.

Appendix B

NEW ORLEANS, LOUISIANA, this 13th day of February, 2015.

/s/ Nannette Jolivette Brown
NANNETTE JOLIVETTE BROWN
UNITED STATES DISTRICT JUDGE

APPENDIX C — DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, DENYING REMAND, DATED JUNE 27, 2014

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION CASE NO. 13-5410 SECTION: "G" (3)

BOARD OF COMMISSIONERS OF THE SOUTHEAST LOUISIANA FLOOD PROTECTION AUTHORITY — EAST,

VERSUS

TENNESSEE GAS PIPELINE COMPANY, LLC *et al.*

June 27, 2014, Decided
June 27, 2014, Filed

ORDER AND REASONS

In this litigation, Plaintiff Board of Commissioners of the Southeast Louisiana Flood Protection Authority—East ("Plaintiff") seeks damages and injunctive relief against ninety-two oil and gas companies whose actions have allegedly caused erosion of coastal lands, leaving south Louisiana increasingly exposed to tropical storms and hurricanes. Plaintiff originally filed suit in Civil District Court for the Parish of Orleans, but Defendants removed the matter to this federal Court. Now pending before the Court is Plaintiff's "Motion to Remand."[1]

1. Rec. Doc. 70.

Having considered the motion, the memoranda in support, the memoranda in opposition, the statements at oral argument, Plaintiff's petition, the notice of removal, and the applicable law, the Court will deny the motion.

Because the Court's specific basis for jurisdiction has the potential to reverberate throughout a number of other considerations in this litigation—particularly, Plaintiff's entitlement, if any, to a jury trial, and choice of law questions—the Court has examined all five bases of jurisdiction raised in Defendants' Notice of Removal.

I. Background

A. Factual Background

Plaintiff in this matter is the 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.[2] The Southeast Louisiana Flood Protection Authority (the "Authority") was created by statute in 2006 to further "regional coordination of flood protection."[3]According to Plaintiff, the Authority's "mission is to ensure the physical and operational integrity of the regional flood risk management system, and to work with local, regional, state and federal partners to plan, design and construct projects that will

2. Rec. Doc. 1-2 at p. 2.

3. 2006 La. Sess. Law. Serv. 1st Ex. Sess. Act 1 (S.B. 8) (West) (codified at La. R.S. § 38:330.1(F)(2)(a)).

reduce the probability and risk of flooding of the residents within the Authority's jurisdiction."[4]

Defendants are ninety-two oil and gas companies operating in what Plaintiff refers to as the "Buffer Zone."[5] The Buffer Zone "extends from East of the Mississippi River through the Breton Sound Basin, the Biloxi Marsh, and the coastal wetlands of eastern New Orleans and up to Lake St. Catherine."[6]

Plaintiff alleges that Defendants' oil and gas operations have led to coastal erosion in the Buffer Zone, making south Louisiana more vulnerable to severe weather and flooding. According to Plaintiff, "[c]oastal lands have for centuries provided a crucial buffer zone between south Louisiana's communities and the violent wave action and storm surge that tropical storms and hurricanes transmit from the Gulf of Mexico."[7] However, "[h]undreds of thousands of acres of coastal lands that once protected south Louisiana are now gone as a result of oil and gas activities."[8] Specifically, Plaintiff asserts that Defendants have "dredged a network of canals to access oil and gas wells and to transport the many products and by-

4. Rec. Doc. 1-2 at p. 5.

5. Plaintiff initially named 149 defendants. *See id.* at pp. 25-34. However, only ninety-two defendants remain in this litigation.

6. *Id.* at p. 7.

7. *Id.* at p. 2.

8. *Id.*

products of oil and gas production."[9] This canal network, in conjunction with "the altered hydrology associated with oil and gas activities," has caused vegetation die-off, sedimentation inhibition, erosion, and submergence—all leading to coastal land loss.[10] In addition to the initial dredging, Plaintiff maintains that Defendants "exacerbate direct land loss by failing to maintain the canal network and banks of the canals that Defendants have dredged, used, or otherwise overseen."[11] This failure has "caused both the erosion of the canal banks and expansion beyond their originally permitted widths and depths of the canals comprising that network."[12] Looking beyond the alleged effects of the canal network, Plaintiffs identify ten other oil and gas activities that allegedly "drastically inhibit the natural hydrological patterns and processes of the coastal lands"—road dumps, ring levees, drilling activities, fluid withdrawal, seismic surveys, marsh buggies, spoil disposal/dispersal, watercraft navigation, impoundments, and propwashing/ maintenance dredging.[13]

B. Procedural Background

On July 24, 2013, Plaintiff filed suit in Civil District Court for the Parish of Orleans, State of Louisiana.[14]

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9. *Id.* at p. 9.

10. *Id.*

11. *Id.* at p. 11.

12. *Id.*

13. *Id.*

14. *Id.* at p. 1.

In its petition, Plaintiff asserts six causes of action: (1) negligence,[15] (2) strict liability,[16] (3) natural servitude of drain,[17] (4) public nuisance,[18] (5) private nuisance,[19] and (6) breach of contract—third party beneficiary.[20] Plaintiff requests both damages and injunctive relief

> . . . in the form of abatement and restoration of the coastal land loss at issue, including, but not limited to, the backfilling and revegetating of each and every canal Defendants dredged, used, and/or for which they bear responsibility, as well as all manner of abatement and restoration activities determined to be appropriate, including, but not limited to, wetlands creation, reef creation, land bridge construction, hydrologic restoration, shoreline protection, structural protection, bank stabilization, and ridge restoration.[21]

While Plaintiff's six causes of action are all ostensibly state-law claims, Plaintiff contends that "Defendants' dredging and maintenance activities at issue in this

15. *Id.* at p. 17.

16. *Id.* at p. 18.

17. *Id.* at p. 19.

18. *Id.* at p. 20.

19. *Id.* at p. 21.

20. *Id.* at p. 22.

21. *Id.* at p. 23.

action are governed by a longstanding and extensive regulatory framework under both federal and state law specifically aimed at protecting against the deleterious effects of dredging activities."[22] According to Plaintiff, "the relevant components of this regulatory framework . . . buttress the Authority's claims."[23] Specifically, Plaintiff points to the River and Harbors Act of 1899, which "grants to the [Army Corps of Engineers] exclusive authority to permit modification of navigable waters of the United States and prohibits the unauthorized alteration of or injury to levee systems and other flood control measures built by the United States."[24] Plaintiff also cites the Clean Water Act of 1972 and accompanying regulations, which require Defendants to "[m]aintain canals and other physical alterations as originally proposed; [r]estore dredged or otherwise modified areas to their natural state upon completion of their use or their abandonment; and [m]ake all reasonable efforts to minimize the environmental impact of the Defendants' activities."[25] Further, Plaintiff references the Coastal Zone Management Act of 1972 and related Louisiana coastal zone regulations that "impose . . . a litany of duties and obligations expressly designed to minimize the adverse ecological, hydrological, topographical, and other environmental effects" associated with oil and gas activities.[26] Finally, Plaintiff cites "[r]egulations and

22. *Id.* at p. 16.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at p. 17.

rights-of-way granted across state-owned lands and water bottoms administered by the Louisiana Office of State Lands."[27] According to Plaintiff, "[t]his regulatory framework establishes a standard of care under Louisiana law that Defendants owed and knowingly undertook when they engaged in oil and gas activities."[28] Additionally, Plaintiff avers that these "permitting schemes created numerous individual obligations under Louisiana law between Defendants and governmental bodies of which Plaintiff is the third-party beneficiary."[29]

On August 13, 2013, Defendant Chevron U.S.A. Inc. ("Chevron") removed the case to federal court.[30] In its Notice of Removal, Chevron asserts five grounds for federal jurisdiction: (1) Plaintiff's right to relief depends upon the resolution of a substantial question of federal law; (2) Plaintiff asserts a general maritime claim; (3) the lawsuit is subject to the Class Action Fairness Act ("CAFA"); (4) the Outer Continental Shelf Lands Act ("OCSLA") applies; and (5) federal enclave jurisdiction applies.[31]

On September 10, 2013, Plaintiff filed the pending "Motion to Remand."[32] On October 28, 2013, all Defendants

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27. *Id.* at p. 16.

28. *Id.* at p. 17.

29. *Id.*

30. Rec. Doc. 1.

31. *Id.* at p. 4.

32. Rec. Doc. 70.

filed a "Joint Response in Opposition to the Motion to Remand,"[33] and Defendant Tennessee Gas Pipeline Company, LLC, Gulf South Pipeline Co. LP, Southern Natural Gas Company, and Boardwalk Pipeline Partners, LP (collectively, the "Natural Gas Act Defendants") filed an additional "Response in Opposition to Motion to Remand"[34] addressing jurisdictional issues specific to certain natural gas producers. The Court also received supplemental briefs from HKN, Inc.,[35] White Oak Operating, LLC,[36] Liberty Oil and Gas Corporation,[37] Manti Operating Company,[38] Mosbacher Energy Company,[39] Coastal Exploration & Production, LLC,[40] and Flash Gas & Oil Northeast, Inc.[41] On November 13, 2013, Plaintiff filed an "Omnibus Reply Memorandum in Support of Its Motion to Remand."[42]

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33. Rec. Doc. 260.

34. Rec. Doc. 254.

35. Rec. Doc. 258.

36. Rec. Doc. 262.

37. Rec. Doc. 263.

38. Rec. Doc. 264.

39. Rec. Doc. 265.

40. Rec. Doc. 266.

41. Rec. Doc. 268.

42. Rec. Doc. 292.

The Court heard oral argument on December 18, 2013.[43] Following oral argument, both Plaintiff and Defendants brought supplemental authorities to the Court's attention.[44] In particular, on February 20, 2014, Defendants Chevron U.S.A., Inc., Union Oil Company of California, Chevron Pipeline Co., and Kewanee Industries, Inc. filed a "Notice of Issuance of Supreme Court Judgment," representing that in light of a recent Supreme Court opinion, they were withdrawing their argument that CAFA supplies a basis for federal jurisdiction in this case.[45]

II. Standard on a Motion to Remand

"'Federal courts are courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and by statute.'"[46] Pursuant to 28 U.S.C. § 1441(a), a defendant may generally remove a civil action filed in state court if the federal court has original jurisdiction over the action. The removing party bears the burden of demonstrating that federal jurisdiction exists.[47] In

43. Rec. Doc. 304.

44. Rec. Doc. 317; Rec. Doc. 331; Rec. Doc. 334; Rec. Doc. 337; Rec. Doc. 344; Rec Doc. 360.

45. Rec. Doc. 331.

46. *Gunn v. Minton*, 133 S. Ct. 1059, 1064, 185 L. Ed. 2d 72 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)).

47. *See Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995).

assessing whether removal was appropriate, the Court "consider[s] the claims in the state court petition as they existed at the time of removal."[48] The Court is guided by the principle, grounded in notions of comity and the recognition that federal courts are courts of limited jurisdiction, that "the removal statute should be strictly construed in favor of remand."[49]

As noted above, in their Notice of Remand, Defendants assert that federal jurisdiction exists based on five grounds: (1) Plaintiff asserts a general maritime claim; (2) federal enclave jurisdiction applies; (3) the Outer Continental Shelf Lands Act ("OCSLA") applies; (4) the lawsuit is subject to the Class Action Fairness Act ("CAFA"); and (5) Plaintiff's right to relief depends upon the resolution of a substantial question of federal law.[50] These five grounds are addressed in turn.

III. Whether Admiralty Jurisdiction Exists

A. Parties' Arguments

1. Plaintiff's Arguments in Support of Remand

Plaintiff argues the Court does not have admiralty jurisdiction because "[t]he Authority's claims do not

48. *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002).

49. *Id.*

50. Rec. Doc. 1 at p. 4.

constitute general maritime claims, and even if they did, general maritime claims are not removable without a separate basis for federal court jurisdiction."[51] According to Plaintiff, "the Petition does not allege that Defendants caused any impediments to navigability or maritime activities."[52]

First, Plaintiff cites the Supreme Court's decision in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*[53] as establishing a two-part test for whether "a maritime nexus sufficient to establish admiralty jurisdiction exists."[54] "[F]irst, 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."[55] "[S]econd, 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."[56]

Applying this test, Plaintiff avers that its 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

51. Rec. Doc. 70-1 at p. 10.

52. *Id.* at pp. 10-11.

53. 513 U.S. 527, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995).

54. Rec. Doc. 70-1 at p. 11.

55. *Id.* (citing *Grubart*, 513 U.S. at 534).

56. *Id.* (citing *Grubart*, 513 U.S. at 534).

the Authority's allegations."[57] Rather, Plaintiff focuses on the "degradation of coast ***lands***, not coastal waterways, through Defendants' oil and gas activities."[58] Citing *Texaco Exploration & Production, Inc. v. AmClyde Engineered Products Co., Inc.*,[59] Plaintiff contends that "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 . . . ."[60] Alleging that "Defendants' act and omissions have caused land to convert to open water," Plaintiff contends that "quite apart from disrupting navigability, Defendants' conduct may have actually enhanced navigability, though at the devastating cost of the natural land buffer."[61]

In further support of its position, Plaintiff discuses *Louisiana Crawfish Producers Association—West v. Amerada Hess Corp.*, where, according to Plaintiff, a magistrate judge in the Western District of Louisiana determined that failure to maintain oil pipelines and dredged canals did not sufficiently connect to traditional maritime activity.[62]

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57. *Id.*

58. *Id.* (emphasis in original).

59. 448 F.3d 760, 771, *amended on reh'g*, 453 F.3d 652 (5th Cir. 2006).

60. Rec. Doc. 70-1 at p. 12.

61. *Id.*

62. *Id.* at p. 12-14 (citing *Louisiana Craw Producers Ass'n v. Amerada Hess Corp.*, No. 10-348, 2012 U.S. Dist. LEXIS 185229, 2012 WL 6929427 (W.D. La. Aug. 1, 2012) (Hanna, M.J.)).

Second, Plaintiff argues that even if the Petition asserts general maritime claims, "that alone would not suffice to support this Court's exercise of jurisdiction."[63] According to Plaintiff, a plaintiff may bring maritime claims in state court under the "saving-to-suitors" clause of 28 U.S.C. § 1333, and "[t]he 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.'"[64]

Plaintiff acknowledges that two decisions from the Southern District of Texas have held that a recent amendment to 28 U.S.C. § 1441 "has undermined the long-standing prohibition on removal."[65] However, Plaintiff maintains that these cases "offer a faulty analysis because they fail to recognize that the 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."[66] According to Plaintiff, two courts in this District "have continued to adhere to the longstanding rule regarding non-removability of maritime claims, even in the wake

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63. *Id.* at p. 14.

64. *Id.* (quoting *In re Eckstein Marine Serv., L.L.C.*, 672 F.3d 310, 315-16 (5th Cir. 2012)).

65. *Id.* at p. 15 (citing *Wells v. Abe's Boat Rentals, Inc.*, No. 13-1112, 2013 U.S. Dist. LEXIS 85534, 2013 WL 3110322 (S.D. Tex. June 18, 2013); *Ryan v. Hercules Offshore, Inc.*, 945 F. Supp. 2d 772, 2013 WL 1967315 (S.D. Tex. 2013)).

66. *Id.* at pp. 15-16.

of the amendment of § 1441."[67] Further, Plaintiff asserts that "[a]t 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."[68]

2. Defendants' Arguments in Opposition to Remand

Defendants argue that "[t]he Court should deny the motion to remand because maritime jurisdiction provides an independent basis for exercising federal jurisdiction."[69] According to Defendants, "to determine whether jurisdiction exists, a court must evaluate, first, whether the alleged 'tort occurred on navigable water' or the alleged 'injury suffered on land was caused by a vessel on navigable water' (the 'location' test), and, second, whether the alleged tort has a connection to maritime activity (the 'connection' test)."[70]

With respect to the location test, Defendants contend that "[t]he 'location' test is satisfied because the Petition alleges injuries suffered on land purportedly caused by

67. *Id.* at pp. 16-17 (citing *Duet v. Am. Commercial Lines LLC*, No. 12-3025, 2013 U.S. Dist. LEXIS 54937, 2013 WL 1682988 (E.D. La. Apr. 17, 2013) (Milazzo, J.); *Int'l Transp. Workers Fed. v. Mi-Das Line, SA*, No. 12-2503, 2012 U.S. Dist. LEXIS 157613, 2012 WL 5398470 (E.D. La. Nov. 2, 2012) (Lemelle, J.)).

68. *Id.* at p. 17 (citing *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 219 (5th Cir. 2013); *In re Eckstein*, 672 F.3d at 310).

69. Rec. Doc. 260 at p. 30.

70. *Id.* at p. 31 (quoting *Grubart*, 513 U.S. at 534).

vessels on navigable waters."[71] Specifically, Defendants assert that "[t]he Petition rests principally on allegations that Defendants' oil and gas dredging activities created a network of access and pipeline canals that have resulted in a loss of coastal lands."[72]

Looking at the connection test, Defendants represent that "[c]ourts have held that the 'connection' test is met when there is 'a potentially disruptive impact on maritime commerce' and 'the general character of the activity' giving rise to the litigation 'shows a substantial relationship to traditional maritime activity.'"[73] According to Defendants, "[t]he Petition's alleged activities impact maritime commerce." Defendants cite *In re Ingram Barge Co.*[74] for the proposition that dredging activities "by their 'very nature . . . seem[] to affect maritime commerce[.]"[75] Further, Defendants argue that the Petition alleges that Defendants "have contributed to an 'increased storm surge risk,'" which would necessarily affect the Port of New Orleans and traffic on the Mississippi River.[76] Addressing the second part of the connection test, Defendants contend that "[b]oth dredging and oil and gas

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71. *Id.*

72. *Id.*

73. *Id.* (quoting *Grubart*, 513 U.S. at 534).

74. No. 05-4419, 2007 U.S. Dist. LEXIS 23158, 2007 WL 837181 (E.D. La. Mar. 14, 2007) (Berrigan, J.).

75. Rec. Doc. 260 at pp. 32-33 (alternations in original).

76. *Id.* at p. 33.

drilling from barges or other vessels have been deemed by the courts (including the Supreme Court) to constitute traditional maritime activities."[77]

Following this analysis of whether Plaintiff's claims are properly characterized as maritime claims, Defendants argue that "maritime claims supply an independent basis for removing this action to federal court under 28 U.S.C. § 1441."[78] Defendants acknowledge that § 1441(b) had previously "prevented removal of maritime claims absent an independent basis for jurisdiction,"[79] such as diversity, but maintain that post-amendment "there is no impediment to this Court's removal jurisdiction."[80] Defendants counter Plaintiff's argument that the prohibition on removal is grounded in § 1331's saving-to-suitors clause, asserting that "the 'saving to suitors clause does no more than preserve the right of maritime suitors to pursue nonmaritime *remedies.* It does not guarantee them a nonfederal *forum*, or limit the right of defendants to remove such actions to federal court where there exists some basis for federal jurisdiction other than admiralty.'"[81] Defendants point to three district court cases recognizing that the effect of the amendment

77. *Id.* (citing, e.g., *Ellis v. United States*, 206 U.S. 246, 259, 27 S. Ct. 600, 51 L. Ed. 1047, 5 Ohio L. Rep. 427 (1907)).

78. *Id.* at p. 35.

79. *Id.*

80. *Id.*

81. *Id.* (quoting *Tenn. Gas Pipeline v. Houston Cas. Ins. Co.*, 87 F.3d 150, 153 (5th Cir. 1996)).

to § 1441 "is to render maritime and admiralty cases removable under § 1441(b)"—*Ryan v. Hercules Offshore, Inc.*,[82] *Wells v. Abe's Boat Rental, Inc.*,[83] and *Bridges v. Phillips 66 Co.*[84] Further, Defendants distinguish the cases cited by Plaintiffs, contending that they either do not address whether the amendment changed the traditional rule or involve claims filed prior to the amendment.[85]

3. Plaintiff's Reply in Further Support of Remand

In its reply, Plaintiff reiterates "[m]aritime commerce is not at issue in this case. The Authority's case is based upon the increased costs that the Authority will be forced to bear in building and maintaining flood protection assets."[86] According to Plaintiff, "[o]nly in the highly attenuated sequence of events proposed by Defendants are those flood protection assets linked to maritime commerce."[87] Further, Plaintiff maintains that "even if there were a sufficient connection with maritime commerce in this case to establish jurisdiction, the Defendants mistakenly rely

82. 945 F. Supp. 2d 772, 2013 WL 1967315.

83. 2013 U.S. Dist. LEXIS 85534, 2013 WL 3110322.

84. No. 13-4777 (M.D. La. filed Sept. 27, 2013).

85. Rec. Doc. 260 at pp. 38-39 (discussing *Barker*, 713 F.3d at 219; *In re Eckstein*, 672 F.3d at 310; *Duet*, 2013 U.S. Dist. LEXIS 54937, 2013 WL 1682988; *Int'l Transp. Workers Fed.*, 2012 U.S. Dist. LEXIS 157613, 2012 WL 5398470).

86. Rec. Doc. 292 at p. 35.

87. *Id.*

on *Ryan v. Hercules Offshore, Inc.* as providing the rule that this Court must follow for remov ability of maritime cases."[88] According to Plaintiff, *Ryan* was wrongly decided, and "the amendment to § 1441 was not meant to effect such a profound change."[89]

4. Supplemental Authority

Following oral argument on the pending motion, both Plaintiff and Defendants submitted supplemental authority regarding the removability of admiralty claims. On January 31, 2014, Defendant brought to the Court's attention a district court order in *Tiley v. American Tugs*, wherein the court adopted the reasoning set forth in *Ryan* and denied a motion to remand.[90] On June 3, 2014, however, Defendants informed the Court that the district court had vacated its earlier *Tiley* order.[91] On March 24, 2014, Plaintiff filed a notice of supplemental authority regarding *Coronel v. AK Victory*, a case from the Western District of Washington in which a court determined that it lacked removal jurisdiction over general maritime claims.[92]

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88. *Id.* at p. 36.

89. *Id.* at p. 37.

90. Rec. Doc. 317 (citing *Tiley v. Am. Tugs, Inc.*, No. 13-6104, 2014 U.S. Dist. LEXIS 55821 (E.D. La. filed Jan. 16, 2014) (Engelhardt, J.)).

91. Rec. Doc. 360 (citing *Tiley v. Am. Tugs, Inc.*, No. 13-6104, 2014 U.S. Dist. LEXIS 95478 (E.D. La. filed May 16, 2014) (Engelhardt, J.)).

92. Rec. Doc. 337 (citing *Coronel v. AK Victory*, No. 13-2304, 1 F. Supp. 3d 1175, 2014 U.S. Dist. LEXIS 26977, 2014 WL 820270 (W.D. Wash. Feb. 28, 2014)).

B. Applicable Law

Article III of the U.S. Constitution extends the judicial power of the United States to "all Cases of admiralty and maritime Jurisdiction."[93] In 28 U.S.C. § 1333, Congress implemented this power, giving federal district courts "original jurisdiction . . . of . . . [a] civil case of admiralty or maritime jurisdiction . . . ."[94]

In determining whether admiralty jurisdiction exists over a tort claim, courts apply the two-part analysis set forth by the Supreme Court in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock.*[95] The first part, known as the location test, asks "whether the tort occurred on navigable water or whether the injury suffered on land was caused by a vessel on navigable water."[96] In this context, "navigable water" refers to a body of water that is "navigable in fact."[97] Bodies of water are navigable in fact where "they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[98]

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93. U.S. Const., Art. III, § 2.

94. 28 U.S.C. § 1333(1).

95. 513 U.S. 527, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995).

96. *Id.* at 534.

97. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563, 19 L. Ed. 999 (1870).

98. *Id.*

The second part, known as the connection test, raises two issues. 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."[99] This inquiry "turns . . . on a description of the incident at an intermediate level of possible generality."[100] Second, a court must examine "whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity."[101] At this step, the court "ask[s] whether a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand."[102]

C. Analysis

Looking first at the location test, to evaluate whether the tort occurred on navigable water or whether the injury suffered on land was caused by a vessel on navigable water, the Court must determine what the alleged injury is. In this case, the injury at issue is "ecological degradation and extensive land loss" within the Buffer Zone, which "in turn has created markedly increased storm surge risk,

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99. *Grubart*, 513 U.S. at 534 (internal citations and quotation marks omitted).

100. *Id.* at 539.

101. *Id.* at 534 (internal citations and quotation marks omitted).

102. *Id.* at 539-40.

attendant flood protection costs, and, thus, damages to Plaintiff."[103] Land degradation and land loss by their very nature occur on land. Thus, the question becomes whether this injury was caused by a vessel on navigable water. According to the allegations in the Petition, this injury was caused by various activities of Defendants, including dredging.[104] The parties do not dispute that dredges are vessels, and as the Supreme Court observed in *Stewart v. Dutra Construction Company*, courts have consistently "group[ed] dredges alongside more traditional seafaring vessels under the maritime statutes."[105] Further, the parties do not dispute that the coastal waterways that were dredged are navigable waters. Accordingly, the Court finds that the location test is met.

Turning to the connection test, to determine whether the incident has a potentially disruptive impact on maritime commerce, the Court must first describe the incident at an intermediate level of possible generality. The description should be "neither too general to distinguish different cases nor too specific to the unique facts of the particular case"[106]—that is, it "should be general enough to capture the possible effects of similar incidents on maritime commerce, but specific enough to exclude

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103. Rec. Doc. 1-2 at p. 11.

104. *Id.* at pp. 9-11.

105. 543 U.S. 481, 497, 125 S. Ct. 1118, 160 L. Ed. 2d 932 (2005).

106. *Tandon v. Captain's Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 2014 U.S. App. LEXIS 9265, 2014 WL 2016551, at *7 (2d Cir. May 19, 2014).

irrelevant cases."[107] *Grubart* instructs that the purpose of this exercise is to determine "whether the incident could be seen within a class of incidents that pose[] more than a fanciful risk to commercial shipping."[108] For example, in *Grubart*, the defendant had used a crane, sitting on a barge in the Chicago River to drive piles into the riverbed above a tunnel in order to reinforce a bridge.[109] Months later, the walls and ceiling of the tunnel collapsed, causing the tunnel as well as nearby buildings to flood.[110] The Court characterized the incident as "damage by a vessel in navigable water to an underwater structure."[111] In *Sisson v. Ruby*,[112] a case on which *Grubart* relied, a fire erupted on a pleasure yacht docked at a marina on Lake Michigan.[113] The fire destroyed the yacht and damaged several neighboring vessels and the marina.[114] There, the Supreme Court described the incident as "a fire on a vessel docked at a marina on navigable waters."[115] *Grubart* elaborated on *Sisson*'s characterization, explaining "[t]o speak of the incident as 'fire' would have been too

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107. 2014 U.S. App. LEXIS 9265, [WL] at *9.

108. *Grubart*, 513 U.S. at 539.

109. *Id.* at 529.

110. *Id.* at 530.

111. *Id.* at 540.

112. 497 U.S. 358, 110 S. Ct. 2892, 111 L. Ed. 2d 292 (1990).

113. *Id.* at 360.

114. *Id.*

115. *Id.* at 362-63.

general to differentiate cases; at the other extreme, to have described the fire as damaging nothing but pleasure boats and their tie-up facilities would have ignored, among other things, the capacity of pleasure boats to endanger commercial shipping that happened to be nearby."[116]

In its Motion to Remand, Plaintiff suggests that this incident focuses on "the degradation of coastal lands . . . through Defendants' oil and gas production activities."[117] This description ignores that the particular "oil and gas production activity" at issue is dredging by vessels in navigable waters. Although Defendants do not propose a precise description to apply to this analysis, in discussing the connection test, they aver that the Petition "focuses on Defendants' dredging activities" and "alleges that Defendants have contributed to an increased storm surge risk."[118] This characterization is misleading as it fails to address the many intermediate steps between the initial dredging and the presence of an increased storm surge risk. The Court finds that at an intermediate level of generality, the incident here is properly described as coastal erosion caused by dredging in navigable waters.

Having characterized the incident, the Court must evaluate whether the incident has a potentially disruptive impact on maritime commerce—that is, whether the incident could be seen within a class of incidents that

116. *Grubart*, 513 F.3d at 538-39.

117. Rec. Doc. 70-1 at p. 11.

118. Rec. Doc. 260 at pp. 32-33 (internal quotation marks omitted).

pose more than a fanciful risk to commercial shipping. Coastal erosion, by itself, does not interfere with maritime commerce or commercial shipping. It does not impede vessel traffic,[119] threaten the physical integrity of vessels,[120] or result in injury to any person on a vessel.[121] Although coastal erosion has allegedly led to increased flood vulnerability, which in turn will allegedly require more spending on flood protection assets, this result is not disruptive to maritime commerce. Plaintiff is not an entity involved in maritime commerce, and its increased financial burden does not negatively impact maritime commerce. The Court is cognizant that a hurricane and the accompanying flooding could certainly impact the Port of New Orleans and commercial shipping in the region, but the Court cannot rely on such an attenuated series of events to find that the dredging at issue here disrupts maritime commerce.

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119. *See, e.g., Grubart*, 513 F.3d at 539 (noting that "river traffic ceased, several commuter ferries were stranded, and many barges could not enter the river system because the river level was lowered to aid repair efforts").

120. *See, e.g., Sisson*, 497 U.S. at 362 (recognizing that a fire "can spread to nearby commercial vessels or make the marina inaccessible to such vessels" and "is one of the most significant hazards facing commercial vessels").

121. *See, e.g., Gruver v. Lesman Fisheries, Inc.*, 489 F.3d 978, 982-83 (9th Cir. 2007) (finding that an employer's physical assault on a crewman on a fishing vessel had a potentially detrimental effect on maritime commerce by depriving the vessel of a deckhand due to his injuries).

While the Court concludes that the incident at issue does not have a potentially disruptive impact on maritime commerce, for completeness, the Court addresses the second prong of the connection test—whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity. In *Grubart*, the Court explained that "[t]he substantial relationship test is satisfied where at least one alleged tortfeasor was engaging in activity substantially related to traditional maritime activity and such activity is claimed to have been a proximate cause of the incident."[122] Further, *Grubart* recognized that "ordinarily" a "tort involving a vessel on navigable waters" will have a substantial relationship to traditional maritime activity.[123] As noted above, the primary activity at issue here involved dredges, which courts recognize as vessels,[124] operating on navigable waters.

The Court finds that coastal erosion caused by dredges in navigable waters does not have a potentially disruptive effect on maritime commerce, and thus the Court does not have admiralty jurisdiction over this matter. Accordingly, the Court need not decide whether general maritime law claims are removable under 28 U.S.C. § 1441 absent a separate and independent ground of federal subject matter jurisdiction.[125]

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122. *Grubart*, 513 U.S. at 541.

123. *Id.* at 543.

124. *See Stewart*, 543 U.S. at 497.

125. The Court notes that district courts have sharply divided on this issue. Some district courts have held that the amendment to

Appendix C

IV. Whether Federal Enclave Jurisdiction Exists

A. Parties' Arguments

1. Plaintiff's Arguments in Support of Remand

Plaintiff contends that "[f]ederal enclave jurisdiction does not attach in this case because [Defendants have] failed to factually demonstrate that there is any federal enclave at issue."[126] Further, Plaintiff maintains that it, "as the 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."[127] Finally, Plaintiff argues that it "has not alleged that any acts occurred, or injuries were sustained, on a federal enclave."[128]

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§ 1441 did not render claims brought under general maritime law removable absent a separate basis for jurisdiction. *See Coronel*, 2014 U.S. Dist. LEXIS 26977, 2014 WL 820270 at *2-11; *Barry v. Shell Oil Co.*, No. 13-6133, 2014 U.S. Dist. LEXIS 23657, 2014 WL 775662, at *1-3 (E.D. La. Feb. 25, 2014) (Zainey, J.). Other courts, however, have held that the amendment to § 1441 changes the traditional rule and makes maritime claims removable. *See Garza v. Phillips 66 Co.*, No. 13-742, 2014 U.S. Dist. LEXIS 45511, 2014 WL 1330547, at *4-5 (M.D. La. Apr. 1, 2014); *Harrold v. Liberty Ins. Underwriters, Inc.*, No. 13-762, 2014 U.S. Dist. LEXIS 21300, 2014 WL 688984, at *3-4 (M.D. La. Feb. 20, 2014); *Carrigan v. M/V AMC AMBASSADOR*, No. 13-03208, 2014 U.S. Dist. LEXIS 12484, 2014 WL 358353, at *2 (S.D. Tex. Jan.31, 2014); *Bridges v. Phillips 66 Co.*, No. 13-477, 2013 U.S. Dist. LEXIS 164542, 2013 WL 6092803, at *4-5 (M.D. La. Nov. 19, 2013); *Wells*, 2013 U.S. Dist. LEXIS 85534, 2013 WL 3110322, at *1-4 ; *Ryan*, 945 F. Supp. 2d at 774-78.

126. Rec. Doc. 70-1 at p. 21.

127. *Id.*

128. *Id.*

Appendix C

According to Plaintiff, courts apply a three-prong test to evaluate the existence of a federal enclave sufficient to confer jurisdiction:

> (1) the United States must purchase land from a state for the purpose of erecting forts, magazines, arsenals, dock-yards, 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."[129]

With respect to prong one, Plaintiff contends that Defendants have "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."[130] With respect to prong three, Plaintiff asserts that Defendants "offer[] no support for the third prong of the test for federal jurisdiction and without such support, this Court cannot exercise jurisdiction."[131]

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129. *Id.* at pp. 22-23 (quoting *Wood v. Am. Crescent Elevator Corp.*, No. 11-397, 2011 U.S. Dist. LEXIS 52239, 2011 WL 1870218, at *3 (E.D. La. May 16, 2011) (Zainey, J.)).

130. *Id.* at p. 23.

131. *Id.*

Additionally, Plaintiff urges that "this Court should reject [Defendants'] novel interpretation of federal jurisdiction," under which "the mere tangential relation of a federal enclave to a plaintiff's cause of action suffices to confer jurisdiction."[132] According to Plaintiff, "courts have required a close relationship between the federal enclave at issue, the conduct that occurred, and the injury sustained," and have limited federal enclave jurisdiction to cases involving "personal injury and other tort claims that occur on federal enclaves."[133]

2. Defendants' Arguments in Opposition to Remand

In their opposition, Defendants cite a four-prong test for federal enclave jurisdiction:

> (1) the United States must have acquired land from a State; (2) the state legislature must have consented to federal jurisdiction; (3) the United States must have formally accepted jurisdiction, but only if the property was acquired by the United States after 1940; and (4) the claims at issue must arise in part on the enclave.[134]

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132. *Id.* at p. 24.

133. *Id.*

134. Rec. Doc. 260 at p. 39 (citing *Wood*, 2011 U.S. Dist. LEXIS 52239, 2011 WL 1870218, at *2).

With respect to prong three, Defendants argue that courts have presumed acceptance of jurisdiction for property acquired prior to 1940, and thus that formal acceptance is only required for acquisitions after this time.[135] Although Defendants acknowledge that 40 U.S.C. § 3112, as amended in 2002, now provides that "i[t] is conclusively presumed that jurisdiction has not been accepted until the Government accepts jurisdiction over land,"[136] Defendants contend that if formal acceptance were required, "dozens of properties would lose their federal enclave status where the federal government has relied on the pre- 1940 presumption that it accepted jurisdiction."[137]

Examining the fourth prong, Defendants aver that Plaintiff's "contention that the Court lacks jurisdiction because the Board has not alleged an injury that occurred on a federal enclave is equally flawed."[138] They contend that "[a]rtful pleading does not defeat a federal court's jurisdiction over disputes involving federal enclaves."[139] According to Defendants, "there are at least two federal enclaves within the area of alleged wetland loss—(1) Breton Island and Chandeleur Island in the Breton

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135. *Id.* at p. 40 (citing, *e.g., United States v. Davis*, 726 F.3d 357, 369 (2d Cir. 2013)).

136. The law was previously codified at 40 U.S.C. § 255.

137. Rec. Doc. 260 at p. 40.

138. *Id.*

139. *Id.* at pp. 40-41 (citing, *e.g., Fung v. Abex Corp.*, 816 F. Supp. 569, 571 (N.D. Cal. 1992)).

National Wildlife Refuge ('Breton NWR') and (2) the Delta National Wildlife Refuge ('Delta NWR')."[140] Defendants argue:

> There can be no doubt that the alleged tortious activity and resulting land loss has occurred on these federal enclaves and that the relief sought by the Board, if granted, will require marsh creation, restoration, and related work on the enclaves. Although there is currently a moratorium against drilling in the Breton NWR, oil and gas exploration and development historically occurred there. Dredging also occurred in the Delta NWR.[141]

Further, Defendants argue that Plaintiff's "Petition does not distinguish between the alleged injuries caused to federal enclaves from other alleged injuries."[142]

3. Plaintiff's Reply in Further Support of Remand

In its reply, Plaintiff avers that "[e]ven assuming that Defendants have satisfied their burden of proving any specific area fulfills the prerequisites for enclave status, they have failed to bear their burden of proving that the federal law applicable within those enclaves creates

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140. *Id.* at p. 41.

141. *Id.* at p. 42.

142. *Id.*

any of the Authority's causes of action."[143] In support of this position, Plaintiff maintains that "federal enclave jurisdiction is part of a court's federal question jurisdiction under 28 U.S.C. § 1331."[144] Thus, according to Plaintiff, "[w]hether a claim arises under federal jurisdiction must be determined by referring to the 'well-pleaded complaint'" and "a federal question must appear on the face of the complaint."[145]

Additionally, Plaintiff contends that neither the Breton National Wildlife Refuge nor the Delta National Wildlife Refuge "bears any significant relationship to the Authority's claims."[146] Plaintiff asserts that "[i]n fact, neither one even falls within the Buffer Zone."[147]

4. Statements at Oral Argument

At oral argument, Defense counsel stated to the Court that Defendants would withdraw their federal-enclave ground for removal if Plaintiff agreed that neither the Breton National Wildlife Refuge nor the Delta National Wildlife Refuge is in the Buffer Zone. The Court inquired whether Plaintiff would stipulate that the Breton National Wildlife Refuge and the Delta National Wildlife Refuge

143. Rec. Doc. 292 at p. 40.

144. *Id.* at p. 39.

145. *Id.*

146. *Id.* at p. 40.

147. *Id.*

are not in the Buffer Zone. Counsel for Plaintiff indicated that he was not prepared to make that stipulation without conferring with co-counsel because he had not handled the federal enclave portion of Plaintiff's argument. Accordingly, the Court stated that it would determine the matter.

B. Applicable Law

Federal enclave jurisdiction is a form of federal question jurisdiction derived from Article I, section 8, clause 17 of the United States Constitution.[148] That clause gives Congress exclusive legislative jurisdiction over federal enclaves, or "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."[149] Courts have reasoned that if Congress has legislative jurisdiction over federal enclaves, then federal courts must also have subject matter jurisdiction over controversies "which arise from incidents occurring in federal enclaves."[150] In

148. *See Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998); *Mater v. Holley*, 200 F.2d 123, 124-25 (5th Cir. 1952).

149. U.S. Const. Art. I, § 8, cl. 17.

150. *Akin*, 156 F.3d at 1034; *see also, e.g., Mater*, 200 F.2d at 124 (observing that the United States has exclusive sovereignty in enclave areas and stating that "[i]t 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"); *Lawler v. Miratek Corp.*, No. 09-252, 2010 U.S. Dist. LEXIS 18478, 2010 WL 743925, at *2 (W.D. Tex. Mar. 2, 2010) ("In order to determine whether this Court has subject matter

order for a place to be a federal enclave, three conditions must be present:

> (1) the United States must purchase land from a state for the purpose of erecting forts, magazines, arsenals, dock-yards, or other needful buildings, (2) the state legislature must consent to the jurisdiction of the federal government, and (3) if the property was acquired after 1940, 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.[151]

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jurisdiction over these claims, it must determine whether or not they arose on federal enclaves."); *Corley v. Long-Lewis, Inc.*, 688 F. Supp. 2d 1315, 1323 (N.D. Ala. 2010) (Davis, M.J.) (finding federal enclave jurisdiction where "there is evidence in the record that [Plaintiff] was exposed to asbestos while working on ships located at these [federal] shipyards"); *Reed v. Fina Oil & Chem. Co.*, 995 F. Supp. 705, 713 (E.D. Tex. 1998) (noting that federal enclave jurisdiction would apply where Plaintiff was exposed to leukemia-inducing agents at a facility from 1944-79 and the federal government owned the facility from 1944-55); *Fung v. Abex Corp.*, 816 F. Supp. 569, 571 (N.D. Cal. 1992) (finding federal enclave jurisdiction where plaintiff was exposed to asbestos at a Navy shipyard).

151. *Wood*, 2011 U.S. Dist. LEXIS 52239, 2011 WL 1870218, at *2 (citing *Paul v. United States*, 371 U.S. 245, 264, 83 S. Ct. 426, 9 L. Ed. 2d 292 (1963); *De Kalb County v. Henry C. Beck Co.*, 382 F.2d 992, 994-95 (5th Cir. 1967)) (internal citations and quotation marks omitted).

C. Analysis

Defendants initially maintained that federal enclave jurisdiction exists in this case because "there are at least two federal enclaves within the area of alleged wetland loss—(1) Breton Island and Chandeleur Island in the Breton National Wildlife Refuge ('Breton NWR') and (2) the Delta National Wildlife Refuge ('Delta NWR')."[152] At oral argument, however, Defense counsel indicated that Defendants would withdraw their federal enclave argument if Plaintiff stipulated that the Breton National Wildlife Refuge and the Delta National Wildlife Refuge were not in the Buffer Zone. Although counsel for Plaintiff, noting that he had not worked on the portion of the motion addressing federal enclave jurisdiction, was unwilling to make that stipulation at oral argument, a review of the record indicates that in its reply brief, Plaintiff states that "neither one even falls within the Buffer Zone."[153] Accordingly, the Court finds that Breton National Wildlife Refuge and the Delta National Wildlife Refuge are not in the Buffer Zone.

Aside from the Breton National Wildlife Refuge and the Delta National Wildlife Refuge, Defendants do not point to any other possible federal enclaves within the Buffer Zone, the area identified in the Petition as experiencing coastal erosion. Further, Defendants do not direct the Court to any possible federal enclaves where Defendants conducted the dredging or other activities that

152. Rec. Doc. 260 at p. 41.

153. *Id.*

allegedly caused the coastal erosion. Although Defendants mention that there are "numerous [] federal enclaves in the New Orleans area,"[154] they do not demonstrate how this controversy arises from an incident at any of those alleged enclaves. Unless Defendants' conduct took place on a federal enclave or the damage complained of—coastal erosion—occurred on a federal enclave, the Court cannot say that the controversy arises from an enclave. While certain federal structures in the New Orleans area might face increased flood risks due to Defendants' alleged conduct, this relationship is too attenuated to support the conclusion that federal enclave jurisdiction is proper.

Considering that the parties agree that Breton National Wildlife Refuge and the Delta National Wildlife Refuge are outside the Buffer Zone, and that Defendants have not identified any other possible federal enclaves in the area where Defendants' conduct took place or in the area experiencing erosion, it is unnecessary to apply the three-part test for whether a federal enclave truly exists.

V. Whether the Outer Continental Shelf Lands Act ("OCSLA") Provides Jurisdiction

A. Parties' Arguments

1. Plaintiff's Arguments in Support of Remand

Plaintiff asserts that "[b]ecause none of the acts and omissions that form the basis for the Authority's claims

154. Rec. Doc. 260 at p. 41.

involves [sic] an operation on the outer continental shelf, OCSLA cannot provide a basis for jurisdiction in this matter."[155] Citing the Fifth Circuit's decision in *Amoco Production Co. v. Sea Robin Pipeline Co.*,[156] Plaintiff explains that "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 [outer continental shelf] and operations thereunder might generate.'"[157] According to Plaintiff, OCSLA's jurisdictional grant "is limited to 'activity occurring beyond the territorial waters of the states.'"[158] Plaintiff points to *Demette v. Falcon Drilling Co.*[159] as establishing a three-part test for "whether a cause arises under OCSLA."[160] That test examines 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."[161]

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155. Rec. Doc. 70-1 at p. 20.

156. 844 F.2d 1202 (5th Cir. 1988).

157. Rec. Doc. 70-1 at p. 20 (quoting *Sea Robin*, 844 F.2d at 1206).

158. *Id.* (quoting *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 213 (5th Cir. 2013)).

159. 280 F.3d 492 (5th Cir. 2002), *overruled in part by Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778 (5th Cir. 2009).

160. Rec. Doc. 70-1 at p. 21.

161. *Id.* (citing *Demette*, 280 F.3d at 496).

Averring that "the acts and omissions at issue center on Louisiana's coastal *lands*, rather than waters,"[162] Plaintiff argues that OCSLA cannot serve as grounds for removal where:

> (1) none of the acts or omissions at issue occurred on the outer continental shelf; (2) no injury was sustained away [sic] 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.[163]

2. Defendants' Arguments in Opposition to Remand

In opposition to Plaintiff's "Motion to Remand," Defendants argue that "[b]ecause this case involves pipelines that transport hydrocarbons from the outer continental shelf, the Court has federal question jurisdiction under OCSLA."[164] Citing *Sea Robin Pipeline Co.*, Defendants contend that "OCSLA jurisdiction exists with respect to any dispute that threatens to disrupt mineral production on the outer continental shelf."[165] Further, Defendants maintain that "the Fifth Circuit has

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162. *Id.* (emphasis in original).

163. *Id.*

164. Rec. Doc. 260 at p. 26.

165. *Id.* (citing *Amoco Production*, 844 F.2d at 1210).

held that OCSLA's grant of federal jurisdiction should be interpreted and applied very broadly."[166]

According to Defendants, this case comes within OCSLA's broad grant of jurisdiction as Plaintiff's "claims present a direct threat to the efficient exploitation of minerals in the outer continental shelf."[167] Defendants aver that Plaintiff's requested relief—backfilling and revegetating every canal dredged by Defendants—"would dramatically alter oil and gas production-related operations in the region, including exploration, development, and production operations on the outer continental shelf."[168] Further, Defendants assert that the dredged canals at issue in this case "are used not only to transport hydrocarbons produced through operations occurring within three miles of the Louisiana coast, but have also been used to transport hydrocarbons from the outer continental shelf to onshore terminals and other locations since the late 1940s."[169]

Addressing Plaintiff's argument that OCSLA jurisdiction cannot exist because the "acts and omissions at issue center on Louisiana's coastal *lands*, rather than water,"[170] Defendants counter that "the law is well-settled

166. *Id.* at p. 27 (citing, *e.g., Barker*, 713 F.3d at 221).

167. *Id.*

168. *Id.* at p. 28.

169. *Id.*

170. *Id.* at p. 29 (citing Rec. Doc. 70-1 at p. 26) (emphasis in original).

that OCSLA jurisdiction exists 'even where' the acts or omissions giving rise to the suit 'occur on land.'"[171] According to Defendants, "[t]o give effect to § 1349's broad grant of jurisdiction, courts thus do not look soley to whether the operation occurred in the water, but instead find OCSLA applicable whenever the liberal 'but for' test for federal-question jurisdiction is met."[172] Defendants point to three reasons why this case meets the but-for test. First, Defendants contend that "the alleged facts implicate the 'proper situs' because Defendants include producers that transport resources from the outer continental shelf to on-shore terminals by way of pipelines located in the canals that are the subject of the Board's claims."[173] Next, Defendants assert that the challenged conduct—dredging canals in wetlands—"was performed in furtherance of mineral development on the outer continental shelf."[174] Finally, Defendants argue that but-for Defendants' mineral operations on the OCS, "there would have been no need to build (nor ongoing use for) some or all of the pipelines that traverse the canals and wetlands at issue."[175]

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171. *Id.* (quoting *BP Exploration & Prod., Inc. v. Callidus Techs., L.L.C.*, No. 02-2318, 2003 U.S. Dist. LEXIS 1204, 2003 WL 193450, at *4 (E.D. La. Jan. 27, 2003) (Zainey, J.)).

172. *Id.*

173. *Id.*

174. *Id.* at p. 30.

175. *Id.*

3. Plaintiff's Reply in Further Support of Remand

In its Reply, Plaintiff asserts that "[t]he test for OCSLA jurisdiction 'is whether the case: (1) involves an operation on the Outer Continental Shelf that involves doing some physical act in search of minerals on the OCS, preparing to extract them by drilling wells and constructing platforms, and removing minerals and transferring them to shore; and, (2) involves a dispute that arises out of or in connection with the defendant's operation on the OCS, that is, 'but for' the operation on the OCS would the case or controversy have arisen.'"[176] According to Plaintiff, neither prong of this test is met. First, Plaintiff avers that the claims "concern[] activity in the coastal Buffer Zone" and "[t]hat geographic description conclusively precludes outer continental shelf operations."[177] Further, Plaintiff maintains that the but-for test is not met: "The Authority would have a case regardless of whether certain pipelines that run through the Buffer Zone connect to the outer continental shelf operations, because the Authority's case is factually dependent upon the exploration and production activities that Defendants undertook *within the Buffer Zone*."[178]

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176. Rec. Doc. 292 at pp. 37-38 (quoting *Stevens v. Energy XXI GOM, LLC*, No. 11-154, 2011 U.S. Dist. LEXIS 66894, 2011 WL 2489998, at *3 (M.D. La. May, 18, 2011) (Riedlinger, M.J.)) (internal alterations omitted).

177. *Id.* at p. 38.

178. *Id.* (emphasis in original).

Finally, Plaintiff argues that Defendants misinterpret Plaintiff's requested relief, stating that "[n]owhere does the Authority suggest that it seeks to have operational pipelines shut off and removed."[179] Thus, relief in this case would not disrupt operations on the OCS.[180]

4. Supplemental Authority

On March 5, 2014—after the Court heard oral argument on the pending motion—Defendants filed a "Notice of Supplemental Authority," bringing the Fifth Circuit's February 24, 2014 decision in *In re Deepwater Horizon* [181] to the Court's attention.[182] According to Defendants, *Deepwater Horizon* "rejected the [] contention that OCSLA contains a 'situs requirement,' which would limit its reach to injuries occurring on the outer continental shelf itself."[183] Defendants aver that "*Deepwater Horizon* confirms that OCSLA jurisdiction is proper,"[184] noting "[a]lthough it is true that neither the dredging nor the erosion took place on the OCS, *Deepwater Horizon* holds that OCSLA contains no 'situs' requirement."[185]

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179. *Id.* at p. 39.

180. *Id.*

181. 745 F.3d 157 (5th Cir. 2014).

182. Rec. Doc. 334 at p. 1.

183. *Id.* at p. 2.

184. *Id.*

185. *Id.*

B. Applicable Law

Pursuant to the Outer Continental Shelf Lands Act ("OCSLA"), as codified at 43 U.S.C. § 1349(b)(1), the district courts of the United States have jurisdiction over claims "arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf . . . ."[186] This jurisdictional grant is broad,[187] and "[a] plaintiff does not need to expressly invoke OCSLA in order for it to apply."[188]

As the Fifth Circuit recently explained in *Deepwater Horizon*, "[c]ourts typically assess jurisdiction under this provision in terms of whether (1) the activities that caused the injury constituted an 'operation' 'conducted on the outer Continental Shelf' that involved the exploration and production of minerals, and (2) the case 'arises out of, or in connection with' the operation."[189] With respect

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186. 43 U.S.C. § 1349(b)(1).

187. *See, e.g., Deepwater Horizon*, 745 F.3d at 163 (OCSLA's jurisdictional grant is "straightforward and broad"); *Barker*, 713 F.3d at 213 ("The jurisdictional grant in OCSLA is broad, covering a 'wide range of activities occurring beyond the territorial waters of the states.'"); *Tenn. Gas Pipeline v. Houston Cas. Ins. Co.*, 87 F.3d 150, 154 (5th Cir. 1996) ("The jurisdictional grant, contained in 43 U.S.C. § 1349(b)(1), is very broad.").

188. *Barker*, 713 F.3d at 213.

189. *Deepwater Horizon*, 745 F.3d at 163.

to the first prong of this analysis, although OCSLA itself does not define "operation," the Fifth Circuit has stated that operation is "the doing of some physical act."[190] "Exploration, development, or production" respectively refer to "the processes involved in searching for minerals on the OCS; preparing to extract them by, inter alia, drilling wells and constructing platforms; and removing the minerals and transferring them to shore."[191] The second prong of the jurisdictional test "require[s] only a 'but for' connection"—that is, a court must evaluate whether but for the operation would the case have arisen.[192] *Deepwater Horizon* clarified that there is no situs requirement for jurisdiction under OCSLA, explaining "[b]ecause federal jurisdiction exists for cases 'arising out of, or in connection with' OCS operations, 43 U.S.C. § 1349, the statute precludes an artificial limit based on situs."[193] Indeed, the Fifth Circuit noted in *Deepwater Horizon* that a situs requirement "conflicts with this court's but-for test."[194]

In its "Motion to Remand," Plaintiff cites the test set forth by the Fifth Circuit in *Demette v. Falcon Drilling Co.* for whether a cause of action arises under OCSLA.[195]

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190. *Tenn. Gas Pipeline*, 87 F.3d at 154 (internal quotation marks and citations omitted).

191. *Id.* at 154-55 (citing 43 U.S.C. § 1331(k)—(m)).

192. *Deepwater Horizon*, 745 F.3d at 163.

193. *Id.* at 164.

194. *Id.*

195. Rec. Doc. 70-1 at p. 21 (citing *Demette*, 280 F.3d at 496).

According to Plaintiff, the *Demette* 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."[196] Plaintiff argues that because "none of these elements are met . . . the Authority's claims do not arise under OCSLA and OCSLA cannot provide a basis for removal."[197] However, the *Demette* test cited by Plaintiff is not a test for whether the Court has jurisdiction pursuant to 43 U.S.C. § 1349, as claimed by Plaintiff. Rather, *Demette* addresses choice of law issues under 43 U.S.C. § 1333, another provision of OCSLA. In *Deepwater Horizon*, the Fifth Circuit explicitly cautioned against "intertwin[ing] the Section 1349 jurisdictional inquiry with OCSLA's choice of law provision, 43 U.S.C. § 1333, . . . because the provisions and issues they raise are distinct."[198] Accordingly, the Court declines to adopt the Plaintiff's articulation of the test for whether jurisdiction exists under OCSLA.

196. *Id.* (citing *Demette*, 280 F.3d at 496).

197. *Id.*

198. *Deepwater Horizon*, 745 F.3d at 164.

C. Analysis

1. Whether the Activities that Caused the Injury Constituted an Operation Conducted on the Outer Continental Shelf that Involved the Exploration and Production of Minerals

Applying the two-prong test described in *Deepwater Horizon*, the Court first examines whether "the activities that caused the injury constituted an 'operation' 'conducted on the outer Continental Shelf' that involved the exploration and production of minerals."[199] Thus, a threshold question is what are the activities that caused the injury. In its petition, Plaintiff alleges that "[i]n the Buffer Zone, Defendants identified in Exhibit A [200] have dredged, used, and/or bear responsibility for the network of access canals and pipelines throughout 20-plus inland oil and gas fields."[201] Plaintiff also claims that Defendants have "fail[ed] to maintain the canal network."[202] Further, Plaintiff identifies ten other "ongoing oil and gas activities contributing to land loss": road dumps, ring levees, drilling activities, fluid withdrawal, seismic surveys, marsh buggies, spoil disposal/dispersal, watercraft navigation, impoundments, and propwashing/maintenance dredging.[203]

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199. *Id.* at 163.

200. "Exhibit A" lists all of the named Defendants in this action. *See* Rec. Doc. 1-2 at pp. 4, 25-34.

201. *Id.* at p. 11.

202. *Id.*

203. *Id.* at p. 10.

The next question the Court must address is whether these activities constitute an operation conducted on the OCS. As noted above, an operation is defined as "some physical act." All of the acts alleged in Plaintiff's Petition take place within the Buffer Zone.[204] Indeed, in their Notice of Supplemental Authority, Defendants specifically acknowledge "neither the dredging nor the erosion took place on the OCS."[205] Considering that all of the activities causing Plaintiffs' injuries occurred on Louisiana's coastal lands or within Louisiana's territorial waters, they cannot be characterized as "an 'operation' 'conducted on the outer Continental Shelf' that involved the exploration and production of minerals."[206]

Nevertheless, the Defendants argue "the law is well-settled that OCSLA jurisdiction exists 'even where' the acts of omissions giving rise to the suit 'occur on land.'"[207] This contention inappropriately relies on a district court's order in *BP Exploration & Production, Inc. v. Callidus Technologies, L.L.C. BP Exploration & Production* did not address jurisdiction under 43 U.S.C. § 1349; rather, it

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204. *See, e.g., id.* at p. 11 (alleging that Defendants have dredged "[i]n the Buffer Zone"); *id.* at p. 10 (noting that "the removal of fluid from beneath the coastal lands is causing subsidence of those lands").

205. Rec. Doc. 334 at p. 2.

206. *Deepwater Horizon*, 745 F.3d at 163.

207. Rec. Doc. 260 at p. 29 (quoting *BP Exploration*, 2003 U.S. Dist. LEXIS 1204, 2003 WL 193450, at *4).

dealt with choice of law under § 1333.[208] As noted above, the Fifth Circuit has directed courts not to intertwine the § 1333 and § 1349 analyses.[209]

Defendants also assert that "[t]o give effect to § 1349's broad grant of jurisdiction, courts thus do not look solely to whether the operation occurred in the water, but instead find OCSLA applicable whenever the liberal 'but for' test for federal-question jurisdiction is met."[210] This argument, however, conflates the two prongs of the test for jurisdiction under OCSLA. Although the second prong involves a but-for analysis, the first prong presents a distinct inquiry—whether "the activities that caused the injury constituted an 'operation' 'conducted on the outer Continental Shelf' that involved the exploration and production of minerals."[211] Here, the first prong—correctly stated—is not met as all of the activities allegedly causing Plaintiff's injuries occurred on Louisiana's coastal lands or within Louisiana's territorial waters.

Finally, Defendants' argument that Plaintiff's claims "present a direct threat to the efficient exploitation of minerals in the outer continental shelf" is unavailing.[212] In

208. *BP Exploration*, 2003 U.S. Dist. LEXIS 1204, 2003 WL 193450 at *1 (noting that the pending motion requested summary judgment on the issue of choice of law).

209. *See Deepwater Horizon*, 745 F.3d at 164.

210. Rec. Doc. 260 at p. 29.

211. *Deepwater Horizon*, 745 F.3d at 163.

212. Rec. Doc. 260 at p. 27.

this case, Defendants' acts occurred on Louisiana's coastal lands or in Louisiana's coastal waters, and Plaintiff's injuries occurred on Louisiana's coastal lands or in Louisiana's coastal waters. Although some of the dredging and pipelines may have facilitated oil and gas activities on the OCS, Defendants have not identified—nor has the Court located—any case where a court based jurisdiction on such an attenuated relationship between operations on the OCS and the conduct and injuries at issue in the litigation. Defendants cite *Amoco Production Co. v. Sea Robin Pipeline Co.*, for the proposition that "Congress intended that 'any dispute that alters the progress of production activities on the [outer continental shelf]' would fall 'within the grant of federal jurisdiction contained in § 1349."[213] *Sea Robin*, however, involved take-or-pay contracts for natural gas produced from wells that were located on the OCS, leading the Fifth Circuit to conclude that "[e]xercise of take-or pay rights . . . necessarily and physically has an immediate bearing on the production of the particular well, certainly in the sense of the volume of gas actually produced."[214] Additionally, Defendants characterize *EP Operating Limited Partnership v. Placid Oil Co.*[215] as "finding OCSLA-based jurisdiction where resolution 'would affect the efficient exploitation of resources from the' outer continental shelf." *EP Operating* is also readily distinguishable from this matter as it

213. *Id.* (quoting *Sea Robin*, 844 F.2d at 1210) (emphasis omitted).

214. *Sea Robin*, 844 F.2d at 1210.

215. 26 F.3d 563 (5th Cir. 1994).

concerned the partition of offshore equipment attached to the OCS.[216]

2. Whether the Case Arises Out Of, or In Connection With the Operation

Although this matter fails to satisfy prong one of the test for jurisdiction under OCSLA—the activities that caused the injury do not constitute an 'operation' 'conducted on the outer Continental Shelf' that involved the exploration and production of minerals—the Court turns to prong two for completeness. Prong two requires the Court to ask whether "the case 'arises out of, or in connection with' the operation" on the OCS.[217] In addressing prong two, the Court examines whether the injury would have occurred but for operations on the OCS.[218]

In this case, some of the dredging and pipelines at issue facilitate oil and gas production on the OCS.

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216. *See id.* at 565 ("EP Operating Limited Partnership ('EP'), a co-owner of certain property located on the Outer Continental Shelf ('OCS'), filed suit against its co-owners to partition the property.").

217. *Deepwater Horizon*, 745 F.3d at 163.

218. *See, e.g., id.* (characterizing prong two as "requir[ing] only a 'but-for' connection"); *Hufnagel v. Omega Serv. Indus., Inc.*, 182 F.3d 340, 350 (determining that "[b]ut for Hufnagel's work on the platform, his injury would not have occurred"); *Recar v. CNG Producing Co.*, 853 F.2d 367, 369 (5th Cir. 1988) (finding jurisdiction under OCSLA where the injured worker's employment furthered mineral development on the OCS and "but for" that employment the worker would not have been injured).

However, as Plaintiff notes, "the Authority's case is factually dependent upon the exploration and production activities that Defendants undertook *within the Buffer Zone*,"[219] and Exhibit D of Plaintiff's petition identifies hundreds of wells on Louisiana's coastal lands and within Louisiana's coastal waters.[220] Accordingly, the Court finds that Plaintiff's injury would have occurred regardless of operations on the OCS, and the but-for test is not satisfied.

VI. Whether the Class Action Fairness Act ("CAFA") Provides Jurisdiction

As a preliminary matter, the Court notes that on February 20, 2014, Defendants Chevron U.S.A., Inc., Union Oil Company of California, Chevron Pipeline Co., and Kewanee Industries, Inc. filed a "Notice of Issuance of Supreme Court Judgment."[221] In their Notice, these four defendants represented that they were withdrawing their argument that CAFA supplies a basis for jurisdiction in light of the Supreme Court's opinion in *Mississippi ex. rel Hood v. AU Optronics, Inc.*[222] Considering that only four of the ninety-two remaining defendants indicated that they were withdrawing their CAFA argument, the Court addresses this issue on the merits.

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219. Rec. Doc. 292 at p. 38 (emphasis in original).

220. Rec. Doc. 1-2 at pp. 37-102.

221. Rec. Doc. 331.

222. 134 S. Ct. 736, 187 L. Ed. 2d 654 (2014).

Appendix C

A. Parties' Arguments

1. Plaintiff's Arguments in Support of Remand

Plaintiff asserts that this case is not removable under CAFA because it does not meet the definition of a "mass action." According to Plaintiff, 28 U.S.C. § 1332 (d)(11)(B)(i) defines a "mass action" as "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 questions of law or fact.'"[223] Looking to subsection 1332(d)(11)(B)(ii)(III), Plaintiff further argues that the term "mass action" does not include a 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 claims or members of a purported class) pursuant to a State statute specifically authorizing such action."[224] Plaintiff points out that "[t]he Authority is the only Plaintiff in this case" and asserts that "[t]his 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."[225]

2. Defendants' Arguments in Opposition to Remand

In opposition to Plaintiff, Defendants argue that although the Authority is the only Plaintiff in this case,

223. Rec. Doc. 70-1 at p. 18.

224. *Id.*

225. *Id.*

"'numerosity' is not determined by counting names in a case caption."[226] Instead a court must examine the substance of an action "so as to determine who are the real parties in interest."[227] Citing the Fifth Circuit's decision in *Mississippi ex rel. Hood v. AU Optronics Corp.*,[228] Defendants contend that "[i]n the context of CAFA, the Fifth Circuit has instructed courts to 'pierce the pleadings and look at the real nature' of the claims 'so as to prevent jurisdictional gamesmanship.'"[229] Defendants look to the Fifth Circuit's decision in *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*,[230] which defined real parties in interest as those "directly and personally concerned in the outcome of the litigation,"[231] and reason that the real party in interest is not the Authority, but the residents, business, and properties within the flood protection system.[232]

3. Plaintiff's Reply in Further Support of Remand

In its Reply, Plaintiff argues that "[t]he specific claims at issue in the lawsuit are for harms visited upon the

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226. Rec. Doc. 260 at p. 43.

227. *Id.*

228. 701 F.3d 796 (5th Cir. 2012), *rev'd Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 187 L. Ed. 2d 654 (2014).

229. Rec. Doc. 260 at p. 43 (quoting *Hood*, 701 F.3d at 799).

230. 536 F.3d 418 (5th Cir. 2008).

231. Rec. Doc. 260 at p. 44 (quoting *Caldwell*, 536 F.3d at 428).

232. *Id.* at p. 44.

Authority."[233] According to Plaintiff, "the Authority's flood protection system, while protecting the public, is an asset under the Authority's care, and for the protection of which the Authority is the real party in interest."[234]

4. Defendants' Notice of Supreme Court Judgment

As previously indicated, on February 20, 2014, Defendants Chevron U.S.A., Inc., Union Oil Company of California, Chevron Pipeline Co., and Kewanee Industries, Inc. filed a "Notice of Issuance of Supreme Court Judgment."[235] In their Notice, these four defendants represent that they are withdrawing their argument that CAFA supplies a basis for jurisdiction in light of the Supreme Court's opinion in *Mississippi ex. rel Hood v. AU Optronics, Inc.*[236]

B. Applicable Law

The Class Action Fairness Act of 2005 ("CAFA") "creates original jurisdiction over cases that previously were beyond federal diversity subject-matter jurisdiction" by enabling defendants in civil suits to remove "mass actions" from state to federal court.[237] CAFA defines a

233. Rec. Doc. 292 at p. 43.

234. *Id.*

235. Rec. Doc. 331.

236. 134 S. Ct. 736, 187 L. Ed. 2d 654 (2014).

237. 14B Charles Alan Wright, et al., *Federal Practice and Procedure* § 3724 (4th ed. 2013).

"mass action" as 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 questions of law or fact."[238]

In its 2008 decision in *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, the Fifth Circuit held that "persons" in the mass action context are "the real parties in interest as to the respective claims."[239] The Fifth Circuit reiterated this position in *Mississippi ex. rel Hood v. AU Optronics, Inc.*, a 2012 decision.[240] In *Hood*, the state of Mississippi brought a consumer protection suit against liquid-crystal display ("LCD") manufacturers, alleging that the manufacturers had formed a cartel to restrict competition and raise prices.[241] The Fifth Circuit reasoned that "the real parties in interest in this suit include both the State and the individual consumers of LCD products" and noted that "it is undisputed that there are more than 100 consumers."[242] Accordingly, the court held that "there are more than 100 claims at issue in this case," and that "[t]he suit therefore meets the CAFA definition of a 'mass action.'"

238. 28 U.S.C. § 1332(d)(11)(B)(i).

239. *Hood*, 701 F.3d at 800 (explaining *Caldwell*'s holding).

240. *Id.*

241. *Id.*

242. *Id.* at 802.

Mississippi appealed the Fifth Circuit's decision, and on January 14, 2014—after oral argument had been held on the pending "Motion to Remand"—the Supreme Court reversed.[243] In its decision, the Supreme Court rejected the argument that CAFA's numerosity requirement could be satisfied by looking at the real parties in interest:

> The question presented is whether a suit filed by a State as the sole plaintiff constitutes a "mass action" under CAFA where it includes a claim for restitution based on injuries suffered by the State's citizens. We hold that it does not. According to CAFA's plain text, a "mass action" must involve monetary claims brought by 100 or more persons who propose to try those claims jointly as named plaintiffs.[244]

Observing that "the State of Mississippi is the only named plaintiff in the instant action," the Court determined that "the case must be remanded to state court."[245]

C. Analysis

In light of the Supreme Court's recent decision in *Hood*, the Court must conclude that the above-captioned matter is not removable pursuant to CAFA. The Authority is the only named plaintiff on the complaint, and *Hood* now

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243. 134 S. Ct. at 739.

244. *Id.*

245. *Id.*

forecloses the "real party in interest" analysis previously adopted by the Fifth Circuit in *Caldwell*. Accordingly, the Court finds that the pending case does not meet the definition of a "mass action," and thus the Court does not have jurisdiction pursuant to CAFA.

VII. Whether Federal Question Jurisdiction Applies

A. Parties' Arguments

1. Plaintiff's Arguments in Support of Remand

Quoting 28 U.S.C. § 1331, Plaintiff asserts that the Court may exercise "original jurisdiction of all civil actions arising under the Constitution, laws or treatises of the United States."[246] According to Plaintiff, "[a] case can 'arise under' federal law in two ways."[247] First, Plaintiff avers, "a case arises under federal law when federal law creates the cause of action asserted."[248] Second, Plaintiff contends, "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.'"[249] Plaintiff argues that neither category applies here.

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246. Rec. Doc. 70-1 at p. 5 (quoting 28 U.S.C. § 1331) (internal quotation marks omitted).

247. *Id.*

248. *Id.* (quoting *Gunn*, 133 S. Ct. at 1064).

249. *Id.* (quoting *Gunn*, 133 S. Ct. at 1064).

According to Plaintiff, "federal law does not create any of the Authority's claims."[250] Plaintiff maintains that because "[a] plaintiff is the master of its complaint," it "may assert state-law claims exclusively, even though it may have federal law claims under the same facts."[251] Plaintiff points to 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."[252] Plaintiff argues that it "has exclusively asserted state law claims."[253] While Plaintiff acknowledges that its Petition references federal statutes and permits, it contends that "none of those statutes or permits supplies the Authority with a federal private right of action."[254] Thus, the Court does not have jurisdiction.[255]

Next, Plaintiff argues that its claims "do not raise a substantial question of federal law."[256] Quoting the Supreme Court's 2013 opinion in *Gunn v. Minton*, Plaintiff asserts that "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually

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250. *Id.*

251. *Id.* (citing *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987)).

252. *Id.* at p. 6 (citing *Caterpillar*, 482 U.S. at 392).

253. *Id.*

254. *Id.*

255. *Id.* (citing *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 817, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986)).

256. *Id.*

disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress."[257] Although Plaintiff's Petition references federal statutes and regulations, Plaintiff maintains "[w]hether 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."[258] According to Plaintiff, "[c]ourts 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."[259] Further, Plaintiff contends that whether a federal issue is substantial "looks . . . to the importance of the issue to the federal system as a whole."[260] Plaintiff contends that the Supreme Court has found a federal issue to be substantial in only two instances. In the 1921 case *Smith v. Kansas City Title & Trust Co.*,[261] the federal question was substantial "because the issue was whether federal bonds were issued unconstitutionally, and

257. *Id.* at p. 7 (quoting *Gunn*, 133 S. Ct. at 1065) (internal quotation marks omitted).

258. *Id.* (citing *Singh v. Duane Morris, LLP*, 538 F.3d 334, 339 (5th Cir. 2008)) (emphasis in original).

259. *Id.* at p. 8 (citing, *e.g., Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 54 S. Ct. 402, 78 L. Ed. 755 (1934)).

260. *Id.* (quoting *Gunn*, 133 S. Ct. at 1066).

261. 255 U.S. 180, 41 S. Ct. 243, 65 L. Ed. 577 (1921).

hence of no validity."[262] Second, in the 2005 case *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*,[263] "the federal issue was the power and reach of the IRS in its collection of delinquent taxes."[264] Plaintiff argues that in this case, "whether or not Defendants complied with the requirements of the Clean Water Act or River 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."[265]

2. Defendants' Arguments in Opposition to Remand

Defendants contend that removal is proper "because (1) the Petition seeks to litigate claims that are created by federal law, and (2) the alleged state law claims cannot be adjudicated without resolving a substantial question of federal law."[266]

Relying on the Supreme Court's 2012 decision in *Mims v. Arrow Financial Services, LLC*,[267] Defendants maintain

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262. Rec. Doc. 70-1 at p. 9.

263. 545 U.S. 308, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005).

264. Rec. Doc. 70-1 at p. 9.

265. *Id.*

266. Rec. Doc. 260 at p. 13.

267. 132 S. Ct. 740, 181 L. Ed. 2d 881 (2012).

that "when 'federal law creates the right of action and provides the rules of decision,' a plaintiff's claim 'arises under the laws of the United States.'"[268] Defendants assert that in its Petition, Plaintiff "alleges that it is entitled to enforce the 'obligations and duties'" provided by over 100 federal permits as a third-party beneficiary.[269] Defendants conclude, "[i]t is thus clear that, because of the federal permits at issue, federal law 'creates the right of action' the Board seeks to assert and 'provides the rules of decision' governing the claim."[270]

Defendants also argue that under *Grable*, "federal courts have authority to 'hear claims recognized under state law' when (1) resolving a federal issue is necessary to resolve a state-law claim, (2) the federal issue is actually disputed, (3) the federal issue is substantial, and (4) federal jurisdiction will not disturb the balance of federal and state judicial responsibilities."[271] According to Defendants, all four parts of the *Grable* test are satisfied here.

First, Defendants contend that "[w]hen a court must interpret federal law to determine a plaintiff's claim, a federal issue is necessarily raised."[272] Defendants maintain that Plaintiff's negligence, natural servitude

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268. Rec. Doc. 260 at p. 14 (quoting *Mims*, 132 S. Ct. at 748) (internal citations omitted)) (alterations omitted).

269. *Id.*

270. *Id.* (quoting *Mims*, 132 S. Ct. at 748).

271. *Id.* at p. 15 (quoting *Grable*, 545 U.S. at 314).

272. *Id.* at p. 16.

of drain, public nuisance, private nuisance, and third-party beneficiary claims all expressly reference a federal regulatory framework, which includes the River and Harbors Act, the Clean Water Act, and the Coastal Zone Management Act.[273] Looking at Plaintiff's tort claims, Defendants aver that Plaintiff "relies on alleged violations of federal statutes, regulations, and permits comprising the applicable 'regulatory framework' as establishing the 'standard of care' giving rise to its claims."[274] Defendants further represent that "[s]ignificantly, the Board has not identified any independent obligation or duty owed by Defendants under state law that could give rise to the alleged 'obligations and duties' on which its claims rest."[275] With respect to Plaintiff's contract claim, Defendants assert that "[t]hrough that claim, the Board seeks to enforce obligations and requirements allegedly imposed by federal law and federal permits. Because the Board has no contractual privity with Defendants, and is not a party to the federal permits, it relies on conclusory allegations that it is a third-party beneficiary to the federal permits."[276] Citing courts in the District of Oregon and the Southern District of California, Defendants urge that courts "have held 'a claim by a plaintiff that he is the third-party beneficiary of a contract between a defendant and the federal government' satisfies the 'arising-under' prong of §1331 because plaintiff's right to relief

273. *Id.*

274. *Id.* at p. 17 (citing Rec. Doc. 1-2).

275. *Id.*

276. *Id.* at p. 18.

necessarily depends on the resolution of a substantial question of federal law.'"[277]

Second, Defendants assert that federal issues are actually disputed as this case "will require the Court to determine what duties and obligations are imposed by the federal regulatory framework, which will require interpreting the River and Harbors Act, the Clean Water Act, and the Coastal Zone Management Act."[278] Defendants further aver that the Court will have to resolve the following disputed issues:

> (1) whether the Board has exhausted required federal administrative procedures, (2) whether the Board can enforce federal permits to which it is not a party, (3) whether any of the Board's claims are properly litigated in a judicial forum and, if so, (4) what remedies are available as a matter of law.[279]

Third, Defendants contend that the federal issues are substantial.[280] Citing *Grable*, Defendants assert that

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277. *Id.* (quoting *Copeland-Turner v. Wells Fargo Bank, N.A.*, No. 11-37, 2011 U.S. Dist. LEXIS 28093, 2011 WL 996706, at *5 (D. Or. Mar. 17, 2011)) (internal alterations omitted). Defendants also cite *Castillo v. Bank of Am., N.A.*, No. 12-1833, 2012 U.S. Dist. LEXIS 145487, 2012 WL 4793240, at *4 (S.D. Cal. Oct. 9, 2012).

278. *Id.* at p. 19.

279. *Id.*

280. *Id.* at 20.

"[a] substantial federal interest is one that indicates 'a serious federal interest in claiming the advantages thought to be inherent in a federal forum.'"[281] Defendants maintain that "[t]he lands at issue in this lawsuit have been the subject of an extensive array of federal regulation, and adjudicating the Board's claims raises substantial and complex questions of federal policy in areas of coastal restoration, environmental protection, energy policy, national security, and interstate commerce."[282] Specifically, Defendants points to the statutes referenced in Plaintiff's Petition—the Clean Water Act, the Rivers and Harbors Act, and the Coastal Zone Management Act—as well as "other federal statutes, programs, and policies that directly address coastal land loss," such as the Energy Policy Act of 2005, the Coastal Wetlands Planning, Protection and Restoration Act of 1990, the Water Resources Development Act of 2007, national energy policy, and interstate commerce generally.[283] Additionally, Defendants aver that Plaintiff "has sued virtually an entire industry" and "seeks mandatory injunctive relief on an unprecedented scale."[284]

Finally, Defendants argue that "denying remand will not disrupt the federal-state balance."[285] Defendants

281. *Id.* (quoting *Grable*, 545 U.S. at 313-14).

282. *Id.*

283. *Id.* at pp. 20-22.

284. *Id.* at p. 24.

285. *Id.* at p. 25.

contend that "the State has no special interest in resolving the complex federal issues related to coastal zone management," and that "the state court will be required to make decisions that extend far beyond the concerns of Louisiana and its citizens."[286] "More fundamentally," Defendants contend that "given the substantial federal interests involved, those interests can be served only by exercising federal jurisdiction."[287]

3. Natural Gas Act Defendants' Arguments in Opposition to Remand

The Natural Gas Act ("NGA") Defendants filed a "separate brief opposing remand to identify the important federal questions presented by the Plaintiff's Petition which are distinctly applicable to them as interstate natural gas pipelines regulated as 'natural gas companies' under the NGA [Natural Gas Act], and the FERC's [Federal Energy Regulatory Commission] implementing regulations."[288]

The NGA Defendants aver that "[t]he federal government exercises exclusive jurisdiction over rates, tariffs and facilities of natural gas companies engaged in the transportation of natural gas in interstate commerce."[289] The NGA Defendants explain that

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286. *Id.*

287. *Id.* at p. 26.

288. Rec. Doc. 254 at p. 8.

289. *Id.*

pursuant to the NGA, a "natural gas company"[290] must obtain a "certificate of public convenience and necessity" from FERC before it "constructs, extends, acquires, or operates any facility for the transportation or sale of natural gas in interstate commerce."[291] Further, FERC's review "involves environmental review of a proposed interstate natural gas pipeline project,"[292] during which FERC "considers environmental concerns, and specifically addresses the issues of soil preservation and land restoration."[293] According to the NGA Defendants, "FERC has imposed project-specific environmental requirements in each Certificate granted since NEPA [National Environmental Policy Act] was enacted in 1969," and "[e]ven pipelines certificated earlier are required to comply with environmental conditions as a result of the FERC's continuing exercise of supervision and jurisdiction over even routine facility modifications."[294] If a certificate holder follows certain FERC procedures, "then the 'certificate holder shall be deemed in compliance

290. "Natural gas company" refers to "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." *Id.* at p. 8 n.5 (quoting 15 U.S.C. § 717a(6)).

291. *Id.* (quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 302, 108 S. Ct. 1145, 99 L. Ed. 2d 316 (1988)) (internal quotation marks omitted).

292. *Id.* at p. 9.

293. *Id.* (quoting *N. Natural Gas Co. v. Iowa Utils. Bd.*, 377 F.3d 817, 822 (8th Cir. 2004)) (internal quotation marks omitted).

294. *Id.* at p. 10.

with' the Clean Water Act and Executive Orders related to potential effects on floodplains and wetlands."[295] "If the state determines that the activity under the blanket certificate is consistent with its coastal zone management plan or waives its right to review the project, then the blanked [sic] certificate holder also 'shall be deemed in compliance with the Coastal Zone Management Act.'"[296] Additionally, the NGA Defendants note that "[j]ust as the FERC has the authority to establish the conditions under which interstate natural gas pipelines may be placed in service, and maintained and operated, the FERC, and not a state court, is also responsible for implementing federal jurisdiction over the conditions under which such pipelines may be 'abandoned,' i.e., taken out of service."[297] The NGA Defendants further aver that under 15 U.S.C. § 717r, "[e]xclusive jurisdiction for review of FERC's actions rests in the United States Courts of Appeals."[298]

In light of this regulatory framework, the NGA Defendants maintain that "Plaintiff's claims present substantial federal questions."[299] Applying the *Grable* test, the NGA Defendants argue that Plaintiff's claims require the resolution of federal issues as "the injunctive relief that Plaintiff seeks as well as Plaintiff's tort and contract

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295. *Id.* at p. 11 (quoting 18 C.F.R. § 157.206(b)(3)(iv)).

296. *Id.* (quoting 18 C.F.R. § 157.206(b)(3)(iii)).

297. *Id.* at pp. 12-13 (citing 15 U.S.C. § 717f(b)).

298. *Id.* at p. 21.

299. *Id.* at p. 13.

claims necessarily require the analysis and construction of the NGA, the FERC's implementing regulations, the FERC's certification and abandonment authority and the agency's orders."[300] Further, the NGA Defendants contend that this matter "raises federal issues regarding whether [Plaintiff] was required to exhaust available administrative remedies before bringing this action against NGA Defendants and whether the injunctive relief requested is consistent with the comprehensive regulatory scheme established by the NGA."[301]

With respect to the second prong of the *Grable* test, the NGA Defendants assert that the federal issues are actually disputed.[302] Specifically, the NGA Defendants dispute whether a Louisiana state court can "impose conditions of operation that differ from those required by the NGA certificates"; "authorize or require the suspension or termination of interstate natural gas pipeline operations"; "find that state tort and nuisance law can impose environmental duties and obligations that differ from or are in addition to those comprehended by the Certificates that FERC issued;" or "determine issues of compliance with federal environmental statutes that are included in the findings set out in FERC's blanket certificate regulations."[303]

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300. *Id.* at p. 14.

301. *Id.*

302. *Id.* at p. 22.

303. *Id.* at pp. 22-23.

Next, the NGA Defendants maintain that the federal issues are substantial as:

> [t]he statutory interpretation required to determine whether state tort and nuisance law can define obligations that differ from FERC certificate conditions, whether certificates of public convenience and necessity issued under the NGA create third-party contract rights and whether injunctive relief can be permitted to interfere with FERC certificate, tariff and rate authority are issues of law. The determination of these issues will not be confined to the Louisiana coastal operations of the NGA Defendants. Rather they go to the heart of federal jurisdiction over interstate commerce engrained [sic] in jurisprudence since the turn of the prior century, more particularly whether the FERC's decisions actually define the balance and encompass local and national interests and even more narrowly whether belated disputes about the conditions of FERC Certificates can be presented in a state tribunal years out of time, rather than in a United States Court of Appeals in a timely manner.[304]

Finally, the NGA Defendants urge that federal jurisdiction will not disturb the balance of federal and state responsibilities, stating that "[t]he authorizations

304. *Id.* at pp. 24-25.

issued to the NGA Defendants have been considered to be enmeshed in interstate commerce subject to the authority of the federal government for almost a century and FERC's exclusive role under the NGA in reviewing and authorizing the construction and of [sic] interstate natural gas pipeline facilities necessarily entails interpretation of federal law."[305]

4. Plaintiff's Reply to All Defendants in Further Support of Remand

First, Plaintiff contends that the Natural Gas Act Defendants' removal arguments are untimely.[306] Plaintiff points out that neither Chevron's "Notice of Removal"[307] nor the NGA Defendants' "Consent to Removal"[308] mention the NGA.[309] According to Plaintiff, "after the thirty-day period of 28 U.S.C. § 1446(b) has elapsed, 'any amendments to the removal notice must be made in accordance with 28 U.S.C. § 1653,' and . . . 'this section cannot be invoked to claim an entirely new and distinct jurisdictional basis.'"[310] Rather,

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305. *Id.* at pp. 27-28.

306. Rec. Doc. 292 at p. 10.

307. Rec. Doc. 1.

308. Rec. Doc. 63.

309. Rec. Doc. 292 at p. 10.

310. *Id.* at p. 11 (quoting *Energy Catering Servs., Inc. v. Burrow*, 911 F. Supp. 221, 222 (E.D. La. 1995) (Mentz, J.)) (internal alterations omitted).

"§ 1653 is limited to curing technical defects only."[311] Plaintiff argues that "[t]his principle holds fast whether a removing defendant is trying to invoke federal question jurisdiction untimely after only diversity jurisdiction has been raised in the removal notice, or whether the removing defendant is untimely attempting to add a distinct basis for federal question jurisdiction from the federal question bases asserted in the removal notice."[312]

Second, Plaintiff asserts that "[n]one of the Authority's claims are created by federal law."[313] Plaintiff avers that under *Mims*, "when federal law creates a private right of action **and** furnishes the substantive rules of decision, the claim arises under federal law, and district courts possess federal-question jurisdiction under § 1331."[314] According to Plaintiff, "none of the Authority's claims involves [sic] a private right of action created by federal law."[315]

Third, Plaintiff argues that none of its claims arise under federal law pursuant to *Grable*. Plaintiff contends that "[n]umerous courts have recognized that where there are alternative, non-federal bases for liability on a state-law cause of action, there is no 'necessary' federal law

311. *Id.*

312. *Id.*

313. *Id.* at p. 13.

314. *Id.* (quoting *Mims*, 132 S. Ct. 748-49) (emphasis in original).

315. *Id.* at p. 14.

question that opens the doors of federal jurisdiction."[316] Acknowledging that "[t]he Authority has alleged the violation of federal regulations, statutes, and permits as providing the backdrop for liability under Louisiana law," Plaintiff nevertheless asserts that it "has also identified state rights-of-way, Louisiana tort law, and the Louisiana law of obligations as the fount of its legal theories."[317] Additionally, Plaintiff maintains that no federal issues are actually disputed as "[t]here is a settled framework of environmental laws that the Authority seeks to apply to the facts of its case."[318] Plaintiff represents that "[i]t does not seek novel interpretations of statutes or regulations; rather, it seeks to use the settled framework of those statutes and regulations to inform its state-law legal theories."[319] Next, Plaintiff asserts that any federal issues are not substantial.[320] Citing *Gunn*, Plaintiff contends that "an issue is important to 'the federal system as a whole' when the issue implicates the federal government's 'direct interest in the availability of a federal forum to vindicate its own administrative action' or when an issue requires the determination of 'the constitutional validity of an act

316. *Id.* at p. 16 (citing, *e.g., Stephens Cnty. v. Wilbros, LLC*, No. 12-201, 2012 U.S. Dist. LEXIS 144795, 2012 WL 4888425 (N.D. Ga. Oct. 6, 2012)).

317. *Id.* at p. 17.

318. *Id.* at p. 21.

319. *Id.*

320. *Id.* at p. 22.

of Congress.'"[321] Further, Plaintiff cites *Grable* for the proposition that "the lack of a private right of action 'is an important clue to Congress's conception of the scope of jurisdiction to be exercised under § 1331.'"[322] With respect to prong four, Plaintiff avers that adjudicating this case in federal court would upset the federal-state balance.[323] Again citing *Grable*, Plaintiff argues that because the violation of federal statutes is commonly given negligence *per se* effect in state tort actions, "a general rule of exercising federal jurisdiction over state tort claims resting on federal statutory violations would thus herald a potentially enormous shift of traditionally state cases into federal courts."[324]

Finally, Plaintiff observes that "[f]or the most part, Defendant's arguments amount to a preview of their anticipated defenses to the Authority's claims."[325] Plaintiff contends that "[i]t is well-settled, however, that a defense raised under federal law will not suffice to transform a plaintiff's state-law petition into one that arises under federal law."[326]

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321. *Id.* at p. 22 (quoting *Gunn*, 133 S. Ct. at 1066).

322. *Id.* at p. 29 (quoting *Grable*, 545 U.S. at 318).

323. *Id.* at p. 30.

324. *Id.* at pp. 30-31 (quoting *Grable*, 545 U.S at 319) (internal quotation marks and alterations omitted).

325. *Id.* at p. 33.

326. *Id.*

5. Natural Gas Act Defendants' Sur-Reply in Opposition to Remand

In their sur-reply, the NGA Defendants contend that "[b]oth the Chevron Notice [of Removal] and the NGA Opposition adequately describe the grounds for removal based on federal question jurisdiction in compliance with § 1446."[327] Further, the NGA Defendants assert that "[e]ven if the Court treats the NGA Opposition as an amendment [to the Notice of Removal], such amendment is permitted under Fifth Circuit precedent."[328]

B. Timeliness of Natural Gas Act Arguments

1. Applicable Law

To remove an action from state to federal court, 28 U.S.C. § 1446 requires that a defendant file a notice of removal, "containing a short and plain statement of the grounds for removal,"[329] "within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . . ."[330] During this thirty-day period, a defendant may freely

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327. Rec. Doc. 296 at p. 4.

328. *Id.* at p. 7 (citing *D. J. McDuffie, Inc. v. Old Reliable Fire Ins. Co.*, 608 F.2d 145 (5th Cir. 1979)).

329. 28 U.S.C. § 1446(a).

330. 28 U.S.C. § 1446(b).

amend its notice of removal.[331] After thirty days, however, "defendants may amend the notice only to set out more specifically the grounds for removal that already have been stated, albeit imperfectly, in the original notice," and "may not add completely new grounds for removal."[332] Courts may construe documents offered in opposition to a motion to remand as an amendment to a notice of removal.[333]

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331. *See Energy Catering*, 911 F. Supp. 221 at 222-23 (citing *Moody v. Commercial Ins. Co.*, 753 F. Supp. 198 (N.D. Tex. 1990); *Mayers v. Connell*, 651 F. Supp. 273, 274 (M.D. La. 1986)); *see also* 14C Charles Alan Wright, et al., *Federal Practice and Procedure* § 3733 (4th ed. 2013).

332. 14C Charles Alan Wright, et al., *Federal Practice and Procedure* § 3733 (4th ed. 2013).

333. *See, e.g., Willingham v. Morgan*, 395 U.S. 402, 407 n.3, 89 S. Ct. 1813, 23 L. Ed. 2d 396 (1969) (treating affidavits filed in support of a motion for summary judgment as an amendment to a petition for removal); *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 205 n.12 (3rd Cir. 2003) (explaining a court may "consider jurisdictional facts contained in later-filed affidavits as amendments to the removal petition where, as here, those facts merely clarify (or correct technical deficiencies in) the allegations already contained in the original notice"); *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 n.1 (9th Cir. 2002) (concluding that the district court did not err in construing an opposition to a motion to remand as an amendment to the notice of removal); *Wang v. Asset Acceptance, LLC*, 680 F. Supp. 2d 1122, 1125 (N.D. Cal. 2010) (treating evidence offered in opposition to a motion to remand as an amendment to the notice of removal); *Carter v. Monsanto Co.*, 635 F. Supp. 2d 479, 487 (S.D. W. Va. 2009) ("Where subsequently filed documents clarify allegations already stated in the notice of removal, a court may construe those documents as amending the notice of removal.").

2. Analysis

In its "Notice of Removal," Defendant Chevron asserts that this matter is removable because "a significant and substantial component of Plaintiff's state law claims requires the interpretation of federal law, and Plaintiff's right to relief under one or more causes of action asserted depends upon resolution of a substantial question of federal law, and therefore, federal question jurisdiction applies."[334] Chevron notes that Plaintiff's Petition identifies a number of federal statutes, specifically the River and Harbors Act of 1899, the Clean Water Act of 1972, and the Coastal Zone Management Act of 1972.[335] Further, Chevron recounts the "extraordinary injunctive relief" Plaintiff seeks, and avers:

> All of these activities fall into the realm of a federal regulatory framework that is pervasive and comprehensive. None of these forms of relief can be performed without federal regulatory involvement and permission. In addition, all of these activities, if ordered, will necessarily interfere with the exploration, production, and transportation of oil and gas in interstate commerce—a matter of national concern.
>
> Moreover, all of these activities, if ordered, will create a high risk of being inconsistent with or interfering with federal energy policy and/or

334. Rec. Doc. 1 at p. 4.

335. *Id.* at pp. 5-6.

> ongoing coastal restoration projects sponsored in large part by the federal government.[336]

The lack of an express reference to the Natural Gas Act or FERC regulations in Chevron's "Notice of Removal" does not warrant excluding the NGA Defendants' arguments as untimely. As noted above, the Notice of Removal discusses the "pervasive and comprehensive" federal regulatory framework governing the oil and gas industry, and notes that the requested injunctive relief may conflict with "federal energy policy."[337] The NGA Defendants' opposition to the "Motion to Remand" provides additional levels of detail on the specific aspects of the federal regulatory framework that apply in the natural gas context. It does not assert an entirely new basis for federal jurisdiction.

The cases cited by Plaintiff address situations in which a defendant raised a new basis for jurisdiction, not where the defendant elaborated on a basis discussed in the notice of removal. For example, in *Stanley v. Wyeth, Inc.*, the defendant initially asserted that the case came under 28 U.S.C. § 1442(a)(1)'s "federal officer" removal provision, but later argued that the court had federal question jurisdiction under 28 U.S.C. § 1331 or diversity jurisdiction under 28 U.S.C. § 1332.[338] Similarly, in *Augustine v.*

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336. *Id.* at pp. 16-17.

337. *Id.* at p. 16.

338. *See Stanley v. Wyeth, Inc.*, No. 06-1979, 2006 U.S. Dist. LEXIS 64037, 2006 WL 2588147, at *1-*2 (E.D. La. Sept. 8, 2006) (Barbier, J.).

Alliance Insurance Agency Services, Inc., the defendant removed on the grounds of federal question jurisdiction, but, in opposition to a motion to remand, suggested that the court had diversity jurisdiction.[339]

Accordingly, the Court finds that the NGA Defendants' arguments are timely and will address them on the merits.

C. Whether Plaintiff's Claims Arise Under Federal Law

1. Applicable Law

Pursuant to 28 U.S.C. § 1331, "Congress has authorized the federal district courts to exercise original jurisdiction in 'all civil actions arising under the Constitution, laws, or treaties of the United States.'"[340] Often called "federal-question jurisdiction," this type of jurisdiction "is invoked by and large by plaintiffs pleading a cause of action created by federal law (*e.g.*, claims under 42 U.S.C. § 1983)."[341] A single claim over which federal-question jurisdiction exists is sufficient to allow removal.[342]

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339. *See Augustine v. Alliance Ins. Agency Servs. Inc.*, 06-9062, 2007 U.S. Dist. LEXIS 100927, 2007 WL 38320, *2 (E.D. La. Jan. 3, 2007) (Feldman, J.).

340. *Gunn*, 133 S. Ct. at 1064 (quoting 28 U.S.C. § 1331).

341. *Grable*, 545 U.S. at 312; *see also Gunn*, 133 S. Ct. at 1064 ("Most directly, a case arises under federal law when federal law creates the cause of action asserted.").

342. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 563, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005); *City of Chicago*

a. Created By Federal Law: The "Well-Pleaded Complaint" Rule

In evaluating whether a plaintiff's cause of action is created by federal law, courts must apply the "well-pleaded complaint" rule. That is, "a federal court has original or removal jurisdiction only if a federal question appears on the face of the plaintiff's well-pleaded complaint; generally, there is no federal jurisdiction if the plaintiff pleads only a state law cause of action."[343] Even where a federal remedy is also available, the "plaintiff is the master of his complaint and may generally allege only a state law cause of action."[344] Further, "[a] defense that raises a federal question is inadequate to confer jurisdiction."[345]

b. Exceptions to the "Well-Pleaded Complaint Rule": Complete Pre-Emption and Substantial Question of Federal Law

i. Complete Pre-Emption

There are "two recognized exceptions to the well-pleaded complaint rule."[346] First, there is the "complete

v. Int'l Coll. of Surgeons, 522 U.S. 156, 164-66, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997).

343. *Bernhard v. Whitney Nat'l Bank*, 523 F.3d 546, 551 (5th Cir. 2008).

344. *Id.*

345. *Merrell Dow*, 478 U.S. at 808.

346. *Devon Energy Production Co., L.P. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1203 (10th Cir. 2012).

pre-emption corollary to the well-pleaded complaint rule."[347] Normally, federal preemption is raised as a defense to the allegations of a plaintiff's complaint.[348] As the Supreme Court explained in *Caterpillar Inc. v. Williams*, generally "a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question at issue."[349] Complete pre-emption is an exception to this general rule. "On occasion, the Court has concluded that the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for the purposes of the well-pleaded complaint rule.'"[350] That is, "[o]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law."[351] In *Hoskins v. Bekins Van Lines*, the Fifth

347. *Caterpillar*, 482 U.S. at 393.

348. *Id.* at 392.

349. *Id.* at 393 (emphasis in original).

350. *Id.* (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987)).

351. *Id.* (citing *Franchise Tax Bd. of the State of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 24, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)); *see also Black's Law Dictionary* 324 (9th ed. 2009) (defining the "complete-preemption doctrine" as "[t]he rule that a federal statute's preemptive force may be so extraordinary and all-encompassing that it converts an ordinary state-common-law complaint into one stating a federal claim for the purposes of the well-pleaded-complaint rule").

Circuit instructed that for the complete pre-emption doctrine to apply, the removing defendant must show:

> (1) the [federal] statute contains a civil enforcement provision that creates a cause of action that both replaces and protects the analogous area of state law; (2) there is a specific jurisdictional grant to the federal courts for enforcement of the right; and (3) there is clear Congressional intent that claims brought under the federal law be removable.[352]

ii. Substantial Question of Federal Law

Second, there is a "special and small" category of cases in which a state law cause of action can give rise to federal-question jurisdiction because the claim involves important federal issues.[353] This exception "captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues."[354] In *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*,

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352. *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 775 (5th Cir. 2003) (quoting *Johnson v. Baylor Univ.*, 214 F.3d 630, 632 (5th Cir. 2000)) (emphasis omitted).

353. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699, 126 S. Ct. 2121, 165 L. Ed. 2d 131 (2006).

354. *Grable*, 545 U.S. at 312.

the Supreme Court instructed that the presence of a federal issue is not "a password opening federal courts to any state action embracing a point of federal law."[355] Rather, "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."[356] If all four requirements are met, "jurisdiction is proper because there is a 'serious federal interest in claiming the advantages thought to be inherent in a federal forum,' which can be vindicated without disrupting Congress's intended division of labor between state and federal courts."[357]

2. Analysis

a. Whether Plaintiff's Claims Are Created by Federal Law Pursuant to the "Well-Pleaded Complaint" Rule

In its petition, Plaintiff asserts six causes of action: (1) negligence under Louisiana Civil Code article 2315,[358] (2) strict liability Louisiana Civil Code articles 2317 and 2317.1,[359] (3) natural servitude of drain under Louisiana

355. *Id.* at 314.

356. *Gunn*, 133 S. Ct. at 1065 (citing *Grable*, 545 U.S. at 314).

357. *Id.* (quoting *Grable*, 545 U.S. at 313-14).

358. Rec. Doc. 1 at p. 17-18.

359. *Id.* at p. 18-19.

Civil Code article 656,[360] (4) public nuisance,[361] (5) private nuisance under Louisiana Civil Code article 667,[362] and (6) breach of contract—third party beneficiary.[363] All of these causes of action are created by Louisiana, not federal, law.

In arguing to the contrary, Defendants rely heavily on *Mims v. Arrow Financial Services, LLC*; however, they fundamentally misconstrue the issue in *Mims.* In *Mims*, the plaintiff filed suit in federal court asserting a claim pursuant to the Telephone Consumer Protection Act of 1991 ("TCPA").[364] The TCPA banned certain telemarketing practices and specifically provided a private right of action for violations of the statute:

> A person or entity may, if otherwise permitted, by the laws or rules of court of a State, bring in an appropriate court of that State—
>
> (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
>
> (B) an action to recover for actual monetary loss from such violation, or to receive $500 in

360. *Id.* at p. 19-20.

361. *Id.* at p. 20-21.

362. *Id.* at p. 21-22.

363. *Id.* at p. 22-23.

364. *Mims*, 132 S. Ct. at 744.

> damages for each such violation, whichever is greater, or
>
> (C) both such actions.[365]

The Supreme Court noted in *Mims* that there was no debate that the TCPA provided plaintiff's right of action; a subsection of the statute was expressly entitled "private right of action."[366] Rather, the question in *Mims* was whether the statute, by permitting an action in state court, divested federal district courts of jurisdiction.[367] Unlike *Mims*, Defendants here have not pointed to any federal statute that provides for a private right of action. The question in this matter is not whether Congress has divested federal courts of jurisdiction, it is whether federal district courts have jurisdiction in the first place.

Thus, applying the well-pleaded complaint rule, the Court concludes that Plaintiff's claims are not created by federal law and that it does not have jurisdiction on this basis.

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365. 47 U.S.C. § 227(b)(3).

366. *See Mims*, 132 S. Ct. at 748 ("Because federal law creates the right of action and provides the rules of decision, Mim's TCPA claim, in 28 U.S.C. § 1331's words, plainly 'arises under' the 'laws of the United States.'") (internal alterations omitted); *see also* 47 U.S.C. § 227(b)(3).

367. *See id.* at 744-45 ("The question presented is whether Congress' provision for private actions to enforce the TCPA renders state courts the *exclusive* arbiters of such actions.") (emphasis in original).

b. Whether an Exception to the "Well-Pleaded Complaint" Rule Applies

i. Whether the Complete Pre-Emption Doctrine Applies

As discussed above, normally, federal pre-emption is raised as a defense to the allegations of a plaintiff's complaint and may not serve as a basis for removing a case to federal court.[368] However, "a state claim may be removed to federal court . . . when a federal statute wholly displaces the state-law cause of action through complete pre-emption."[369]

The Defendants' primary memorandum in opposition does not address pre-emption as a federal defense or in the context of the complete pre-emption doctrine. Although the Natural Gas Act Defendants' opposition discusses pre-emption,[370] it neither expressly references the complete pre-emption doctrine nor discusses the seminal Supreme Court or Fifth Circuit cases articulating the complete pre-emption doctrine.[371] Thus, it appears that the Natural Gas

368. *See Caterpillar*, 482 U.S. at 392-93.

369. *Hoskins*, 343 F.3d 769 (quoting *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8, 123 S. Ct. 2058, 156 L. Ed. 2d 1 (2003)) (internal quotation marks omitted).

370. *See e.g.*, Rec. Doc. 254 at pp. 8-13 (discussing "the comprehensive scheme of federal regulation"), p. 18 (mentioning "the pre-emptive effect of the NGA), p. 19 (averring that "issues of federal preemption exist").

371. *See, e.g., Caterpillar*, 482 U.S. at 393-94; *Metro. Life Ins. Co.*, 481 U.S. at 65; *Franchise Tax Bd.*, 463 U.S. at 24; *Hoskins*, 343 F.3d at 775.

Act Defendants are not arguing that complete pre-emption applies. They discuss pre-emption in its normal context as a federal defense, which does not provide grounds for removal, rather than as an exception or corollary to the well-pleaded complaint rule. Further, the Natural Gas Act Defendants do not point to any civil enforcement provision in the Natural Gas Act or other federal statute, which would be required to establish complete pre-emption under *Hoskins*.[372] Accordingly, the Court determines that

372. In contending that Plaintiff's claims necessarily raise a substantial federal issue, the Natural Gas Act Defendants offer arguments that allude to pre-emption. Specifically, the NGA Defendants aver that "Plaintiff's Petition fails to set forth the standard of care to which the NGA Defendants were expected to adhere" and that "Plaintiff attempts to side-step that the standard of care that applies to interstate natural gas pipelines is established by the NGA." Rec. Doc. 254 at p. 19. According to the NGA Defendants, "[t]he duties that apply to the NGA Defendants can only be defined by referring to, relying upon, and interpreting the Certificates authorizing the siting, construction and operation of their interstate natural gas pipelines, including their environmental conditions. Defining those duties entails balancing local concerns, including local environmental concerns and national interests, a function Congress delegated to the FERC." *Id.*

The NGA Defendants' assertion that the Natural Gas Act and FERC regulations provide the proper standard of care, however, is more accurately characterized as the affirmative defense of preemption, which does not support federal-question jurisdiction. In *Simmons v. Sabine River Authority of Louisiana*, the Fifth Circuit addressed a negligence claim brought against the operator of a hydroelectric dam and state waterway authority, alleging that the defendants should have maintained a higher minimum reservoir elevation. *See* 732 F.3d 469, 472 (5th Cir. 2013). Defendants argued that plaintiffs' claims were subject to

it does not have jurisdiction based on the complete pre-emption doctrine.

ii. Whether Plaintiff's Claims Raise a Substantial Issue of Federal Law

As explained above, under an exception to the "well-pleaded complaint" rule, "federal jurisdiction over a

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preemption, as FERC, through the Federal Power Act ("FPA"), had exclusive control over dam operations. *See id.* at 473. The Fifth Circuit held that plaintiffs' claims were preempted "[b]ecause the state law property claims at issue here infringe on FERC's operational control." *Id.* at 476. The court explained that "[a]pplying state tort law to set the duty of care for the operation of FERC-licensed projects would 'stand as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FPA. . . . [T]he district court properly concluded that the FPA preempts Plaintiffs' claims for negligence." *Id.* at 477 (quoting *Arizona v. United States*, 132 S. Ct. 2492, 2501, 183 L. Ed. 2d 351 (2012)). In this manner, the Natural Gas Act Defendants' argument that the statutes and regulations governing FERC licensees provides the standard of care closely parallels the arguments made in *Simmons*, which were evaluated as the affirmative defense of pre-emption.

As noted above, under the Supreme Court decision in *Caterpillar Inc. v. Williams*,"a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question at issue." *Caterpillar*, 482 U.S. at 392 (emphasis in original). Accordingly, the Natural Gas Act Defendants' argument that the standard of care cannot conflict with the Natural Gas Act and FERC requirements does not provide a basis for federal-question jurisdiction.

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."[373] The Court addresses these four requirements in turn.

(a) Necessarily Raised

A federal issue is "necessarily raised" when a court must apply federal law to the facts of the plaintiff's case.[374] "Where a federal issue is present as only one of multiple theories that could support a particular claim," however, courts have determined that the federal question is insufficient to establish jurisdiction.[375] Having reviewed the Petition, the Court finds that at least three of Plaintiff's six claims necessarily raise a federal issue.

In Count 1 of its Petition, Plaintiff brings a claim for negligence under Louisiana Civil Code article 2315.[376] In order to prevail on this claim, Plaintiff must prove that (1) Defendants' conduct was the cause-in-fact of the resulting harm; (2) Defendants owed Plaintiff a duty of care; (3) the

373. *Gunn*, 133 S. Ct. at 1065 (citing *Grable*, 545 U.S. at 314).

374. *Id.* at 1065 (noting that adjudicating plaintiff's claim "will necessarily require application of patent law to the facts of [plaintiff's] case").

375. *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 194 (2d Cir. 2005); *see also, e.g., Stephens Cnty v Wilbros, LLC*, No. 12-201, 2012 U.S. Dist. LEXIS 144795, 2012 WL 4888425, at *2 (N.D. Ga. Oct. 6, 2012).

376. Rec. Doc. 1-2 at p. 17.

requisite duty was breached by Defendants; and (4) the risk of harm was within the scope of protection afforded by the duty breached.[377] According to the Petition, the duty in this case is established by a "longstanding and extensive regulatory framework under both federal and state law."[378] Specifically, the Petition describes three federal statutes. First, the Rivers and Harbors Act of 1899 "prohibits the unauthorized alteration of or injury to levee systems and other flood control measures built by the United States."[379] Next, the Clean Water Act of 1972 requires Defendants to "[m]aintain canals and other physical alterations as originally proposed; [r]estore dredged or otherwise modified areas to their natural state upon completion of their use or their abandonment; and [m]ake all reasonable efforts to minimize the environmental impact of the Defendants' activities."[380] Finally, the Coastal Zone Management Act of 1972 imposes "a litany of duties and obligations expressly designed to minimize the adverse ecological, hydrological, topographical, and other environmental effects" associated with oil and gas activities.[381] The Petition also mentions "[r]egulations related to rights-of-way granted across state-owned lands and water bottoms administered by the Louisiana

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377. *Peterson v. Gibraltor Sav. and Loan*, 98-1601 (La. 5/18/99), 733 So. 2d 1198, 1203-04.

378. Rec. Doc. 1-2 at p. 16.

379. *Id.*

380. *Id.*

381. *Id.* at p. 17.

Office of State Lands"[382] as well as "Louisiana coastal zone regulations."[383] However, aside from these general references, the Petition never points to any specific Louisiana statutes or regulations.

By turning to federal law to establish the standard of care, Plaintiff "necessarily raises" what duties these laws impose upon Defendants. In determining whether Plaintiff may prevail on its claim for negligence, the Court will have to interpret federal law to ascertain, among other issues, whether Defendants' conduct constitutes an unauthorized alteration or injury to the levee systems under the Rivers and Harbors Act, whether the Clean Water Act required Defendants to restore allegedly abandoned dredged canals, and what steps the Coastal Zone Management Act required Defendants to take to minimize adverse environmental effects. These three federal statutes do not merely present "one of multiple theories" that could support Plaintiff's negligence claim. Rather, they are the only specific sources of the duty Plaintiff must establish in order to prevail. Indeed, another Court in this district determined in *Barasich v. Columbia Gulf Transmission Co.* that oil and gas companies do not have a duty under Louisiana law to protect members of the public "from the results of coastal erosion allegedly caused by [pipeline] operators that were physically and proximately remote from plaintiffs or their property."[384] Accordingly,

382. *Id.* at p. 16.

383. *Id.* at p. 17.

384. *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676, 693 (2006) (Vance, J.).

Plaintiff's negligence claim necessarily involves the application of federal law.[385]

In Count 4 of the its Petition, Plaintiff asserts a claim for public nuisance.[386] "A public nuisance is an unreasonable interference with a right common to the general public."[387]

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385. In contending that Plaintiff's claims necessarily raise a federal question, the Natural Gas Act Defendants offer arguments distinct from those addressed in the main Defendants' brief. The main Defendants contend that a federal question is necessarily raised because Plaintiff's Petition expressly incorporates the Rivers and Harbors Act, the Clean Water Act, and the Coastal Zone Management Act in defining the standard of care. The Natural Gas Act Defendants, however, cite federal law not addressed in Plaintiff's Petition in their supplemental opposition to the Motion to Remand. The Natural Gas Act Defendants aver that "Plaintiff's Petition fails to set forth the standard of care to which the NGA Defendants were expected to adhere" and that "Plaintiff attempts to side-step that the standard of care that applies to interstate natural gas pipelines is established by the NGA." Rec. Doc. 254 at p. 19. According to the Natural Gas Act Defendants, "[t]he duties that apply to the NGA Defendants can only be defined by referring to, relying upon, and interpreting the Certificates authorizing the siting, construction and operation of their interstate natural gas pipelines, including their environmental conditions. Defining those duties entails balancing local concerns, including local environmental concerns and national interests, a function Congress delegated to the FERC." *Id.*

However, as discussed in footnote 372, the NGA Defendants' argument is more accurately characterized as the defense of pre-emption and does provide a basis for federal-question jurisdiction.

386. Rec. Doc. 1-2 at p. 20.

387. 4 A. N. Yiannopoulos, *Louisiana Civil Law Treatise, Predial Servitudes* § 3:31 (4th ed. 2013) (citing *Restatement (Second) of Torts* § 821B (1979)).

In assessing whether a defendant's conduct constitutes a public nuisance, courts consider "whether the conduct involves a significant interference with public health, safety, peace, comfort, or convenience."[388] According to the Petition, "Defendants' continuing acts and/or omissions . . . have caused, and will continue to cause, the extensive weakening and loss of coastal lands in the Buffer Zone constituting an unreasonable interference with the health, safety, peace, and/or comfort of southeast Louisiana communities as those acts and/or omissions have, and continue to, expose communities to increased storm surge risk."[389] The Petition avers that this "unreasonable interference is in violation of the standard of care as prescribed in the regulatory framework."[390] As discussed above in the context of Plaintiff's negligence claim, by turning to federal law to establish the standard of care, Plaintiff "necessarily raises" what conduct constitutes "unreasonable interference" under the Rivers and Harbors Act, the Clean Water Act, and the Coastal Zone Management Act. Accordingly, Plaintiff's public nuisance claim necessarily involves the application of federal law.

Finally, in Count 6 of its Petition, Plaintiff brings a claim as a third-party beneficiary for breach of contract.[391] According to the Petition, "[t]he express obligations

388. *Cox v. City of Dallas, Tex.*, 256 F.3d 281, 289 (5th Cir. 2001) (citing *Restatement (Second) of Torts* § 821B (1979)).

389. Rec. Doc. 1-2 at p. 20.

390. *Id.* at p. 21.

391. *Id.* at p. 22.

and duties contained in the permit(s) and right(s)-of-way identified in the Exhibits [attached to the Petition] and governing Defendants' activities all require that Defendants not impair the Buffer Zone."[392] Plaintiff asserts that these permits and rights-of-way "all manifest an intent to confer a direct and certain benefit to the Authority and/or the levee districts that it governs," and therefore Plaintiff is a third-party beneficiary entitled to recover for breach of contract.[393] The Court notes that at least some of the dredging permits identified in the exhibits to the Petition are federal permits, issued pursuant to federal law.[394]

Plaintiff contends that no necessary federal question is raised by its third party beneficiary claim because that claim "is a creature of Louisiana law that does not require the court to evaluate the legality of any agency action or interpret any federal statutes."[395] On the other hand, Defendants cite *Copeland-Turn v. Wells Fargo Bank, N.A.*, a case from the District of Oregon, for the proposition that "'a claim by plaintiff that he is the third-party beneficiary of a contract between a defendant and the federal government' satisfies 'the arising under' prong of § 1331 because the plaintiff's right to relief necessarily

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392. *Id.*

393. *Id.*

394. For example, Plaintiff's Petition identifies the "Lake Borgne 59" permit issued to Chevron Oil Company on December 23, 1975. Rec. Doc. 1-2 at p. 113. This permit was issued by the Department of the Army pursuant to the River and Harbors Act and the Federal Water Pollution Control Act. Rec. Doc. 260-6 at pp. 2-18.

395. Rec. Doc. 292 at p. 18.

depends on the resolution of a substantial question of federal law."[396]

The reality is more complicated than either party admits. There appears to be no bright-line rule regarding what law governs a third-party beneficiary claim based on a contract to which the United States is a party. Rather, numerous courts have grappled with whether to apply state contract law or federal common law.

In the 1977 case *Miree v. DeKalb County*, the Supreme Court considered a breach of contract claim brought by survivors of passengers who died in an airplane crash.[397] Federal jurisdiction was based on diversity of citizenship, and thus the substantive law of the forum state would normally apply under *Erie Railroad Co. v. Tompkins.*[398] Plaintiffs argued that they were third-party beneficiaries of a contract between DeKalb County, Georgia and the Federal Aviation Administration ("FAA").[399] In exchange for federal funding, the contract obligated the county to "take action to restrict the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal airport operations."[400]

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396. Rec. Doc. 260 at p. 18 (quoting *Copeland-Turner*, 2011 U.S. Dist. LEXIS 28093, 2011 WL 9960706, at *5).

397. *Miree v. De Kalb County*, 433 U.S. 25, 26, 97 S. Ct. 2490, 53 L. Ed. 2d 557 (1977).

398. *Id.* at 28 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)).

399. *Id.* at 27.

400. *Id.*

Plaintiffs argued that the county breached the contract by maintaining a garbage dump next to the airport and that birds swarming around the dump flew into the plane's engine, causing the crash.[401] The Fifth Circuit applied federal common law and determined that the plaintiffs did not have standing to sue as third-party beneficiaries.[402] However, the Supreme Court held that Georgia law should have been applied to determine whether plaintiffs were third-party beneficiaries.[403] In concluding that state law applied, the Court observed the case raised no questions regarding the rights and duties of the United States, did not threaten the federal fisc, and presented only a speculative federal interest.[404] Nevertheless, the Supreme Court acknowledged that federal common law may apply in diversity cases when "a uniform national rule is necessary to further the interest of the federal government."[405] While *Miree* discussed choice of law issues in the context of a diversity case, courts have since interpreted this language for the broader proposition that federal common law may apply in lieu of state substantive law, giving rise to a federal question in cases between non-diverse parties.[406]

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401. *Id.*

402. *Id.* at 27-28.

403. *Id.* at 32-33.

404. *See id.* at 28-33.

405. *Id.* at 29 (citing *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S. Ct. 573, 87 L. Ed. 838 (1943)).

406. *See Almond v. Capital Properties, Inc.*, 212 F.3d 20 (1st Cir. 2000) (discussed *infra*); *Price v. Pierce*, 823 F.2d 1114 (7th Cir. 1987) (discussed *infra*).

Appendix C

The Supreme Court as well as several appellate courts have since distinguished *Miree.* In *Boyle v. United Technologies Corp.*, decided in 1988, the Supreme Court acknowledged that under *Miree*, "i[t] is true that where litigation is purely between private parties and does not touch the rights and duties of the United States, federal law does not govern."[407] However, in *Boyle*, the Court declined to follow *Miree* and held that federal law applied to a product liability suit by survivors of a Marine killed in a helicopter crash against the helicopter manufacturer.[408] The Court explained:

> The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected.[409]

Miree was also distinguished by the Seventh Circuit in *Price v. Pierce.*[410] There, the court addressed a third-party beneficiary claim for breach of a contract between the Illinois Housing Developing Authority and various

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407. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 506, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988).

408. *Id.* at 507.

409. *Id.*

410. 823 F.2d 1114 (7th Cir. 1987).

developers.[411] Plaintiffs alleged that the developers breached their contractual obligations to set aside forty percent of all apartments for lower-income families.[412] The contract at issue was authorized by federal statute and approved by the Department of Housing and Urban Development ("HUD").[413] In assessing whether jurisdiction was proper, the Seventh Circuit concluded that the case arose under federal law because federal common law applied to whether plaintiffs were third-party beneficiaries, and whether the developers had breached the contract.[414] The court expressly distinguished *Miree*, explaining that the federal interest at stake in *Price* was "particularly strong":

> [I]t would be odd to think that a suit by tenants and applicants for federally subsidized housing against developers of such housing for breach of contracts approved by HUD and fundamental to the achievement of HUD's objectives . . . would have to be brought in state court and decided in accordance with state contract law.[415]

Further, the Seventh Circuit noted the "desirability of a uniform interpretation of these contracts," and suggested

411. *See id.* at 1117-18.

412. *See id.*

413. *See id.*

414. *Id.* at 1120-21.

415. *Id.* at 1120.

that uniform interpretation "will best be achieved by allowing suit in federal courts."[416]

The First Circuit adopted the reasoning of *Price* in *Almond v. Capital Properties, Inc.*[417] In *Almond*, defendant Capital Properties entered into an agreement with the Federal Railroad Administration ("FRA") whereby the FRA agreed to pay fifty percent of the cost of a new garage at a railroad station in Providence, Rhode Island.[418] As part of the agreement, the FRA retained the right to approve any changes in public parking rates.[419] When Capital Properties eliminated a monthly discount for commuters, the governor of Rhode Island and the state Department of Transportation brought an action in state court to enjoin the rate increase under a breach-of-contract theory.[420] Capital Properties removed the case to federal court.[421] Examining its jurisdiction *sua sponte*, the First Circuit expressly adopted the reasoning of *Price*,[422] and held that federal-question jurisdiction existed "because the complaint necessarily presents and turns on a contractual obligation to the United States."[423]

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416. *Id.*

417. 212 F.3d 20 (1st Cir. 2000).

418. *Id.* at 21.

419. *Id.*

420. *Id.* at 21-22.

421. *Id.* at 22.

422. *Id.* at 24.

423. *Id.* at 22. Similarly, the Ninth Circuit has held that "[f]ederal law governs the interpretation of contracts entered into

Therefore, in light of the forgoing caselaw, it appears that federal law applies to "nonparty breach of contract claims where the contract implicated a federal interest, the United States was a party to the contract, and the contract was entered into pursuant to federal law."[424] At least some of the dredging permits characterized by the Plaintiff as "contracts" for the purposes of its third-party beneficiary claim were entered into by the United States (specifically, the Army Corps of Engineers) and Defendants pursuant to federal law, including the River and Harbors Act.[425] Further, the dredging permits at issue implicate the important federal interests in coastal land management, sound energy policy, and developing natural resources.[426] As *Price* observed, "it would be odd

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pursuant to federal law and to which the government is a party." *Smith v. Central Ariz. Water Conservation Dist.*, 418 F.3d 1028, 1034 (9th Cir. 2005).

424. *Markle v. HSBC Mortg. Corp. (USA)*, 844 F. Supp. 2d 172, 180 n.9 (D. Mass. 2011) (synthesizing *Miree, Price, Almond*, and *Smith*).

425. *See* Rec. Doc. 260-6, Permit issued by the Department of the Army to Chevron Oil Company, dated December 23, 1975; Rec. Doc. 260-7, Permit issued by the Department of the Army to Arco Oil and Gas Company, dated June 11, 1981.

426. *See, e.g.*, 16 U.S.C. § 1451 ("The Congress finds that . . . (a) There is a national interest in the effective management, beneficial use, protection and development of the coastal zone."); 30 U.S.C. § 1602 ("The Congress declares that it is the continuing policy of the United States to promote an adequate and stable supply of materials necessary to maintain national security, economic well-being and industrial production with appropriate attention to a long-term balance between resource production, energy use, a healthy environment, natural resources conversation, and social needs.").

to think" that a suit by a state entity against the entire oil and gas industry for breach of permits approved by the Army Corps of Engineers and "fundamental to the achievement" of national environmental and energy policies "would have to be brought in state court and decided in accordance with state contract law."[427] The national interest in balancing the need for natural resources with the environmental effects of drilling along the Gulf Coast is more akin to HUD's interest in ensuring an adequate supply of affordable housing, the Department of Defense's interest in obtaining favorable procurement contracts for military equipment, or the FRA's interest in accessible interstate public transportation than it is to the FAA's interest in enforcing the obligation of a county to not construct a garbage dump within a prescribed range of an airport. Accordingly, federal common law applies to the interpretation of the alleged contracts, and Plaintiff's breach of contract claim necessarily raises an issue of federal law.

(b) Actually Disputed

The federal issues identified above—including whether Defendants' conduct constitutes an unauthorized alteration or injury to the levee systems under the Rivers and Harbors Act, whether Defendants were required to restore allegedly abandoned dredged canals under the Clean Water Act, what steps Defendants had to take to minimize environmental effects under the Coastal Zone Management Act, whether Plaintiff is a third-party

427. *Price*, 823 F.2d at 1120.

beneficiary of dredging permits issued by the federal government, and whether Defendants have violated the terms of those permits—are all disputed in this case.

(c) Substantial

The substantiality requirement demands that a federal question must not only be important to the parties, but also important to the federal system. In *Gunn v. Minton*, the Supreme Court explained that for a case to be "substantial in the relevant sense,"

> it 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 claim "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.[428]

The Supreme Court has not fully described what makes an issue important to the federal system as a whole; however, it has provided some specific insight on the contours of substantiality. First, a federal issue may be substantial where state adjudication would "undermine the development of a uniform body of [federal] law."[429] For example, in *Gunn*, a client sued his attorney for

428. *Gunn*, 133 S. Ct. at 1066 (emphasis in original).

429. *Id.* at 1067 (internal citations and quotation marks omitted).

malpractice in the handling of a patent case.[430] To prevail on his state malpractice claim, plaintiff had to establish that but-for his attorney's failure to raise a specific issue of patent law, he would have won the underlying patent case.[431] The Supreme Court acknowledged that a federal issue was necessarily raised; the trial court would have to apply patent law to determine whether plaintiff would have won the underlying case.[432] However, the Court concluded that the issue was not substantial because its resolution was unlikely to impact other cases.[433] The Court noted that Congress had already ensured the uniformity of patent law "by vesting exclusive jurisdiction over actual patent cases in federal district courts and exclusive appellate jurisdiction in the Federal Circuit."[434]

Additionally, a issue may be substantial where a case presents "a nearly pure issue of law . . . that could be settled once and for all," rather than a "fact-bound and situation-specific" one.[435]

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430. *Id.* at 1063.

431. *Id.*

432. *Id.* at 1065.

433. *Id.* at 1067 (noting that "[t]he present case is poles apart from *Grable*, in which a state court's resolution of the federal question would be controlling in numerous other cases").

434. *Id.*

435. *Empire Healthchoice*, 547 U.S. at 700-01 (internal citations and quotation marks omitted); *see also Singh*, 538 F.3d at 339 ("[T]his case involves no important issue of federal law. Instead, the federal issue is predominantly one of fact.").

Further, a federal issue may be substantial where the resolution of the issue has "broader significance . . . for the Federal Government."[436] In *Grable*, for example, the Internal Revenue Service had seized property from the plaintiff and sold it to satisfy the plaintiff's federal tax delinquency.[437] Years later, the plaintiff brought a state law quiet title action against the third party who had purchased the property, alleging that the sale was invalid because IRS had failed to comply with federal notice requirements.[438] In holding that federal-question jurisdiction existed, the Supreme Court explained that "[t]he meaning of a federal tax provision is an important issue of federal law that sensibly belongs in federal court."[439] Further, "[t]he Government has a strong interest in the prompt and certain collection of delinquent taxes, and the ability of the IRS to satisfy its claims from the property of delinquents requires clear terms of notice to allow buyers like [defendant] to satisfy themselves that the Service has touched the bases necessary for good title."[440] Accordingly, *Grable* determined that "[t]he Government thus has direct

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436. *Gunn*, 133 S. Ct. at 1066.

437. *Grable*, 545 U.S. at 310-11.

438. *Id.* at 310-11.

439. *Id.* at 315; *see also Smith*, 255 U.S. at 180 (holding that a shareholder suit seeking to enjoin a private company from investing in certain federal bonds on the grounds that the statute authorizing the issuance of those bonds was unconstitutional presented a federal question).

440. *Id.*

interest in the availability of a federal forum to vindicate its own administrative actions."[441]

Finally, under the Supreme Court's decision in *Merrell Dow Pharmaceuticals Inc. v. Thompson*,[442] the absence of a federal private right of action is "worth some consideration in the assessment of substantiality."[443]

Looking beyond Supreme Court jurisprudence, the Courts of Appeals have brought additional factors to bear on the substantiality analysis. For example, in *Mikulski v. Centerior Energy Corp.*, the Sixth Circuit identified four considerations relevant to whether a federal issue is substantial:

> (1) whether the case includes a federal agency, and particularly, whether that agency's compliance with the federal statute is in dispute; (2) whether the federal question is important (i.e., not trivial); (3) whether a decision on the federal question will resolve the case (i.e., the federal question is not merely incidental to the outcome); and (4) whether a decision as to the federal question will control numerous

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441. *Id.*

442. 478 U.S. 804, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986).

443. *Grable*, 545 U.S. at 318 ("*Merrell Dow* should be read in its entirety as treating the absence of a federal private right of action as evidence relevant to, but not dispositive of, the 'sensitive judgements about congressional intent' that § 1331 requires.").

> other cases (i.e., the issue is not anomalous or isolated).[444]

Conversely, in *Adventure Outdoors, Inc. v. Bloomberg*,[445] the Eleventh Circuit determined that a federal issue was not substantial

> where (1) there was no dispute over the meaning of the federal law at issue; (2) the meaning of the federal law at issue was clear; (3) state application of the federal law did not pose a serious threat to the federal interest of uniformity and consistency of federal law; and (4) the federal legal issue was not dispositive of the case because factual issues remained no matter how the legal issue was resolved.[446]

As discussed above, the pending case necessarily raises at least the following disputed issues: whether Defendants' conduct constitutes an unauthorized alteration or injury to the levee systems under the Rivers and Harbors Act; whether the Clean Water Act required Defendants to restore allegedly abandoned dredged canals; what steps the Coastal Zone Management Act required Defendants to take to minimize environmental

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444. *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 570 (6th Cir. 2007).

445. 552 F.3d 1290 (11th Cir. 2008).

446. *Davis v. GMAC Mortg. LLC*, No. 11-95, 2012 U.S. Dist. LEXIS 33351, 2011 WL 860389, at *4 (M.D. Ga. Mar. 13, 2012) (internal citations omitted) (summarizing *Adventure Outdoors*).

effects; whether Plaintiff is a third-party beneficiary of dredging permits issued by the federal government; and whether Defendants have violated the terms of those federal permits. The question now becomes whether these issues are substantial.

First, the Court recognizes the importance of the federal questions at stake in this case. The disputed issues implicate coastal land management, national energy policy, and national economic policy—all vital federal interests. Both Plaintiff and Defendants have observed the breadth of federal regulations governing the coastal lands at issue in this suit, including the Rivers and Harbors Act, the Clean Water Act, the Coastal Zone Management Act, the Natural Gas Act, the Energy Policy Act of 2005, the Coastal Wetlands Planning, Protection and Restoration Act of 1990, the Water Resources Development Act of 2007, and the Natural Gas Act.[447] Not only does the very number of applicable statutes speak to the importance of these federal issues, the actual language of the acts recognizes that these are issues of national concern. In the Coastal Zone Management Act, for example, Congress specifically found that "[t]here is a national interest in the effective management, beneficial use, protection, and development of the coastal zone."[448] Similarly, under the Natural Gas Act, "it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation

447. *See* Rec. Doc. 1-2 at pp. 16-17; Rec. Doc. 254 at pp. 8-13; Rec. Doc. 260 at pp. 20-22.

448. 16 U.S.C. § 1451(a).

in matters relating to the transportation of natural gas and sale thereof in interstate and foreign commerce is necessary in the public interest."[449]

Additionally, the Court notes that although this matter is a single case, it affects an entire industry, not just a few isolated parties. Plaintiff named 149 oil and gas companies as defendants in its Petition,[450] and brought breach-of-contract claims on the basis of hundreds of permits.[451] This matter stands in stark contrast to *Gunn*, which addressed a single patent sought by one entrepreneur,[452] and *Merrell Dow*, which considered a single drug manufactured by one pharmaceutical company.[453]

While Plaintiff may not be expressly challenging a specific action of a federal agency, the breadth of Plaintiff's claims amounts to a collateral attack on an entire regulatory scheme. The Rivers and Harbors Act, the Clean Water Act, the Coastal Zone Management Act,

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449. 15 U.S.C. § 717(a).

450. *See* Rec. Doc. 1-2 at pp. 25-34. Ninety-two defendants remain in the litigation. Some defendants have been dismissed without prejudice. *See, e.g.*, Rec. Doc. 244. Other defendants were incorrectly named.

451. Rec. Doc. 1-2 at pp. 104-122.

452. *See Gunn*, 133 S. Ct. at 1062-63 (describing Vernon Minton's attempt to patent an interactive securities trading system).

453. *See Merrell Dow*, 478 U.S. at 805-06 (describing Merrell Dow Pharmaceutical's production of Bendectin, a drug for morning sickness).

and the Army Corps of Engineers permitting system—in conjunction with a number of other federal measures not cited by Plaintiff—are the byproducts of a federal effort to balance the country's economic need for oil and gas with local, regional, and national environmental concerns. Plaintiff's claims are premised on the notion that this regulatory framework provides inadequate protection for the residents of southeastern Louisiana, and through this litigation, Plaintiff seeks to have the entire oil and gas industry compensate residents for the shortfall. The approach taken by Plaintiff has already been replicated by other local interests, as a number of Louisiana parishes have brought similar cases against oil and gas companies for damages due to dredging activities.[454] Further, these

454. The parish cases were initially brought in state court but have since been removed to federal court. Case No. 13-6693 *Parish of Plaquemines v. Total Petrochemical & Refining USA, Inc.*; Case No. 13-6698 *Parish of Jefferson v. Atlantic Richfield Co.*; Case No. 13-6701 *Parish of Jefferson v. Anadarko E&P Onshore*; Case No. 13-6704 *Parish of Plaquemines v. BEPCO, L.P.*; Case No. 13-6706 *Parish of Plaquemines v. Linder Oil Co.*; Case No. 13-6707 *Parish of Plaquemines v. Caskids Operating Co.*; Case No. 13-6708 *Parish of Jefferson v. Canlan Oil Co.*; Case No. 13-6709 *Parish of Plaquemines v. Palm Energy Offshore, LLC*; Case No. 13-6710 *Parish of Plaquemines v. Riverwood Prod. Co.*; Case No. 13-6711 *Parish of Plaquemines v. Apache Oil Corp.*; Case No. 13-6712 *Parish of Plaquemines v. June Energy, Inc.*; Case No. 13-6714 *Parish of Jefferson v. Equitable Petroleum Corp.*; Case No. 13-6715 *Parish of Plaquemines v. Helis Oil & Gas Co.*; Case No. 13-6716 *Parish of Plaquemines v. Devon Energy Prod. Co.*; Case No. 13-6717 *Parish of Jefferson v. Exxon Mobil Corp.*; Case No. 13-6718 *Parish of Plaquemines v. Campbell Energy Corp.*; Case No. 13-6719 *Parish of Plaquemines v. LLOG Exploration & Prod. Co.*; Case No. 13-6720 *Parish of Plaquemines v. Conoco Phillips Co.*; Case No. 13-6722

issues are not unique to Louisiana; state and local entities in the other Gulf states could bring similar litigation.

The Court also notes that whether state and local entities are properly considered third-party beneficiaries of federal dredging permits is "a nearly pure issue of law . . . that could be settled once and for all."[455] Additionally, if state courts interpret federal dredging permits and third-party beneficiary status inconsistently, permit holders could face different levels of liability in different jurisdictions, undermining the uniform application of federal law and further complicating a permitting process that seeks to balance difficult environmental and economic considerations. These factors suggest that the issue is substantial.

Given the replication of these critical federal issues of law in the parish suits and the potential for even more litigation, the Court finds that Plaintiff's action "justif[ies] resort to the experience, solicitude, and hope of uniformity

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Parish of Plaquemines v. Rozel Operating Co.; Case No. 13-6723 *Parish of Plaquemines v. Goodrich Petroleum Co.*; Case No. 13-6727 *Parish of Plaquemines v. Hillcorp Energy Co.*; Case No. 13-6728 *Parish of Jefferson v. Destin Operating Co.*; Case No. 13-6729 *Parish of Plaquemines v. Northcoast Oil Co.*; Case No. 13-6732 *Parish of Plaquemines v. Exchange Oil & Gas Corp.*; Case No. 13-6733 *Parish of Plaquemines v. Great Southern Oil & Gas Co.*; Case No. 13-6735 *Parish of Plaquemines v. HHE Energy Co.*; Case No. 13-6736 *Parish of Plaquemines v. Equitable Petroleum Corp.*; Case No. 13-6738 *Parish of Jefferson v. Chevron U.S.A. Holdings, Inc.*

455. *Empire Healthchoice*, 547 U.S. at 700-01 (internal citations and quotation marks omitted).

that a federal forum offers on federal issues."[456] Although in applying *Merrell Dow* the absence of a federal right of action is certainly some evidence against substantiality, *Grable* held that the absence of a federal right of action is not dispositive.[457] In this case, the other considerations described above prevail. Accordingly, the Court finds that the federal issues at stake are substantial.

(d) Federal-State Balance

In determining whether finding jurisdiction would disturb the balance of federal and state judicial responsibilities, the Court must consider whether exercising jurisdiction would "herald an enormous shift of traditionally state cases into federal courts."[458] Plaintiff's claims in this matter are not typical state law negligence and contract claims. Rather, Plaintiff's claims look to federal law to impose liability on an entire industry for the harms associated with coastal erosion. The backfilling, revegetation, and restoration actions that Plaintiff seeks in its request for injunctive relief will impact coastal land management of Louisiana and neighboring states as well as national oil and gas markets. Further, federal courts are particularly familiar with the federal regulatory scheme that forms the foundation of Plaintiff's claims and with the law to be applied to contracts to which the United States

456. *Grable*, 545 U.S. at 314.

457. *Id.* at 318 ("*Merrell Dow* should be read in its entirety as treating the absence of a federal private right of action as evidence relevant to, but not dispositive of, the 'sensitive judgments about congressional intent' that § 1331 requires.").

458. *Id.* at 319.

is a party. Accordingly, the Court finds that exercising jurisdiction will not disturb the balance of federal and state judicial responsibilities. Considering that Plaintiffs state law claims necessarily raise a federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing the congressionally approved balance of federal and state judicial responsibilities, the Court finds that federal question jurisdiction exists.

VIII. Conclusion

As discussed above, the Court does not find grounds to exercise admiralty jurisdiction or federal enclave jurisdiction in this matter. Further, neither OCSLA's nor CAFA's jurisdictional grant applies here. However, the Court does find that it has federal-question jurisdiction under 28 U.S.C. § 1331. Plaintiff's state law claims necessarily raise a federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing the congressionally approved balance of federal and state judicial responsibilities. Accordingly,

IT IS HEREBY ORDERED that Plaintiff's "Motion to Remand"[459] is **DENIED**.

NEW ORLEANS, LOUISIANA, this 27th day of June, 2014.

/s/ Nannette Jolivette Brown
NANNETTE JOLIVETTE BROWN
UNITED STATES DISTRICT JUDGE

459. Rec. Doc. 70.

APPENDIX D — JUDGMENT DENYING PETITION FOR *EN BANC* REHEARING BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, DATED APRIL 12, 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-30162

BOARD OF COMMISSIONERS OF THE SOUTHEAST LOUISIANA FLOOD PROTECTION AUTHORITY - EAST; ORLEANS LEVEE DISTRICT; LAKE BORGNE BASIN LEVEE DISTRICT; EAST JEFFERSON LEVEE DISTRICT,

Plaintiffs-Appellants,

v.

TENNESSEE GAS PIPELINE COMPANY, L.L.C.; ALTA MESA SERVICES, L.P.; ANADARKO E&P ONSHORE, L.L.C.; APACHE CORPORATION; ATLANTIC RICHFIELD COMPANY; BEPCO, L.P.; BOARDWALK PIPELINE PARTNERS, L.P.; BOPCO, L.P.; BP AMERICA PRODUCTION COMPANY; BP OIL PIPELINE COMPANY; CALLON OFFSHORE PRODUCTION, INCORPORATED; CALLON PETROLEUM COMPANY; CASKIDS OPERATING COMPANY; CENTERPOINT ENERGY RESOURCES CORPORATION; CHEVRON PIPELINE COMPANY; CHEVRON USA, INCORPORATED; CLAYTON WILLIAMS ENERGY, INCORPORATED; CLOVELLY OIL COMPANY, L.L.C.; COASTAL

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EXPLORATION AND PRODUCTION, L.L.C.; COLLINS PIPELINE COMPANY; CONOCOPHILLIPS COMPANY; CONTINENTAL OIL COMPANY; COX OPERATING, L.L.C.; CRAWFORD HUGHES OPERATING COMPANY; DALLAS EXPLORATION, INCORPORATED; DAVIS OIL COMPANY; DEVON ENERGY PRODUCTION COMPANY, L.P.; ENERGEN RESOURCES CORPORATION; ENTERPRISE INTRASTATE, L.L.C.; EOG RESOURCES, INCORPORATED; EP ENERGY MANAGEMENT, L.L.C.; EXXON MOBIL CORPORATION; EXXON MOBIL PIPELINE COMPANY; FLASH GAS & OIL NORTHEAST, INCORPORATED; GRAHAM ROYALTY, LIMITED; GREKA AM, INCORPORATED; GULF PRODUCTION COMPANY, INCORPORATED; GULF SOUTH PIPELINE COMPANY, L.P.; HELIS ENERGY, L.L.C.; HELIS OIL & GAS COMPANY, L.L.C.; HESS CORPORATION, A DELAWARE CORPORATION; HILLIARD OIL & GAS, INCORPORATED; HKN, INCORPORATED; INTEGRATED EXPLORATION & PRODUCTION, L.L.C.; J.C. TRAHAN DRILLING CONTRACTOR, INCORPORATED; J.M. HUBER CORPORATION; KENMORE OIL COMPANY, INCORPORATED; KEWANEE INDUSTRIES, INCORPORATED; KOCH EXPLORATION COMPANY, L.L.C.; KOCH INDUSTRIES, INCORPORATED; LIBERTY OIL & GAS CORPORATION; LLOG EXPLORATION COMPANY; MANTI OPERATING COMPANY; MARATHON OIL COMPANY; MOEM PIPELINE, L.L.C.; MOSBACHER ENERGY COMPANY; NATURAL RESOURCES CORPORATION OF

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TEXAS; NEWFIELD EXPLORATION GULF COAST, L.L.C.; NOBLE ENERGY, INCORPORATED; O'MEARA, L.L.C.; P.R. RUTHERFORD; PLACID OIL COMPANY; PLAINS PIPELINE, L.P.; REPUBLIC MINERAL CORPORATION; RIPCO, L.L.C.; ROZEL OPERATING COMPANY; MURPHY EXPLORATION & PRODUCTION COMPANY, USA; SHELL OIL COMPANY; SOUTHERN NATURAL GAS COMPANY, L.L.C.; SUN OIL COMPANY; SUNDOWN ENERGY, L.P.; UNION OIL COMPANY OF CALIFORNIA; WHITING OIL & GAS CORPORATION; WILLIAMS EXPLORATION COMPANY; YUMA EXPLORATION AND PRODUCTION COMPANY, INCORPORATED; MERIDIAN RESOURCE & EXPLORATION, L.L.C.; PICKENS COMPANY, INCORPORATED; ESTATE OF WILLIAM G. HELIS; LOUISIANA LAND AND EXPLORATION COMPANY, L.L.C. MARYLAND; KAISER-FRANCIS OIL COMPANY; BP PIPELINES NORTH AMERICA, INCORPORATED; VINTAGE PETROLEUM, L.L.C., DELAWARE; ENLINK LIG, L.L.C.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING *EN BANC*

(Opinion 03/03/2017, 5 Cir., _____, _____ F.3d _____)

Appendix D

Before STEWART, Chief Judge, and OWEN and COSTA, Circuit Judges.

PERCURIAM:

(✓) Treating the Petition for Rehearing *En Banc* as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing *En Banc* (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing *En Banc* is DENIED.

( ) Treating the Petition for Rehearing *En Banc* as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing *En Banc* is DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

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* Judges Jones, Smith, Dennis, and Clement did not participate in the consideration of the rehearing *en banc*.

APPENDIX E — RELEVANT STATUTORY PROVISIONS

28 U.S.C.A. § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

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28 U.S.C.A. § 1441

(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 removable 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 defendants is a citizen of the State in which such action is brought.

(c) Joinder of Federal law claims and State law claims.--(1) If a civil action includes--

(A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and

(B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute, the entire action

may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).

(2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only defendants against whom a claim described in paragraph (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1).

(d) Actions against foreign States.--Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) Multiparty, multiforum jurisdiction.--(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if--

(A) the action could have been brought in a United States district court under section 1369 of this title; or

> **(B)** the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during

that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) Derivative removal jurisdiction.--The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

Appendix E

42 La. Admin. Code Part I

Subchapter B. Coastal Use Guidelines

Coastal use guidelines as approved by the House Natural Resources Committee on July 9, 1980, the Senate Natural Resources Committee on July 11, 1980, and the governor on July 24, 1980.

§701. Guidelines Applicable to All Uses

A. The guidelines must be read in their entirety. Any proposed use may be subject to the requirements of more than one guideline or section of guidelines and all applicable guidelines must be complied with.

B. Conformance with applicable water and air quality laws, standards and regulations, and with those other laws, standards and regulations which have been incorporated into the coastal resources program shall be deemed in conformance with the program except to the extent that these guidelines would impose additional requirements.

C. The guidelines include both general provisions applicable to all uses and specific provisions applicable only to certain types of uses. The general guidelines apply in all situations. The specific guidelines apply only to the situations they address. Specific and general guidelines should be interpreted to be consistent with each other. In the event there is an inconsistency, the specific should prevail.

D. These guidelines are not intended to nor shall they be interpreted so as to result in an involuntary acquisition or taking of property.

E. No use or activity shall be carried out or conducted in such a manner as to constitute a violation of the terms of a grant or donation of any lands or waterbottoms to the state or any subdivision thereof. Revocations of such grants and donations shall be avoided.

F. Information regarding the following general factors shall be utilized by the permitting authority in evaluating whether the proposed use is in compliance with the guidelines:

1. type, nature, and location of use;

2. elevation, soil, and water conditions and flood and storm hazard characteristics of site;

3. techniques and materials used in construction, operation, and maintenance of use;

4. existing drainage patterns and water regimes of surrounding area including flow, circulation, quality, quantity, and salinity; and impacts on them;

5. availability of feasible alternative sites or methods of implementing the use;

6. designation of the area for certain uses as part of a local program;

7. economic need for use and extent of impacts of use on economy of locality;

8. extent of resulting public and private benefits;

9. extent of coastal water dependency of the use;

10. existence of necessary infrastructure to support the use and public costs resulting from use;

11. extent of impacts on existing and traditional uses of the area and on future uses for which the area is suited;

12. proximity to and extent of impacts on important natural features such as beaches, barrier islands, tidal passes, wildlife and aquatic habitats, and forest lands;

13. the extent to which regional, state, and national interests are served including the national interest in resources and the siting of facilities in the coastal zone as identified in the coastal resources program;

14. proximity to, and extent of impacts on, special areas, particular areas, or other areas of particular concern of the state program or local programs;

15. likelihood of, and extent of impacts of, resulting secondary impacts and cumulative impacts;

16. proximity to and extent of impacts on public lands or works, or historic, recreational, or cultural resources;

17. extent of impacts on navigation, fishing, public access, and recreational opportunities;

18. extent of compatibility with natural and cultural setting;

19. extent of long term benefits or adverse impacts.

G. It is the policy of the coastal resources program to avoid the following adverse impacts. To this end, all uses and activities shall be planned, sited, designed, constructed, operated, and maintained to avoid to the maximum extent practicable significant:

1. reductions in the natural supply of sediment and nutrients to the coastal system by alterations of freshwater flow;

2. adverse economic impacts on the locality of the use and affected governmental bodies;

3. detrimental discharges of inorganic nutrient compounds into coastal waters;

4. alterations in the natural concentration of oxygen in coastal waters;

5. destruction or adverse alterations of streams, wetland, tidal passes, inshore waters and waterbottoms, beaches, dunes, barrier islands, and other natural biologically valuable areas or protective coastal features;

6. adverse disruption of existing social patterns;

7. alterations of the natural temperature regime of coastal waters;

8. detrimental changes in existing salinity regimes;

9. detrimental changes in littoral and sediment transport processes;

10. adverse effects of cumulative impacts;

11. detrimental discharges of suspended solids into coastal waters, including turbidity resulting from dredging;

12. reductions or blockage of water flow or natural circulation patterns within or into an estuarine system or a wetland forest;

13. discharges of pathogens or toxic substances into coastal waters;

14. adverse alteration or destruction of archaeological, historical, or other cultural resources;

15. fostering of detrimental secondary impacts in undisturbed or biologically highly productive wetland areas;

16. adverse alteration or destruction of unique or valuable habitats, critical habitat for endangered species,

important wildlife or fishery breeding or nursery areas, designated wildlife management or sanctuary areas, or forestlands;

17. adverse alteration or destruction of public parks, shoreline access points, public works, designated recreation areas, scenic rivers, or other areas of public use and concern;

18. adverse disruptions of coastal wildlife and fishery migratory patterns;

19. land loss, erosion, and subsidence;

20. increases in the potential for flood, hurricane and other storm damage, or increases in the likelihood that damage will occur from such hazards;

21. reduction in the long term biological productivity of the coastal ecosystem.

H.1. In those guidelines in which the modifier "maximum extent practicable" is used, the proposed use is in compliance with the guideline if the standard modified by the term is complied with. If the modified standard is not complied with, the use will be in compliance with the guideline if the permitting authority finds, after a systematic consideration of all pertinent information regarding the use, the site and the impacts of the use as set forth in Subsection F above, and a balancing of their relative significance, that the benefits resulting from the proposed use would clearly outweigh the adverse impacts

resulting from noncompliance with the modified standard and there are no feasible and practical alternative locations, methods, and practices for the use that are in compliance with the modified standard and:

a. significant public benefits will result from the use; or

b. the use would serve important regional, state, or national interests, including the national interest in resources and the siting of facilities in the coastal zone identified in the coastal resources program, or;

c. the use is coastal water dependent.

2. The systematic consideration process shall also result in a determination of those conditions necessary for the use to be in compliance with the guideline. Those conditions shall assure that the use is carried out utilizing those locations, methods, and practices which maximize conformance to the modified standard; are technically, economically, environmentally, socially, and legally feasible and practical; and minimize or offset those adverse impacts listed in §701.G and in the Subsection at issue.

I. Uses shall to the maximum extent practicable be designed and carried out to permit multiple concurrent uses which are appropriate for the location and to avoid unnecessary conflicts with other uses of the vicinity.

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J. These guidelines are not intended to be, nor shall they be, interpreted to allow expansion of governmental authority beyond that established by R.S. 49:214.21-49:214.42, as amended; nor shall these guidelines be interpreted so as to require permits for specific uses legally commenced or established prior to the effective date of the coastal use permit program nor to normal maintenance or repair of such uses.

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§705. Guidelines for Linear Facilities

A. Linear use alignments shall be planned to avoid adverse impacts on areas of high biological productivity or irreplaceable resource areas.

B. Linear facilities involving the use of dredging or filling shall be avoided in wetland and estuarine areas to the maximum extent practicable.

C. Linear facilities involving dredging shall be of the minimum practical size and length.

D. To the maximum extent practicable, pipelines shall be installed through the "push ditch" method and the ditch backfilled.

E. Existing corridors, rights-of-way, canals, and streams shall be utilized to the maximum extent practicable for linear facilities.

F. Linear facilities and alignments shall be, to the maximum extent practicable, designed and constructed to permit multiple uses consistent with the nature of the facility.

G. Linear facilities involving dredging shall not traverse or adversely affect any barrier island.

H. Linear facilities involving dredging shall not traverse beaches, tidal passes, protective reefs, or other natural gulf shoreline unless no other alternative exists.

If a beach, tidal pass, reef, or other natural gulf shoreline must be traversed for a non-navigation canal, they shall be restored at least to their natural condition immediately upon completion of construction. Tidal passes shall not be permanently widened or deepened except when necessary to conduct the use. The best available restoration techniques which improve the traversed area's ability to serve as a shoreline shall be used.

I. Linear facilities shall be planned, designed, located, and built using the best practical techniques to minimize disruption of natural hydrologic and sediment transport patterns, sheet flow, and water quality and to minimize adverse impacts on wetlands.

J. Linear facilities shall be planned, designed, and built using the best practical techniques to prevent bank slumping and erosion, and saltwater intrusion, and to minimize the potential for inland movement of storm-generated surges. Consideration shall be given to the use of locks in navigation canals and channels which connect more saline areas with fresher areas.

K. All nonnavigation canals, channels, and ditches which connect more saline areas with fresher areas shall be plugged at all waterway crossings and at intervals between crossings in order to compartmentalize them. The plugs shall be properly maintained.

L. The multiple use of existing canals, directional drilling, and other practical techniques shall be utilized to the maximum extent practicable to minimize the number

and size of access canals, to minimize changes of natural systems, and to minimize adverse impacts on natural areas and wildlife and fisheries habitat.

M. All pipelines shall be constructed in accordance with Parts 191, 192, and 195 of Title 49 of the Code of Federal Regulations, as amended, and in conformance with the Commissioner of Conservation's Pipeline Safety Rules and Regulations and those safety requirements established by R.S. 45:408, whichever would require higher standards.

N. Areas dredged for linear facilities shall be backfilled or otherwise restored to the pre-existing conditions upon cessation of use for navigation purposes to the maximum extent practicable.

O. The best practical techniques for site restoration and revegetation shall be utilized for all linear facilities.

P. Confined and dead end canals shall be avoided to the maximum extent practicable. Approved canals must be designed and constructed using the best practical techniques to avoid water stagnation and eutrophication.

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§719. Guidelines for Oil, Gas, and Other Mineral Activities

A. Geophysical surveying shall utilize the best practical techniques to minimize disturbance or damage to wetlands, fish and wildlife, and other coastal resources.

B. To the maximum extent practicable, the number of mineral exploration and production sites in wetland areas requiring floatation access shall be held to the minimum number, consistent with good recovery and conservation practices and the need for energy development, by directional drilling, multiple use of existing access canals, and other practical techniques.

C. Exploration, production, and refining activities shall, to the maximum extent practicable, be located away from critical wildlife areas and vegetation areas. Mineral operations in wildlife preserves and management areas shall be conducted in strict accordance with the requirements of the wildlife management body.

D. Mineral exploration and production facilities shall be to the maximum extent practicable designed, constructed, and maintained in such a manner to maintain natural water flow regimes, avoid blocking surface drainage, and avoid erosion.

E. Access routes to mineral exploration, production, and refining sites shall be designed and aligned so as to avoid adverse impacts on critical wildlife and vegetation areas to the maximum extent practicable.

F. Drilling and production sites shall be prepared, constructed, and operated using the best practical techniques to prevent the release of pollutants or toxic substances into the environment.

G. All drilling activities, supplies, and equipment shall be kept on barges, on drilling rigs, within ring levees, or on the well site.

H. Drilling ring levees shall to the maximum extent practicable be replaced with small production levees or removed entirely.

I. All drilling and production equipment, structures, and storage facilities shall be designed and constructed utilizing best practical techniques to withstand all expectable adverse conditions without releasing pollutants.

J. Mineral exploration, production, and refining facilities shall be designed and constructed using best practical techniques to minimize adverse environmental impacts.

K. Effective environmental protection and emergency or contingency plans shall be developed and complied with for all mineral operations.

L. The use of dispersants, emulsifiers, and other similar chemical agents on oil spills is prohibited without the prior approval of the Coast Guard or Environmental Protection Agency on-scene coordinator, in accordance with the National Oil and Hazardous Substances Pollution Contingency Plan.

M. Mineral exploration and production sites shall be cleared, revegetated, detoxified, and otherwise restored as near as practicable to their original condition upon termination of operations to the maximum extent practicable.

N. The creation of underwater obstructions which adversely affect fishing or navigation shall be avoided to the maximum extent practicable.