

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

In re Flint Water Cases.

Judith E. Levy
United States District Judge

_____/

This Order Relates To:

*BROWN, ET AL. V. SNYDER, ET
AL.
CASE NO. 18-CV-10699*

_____/

**ORDER TO SHOW CAUSE WHY THIS CASE SHOULD NOT BE
REMANDED FOR LACK OF SUBJECT-MATTER
JURISDICTION**

This case was removed from the Michigan Court of Claims by defendants Daniel Wyant, Bradley Wurfel, Liane Shekter-Smith, Adam Rosenthal, Stephen Busch, Patrick Cook, and Michael Prysby on February 28, 2018. (Dkt. 1.) The stated grounds for removal were 28 U.S.C. § 1442, federal officer removal jurisdiction, and 28 U.S.C. § 1441, substantial federal question jurisdiction. The complaint asserts a single claim under the takings clause of the Michigan state constitution. (Dkt. 1-2.)

In *Mays v. City of Flint, Mich.*, the Sixth Circuit determined that these same defendants were “not eligible for federal-officer removal,” because they “were not ‘acting under’ the [Environmental Protection Agency].” *Mays*, 871 F.3d at 449. *Mays* is binding on this Court. The Court lacks a basis to reject that decision where the factual and legal arguments in support of removal are identical to those in *Mays*, and the primary reason for removal is a preservation of the right to remove. (Dkt. 1 at 20 n.11.)

As to the removing defendants’ substantial federal question argument, defendants argue that the complaint contains “specific and implicit allegations that [the removing] defendants . . . had duties to Plaintiffs based on the federal [Safe Drinking Water Act], [Surface Water Treatment Rule], and [Lead and Copper Rule] standards, regulations, monitoring, and testing requirements[.]” (*Id.* at 41.) Removal based on a substantial federal question is appropriate only in “a special and small category of cases.” *Gunn v. Minton*, 568 U.S. 251, 258 (2013).

The removing defendants describe plaintiffs’ takings clause claim as a “gross negligence” claim that implicates these federal statutes and

regulations. (Dkt. 1 at 41.) They also reference “disputed interpretations” of these statutes and regulations. (*Id.* at 43.) However, the notice of removal only generally references how plaintiffs’ state constitutional claim might implicate disputes related to the interpretation of these statutes and regulations.

Further, defendants did not address how exercising federal jurisdiction over a state constitutional claim “resting on federal . . . statutory violations” would not herald “a potentially enormous shift of traditionally state cases into federal courts,” particularly with regard to claims where no other private right of action exists under the implicated federal statutes and regulations. *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 319 (2005).

Finally, the Court is to consider whether resolution of the federal question is dispositive of the case. *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 571 (6th Cir. 2007). Resolution of a federal question is dispositive where any resolution would be dispositive, not just where a resolution in defendants’ favor would be dispositive, but a resolution in plaintiffs’ favor would require plaintiffs to prove further elements of their state-law claim. *Id.* Here, the removing defendants state only

that if they “establish that these federal laws and regulations were not violated, Plaintiffs’ claims against these Removing Defendants are defeated.”¹ (Dkt. 1 at 41.)

The removing defendants are ordered to SHOW CAUSE, in writing, why the Court should not remand this case to the Michigan Court of Claims for lack of a substantial federal question. The removing defendants’ response is due on or before **April 13, 2018**. Plaintiffs may file a reply to the removing defendants’ response on or before **May 1, 2018**. All claims against the State defendants will be remanded.

IT IS SO ORDERED.

Dated: March 29, 2018
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

¹ On March 21, 2018, removing defendants entered into a stipulation to remand with State defendants (the State of Michigan, Governor Rick Snyder, the Michigan Department of Environmental Quality, the Michigan Department of Health and Human Services, Nick Lyon, Eden Wells, and Andy Dillon) because the State defendants assert Eleventh Amendment immunity to this Court’s jurisdiction and did not consent to removal. (Dkt. 7)

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on March 29, 2018.

s/Shawna Burns
SHAWNA BURNS
Case Manager