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THE CITY AND COUNTY OF SAN FRANCISCO

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THE CITY AND COUNTY OF SAN FRANCISCO, Plaintiff, vs. The UNITED STATES DEPARTMENT OF TRANSPORTATION; RAY LAHOOD, Secretary of Transportation, sued solely in his official capacity; the PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION; and CYNTHIA L. QUARTERMAN, Administrator of the Pipeline and Hazardous Materials Safety Administration, sued solely in her official capacity, Defendants.	Case No. C 12-00711 RS **NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN that the City and County of San Francisco, a Plaintiff in the above-named case, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on February 28, 2013 (attached as Exhibit A), and all orders that gave rise to that judgment, including, but not limited to, the Order Granting Motion To Dismiss, With Leave to Amend, entered in this action on July 25, 2012 (attached as Exhibit B), and the Order Granting Motion To Dismiss, entered in this action on February 28, 2013 (attached as Exhibit C).

Dated: April 26, 2013

DENNIS J. HERRERA
City Attorney
THERESE M. STEWART
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OWEN CLEMENTS
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By: _____
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Attorneys for Plaintiff/Appellant
CITY AND COUNTY OF SAN FRANCISCO

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

THE CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, et al.,

Defendants.

/

No. C 12-0711 RS

JUDGMENT

Based on the order issued herewith, granting defendants' motion to dismiss, the Court enters judgment in favor of defendants and against plaintiffs in the above-entitled action.

IT IS SO ORDERED.

Dated: 2/28/13

RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

THE CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, et al.,

Defendants.

/

No. C 12-0711 RS

ORDER GRANTING MOTION TO DISMISS, WITH LEAVE TO AMEND

I. INTRODUCTION

In this action, plaintiff the City and County of San Francisco ("the City") seeks declaratory and injunctive relief to compel the United States Department of Transportation, through the federal Pipeline and Hazardous Materials Agency ("PHMSA"), to exercise more stringent oversight of the California Public Utilities Commission ("CPUC") with respect to the CPUC's delegated responsibility to enforce federal natural gas pipeline safety standards in California. Defendants move to dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, contending that the City lacks standing to bring the claims, and that the Court lacks jurisdiction under the provision of the Natural Gas Pipeline Safety Act invoked by the City. Pursuant to Civil Local Rule 7-1(b), the motion is suitable for disposition without oral argument, and the hearing set for July 26, 2012 is vacated. Although the City has adequately established that it has satisfied

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constitutional standing requirements, the statute on which it relies does not support an entitlement to bring claims of this nature. The City's alternative argument that it may nevertheless seek similar relief under the Administrative Procedures Act ("APA"), requires amendment of the complaint before a determination can be made as to whether such a claim can be successfully pleaded. Accordingly, the motion will be granted, with leave to amend.

II. BACKGROUND

Prior to 1968, regulation of natural gas pipelines was left entirely to the states. That year, Congress enacted the Natural Gas Pipeline Safety Act, Pub. L. 90-481, 82 Stat. 720 ("PSA") "to provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities." 49 U.S.C. § 60102(a)(1). Pursuant to that law and subsequent amendments, the Secretary of Transportation has delegated authority to PHMSA to adopt minimum safety standards for the design, construction, testing, operation and maintenance of natural gas and hazardous liquid pipelines. 49 C.F.R. § 1.53. See 49 C.F.R. parts 190-99. Under the regulatory scheme, states may assume responsibility for regulating intrastate gas pipeline facilities by submitting an annual certification to the Secretary pursuant to section 5 of Pub. L. No. 90-481 (originally codified at 49 U.S.C. § 1674; currently codified as amended at 49 U.S.C. §60105). If a state does so, the Secretary is prohibited from enforcing safety standards or practices for intrastate gas pipelines in that state. *Id.* If the Secretary determines, however, that a state is not "satisfactorily enforcing compliance" with the federal standards, he has the discretion to reject the certification or take other appropriate action to achieve adequate enforcement, including asserting federal jurisdiction over intrastate facilities. *Id.*

Since the 1970s, California has, through the CPUC, submitted an annual certification to the Secretary to regulate all intrastate natural gas pipelines in the state, except for certain pipelines that are beyond the scope of its authority, which remain subject to federal regulation. The submission of that certification makes CPUC eligible to receive federal funding for up to 80% of the costs reasonably required to administer its pipeline safety program pursuant to 49 U.S.C. § 60107(a)(1). In this action, the City complains, in essence, that the federal regulators have abdicated their

responsibility to exercise sufficient oversight to ensure that the CPUC is complying with its duties under the certification to enforce federal pipeline safety standards in California.

The City alleges that as a consequence of inadequate federal oversight, the CPUC has allowed the Pacific Gas & Electric Company ("PG&E") to violate minimum federal safety standards "blatantly," which in turn has led to numerous catastrophic events, including the pipeline explosion in San Bruno, California in 2010. The San Bruno explosion and resulting fire killed eight people, injured fifty, and destroyed or damaged more than one hundred homes. The City also points to a 2008 pipeline explosion in Rancho Cordova, California that killed one and injured five, and an incident in Cupertino, California in 2011 that caused extensive property damage.

Alleging that further such incidents are inevitable, and that persons and property within the City and County of San Francisco are therefore facing an imminent risk of harm, the City seeks declaratory and injunctive relief. Specifically, the City requests an injunction requiring the Secretary, the Department of Transportation, PHMSA, and its administrator (1) to "comply with their duty to oversee certified state authorities and to ensure that federal pipeline safety standards are enforced;" (2) to cease "improperly delegating their authority to do so to gas pipeline operators like PG&E," and; (3) "to only disburse federal funds to a state authority that are reasonably required to carry out a pipeline safety program in compliance with the authority's certification to PHMSA."

III. LEGAL STANDARD

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While "detailed factual allegations are not required," a complaint must include sufficient facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 US 544, 570 (2007)). A claim is facially plausible "when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Defendants seek dismissal under Rule 12(b)(1) of the Federal Rules of Civil Procedure, arguing that the City's lack of standing deprives the Court of jurisdiction, and that subject matter jurisdiction is otherwise lacking. A motion to dismiss for lack of subject matter jurisdiction may be

made on the grounds that the lack of jurisdiction appears from the "face of the complaint," or may be based on extrinsic evidence apart from the pleadings. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003); *McMorgan & Co. v. First Cal. Mortgage Co.*, 916 F. Supp. 966, 973 (N.D. Cal. 1995).

Although defendants' motion is also brought under Rule 12(b)(6), they make no separate argument that the allegations of the complaint are deficient under that rule; rather they merely assert that absent a basis for jurisdiction, the City has failed to state a claim. Indeed, at least where the jurisdictional issue is whether the plaintiff has standing, dismissal is appropriate under Rule 12(b)(6) absent sufficient factual allegations in the complaint, which, if proven, would confer standing. *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 771 (9th Cir. 2006).

IV. DISCUSSION

A. Standing

Defendants first argue that under general principles of standing, the complaint should be dismissed because the City has not alleged a "concrete injury," caused by the actions or inaction of defendants, that is redressable through a judicial decision. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). ("[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent, not 'conjectural' or 'hypothetical,''. . . Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' . . . Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'")

Defendants' challenge to the adequacy of the City's allegations to show standing rests on their assertions that (1) it is unduly speculative that a gas pipeline accident will occur and cause injury in San Francisco, particularly given recent efforts by the CPUC and PG&E to address past problems; (2) any accident that does occur will be the fault of PG&E and/or the CPUC, not

defendants, and (3) because any accident would not be defendants' fault, pursuing relief against them does not satisfy the "redressability" requirement. These contentions may reflect defendants' view of the merits, but they are not persuasive as grounds for concluding the City lacks standing. *See Bennett v. Spear*, 520 U.S. 154, 168 (1997) ("at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim."); *id.* at 169 ("While, as we have said, it does not suffice if the injury complained of is the result of the *independent* action of some third party not before the court . . . that does not exclude injury produced by determinative or coercive effect upon the action of someone else." (emphasis in original)).

B. Private right of action under the PSA

In arguing there is a jurisdictional basis for this action, the City first relies on the "citizen's suit" provision of the PSA, codified at 49 U.S.C. §60121(a).[1] That section provides, in relevant part, "[a] person may bring a civil action in an appropriate district court of the United States for an injunction against another person (including the United States Government . . .) for a violation of this chapter or a regulation prescribed or order issued under this chapter." Defendants contend this action cannot go forward under this section, primarily characterizing the issue as one of sovereign immunity.

Although not entirely free from doubt, it appears that defendants' invocation of "sovereign immunity" is misplaced. As the City correctly points out, §702 of the APA waives sovereign immunity in actions "seeking relief other than money damages." 5 U.S.C. § 702; *see The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 523-24 (9th Cir. 1989). There is conflict in Circuit precedent, however, as to whether the waiver provided in §702 applies outside of actions brought under, and subject to other limitations in, the APA. *See Gros Ventre Tribe v. United*

[1] Although the City is a public entity, for these purposes it is in a the position of a private party—a "citizen"—as contrasted to the Attorney General, whose ability to enforce federal statutes stands on a different basis.

States, 469 F.3d 801, 809 (9th Cir. 2006) (noting, but not resolving, conflicting holdings of *Presbyterian* and *Gallo Cattle Co. v. U.S. Department of Agriculture,* 159 F.3d 1194 (9th Cir. 1998)). Thus, if this action is not brought under, and in conformance with, the APA, there is at least arguably a sovereign immunity hurdle that the City must overcome.

Even if not characterized as a sovereign immunity issue, however, defendants' more basic argument that this action is not authorized by 49 U.S.C. §60121(a) has merit. The relief the City seeks—compelling defendants to carry out what the City contends are their statutory duties under the PSA—is, in effect, a mandamus claim. Where Congress has intended citizen suit provisions to encompass mandamus relief, it generally has included specific provisions to that effect. *See, e.g.* Section 304 of the Clean Air Act, 42 U.S.C. § 7604(a)(2) (authorizing citizen suits "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator."). Indeed, the PSA itself contains such a provision in the limited context of a section protecting "whistleblowers" from discrimination. *See* 49 U.S.C. §60129(c) ("Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding . . . .").

The City relies on the *absence* of any specific provisions in §60121 regarding mandamus-type relief to argue that it may pursue this action as one for "violations" of the PSA by the government. In *Bennett v. Spear*, 520 U.S. 154 (1997), the Supreme Court rejected a similar attempt to characterize mandamus relief as permissible under a citizen's suit provision authorizing actions against "any person, including the United States . . . who is alleged to be in violation" of the Endangered Species Act ("ESA"). *Id.* at 173. The *Bennett* court explained:

> The Government contends that the Secretary's conduct in implementing or enforcing the ESA is not a "violation" of the ESA within the meaning of this provision. In its view, [the provision] is a means by which private parties may enforce the substantive provisions of the ESA against regulated parties—both private entities and Government agencies—but is not an alternative avenue for judicial review of the Secretary's implementation of the statute. We agree.

Id.

Likewise, here, while §60121 would authorize a suit against government entities to the extent they engage in activities regulated by the PSA—such as constructing or operating pipelines—it is not an appropriate vehicle for seeking mandamus relief regarding defendants' performance of their regulatory obligations. The City contends *Bennett* is distinguishable because the ESA's citizen suit provision expressly allows for mandamus relief on limited issues, and the Court's analysis pointed to those provisions in rejecting an expansive reading of "violation." *See Bennett*, 520 U.S. at 173. As noted, however, the PSA likewise contains a provision authorizing mandamus relief in limited circumstances, albeit removed by several sections from the primary citizen's suit provision, rather than appearing in an adjacent subsection.

Moreover, the City's basic argument is that Congress's omission of any specific provisions regarding mandamus-type relief from §60121 justifies reading "violation" broadly to include failures by the Secretary in carrying out his administrative duties. Given that Congress has repeatedly demonstrated that it knows how to provide specifically for mandamus-type relief, that argument is not persuasive, and the City's strained reading of the scope of §60121 is not tenable. Accordingly, this action is not authorized by virtue of the PSA's citizen suit provision. *See also Friends of the Aquifer, Inc. v. Mineta*, 150 F.Supp.2d 1297 (N.D. Fla. 2001) (dismissing mandamus petition to compel the Secretary to promulgate regulations under the PSA in compliance with statutory deadlines, and rejecting §60121 as potential basis for the proceeding.)[2]

[2] *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004), on which the City relies, does not compel a contrary conclusion. The issue in *Bonnichsen* was whether the citizen's suit provision of the Native American Graves Protection and Repatriation Act abrogates *prudential* standing doctrine, an issue not presented here. Additionally, in concluding that there was jurisdiction to hear the claim, the *Bonnichsen* court relied on a passage in *Bennett* discussing relief available under the ESA's provision that expressly authorizes mandamus-type relief in certain circumstances. *See Bonnichsen*, 367 F.3d at 874 (citing *Bennett*, 520 U.S. at 166). Finally, as defendants point out, the governmental action at issue in *Bonnichsen* was not mere administration of a regulatory scheme, but more akin to a regulated act.

C. Action under the APA

The City argues that if this action may not properly be maintained as a "citizen's suit" under §60121(a), the Court nonetheless may exercise jurisdiction under the APA. That is not quite correct. *See Gallo Cattle,* 159 F.3d at 1198. ("[I]t is well settled that the APA does not independently confer jurisdiction on the district courts . . . . Rather, the APA prescribes standards for judicial review of an agency action, once jurisdiction is otherwise established.") The City's complaint, however, correctly cites 28 U.S.C. § 1331, as a potential basis for jurisdiction. *See Gallo Cattle,* 159 F.3d at 1198 ("[W]hile beyond dispute that the APA does not provide an independent basis for subject matter jurisdiction, a federal court has jurisdiction pursuant to 28 U.S.C. § 1331 over challenges to federal agency action as claims arising under federal law, unless a statute expressly precludes review.")

The existing complaint makes no attempt to assert a claim under the APA. The City suggests it need not amend to do so, because " [f]ailure to allege specifically the statute conferring jurisdiction is not always fatal to an action if the facts showing jurisdiction appear in the complaint." *Mir v. Fosburg*, 646 F.2d 342, 346-7 (9th Cir. 1980). A valid claim under the APA, however, is subject to certain specific requirements. *See, e.g. Gros Ventre,* 469 F.3d at 814 (observing that a claim under §706 of the APA "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take* . . . . [C]ourts do not have the authority to enter general orders compelling compliance with broad statutory mandates." (emphasis in original, internal citations and quotes omitted)).

Defendants urge denial of leave to amend, arguing that the City will not be able to plead a viable APA claim, in light of such requirements. While it may be that not all of the present broad allegations can be shoehorned into a properly-articulated APA claim, it is not evident that the City is categorically foreclosed from seeking at least some relief under the APA. Accordingly, while the present complaint cannot be construed as pleading a viable APA claim, the City will be given leave to amend.

V. CONCLUSION

The motion to dismiss is granted, with leave to amend. Any amended complaint shall be filed within 20 days of the date of this order.

IT IS SO ORDERED.

Dated: 7/25/12

RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

THE CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, et al.,

Defendants.

/

No. C 12-0711 RS

ORDER GRANTING MOTION TO DISMISS

I. INTRODUCTION

In this action, plaintiff the City and County of San Francisco ("the City") seeks declaratory and injunctive relief to compel the United States Department of Transportation, through the federal Pipeline and Hazardous Materials Agency ("PHMSA"), to exercise more stringent oversight of the California Public Utilities Commission ("CPUC") with respect to the CPUC's delegated responsibility to enforce federal natural gas pipeline safety standards in California. The City's original complaint was framed as a citizen's suit under the Natural Gas Pipeline Safety Act, Pub. L. 90-481, 82 Stat. 720 ("PSA"). Those claims were dismissed, but the City was given leave to amend to attempt to state a claim under the Administrative Procedures Act ("APA"). Defendants now move to dismiss the Amended Complaint, contending the City has failed to allege the narrow kinds of agency action or inaction that would be subject to judicial review under the APA.

II. BACKGROUND

Prior to 1968, regulation of natural gas pipelines was left entirely to the states. That year, Congress enacted the Natural Gas Pipeline Safety Act, Pub. L. 90-481, 82 Stat. 720 ("PSA") "to provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities." 49 U.S.C. § 60102(a)(1). Pursuant to that law and subsequent amendments, the Secretary of Transportation has delegated authority to PHMSA to adopt minimum safety standards for the design, construction, testing, operation and maintenance of natural gas and hazardous liquid pipelines. 49 C.F.R. § 1.53. See 49 C.F.R. parts 190-99. Under the regulatory scheme, states may assume responsibility for regulating intrastate gas pipeline facilities by submitting an annual certification to the Secretary pursuant to section 5 of Pub. L. No. 90-481 (originally codified at 49 U.S.C. § 1674; currently codified as amended at 49 U.S.C. §60105). If a state does so, the Secretary is prohibited from enforcing safety standards or practices for intrastate gas pipelines in that state. *Id.* If the Secretary determines, however, that a state is not "satisfactorily enforcing compliance" with the federal standards, he has the discretion to reject the certification or take other appropriate action to achieve adequate enforcement, including asserting federal jurisdiction over intrastate facilities. *Id.*

Since the 1970s, California has, through the CPUC, submitted an annual certification to the Secretary to regulate all intrastate natural gas pipelines in the state, except for certain pipelines that are beyond the scope of its authority, which remain subject to federal regulation. The submission of that certification makes CPUC eligible to receive federal funding for up to 80% of the costs reasonably required to administer its pipeline safety program pursuant to 49 U.S.C. § 60107(a)(1). In this action, the City complains, in essence, that the federal regulators have abdicated their responsibility to exercise sufficient oversight to ensure that the CPUC is complying with its duties under the certification to enforce federal pipeline safety standards in California.

The City alleges that as a consequence of inadequate federal oversight, the CPUC has allowed the Pacific Gas & Electric Company ("PG&E") to violate minimum federal safety standards "blatantly," which in turn has led to numerous catastrophic events, including the pipeline explosion

in San Bruno, California in 2010. The San Bruno explosion and resulting fire killed eight people, injured fifty, and destroyed or damaged more than one hundred homes. The City also points to a 2008 pipeline explosion in Rancho Cordova, California that killed one and injured five, and an incident in Cupertino, California in 2011 that caused extensive property damage.

Alleging that further such incidents are inevitable, and that persons and property within the City and County of San Francisco are therefore facing an imminent risk of harm, the City seeks declaratory and injunctive relief. Specifically, the City requests an injunction requiring the Secretary, the Department of Transportation, PHMSA, and its administrator (1) to "comply with their duty to oversee certified state authorities and to ensure that federal pipeline safety standards are enforced;" (2) to cease "improperly delegating their authority to do so to gas pipeline operators like PG&E," and; (3) "to only disburse federal funds to a state authority that are reasonably required to carry out a pipeline safety program in compliance with the authority's certification to PHMSA." The amended complaint also includes other formulations of requested declaratory and injunctive relief in essentially the same vein, with more details, and more tailored to echo the language of APA actions.

The amended complaint contains four claims for relief. The first two are those from the original complaint brought directly under the PSA, as to which leave to amend was *not* granted. The City explains that it has repleaded them merely to preserve its appellate rights, and does not seek to defend them in its opposition to the present motion to dismiss. Accordingly, those claims will again be dismissed, without leave. The City's third claim for relief is brought under section 706(1) of the APA, 5 U.S.C. § 706(1), and asserts that defendants have "unlawfully withheld" "agency action." The fourth claim for relief invokes section 706(2) of the APA, 5 U.S.C. § 706(2), and claims defendants' conduct has been "arbitrary, capricious and an abuse of discretion."

III. LEGAL STANDARD

Defendants' motion invokes both Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure. In challenging the original complaint, defendants relied on Rule 12(b)(1) at least in part because they were arguing that the City lacked standing, thereby depriving the Court of

jurisdiction. In the present motion, defendants have not clearly articulated why either or both of the rules apply, but the gravamen of their motion is that the City has failed to state a claim, an argument sounding primarily under Rule 12(b)(6).

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While "detailed factual allegations are not required," a complaint must include sufficient facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 US 544, 570 (2007)). A claim is facially plausible "when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Rule 12(b)(1) is also relevant, however, because absent a tenable APA claim, there is no subject matter jurisdiction to review alleged agency inaction. *See Ecology Center, Inc. v. United States Forest Service,* 192 F.3d 922, 926 (9th Cir. 1999). A motion to dismiss for lack of subject matter jurisdiction may be made on the grounds that the lack of jurisdiction appears from the "face of the complaint," or may be based on extrinsic evidence apart from the pleadings. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003); *McMorgan & Co. v. First Cal. Mortgage Co.*, 916 F. Supp. 966, 973 (N.D. Cal. 1995).

IV. DISCUSSION

A. Section 706(1)

There is no dispute that a claim under §706(1) of the APA "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take* . . . . [C]ourts do not have the authority to enter general orders compelling compliance with broad statutory mandates." *Gros Ventre Tribe v. United States,* 469 F.3d 801, 814 (9th Cir. 2006) (emphasis in original, internal citations and quotes omitted)). "§ 706(1) empowers a court to compel an agency only 'to perform a ministerial or non-discretionary act.'" *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

Defendants contend the amended complaint runs afoul of this principle because, at heart, the City is merely leveling a "broad attack on a Federal program for allegedly failing to achieve its

general statutory objectives," which is impermissible under *Norton*. *See id.* at 64. Defendants argue that the amended complaint's multiple references to "mandatory" duties are only labels and legal conclusions, which can and should be disregarded. Apart from those conclusory assertions, defendants contend, the amended complaint identifies *no* ministerial act or non-discretionary duty that they have allegedly failed to perform.

The City, in turn, insists it has adequately alleged that the Secretary is charged with two non-discretionary duties: (1) the duty to decide whether a State authority is satisfactorily enforcing federal pipeline safety standards before accepting a State certification of enforcement or disbursing federal funds; and (2) the duty to take "appropriate action to achieve adequate enforcement," applicable if the Secretary decides that a State authority is not satisfactorily enforcing those safety standards. The City argues a tenable APA claim arises from "[d]efendants' wholesale abdication of their duty to ensure that State authorities are actually enforcing federal safety standards through the promulgation of a minimum standard setting the benchmark for state agency performance."

The City relies on a Tenth Circuit decision, *Estate of Smith v. Heckler*, 747 F.2d 583 (10th Cir. 1984), in which the plaintiffs challenged the approach of the Secretary of Health and Human Services to reviewing the adequacy of states' certifications that care given to Medicaid recipients in those states met federal standards.[1] Defendants respond that *Estate of Smith* is distinguishable, on grounds that the requirements imposed by the Medicaid Act on the Secretary were, in defendants' view, more detailed and specific than those imposed by the PSA. Defendants also argue that the Tenth Circuit's approach to the APA has not been consistent with that of the Ninth Circuit, and that *Estate of Smith* predates the Supreme Court's broader enunciation of the governing principles in *Norton*.

More fundamentally, defendants argue that, contrary to the City's underlying premise, they in fact do evaluate the adequacy of the CPUC's enforcement of federal pipeline safety standards.

[1] This Tenth Circuit decision should not be confused with the better-known Supreme Court decision, *Heckler v. Chaney*, 470 U.S. 821 (1985), which held that an agency's decision not to take enforcement action is not subject to judicial review. Defendants rely on *Heckler v. Chaney* insofar as the City's claims can be characterized as a challenge to their failure to take enforcement actions.

Defendants point to 49 C.F.R. Part 198 which sets forth the performance factors they purportedly use to determine whether States are satisfactorily carrying out a pipeline safety program and whether, or to the extent which, PHMSA should provide grants-in-aid to assist the States in carrying out their state pipeline programs under 49 U.S.C. § 60107. These factors include, the "quality of state inspections, investigations, and enforcement/compliance actions." 49 C.F.R. § 198.13(c).

Defendants have also pointed to permissive language in the PSA (i.e., repeated use of the term "may") regarding actions the Secretary is authorized to take to ensure compliance with federal standards. That language is not dispositive, however, because defendants cannot and do not argue that the Secretary has *no* mandatory duty to oversee state enforcement efforts. Indeed, defendants implicitly recognize as much, by contending instead that the ultimate deficiency in the City's complaint is that it is a challenge to *how* defendants are carrying out their duties, rather than a legitimate claim of a failure to act.

On that point, defendants have the better argument. Section 706(1) does not provide a vehicle for bringing "complaints about the sufficiency of an agency action 'dressed up as an agency's failure to act.'" *Ecology Center,* 192 F.3d at 926 (quoting *Nevada v. Watkins*, 939 F.2d 710, 714 n. 11 (9th Cir. 1991)). Notwithstanding the City's characterizations of its allegations, it "has not pleaded a genuine § 706(1) claim." *Id.* at 926. Accordingly the motion to dismiss must be granted as to the third claim for relief. As there is no suggestion that other or additional facts could be pleaded that would alter the fundamental and untenable nature of the claim the City is attempting to bring, leave to amend will not be granted.

B. Section 706(2)

While not every claim under section 706(2) would be coextensive with a section 706(1) claim, in this instance the City's attempt to recast the same facts into a theory that defendants have acted arbitrarily and capriciously adds nothing of substance. Accordingly, the fourth claim for relief must also be dismissed, without leave to amend.

V. CONCLUSION

The motion to dismiss is granted. A separate judgment will issue.

IT IS SO ORDERED.

Dated: 2/28/13

RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE

PROOF OF SERVICE

I, Alison Lambert, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Seventh Floor, San Francisco, CA 94102.

On April 26, 2013, I served the following document(s):

NOTICE OF APPEAL

on the following persons at the locations specified:

David Ephraim Pinchas
Assistant United States Attorney
300 North Los Angeles Street
Room 7516
Los Angeles, CA 90012
Attorney for Defendant
213-894-2920
Email: david.pinchas@usdoj.gov

in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed April 26, 2013, at San Francisco, California.

Alison Lambert

ALISON LAMBERT