Docket No. 14-16864

In the

United States Court of Appeals

for the

Ninth Circuit

NAVAJO NATION,

Plaintiff-Appellant,

v.

DEPARTMENT OF THE INTERIOR, SALLY JEWELL, Secretary of the Interior, BUREAU OF RECLAMATION and BUREAU OF INDIAN AFFAIRS,

Defendants-Appellees,

STATE OF ARIZONA, CENTRAL ARIZONA WATER CONSERVATION DISTRICT, ARIZONA POWER AUTHORITY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SALT RIVER VALLEY WATER USERS' ASSOCIATION, IMPERIAL IRRIGATION DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, COACHELLA VALLEY WATER DISTRICT, STATE OF NEVADA, COLORADO RIVER COMMISSION OF NEVADA, SOUTHERN NEVADA WATER AUTHORITY and STATE OF COLORADO,

Intervenors-Defendants-Appellees.

Appeal from a Decision of the United States District Court for the District of Arizona, No. 3:03-CV-00507-GMS · Honorable G. Murray Snow

BRIEF OF APPELLANT

SCOTT B. MCELROY, ESQ.
ALICE E. WALKER, ESQ.
McELROY, MEYER, WALKER & CONDON, P.C.
1007 Pearl Street, Suite 220
Boulder, Colorado 80302
(303) 442-2021 Telephone
(303) 444-3490 Facsimile

STANLEY M. POLLACK, ESQ.
M. KATHRYN HOOVER, ESQ.
NAVAJO NATION DEPARTMENT OF JUSTICE
Post Office Box 2010
Window Rock, Arizona 86515
(928) 871-7510 Telephone
(928) 871-6200 Facsimile

Attorneys for Appellant Navajo Nation

CORPORATE DISCLOSURE STATEMENT

The Navajo Nation is a federally recognized Indian tribe and sovereign government, so a corporate disclosure statement is not required pursuant to Federal Rule of Appellate Procedure 26.1.

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I. STATEMENT OF JURISDICTION

The United States District Court for the District of Arizona ("District Court") had federal question jurisdiction over the original action pursuant to 28 U.S.C. § 1331, and since the plaintiff/appellant is an Indian tribe, it had jurisdiction pursuant to 28 U.S.C. § 1362. The Navajo Nation, the plaintiff below, appeals the District Court's *Order* (July 22, 2014) ("Order") (ER 4) dismissing all claims in the original action. The Navajo Nation had sixty days to appeal, FED. R. APP. P. 4(a)(1)(B), but its motion pursuant to Federal Rule of Civil Procedure 60(b)(6) tolled the deadline. *Motion for Specific Relief from the July 22 Order Pursuant to Rule 60(b)(6)* (Aug. 18, 2014) ("Post-Judgment Motion") (ER 37); *see* FED. R. APP. 4(a)(4)(A)(vi) The Navajo Nation nonetheless filed a *Notice of Appeal* (Sept. 19, 2014) (ER 31) within sixty days, which took effect when the District Court denied the Post-Judgment Motion on October 1, 2014. *Order* (Oct. 1, 2014) (ER 1) ("Post-Judgment Order"); *see* FED. R. APP. P. 4(a)(4)(B)(i). On October 10, 2014, the Navajo Nation filed an *Amended Notice of Appeal* (Oct. 10, 2014) (ER 21), so this appeal is timely and the Ninth Circuit has jurisdiction pursuant to 28 U.S.C. § 1291.

II. STATEMENT OF THE ISSUES

(1) Whether the District Court erred when it granted the Federal Defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b) on the

grounds that the Navajo Nation, a sovereign Indian tribe with concrete interests in arid reservation trust lands contiguous to the Colorado River, had not adequately alleged procedural injury and, therefore, did not have standing under the National Environmental Policy Act to challenge certain federal guidelines that control the management of the mainstem of the Colorado River in the Lower Basin?

(2) Whether the waiver of sovereign immunity in section 702 of the Administrative Procedure Act applies to the Navajo Nation's claims not arising under the Act, which seek injunctive and declaratory relief on the grounds that the actions of the Department of the Interior and its agencies breached treaty, statutory, and common law fiduciary obligations to preserve and protect the Navajo Nation's trust resources, which include the arid reservation lands contiguous to the Colorado River?

(3) Alternatively, whether the District Court invoked the wrong legal test under Federal Rule of Civil Procedure 60(b)(6) and otherwise abused its discretion in denying leave to amend certain claims for relief?

III. ADDENDUM

Pursuant to Circuit Rule 28-2.7, pertinent statutes and regulations are set forth verbatim in the attached addendum.

IV. STATEMENT OF THE CASE

A. THE NAVAJO NATION AND ITS RESERVATION.

The appellant Navajo Nation is a federally-recognized Indian tribe exercising sovereign authority over the Navajo Indian Reservation ("Reservation"), which encompasses over thirteen million acres within the drainage basin of the Colorado River above Lake Mead in Arizona, New Mexico, and Utah, and borders the Colorado River in the Lower Basin in Arizona.[1] *Second Amended Complaint for Declaratory and Injunctive Relief* ¶¶ 2, 10-13 (Nov. 14, 2013) ("Complaint") (ER 123, 125, 127-30); *Navajo Nation's Response to Motions to Dismiss* at 7-8 (Nov. 14, 2013) ("Navajo Response") (ER 72-74). When the federal government set aside the Reservation as a permanent home for the Navajo people, it recognized that water was required to fulfill that purpose. Complaint ¶ 14 (ER 130). The Navajo Nation, however, lacks sufficient water supplies to meet its present and future needs. *Id.* ¶ 27 (ER 132); Navajo Response at 10-12 (ER 76-78). The to

[1] Portions of the Reservation also lie within the Upper Basin of the Colorado River. In this brief, the "Upper Basin" refers to those lands within the watershed of the Colorado River that drain into the river above Lee Ferry located in the Grand Canyon in Arizona. Similarly, the "Lower Basin" refers to lands within the watershed of the Colorado River that drain into the river below Lee Ferry.

which the Navajo Nation holds water rights from the mainstem of the Colorado River in the Lower Basin has never been determined.[2]

B. THE EVENTS RESULTING IN THE LITIGATION.

In the Lower Basin of the Colorado River, the United States has two disparate sets of obligations. First, the Secretary of the Interior ("Secretary") is tasked with managing the Colorado River in the Lower Basin for the benefit of the Lower Basin states,[3] pursuant to a body of law commonly known as the Law of the River, which governs matters in both the Lower and Upper Basins. The Law of the River includes a wide range of authorities affecting the Lower Basin, among which are the Colorado River Compact of November 24, 1922 ("1922 Compact") (ER 153), the Boulder Canyon Project Act, 43 U.S.C. §§ 617-617u, and the decree in *Arizona v. California*, 376 U.S. 340 (1964) ("1964 Decree"). Complaint ¶ 4 (ER 125-26); Navajo Response at 15-30 (ER 81-96). The Bureau of Reclamation ("Reclamation") is the principal agency that carries out these duties in the Lower Basin. Complaint ¶ 5 (ER 126).

Second, the Department of the Interior ("Department"), the Secretary, Reclamation, and the Bureau of Indian Affairs (collectively "Federal Defendants"),

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[2] In *Arizona v. California*, 373 U.S. 546 (1963), the United States asserted that it "had 'full and exclusive authority to control the presentation of the Indian's interests in the [litigation].'" *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 427 (1991).

[3] Arizona, California and Nevada.

also owe trust obligations to Indian tribes in the Lower Basin who require water from the Colorado River to make their reservations the permanent homelands promised to them when their reservations were established. In carrying out these obligations, the Federal Defendants must, at a minimum, comply with laws protecting tribal interests. *Id.* ¶¶ 3-6 (ER 125-26); Navajo Response at 12-15 (ER 78-81).

Use of mainstem water in the Lower Basin by the Navajo Nation will reduce the water available for other Arizona citizens. Arizona is entitled to the consumptive use of 2.8 million acre-feet of water per year ("mafy") from the Colorado River, Complaint ¶ 33 (ER 134), and to nearly half of any Lower Basin surplus. 1964 Decree art. II(B)(2), 376 U.S. at 342; Navajo Response at 23 (ER 89). Any consumptive use in Arizona that reduces flows into Lake Mead, as Navajo use will do, is charged against Arizona's allocation. 1964 Decree art. II(B)(4), 376 U.S. at 343; Complaint ¶ 34 (ER 134-35). California is entitled to 4.4 mafy, but has historically exceeded this allocation. *Colorado River Interim Surplus Criteria Final Environmental Impact Statement* vol. I at 1-3 (Dec. 2000) ("Surplus Guidelines EIS") (ER 281). In times of shortage, the Colorado River Basin Project Act, 43 U.S.C. §§ 1501-56, subordinates Central Arizona Project

("CAP") water[4] to California's allocation. *Id.* § 1521(b); Navajo Response at 29 (ER 95).

This case concerns whether, under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-70h the Federal Defendants, acting through the Secretary and Reclamation, adequately addressed the effects of their proposed actions on the Navajo Nation's trust resources when they sought to reduce California's over-reliance on the Colorado River and to provide certainty and predictability to the seven Basin states[5] who use that water supply. Navajo Response at 33-34 (ER 97-98). The case also concerns whether the Federal Defendants breached their fiduciary obligations to the Navajo Nation when they took such actions. Complaint ¶ 1 (ER 124-25).

In 2000, pursuant to NEPA, NEPA regulations, departmental policies, and *Reclamation's NEPA Handbook* (current version updated Feb. 2012) (ER 122), Reclamation issued an environmental impact statement ("EIS") proposing alternative guidelines to pre-determine the conditions under which the Secretary would declare a Lower Basin water surplus. Surplus Guidelines EIS vol. I at 1-1 to

[4] CAP is the largest single Arizona diverter and its consumptive use exceeds 1.2 mafy, *Final Environmental Impact Statement, Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead* vol. I at 3-35 (Oct. 2007) ("Shortage Guidelines EIS") (ER 197), almost half of Arizona's allocation.

[5] The "seven Basin states" are Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming.

-2 (ER 279-80). On January 16, 2001, the Secretary signed a *Record of Decision, Colorado River Interim Surplus Guidelines Final Environmental Impact Statement* ("Surplus Guidelines ROD") (ER 158), adopting the preferred alternative described in the EIS. The Secretary cited the "seven-state consensus" as a basis for adopting the guidelines. *Id.* at 7 (ER 160).

In 2007, in the face of an ongoing record drought, Reclamation issued another EIS, pursuant to the same authority, examining guidelines that, inter alia, (1) pre-determine through the year 2026 the conditions that trigger a determination by the Secretary of a shortage for the water supplies in the Lower Basin; (2) encourage intentionally created surplus; and (3) modify the Surplus Guidelines and extend them through 2026. Shortage Guidelines EIS vol. I at 1-1 to -2 (ER 181-82). The probabilities of potential effects on water users in Arizona varied considerably under each alternative in the guidelines. With respect to impacts on water deliveries through 2026, for example, the probability of an involuntary shortage determination ranged from 7% to 49% (41% under the preferred alternative), the probability of shortages ranged from 12% to 49% (41% under the preferred alternative), the probability of normal deliveries ranged from 19% to 47% (19% under the preferred alternative), and the probability of a surplus ranged from 17% to 41% (40% under the preferred alternative). *Id.* vol. 1 at 2-26, 4-97 to 4-152 (ER 187, 202-54). On December 13, 2007, the Secretary signed a *Record of*

Decision, Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead Final Environmental Impact Statement ("Shortage Guidelines ROD") (ER 162) adopting the preferred alternative, in large part to avoid "destabilizing litigation" and maintain a multi-state "consensus." *Id.* at 12 (ER 164); *accord id.* at 1, 13 (ER 163, 165).

In response to tribal concerns regarding the effect of the Department's actions on the water supplies available to meet tribal needs, the Secretary stated that the Surplus "guidelines will benefit the tribes by helping to ensure that California does not develop a permanent reliance on unused [tribal] water rights." Surplus Guidelines ROD at 9 (ER 161). When it promulgated the Shortage Guidelines, Reclamation acknowledged that Indian trust lands, with or without water rights, were trust assets requiring it to analyze the effect of its proposed actions on such interests. Shortage Guidelines EIS vol. I at 3-96 to -97, 4-249, vol. IV at IT-109 to -111 (ER 119-20, 121, 115-17). But it devoted less than a page to its analysis of the effects of the proposed action on Indian trust assets, offering only that Reclamation did not intend to interfere with any "vested water right of any kind, quantified or unquantified . . . ." *Id.* vol. I at 4-249 (ER 121). The agency stated that if additional tribal rights were judicially recognized in the future, it would manage the river to allow for the delivery of such rights without explaining how this significant undertaking would be accomplished. *Id.* (ER 121).

When it adopted both the Surplus Guidelines and the Shortage Guidelines, Reclamation never addressed the effects of its actions on the Federal Defendants' ability to secure water for Indian tribes, such as the Navajo Nation, with a need for water from the Colorado River but without adjudicated rights from that source. Nor did it address the issue of whether its actions would make it harder for affected tribes to develop any water to which they were entitled.

C. THE PROCEEDINGS BELOW.

In 2003, the Navajo Nation filed suit to challenge the Surplus Guidelines and other Colorado River programs and also allege a breach of the Secretary's federal trust obligations to the Navajo Nation arising from the Secretary's management of the Colorado River. *Complaint for Declaratory and Injunctive Relief* (Mar. 14, 2003) (ER 179). Following the intervention of numerous interested parties, the District Court stayed the case from 2004 to mid-2013 in order to facilitate settlement negotiations. *See Memorandum of Points and Authorities in Support of Navajo Nation's Motion for Specific Relief from the July 22 Order Pursuant to Rule 60(b)(6)* at 6 (Aug. 18, 2014) ("Post-Judgment Memorandum") (ER 47). Shortly after the final stay expired on May 16, 2013, the Navajo Nation amended its complaint and added a claim challenging the Shortage Guidelines ROD. *First Amended Complaint for Declaratory and Injunctive Relief* ¶¶ 41-45, 68-71 (July 10, 2013) (ER 174-76, 177-78).

The Navajo Nation's first and second claims for relief arise from the Federal Defendants' failure to comply with NEPA's procedural requirements. NEPA fosters the productive harmony of people with nature and protects the human environment, Navajo Response at 45-46 (ER 102-03), and NEPA regulations require that environmental impact statements ("EIS") consider direct, indirect, and cumulative effects of major federal actions. *Id.* (ER 102-03). Consistent with trust principles, NEPA regulations, departmental policies, and Reclamation's NEPA Handbook also protect specific tribal interests. *Id.* at 46-48 (ER 103-05).

The seventh claim for relief alleges that the Federal Defendants breached their fiduciary duties as trustees of the Navajo Nation's natural resources, including its lands and waters. Complaint ¶¶ 1, 89-91 (ER 124-25, 145). The Federal Defendants did this by making significant decisions concerning the management of the mainstem of the Colorado River in the Lower Basin without first accounting for the water supplies required by the Navajo Nation to fulfill the promise of the Treaty of June 1, 1868, 15 Stat. 667 (ER 60) to make the Reservation a viable and sustainable homeland.

The Federal Defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b). *Federal Defendants' Motion to Dismiss First Amended Complaint* (Sept. 9, 2013) ("Motion to Dismiss") (ER 146); *Federal Defendants' Memorandum in Support of Motion to Dismiss Amended Complaint* (Sept. 9, 2013)

("Federal Defendants' Memorandum") (ER 150). The Defendant-Intervenors filed additional motions to dismiss. Order at 1-2 (ER 4-5). After the parties consented to leave to amend for the sole purpose of voluntarily dismissing the sixth claim for relief, *see* Post-Judgment Reply at 9 (ER 30), briefing concluded with the Navajo Response (ER 72) and the *Federal Defendants' Reply Memorandum in Support of Motion to Dismiss the Second Amended Complaint* (Dec. 20, 2013) (ER 59).

On July 11, 2014, the District Court held a hearing limited to questions it identified to address generally (1) the nature and status of the Navajo Nation's potential water right claims from the mainstem of the Colorado River in the Lower Basin; and (2) and the waiver of sovereign immunity for the Nation's breach of trust claims. *Order* (July 1, 2014) (ER 57); *Order* (July 8, 2014) (ER 55); *see Reporter's Transcript of Proceedings Before the Honorable G. Murray Snow* (Status Conference) (July 11, 2014) ("Transcript") (ER 52). The District Court's questions did not address the Navajo Nation's standing to bring its NEPA claims. In response to the District Court's inquiry, sua sponte, the Navajo Nation said it preferred dismissal with leave to amend its Complaint over dismissal of its claims without prejudice. Transcript at 33, 48 (ER 53, 54); Post-Judgment Memorandum at 2 (ER 43).

The District Court nonetheless dismissed all claims without prejudice, Order at 17 (ER 20), finding that the Navajo Nation lacked standing to bring its NEPA

claims, *id.* at 11 (ER 14), and that section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 did not waive federal sovereign immunity to allow the breach of trust claims. Order at 13-15 (ER 16-18). The District Court held that the additional motions filed by the Defendant-Intervenors were rendered moot upon this dismissal. *Id.* at 16 (ER 19). The Order was silent on leave to amend.

With regard to the Navajo Nation's standing to bring its NEPA claims, the District Court stated that it would "assume without deciding that the Federal Defendants violated some procedural rules of NEPA, that the Nation has some kind of interest in the water of the Lower Basin, and that the procedural rules protect the Nation's interests in that water." *Id.* at 11 (ER 14). The District Court held, however, that the Navajo Nation had not adequately asserted "a NEPA procedural injury" because the challenged administrative actions could not alter any water rights that ultimately might be adjudicated to the Navajo Nation. *Id.* (ER 14). It did not discuss any of the other claims of injury asserted by the Navajo Nation.

In dismissing the Navajo Nation's breach of trust claim on the basis of the United States' sovereign immunity, the District Court read this Court's precedent to limit the waiver of federal immunity in section 702 of the APA only to claims satisfying the requirements of section 704 or section 706 of that act or raising constitutional challenges. Order at 14-15 (citing *Gallo Cattle Co. v. U.S. Dep't*

Agric., 159 F.3d 1194, 1198 (9th Cir. 1998); *Presbyterian Church v. United States*, 870 F.2d 518, 526 (9th Cir. 1989)) (ER 17-18). It specifically declined to read *Presbyterian Church* as applicable to claims other than constitutional claims. *Id.* at 15 (ER 18). While the District Court expressed doubt that the Navajo Nation could substantiate its breach of trust claims, *id.* at 12-13 (ER 15-16), it granted the Motion to Dismiss solely on the basis of sovereign immunity, not for failure to state the breach of trust claims. *Id.* at 15 (ER 18).

The District Court's dismissal was effectively with prejudice due to the effect of the statute of limitations, 28 U.S.C. § 2401(a) so the Navajo Nation filed the Post-Judgment Motion (ER 37) arguing that principles of Federal Rule of Civil Procedure 15 favored dismissal with leave to amend claims one, two, and seven. Post-Judgment Memorandum at 3-10 (ER 44-51). After a response, *Defendants' and Defendant-Intervenors' Combined Memorandum in Opposition to Plaintiff Navajo Nation's Fed. R. Civ. P. 60(b) Motion for Specific Relief and Memorandum in Support* (Sept. 12, 2014) (ER 36), and reply, *Reply in Support of Plaintiff Navajo Nation's Fed. R. Civ. P. 60(b) Motion for Specific Relief* (Sept. 22, 2014) ("Post-Judgment Reply") (ER 26), the District Court issued the Post-Judgment Order (ER 1) denying relief. The Navajo Nation now appeals the Order (ER 4) and Post-Judgment Order (ER 1).

V. SUMMARY OF THE ARGUMENT

At this stage of litigation, on a Rule 12(b) motion to dismiss and prior to the submission of affidavits or other evidence, the allegations in the Complaint embrace facts sufficient to demonstrate that the Navajo Nation has standing to bring its first and second claims. Moreover, the Navajo Nation alleged NEPA procedural violations, which relaxed the imminence, causation, and redressability components of constitutional standing. Consistent with federal law and policy, the Navajo Nation has sovereign and concrete interests in the Reservation and in the water required to make it a permanent home for the Navajo people. NEPA regulations protect tribal interests in trust resources, so it is reasonably probable that the Navajo Nation's interests are threatened by a violation of those procedures in the adoption of guidelines for managing the Colorado River adjacent to Navajo lands. Since the proper study of these impacts may redress procedural injuries, the Navajo Nation has standing to bring the first and second claims for relief.

The language of section 702 of the APA and the prior decisions of this Court, as well as other Circuit Courts, establish that section 702 waives the immunity of the United States for breach of trust claims asserted by the Navajo Nation in its seventh claim for relief. Federal sovereign immunity, therefore, does not bar this action.

In the alternative, the District Court abused its discretion when, at the Navajo Nation's request at oral argument and on the Navajo Nation's Post-Judgment Motion (ER 37), subsequent to dismissal of the Navajo Nation's claims, it refused leave to amend the complaint. By requiring the Navajo Nation to show extraordinary circumstances justifying its request to amend, the Court applied the wrong law to the issue before it. In addition, it made substantial factual errors when it ignored the Navajo Nation's argument that leave to amend was appropriate under the circumstances.

VI. ARGUMENT

A. THE NAVAJO NATION HAS STANDING TO BRING ITS NEPA CLAIMS.

1. Standing is Subject to De Novo Review.

Standing is a question of law subject to de novo review. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1196 (9th Cir. 2004); *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969 (9th Cir. 2003). "[O]n appeal from a Rule 12(b) motion to dismiss," courts "must presume that the general allegations in the complaint encompass the specific facts necessary to support those allegations," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)), and "construe the complaint in favor of the complaining party." *Tyler v. Cuomo*, 236 F.3d 1124, 1131 (9th Cir. 2000) (internal quotation marks omitted). Thus, "general factual allegations of

injury resulting from the defendant's conduct may suffice." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

2. The Navajo Nation has Constitutional Standing.

Article III of the Constitution requires three elements for standing: (1) a concrete and imminent injury; (2) causation between the injury and conduct complained of; and (3) likelihood of redressability. *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 n.6 (9th Cir. 2011); *Douglas County v. Babbitt*, 48 F.3d 1495, 1499 (9th Cir. 1995). The Navajo Nation's NEPA claims meet that standard. As described below, "[t]he requisite weight of proof for each element of the test is lowered" when standing is based on "procedural injury" as are the Navajo Nation's claims in this case. *Churchill County v. Babbitt*, 150 F.3d 1072, 1077 (9th Cir. 1998), *amended by* 158 F.3d 491 (9th Cir. 1998).[6]

a. The Navajo Nation Adequately Alleged Procedural Injury.

The assertion of a procedural right to protect a concrete interest (the first element of Article III standing) is "special" in that the normal showing of "immediacy" is not required to demonstrate injury. *Defenders of Wildlife*, 504 U.S. at 572 n.7; *accord Cantrell v. City of Long Beach*, 241 F.3d 674, 679 n.3, 682

[6] The District Court based dismissal on the injury element, so it did not address other standing requirements. *See* Order at 11, 12 n.3 (ER 14, 15). Nevertheless, this brief shows that the Navajo Nation satisfies each requirement for standing.

(9th Cir. 2001). Instead, a plaintiff "'must show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.'" *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2010) (quoting *Better Forestry*, 341 F.3d at 969); *accord Pit River Tribe v. U.S. Forest Serv.* (*Pit River I*), 469 F.3d 768, 779 (9th Cir. 2006). Specifically, the Navajo Nation must show that (1) the Federal Defendants violated NEPA; (2) NEPA protects its concrete interests; and (3) it is reasonably probable that the Federal Defendants' conduct threatens its interests. *See City of Sausalito*, 386 F.3d at 1197; *Better Forestry*, 341 F.3d at 969-70. The District Court "assume[d] without deciding" the first two parts of the test, Order at 11 (ER 14), but misapplied the third part of the test when it invoked the wrong standard for the burden of proof at this stage of the case and failed to grasp the full nature of the injury alleged by the Navajo Nation.

i. The Burden of Proof is Reduced at the Pleading Stage.

The District Court applied the wrong burden of proof when it found the Navajo Nation did not "establish injury under the standard for establishing a NEPA procedural injury." *Id.* (ER 14). In response to a Rule 12(b) motion, a plaintiff must support standing "with the manner and degree of evidence required at the successive stages of the litigation": (1) on a Rule 12(b) motion courts "presum[e] that general allegations embrace those specific facts that are necessary to support

the claim"; (2) on summary judgment a plaintiff "must set forth by affidavit or other evidence specific facts" showing standing; and (3) at trial it must adequately support the facts with further evidence. *Defenders of Wildlife*, 504 U.S. at 561 (internal quotation marks omitted); *accord Maya v. Centex Corp.*, 658 F.3d 1060, 1068-69 (9th Cir. 2011); *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002); *see, e.g., Nat'l Wildlife Fed'n*, 497 US. at 880-81, 886 (district court denied dismissal and court of appeals affirmed because general allegations in complaint were sufficient to survive motion to dismiss, but later on summary judgment the facts adduced by affidavit were inadequate for standing). Here, it was reasonable for the Navajo Nation to rest on its Complaint and to proceed on the basis that the allegations encompassed the necessary facts asserting injury. *See Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1084, 1086-87 (9th Cir. 2003) (plaintiffs survived Rule 12(b) motion by alleging federal defendants' reallocation of water would cause loss of affordable irrigation water).[7]

[7] This case is somewhat unusual because standing was decided on a Rule 12(b) motion to dismiss. Given the graduated burden of proof at the successive stages of litigation, standing disputes usually arise in the context of summary judgment or later, where courts no longer presume facts and must rely on affidavits or other evidence to decide standing. *See, e.g., Summers v. Earth Island Inst.*, 555 U.S. 488, 491-92, 494-95 (2009); *Food Safety*, 636 F.3d at 1171-72; *Kraayenbrink*, 632 F.3d at 477, 484-85; *Pit River I*, 469 F.3d at 778; *City of Sausalito*, 386 F.3d at 1196, 1198; *Better Forestry*, 341 F.3d at 969, 971; *Churchill County*, 150 F.3d at 1077, 1079; *Douglas County*, 48 F.3d at 1499, 1501.

ii. The Navajo Nation Adequately Alleged a Procedural Violation.

A simple allegation of a cognizable procedural violation, such as the inadequacy of an EIS, satisfies the first part of the procedural injury test. *See*, *e.g.*, *Food Safety*, 636 F.3d at 1171-72; *Cantrell*, 241 F.3d at 679. That a defendant "may in fact have complied with NEPA does not diminish" a plaintiff's standing, *Food Safety*, 636 F.3d at 1172, because a contrary rule would limit standing to only successful plaintiffs. *Better Forestry*, 341 F.3d at 971 n.5. The Navajo Nation satisfied the procedural injury test's first part by alleging the inadequacy of the Surplus Guidelines EIS, Surplus Guidelines ROD, Shortage Guidelines EIS, and Shortage Guidelines ROD because they failed to adequately address the effect of the proposed actions on the trust assets of the Navajo Nation, including both its reservation lands as well as any unadjudicated water rights it might hold. Complaint ¶¶ 36-45, 60-71 (ER 135-40, 141-44).

iii. The Navajo Nation has a Procedural Right to Protect a Concrete Interest.

The Navajo Nation satisfied the second part of the procedural injury test because NEPA gives it a procedural right to protect its concrete interests, and a geographic nexus exists between the Reservation and the Colorado River. *See Food Safety*, 636 F.3d at 1172; *Kraayenbrink*, 632 F.3d at 485. The Council on Environmental Quality's NEPA regulations expressly protect tribal interests. *See*,

e.g., 40 C.F.R. § 1502.16(c) ("in the case of a reservation" EIS must discuss conflicts between proposal and federal and tribal objectives for reservation); *id.* § 1503.1(a)(2)(ii) (must seek tribal comments when "effects may be on a reservation"); *id.* § 1506.6(b)(3)(ii) (notice required "when effects may occur on reservations"). Likewise, the Department's regulations require tribal comments when a proposal "may affect the environment of either: (1) Indian trust or restricted land; or (2) Other Indian trust resources, trust assets, or tribal health and safety." 43 C.F.R. § 46.435(c). These regulations give the Navajo Nation a procedural right to protect its trust lands and other interests. *See Churchill County*, 150 F.3d at 1078 (duty to seek comments from local agencies conferred procedural right on county for purpose of injury); *Douglas County*, 48 F.3d at 1501 (same); *California v. Block*, 690 F.2d 753, 776 (9th Cir. 1982) (same for state).

Implicit in the regulations is recognition of the Navajo Nation's concrete and particularized interests in the Reservation and other trust resources and in properly accounting for effects of any proposed federal action on those trust assets, including to the health and safety of Navajo people. The Navajo Nation has concrete interests in seeing the Reservation's purpose fulfilled as a livable, productive, and permanent homeland. That cannot occur without an adequate water supply, whether or not the Navajo Nation is entitled to water rights for the lands at issue under *Winters v. United States*, 207 U.S. 564 (1908). In other words,

the Navajo Nation has a vital interest in the supply, management, and quality of local water resources having any potential to satisfy its needs, either in full or part. Complaint ¶¶ 14, 27 (ER 130, 132); Navajo Response at 9-12 (ER 75-78); *see Arizona v. California*, 373 U.S. at 600 (water is reserved "to satisfy the future as well as the present needs of the Indian Reservations"); *id.* at 552 ("Much of this large basin is so arid that it is . . . largely dependent upon managed use of the waters of the Colorado River System to make it productive and inhabitable."); *id.* at 598-99 (water is "essential to the life of the Indian people" on "arid" reservations); *Pyramid Lake Paiute Tribe of Indians v. Nev., Dep't of Wildlife*, 724 F.3d 1181, 1188 (9th Cir. 2013) (tribe has "well established" interest in maximizing flows to reservation); Shortage Guidelines EIS vol. I at 3-96 (unquantified Navajo rights constitute an Indian Trust Asset) (ER 119); *id.* vol. I at Glo-6 ("Indian Trust Assets are 'legal interests' in 'assets' held in 'trust' by the federal government for federally recognized Indian tribes") (ER 270); *cf. Nebraska v. Wyoming*, 325 U.S. 589, 610 (1945) ("deprivation of water in arid or semiarid regions cannot help but be injurious"). These unique interests are more substantive than the public's collective interest in procedural compliance. *See Cantrell*, 241 F.3d at 681; *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516-17 (9th Cir. 1992).

The Navajo Nation's sovereignty also favors standing. A state, for example, "is entitled to special solicitude in [the] standing analysis," *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 520 (2007), due to "a well-founded desire to protect both its territory and its proprietary interests both from direct harm and from spill-over effects resulting from action on federal land." *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011). Similarly, local governments may "uniquely 'sue to protect their its own proprietary interests,'" *id.* (quoting *City of Sausalito*, 386 F.3d at 1197), so cities and counties have standing to protect their lands and local drinking water from a federal program's effects. *Churchill County*, 150 F.3d at 1078-80 (concrete interests in land and water management); *see City of Sausalito*, 386 F.3d at 1198 (city "has a proprietary interest in protecting its natural resources from harm"). These principles should apply equally, if not more so, to the Navajo Nation, a sovereign government with proprietary interests in trust resources that the Federal Defendants are obligated to protect.

NEPA, and the regulations, departmental policies and procedures and handbooks promulgated by the Federal Defendants to implement NEPA and carry out the trust responsibility protect tribal interests in trust resources. The Reservation (the ultimate basis of standing) is also adjacent to the Colorado River in the Lower Basin (the potentially affected area). Complaint ¶¶ 1, 11-13 (ER 124-

25, 127-30). The Navajo Nation, therefore, has a procedural right to protect its concrete interests, and it satisfies the procedural injury test's second requirement.

iv. There is a Reasonable Probability of Threat to the Navajo Nation's Interests.

The third part of the test relaxes the imminence component of injury, and a plaintiff need only show "'the reasonable probability' of the challenged action's threat to [its] concrete interest.'" *Better Forestry*, 341 F.3d at 972 (quoting *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001)). The District Court misapplied this standard in dismissing the Navajo Nation's claims.

NEPA procedures require due consideration of tribal interests, *see supra* Part VI.A.2.a.iii, so a violation of those procedures necessarily threatens tribal interests by creating a risk of overlooking harmful effects. *See Churchill County*, 150 F.3d at 1079 ("unexplored" effects "threaten" city and county lands); *Mumma*, 956 F.2d at 1514 ("alleged procedural failure in the EIS" creates "risk" of overlooking impacts so it is "actual, present harm"); Complaint ¶¶ 63-66, 69-70 (ER 141-42, 143). Moreover, a plaintiff "need not assert that any specific injury will occur" if it alleges that impacts "'might be overlooked as a result of deficiencies in the government's [NEPA] analysis,'" *Better Forestry*, 341 F.3d at 971-72 (quoting *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1355 (9th Cir. 1994)), because otherwise a court "'would in essence be requiring that the plaintiff conduct the same environmental investigation that he seeks in his suit to compel

the agency to undertake.'" *Id.* at 972 (quoting *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975)). Here, it is logical to assert that ill-informed guidelines for managing the Colorado River threaten Navajo interests in adjacent trust lands and related Reservation water needs. *See Churchill County*, 150 F.3d at 1079 ("reasonably probable" that transfer of local water rights will harm city and county lands in absence of EIS); *Douglas County*, 48 F.3d at 1501 ("It is logical for the County to assert that its lands could be threatened by how the adjoining federal lands are managed."); Complaint ¶ 29 (actions "threaten the availability of Colorado River water to satisfy the Navajo Nation's rights and needs") (ER 132).

In addition, the subordination of CAP water to California's allocation of 4.4 mafy from the Colorado River and a shortage-sharing agreement with Nevada render Arizona particularly vulnerable to water shortages. *See* Shortage Guidelines EIS vol. I at 3-34, 4-19 to -22, 4-142 to -146 (ER 196, 198-201, 247-51); Navajo Response at 29-30 (ER 95-96). This affects the Navajo Nation because its water use from the Colorado River in the Lower Basin would be accounted for as part of Arizona's 2.8 mafy allocation, and even with its cognizable claims to senior water rights, *see supra* Part IV.A, the complex process of bringing water to the Reservation in a contentious political climate makes it difficult to predict the full scope of Navajo rights after litigation or settlement. Reclamation's promise to manage the Colorado River "consistent with" any tribal water rights "developed,

established or quantified during the interim period" ignores political and practical realities. Shortage Guidelines EIS vol. I at 4-249 (ER 121); *id.* vol. IV at IT-109 (ER 115); Navajo Response at 30, 34-37 (ER 96, 98-101). Given that the likelihood of a shortage determination would be different under each of the alternatives in the guidelines proposed in the EIS, *see* Shortage Guidelines EIS vol. I at 2-26, 4-97 to -152 (ER 187, 202-54), it is reasonably probable that unexplored effects threaten Navajo interests, especially since the precise nature of any Navajo Nation entitlement is unknown. *See* Douglas Kenney et al., *The Colorado River and the Inevitability of Institutional Change*, 32 PUB. LAND & RESOURCES L. REV. 103, 137-38 (2011) (Colorado River leaders view Shortage Guidelines as "insufficient to address conditions likely to develop in the coming decade or two," including issues with "unresolved" Navajo claims). Similarly, Arizona receives a substantial share of Lower Basin surplus water, 1964 Decree art. II(B)(2), 376 U.S. at 342, which may be needed to satisfy Navajo claims, and since the likelihood of a surplus determination varied with each alternative considered in the EIS, Shortage Guidelines EIS vol. I at 2-26, 4-116 to -120, 4-151 (ER 187, 221-25, 253), it is reasonably probable that unexplored effects threaten the Navajo Nation's interests.

The Shortage Guidelines also encourage water users to intentionally create surplus supplies of water, through conservation, purchase, importation, and other methods, for their consumptive use. *Id.* at 2-19, 4-333 (ER 183, 255); Shortage

Guidelines ROD at 38-43 (ER 166-71). Even though these guidelines will significantly reduce the supply of currently undeveloped water from the Colorado River available to Arizona for up to fifty years, Shortage Guidelines ROD at 58 (ER 172), Reclamation failed to consider whether this hinders the Navajo Nation's ability to develop its own surplus supplies in the future. *See* Shortage Guidelines EIS vol. I at 4-333 to -342 (ER 255-64). It is reasonable to assume that the Navajo Nation may obtain decreed rights during this time or otherwise acquire the right to use mainstem water and that the intentionally-created surplus supplies allowed to be developed under the Shortage Guidelines may be needed to satisfy its rights. It is also reasonable to fear that these provisions will limit the Navajo Nation's future options both in terms of adjudicating its rights and in developing the infrastructure required to deliver the much needed water supplies to the Reservation.

Further, the Secretary adopted the guidelines based, in no small part, on a desire to avoid litigation and maintain a multi-state consensus. *See supra* Part IV.B. Having appeased the Lower Basin states, it is reasonably probable that the Federal Defendants are now not inclined to disturb the still waters by assisting the Navajo Nation in protecting and obtaining water supplies required to meet the needs of the Navajo Reservation. Complaint ¶¶ 25-31, 40, 45 (describing efforts to obtain federal assistance and alleging guidelines will cause harmful management practices to "continue") (ER 131-33, 137, 140); Navajo Response at 36 (ER 100).

The Complaint is presumed to embrace facts supporting all of these allegations.

The Navajo Nation further alleged that the guidelines will increase the Lower Basin states' reliance on the Colorado River, Complaint ¶¶ 31, 40, 45 (ER 133, 137, 140), which was the only injury the District Court examined under the reasonable probability standard. Order at 11 (ER 14). The Navajo Nation adequately alleged a reasonable probability of threat here as well, because the risk of injury need not "be certain, as opposed to contingent," and the fact that a "potential injury would be the result of a chain of events need not doom the standing claims." *Mumma*, 956 F.2d at 1515; *see Pyramid Lake*, 724 F.3d at 1187 (even though tribe lacked water rights under decree and its rights were not threatened it satisfied Article III standing by alleging defendants' "proposed transfer of water rights . . . will increase demand . . . and thereby diminish flows to Pyramid Lake," which was "central to [tribe's] cultural and economic life").

As shown, the Federal Defendants did not properly account for the Navajo Nation's concrete interests, the Reservation's purpose as a permanent homeland, or related water needs, and it is reasonably probable that the unexplored effects of long-term guidelines for managing the adjacent Colorado River threaten those interests. The Navajo Nation, therefore, has satisfied the procedural injury test's third part.

b. The Navajo Nation Satisfied the Relaxed Causation and Redressability Requirements.

After showing procedural injury, "'the causation and redressability requirements are relaxed,'" *Food Safety*, 636 F.3d at 1172 (quoting *Better Forestry*, 341 F.3d at 975), and the Navajo Nation "'must show only that [it has] a procedural right that, if exercised, *could* protect [its] concrete interests.'" *Pit River I*, 469 F.3d at 779 (quoting *Defenders of Wildlife v. U.S. Envtl. Prot. Agency*, 420 F.3d 946, 957 (9th Cir. 2005)). "'[I]t is enough that a revised EIS may redress'" alleged procedural injuries. *Kraayenbrink*, 632 F.3d at 485 (quoting *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1113 (9th Cir. 2002)).

The second element of Article III standing, causation, is often linked to the reasonable probability standard, *see, e.g.*, *Veneman*, 313 F.3d at 1113; *Hall*, 266 F.3d at 977, but it "is only implicated where the concern is that an injury caused by a third party is too tenuously connected to the acts of the defendant." *Better Forestry*, 341 F.3d at 975 (citing *Mumma*, 956 F.2d at 1518). As discussed above, the Navajo Nation alleged the reasonable probability of threat to its interests from (1) risks created by uninformed decisions; (2) the logical threat to the Reservation from guidelines pre-determining when the Secretary will declare a surplus or shortage; and (3) the resulting disincentive for the Federal Defendants to fulfill their obligations concerning the Reservation. *See supra* Part VI.A.2.a.iv. Each allegation of threat is a direct result of the Federal Defendants' conduct, so

causation is satisfied. *See Mumma*, 956 F.2d at 1517-18.

For the third element of Article III standing, redressability, a plaintiff with a procedural right "has a relatively easy burden to meet." *Better Forestry*, 341 F.3d at 976; *see Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2004) ("alleged noncompliance with NEPA is sufficient to meet [relaxed causation and redressability] requirements"). Procedural injuries are redressed by requiring procedural compliance, *Pit River I*, 469 F.3d at 779, so the Navajo Nation need not show that a new EIS will result in a different decision. *Laub*, 342 F.3d at 1087; *Cantrell*, 241 F.3d at 682. Since an EIS must discuss conflicts with federal and tribal objectives for reservation lands, 40 C.F.R. § 1502.16(c); *see supra* Part VI.A.2.a.iii, it follows that the Federal Defendants' decision-making could be influenced by a revised EIS properly studying such effects. *See Laub*, 342 F.3d at 1087 (agency "could be influenced by" revised EIS because regulation requires it to consider specific effects); *Hall*, 266 F.3d at 977 ("suffices that, as NEPA contemplates, the [agency] could be influenced by environmental considerations that NEPA requires an agency to study"). The Navajo Nation has satisfied the relaxed redressability standard.

3. NEPA's Zone of Interests is No Longer Relevant to Standing.

Historically, after a plaintiff satisfied the requirements for constitutional standing, courts examined the relevant statutes and applied a "zone of interests"

test to complete the standing analysis. *See* Order at 12 n.3 (ER 15). The Supreme Court, however, recently clarified that the zone of interests test relates to whether a plaintiff has a cause of action under a particular statute, not to whether a plaintiff has standing. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386-90 (2014); *see El Dorado Estates v. City of Fillmore*, 765 F.3d 1118, 1122 (9th Cir. 2014) (after *Lexmark*, question "is more appropriately dealt with not in terms of standing but instead as a matter of statutory interpretation"); *Metcalf v. Blue Cross Blue Shield of Mich.*, No. 3:14-cv-00302-ST, 2014 WL 5776160, at *3 (D. Or. Nov. 5, 2014) ("In *Lexmark*, the Supreme Court clarified its jurisprudence on the requirement of statutory 'standing' – by eliminating it."). Since this appeal relates to whether the Navajo Nation has standing, and the zone of interests test and other "prudential" requirements no longer apply to that inquiry, the Navajo Nation need not address those requirements herein.

Regardless, the Navajo Nation's procedural injuries fall within NEPA's zone of interests. The Supreme Court formerly instructed "that the 'zone of interests' test is to be construed generously" and "'is not meant to be especially demanding,'" so an interest falls outside of NEPA's zone only if it is "'so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *City of Sausalito*, 386 F.3d at 1200 (quoting *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388,

399 (1987)); *accord Lexmark*, 134 S. Ct. at 1389. Here, NEPA regulations protect tribal interests and give tribal governments an important role in the EIS process, *see supra* Part VI.A.2.a.iii, so the Navajo Nation's procedural injuries fall under NEPA's protective umbrella and it is reasonable to assume that Congress intended to permit this suit. *See City of Davis*, 521 F.2d at 672 ("municipal interests fall within the scope of NEPA's protections" because "statute expressly contemplates that . . . local governments are to play an important role"). Thus, although not related to standing or this appeal, NEPA provides the Navajo Nation with a cause of action.

B. THE NAVAJO NATION'S BREACH OF TRUST CLAIM IS NOT BARRED BY SOVEREIGN IMMUNITY.

1. Jurisdiction is Subject to De Novo Review.

This Court "review[s] issues of sovereign immunity and subject matter jurisdiction *de novo*." *Orff v. United States*, 358 F.3d 1137, 1142 (9th Cir. 2004); *accord Clinton v. Babbitt*, 180 F.3d 1081, 1086 (9th Cir. 1999).

2. The APA Waives the United States' Sovereign Immunity for Breach of Trust Claims Seeking Injunctive and Declaratory Relief.

Given the broad waiver of sovereign immunity Congress enacted by amendment of the APA, the Federal Defendants' sovereign immunity does not bar the Navajo Nation's seventh claim for breach of trust seeking injunctive and declaratory relief. Section 702 of the APA waives the immunity of the United

States for actions seeking relief other than monetary damages, and provides in relevant part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702. The first sentence of section 702 was included in the APA as originally enacted in 1946; Congress amended section 702 in 1976 to add the second sentence. *See Presbyterian Church*, 870 F.2d at 524. By the 1976 amendment, "Congress enacted a general consent to" actions against the Secretary for injunctive and declaratory relief. *United States v. Mitchell*, 463 U.S. 206, 227 n.32 (1983). The amendment of section "702 was designed to 'eliminate the defense of sovereign immunity as to *any* action in a Federal court seeking relief other than money damages and stating a claim based on the assertion of unlawful official action by an agency or by an officer or employee of the agency.'" *Presbyterian Church*, 870 F.2d at 524 (quoting H. R. REP. NO. 94-1656 (1976) (emphasis added)). This is Ninth Circuit law for claims with a cause of action grounded in statutes, treaties, the Constitution, or the common law, as well as claims premised on the APA.

This Court has repeatedly held that the broad waiver of federal sovereign immunity that Congress added in 1976 is not cabined by the reference to "agency action" in the first sentence, or the definition of "agency action" contained in the APA. *See* 5 U.S.C. § 551(13). In *Presbyterian Church*, the Court explicitly rejected the federal defendants' argument "that § 702's waiver of sovereign immunity is limited to instances of 'agency action' as technically defined in § 551(13)." 870 F.2d at 525. The Court observed that while such a limitation may have existed in section 702's original 1946 form, "[o]n its face, the 1976 amendment is an *unqualified* waiver of sovereign immunity in actions seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable." *Id.* (emphasis added);[8] *accord Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conservation of Mont.*, 792 F.2d 782, 793 (9th Cir. 1986) ("[A]bolition of sovereign immunity in § 702 is not limited to suits 'under the [APA]'; the abolition applies to every 'action in a court of the United States seeking relief other than money damages . . . . No words of § 702 and no words of the legislative history provides any restriction to suits 'under' the APA." (quoting 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 23:19 (2d ed. 1983))).

[8] While earlier decisions of the Court discussed below reached the same conclusion, *Presbyterian Church* contains the Court's most searching analysis of the 1976 amendment to section 702 and it is particularly relevant as a case where the waiver of sovereign immunity was found to apply.

Indeed, this Court consistently recognizes that the APA's waiver of sovereign immunity extends to all non-monetary claims challenging federal misfeasance. Thus, in *Hill v. United States*, the Court held that the 1976 amendment to the APA constitutes "a blanket waiver of sovereign immunity as to a broad category of actions against the government, and by its terms it certainly includes the non-monetary relief sought by" the plaintiff, 571 F.2d 1098, 1102 (9th Cir. 1978), and that the waiver applied retroactively to the plaintiff's claims for declaratory and affirmative relief, brought pursuant to the Tucker Act, to adjust his civil service status asserted prior to 1976. *Id.* at 1101-03 & n.7;[9] *see also Clinton v. Babbitt*, 180 F.3d at 1087 (APA waives sovereign immunity for constitutional claims brought pursuant to section 1331 and seeking injunctive and declaratory relief, citing *Presbyterian Church* and *Assiniboine & Sioux Tribes*); *Pit River Home & Agric. Coop. Ass'n. v. United States*, 30 F.3d 1088, 1097 n.5 (9th Cir. 1994) (APA waives sovereign immunity in non-monetary actions for breach of fiduciary duty against the United States under 28 U.S.C. § 1331; *Assiniboine & Sioux Tribes*, 792 F.2d at 793 ("Section 702 does waive sovereign immunity in non-statutory review actions for non-monetary claims for relief brought under 28

[9] The Supreme Court subsequently determined that Congress intended to provide both a cause of action for monetary claims against the United States and a waiver of sovereign immunity in the Tucker Act. *See United States v. Mitchell*, 463 U.S. 206, 218-19 (1983).

U.S.C. § 1331" and waives sovereign immunity in action by the plaintiff tribes under 28 U.S.C. § 1362 alleging violations of the Indian Mineral Leasing Act of 1938 and federal trust obligations); *Rowe v. United States*, 633 F.2d 799, 801 (9th Cir. 1980) (where claim was premised on the APA, Court reiterated its holding in *Hill* that the APA provides "a waiver of sovereign immunity in an action for relief other than money damages that states a claim that a federal agency or officer failed to act as required in an official capacity" (footnote omitted)).[10]

3. The District Court Improperly Limited the APA's Waiver of Sovereign Immunity to Non-APA Claims Alleging a Violation of the Constitution.

The District Court held that the Navajo Nation's breach of trust claims were barred by the sovereign immunity of the United States because "the Nation fail[ed] to challenge any particular agency action or bring a constitutional claim." Order at 15 (ER 18). This decision is wrong on two counts. First, if, as the Navajo Nation

[10] Other Circuits have reached the same result. In 2011, the Federal Circuit held that section 702 waived the federal government's immunity for declaratory relief sought on a cause of action arising under the Patent Act, *Delano Farms Co. v. Cal. Table Grape Comm'n*, 655 F.3d 1337, 1343-50 (Fed. Cir. 2011), and in doing so, it heavily relied on *Presbyterian Church. Id.* at 1346. Likewise, the D.C. Circuit held "that the 'APA's waiver of sovereign immunity [in section 702] applies to any suit whether under the APA or not.'" *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 186 (D.C. Cir. 2006) (quoting *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996)); *accord Treasurer of N.J. v. U.S. Dep't of Treasury*, 684 F.3d 382, 395-400 (3d Cir. 2012); *Michigan v. U.S. Army Corps. of Eng'rs*, 667 F.3d 765, 774-76 (7th Cir. 2011); *United States v. City of Detroit*, 329 F.3d 515, 521 (6th Cir. 2003); *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988).

asserts and this Court has repeatedly confirmed, the waiver of sovereign immunity now encompassed in section 702 extends to non-APA claims, there is no textual, historical, legal, or logical basis for limiting its application solely to constitutional claims. Second, because the Navajo Nation does not rely on the APA for its cause of action for its breach of trust claim, the additional jurisdictional requirements of the APA, such as the need for final agency action, do not apply.

In the District Court's view, section 702's waiver of the sovereign immunity of the United States is effective in only three situations: (1) when the plaintiff's complaint challenges "final agency action" as defined in 5 U.S.C. § 704; (2) when the plaintiff seeks to compel the United States to undertake some legally mandated action as provided in 5 U.S.C. § 706; and (3) when the plaintiff alleges that federal action is unconstitutional. Order at 14-15 (ER 17-18). The District Court declined to accept what it characterized as the Navajo Nation's "invitation" to the Court "to adopt a broad reading of *Presbyterian Church* that would expand its reading of the APA's waiver beyond constitutional claims to encompass a general breach of trust claim." *Id.* at 15 (ER 18). However, nothing in the text of section 702 refers to constitutional claims and the Navajo Nation's reliance on section 702 to overcome the Federal Defendants' sovereign immunity did not require an expansion of existing law.

The narrow interpretation of *Presbyterian Church* advocated by the Federal Defendants and adopted by the District Court can only be reached by relying on isolated statements from the decision in a vacuum and ignoring the context of the issues presented for the Court's review. In *Presbyterian Church*, the Court examined claims that surveillance activities by the Immigration and Naturalization Service violated the First and Fourth Amendments to the Constitution, and the Court found that section "702 waives sovereign immunity to permit such claims. 870 F.2d at 525 n.9. Thus, statements in *Presbyterian Church* that section "702 waives sovereign immunity . . . for constitutional claims," *id.*, and permits actions "for equitable relief against unconstitutional government conduct," *id.* at 526, simply reflect the fact that the claims before the Court were constitutional in nature; the statements cannot be read as a limitation on the Court's broader holding. For the same reason, the statement in *Presbyterian Church* that the plaintiffs "properly invoke federal jurisdiction under 28 U.S.C § 1331 because their claims arise out of the Constitution," *id.* at 524, cannot be read as a holding that the Court's federal question jurisdiction does not also extend to claims arising from a treaty, statute, or the common law. Nothing in the *Presbyterian Church* decision limits the Court's broad holding that the APA waives the government's immunity from suit in all cases seeking non-monetary relief. The Navajo Nation's breach of trust claims are not dependent upon the APA and, as was the case in

Presbyterian Church, the APA waives the United States' immunity for the Navajo Nation's non-APA claims seeking non-monetary relief against the Federal Defendants.

Contrary to the argument advanced by the United States and accepted by the District Court, *see* Federal Defendants' Memo at 31-32 (ER 151-52); Order at 14 (ER 17), this Court's decision in *Gallo Cattle* is not controlling here, but neither is it inconsistent with the precedent reading section 702 to provide a broad waiver of federal immunity.[11] *Gallo Cattle* is distinguishable because the plaintiff there, unlike the Navajo Nation, relied on the APA for its cause of action. In *Gallo Cattle*, the plaintiff challenged the decision of a Department of Agriculture administrative hearing officer denying interim relief pursuant to the judicial review provisions of the Dairy and Tobacco Adjustment Act of 1983, and alternatively, the APA. 159 F.3d at 1196-98. The lower court held that neither statute authorized the federal courts to review an interim agency decision, and this Court affirmed. *Id.* at 1196-1200. The lack of final agency action precluded the plaintiff

[11] In *Gros Ventre Tribe v. United States*, the Court stated that it could not reconcile the decision in *Presbyterian Church* with the decision in *Gallo Cattle*. 469 F.3d 801, 803-10 (9th Cir. 2006). The Court, however, did not base its decision on the sovereign immunity of the United States; instead, it rejected the tribal claims on other grounds. *Id.* at 810; *see Equal Employment Opportunity Comm'n v. Peabody W. Coal Co.*, 610 F.3d 1070, 1086 (9th Cir. 2010) (noting same tension between *Presbyterian Church* and *Gallo Cattle* found in *Gros Ventre*, but again resolving case on other grounds.).

from stating a claim under the APA. *Id.* The Court's statement that section 704's requirement of final agency action is a "limitation" on the APA's waiver of sovereign immunity, *id.* at 1198, was once again a product of the matter before the Court and has no application to the Navajo Nation's seventh claim for relief, which does not depend on the APA for its cause of action.

Thus, as this Court has observed, *Gallo Cattle* is "readily distinguishable" from *Presbyterian Church* because "*Gallo Cattle* concerns challenges under the APA itself." *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 867 n.22 (9th Cir. 2011), *vacated on other grounds en banc*, 678 F.3d 1013 (9th Cir. 2012). "The more principled way to reconcile the cases is to acknowledge that the claims in *Gallo Cattle* were brought under the APA, and were necessarily limited by § 704's requirement of finality." *Valentini v. Shinseki*, 860 F. Supp. 2d 1079, 1101 (C.D. Cal. 2012). Where, as here, "the allegation is that the agency action violates another law – be it statutory, constitutional, or common law – the waiver of sovereign immunity is not so limited, but rather is the broad, unqualified waiver described in *Presbyterian Church* and suggested in the plain language of the statute." *Id.*

Further, because the Court held in *Gallo Cattle* that the plaintiff had failed to state a claim under the APA, the APA's waiver of immunity was necessarily ineffective *for that claim.* In *Hill*, the Court recognized that the failure of Congress

to provide a cause of action for a claim can be construed as a failure to waive the immunity of the United States, so that the distinct questions of whether a plaintiff has stated a claim against the United States and whether there is a waiver of federal immunity are treated together as one question, citing the Supreme Court's decision in *United States v. Testan*, 424 U.S. 392 (1976), as an example:

> The Court in Testan combined these two concepts, interpreting Congress' failure to grant the substantive right as synonymous with a refusal to waive sovereign immunity. In many suits against the government, of course, sovereign immunity and failure to state a claim upon which relief can be granted are not identical.

Hill, 571 F.2d at 1102 n.7.[12] The matter is further complicated by the 1976 amendment to the APA, where Congress provided a waiver of immunity for claims alleging a violation of that statute (where the issues may be collapsed), but that also extends to non-APA claims against the United States seeking non-monetary relief (where the issues remain distinct).

Suits brought pursuant to the APA, such as *Gallo Cattle*, are like *Testan* in that failure to meet the statutory requirements to assert an APA claim can be, and have been, interpreted as a failure of Congress to waive the immunity of the United

[12] In *Testan*, the Supreme Court held that because neither the Classification Act nor the Back Pay Act provided a cause of action for money damages against the United States, the Congress had not consented to suit, and "the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" 424 U.S. at 399 (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)).

States for such actions; the issues of sovereign immunity and failure to state a claim are two sides of the same coin. However, the Navajo Nation's seventh claim is in the second category recognized by *Hill*. Like the claims presented in *Hill* and *Presbyterian Church*, the Navajo Nation's cause of action and the applicable waiver of sovereign immunity are distinct issues. *Gallo Cattle* offers no guidance for the Court when faced with a claim, such as the Navajo Nation's seventh claim for relief, that does not rely on the APA for its cause of action.[13]

The District Court's reliance on *Robinson v. Salazar*, 885 F. Supp. 2d 1002 (E.D. Cal. 2012), was similarly misplaced. *See* Order at 14-15 (ER 17-18). In *Robinson*, while the plaintiffs characterized their claims as arising under the Constitution, the district court disagreed, finding that they were instead "issues within the realm of the DOI administrative duties of defendant [Secretary] Salazar." 885 F. Supp. 2d at 1028. The district court did not hold that the APA's waiver was limited to claims grounded in the APA and the Constitution, but rather that the plaintiffs did not present constitutional claims and had expressly disavowed reliance on the APA for their cause of action. *Id.* Further, the plaintiffs

[13] The failure of the Court in *Gallo Cattle* to cite *Presbyterian Church* or other Ninth Circuit precedent concerning the scope of the APA waiver for *non-APA* claims is telling. Those cases were of little relevance to the issue in *Gallo Cattle* – a case where the plaintiff looked to the APA for both its cause of action and the waiver of sovereign immunity, and where section 702's waiver of sovereign immunity would apply only if the plaintiff met the requirements established by Congress to state a cause of action under the APA.

in *Robinson* did not look to the APA for a waiver of the Secretary's immunity, but argued that the Secretary acted ultra vires and sought injunctive relief under the theory of *Ex Parte Young*, 209 U.S. 123, 166 (1908). *Robinson*, 885 F. Supp. 2d at 1028. The district court correctly observed that Congress in amending section 702 intended to "replace[] the *Ex parte Young* fiction." *Id.* (citing *Presbyterian Church*, 870 F.2d at 525-26). The district court's holding in *Robinson* was simply that, on the facts before the court, "the APA is the remedy for suits against federal officers for actions arising from their administrative duties." *Id*. As with *Gallo Cattle*, the decision in *Robinson* offers little to guide the Court's inquiry here.

In sum, by the 1976 amendment to section 702, "Congress enacted a general consent to" actions against the Secretary for injunctive and declaratory relief. *Mitchell*, 463 U.S. at 227 n.32. If section 702 waives the United States' immunity for claims not grounded in the APA, that waiver cannot be limited to constitutional claims, and the District Court erred in reaching that conclusion. By declining to accept the "invitation" of the Navajo Nation to read the waiver of sovereign immunity in section 702 to extend to all claims against the government for non-monetary relief, and following instead the miscues of the Federal Defendants, the District Court erred.[14] This Court should reverse the Order dismissing the breach

[14] Before the District Court, the United States cited only *Gallo Cattle* in its Motion to Dismiss, neglecting to mention the substantial authority in this Circuit

of trust claim because it is clear that the APA waives the United States' sovereign immunity for all actions seeking non-monetary relief from federal misfeasance, regardless of whether the claims arise from a statute, treaty, the Constitution, or the common law.

C. ALTERNATIVELY, DISMISSAL WITH LEAVE TO AMEND THE COMPLAINT IS WARRANTED.

1. Denial of Leave to Amend is Reviewed for Abuse of Discretion.

Orders under Federal Rule of Civil Procedure 60(b)(6) are reviewed for "an abuse of discretion," such as when a court "'does not apply the correct law or . . . rests its decision on a clearly erroneous finding of material fact.'" *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008) (quoting *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1223 (9th Cir. 2000)).

2. The District Court Abused its Discretion.

To the extent the Complaint is inadequate, the District Court abused its discretion when it denied the Post-Judgment Motion. Post-Judgment Order at 3 (ER 3). In seeking relief, the Navajo Nation relied upon the discussion of leave to

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and elsewhere addressing the actual question before the Court, which is the application of the APA's waiver of sovereign immunity to non-APA claims. Federal Defendants' Memo at 31-32 (ER 151-52). This argument is inconsistent with the position taken by the United States in other Circuits, where it has conceded that the APA waives the immunity of the United States for breach of trust claims. *See, e.g.*, *El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 892 (D.C. Cir. 2014).

amend at the July 11 hearing, the broad mandate of Federal Rule of Civil Procedure 15 to freely grant such leave when justice requires, Rule 15's underlying purpose of facilitating decisions on the merits rather than on the pleadings, and the unusual fact that the dismissal was effectively with prejudice due to the statute of limitations. Post-Judgment Memorandum at 2-5 (ER 43-46).

The District Court invoked the "'extraordinary circumstances'" test, Post-Judgment Order at 2 (quoting *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993)) (ER 2), and found that the Navajo Nation failed to: (1) correct deficiencies in its claims in its two prior amended complaints or explain this omission; (2) explain how the dismissal was effectively with prejudice because of the running of the applicable statute of limitations; or (3) identify specific amendments the Navajo Nation could make. *Id.* at 2-3 (ER 2-3). The District Court abused its discretion because it applied the law incorrectly and made erroneous findings of material fact.

First, the extraordinary circumstances test only applies when a party seeks relief under Rule 60(b)(6) because it waited too long to obtain relief under a different subsection. *See, e.g.*, *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393 (1993); *Alpine Land*, 984 F.2d at 1049-50; *see* FED. R. CIV. P. 60(b)-(c); 11 FEDERAL PRACTICE AND PROCEDURE § 2864 (3d ed.) ("'extraordinary circumstances' test is not invoked" if "movant clearly

demonstrates some 'other reason' justifying relief outside of the earlier clauses in the rule"); Post-Judgment Reply at 4 (ER 28). The Post-Judgment Motion was timely under either Federal Rule of Civil Procedure 60(b) or Rule 59(e), so the District Court abused its discretion by applying incorrect law. In addition, justice requires that the Navajo Nation not be subject to an extraordinary circumstances test when it was the District Court's initial failure to properly consider leave to amend under the permissive principles of Rule 15(a)(2) that put the Navajo Nation in the position of having to seek relief under Rule 60(b)(6).

Second, the District Court heavily relied on the "previous opportunities to amend" and wrongly found the Navajo Nation did "not explain" its failure to address any pleading deficiencies in its first and second amended complaints. Post-Judgment Order at 3 (ER 3). In fact, the Navajo Nation explained that the first amendment, immediately following a nine-year stay and filed prior to the motions to dismiss, "was necessitated by the passage of time and the occurrence of additional events," and that the second amendment, filed subsequent to the motions to dismiss and with the parties' consent, was "for the sole purpose of voluntarily dismissing its sixth claim for relief and removing all substantive references to that claim." Post-Judgment Reply at 9 (ER 30). The Navajo Nation also explained that it "did not obtain leave to amend any other claim or factual allegation because it believed the allegations . . . adequately stated its claims for relief and met the

legal requirements to withstand" a motion to dismiss. *Id.* (ER 30). The District Court's clearly erroneous finding of material fact was an abuse of discretion.

Third, the District Court made a clearly erroneous finding that the Navajo Nation did "not explain what statute of limitations might bar" its claims. Post-Judgment Order at 3 (ER 3). In fact, the Navajo Nation explained that 28 U.S.C. § 2401(a) establishes a six-year deadline to sue the Federal Defendants, and that the dismissal without prejudice subjected its claims to this statute with the result that all of the Nation's claims would be time-barred. Post-Judgment Memorandum at 4-5 (ER 45-46); Post-Judgment Reply at 5 (ER 29).

Fourth, instead of presuming the Complaint embraced the necessary facts, *see supra* Part VI.A.2.a.i, the District Court required the Navajo Nation "to identify any specific amendments it would make." Post-Judgment Reply at 3 (ER 27). Even without a Rule 15 motion, a court should deny leave to amend only if it finds "that the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990); *see, e.g.*, *United States v. Corinthian Colleges*, 655 F.3d 984, 995-96 (9th Cir. 2011); *Kanelos v. County of Mohave*, Nos. CV-10-8099-PCT-GMS, CV-10-8149-PCT-GMS, 2011 WL 587203, at *5 (D. Ariz. Feb. 9, 2011) (District Court gave leave in absence of Rule 15 motion given "possibility" plaintiff could "assert sufficiently specific facts to establish standing"). The District Court's

finding of "unclear futility," Post-Judgment Order at 3 (ER 3), falls short of the finding required by *Cook* and *Corinthian Colleges*, especially where, as here, there are "distinguishing factors" like the trust relationship between the parties and "the pervasive presumption favoring Indian rights" flowing therefrom. *Shoshone-Bannock Tribes of Fort Hall Reservation v. Leavitt*, 408 F. Supp. 2d 1073, 1081 (D. Or. 2005) (balance tipped "decidedly in favor of achieving justice" under Rule 60(b)(6)). Although the Navajo Nation believes it adequately alleged facts to show standing, to the extent it did not, this brief shows it is possible to amend the claims and to otherwise proceed with this lawsuit.

VII. CONCLUSION

For all of the foregoing reasons, the Navajo Nation respectfully requests this Court to reverse the Order and find that (1) the Navajo Nation has standing to bring its first and second claims; and (2) the APA waived federal immunity with respect to the seventh claim. Alternatively, the Navajo Nation requests leave to amend its first, second, and seventh claims for relief.

Respectfully submitted on this
24th day of December 2014

Stanley M. Pollack
M. Kathryn Hoover
NAVAJO NATION DEPARTMENT
OF JUSTICE
Post Office Drawer 2010
Window Rock, Arizona 86515
Telephone: (928) 871-7510
Fax: (928) 871-6200
smpollack@nndoj.org
khoover@nndoj.org

Scott B. McElroy
Alice E. Walker
McELROY, MEYER, WALKER
& CONDON, P.C.
1007 Pearl Street, Suite 220
Boulder, Colorado 80302
Telephone: (303) 442-2021
Fax: (303) 444-3490
smcelroy@mmwclaw.com
awalker@mmwclaw.com

By: */s/ Scott B. McElroy*
SCOTT B. MCELROY
ATTORNEYS FOR APPELLANT,
NAVAJO NATION

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 11,713 words.

STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

ADDENDUM

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Administrative Procedure Act, 5 U.S.C. §§ 702, 704, 706

National Environmental Policy Act, 42 U.S. C. §§ 4321-70h

40 C.F.R. § 1502.16(c)

40 C.F.R. § 1503.1(a)(2)(ii)

40 C.F.R. § 1506.6(b)(3)(ii)

43 C.F.R. § 46.435(c)

5 U.S.C.A. § 702

§ 702. Right of review

Currentness

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

Notes of Decisions (1155)

5 U.S.C.A. § 702, 5 USCA § 702
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

End of Document

5 U.S.C.A. § 704

§ 704. Actions reviewable

Currentness

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

Notes of Decisions (876)

5 U.S.C.A. § 704, 5 USCA § 704
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

End of Document

5 U.S.C.A. § 706

§ 706. Scope of review

Currentness

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

Notes of Decisions (3449)
5 U.S.C.A. § 706, 5 USCA § 706

Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14**End of Document**

42 U.S.C.A. Ch. 55, Refs & Annos

Currentness

42 U.S.C.A. Ch. 55, Refs & Annos, 42 USCA Ch. 55, Refs & Annos
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4321

§ 4321. Congressional declaration of purpose

Currentness

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

CREDIT(S)

(Pub.L. 91-190, § 2, Jan. 1, 1970, 83 Stat. 852.)

42 U.S.C.A. § 4331

§ 4331. Congressional declaration of national environmental policy

Currentness

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

CREDIT(S)
(Pub.L. 91-190, Title I, § 101, Jan. 1, 1970, 83 Stat. 852.)

42 U.S.C.A. § 4332

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

Currentness

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it

be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind’s world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

CREDIT(S)
(Pub.L. 91-190, Title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub.L. 94-83, Aug. 9, 1975, 89 Stat. 424.)

42 U.S.C.A. § 4332a

§ 4332a. Accelerated decisionmaking in environmental reviews

Effective: October 1, 2012

Currentness

(a) In general

In preparing a final environmental impact statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), if the lead agency modifies the statement in response to comments that are minor and are confined to factual corrections or explanations of why the comments do not warrant additional agency response, the lead agency may write on errata sheets attached to the statement instead of rewriting the draft statement, subject to the condition that the errata sheets--

(1) cite the sources, authorities, or reasons that support the position of the agency; and

(2) if appropriate, indicate the circumstances that would trigger agency reappraisal or further response.

(b) Incorporation

To the maximum extent practicable, the lead agency shall expeditiously develop a single document that consists of a final environmental impact statement and a record of decision, unless--

(1) the final environmental impact statement makes substantial changes to the proposed action that are relevant to environmental or safety concerns; or

(2) there are significant new circumstances or information relevant to environmental concerns and that bear on the proposed action or the impacts of the proposed action.

CREDIT(S)
(Pub.L. 112-141, Div. A, Title I, § 1319, July 6, 2012, 126 Stat. 551.)

42 U.S.C.A. § 4332a, 42 USCA § 4332a
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4333

§ 4333. Conformity of administrative procedures to national environmental policy

Currentness

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

CREDIT(S)

(Pub.L. 91-190, Title I, § 103, Jan. 1, 1970, 83 Stat. 854.)

Notes of Decisions (1)
42 U.S.C.A. § 4333, 42 USCA § 4333
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4334

§ 4334. Other statutory obligations of agencies

Currentness

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

CREDIT(S)
(Pub.L. 91-190, Title I, § 104, Jan. 1, 1970, 83 Stat. 854.)

Notes of Decisions (2)
42 U.S.C.A. § 4334, 42 USCA § 4334
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4335

§ 4335. Efforts supplemental to existing authorizations

Currentness

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

CREDIT(S)
(Pub.L. 91-190, Title I, § 105, Jan. 1, 1970, 83 Stat. 854.)

Notes of Decisions (1)
42 U.S.C.A. § 4335, 42 USCA § 4335
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. Ch. 55, Subch. II, Refs & Annos

Currentness

42 U.S.C.A. Ch. 55, Subch. II, Refs & Annos, 42 USCA Ch. 55, Subch. II, Refs & Annos
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4341

§ 4341. Omitted

Effective: May 15, 2000

Currentness

42 U.S.C.A. § 4341, 42 USCA § 4341
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4342

§ 4342. Establishment; membership; Chairman; appointments

Currentness

There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

CREDIT(S)
(Pub.L. 91-190, Title II, § 202, Jan. 1, 1970, 83 Stat. 854.)
42 U.S.C.A. § 4342, 42 USCA § 4342
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4343

§ 4343. Employment of personnel, experts and consultants

Currentness

(a) The Council may employ such officers and employees as may be necessary to carry out its functions under this chapter. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this chapter, in accordance with section 3109 of Title 5 (but without regard to the last sentence thereof).

(b) Notwithstanding section 1342 of Title 31, the Council may accept and employ voluntary and uncompensated services in furtherance of the purposes of the Council.

CREDIT(S)
(Pub.L. 91-190, Title II, § 203, Jan. 1, 1970, 83 Stat. 855; Pub.L. 94-52, § 2, July 3, 1975, 89 Stat. 258.)

42 U.S.C.A. § 4343, 42 USCA § 4343
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4344

§ 4344. Duties and functions

Currentness

It shall be the duty and function of the Council--

(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 4341 of this title;

(2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in subchapter I of this chapter, and to compile and submit to the President studies relating to such conditions and trends;

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

(5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7) to report at least once each year to the President on the state and condition of the environment; and

(8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

CREDIT(S)
(Pub.L. 91-190, Title II, § 204, Jan. 1, 1970, 83 Stat. 855.)

Notes of Decisions (16)
42 U.S.C.A. § 4344, 42 USCA § 4344
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4345

§ 4345. Consultation with Citizens' Advisory Committee on Environmental Quality and other representatives

Currentness

In exercising its powers, functions, and duties under this chapter, the Council shall--

(1) consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order numbered 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labor, conservation organizations, State and local governments and other groups, as it deems advisable; and

(2) utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

CREDIT(S)
(Pub.L. 91-190, Title II, § 205, Jan. 1, 1970, 83 Stat. 855.)

42 U.S.C.A. § 4345, 42 USCA § 4345
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4346

§ 4346. Tenure and compensation of members

Currentness

Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates (5 U.S.C. 5313). The other members of the Council shall be compensated at the rate provided for Level IV or[1] the Executive Schedule Pay Rates (5 U.S.C. 5315).

CREDIT(S)
(Pub.L. 91-190, Title II, § 206, Jan. 1, 1970, 83 Stat. 856.)

Footnotes
[1] So in original. Probably should be "of".

42 U.S.C.A. § 4346, 42 USCA § 4346
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4346a

§ 4346a. Travel reimbursement by private organizations and Federal, State, and local governments

Currentness

The Council may accept reimbursements from any private nonprofit organization or from any department, agency, or instrumentality of the Federal Government, any State, or local government, for the reasonable travel expenses incurred by an officer or employee of the Council in connection with his attendance at any conference, seminar, or similar meeting conducted for the benefit of the Council.

CREDIT(S)
(Pub.L. 91-190, Title II, § 207, as added Pub.L. 94-52, § 3, July 3, 1975, 89 Stat. 258.)

42 U.S.C.A. § 4346a, 42 USCA § 4346a
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4346b

§ 4346b. Expenditures in support of international activities

Currentness

The Council may make expenditures in support of its international activities, including expenditures for: (1) international travel; (2) activities in implementation of international agreements; and (3) the support of international exchange programs in the United States and in foreign countries.

CREDIT(S)
(Pub.L. 91-190, Title II, § 208, as added Pub.L. 94-52, § 3, July 3, 1975, 89 Stat. 258.)

42 U.S.C.A. § 4346b, 42 USCA § 4346b
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4347

§ 4347. Authorization of appropriations

Currentness

There are authorized to be appropriated to carry out the provisions of this chapter not to exceed $300,000 for fiscal year 1970, $700,000 for fiscal year 1971, and $1,000,000 for each fiscal year thereafter.

CREDIT(S)
(Pub.L. 91-190, Title II, § 209, formerly § 207, Jan. 1, 1970, 83 Stat. 856; renumbered § 209, Pub.L. 94-52, § 3, July 3, 1975, 89 Stat. 258.)
42 U.S.C.A. § 4347, 42 USCA § 4347
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4361

§ 4361. Repealed. Pub.L. 104-66, Title II, § 2021(k)(1), Dec. 21, 1995, 109 Stat. 728

Currentness

42 U.S.C.A. § 4361, 42 USCA § 4361
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4361a

§ 4361a. Repealed. Pub.L. 104-66, Title II, § 2021(k)(2), Dec. 21, 1995, 109 Stat. 728

Currentness

42 U.S.C.A. § 4361a, 42 USCA § 4361a
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4361b

§ 4361b. Implementation by Administrator of Environmental Protection Agency of recommendations of "CHESS" Investigative Report; waiver; inclusion of status of implementation requirements in annual revisions of plan for research, development, and demonstration

Currentness

The Administrator of the Environmental Protection Agency shall implement the recommendations of the report prepared for the House Committee on Science and Technology entitled "The Environmental Protection Agency Research Program with primary emphasis on the Community Health and Environmental Surveillance System (CHESS): An Investigative Report", unless for any specific recommendation he determines (1) that such recommendation has been implemented, (2) that implementation of such recommendation would not enhance the quality of the research, or (3) that implementation of such recommendation will require funding which is not available. Where such funding is not available, the Administrator shall request the required authorization or appropriation for such implementation. The Administrator shall report the status of such implementation in each annual revision of the five-year plan transmitted to the Congress under section 4361 of this title.

CREDIT(S)
(Pub.L. 95-155, § 10, Nov. 8, 1977, 91 Stat. 1262.)

42 U.S.C.A. § 4361b, 42 USCA § 4361b
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4361c

§ 4361c. Staff management

Currentness

(a) Appointments for educational programs

(1) The Administrator is authorized to select and appoint up to 75 full-time permanent staff members in the Office of Research and Development to pursue full-time educational programs for the purpose of (A) securing an advanced degree or (B) securing academic training, for the purpose of making a career change in order to better carry out the Agency's research mission.

(2) The Administrator shall select and appoint staff members for these assignments according to rules and criteria promulgated by him. The Agency may continue to pay the salary and benefits of the appointees as well as reasonable and appropriate relocation expenses and tuition.

(3) The term of each appointment shall be for up to one year, with a single renewal of up to one year in appropriate cases at the discretion of the Administrator.

(4) Staff members appointed to this program shall not count against any Agency personnel ceiling during the term of their appointment.

(b) Post-doctoral research fellows

(1) The Administrator is authorized to appoint up to 25 Post-doctoral Research Fellows in accordance with the provisions of section 213.3102(aa) of title 5 of the Code of Federal Regulations.

(2) Persons holding these appointments shall not count against any personnel ceiling of the Agency.

(c) Non-Government research associates

(1) The Administrator is authorized and encouraged to utilize research associates from outside the Federal Government in conducting the research, development, and demonstration programs of the Agency.

(2) These persons shall be selected and shall serve according to rules and criteria promulgated by the Administrator.

(d) Women and minority groups

For all programs in this section, the Administrator shall place special emphasis on providing opportunities for education and training of women and minority groups.

CREDIT(S)
(Pub.L. 95-477, § 6, Oct. 18, 1978, 92 Stat. 1510.)

42 U.S.C.A. § 4361c, 42 USCA § 4361c
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4362

§ 4362. Interagency cooperation on prevention of environmental cancer and heart and lung disease

Currentness

(a) Not later than three months after August 7, 1977, there shall be established a Task Force on Environmental Cancer and Heart and Lung Disease (hereinafter referred to as the "Task Force"). The Task Force shall include representatives of the Environmental Protection Agency, the National Cancer Institute, the National Heart, Lung, and Blood Institute, the National Institute of Occupational Safety and Health, and the National Institute on Environmental Health Sciences, and shall be chaired by the Administrator (or his delegate).

(b) The Task Force shall--

(1) recommend a comprehensive research program to determine and quantify the relationship between environmental pollution and human cancer and heart and lung disease;

(2) recommend comprehensive strategies to reduce or eliminate the risks of cancer or such other diseases associated with environmental pollution;

(3) recommend research and such other measures as may be appropriate to prevent or reduce the incidence of environmentally related cancer and heart and lung diseases;

(4) coordinate research by, and stimulate cooperation between, the Environmental Protection Agency, the Department of Health and Human Services, and such other agencies as may be appropriate to prevent environmentally related cancer and heart and lung diseases; and

(5) report to Congress, not later than one year after August 7, 1977, and annually thereafter, on the problems and progress in carrying out this section.

CREDIT(S)
(Pub.L. 95-95, Title IV, § 402, Aug. 7, 1977, 91 Stat. 791; Pub.L. 96-88, Title V, § 509(b), Oct. 17, 1979, 93 Stat. 695.)

42 U.S.C.A. § 4362, 42 USCA § 4362
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4362a

§ 4362a. Membership of Task Force on Environmental Cancer and Heart and Lung Disease

Currentness

The Director of the National Center for Health Statistics and the head of the Center for Disease Control (or the successor to such entity) shall each serve as members of the Task Force on Environmental Cancer and Heart and Lung Disease established under section 4362 of this title.

CREDIT(S)
(Pub.L. 95-623, § 9, Nov. 9, 1978, 92 Stat. 3455.)

42 U.S.C.A. § 4362a, 42 USCA § 4362a
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4363

§ 4363. Continuing and long-term environmental research and development

Currentness

The Administrator of the Environmental Protection Agency shall establish a separately identified program of continuing, long-term environmental research and development for each activity listed in section 2(a) of this Act. Unless otherwise specified by law, at least 15 per centum of funds appropriated to the Administrator for environmental research and development for each activity listed in section 2(a) of this Act shall be obligated and expended for such long-term environmental research and development under this section.

CREDIT(S)

(Pub.L. 96-569, § 2(f), Dec. 22, 1980, 94 Stat. 3337.)
42 U.S.C.A. § 4363, 42 USCA § 4363
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4363a

§ 4363a. Pollution control technologies demonstrations

Currentness

(1) The Administrator shall continue to be responsible for conducting and shall continue to conduct full-scale demonstrations of energy-related pollution control technologies as necessary in his judgment to fulfill the provisions of the Clean Air Act as amended [42 U.S.C.A. § 7401 et seq.], the Federal Water Pollution Control Act as amended [33 U.S.C.A. § 1251 et seq.], and other pertinent pollution control statutes.

(2) Energy-related environmental protection projects authorized to be administered by the Environmental Protection Agency under this Act shall not be transferred administratively to the Department of Energy or reduced through budget amendment. No action shall be taken through administrative or budgetary means to diminish the ability of the Environmental Protection Agency to initiate such projects.

CREDIT(S)
(Pub.L. 96-229, § 2(d), Apr. 7, 1980, 94 Stat. 327.)

42 U.S.C.A. § 4363a, 42 USCA § 4363a
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4364

§ 4364. Expenditure of funds for research and development related to regulatory program activities

Currentness

(a) Coordination, etc., with research needs and priorities of program offices and Environmental Protection Agency

The Administrator of the Environmental Protection Agency shall assure that the expenditure of any funds appropriated pursuant to this Act or any other provision of law for environmental research and development related to regulatory program activities shall be coordinated with and reflect the research needs and priorities of the program offices, as well as the overall research needs and priorities of the Agency, including those defined in the five-year research plan.

(b) Program offices subject to coverage

For purposes of subsection (a) of this section, the appropriate program offices are--

(1) the Office of Air and Waste Management, for air quality activities;

(2) the Office of Water and Hazardous Materials, for water quality activities and water supply activities;

(3) the Office of Pesticides, for environmental effects of pesticides;

(4) the Office of Solid Waste, for solid waste activities;

(5) the Office of Toxic Substances, for toxic substance activities;

(6) the Office of Radiation Programs, for radiation activities; and

(7) the Office of Noise Abatement and Control, for noise activities.

(c) Report to Congress; contents

The Administrator shall submit to the President and the Congress a report concerning the most appropriate means of assuring, on a continuing basis, that the research efforts of the Agency reflect the needs and priorities of the regulatory program offices, while maintaining a high level of scientific quality. Such report shall be submitted on or before March 31, 1978.

CREDIT(S)
(Pub.L. 95-155, § 7, Nov. 8, 1977, 91 Stat. 1259.)

42 U.S.C.A. § 4364, 42 USCA § 4364
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4365

§ 4365. Science Advisory Board

Effective: February 7, 2014

Currentness

(a) Establishment; requests for advice by Administrator of Environmental Protection Agency and Congressional committees

The Administrator of the Environmental Protection Agency shall establish a Science Advisory Board which shall provide such scientific advice as may be requested by the Administrator, the Committee on Environment and Public Works of the United States Senate, or the Committee on Science, Space, and Technology, on Energy and Commerce, or on Public Works and Transportation of the House of Representatives.

(b) Membership; Chairman; meetings; qualifications of members

Such Board shall be composed of at least nine members, one of whom shall be designated Chairman, and shall meet at such times and places as may be designated by the Chairman of the Board in consultation with the Administrator. Each member of the Board shall be qualified by education, training, and experience to evaluate scientific and technical information on matters referred to the Board under this section.

(c) Proposed environmental criteria document, standard, limitation, or regulation; functions respecting in conjunction with Administrator

(1) The Administrator, at the time any proposed criteria document, standard, limitation, or regulation under the Clean Air Act [42 U.S.C.A. § 7401 et seq.], the Federal Water Pollution Control Act [33 U.S.C.A. § 1251 et seq.], the Resource Conservation and Recovery Act of 1976 [42 U.S.C.A. § 6901 et seq.], the Noise Control Act [42 U.S.C.A. § 4901 et seq.], the Toxic Substances Control Act [15 U.S.C.A. § 2601 et seq.], or the Safe Drinking Water Act [42 U.S.C.A. § 300f et seq.], or under any other authority of the Administrator, is provided to any other Federal agency for formal review and comment, shall make available to the Board such proposed criteria document, standard, limitation, or regulation, together with relevant scientific and technical information in the possession of the Environmental Protection Agency on which the proposed action is based.

(2) The Board may make available to the Administrator, within the time specified by the Administrator, its advice and comments on the adequacy of the scientific and technical basis of the proposed criteria document, standard, limitation, or regulation, together with any pertinent information in the Board's possession.

(d) Utilization of technical and scientific capabilities of Federal agencies and national environmental laboratories for determining adequacy of scientific and technical basis of proposed criteria document, etc.

In preparing such advice and comments, the Board shall avail itself of the technical and scientific capabilities of any Federal agency, including the Environmental Protection Agency and any national environmental laboratories.

(e) Committees

(1) Member committees

(A) In general

The Board is authorized to establish such member committees and investigative panels as the Administrator and the Board determine to be necessary to carry out this section.

(B) Chairmanship

Each member committee or investigative panel established under this subsection shall be chaired by a member of the Board.

(2) Agriculture-related committees

(A) In general

The Administrator and the Board--

(i) shall establish a standing agriculture-related committee; and

(ii) may establish such additional agriculture-related committees and investigative panels as the Administrator and the Board determines to be necessary to carry out the duties under subparagraph (C).

(B) Membership

The standing committee and each agriculture-related committee or investigative panel established under subparagraph (A) shall be--

(i) composed of--

(I) such quantity of members as the Administrator and the Board determines to be necessary; and

(II) individuals who are not members of the Board on the date of appointment to the committee or investigative panel; and

(ii) appointed by the Administrator and the Board, in consultation with the Secretary of Agriculture.

(C) Duties

The agriculture-related standing committee and each additional committee and investigative panel established under subparagraph (A) shall provide scientific and technical advice to the Board relating to matters referred to the Board that the Administrator and the Board determines, in consultation with the Secretary of Agriculture, to have a significant direct impact on enterprises that are engaged in the business of the production of food and fiber, ranching and raising livestock, aquaculture, and all other farming- and agriculture-related industries.

(f) Appointment and compensation of secretary and other personnel; compensation of members

(1) Upon the recommendation of the Board, the Administrator shall appoint a secretary, and such other employees as deemed necessary to exercise and fulfill the Board's powers and responsibilities. The compensation of all employees appointed under this paragraph shall be fixed in accordance with chapter 51 and subchapter III of chapter 53 of Title 5.

(2) Members of the Board may be compensated at a rate to be fixed by the President but not in excess of the maximum rate of

pay for grade GS-18, as provided in the General Schedule under section 5332 of Title 5.

(g) Consultation and coordination with Scientific Advisory Panel

In carrying out the functions assigned by this section, the Board shall consult and coordinate its activities with the Scientific Advisory Panel established by the Administrator pursuant to section 136w(d) of Title 7.

(h) Public participation and transparency

The Board shall make every effort, consistent with applicable law, including section 552 of Title 5 (commonly known as the "Freedom of Information Act") and section 552a of Title 5 (commonly known as the "Privacy Act"), to maximize public participation and transparency, including making the scientific and technical advice of the Board and any committees or investigative panels of the Board publically available in electronic form on the website of the Environmental Protection Agency.

(i) Report to Congress

The Administrator shall annually report to the Committees on Environment and Public Works and Agriculture of the Senate and the Committees on Transportation and Infrastructure, Energy and Commerce, and Agriculture of the House of Representatives regarding the membership and activities of the standing agriculture-related committee established pursuant to subsection (e)(2)(A)(i).

CREDIT(S)
(Pub.L. 95-155, § 8, Nov. 8, 1977, 91 Stat. 1260; Pub.L. 96-569, § 3, Dec. 22, 1980, 94 Stat. 3337; Pub.L. 103-437, § 15(o), Nov. 2, 1994, 108 Stat. 4593; Pub.L. 104-66, Title II, § 2021(k)(3), Dec. 21, 1995, 109 Stat. 728; Pub.L. 113-79, Title XII, § 12307, Feb. 7, 2014, 128 Stat. 989.)

Notes of Decisions (1)
42 U.S.C.A. § 4365, 42 USCA § 4365
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4366

§ 4366. Identification and coordination of research, development, and demonstration activities

Currentness

(a) Consultation and cooperation of Administrator of Environmental Protection Agency with heads of Federal agencies; inclusion of activities in annual revisions of plan for research, etc.

The Administrator of the Environmental Protection Agency, in consultation and cooperation with the heads of other Federal agencies, shall take such actions on a continuing basis as may be necessary or appropriate--

(1) to identify environmental research, development, and demonstration activities, within and outside the Federal Government, which may need to be more effectively coordinated in order to minimize unnecessary duplication of programs, projects, and research facilities;

(2) to determine the steps which might be taken under existing law, by him and by the heads of such other agencies, to accomplish or promote such coordination, and to provide for or encourage the taking of such steps; and

(3) to determine the additional legislative actions which would be needed to assure such coordination to the maximum extent

possible.

The Administrator shall include in each annual revision of the five-year plan provided for by section 4361 of this title a full and complete report on the actions taken and determinations made during the preceding year under this subsection, and may submit interim reports on such actions and determinations at such other times as he deems appropriate.

(b) Coordination of programs by Administrator

The Administrator of the Environmental Protection Agency shall coordinate environmental research, development, and demonstration programs of such Agency with the heads of other Federal agencies in order to minimize unnecessary duplication of programs, projects, and research facilities.

(c) Joint study by Council on Environmental Quality in consultation with Office of Science and Technology Policy for coordination of activities; report to President and Congress; report by President to Congress on implementation of joint study and report

(1) In order to promote the coordination of environmental research and development activities, and to assure that the action taken and methods used (under subsection (a) of this section and otherwise) to bring about such coordination will be as effective as possible for that purpose, the Council on Environmental Quality in consultation with the Office of Science and Technology Policy shall promptly undertake and carry out a joint study of all aspects of the coordination of environmental research and development. The Chairman of the Council shall prepare a report on the results of such study, together with such recommendations (including legislative recommendations) as he deems appropriate, and shall submit such report to the President and the Congress not later than May 31, 1978.

(2) Not later than September 30, 1978, the President shall report to the Congress on steps he has taken to implement the recommendations included in the report under paragraph (1), including any recommendations he may have for legislation.

CREDIT(S)
(Pub.L. 95-155, § 9, Nov. 8, 1977, 91 Stat. 1261.)

42 U.S.C.A. § 4366, 42 USCA § 4366
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4366a

§ 4366a. Omitted

Effective: November 16, 2000

Currentness

42 U.S.C.A. § 4366a, 42 USCA § 4366a
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4367

§ 4367. Reporting requirements of financial interests of officers and employees of Environmental Protection Agency

Currentness

(a) Covered officers and employees

Each officer or employee of the Environmental Protection Agency who--

(1) performs any function or duty under this Act; and

(2) has any known financial interest in any person who applies for or receives grants, contracts, or other forms of financial assistance under this Act,

shall, beginning on February 1, 1978, annually file with the Administrator a written statement concerning all such interests held by such officer or employee during the preceding calendar year. Such statement shall be available to the public.

(b) Implementation of requirements by Administrator

The Administrator shall--

(1) act within ninety days after November 8, 1977--

(A) to define the term "known financial interest" for purposes of subsection (a) of this section; and

(B) to establish the methods by which the requirement to file written statements specified in subsection (a) of this section will be monitored and enforced, including appropriate provision for the filing by such officers and employees of such statements and the review by the Administrator of such statements; and

(2) Omitted.

(c) Exemption of positions by Administrator

In the rules prescribed under subsection (b) of this section, the Administrator may identify specific positions of a nonpolicymaking nature within the Administration and provide that officers or employees occupying such positions shall be exempt from the requirements of this section.

(d) Violations; penalties

Any officer or employee who is subject to, and knowingly violates, this section, shall be fined not more than $2,500 or imprisoned not more than one year, or both.

CREDIT(S)
(Pub.L. 95-155, § 12, Nov. 8, 1977, 91 Stat. 1263.)

42 U.S.C.A. § 4367, 42 USCA § 4367
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4368

§ 4368. Grants to qualified citizens groups

Currentness

(1) There is authorized to be appropriated to the Environmental Protection Agency, for grants to qualified citizens groups in States and regions, $3,000,000.

(2) Grants under this section may be made for the purpose of supporting and encouraging participation by qualified citizens groups in determining how scientific, technological, and social trends and changes affect the future environment and quality of life of an area, and for setting goals and identifying measures for improvement.

(3) The term "qualified citizens group" shall mean a nonprofit organization of citizens having an area based focus, which is not single-issue oriented and which can demonstrate a prior record of interest and involvement in goal-setting and research concerned with improving the quality of life, including plans to identify, protect and enhance significant natural and cultural resources and the environment.

(4) A citizens group shall be eligible for assistance only if certified by the Governor in consultation with the State legislature as a bonafide organization entitled to receive Federal assistance to pursue the aims of this program. The group shall further demonstrate its capacity to employ usefully the funds for the purposes of this program and its broad-based representative nature.

(5) After an initial application for assistance under this section has been approved, the Administrator may make grants on an annual basis, on condition that the Governor recertify the group and that the applicant submits to the Administrator annually--

(A) an evaluation of the progress made during the previous year in meeting the objectives for which the grant was made;
(B) a description of any changes in the objectives of the activities; and

(C) a description of the proposed activities for the succeeding one year period.

(6) A grant made under this program shall not exceed 75 per centum of the estimated cost of the project or program for which the grant is made, and no group shall receive more than $50,000 in any one year.

(7) No financial assistance provided under this section shall be used to support lobbying or litigation by any recipient group.

CREDIT(S)
(Pub.L. 95-477, § 3(d), Oct. 18, 1978, 92 Stat. 1509.)
42 U.S.C.A. § 4368, 42 USCA § 4368
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4368a

§ 4368a. Utilization of talents of older Americans in projects of pollution prevention, abatement, and control

Effective: July 1, 2000

Currentness

(a) Technical assistance to environmental agencies

Notwithstanding any other provision of law relating to Federal grants and cooperative agreements, the Administrator of the Environmental Protection Agency is authorized to make grants to, or enter into cooperative agreements with, private nonprofit organizations designated by the Secretary of Labor under title V of the Older Americans Act of 1965 [42 U.S.C.A. § 3056 et seq.] to utilize the talents of older Americans in programs authorized by other provisions of law administered by the Administrator (and consistent with such provisions of law) in providing technical assistance to Federal, State, and local environmental agencies for projects of pollution prevention, abatement, and control. Funding for such grants or agreements may be made available from such programs or through title V of the Older Americans Act of 1965 [42 U.S.C.A. § 3056 et seq.] and subtitle D of title I of the Workforce Investment Act of 1998 [29 U.S.C.A. § 2911 et seq.].

(b) Pre-award certifications

Prior to awarding any grant or agreement under subsection (a) of this section, the applicable Federal, State, or local environmental agency shall certify to the Administrator that such grants or agreements will not--

(1) result in the displacement of individuals currently employed by the environmental agency concerned (including partial displacement through reduction of nonovertime hours, wages, or employment benefits);

(2) result in the employment of any individual when any other person is in a layoff status from the same or substantially equivalent job within the jurisdiction of the environmental agency concerned; or

(3) affect existing contracts for services.

(c) Prior appropriation Acts

Grants or agreements awarded under this section shall be subject to prior appropriation Acts.

CREDIT(S)

(Pub.L. 98-313, § 2, June 12, 1984, 98 Stat. 235; Pub.L. 105-277, Div. A, § 101(f) [Title VIII, § 405(d)(35), (f)(27)], Oct. 21, 1998, 112 Stat. 2681-426, 2681-434.)

AMENDMENT OF SUBSECTION (A)

<Pub.L. 113-128, Title V, §§ 506, 512(j), July 22, 2014, 128 Stat. 1703, 1709, provided that effective on the first day of the first full program year after July 22, 2014, which program year begins on July 1 in the fiscal year for which the appropriation is made (July 1, 2015), subsec. (a) is amended by striking “Funding for such grants or agreements may be made available from such programs or through title V of the Older Americans Act of 1965 [42 U.S.C.A. § 3056 et seq.] and subtitle D of title I of the Workforce Investment Act of 1998 [29 U.S.C.A. § 2911 et seq.]” and inserting “Funding for such grants or agreements may be made available from such programs or through title V of

the Older Americans Act of 1965 and subtitle D of title I of the Workforce Innovation and Opportunity Act".>

Notes of Decisions (3) 42 U.S.C.A. § 4368a, 42 USCA § 4368a
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4368b

§ 4368b. General assistance program

Effective: October 2, 1996

Currentness

(a) Short title

This section may be cited as the "Indian Environmental General Assistance Program Act of 1992".

(b) Purposes

The purposes of this section are to--

(1) provide general assistance grants to Indian tribal governments and intertribal consortia to build capacity to administer environmental regulatory programs that may be delegated by the Environmental Protection Agency on Indian lands; and

(2) provide technical assistance from the Environmental Protection Agency to Indian tribal governments and intertribal consortia in the development of multimedia programs to address environmental issues on Indian lands.

(c) Definitions

For purposes of this section:

(1) The term "Indian tribal government" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (43 U.S.C.A. § 1601, et seq.)), which is recognized as eligible for the special services provided by the United States to Indians because of their status as Indians.

(2) The term "intertribal consortia" or "intertribal consortium" means a partnership between two or more Indian tribal governments authorized by the governing bodies of those tribes to apply for and receive assistance pursuant to this section.

(3) The term "Administrator" means the Administrator of the Environmental Protection Agency.

(d) General assistance program

(1) The Administrator of the Environmental Protection Agency shall establish an Indian Environmental General Assistance Program that provides grants to eligible Indian tribal governments or intertribal consortia to cover the costs of planning, developing, and establishing environmental protection programs consistent with other applicable provisions of law providing for enforcement of such laws by Indian tribes on Indian lands.

(2) Each grant awarded for general assistance under this subsection for a fiscal year shall be no less than $75,000, and no single grant may be awarded to an Indian tribal government or intertribal consortium for more than 10 percent of the funds appropriated under subsection (h) of this section.

(3) The term of any general assistance award made under this subsection may exceed one year. Any awards made pursuant to this section shall remain available until expended. An Indian tribal government or intertribal consortium may receive a general assistance grant for a period of up to four years in each specific media area.

(e) No reduction in amounts

In no case shall the award of a general assistance grant to an Indian tribal government or intertribal consortium under this section result in a reduction of Environmental Protection Agency grants for environmental programs to that tribal government or consortium. Nothing in this section shall preclude an Indian tribal government or intertribal consortium from receiving individual media grants or cooperative agreements. Funds provided by the Environmental Protection Agency through the general assistance program shall be used by an Indian tribal government or intertribal consortium to supplement other funds provided by the Environmental Protection Agency through individual media grants or cooperative agreements.

(f) Expenditure of general assistance

Any general assistance under this section shall be expended for the purpose of planning, developing, and establishing the capability to implement programs administered by the Environmental Protection Agency and specified in the assistance agreement. Purposes and programs authorized under this section shall include the development and implementation of solid and hazardous waste programs for Indian lands. An Indian tribal government or intertribal consortium receiving general assistance pursuant to this section shall utilize such funds for programs and purposes to be carried out in accordance with the terms of the assistance agreement. Such programs and general assistance shall be carried out in accordance with the purposes and requirements of applicable provisions of law, including the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.).

(g) Procedures

(1) Within 12 months following October 24, 1992, the Administrator shall promulgate regulations establishing procedures under which an Indian tribal government or intertribal consortium may apply for general assistance grants under this section.

(2) The Administrator shall publish regulations issued pursuant to this section in the Federal Register.

(3) The Administrator shall establish procedures for accounting, auditing, evaluating, and reviewing any programs or activities funded in whole or in part for a general assistance grant under this section.

(h) Authorization

There are authorized to be appropriated to carry out the provisions of this section, such sums as may be necessary for each of the fiscal years 1993, 1994, 1995, 1996, 1997, and 1998.

(i) Report to Congress

The Administrator shall transmit an annual report to the appropriate Committees of the Congress with jurisdiction over the applicable environmental laws and Indian tribes describing which Indian tribes or intertribal consortia have been granted approval by the Administrator pursuant to law to enforce certain environmental laws and the effectiveness of any such enforcement.

CREDIT(S)
(Pub.L. 95-134, Title V, § 502, as added Pub.L. 102-497, § 11, Oct. 24, 1992, 106 Stat. 3258; amended Pub.L. 103-155, Nov. 24, 1993, 107 Stat. 1523; Pub.L. 104-233, § 1, Oct. 2, 1996, 110 Stat. 3057.)

42 U.S.C.A. § 4368b, 42 USCA § 4368b
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4369

§ 4369. Miscellaneous reports

Currentness

(a) Availability to Congressional committees

All reports to or by the Administrator relevant to the Agency's program of research, development, and demonstration shall promptly be made available to the Committee on Science, Space, and Technology of the House of Representatives and the Committee on Environment and Public Works of the Senate, unless otherwise prohibited by law.

(b) Transmittal of jurisdictional information
The Administrator shall keep the Committee on Science, Space, and Technology of the House of Representatives and the Committee on Environment and Public Works of the Senate fully and currently informed with respect to matters falling within or related to the jurisdiction of the committees.

(c) Comment by Government agencies and the public

The reports provided for in section 5910 of this title shall be made available to the public for comment, and to the heads of affected agencies for comment and, in the case of recommendations for action, for response.

(d) Transmittal of research information to the Department of Energy

For the purpose of assisting the Department of Energy in planning and assigning priorities in research development and demonstration activities related to environmental control technologies, the Administrator shall actively make available to the Department all information on research activities and results of research programs of the Environmental Protection Agency.

CREDIT(S)
(Pub.L. 95-477, § 5, Oct. 18, 1978, 92 Stat. 1510; Pub.L. 103-437, § 15(c)(6), Nov. 2, 1994, 108 Stat. 4592.)

42 U.S.C.A. § 4369, 42 USCA § 4369
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4369a

§ 4369a. Reports on environmental research and development activities of Agency

Currentness

(a) Reports to keep Congressional committees fully and currently informed

The Administrator shall keep the appropriate committees of the House and the Senate fully and currently informed about all aspects of the environmental research and development activities of the Environmental Protection Agency.

(b) Omitted

CREDIT(S)
(Pub.L. 96-229, § 4, Apr. 7, 1980, 94 Stat. 328.)
42 U.S.C.A. § 4369a, 42 USCA § 4369a
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4370

§ 4370. Reimbursement for use of facilities

Currentness

(a) Authority to allow outside groups or individuals to use research and test facilities; reimbursement

The Administrator is authorized to allow appropriate use of special Environmental Protection Agency research and test facilities by outside groups or individuals and to receive reimbursement or fees for costs incurred thereby when he finds this to be in the public interest. Such reimbursement or fees are to be used by the Agency to defray the costs of use by outside groups or individuals.

(b) Rules and regulations

The Administrator may promulgate regulations to cover such use of Agency facilities in accordance with generally accepted accounting, safety, and laboratory practices.

(c) Waiver of reimbursement by Administrator

When he finds it is in the public interest the Administrator may waive reimbursement or fees for outside use of Agency facilities by nonprofit private or public entities.

CREDIT(S)
(Pub.L. 96-229, § 5, Apr. 7, 1980, 94 Stat. 328.)

42 U.S.C.A. § 4370, 42 USCA § 4370
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4370a

§ 4370a. Assistant Administrators of Environmental Protection Agency; appointment; duties

Currentness

(a) The President, by and with the advice and consent of the Senate, may appoint three Assistant Administrators of the Environmental Protection Agency in addition to--

(1) the five Assistant Administrators provided for in section 1(d) of Reorganization Plan Numbered 3 of 1970 (5 U.S.C. Appendix);

(2) the Assistant Administrator provided by section 2625(g) of Title 15; and

(3) the Assistant Administrator provided by section 6911a of this title.

(b) Each Assistant Administrator appointed under subsection (a) of this section shall perform such duties as the Administrator of the Environmental Protection Agency may prescribe.

CREDIT(S)
(Pub.L. 98-80, § 1, Aug. 23, 1983, 97 Stat. 485.)

42 U.S.C.A. § 4370a, 42 USCA § 4370a
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4370b

§ 4370b. Availability of fees and charges to carry out Agency programs

Currentness

Notwithstanding any other provision of law, after September 30, 1990, amounts deposited in the Licensing and Other Services Fund from fees and charges assessed and collected by the Administrator for services and activities carried out pursuant to the statutes administered by the Environmental Protection Agency shall thereafter be available to carry out the Agency's activities in the programs for which the fees or charges are made.

CREDIT(S)

(Pub.L. 101-144, Title III, Nov. 9, 1989, 103 Stat. 858.)

42 U.S.C.A. § 4370b, 42 USCA § 4370b
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4370c

§ 4370c. Environmental Protection Agency fees

Currentness

(a) Assessment and collection

The Administrator of the Environmental Protection Agency shall, by regulation, assess and collect fees and charges for services and activities carried out pursuant to laws administered by the Environmental Protection Agency.

(b) Amount of fees and charges

Fees and charges assessed pursuant to this section shall be in such amounts as may be necessary to ensure that the aggregate amount of fees and charges collected pursuant to this section, in excess of the amount of fees and charges collected under current law--

(1) in fiscal year 1991, is not less than $28,000,000; and

(2) in each of fiscal years 1992, 1993, 1994, and 1995, is not less than $38,000,000.

(c) Limitation on fees and charges

(1) The maximum aggregate amount of fees and charges in excess of the amounts being collected under current law which may be assessed and collected pursuant to this section in a fiscal year--

(A) for services and activities carried out pursuant ot[1] the Federal Water Pollution Control Act [33 U.S.C.A. § 1251 et seq.] is $10,000,000; and

(B) for services and activities in programs within the jurisdiction of the House Committee on Energy and Commerce and administered by the Environmental Protection Agency through the Administrator, shall be limited to such sums collected as of November 5, 1990, pursuant to sections 2625(b) and 2665(e)(2) of Title 15, and such sums specifically authorized by the Clean Air Act Amendments of 1990.

(2) Any remaining amounts required to be collected under this section shall be collected from services and programs administered by the Environmental Protection Agency other than those specified in subparagraphs (A) and (B) of paragraph (1).

(d) Rule of construction

Nothing in this section increases or diminishes the authority of the Administrator to promulgate regulations pursuant to section 9701 of Title 31.

(e) Uses of fees

Fees and charges collected pursuant to this section shall be deposited into a special account for environmental services in the Treasury of the United States. Subject to appropriation Acts, such funds shall be available to the Environmental Protection Agency to carry out the activities for which such fees and charges are collected. Such funds shall remain available until

expended.

CREDIT(S)
(Pub.L. 101-508, Title VI, § 6501, Nov. 5, 1990, 104 Stat. 1388-320.)

Footnotes

1
So in original. Probably should be “to”.

42 U.S.C.A. § 4370c, 42 USCA § 4370c
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4370d

§ 4370d. Percentage of Federal funding for organizations owned by socially and economically disadvantaged individuals

Currentness

The Administrator of the Environmental Protection Agency shall, on and after October 6, 1992, to the fullest extent possible, ensure that at least 8 per centum of Federal funding for prime and subcontracts awarded in support of authorized programs, including grants, loans, and contracts for wastewater treatment and leaking underground storage tanks grants, be made available to business concerns or other organizations owned or controlled by socially and economically disadvantaged individuals (within the meaning of section 637(a)(5) and (6) of Title 15), including historically black colleges and universities. For purposes of this section, economically and socially disadvantaged individuals shall be deemed to include women.

CREDIT(S)
(Pub.L. 102-389, Title III, Oct. 6, 1992, 106 Stat. 1602.)

42 U.S.C.A. § 4370d, 42 USCA § 4370d
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4370e

§ 4370e. Working capital fund in Treasury

Effective: October 21, 1998

Currentness

There is hereby established in the Treasury a “Working capital fund”, to be available without fiscal year limitation for expenses and equipment necessary for the maintenance and operation of such administrative services as the Administrator determines may be performed more advantageously as central services: *Provided*, That any inventories, equipment, and other assets pertaining to the services to be provided by such fund, either on hand or on order, less the related liabilities or unpaid obligations, and any appropriations made hereafter for the purpose of providing capital, shall be used to capitalize such fund: *Provided further*, That such fund shall be paid in advance or reimbursed from funds available to the Agency and other Federal agencies for which such centralized services are performed, at rates which will return in full all expenses of operation, including accrued leave, depreciation of fund plant and equipment, amortization of automated data processing (ADP) software and systems (either acquired or donated), and an amount necessary to maintain a reasonable operating reserve, as determined by the Administrator: *Provided further*, That such fund shall provide services on a competitive basis: *Provided further*, That an amount not to exceed four percent of the total annual income to such fund may be retained in the fund for fiscal year 1997 and each fiscal year thereafter, to remain available until expended, to be used for the acquisition of capital equipment and for the improvement and implementation of Agency financial management, ADP, and other support systems: *Provided further*, That

no later than thirty days after the end of each fiscal year amounts in excess of this reserve limitation shall be transferred to the Treasury.

CREDIT(S)
(Pub.L. 104-204, Title III, Sept. 26, 1996, 110 Stat. 2912; Pub.L. 105-65, Title III, Oct. 27, 1997, 111 Stat. 1374; Pub.L. 105-276, Title III, Oct. 21, 1998, 112 Stat. 2499.)

42 U.S.C.A. § 4370e, 42 USCA § 4370e
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4370f

§ 4370f. Availability of funds after expiration of period for liquidating obligations

Effective: October 27, 2000

Currentness

For fiscal year 2001 and thereafter, the obligated balances of sums available in multiple-year appropriations accounts shall remain available through the seventh fiscal year after their period of availability has expired for liquidating obligations made during the period of availability.

CREDIT(S)
(Pub.L. 106-377, § 1(a)(1) [Title III], Oct. 27, 2000, 114 Stat. 1441, 1441A-44.)

42 U.S.C.A. § 4370f, 42 USCA § 4370f
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4370g

§ 4370g. Availability of funds for uniforms and certain services

Effective: March 11, 2009

Currentness

For fiscal year 2009 and thereafter, the Science and Technology and Environmental Programs and Management Accounts are available for uniforms, or allowances therefore, as authorized by sections 5901 and 5902 of Title 5 and for services as authorized by section 3109 of Title 5, but at rates for individuals not to exceed the daily equivalent of the rate paid for level IV of the Executive Schedule.

CREDIT(S)
(Pub.L. 111-8, Div. E, Title II, Mar. 11, 2009, 123 Stat. 728.)

42 U.S.C.A. § 4370g, 42 USCA § 4370g
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

42 U.S.C.A. § 4370h

§ 4370h. Availability of funds for facilities

Effective: March 11, 2009

Currentness

For fiscal year 2009 and thereafter, the Science and Technology, Environmental Programs and Management, Office of Inspector General, Hazardous Substance Superfund, and Leaking Underground Storage Tank Trust Fund Program Accounts, are available for the construction, alteration, repair, rehabilitation, and renovation of facilities provided that the cost does not exceed $85,000 per project.

CREDIT(S)
(Pub.L. 111-8, Div. E, Title II, Mar. 11, 2009, 123 Stat. 729.)

42 U.S.C.A. § 4370h, 42 USCA § 4370h
Current through P.L. 113-185 (excluding P.L. 113-183) approved 10-6-14

40 C.F.R. § 1502.16

§ 1502.16 Environmental consequences.

Currentness

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

Credits
[43 FR 55994, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.
AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (1263) Current through Nov. 26, 2014; 79 FR 70473.**End of Document**

40 C.F.R. § 1503.1

§ 1503.1 Inviting comments.

Currentness

(a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:

(1) Obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.

(2) Request the comments of:

(i) Appropriate State and local agencies which are authorized to develop and enforce environmental standards;

(ii) Indian tribes, when the effects may be on a reservation; and

(iii) Any agency which has requested that it receive statements on actions of the kind proposed.

Office of Management and Budget Circular A–95 (Revised), through its system of clearinghouses, provides a means of securing the views of State and local environmental agencies. The clearinghouses may be used, by mutual agreement of the lead agency and the clearinghouse, for securing State and local reviews of the draft environmental impact statements.

(3) Request comments from the applicant, if any.

(4) Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.

(b) An agency may request comments on a final environmental impact statement before the decision is finally made. In any case other agencies or persons may make comments before the final decision unless a different time is provided under § 1506.10.

SOURCE: 43 FR 55997, Nov. 29, 1978., unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (197)Current through Nov. 26, 2014; 79 FR 70473.End of Document

40 C.F.R. § 1502.16

§ 1502.16 Environmental consequences.

Currentness

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

Credits
[43 FR 55994, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.
AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (1263) Current through Nov. 26, 2014; 79 FR 70473.**End of Document**

43 C.F.R. § 46.435

§ 46.435 Inviting comments.

Effective: November 14, 2008

Currentness

(a) A bureau must seek comment from the public as part of the Notice of Intent to prepare an environmental impact statement and notice of availability for a draft environmental impact statement;

(b) In addition to paragraph (a) of this section, a bureau must request comments from:

(1) Federal agencies;

(2) State agencies through procedures established by the Governor of such state under EO 12372;

(3) Local governments and agencies, to the extent that the proposed action affects their jurisdictions; and

(4) The applicant, if any, and persons or organizations who may be interested or affected.

(c) The bureau must request comments from the tribal governments, unless the tribal governments have designated an alternate review process, when the proposed action may affect the environment of either:

(1) Indian trust or restricted land; or

(2) Other Indian trust resources, trust assets, or tribal health and safety.

(d) A bureau does not need to delay preparation and issuance of a final environmental impact statement when any Federal, State, and local agencies, or tribal governments from which comments must be obtained or requested do not comment within the prescribed time period.

SOURCE: 73 FR 61314, Oct. 15, 2008, unless otherwise noted.

AUTHORITY: 42 U.S.C. 4321 et seq. (The National Environmental Policy Act of 1969, as amended); Executive Order 11514, (Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977)); 40 CFR parts 1500–1508 (43 FR 55978) (National Environmental Policy Act, Implementation of Procedural Provisions).

Current through Nov. 26, 2014; 79 FR 70473. End of Document

CERTIFICATE OF SERVICE

I hereby certify that on December 24, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen Moore
Senior Appellate Paralegal
COUNSEL PRESS LLC