

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EARTH ISLAND INSTITUTE,

Plaintiff,

v.

CRYSTAL GEYSER WATER COMPANY,
et al.,

Defendants.

Case No. 20-cv-02212-HSG

**ORDER GRANTING MOTION TO
REMAND**

Re: Dkt. No. 69

Pending before the Court is Plaintiff Earth Island Institute’s (“Plaintiff” or “EII”) motion to remand (“Motion to Remand”) this action to San Mateo County Superior Court. Dkt. No. 69. Briefing on the Motion to Remand is complete. Dkt. Nos. 77 (“Opp.”); 92 (“Reply”). On July 16, 2020, the Court held a hearing on the Motion to Remand. Dkt. No. 93. For the reasons set forth below, the Court **GRANTS** the motion.

I. BACKGROUND

On February 26, 2020, Plaintiff filed this action against several food, beverage, and consumer goods companies (collectively, “Defendants”) in the San Mateo Superior Court seeking compensatory and equitable relief associated with alleged injuries sustained as a result of plastic pollution in California coasts and waterways. *See* Dkt. No. 2-2 (“Compl.”) ¶¶ 19-21, 161-226. Plaintiff alleges that the plastic pollution was created by Defendants’ products (“Products”), and bases its claims on Defendants’ dissemination of those Products in the California marketplace without sufficient warning of known dangers and Defendants’ statements to the public regarding those dangers. *Id.* ¶¶ 18, 93-152.

Among other allegations, Plaintiff alleges that by putting the recycling symbol on Defendants’ Products, Defendants misinformed consumers about what happens to those Products

1 once they are deposited in a recycling bin. *Id.* ¶¶ 10-15, 134-152. Further, according to Plaintiff,
 2 consumers are not aware that the vast majority of those Products will either be burned or shipped
 3 to a developing country and dumped in waterways. *Id.* ¶¶ 11-15, 93-111, 132.

4 As a result, EII seeks contribution from Defendants for costs associated with the alleged
 5 pollution by seeking relief under California laws for public nuisance, strict product liability
 6 (failure to warn and design defect), negligence, breach of express warranty, and unlawful practices
 7 under the California Consumer Legal Remedies Act (“CLRA”). *Id.* ¶¶ 161-226.

8 On April 1, 2020, Defendants removed the action to this Court, asserting several bases for
 9 federal jurisdiction. Dkt. No. 2.

10 **II. LEGAL STANDARD**

11 “Except as otherwise expressly provided by Act of Congress, any civil action brought in a
 12 State court of which the district courts of the United States have original jurisdiction, may be
 13 removed” to federal court. 28 U.S.C. § 1441(a). District courts “shall have original jurisdiction of
 14 all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C.
 15 § 1331. For removal to be proper, the federal question must be “presented on the face of the
 16 plaintiff’s properly pleaded complaint.” *See Hunter v. Phillip Morris USA*, 582 F.3d 1039, 1042
 17 (9th Cir. 2009); *see also Oklahoma Tax Comm’n v. Graham*, 489 U.S. 838, 840–41 (1989).

18 There is a “presumption against removal jurisdiction, under which [federal courts] ‘strictly
 19 construe the removal statute,’ and reject federal jurisdiction ‘if there is any doubt as to the right of
 20 removal in the first instance.’” *Grancare, LLC v. Thrower by & through Mills*, 889 F.3d 543, 550
 21 (9th Cir. 2018) (quoting *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (per curiam)); *see*
 22 *also* 28 U.S.C. § 1447(c) (“If at any time before final judgment it appears that the district court
 23 lacks subject matter jurisdiction, the case shall be remanded.”). “The ‘strong presumption’ against
 24 removal jurisdiction means that the defendant always has the burden of establishing that removal
 25 is proper.” *See Gaus*, 980 F.2d at 566.

26 **III. DISCUSSION**

27 Defendants contend that the Court has jurisdiction over Plaintiff’s Complaint on four
 28 independent grounds: (1) Plaintiff’s claims, and in particular the public nuisance claim, necessarily

1 arise under federal common law; (2) Plaintiff's claims, even if properly brought under state law,
 2 depend on the resolution of substantial and disputed federal issues; (3) Plaintiff's claims arose in
 3 federal enclaves; and (4) Plaintiff alleges tort claims relating to maritime activity and occurring on
 4 navigable waters.

5 **A. Federal Question Jurisdiction**

6 Defendants contend that federal jurisdiction exists because Plaintiff's causes of action
 7 necessarily turn on federal common law, such that federal common law *must* govern interstate
 8 pollution or public nuisance cases. Defendants insist that the complaint is not well-pleaded, and
 9 that if it were, it would raise a federal question mandating the exercise of federal jurisdiction.

10 On its face, Plaintiff's Complaint pleads only state law claims, and Plaintiff does not seek
 11 any relief under federal law, or premise its state law claims on any violations of federal law. "The
 12 presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint
 13 rule,' which provides that federal jurisdiction exists only when a federal question is presented on
 14 the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386,
 15 392 (1987). As a general matter, even if both federal and state law provide a remedy, Plaintiff can
 16 avoid federal jurisdiction by pleading only state law claims, if it is willing to forgo federal
 17 remedies. *See id.* (as master of the claim, plaintiff "may avoid federal jurisdiction by exclusive
 18 reliance on state law"). That said, while "[j]urisdiction may not be sustained on a theory that the
 19 plaintiff has not advanced," *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986),
 20 it is clear that "a plaintiff may not defeat removal by omitting to plead necessary federal questions
 21 in a complaint." *Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1041 (9th Cir. 2003).

22 Defendants contend that Plaintiff's claims, and in particular its public nuisance claim, arise
 23 under federal common law, making jurisdiction proper under the "necessarily federal in character"
 24 exception to the well-pleaded complaint rule. *ARCO Envtl. Remediation, L.L.C. v. Dep't of*
 25 *Health & Envtl. Quality of Montana*, 213 F.3d 1108, 1114 (9th Cir. 2000); *Wayne v. DHL*
 26 *Worldwide Express*, 294 F.3d 1179, 1183 (9th Cir. 2002).

27 Defendants' federal jurisdiction theory relies on two core premises: (1) federal common
 28 law must be the actual basis for Plaintiff's claims, notwithstanding the state law nuisance label

1 they carry; and (2) these claims may *only* be pursued as a matter of federal common law, which
2 displaces all state law bases for pursuing the relief Plaintiff seeks. *See* Opp. at 5-9. Because the
3 Court finds that the second premise is incorrect as a matter of law, it need not conclusively decide
4 the correctness of the first. But because both premises rely on the existence of federal common
5 law, the Court begins with a discussion of what federal common law is, and whether it still exists
6 (because Plaintiff claims it does not, Mot. at 7).

7 **i. Is Federal Common Law the Basis for Plaintiff’s Claims?**

8 Federal common law operates where “our federal system does not permit the controversy
9 to be resolved under state law” because it implicates “uniquely federal interests,” including where
10 “the interstate or international nature of the controversy makes it inappropriate for state law to
11 control.” *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640–41 (1981). In *American*
12 *Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) (“*AEP*”), the Supreme Court rejected the
13 notion that federal common law has been entirely displaced, and reaffirmed the “‘new’ federal
14 common law” that developed “[i]n the wake of *Erie*.” *Id.* at 420–21. “The ‘new’ federal common
15 law addresses ‘subjects within national legislative power where Congress has so directed’ or
16 where the basic scheme of the Constitution so demands.” *Id.* at 421 (quoting Friendly, *In Praise of*
17 *Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 408 n.119, 421–22 (1964)).

18 In *Illinois v. City of Milwaukee*, 406 U.S. 91, 99 (1972) (“*Milwaukee P*”), the Supreme
19 Court considered whether the district court had subject matter jurisdiction over a case alleging
20 water pollution in Lake Michigan on the ground that “pollution of interstate or navigable waters
21 creates actions arising under the ‘laws’ of the United States within the meaning of [28 U.S.C.] §
22 1331(a).” The Court held that jurisdiction existed, explaining that “[w]hen we deal with air and
23 water in their ambient or interstate aspects, there is a federal common law.” *Id.* at 103. The Court
24 found that the public nuisance remedy sought by Illinois was “not within the scope of remedies
25 prescribed by Congress” under the Federal Water Pollution Control Act, but explained that “the
26 remedies which Congress provides are not necessarily the only federal remedies available.” *Id.*
27 The Court acknowledged that the federal common law of public nuisance requires a federal court
28 to make case-by-case determinations based on the unique facts of the case, and established no rule,

1 decision, or standard setting out the elements of a water-based public nuisance cause of action.
2 *See id.* at 107-08. *Milwaukee I* articulated the concern that, without federal common law, “the
3 varying common law of the individual States” could be applied to the regulation of interstate
4 pollution, with disparate results. *Id.* at 107 n.9 (quoting *Texas v. Pankey*, 441 F.2d 236, 241 (10th
5 Cir. 1971)). Accordingly, the Court affirmed that “where there is an overriding federal interest in
6 the need for a uniform rule of decision or where the controversy touches basic interests of
7 federalism, we have fashioned federal common law.” *Id.* at 105 n.6.

8 Nearly a decade later, in *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981)
9 (“*Milwaukee IP*”), the Supreme Court held that Congress displaced elements of federal public
10 nuisance common law by adopting amendments to the Clean Water Act. *Milwaukee II*, 451 U.S.
11 at 314; *see also AEP*, 564 U.S. at 419-420. The Clean Water Act amendments established “a
12 comprehensive program for controlling and abating water pollution.” *Milwaukee II*, 451 U.S. at
13 318–320. The *Milwaukee II* Court concluded that “federal courts lack authority to impose more
14 stringent effluent limitations under federal common law than those imposed by the agency charged
15 by Congress with administering this comprehensive scheme.” *Id.* at 320.

16 *Milwaukee II* did not hold that the Clean Water Act displaced all federal common law
17 concerning ambient and interstate water pollution. Instead, the Supreme Court held that the 1972
18 amendments to the Clean Water Act had displaced federal common law with respect to water
19 pollution from “point source” discharges expressly covered by the Act’s permitting scheme, and
20 cabined its holding to “the claims of respondents,” which concerned effluent discharges and
21 limitations governed by that permitting scheme. 451 U.S. at 317–18 (“The overflows do not
22 present a different case. They are point source discharges and, under the Act, are prohibited
23 unless subject to a duly issued permit. As with the discharge of treated sewage, the overflows,
24 through the permit procedure of the Act, are referred to expert administrative agencies for control.
25 All three of the permits issued to petitioners explicitly address the problem of overflows.”).

26 Similarly, in 2011 the Supreme Court reiterated in *AEP* that “federal common law”
27 governs a public nuisance claim involving “air and water in their ambient or interstate aspects,”
28 and held that “borrowing the law of a particular state would be inappropriate” given the

1 “demonstrated need for a federal rule of decision” for such claims. 564 U.S. at 421–22 (quoting
2 *Milwaukee I*, 406 U.S. at 103). Ultimately, the Court did not decide whether federal common law
3 provided the plaintiffs there with a remedy, because the Court concluded that Congress, through
4 the Clean Air Act, had displaced any such remedy for claims based on carbon dioxide emissions.
5 *Id.* at 423. Importantly for present purposes, *AEP* did not address a claim of preemption or
6 displacement of state law by federal common law, and the Court expressly left open for
7 consideration on remand whether the federal statute at issue (the Clean Air Act) preempted state
8 law nuisance claims. *Id.* at 429.

9 Applying *AEP*, the Ninth Circuit in *Native Village of Kivalina v. Exxon Mobil Corp.*, 696
10 F.3d 849 (9th Cir. 2012), considered whether federal common law could support a public nuisance
11 claim brought by an Alaskan village to recover for damages attributable to energy companies’
12 “emissions of large quantities of greenhouse gases”—damages that included erosion caused by
13 “sea levels ris[ing].” *Id.* at 853–54. Given the interstate and transnational character of a claim
14 asserting damage from the global accumulation of carbon dioxide emissions, the Ninth Circuit
15 found that “federal common law can apply to transboundary pollution suits.” *Id.* at 855. But
16 again, *Kivalina* ultimately turned on a different question than the one presented in this case,
17 because the court there found that a federal statute (the Clean Air Act) had displaced the federal
18 common law remedy sought by the plaintiffs. *Id.* at 855–57.

19 These cases lead the Court to a series of conclusions about the state of federal common law
20 implicated by Defendants’ removal theory. First, the Court must reject Plaintiff’s claim that
21 “federal common law involving pollution of the air and water has been displaced and abolished by
22 federal statutes.” Mot. at 7. No case has gone so far. *AEP* and *Kivalina* dealt only with the scope
23 of statutory displacement of federal common law by the Clean Air Act, and the Ninth Circuit in
24 *Kivalina* stressed that “[t]he existence of laws generally applicable to the question is not
25 sufficient” and that “the applicability of displacement is an issue-specific inquiry.” 696 F.3d at
26 856. As discussed above, *Milwaukee II* found only a narrow displacement under the Clean Water
27 Act as to point source discharges, and Plaintiff fails to cite any authority interpreting *Milwaukee II*
28 as broadly as it urges.

1 Second, however, cases about whether a federal common law right *exists* (i.e., may a
2 plaintiff bring a federal common law nuisance action if it wishes?) have limited application here,
3 where Plaintiff intentionally seeks to *avoid* invoking federal common law (or any other federal
4 law). Defendants essentially argue that Plaintiff’s claims must be assessed with reference to
5 federal common law, but it is not even clear to the Court what the standards for such a claim
6 would be. So while the best answer the Court can muster to the question of whether Plaintiff
7 could have brought a federal common law claim here if it wanted to do so is “perhaps,” that is not
8 really the right question given the posture of this case. *See City of Oakland v. BP PLC*, 960 F.3d
9 570, 580 (9th Cir. 2020) (holding that “[e]ven assuming that [Plaintiff] Cities’ allegations could
10 give rise to a cognizable claim for public nuisance under federal common law . . . , the district
11 court did not have jurisdiction under § 1331 because the state-law claim for public nuisance fails
12 to raise a substantial federal question”). Instead, the key question is whether federal common law,
13 even assuming it still exists, completely displaces Plaintiff’s state law claims. The Court turns to
14 that question next.

15 **ii. Even Assuming It Has Not Been Displaced by Statute, Does Federal**
16 **Common Law Itself Displace (i.e., Completely Preempt) Plaintiff’s Asserted**
17 **State Law Bases for Its Claims?**

18 Even if it were to ignore the well-pleaded complaint rule and find that Plaintiff’s state law
19 claims implicate federal common law, the Court concludes that removal is proper only upon a
20 showing of “complete preemption” of the state issues raised.¹ Defendants contend that if federal
21 common law could be applied to Plaintiff’s claims, that fact alone confers jurisdiction sufficient to
22 support removal to federal court. According to Defendants, where federal common law could

23 ¹ The Supreme Court has explained that ordinary preemption, as a federal defense, does not
24 provide a basis for removal “even if the defense is anticipated in the plaintiff’s complaint, and even
25 if both parties concede that the federal defense is the only question truly at issue.” *Caterpillar*,
26 482 U.S. at 393. “Complete preemption” is different. Unlike ordinary preemption, complete
27 preemption “is so ‘extraordinary’ that it ‘converts an ordinary state law common-law complaint
28 into one stating a federal claim for purposes of the well-pleaded complaint rule.’” *Id.* The
Supreme Court has found complete preemption based on certain statutory causes of action where
“the federal statutes at issue provided the exclusive cause of action for the claim asserted and also
set forth procedures and remedies governing that cause of action.” *Beneficial Nat. Bank v.*
Anderson, 539 U.S. 1, 8 (2003). Substantial ordinary preemption issues may end up being
implicated in this case, but those can be addressed by the state courts on remand.

1 apply to an issue of sufficient importance—here, marine and water pollution—that common law
2 necessarily makes Plaintiff’s causes of action federal in character, supporting removal. The Court
3 disagrees.

4 First, as two courts analyzing Defendants’ argument have explained recently, “nothing in
5 the artful-pleading doctrine . . . sanctions this particular transformation,” *Rhode Island v. Chevron*
6 *Corp.*, 393 F. Supp. 3d 142, 148 (D.R.I. 2019). In *Rhode Island*, that state brought an action in
7 state court against a number of companies involved in the extraction, advertisement, and sale of
8 fossil fuels. *Id.* at 146. The plaintiff alleged various state law tort claims, including public
9 nuisance, arising from the damage those companies allegedly inflicted and would inflict upon non-
10 federal property and natural resources in the state. *Id.* Following removal, the district court
11 granted plaintiff’s motion to remand. In doing so, the district court recognized that “transborder
12 air and water disputes are one of the limited areas where federal common law survived,” while
13 noting that “[a]t least some of it . . . has been displaced by the Clean Air Act (‘CAA’).” *Id.* at 149.
14 But remand was nonetheless required because neither federal common law nor the Clean Air Act
15 completely preempted plaintiff’s state law claims:

16 [W]hether displaced or not, environmental federal common law does
17 not—absent congressional say-so—completely preempt the State’s
18 public nuisance claim, and therefore provides no basis for removal. .
19 . . . With respect to the CAA, [a]s far as the Court can tell, the CAA
20 authorizes nothing like the State’s claims, much less to the exclusion
of those sounding in state law. In fact, the CAA itself says that
controlling air pollution “is the primary responsibility of States and
local governments.”

21 *Id.* at 149-150 (citing 42 U.S.C. § 7401(a)(3) and *AEP*, 564 U.S. at 428). The district court cited
22 the Second Circuit’s holding in *Marcus v. AT&T Corp.*, 138 F.3d 46, 54 (2nd Cir. 1998), that “it
23 would be disingenuous to maintain that, while [a federal statute] does not preempt state law claims
24 directly, it manages to do so indirectly under the guise of federal common law.” *Id.* at 149.

25 Similarly, in *State of New Mexico v. Monsanto*, 454 F.Supp.3d 1132 (D.N.M. 2020), New
26 Mexico brought suit in state court against companies involved in the manufacture, marketing, and
27 distribution of polychlorinated biphenyls (“PCBs”). Plaintiff alleged that Defendants
28 contaminated New Mexico’s natural resources with toxic PCBs, and asserted claims solely under

1 state law, including public nuisance. After removal, plaintiff filed a motion to remand, which the
2 district court granted. The district court rejected defendants' argument that "federal common law
3 governs all claims for transboundary pollution," *id.* at 1147, and assessed instead whether such
4 common law completely preempted plaintiff's claims. Noting that under longstanding Supreme
5 Court precedent "[c]omplete preemption occurs only when Congress intended for federal law to
6 provide the 'exclusive cause of action' for the claim asserted," *id.* at 1149, the district court found
7 that defendants "present[ed] no legal authority to show that Congress has manifested an intent for
8 federal common law to *completely* preempt the area of environmental pollution or public
9 nuisance." *Id.* at 1150 (emphasis in original). The district court pointed out that the defendants'
10 cited cases were initially filed in federal court and thus did not address the removability question,
11 given that "removal jurisdiction is 'a somewhat different animal than original federal question
12 jurisdiction.'" *Id.* Accordingly, the district court found no support for the proposition that
13 "federal common law confers federal removal jurisdiction," *id.* at 1151, and ordered the case
14 remanded.

15 The Court agrees with the reasoning of these cases, and thus rejects Defendants' theory of
16 complete preemption by federal common law. Fundamentally, the Court cannot reconcile well-
17 established precedent establishing that even statutory complete preemption is a "special and small"
18 category that the Supreme Court has found limited to a total universe of three federal laws in
19 American history with Defendants' claim that the Court *must* find complete preemption here based
20 on the much more malleable concept of federal common law. *See City of Oakland*, 960 F.3d at
21 579-580 (listing the three statutes identified by the Supreme Court as meeting the complete
22 preemption criteria). This is especially true because, as Defendants acknowledge, even the Clean
23 Water Act does not completely preempt the type of state law claims brought by Plaintiff here. *See*
24 *County of San Mateo v. Chevron Corp.*, 294 F.Supp.3d 934, 938 (N.D. Cal. 2018) (noting that the
25 Clean Air Act and Clean Water Act "contain savings clauses that preserve state causes of action
26 and suggest that Congress did not intend the federal causes of action under those statutes 'to be
27 exclusive.'"); *see also* Dkt. No. 99 (hearing transcript) at 20 (agreement by defense counsel that
28 "the Clean Water Act does not completely preempt the claims at issue here"). The Ninth Circuit

1 has recently confirmed in *City of Oakland* that it is not enough for the state law claim to
 2 “implicate[] a variety of ‘federal interests,’ including energy policy, national security, and foreign
 3 policy.” 960 F.3d at 580-581. Instead, in that case, as here, “evaluation of the [plaintiff] Cities’
 4 claim that the [defendant] Energy Companies’ activities amount to a public nuisance would
 5 require factual determinations, and a state-law claim that is ‘fact-bound and situation-specific’ is
 6 not the type of claim for which federal jurisdiction lies,” requiring remand. *Id.* For all of these
 7 reasons, the Court accordingly finds Defendants’ creative argument to be inconsistent with the
 8 well-pleaded complaint rule and longstanding controlling authority.

9 In support of their argument for removability based on federal common law, Defendants
 10 rely—almost exclusively—on *New SD, Inc. v. Rockwell Intern. Corp.*, 79 F.3d 953 (9th Cir.
 11 1996). *New SD* involved a breach of contract dispute related to the design, fabrication, and
 12 delivery of components for a space-based ballistic missile system. *Id.* at 954. The plaintiff filed
 13 the case in state court; the defendants removed; the district court denied a remand motion; and the
 14 plaintiff took an interlocutory appeal. *Id.*

15 Notably, the *New SD* court found that the plaintiff made “a number of forceful
 16 arguments” in favor of remand, but found itself bound by the court’s earlier decision in *American*
 17 *Pipe & Steel Corp. v. Firestone Tire & Rubber Co.*, 292 F.2d 640 (9th Cir. 1961). *See* 79 F.3d at
 18 954. The *New SD* court characterized *American Pipe* as standing for the principle that “the
 19 construction of subcontracts, let under prime contracts connected with the national security, should
 20 be regulated by a uniform federal law”—namely “federal common law.” *Id.* at 955. It followed
 21 that *American Pipe* could not have been decided as it was “unless on government contract matters
 22 having to do with national security, state law is totally displaced by federal common law.” *Id.*
 23 (“Where the federal interest requires that ‘the rule must be uniform throughout the country,’ as we
 24 said was the case in *American Pipe*, ... then the ‘entire body of state law applicable to the area
 25 conflicts and is replaced by federal rules.’”) (internal citations omitted).

26 The Court finds that *New SD* cannot reasonably be stretched to support Defendants’
 27 removability argument here. First, the national security contracting context in that case, including
 28 the direct reliance on *American Pipe*, simply bears no resemblance to the facts presented in this

1 case, and it does not appear that *New SD* has been discussed in any of the myriad removal battles
2 in cases involving state law nuisance claims based on pollution. *See L'Garde, Inc. v. Raytheon*
3 *Space and Airborne Systems*, 805 F.Supp.2d 932, 942 (C.D. Cal. 2011) (“Since the dispute in *New*
4 *SD* involved a prime contractor and a subcontractor on a government contract clearly implicating
5 national security interests, the court found federal common law must replace state law in order to
6 provide a uniform federal standard which would prevent the cost of national security from being
7 ‘increased in the process.’ However, the Court finds that this case relied upon by Defendant
8 concerns matters of national security that are simply not present here.”) (internal citations
9 omitted); *see also* Dkt. No. 99 (hearing transcript) at 12 (acknowledgment by defense counsel that
10 *New SD* has not “been cited in any of these environmental cases of the sort that have been raised
11 around the country, including in this circuit, for the premise that [Defendants are] stating”). The
12 Court cannot draw a principle as broad as Defendants assert from a case so plainly bound to its
13 context.

14 Second, it is not clear to the Court whether the premise underlying *New SD* survived the
15 Supreme Court’s later decisions in *Grable & Sons Metal Products, Inc. v. Darue Engineering &*
16 *Mfg.*, 545 U.S. 308 (2005), and *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677,
17 701 (2006). The reasoning of *New SD* was built on the premise that private disputes relating to
18 government contracts should be uniformly adjudicated in federal court when “the cost of national
19 security stands to be increased in the process.” 79 F.3d at 955 (citing *American Pipe*, 292 F.2d at
20 644). But in *Grable*, the Supreme Court explained that “the presence of a disputed federal issue
21 and the ostensible importance of a federal forum are *never necessarily dispositive*; there must
22 always be an assessment of any disruptive portent in exercising federal jurisdiction.” 545 U.S. at
23 314 (emphasis added); *see also Raytheon Co. v. Alliant Techsystems, Inc.*, 2014 WL 29106, at *4
24 (D. Az. Jan. 3, 2014) (“The Court recognizes that *American Pipe* and *New SD* were decided before
25 the Supreme Court’s decisions in *Grable* and *Empire*, which clarified the proper scope of the
26 substantial federal question doctrine.”); *id.* at *5 (“The Supreme Court’s clarification leads to a
27 conclusion that the premise of *American Pipe* and *New SD* that private disputes relating to a
28 government contract should be uniformly adjudicated in federal court when ‘the cost of national

1 security stands to be increased in the process’... is no longer sound.”). This Court need not go so
2 far as to conclude that these Supreme Court cases are “clearly irreconcilable” with *New SD*. See
3 *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (explaining that when Ninth Circuit and
4 subsequent Supreme Court precedent conflict, “district courts should consider themselves bound
5 by the intervening higher authority and reject the prior opinion of this court as having been
6 effectively overruled.”). But at a minimum, they weigh in favor of significant skepticism that a
7 long-ago ruling made in a very fact-specific national security context actually stated a broad rule
8 of *de facto* complete preemption by federal common law, as Defendants urge.

9 Defendants also rely on dicta in a footnote in *Milwaukee II*, in which the Supreme Court
10 noted what it characterized as “an inconsistency” in the argument made by one of the plaintiff
11 states “that both federal and state nuisance law apply to this case.” 451 U.S. at 314 n.7. The
12 Supreme Court said that “[i]f state law can be applied, there is no need for federal common law; if
13 federal common law exists, it is because state law cannot be used.” *Id.* Importantly, as noted
14 above, *Milwaukee II* involved a dispute between sovereign governmental entities in different states
15 (the states of Illinois and Michigan on one side and the city of Milwaukee and other municipal
16 entities in Wisconsin on the other). The question there was whether a state could avail itself of
17 federal common law in federal court to bring a claim against out-of-state government bodies, and
18 the Court found that it could not because of statutory complete preemption as to the relevant issue.
19 This Court will confess that it is unsure what should be taken from a footnote discussing an
20 “inconsistency” that did not impact the ground on which the case was actually decided. But in any
21 event, because *Milwaukee II* was filed in federal court in the first instance, the Supreme Court did
22 not have to consider the preemption issues raised in the removal context here, and so this Court
23 does not find the footnote controlling as to those issues. See *New Mexico*, 454 F.Supp.3d at 1150
24 (pointing out that “because the plaintiffs in both *Milwaukee I* and *Milwaukee II* filed suit in federal
25 court, the Supreme Court did not address preemption issues—either ordinary or complete—
26 because the cases were not removed”).

27 For similar reasons, the Court finds Defendants’ reliance on *Wayne* unpersuasive. That
28 case primarily involved the question of whether the Airline Deregulation Act of 1978 completely

1 preempted state law unfair competition and consumer claims. 294 F.3d at 1182-84.
 2 Unsurprisingly, given the very narrow scope of that doctrine as discussed above, the court found
 3 that it did not. *Id.* The court then cited *Milwaukee I* for the proposition that “[f]ederal jurisdiction
 4 would exist in this case if the claims arise under federal common law,” and said that such law
 5 could arise from “enclaves of federal judge-made law which bind the states.” *Id.* at 1184. The
 6 court found the “release valuation doctrine” to be such an enclave, but found the doctrine to be
 7 inapplicable to the facts there. *Id.* Again, the Court cannot find support for Defendants’ very
 8 broad theory of common law preemption in the relatively brief analysis, from a completely
 9 different context, in *Wayne*.

10 Defendants provide no legal authority suggesting that Congress has manifested an intent
 11 that federal common law completely preempt the area of marine environmental pollution or public
 12 nuisance. *See Beneficial Nat. Bank*, 539 U.S. at 9 n.5 (explaining that for purposes of complete
 13 preemption “the proper inquiry focuses on whether Congress intended the federal cause of action
 14 to be exclusive.”). Most notably, the Clean Water Act contains savings clauses that preserve state
 15 causes of action and suggest that Congress did not intend the federal causes of action under the
 16 Clean Water Act “to be exclusive.” 42 U.S.C. §§ 7604(e), 7416; 33 U.S.C. §§ 1365(e), 1370.
 17 Even assuming that Plaintiff’s causes of action implicate one of the limited areas where federal
 18 common law survives (and applies), environmental federal common law does not—absent clear
 19 congressional direction—completely preempt Plaintiff’s public-nuisance and other causes of
 20 action. *See Milwaukee II*, 451 U.S. at 328 (noting the lack of complete statutory preemption in the
 21 context of the Clean Water Act and leaving open the possibility that “States may establish such
 22 [water pollution] limitations through state nuisance law.”).

23 In sum, Defendants’ invocation of federal common law does not—absent manifestation of
 24 congressional intent—completely preempt Plaintiff’s public-nuisance claim. The Court must
 25 reject Defendants’ request for displacement of the well-pleaded state law claims in Plaintiff’s
 26 complaint by federal common law, and removal is not proper on this basis.

27 **B. Federal Jurisdiction under *Grable***

28 Alternatively, Defendants contend that the Court also has jurisdiction under 28 U.S.C. §

1 1331 because Plaintiff asserts state law claims that require the resolution of significant federal
2 issues. *Grable*, 545 U.S. at 312. The Court again disagrees.

3 “[F]ederal jurisdiction over a state law claim will lie if a federal issue is (1) necessarily
4 raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without
5 disrupting the federal-state balance approved by Congress.” *Gunn v. Minton*, 568 U.S. 251, 258
6 (2013) (citing *Grable*, 545 U.S. at 313–14). Federal jurisdiction under *Grable* exists only for a
7 “special and small category” of cases. *See Empire Healthchoice*, 547 U.S. at 701 (“In sum,
8 *Grable* emphasized it takes more than a federal element ‘to open the ‘arising under’ door. This
9 case cannot be squeezed into the slim category *Grable* exemplifies.”) (internal citations omitted).

10 As the Ninth Circuit recently explained in *City of Oakland*, only a few cases have fallen
11 into this “slim category,” including: “(1) a series of quiet-title actions from the early 1900s that
12 involved disputes as to the interpretation and application of federal law; (2) a shareholder action
13 seeking to enjoin a Missouri corporation from investing in federal bonds on the ground that the
14 federal act pursuant to which the bonds were issued was unconstitutional; and (3) a state quiet title
15 action claiming that property had been unlawfully seized by the IRS because the notice of the
16 seizure did not comply with the Internal Revenue Code.” 969 F.3d at 904 (citations omitted). “In
17 other cases where parties have sought to invoke federal jurisdiction over state-law claims, the
18 Court has concluded that jurisdiction was lacking, even when the claims were premised on
19 violations of federal law; required remedies ‘contemplated by a federal statute’; or required the
20 interpretation and application of a federal statute in a hypothetical case underlying a legal
21 malpractice claim.” *Id.* (citations omitted).

22 In *City of Oakland*, the Ninth Circuit evaluated whether removal was proper by analyzing
23 whether the claims raised a substantial disputed federal issue under *Grable*. The Ninth Circuit
24 held that no “substantial” federal issue was raised, in significant part because the Ninth Circuit had
25 previously “held that federal public nuisance claims” targeting global warming “are displaced by
26 the Clean Air Act,” so it was “not clear that the [complaint] require[d] an interpretation or
27 application of federal law at all.” *Id.* at 581. Instead, the court turned to whether the other federal
28 issues allegedly presented in that case were substantial. *Id.* The court concluded they were not,

1 because the cities' claims did not require "an interpretation of a federal statute," and there was no
2 other "legal issue necessarily raised by the claim that, if decided, will 'be controlling in numerous
3 other cases.'" *Id.*

4 Plaintiff contends that Defendants have not identified a "substantial question of federal
5 law" on which its "right to relief necessarily depends." *Franchise Tax Bd. of State of Cal. v.*
6 *Constr. Laborers Vacation Tr. for S. California*, 463 U.S. 1, 27 (1983). Defendants counter that
7 "the applicability of federal common law renders Plaintiff's entire nuisance claim necessarily
8 federal in character." *Opp.* at 14 ("federal common law can also be viewed as a federal issue that
9 supports federal jurisdiction under [] *Grable*"). Defendants argue that transborder issues are
10 necessarily implicated by Plaintiff's claims because plastic use and promotion of recycling must
11 be governed by a uniform federal rule rather than left to state court systems to resolve. Defendants
12 also point to the Pollution Prevention Act in which "Congress...declare[d] it to be the national
13 policy of the United States that pollution should be prevented or reduced at the source whenever
14 feasible; [and that] pollution that cannot be prevented should be recycled in an environmentally
15 safe manner whenever feasible." 42 U.S.C. § 13101(b). And, according to Defendants, the
16 Complaint seeks to hold Defendants liable for "shift[ing] public focus to consumer recycling
17 behavior," *Compl.* ¶ 122, and "labeling and advertising . . . plastic packaging as recyclable," *id.* ¶
18 126.

19 However, Defendants point to no allegation in Plaintiff's Complaint whose resolution
20 would interfere with the functioning of any federal agency or policy. Instead, they claim that
21 Plaintiff's nuisance claim implicates a "substantial" issue of federal law because "an entire
22 industry or industries will be affected." *Opp.* at 17. But the "entire industries affected" standard is
23 not one recognized by the Ninth Circuit as creating a "substantial" federal issue. An incidental
24 effect on federal policy does not make a legal challenge "necessarily federal." *See ARCO*, 213
25 F.3d at 1115 ("an action does not become a challenge to a CERCLA cleanup simply because the
26 action has an incidental effect on the progress of a CERCLA cleanup.").

27 While the issue of plastic pollution is no doubt important, similar issues have been found
28 insufficient to trigger *Grable* jurisdiction. *See, e.g., City of Oakland*, 960 F.3d at 581 ("The

1 question whether the Energy Companies can be held liable for public nuisance based on
 2 production and promotion of the use of fossil fuels and be required to spend billions of dollars on
 3 abatement is no doubt an important policy question, but it does not raise a substantial question of
 4 federal law for the purpose of determining whether there is jurisdiction under § 1331.”). The
 5 Court finds that Plaintiff’s state law claims do not raise a substantial federal issue, as the claims do
 6 not fit within the “slim category *Grable* exemplifies.” *See Empire Healthchoice*, 547 U.S. at 701.
 7 Therefore, the Court need not consider the rest of the *Grable* factors.

8 C. Federal Enclave Jurisdiction

9 Defendants next contend that the present action is subject to federal enclave jurisdiction
 10 because certain bodies of water described in the Complaint are allegedly on, adjacent to, or near
 11 certain federal enclaves. This argument fails.

12 The “federal enclave doctrine permits federal courts to exercise jurisdiction over. . . claims
 13 that arise in federal enclaves.” *Coleman v. Trans Bay Cable, LLC*, No. 19-CV-02825-YGR, 2019
 14 WL 3817822, at *3 (N.D. Cal. Aug. 14, 2019). To support removal, Defendants “bear the burden
 15 of establishing that the material events alleged in the complaint and giving rise to [Plaintiff’s]
 16 claims occurred in” an enclave. *Id.* “In federal enclave cases, federal question jurisdiction applies
 17 when the locus in which the claim arose is within a federal enclave.” *Ballard v. Ameron Int’l*
 18 *Corp.*, No. 16-CV-06074-JSC, 2016 WL 6216194, at *3 (N.D. Cal. Oct. 25, 2016).

19 Federal enclave jurisdiction exists only where the claim arises on the federal enclave—not
 20 just near it *See State v. Monsanto Co.*, 274 F. Supp. 3d 1125, 1132 (W.D. Wash. 2017), *aff’d*, 738
 21 F. App’x 554 (9th Cir. 2018) (where plaintiff did not seek relief for contamination of federal
 22 territories and would have no standing to do so, court was “satisfied” that none of plaintiff’s
 23 claims arose on federal enclaves);² *see also Willis v. Craig*, 555 F.2d 724, 725 (9th Cir. 1977)
 24 (district court did not have jurisdiction where accident did not occur on federal enclave). Water is
 25 not part of a federal enclave merely because it is adjacent to or near the enclave or flows into or
 26 out of it. *See, e.g., People of the State of California v. U.S.*, 235 F.2d 647, 656 (9th Cir. 1956) (the

27 _____
 28 ² As an unpublished Ninth Circuit decision, *Monsanto* is not precedent, but may be considered for its persuasive value. *See* Fed. R. App. P. 32.1; CTA9 Rule 36-3.

1 federal government, “as regards all claimants to water outside the enclave, is not in the position of
2 sovereign.”).

3 Under the public trust doctrine, the contours of which remain a matter of state law, the
4 state of California “acquired title as trustee” to certain waters and lands adjacent to them on behalf
5 of the people in the state “upon admission to the union.” *Nat’l Audubon Soc’y v. Superior Court*,
6 33 Cal. 3d 419, 433-434 (Cal. 1983); *see PPL Montana, LLC v. Montana*, 565 U.S. 576, 604-605
7 (2012) (explaining that “the public trust doctrine remains a matter of state law” and that “the
8 States retain residual power to determine the scope of the public trust over waters within their
9 borders.”). Congress has also demarcated certain coastal lands as belonging to the coastal states.
10 *Sec’y of the Interior v. California*, 464 U.S. 312, 315–16 (1984) (“By virtue of the Submerged
11 Lands Act, passed in 1953, the coastal zone belongs to the states, while the [outer continental
12 shelf] belongs to the federal government.”); *see* 43 U.S.C. §§ 1302, 1311.

13 Defendants argue that California contains many federal enclaves that encompass or overlap
14 with waterways and coastal areas, such as the Presidio in San Francisco, the Golden Gate National
15 Recreation Area, Point Reyes National Seashore, Naval Air Station North Island, Point Mugu
16 Naval Air Weapons Station, Camp Pendleton, Vandenburg Air Force Base, and numerous other
17 federal facilities and national park areas. *Opp.* at 24 (citing *Total v. Bies*, No. C 10-05956 CW,
18 2011 WL 1324471, at *2 (N.D. Cal. Apr. 6, 2011) (denying motion to remand where claim arose
19 in the Presidio in San Francisco, a federal enclave); *Azhocar v. Coastal Marine Servs., Inc.*, 2013
20 WL 2177784, at *1 (S.D. Cal. May 20, 2013) (“[Federal] enclaves include ‘numerous military
21 bases, federal facilities, and even some national forests and parks.’” (citation omitted)).

22 However, federal enclave jurisdiction is inappropriate where the federal land is not the
23 “locus in which the claim arose.” *See In re High-Tech Employee Antitrust Litigation*, 856
24 F.Supp.2d 1103, 1125 (N.D. Cal. 2012) (quoting *Alvares v. Erickson*, 514 F.2d 156, 160 (9th Cir.
25 1975)). Neither Defendants’ notice of removal nor Plaintiff’s Complaint identifies any purported
26 federal enclave where the alleged harm arose. Instead, Defendants simply highlight a number of
27 federal enclaves in California that could potentially be at issue. But Defendants do not identify
28 which (if any) of these enclaves were allegedly harmed, nor do they identify any federal enclave

1 as the locus of the events in question. In similar circumstances, enclave jurisdiction has been
2 rejected. *See New Mexico*, 454 F.Supp.3d at 1146 (where complaint alleged “that the only natural
3 resources that are the subject of this suit all rest within the State of New Mexico,” the court found
4 insufficient basis to conclude, without supporting facts or evidence, that the suit was subject to
5 federal enclave jurisdiction just because certain bodies of water were allegedly on or adjacent to
6 federal enclaves).

7 The Court finds that Defendants have not satisfied their burden to establish federal enclave
8 jurisdiction because none of the conduct alleged in the Complaint, or the harm the Complaint
9 seeks to remedy, has its locus on a federal enclave. *See Coleman*, 2019 WL 3817822, at *3 (locus
10 of claims); *Ballard*, 2016 WL 6216194, at *3 (material events).

11 **D. Admiralty and Maritime Jurisdiction**

12 Lastly, Defendants argue that Plaintiff alleges harm on navigable waters relating to
13 maritime activity, so as to create admiralty or maritime jurisdiction under 28 U.S.C. § 1333.
14 Admiralty or maritime jurisdiction arises when a “tort occurred on navigable water...or injury
15 suffered on land was caused by a vessel on navigable water.” *Jerome B. Grubart, Inc. v. Great*
16 *Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995). Following the Extension of Admiralty
17 Jurisdiction Act of 1948, 46 U.S.C. § 30101(a), admiralty jurisdiction turns on three factors: (1)
18 “whether the tort occurred on navigable water or whether injury suffered on land was caused by a
19 vessel on navigable water”; (2) “whether the incident has ‘a potentially disruptive impact on
20 maritime commerce’”; and (3) “whether ‘the general character’ of the ‘activity giving rise to the
21 incident’ shows a ‘substantial relationship to traditional maritime activity.’” *Id.*

22 It is the “clear law” of the Ninth Circuit “that the situs of a tort for the purpose of
23 determining admiralty jurisdiction is the place where the injury occurs.” *Taghadomi v. United*
24 *States*, 401 F.3d 1080, 1084 (9th Cir. 2005). “For the purpose of determining admiralty
25 jurisdiction, the tort is deemed to occur, not where the wrongful act or omission has its inception,
26 but where the impact of the act or omission produces such injury as to give rise to a cause of
27 action.” *Id.* at 1085 (quoting 2 Am. Jur. 2d Admiralty § 75).

28 Defendants contend that the Court has admiralty or maritime jurisdiction because the

1 “situs” of Plaintiff’s claims is navigable waters. Opp. at 23. According to Defendants, this is
 2 because Plaintiff alleges injuries relating to the accumulation of plastic waste in the world’s
 3 oceans and coastal areas and waterways, including the Pacific Ocean. *Id.* (citing to Compl. ¶¶ 1–
 4 3, 5, 14, 27, 79–87, 90, 103, 118, 169, 172, 188–94, 200–02).

5 However, even if these injuries arguably may have occurred at some point on navigable
 6 waters, Plaintiff has only pled torts occurring in California waterways and coasts, rather than
 7 oceanic waters, navigable waters of the United States, federal enclaves, or the waters of multiple
 8 states. *See, e.g.*, Compl. ¶¶ 17-21 24-26, 28, 33, 37, 40, 44, 48, 52, 56, 60, 64, 68, 85, 91, 105,
 9 116, 144, 145, 149, 153, 154, 160, 169. To the extent Defendants refer to sections of the
 10 Complaint that highlight global pollution, the Court finds that such references are not elements of
 11 Plaintiff’s causes of action, and do not make this a maritime or admiralty case.

12 For example, Plaintiff alleges that it is “injured by Defendants’ conduct and the consequent
 13 harms to waterways, coasts, and marine life in California,” Compl. ¶ 24; “Earth Island...has
 14 diverted resources to address plastic pollution in California...Absent relief from this Court, plastic
 15 pollution and the resulting harms to California waterways, coasts, and marine life will
 16 continue...,” *id.* ¶ 25; Defendants “directed substantial business to California...packaged,
 17 transported, traded, distributed, marketed promoted, sold, an/or consumed in California,” *id.* ¶¶ 33,
 18 37, 40, 44, 48, 52, 56, 60, 64, 68; “Plaintiff’s injuries described herein arose out of and related to
 19 those operations and occurred in California,” *id.* ¶ 73; “Earth Island has been harmed by
 20 Defendants’ torts in California; the organization has had to allocate larger and larger shares of its
 21 budget and resources to plastic pollution mitigation in California, a direct result of Defendants’
 22 injurious conduct,” *id.* ¶ 74; “These injuries derive from the increase of plastic pollution in
 23 California waterways and coasts,” *id.* ¶ 153; “Earth Island is diverting more and more
 24 organizational resources to remediating California coasts and waterways impacted by plastic
 25 pollution,” *id.* ¶ 160; and Defendants “have created, contributed to, and/or assisted in creating
 26 conditions which constitute a nuisance by causing plastic pollution in California waterways and
 27 coasts.” *Id.* ¶ 169.

28 Permitting Defendants to manufacture federal jurisdiction here using doctrines such as

1 maritime law would abrogate the principle that a plaintiff is “master of the claim.” *Caterpillar*,
2 482 U.S. at 392. Accordingly, the Court finds that Defendants have not met their burden of
3 establishing admiralty or maritime jurisdiction.

4 **IV. CONCLUSION**

5 For the foregoing reasons, the Court **GRANTS** Plaintiff’s motion to remand the case to
6 San Mateo County Superior Court. The Clerk is **DIRECTED** to remand the case to state court
7 and close the file.

8
9 **IT IS SO ORDERED.**

10 Dated: 2/23/2021

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12 HAYWOOD S. GILLIAM, JR.
13 United States District Judge
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United States District Court
Northern District of California