UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

PORT OF CORPUS CHRISTI AUTHORITY OF NUECES COUNTY, TEXAS,	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 2:22-CV-00030
THE PORT OF CORPUS CHRISTI LP, *et al.*,	§	
Defendants.	§	

ORDER ON MOTION TO REMAND

Plaintiff Port of Corpus Christi Authority of Nueces County, Texas (Port Authority) sued Defendants The Port of Corpus Christi, L.P. n/k/a The Port of Texas, L.P. (TPCC) and Kenneth Berry (Berry) in state court. D.E. 1-3. The Port Authority seeks monetary and injunctive relief related to, among other things, the discharge of substances and the placement of equipment constituting a trespass on the Port Authority's submerged land adjacent to Berry Island. D.E. 1-3. Defendants allege that their actions have been conducted in compliance with a federal permit. That permit allows placement of dredge spoils on Berry Island and carefully prescribes the manner for doing so, with the United States Army Corps of Engineers (USACE) maintaining the power to monitor and regulate the matter. D.E. 1, 19.

On February 14, 2022, Defendants removed the case to this Court, alleging federal officer, federal question, and admiralty jurisdiction under 28 U.S.C. §§ 1331, 1333, and 1442. D.E. 1, 19. Before the Court is the Port Authority's emergency motion to remand (D.E. 17), Defendants' response (D.E. 20), the Port Authority's reply (D.E. 21), and Defendants' sur-reply (D.E. 24). For the reasons set out below, the Court **GRANTS** the motion (D.E. 17) and **REMANDS** this action.

INTRODUCTION

Service Mark Complaint. The Port Authority filed this action in County Court at Law No. 4, Nueces County, Texas on April 27, 2018. D.E. 2-1. It originally sued TPCC, complaining of service mark dilution and service mark infringement. *Id*.; D.E. 2-4. In its second amended petition, it added claims for falsely implying governmental affiliation under Texas state law. D.E. 1-3. At the beginning of this case, TPCC was using the name The Port of Corpus Christi, L.P., which was alleged to dilute or infringe the Port Authority's service mark for The Port of Corpus Christi.

During the course of the state court litigation, TPCC changed its name to The Port of Texas, L.P. D.E. 1-3, pp. 11-12; D.E. 19, p. 1 n.1. However, the Port Authority continues to complain that TPCC and Berry (now added with allegations of alter ego) have not taken the necessary measures to eliminate all of their continuing or record usages of the Port Authority's name. Despite the existence of this ongoing controversy regarding the service marks, no party suggests that it impacts the question of whether federal jurisdiction is now available to these parties, which is the only question before the Court.

Submerged Land Complaint. On February 11, 2022, the Port Authority amended its state court petition, fundamentally altering the nature of the case with additional claims. It now complains of suspended solids (including sand and clay) discharged from Berry Island, alleged to be owned or controlled by Defendants. D.E. 1-3. It also complains of rip rap (large loose concrete or stones) that Defendants have placed off the eastern and southern sides of Berry Island directly on the Port Authority's submerged land and a dredge pipe affixed over and upon that land.

According to the second amended petition, those substances are physical trespasses and encroachments. They have accumulated and will continue to accumulate on the Port Authority's adjacent submerged land, constituting obstructions and creating sandbars and islands that can be viewed above the low tide water line. This interferes with the Port Authority's use of the submerged area in conjunction with the Corpus Christi Ship Channel and the La Quinta Ship Channel. The Port Authority alleges that the source of the problem is a dredge material operation on Berry Island. The Port Authority has not supplied any evidence of the details by which that business is run, only that it is apparent from a visual inspection of the area. *See* D.E. 1-3, pp. 143-45.

The USACE Permit. According to Defendants, the operation of which the Port Authority complains is conducted pursuant to permits and agreements relating to a Dredge Material Placement Area (DMPA) on the island. Defendants argue that the DMPA permit, issued by USACE, triggers a number of predicates for federal jurisdiction. The only permit referenced in the materials of record shows that Moda Ingleside Oil Terminal, LLC

(Moda), as "permittee," is "authorized" to "conduct maintenance dredging operations" pursuant to specified terms and conditions for compliance with federal regulations. D.E. 1-4, p. 1. The permit provides that "All dredged material will be placed on Berry Island." *Id*. It does not contemplate, on its face, the discharge of suspended solids or other materials from Berry Island onto adjacent submerged land.

Parties Governed by the Permit. While there is no explanation of the transaction(s) involved, it appears that Moda is working with another company, Enbridge (also referenced in the record attachments as Moda/Enbridge or Embridge, Inc.).[1] Both Moda and Enbridge appear to be subject to USACE enforcement efforts. D.E. 19-1, pp. 129-32. In contrast, neither Defendant is named in the permit. And neither Defendant was identified in the USACE enforcement correspondence.

Land Use Issues. Under the permit, Moda is required to enter into a land use agreement with the Port of Corpus Christi[2] as outlined in an attachment to the permit, which attachment does not appear in the record. D.E. 1-4, p. 3. The Amended Notice of Removal does, however, include an Amended and Restated Easement Agreement between Moda and Berry, allowing the "perpetual deposition of dredge spoil material" on Berry Island. D.E. 19-1, pp. 82-95 (partially redacted). Nothing in that agreement appears to grant either

[1] The entity may be, or be related to, Enbridge Ingleside Oil Terminal, LLC. *See* D.E. 25 (Defendants' Notice of Related Litigation).

[2] It is not clear, given the service mark dispute, which entity the "Port of Corpus Christi" is referencing in the permit. According to a 12-Step Mitigation Plan drafted for environmental preservation, Moda was to negotiate a land use agreement with the Port Authority. D.E. 19-1, pp. 45, 48. However, the only land use agreement in the record, an easement, is between Moda and Berry. D.E. 19-1, pp. 82-95.

Defendant any rights or responsibilities under the Moda permit. Nor does it purport to grant any party rights to the submerged land surrounding Berry Island.

As the Port Authority has pointed out, the permit bears certain express limitations, including:

> a. This permit does not obviate the need to obtain other Federal, state, or local authorizations required by law.
> b. This permit does not grant any property rights or exclusive privileges.
> c. This permit does not authorize any injury to the property or rights of others.

D.E. 1-4, p. 3. Moreover, "In issuing this permit, the Federal Government does not assume any liability for the following: . . . c. Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit." *Id*. Thus, compliance issues do not affect federal government operations except insofar as it chooses to engage in enforcement actions adversarial to the permittee(s).

Permit Enforcement. The permittee may not abandon its authorized activity without a modification of the permit, which may require restoration of the area. D.E. 1-4, p. 3. As noted, when a permit compliance issue was raised, the USACE referred to Moda/Enbridge as the party that may be in violation of the permit. D.E. 19-1, p. 129. An email exchange included with the Amended Notice of Removal shows that Berry sought and obtained the approval of the Texas Commission on Environmental Quality (TCEQ) to relocate the outfall structure on Berry Island. D.E. 19-1, p. 126. While the correspondence references a communication with USACE, nothing indicates that Defendants are federal permittees and the TCEQ is a Texas governmental body, not a federal one. Therefore,

nothing in the record shows that either Defendant is subject to any federal permit or ongoing proceeding involving the federal government.

Removal. On February 14, 2022, as a result of the Port Authority filing its second amended petition raising the DMPA issues, Defendants removed the case to this Court. D.E. 1. Pursuant to their first amended notice of removal (D.E. 19) filed on February 23, 2022, Defendants assert federal jurisdiction as follows:

- **Federal Officer Removal Jurisdiction** (28 U.S.C. § 1442(a)): Defendants' rights and responsibilities associated with operation of a DMPA are governed and supervised by USACE;
- **Federal Question Jurisdiction** (28 U.S.C. § 1331):
  - Plaintiff's state law claims implicate Defendants' compliance with USACE directives;
  - Plaintiff's state law claims are based on and relate to the Rivers and Harbors Act of 1989, 33 U.S.C. §§ 401-467; the Clean Water Act of 1972, 33 U.S.C. §§ 1251-1388; as well as the comprehensive federal regulations that empower the USACE, 33 C.F.R. §§ 321-24;
  - Plaintiff's state law claims challenge the USACE's exclusive jurisdiction over permit compliance;
  - Plaintiff's claims fall within the scope of the USACE's complete regulatory preemption; and
- **Admiralty/Maritime Jurisdiction** (28 U.S.C. § 1333(1)): Plaintiff's claims relate to navigable waters and maritime commerce.

Defendants' jurisdictional claims are made despite the Port Authority's express pleading that it disclaims any issue regarding permit compliance, stating its claim exclusively in terms of Texas state law: common law trespass. D.E. 1-3.

DISCUSSION

Each claim of federal jurisdiction has its own slightly different standard of review and rubric, as set out below. However, common to each is that the party seeking federal jurisdiction—Defendants here—bear the burden of demonstrating that jurisdiction is proper. *See Jackson v. Am. Bureau of Shipping*, No. CV H-20-109, 2020 WL 1743541, at *1 (S.D. Tex. Apr. 8, 2020) (noting *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 296 (5th Cir. 2020) and citing *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002)) (federal officer removal jurisdiction); *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001) (federal question jurisdiction); *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995) (admiralty jurisdiction). Defendants have not sustained their burden.

A. Federal Officer

Standard of Review and Rubric. Unlike most questions regarding federal jurisdiction, construction in favor of remand does not apply with respect to federal officer removals under 28 U.S.C. § 1442(a). *See Betzner v. Boeing Co.*, 910 F.3d 1010, 1014 (7th Cir. 2018). The statute is construed liberally to effectuate its basic purpose, which is:

> to protect the Federal Government from the interference with its operations that would ensue were a State able, for example, to arrest and bring to trial in a State court for an alleged offense against the law of the State, officers and agents of the Federal Government acting within the scope of their authority.

Watson v. Philip Morris Co., 551 U.S. 142, 150 (2007) (citations omitted and punctuation cleaned up). While there is no presumption against federal officer removal jurisdiction, neither is there a presumption in its favor.

According to the Fifth Circuit:

> Henceforth, to remove under section 1442(a), a defendant must show (1) it has asserted a colorable federal defense, (2) it is a "person" within the meaning of the statute, (3) that has acted pursuant to a federal officer's directions, and (4) the charged conduct is connected or associated with an act pursuant to a federal officer's directions.

Latiolais, 951 F.3d at 296.

Discussion of the Elements. Defendants, relying on the liberal construction requirement and the removal of any causation requirement pursuant to the *Latiolais* opinion, concentrate their argument on the extent to which the charged conduct is connected or associated with federal directions—the accuracy of the Port Authority's assertions regarding regulation of DMPAs. Defendants address the first and fourth elements, and appear to assume that they have demonstrated the first three elements by simply referencing the USACE DMPA permit.

In contrast, the Port Authority has complained that Defendants do not meet the third element and dispute Defendants' arguments or assumptions regarding the first and fourth. The Port Authority relies heavily on the *Watson* opinion. That Supreme Court opinion concentrated on the second and third elements, holding that a party does not come within the scope of the federal officer removal statute by merely being in a business that is subject to, and in compliance with, federal regulations.

> [P]recedent and statutory purpose make clear that the private person's "acting under" must involve an effort to assist, or to help carry out, the duties or tasks of the federal superior.
>
> In our view, the help or assistance necessary to bring a private person within the scope of the statute does not include simply complying with the law.

551 U.S. at 152 (citations omitted).

> The question before us is whether the fact that a federal regulatory agency directs, supervises, and monitors a company's activities in considerable detail brings that company within the scope of the italicized language ("*acting under*" an "*officer*" of the United States) and thereby permits removal. We hold that it does not.

Id. at 145. The Supreme Court ruled this way, despite acknowledging that the federal officer removal statute is worded broadly and is to be construed liberally. *Id*. at 147-48. Delegation of federal governmental authority is what triggers the statute, not the status of being regulated and therefore subject to federal authority wielded by others. *Id*. at 157.

Nothing in the materials of record demonstrates that either Defendant has acted to help or assist any federal officer or agency. Instead, Defendants argue that *Watson* has been abrogated by the Removal Clarification Act (RCA) and *Latiolais*. D.E. 24, p. 2. But neither of those authorities addressed the third element of what it means to "act under that [federal] officer." 28 U.S.C. § 1442(a)(1).

The RCA expanded the language of § 1442(a)(1) that previously required the conduct for which the removing defendant was sued to be "for any act under color of such office." After the RCA, that language became "for *or relating to* any act under color of

such office." PL 112-51, November 9, 2011, 125 Stat 545 (emphasis added). That change goes to the fourth element, which only comes into play if the third element is satisfied.

That interpretation is consistent with the opinion in *Latiolais*. There, the defendants had contracted with the federal government to refurbish a United States Navy ship pursuant to contract specifications. A federal activity had been delegated to the defendants for execution. That satisfied the third element. Thereafter, the only issue was the extent to which the plaintiff's claim had to implicate that federal governmental activity—the fourth element. The mesothelioma claim was sufficiently related because the government contract specified that the defendants would have their employees work with asbestos. Here, Defendants have not demonstrated that they entered into any contract with the federal government or were otherwise delegated authority to execute a federal activity. Therefore, nothing in *Latiolais* addressing the fourth element has any application here.

And even if—contrary to the *Watson* decision—holding a federal permit were sufficient to satisfy the requirement of acting pursuant to a federal officer's directions, Defendants have not demonstrated that they hold any federal permit at all. The only permit of record appears to be held by Moda/Enbridge. Defendants have not satisfied the third element of the requirements for federal officer removal. For that reason, the Court need not and does not address the other elements.

The Court **HOLDS** that Defendants have not demonstrated that they are entitled to remove pursuant to the federal officer removal statute, 28 U.S.C. § 1442(a).

B. Federal Question

Standard of Review and Rubric. On its face, the Port Authority's complaint is based solely on state law regarding trespass. Defendants argue that a federal question is presented because any challenge to their operations constitutes a collateral attack on the USACE's authority pursuant to federal statutes—the Rivers and Harbors Act and Clean Water Act—and associated federal regulations. Indeed, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

Removal based on federal question jurisdiction is permitted by 28 U.S.C. § 1441(a). Unlike federal officer removal under § 1442, removal on the basis of a federal question is strictly construed with doubts resolved in favor of remand in recognition of interests of comity with the jurisdiction of state courts. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941); *Howery*, 243 F.3d at 917; *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 524 (5th Cir. 1994).

Whether a cause of action "arises under" federal law is generally determined by the allegations of the plaintiff's complaint. This well-pleaded complaint rule requires determining whether federal law creates the cause of action or the claim necessarily depends on resolution of a substantial question of federal law. *Bd. of Comm'rs v. Tenn. Gas Pipeline Co.*, 850 F.3d 714, 721 (5th Cir. 2017). A defense based on federal law does not create federal jurisdiction: "[I]t is the character of the action and not the defense which determines whether there is federal question jurisdiction." *Thurston Motor Lines, Inc. v.*

Jordan K. Rand, Ltd., 460 U.S. 533, 535 (1983) (citation omitted); *accord Hood ex rel. Mississippi v. JP Morgan Chase & Co*., 737 F.3d 78, 89 (5th Cir. 2013) (discussing the difference between a federal defense and complete federal preemption).

When the claim is based on state law, a federal issue can be a basis for federal jurisdiction, but it is not automatically a sufficient basis.

> Only in a " 'special and small category' of cases" will federal jurisdiction exist when state law creates the cause of action. 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."

Tenn. Gas, 850 F.3d at 721-22 (footnotes omitted).

Federal Question Arising Under Trespass Allegations. Each of Defendants' arguments for finding a federal question embedded in the Port Authority's trespass claim is based on the premise that Defendants' actions were authorized, prescribed, and are perpetually regulated by the USACE pursuant to federal statutes and regulations. But that is not substantiated by the record. As discussed, Defendants are not permittees of USACE. The only permit that has been submitted expressly excludes governance of third-party property rights, cautions against injuring the property of others, and notes that the permittee will need to enter into any land use agreements necessary to effectuate its private business project.

Nothing in the permit contemplates the discharge of suspended solids capable of settling on adjacent lands and creating sandbars, shoals, or islands. And while USACE has

shown interest in an enforcement action to address this, it does so not for the purpose of enforcing the Port Authority's rights but to address ecological concerns that are affected by the same conduct that constitutes a trespass on the Port Authority's submerged land. No USACE enforcement action purports to represent the Port Authority's interests. And USACE has not exercised any right of condemnation or otherwise assumed jurisdiction over the Port Authority's property rights.

In their attempt to demonstrate that there is a federal question in the Port Authority's trespass claim, Defendants rely on *Tennessee Gas.* 850 F.3d at 720. In that case, the Fifth Circuit held that the Flood Protection Authority's state law claims for negligence and nuisance satisfied federal question jurisdiction because both required the application of standards and duties that existed only in federal law. *Id*. at 722.

> 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," and the Board's negligence 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.

Id. at 723 (footnote omitted). The *Tennessee Gas* opinion then goes on to determine that the federal question raised by the negligence and nuisance claims satisfies the necessary, disputed, substantial, and balance of state and federal power issues described above. *Id*. at 721-22.

The holding of *Tennessee Gas* has no application to the Port Authority's trespass claim. Trespass under Texas law does not require proof of the breach of any duty, much

less a duty prescribed by federal law. Instead, the Texas Supreme Court states that it "has consistently defined a trespass as encompassing three elements: (1) entry (2) onto the property of another (3) without the property owner's consent or authorization." *Envt'l Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414, 419 (Tex. 2015). Defendants have not shown that federal law is required to determine any of those elements. Thus, the state trespass claim does not raise a federal question.

Complete Preemption. Complete preemption is a narrow exception or corollary to the well-pleaded complaint rule. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987). However, Defendants' argument that the land use is within the scope of the USACE's complete regulatory preemption is unaccompanied by any authority and is incorrect as a matter of law. Not only is the argument contrary to the express limits in the permit, it has been rejected by courts that have confronted the issue.

According to Defendants' argument, the USACE regulatory power flows from the Rivers and Harbors Act and the Clean Water Act. As the Port Authority demonstrated, neither act has complete preemptive power. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (finding that state common law claims are not preempted if based on the state law where the source of the pollution is located, even if the alleged pollution is the result of a permitted activity); *Hollingsworth v. Richardson*, No. 3:08-CV-01613-CLS, 2008 WL 11422614, at *5 (N.D. Ala. Sept. 26, 2008) ("The plain language of [the Rivers and Harbors Act] does not even hint at a Congressional intent to preempt the state law [trespass] claims . . . .").

Moreover, the Port Authority's rights in trespass do not conflict with the interests of clean water or navigable waterways. And Defendants appear to have abandoned their preemption argument as it is not addressed in their response or sur-reply. *See* D.E. 20, 24.

Remedy. Defendants argue that the Port Authority seeks to impose injunctive remedies against the USACE as it is the only party "acting in concert with them" "in the course of any dredge material placement activities on Berry Island, causing, commanding, allowing, requesting, instructing, or otherwise permitting the discharge of any materials or substances from Berry Island that settle upon Plaintiff's submerged land." D.E. 24 (quoting D.E. 1-3, ¶ 114). Nothing in the record suggests that USACE is actually doing the dredging work. It only provided the permit by which such work is determined to be in compliance with federal law and regulations. Under the standard of review, the Court does not construe the allegations or request for injunctive relief to raise a claim against USACE.

Rather, it appears that if this language can be construed as involving a third party to this litigation, Moda/Enbridge is engaging in dredge material placement activities on Berry Island that may be resulting in the discharge of substances that are encroaching on the Port Authority's submerged land. Nothing about seeking relief against Moda/Enbridge's ongoing operations—if that is what the Port Authority intended by its pleading—has been demonstrated to raise a federal question. Instead, it is a matter of injury to third-party property rights, an issue excepted from the scope of the Moda/Enbridge permit.

The Court **HOLDS** that Defendants have not demonstrated that the Port Authority's state law trespass claim raises a federal question. Thus, removal pursuant to 28 U.S.C. §§ 1331 and 1441(a) is improper.

C. Admiralty/Maritime

In their amended notice of removal, Defendants claim the right to remove under federal admiralty and maritime jurisdiction, 28 U.S.C. §§ 1333, 1441(a). D.E. 19, pp. 13, 30-31. In so doing, they cite cases that permitted removal on this basis despite the "savings to suitors" clause in § 1331(1), which has historically allowed plaintiffs to choose a state forum for an admiralty or maritime case. D.E. 19, p. 31 (citing *Ryan v. Hercules Offshore, Inc.*, No. H-12-3510, 2013 WL 1967315 (S.D. Tex. May 13, 2013) and *Wells v. Abe's Boat Rentals Inc.*, No. H-13-1112, 2013 WL 3110322 (S.D. Tex. June 18, 2013)).

As the Port Authority has demonstrated in its motion, Defendants' cases are no longer authoritative. *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 219 (5th Cir. 2013); *Figueroa v. Marine Inspection Servs.*, 28 F. Supp. 3d 677, 679-82 (S.D. Tex. 2014) (discussing at length the Federal Jurisdiction and Venue Clarification Act and removal rights based solely on admiralty jurisdiction). Without a separate basis for jurisdiction, an admiralty or maritime claim is not removable. *Barker*, 713 F.3d at 219; *Figueroa*, 28 F. Supp. 3d at 682. Defendants appear to have abandoned this basis for removal as it is not addressed in their response or sur-reply. *See* D.E. 20, 24. And its alternate bases for removal have failed.

The Court **HOLDS** that Defendants have not demonstrated that they can remove this case pursuant to admiralty or maritime jurisdiction.

CONCLUSION

For the reasons set out above, the Court **GRANTS** the motion for remand (D.E. 17) and remands this case to the County Court at Law No. 4 of Nueces County, Texas, the court from which it was removed.

ORDERED on March 7, 2022.

NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE