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NOT RECOMMENDED FOR PUBLICATION
File Name: 18a0197n.06

No. 17-1401

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

TAMARA NAPPIER, as mother and next friend of T.N., a minor child, on behalf of T.N. and a class of all others similarly situated,	)	FILED Apr 16, 2018 DEBORAH S. HUNT, Clerk
Plaintiff-Appellee,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN
v.	)	
RICHARD SNYDER, et al.,	)	
Defendants-Appellees,	)	
DANIEL WYANT, et al.,	)	
Defendants-Appellants.	)	

BEFORE: CLAY, COOK and WHITE, Circuit Judges.

HELENE N. WHITE, Circuit Judge.

Defendants-Appellants Stephen Busch, Patrick Cook, Michael Prysby, Liane Shekter Smith, Bradley Wurfel and Daniel Wyant, employees of the Michigan Department of Environmental Quality, ("MDEQ Defendants") appeal the district court's order remanding this case to the Michigan Court of Claims on the basis that it was improperly removed. Finding this court's prior decision in *Mays v. City of Flint,*

Michigan, 871 F.3d 437 (6th Cir. 2017) controlling, we AFFIRM.

I. Background

This case arises from the water crisis in Flint, Michigan. Plaintiff Nappier and minor T.N. ("Plaintiff") are residents of Flint. Seeking to represent a class

> of all individuals who, from April 25, 2014 through the date of trial, are or were minor children (age 17 years and younger) who are or were residing in the City of Flint, Michigan and who have been brain damaged as a result of the ingestion of lead poisoned water from pipes and service lines that supplied water from the Flint River without the use of any corrosion control,

(R. 1-3, PID 45; *see also id.* at PID 55-57), plaintiff filed her class-action complaint in the Michigan Court of Claims on March 23, 2016, alleging that Defendants breached various duties relating to the Flint water supply.

There are numerous defendants, including various state officials, department heads and program heads, emergency managers, and the appellant MDEQ employees. On May 31, MDEQ Defendant Busch removed the case to the U.S. District Court for the Western District of Michigan, asserting federal subject-matter jurisdiction under the federal-officer removal statute, 28 U.S.C. § 1442, and federal-question jurisdiction under 28 U.S.C. § 1441. On June 14, 2016, several other defendants (State Defendants) filed a motion to remand, advancing arguments that are no longer relevant. During the remainder of 2016, various defendants filed a variety

of motions, including motions to dismiss and a motion to change venue.

After the district court scheduled oral argument on State Defendants' motion to remand, it was provided with supplemental authority calling its attention to the decision of the U.S. District Court for the Eastern District of Michigan in *Mays v. City of Flint*, No. 5:16-cv-11519-JCO-MKM (E.D. Mich. Oct. 6, 2016). The Plaintiffs in *Mays*, purporting to represent "a class of thousands of Flint water users," sued numerous defendants, including MDEQ defendants, alleging "gross negligence, fraud, assault and battery, and intentional infliction of emotional distress." (R. 60-1 at PID 6737.) The MDEQ defendants removed the case to federal court, invoking the same bases for federal jurisdiction as invoked here. The district court found that removal was improper because the MDEQ defendants had not shown that they were acting under federal officers or were being sued for acts performed under color of federal office, and because the plaintiffs' claims did not raise a federal question. The supplemental authority also included this court's order denying the *Mays* MDEQ defendants' motion for a stay of the district court's remand order pending appeal, for failure to show "a strong likelihood of success on the merits." (R. 60-2.)

The district court issued a memorandum and order canceling the scheduled oral argument and ordering further briefing on why the court should not remand the case to state court for lack of subject-matter jurisdiction in light of *Mays*. After reviewing the supplemental briefs, the district court issued its opinion finding that removal was improper and remanding the case to state court. Citing *Mays*, the district court found that MDEQ Defendants did not

qualify for federal-officer removal because of their "independent role as enforcer of Michigan law and the [Safe Drinking Water Act (SDWA)]." (R. 75 at PID 7399.) The district court also cited *Mays* in support of its conclusion that Plaintiff's state-law negligence claim did not raise a federal question.

During the pendency of this appeal, a divided panel of this court affirmed the district court's remand order in *Mays*, and this court denied rehearing en banc.[1]

II. Discussion

"We review de novo the district court's determination that it lacked subject-matter jurisdiction and its consequent decision to issue a remand order." *Mays*, 871 F.3d at 442 (citing *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 401, 404 (6th Cir. 2007)).

A. Federal-Officer Removal

The federal-officer removal statute provides that the following may remove a civil action to federal district court:

> The United States or any agency thereof or any officer (*or any person acting under that officer*) of the United States or of any agency thereof, in an official or individual capacity, *for or relating to any act under color of such office* or on account of any right, title or

[1] On October 10, 2017, the MDEQ appellants in *Mays* filed a petition for rehearing en banc. That petition was subsequently denied and, on February 13, 2018, the MDEQ appellants filed a petition for certiorari with the United States Supreme Court.

> authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. § 1442(a)(1) (emphasis added). When the removing party is not a federal officer, we apply a three-part test to determine whether removal is proper. The removing party must demonstrate that: (1) it is a "person" within the meaning of the statute who "acted under a federal officer"; (2) "it performed the actions for which it is being sued under color of federal office"; and (3) "it raised a colorable federal defense." *Bennett v. MIS Corp.*, 607 F.3d 1076, 1085 (6th Cir. 2010) (alterations, quotations, and citations omitted). The Supreme Court has defined "acting under":

> In this context, the word "under" must refer to what has been described as a relationship that involves "acting in a certain capacity, considered in relation to one holding a superior position or office." That relationship typically involves "subjection, guidance, or control." In addition, precedent 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.

Watson v. Philip Morris Companies, Inc., 551 U.S. 142, 151–52 (2007) (citations omitted).

MDEQ Defendants argue that (1) the district court erroneously resolved doubts about the propriety of removal in favor of remand rather than in favor of broad federal-officer removal; (2) although they were implementing Michigan's SDWA, they were "acting under" federal officers at the United

States Environmental Protection Agency (USEPA) because (a) they were performing tasks that the USEPA otherwise would have been required to undertake, (b) the USEPA retained authority to control MDEQ's actions and MDEQ was subject to USEPA supervision, and (c) the USEPA provided federal funding for MDEQ to administer and enforce the federal SDWA; (3) Michigan's SDWA and its decision to take primary enforcement authority for the federal SDWA, and the duties that Plaintiff alleges MDEQ Defendants breached, only came about because of the federal SDWA; (4) the district court erred when it found that the USEPA was merely assisting MDEQ to perform its duties, and the reverse is true; (5) plaintiffs satisfied the "causal nexus" requirement for federal-officer removal; and (6) the SDWA preempts state tort claims and they are therefore entitled to immunity.

In *Mays*, this court held that the relationship between the MDEQ and the USEPA "is a model of cooperative federalism, not an agency relationship," 871 F.3d at 447, and "MDEQ Defendants were not 'acting under' the EPA and thus are not eligible for federal-officer removal," *id.* at 449. The MDEQ Defendants do not argue that *Mays* is not controlling, and it is clear that a ruling in the MDEQ Defendants' favor would be contrary to *Mays*. "It is firmly established that one panel of this court cannot overturn a decision of another panel; only the court sitting en banc can overturn such a decision." *United States v. Lanier*, 201 F.3d 842, 846 (6th Cir. 2000) (citing *United States v. Smith*, 73 F.3d 1414, 1418 (6th Cir. 1996)). Because *Mays* is legally indistinguishable, we affirm the district court's ruling that federal-officer removal was improper.

B. Federal-Question Jurisdiction

MDEQ Defendants also argue that they established federal-question jurisdiction. A case may be removed to federal district court if the court would have had original jurisdiction. 28 U.S.C. § 1441(a). "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.* § 1331. In this case, plaintiff did not allege any federal claims on the face of her complaint. "[F]ederal 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." *Gunn v. Minton*, 568 U.S. 251, 258 (2013) (discussing *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313-14 (2005)). "The substantiality inquiry under *Grable* looks . . . to the importance of the issue to the federal system as a whole." *Id.* at 260. "[T]he presence of a claimed violation of a federal statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." *Mays*, 871 F.3d at 449 (internal alterations omitted) (quoting *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 814 (1986)).

MDEQ Defendants argue that the district court erred by finding that Plaintiff's "'garden-variety' state-law tort claim . . . does not raise a federal question at the level of importance" required by *Grable*, (R. 75, PID 7403), because violations of the SDWA and the Lead Copper Rule will underpin state tort claims in jurisdictions across the country. They also assert that federal jurisdiction would not upset the balance of federal and state responsibilities.

But *Mays* resolved this issue as well, finding that the plaintiffs' claims did not raise a substantial federal question. 871 F.3d at 449–50. Again, because *Mays* is legally indistinguishable on this issue, we affirm the district court's determination that § 1441 removal was improper.[2]

III. Conclusion

For these reasons, we **AFFIRM**.

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[2] Appellee State Defendants additionally argue that removal was improper under § 1441 for lack of unanimity. "[T]here is a rule of unanimity that has been derived from the statutory language prescribing the procedure for removing a state action to federal court, 28 U.S.C. § 1446." *Loftis v. United Parcel Serv., Inc.*, 342 F.3d 509, 516 (6th Cir. 2003). *See* 28 U.S.C. § 1446(b)(2)(A) ("When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action."). MDEQ Defendants do not dispute that Appellee State Defendants did not consent to removal. Thus, § 1441 removal was additionally improper for lack of unanimity.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TAMARA NAPPIER, as mother and next fried of T.N., a minor child, on behalf of T.N. and a class of all others similarly situated,

Plaintiff,

v.

RICHARD SNYDER, et al.,

Defendants.
_____/

FILED MARCH 31, 2017

Case No. 1:16-CV-636

HON. GORDON J. QUIST

OPINION REGARDING JURISDICTION

Plaintiff filed this putative class action case in the Michigan Court of Claims on March 23, 2016, against Richard Snyder, Nick Lyon, Eden Wells, Nancy Peeler, and Robert Scott (collectively the State Defendants); Stephen Busch, Patrick Cook, Michael Prysby, Liane Shekter Smith, and Bradley Wurfel (collectively the MDEQ Defendants); and Darnell Early and Gerald Ambrose. Plaintiff alleged a single substantive count of gross negligence and/or negligence against all Defendants arising out of the water crisis in Flint, Michigan.

On May 31, 2016, Defendant Busch removed the case to this Court, alleging that removal was proper under the federal-officer removal statute, 28 U.S.C. § 1442(a)(1), and, alternatively, under the substantial federal question doctrine arising from 28 U.S.C. § 1441. On February 17, 2017, the Court entered an order cancelling oral argument on Defendants'

motions to dismiss and directing the parties to address the Court's concerns regarding subject matter jurisdiction. Pursuant to the February 17, 2017, Order, the MDEQ Defendants, Plaintiff, and the State Defendants have filed responses. Having read the parties' responses, the Court concludes that the MDEQ Defendants were not "acting under" any federal officer or agency when they took the actions set forth in the complaint, and thus were not entitled to remove this case under the federal-officer removal statute. In addition, the Court concludes that it does not have jurisdiction under the substantial federal question doctrine.[1] Accordingly, the Court will remand this case to the Michigan Court of Claims.

I. BACKGROUND[2]

In 2014, as a cost-saving measure, the City of Flint switched its water source from the City of Detroit water system to the Flint River. (ECF No. 1-3 at PageID.43.) In connection with the switch, officials discontinued corrosion-control treatments required by the Environmental Protection Agency's (EPA) Lead and Copper Rule (LCR) and added ferric chloride, which increased the corrosivity of the Flint River water, to reduce formation of trihalomethanes from organic matter. (*Id.*)

Plaintiff, the mother and next friend of T.K., a minor, alleges that Defendants knew that the water

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[1] Although the MDEQ Employee Defendants request oral argument, the Court concludes that oral argument will not assist the Court in deciding the issue, which has been fully briefed by the MDEQ Employee Defendants.

[2] The following facts are taken from the complaint.

pumped from the Flint River was toxic and not fit for consumption, but nonetheless assured the public that it was safe to drink. (*Id.*) Plaintiff further alleges that, in spite of Defendants' assurances, T.K. experienced an elevated blood lead level and suffered permanent brain damage as a result of drinking water from the Flint River. (*Id.* at PageID.45.) Plaintiff alleges that Defendants were grossly negligent and/or negligent in participating in, or facilitating, the switch to Flint River water as the source of the City of Flint's water. Plaintiff seeks to represent a class of all individuals who were minors, resided in the City of Flint, and suffered brain damage as a result of ingesting water supplied from the Flint River. (*Id.* at PageID.41.)

The MDEQ Defendants are current and former employees of the MDEQ who played a part in the City of Flint's change of water sources.

Defendant Shekter Smith was, until October 19, 2015, the Chief of the Office of Drinking Water and Municipal Assistance for the MDEQ. Plaintiff alleges that Shekter Smith "knowingly participated in, approved of, and caused the decision to transition Flint's water source to a highly corrosive, inadequately studied and treated alternative," and made false statements that led to public consumption of the contaminated water. (*Id.* at PageID.47, ¶ 38.)

Defendant Wyant was, until December 29, 2015, the Director of the MDEQ. Plaintiff alleges that Wyant "participated in, directed, and oversaw the MDEQ's repeated violations of federal water quality laws, the failure to properly study and treat Flint River water, and the MDEQ's program of systemic denial, lies, and attempts to discredit honest outsiders." (*Id.*, ¶ 39.) Plaintiff alleges that Defendant

Wyant also made false statements that led to continued public consumption of contaminated water. (*Id.*)

Defendant Busch was and remains the District Supervisor assigned to the Lansing District Office of the MDEQ. Plaintiff alleges that Busch "participated in MDEQ's repeated violation of federal water quality laws, the failure to properly study and treat Flint River water, and the MDEQ's program of systemic denial, lies, and attempts to discredit honest outsiders." (*Id.* at PageID.47–48, ¶ 40.)

Defendant Cook was and remains a Water Treatment Specialist assigned to the Lansing Community Drinking Water Unit of the MDEQ. Cook is also the manager of that unit and "participated in[,] approved, and/or assented to the decision to allow Flint's water to be delivered to residents without corrosion control or proper study and/or testing." (*Id.* at PageID.48, ¶ 41.)

Defendant Prysby was and remains an Engineer assigned to MDEQ District 11 (Genesee County). Prysby "participated in, approved, and/or assented to the decision to switch to the water source, failed to properly monitor and/or test the Flint River water, and provid[ed] assurances . . . that the Flint River water was safe when he knew or should have known those statements to be untrue." (*Id.*, ¶ 42.)

Defendant Wurfel was, until December 29, 2015, the MDEQ's Director of Communications. Plaintiff alleges that Wurfel was "the MDEQ's principal means of public deception, repeatedly denying the increasingly obvious disaster as it unfolded." (*Id.* at PageID.49, ¶ 43.)

II. REMOVAL BURDEN

MDEQ Defendant Busch removed the case to this Court pursuant to the federal-officer removal statute, 28 U.S.C. § 1442(a)(1), alleging that pursuant to the federal Safe Water Drinking Act (SDWA), 42 U.S.C. § 300f *et seq.* and the EPA's LCR, the EPA has delegated authority to the MDEQ to act on its behalf and regulate public water drinking systems and that Defendant Busch took the actions alleged by Plaintiff in the course of fulfilling his duties delegated by the EPA to the MDEQ. (ECF No. 1 at PageID.4.) Defendant Busch alleged that he "was standing in the shoes of the EPA and taking actions which EPA would have otherwise been required to take, and his alleged actions were taken pursuant to EPA's oversight and guidance." (*Id.*) Defendant Busch also alleged that this Court has jurisdiction under 28 U.S.C. § 1441 because "Plaintiffs' [sic] claims are inextricably intertwined with the construction, interpretation, and effect of the SDWA and the LCR." (*Id.* at PageID.10.) The remaining MDEQ Defendants join in Busch's notice of removal.

As the removing parties, the MDEQ Defendants have the burden of establishing this Court's jurisdiction. *Jerome-Duncan, Inc. v. Auto-By-Tel, LLC*, 176 F.3d 904, 907 (6th Cir. 1999). Any doubts regarding "the propriety of removal are resolved in favor of remand."[3] *Smith v. Nationwide Prop. & Cas. Ins.*

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[3] Suggesting that the answer to the instant jurisdictional question is obvious, the MDEQ Defendants state that "[i]t is telling that Plaintiffs [sic] did not object to removal, given the authority that MDEQ Defendants presented." (ECF no. 72 at PageID.6815.) But Plaintiff's failure to object does not relieve this Court of its obligation to examine its jurisdiction in this

[Footnote continued on next page]

Co., 505 F.3d 401, 405 (6th Cir. 2007) (quoting *Jacada, Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 704 (6th Cir. 2005) (internal quotation marks omitted)).

III. DISCUSSION

A. Removal Under § 28 U.S.C. § 1442(a)(1)

The federal-officer removal statute provides as follows:

> (a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> > (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any act of Congress for the

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case. *See Kusens v. Pascal Co.*, 448 F.3d 349, 359 (6th Cir. 2006) ("It is well-established that the federal courts are under an independent obligation to examine their own jurisdiction."). Moreover, in her response, Plaintiff states that "she is not in a position to opine regarding the MDEQ Defendants' factual basis for removal." (ECF No. 73 at PageID.7387.) Thus, the Court infers nothing from Plaintiff's failure to object.

> apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. § 1442(a)(1).

The purpose of the statute is to protect federal officers from being subjected to legal proceedings in hostile state courts based on the enforcement of federal laws "by providing these federal officials with an unbiased federal forum." *Brown & Williamson Tobacco Corp. v. Wigand*, 913 F. Supp. 530, 533–34 (W.D. Ky. 1996); *see also N. Colo. Water Conservancy Dist. v. Bd. Of Cnty. Comm'rs of the Cnty. of Grand*, 482 F. Supp. 1115, 1117 (D. Colo. 1980) ("The purpose of 28 U.S.C. § 1442(a)(1) is to protect federal officers from state interference with the exercise of federal authority."). As the Supreme Court has explained, the history of the federal-officer removal statute is rooted in customs and revenue statutes that met with fierce opposition from the States. *Willingham v. Morgan*, 395 U.S. 402, 405, 89 S. Ct. 1813, 1815 (1969). The *Willingham* Court noted that the first such removal provision was included in an 1815 customs statute aimed at "enforc[ing] an embargo on trade with England over the opposition of the New Englant [sic] States, where the War of 1812 was quite unpopular." *Id.* The removal provision prevented States from interfering with enforcement of the customs statute by allowing federal officers to remove to federal court any civil or criminal proceeding against them based on "any act done 'under colour' of the statute." *Id.* Similar removal provisions were included in Civil War-era revenue laws, and Congress subsequently extended the protection to all federal officers when it enacted the current provision in 1948. *Id.* at 405–06, 89 S. Ct. at 1815.

It is true, as the MDEQ Defendants note, that the Supreme Court has observed that "[t]he federal officer removal statute is not 'narrow' or 'limited[,]' . . . [and] [a]t the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law." *Id.* at 406–07, 89 S. Ct. at 1816 (citation omitted). But, *Willingham* cited *Colorado v. Symes*, 286 U.S. 510, 52 S. Ct. 635 (1932), for the quoted proposition, which, the Sixth Circuit has observed, considered a narrower removal statute that "protected only those 'acting under or by authority of' federal officers who were themselves 'acting by authority of any revenue law of the United States." *Ohio State Chiropractic Ass'n v. Humana Health Plan, Inc.*, 647 F. App'x 619, 622 (6th Cir. 2016). The Sixth Circuit further observed in *Humana* that "each of the broad interpretations that Humana emphasizes traces to earlier versions of § 1442 that granted the removal power only to individuals enforcing federal customs and revenue laws." *Id.* (citing, among others, *Arizona v. Manypenny*, 451 U.S. 232, 101 S. Ct. 1657 (1981), and *Willingham*). Thus, the court reasoned, "proper context" showed that the liberal construction recognized in *Symes* was of limited use in determining whether a private health insurance contractor was entitled to remove under § 1442(a)(1). *Id.*[4]

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[4] Some courts have recognized a distinction in the application of the removal statute depending on the status of the removing party. Those courts note that while "federal officer jurisdiction is read expansively in suits involving federal officials, it is read narrowly where . . . only the liability of a private company purportedly acting at the direction of a federal officer is at issue."

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Removing parties, such as the MDEQ Defendants, who are not federal officers must satisfy a three-part test to establish proper removal under § 1442(a)(1). *Bennett v. MIS Corp.*, 607 F.3d 1076, 1085 (6th Cir. 2010). First, the removing party must show that "it is a 'person' within the meaning of the statute who 'act[ed] under [a federal] officer.'" *Id.* (quoting § 1442(a)(1)). Second, the party "must demonstrate that it performed the actions for which it is being sued 'under color of [federal] office[.]'" *Id.* (quoting § 1442(a)(1)). Finally, the party must "raise[] a colorable federal defense." *Id.* (citing *Jefferson Cnty. v. Acker*, 527 U.S. 423, 431, 119 S. Ct. 2069 (1999)).

The Supreme Court's decision in *Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142, 127 S. Ct. 2301 (2007), provides the most useful guide in determining the circumstances under which a non-federal officer will be deemed to satisfy the "acting under" a federal officer requirement. In *Watson*, the plaintiffs sued the defendants, cigarette manufacturers, alleging that the defendants violated state laws prohibiting unfair and deceptive business practices by advertising certain cigarette brands as "light," when, in fact, the manufacturers manipulated testing results by designing cigarettes and using techniques that caused the cigarettes to have lower levels of tar and nicotine than the cigarettes actually sold to customers. *Id.* at 146, 127 S. Ct. at 2304. The defendants invoked the federal-officer removal statute to

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Mills v. Martin & Bayley, Inc., No. 05-888-GPM, 2007 WL 2789431, at *5 (S.D. Ill. Sept. 21, 2007) (internal quotation marks omitted).

remove, and both the district court and the Eighth Circuit concluded that removal was proper because the plaintiffs' complaint attacked the defendants' use of the federal government's method of testing cigarettes. *Id.* The Court held that removal was improper because the federal government's heavy regulation of the defendants' product testing did not satisfy the statute's "acting under" requirement. *Id.* at152–53, 127 S. Ct. at 2308.

Watson emphasized several important principles that bear on whether a private person acted under a federal officer. First, the "acting under" relationship "typically involves subjection, guidance, or control," *id.* at 151, 127 S. Ct. at 2307, and "must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Id.* at 152, 127 S. Ct. at 2307. Mere compliance with the law does not constitute "help or assistance necessary to bring a private person within the scope of the statute." *Id.* Second, the fact that a company (or a State) is subject to, and complies with, a federal order does not ordinarily create the type of state-court "prejudice" at which the removal statute is directed. *Id.* Finally, the fact that an entity is "highly regulated . . . even if the regulation is highly detailed and even if the [entity's] activities are highly supervised and monitored," will not provide a basis for removal under § 1442(a)(1). *Id.* at 153, 127 S. Ct. at 2308.

The MDEQ Defendants offer essentially three bases to support their contention that they were acting at the direction, and with the authorization, of the EPA, such that they should be deemed to have "acted under" the EPA. First, the MDEQ Defendants note that after Flint's water source was switched to the Flint River and water quality issues arose, the

EPA directed the MDEQ's response and ultimately issued an Emergency Administrative Order addressing the steps the MDEQ and the City of Flint were required to take to protect the public health. Second, the MDEQ Defendants argue that Plaintiff's allegations regarding their involvement in the process of switching the source of Flint's water system to the Flint River necessarily implicate the MDEQ Defendants' administration, application, and enforcement of the federal LCR, demonstrating that the MDEQ Defendants acted on behalf of the EPA and not simply as an instrumentality of the State. Finally, they argue that, although their administration and enforcement of the federal LCR was accomplished through the Michigan Safe Drinking Water Act, they acted at the direction, and on behalf of, the EPA, and thus are actually being sued for actions that the EPA would have taken in the absence of the EPA's formal delegation of authority to the MDEQ.

While this Court believes that *Mays, et al v. City of Flint, et al.*, No. 16-11519 (E.D. Mich. Oct. 6, 2016), correctly concluded that the MDEQ Defendants are not entitled to remove under § 1442(a)(1), the analysis, in this Court's judgment, begins and ends with the State of Michigan's (and by extension the MDEQ's) independent role as enforcer of Michigan law and the SDWA.

Congress enacted the SDWA in 1974 'to ensure that public water supply systems meet minimum national standards for the protection of public health." *Nat'l Wildlife Fed'n v. EPA*, 980 F.2d 765, 768 (D.C. Cir. 1992). The SDWA provides that the EPA's drinking water regulations "shall apply to each public water system in each State." 42 U.S.C. § 300g. The SDWA also recognizes that the States may play an

important part in administering and enforcing drinking water standards. *See Nat. Res. Def. Council v. EPA*, 806 F. Supp. 275, 277 (D.D.C. 1992) (noting that "it is clear from the plain language of the Safe Drinking Water Act that the states play a critical and independent role of implementation"). In fact, a State may obtain "primary enforcement responsibility for public water systems" if the EPA determines that the State meets certain requirements. 42 U.S.C. § 300g-2. To obtain such authority, a State must: (1) adopt its own "drinking water regulations that are no less stringent than the . . . [EPA's] regulations,"; (2) adopt and implement adequate procedures to enforce such regulations; and (3) keep records and make reports required by the EPA. 42 U.S.C. § 300g-2(a). *See also* 40 C.F.R. § 142.10 (setting forth the requirements for determination of primary enforcement responsibility). Thus, while the SDWA "is administered by the EPA[,] . . . [it] establishes a joint federal-state system for assuring compliance with national standards." *Manufactured Hous. Inst. v. EPA*, 467 F.3d 391, 401 (4th Cir. 2006); *see also United States v. Cnty. of Westchester*, No. 13-cv-5475 (NSR), 2014 WL 1759798, at *4 (S.D.N.Y. Apr. 28, 2014) (stating that the SDWA "authorized the EPA to establish Federal standards that would be applicable to all public water systems and to establish a joint Federal–State system for assuring compliance with these standards and for protecting underground sources of drinking water"); *Nat. Res. Def. Council*, 806 F. Supp. at 277–78 (concluding that the members of a Governors' Forum on Environmental Management were not mere advisors to the EPA because, under the SDWA, governors "act operationally as independent chief executives in partnership with the federal agency," and a contrary

conclusion "would ignore the responsibilities the states maintain in complying with the [SDWA]").

As the MDEQ Defendants concede, the Michigan legislature passed its own Safe Drinking Water Act in 1976, *see* M.C.L.A. § 325.1001, *et seq.*, and the MDEQ's predecessor assumed primary enforcement responsibility to administer and enforce the SDWA in 1978. (ECF No. 72-2.) And, pursuant to Michigan's Safe Drinking Water Act, the MDEQ has "power and control over public water supplies and suppliers of water." M.C.L.A. § 325.1003.

In light of the SDWA's "joint federal-state system" that, as here, assigns primary enforcement responsibility to the States, the MDEQ Defendants were not "acting under" the EPA at all, in the sense of assisting or helping the EPA to perform its duties or tasks. *See Watson*, 551 U.S. at 2307. Rather, it is clear that at all times, the MDEQ Defendants were acting for and on behalf of the MDEQ to fulfill its own duties under the Michigan Safe Drinking Water Act. *Cf. N. Colo. Water Conservancy Dist.*, 482 F. Supp. at 1118 (concluding that the removing parties were "not acting as federal entities or as agents of the [EPA]" pursuant to the Clean Water Act, but instead were acting as political subdivisions of Colorado). Such remains true notwithstanding that the MDEQ Defendants consulted and interacted extensively with the EPA when water quality issues arose after the switch to the Flint River. After all, consultation and interaction are consistent with any joint undertaking. Thus, if anything, this is not a case of the MDEQ assisting the EPA to perform its duties, but of EPA personnel assisting the MDEQ in performing its duties.

The EPA's Emergency Administrative Order issued on January 21, 2016, does not alter the analysis. The order itself confirms that, rather than acting for the EPA, the MDEQ was "an instrumentality of the State." (ECF No. 1-7 at PageID.93.) Moreover, even if the order directed MDEQ to follow or apply the LCR or other regulations in a particular manner, *Watson* says that compliance with federal law does not constitute the type of "help or assistance" required under § 1442(a)(1), and compliance with a regulatory order is unlikely to "create a significant risk of state-court 'prejudice.'" 551 U.S. at 152, 127 S. Ct. at 2307.

Accordingly, the MDEQ Defendants have not shown that removal is proper under § 1442(a)(1).

B. Removal Under 28 U.S.C. § 1441

The MDEQ Defendants' also argue that removal was proper because Plaintiff's state-law gross negligence/negligence claim raises a substantial federal question, namely construction and interpretation of the SDWA and the LCR. (ECF No. 1 at PageID.10.) The substantial federal question doctrine applies "where the vindication of a right under state law necessarily turn[s] on some construction of federal law." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9, 103 S. Ct. 2841, 2846 (1983). However, "[t]he mere presence of a federal issue in a state law cause of action does not automatically confer federal question jurisdiction, either originally or on removal." *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 565 (6th Cir. 2007) (en banc). Application of the doctrine requires that: "(1) the state-law claim must necessarily raise a disputed federal issue; (2) the federal interest in the issue must be substantial; and (3) the exercise of

jurisdiction must not disturb any congressionally approved balance of federal and state judicial responsibilities." *Id.* (citing *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314, 125 S. Ct. 2363, 2368 (2005)). The Supreme Court has emphasized that the substantial federal question doctrine is limited to "a 'special and small category' of cases." *Gunn v. Minton*, __ U.S. __ 133 S. Ct. 1059, 1064–65 (2013) (quoting *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 701, 126 S. Ct. 2121, 2137 (2006)).

In *Grable & Sons Metal Products v. Darue Engineering & Manufacturing*, 545 U.S. 308, 125 S. Ct. 2363 (2005), the plaintiff filed a quiet title action in Michigan state court, alleging that the defendant's title to certain property was invalid. 545 U.S. at 311, 125 S. Ct. at 2366. Pursuant to a Michigan court rule, the Plaintiff specifically alleged that its title was superior to the defendant's title because the Internal Revenue Service failed to give adequate notice, as required by a federal statute. *Id.* at 314–15, 125 S. Ct. at 2368. The Court concluded that the Defendant properly removed the case based on federal question jurisdiction because whether the plaintiff "was given notice within the meaning of the federal statute [was] . . . an essential element of its quiet title claim, and the meaning of the federal statute [was] actually in dispute." *Id.* at 315, 125 S. Ct. at 2368. In fact, the Court observed, because the proper interpretation of the federal statute was "the only legal or factual issue contested in the case," its meaning was "an important issue of federal law that sensibly belongs in a federal court." *Id.*

In contrast to *Grable*, the MDEQ Defendants have not shown that Plaintiff's state-law negligence-

based claims implicate an important federal interest. As the Court wrote in *Gunn*:

> 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 raises a disputed 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.

133 S. Ct. at 1066 (internal quotation marks and bracket omitted). In short, the state-law claim at issue in this case is a "garden-variety" state-law tort claim that does not raise a federal question at the level of importance of that raised in *Grable*. *See Mikulski*, 501 F.3d at 571; *see also Mays*, slip op. at 13.

IV. CONCLUSION

For the foregoing reasons, the Court will remand this case to the Michigan Court of claims for lack of jurisdiction.

An Order consistent with this Opinion will enter.

Dated: March 31, 2017

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES
DISTRICT JUDGE