

Attachment B

Statement of Facts and Law Supporting a Complaint

Against USAID for Violation of

5 U.S.C. § 2302(b)(10) & (12)

BEFORE THE
Office of Special Counsel (“OSC”)
Washington, D.C.

Complaint of)
John MacKnight Fitzgerald,) **Complaints and Disclosure Analysis**
) **Division**
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Environmental Policy Analyst) File No. _____
USAID)
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**STATEMENT OF FACTS AND LAW SUPPORTING COMPLAINT OF USAID
VIOLATIONS, 5 U.S.C. 2302(B)(10)&(12)**

Statement of Facts

Introduction. In 1986, the United States Congress directed the Administrator for U.S. Agency for International Development (USAID) to create a system ? in consultation with the Secretaries of Treasury and State — for assessing the potential environmental impacts of pending lending projects of the Multilateral Development Bank (MDB). Ian A. Bowles and Cyril F. Komos, *The American Campaign for Environmental Reforms at the World Bank*, 23 FLETCHER F. WORLD AFF. 211, 211 (1999). USAID had begun and “early warning system” project the early to mid-1980s. This environmental review requirement was made permanent in legislation Title 13 of the International

Financial Institutions Act (“IFIA”)(codified within which is the “Pelosi Amendment”, IFIA Title 13, Section 1307, adopted in 1989).

In response to this legislation, USAID developed an MDB environmental policy monitoring system. At one time a three (3) employee staff oversaw this statutory mandate. Today, the discharging of this responsibility rests with one person — Mr. John Fitzgerald — a Schedule B, Environmental Policy Analyst in the Bureau of Policy and Program Coordination. In this position, Mr. Fitzgerald has highlighted a number of problems with the manner in which reviews are conducted (or not conducted). See Exhibit 1, Resume of John MacKnight Fitzgerald; Exhibit 2, Description of Complainant’s position and accompanying materials on its importance.

For these disclosures, Mr. Fitzgerald has been subjected to retaliation on May 23, 2002 in the form of position termination. See Exhibit 3, Letter, Howard Anderson, Director, Development Resources Division, International Cooperation and Development to John Fitzgerald, RSSA Management Center, Development Resources Division, International Cooperation and Development, Foreign Agricultural Service (May 23, 2002). This prohibited personnel practice was in violation of Title 5, Section 2302 of the United States Code.

Chad-Cameroon Pipeline. Pursuant to 22 U.S.C. § 262m-2, Mr. Fitzgerald requested that all agencies with oversight capacity obtain a copy of the Chad-Cameroon loan agreement (“Agreement”) during the Spring of 2000. See Exhibit 6, media coverage of projects with failed environmental review, based in part on Complainant’s disclosures through the Tuesday Group; this exhibit also contains a summary of the gross waste and abuse on the Chad-Cam pipeline project. For Exhibits 4 & 5, see Attachment C. This agreement is the central contract between a Exxon/Mobile-led consortium, the Governments of Chad and Cameroon, and the World Bank/IFC. At the next interagency meeting, Mr. Fitzgerald and a U.S. Treasury Department lawyer led a discussion in which they disclosed that the Agreement was marked by poorly-defined terms and

environmentally evasive loop-holes. Even the Treasury Department lawyer described the Agreement as “swiss cheese”. These concerns were shared in May and June, 2000 with the “Tuesday Group”, among which were Non-Governmental Organizations such as the Bank Information Center whose non-profit mission is to correct wrongdoing within the international financial community. See Exhibit 7, example of environmental evaluation in which Complainant’s substantive and critical disclosures were stripped by retaliating management.

In April, Mr. Fitzgerald had asked that the National Oceanic and Atmospheric Administration (“NOAA”) review General Oil Spill Response Plan. NOAA delivered an opinion: it was an outline of a plan, but not a plan. Mr. Fitzgerald then asked for an opinion from the Interagency Task Force on Invasive Species’ aquatic species staff on the lack of a plan or any action to address the issues of invasive species. It appeared that invasive species in the ballast water of tankers could be inadvertently be dumped at the new oil loading site. The ITFIS opinion said failure to address it would violate federal policy.

Following adverse recommendations by NOAA and the ITFIS, Mr. Fitzgerald recommended adopting all of General Account Office’s April 2000 general anti-corruption recommendations for the World Bank with specific regard to this project. The general dissection of the Agreement continued as USAID/AFR/CARPE Director Jim Graham and contractor staff, Fred Swartzendruber, asked numerous questions about which choice of law would apply to oil that might be sent through the pipeline. They also asked for clarification of, and guarantees for, the funding for the parkland reserves promised as offsets for harm. Both noted that the Bank had mistated the level of advance road building earlier.

Treasury’s Environmental Analyst, Mike Colby, then raised a number of questions about CCP as well. In January and March, 2000, Colby had announced at Tuesday Group meetings which Mr. Fitzgerald attended before joining USIAD that

Treasury was prepared to require the Bank to submit Environmental Assessment (“EA”) concerning policy changes significantly impacting the environment, as is required under the Pelosi Amendment. This reform was later halted within the Treasury Department. By autumn, Colby had left Treasury. USAID PPC and AFR still proposed opposition to the project. They issued a memorandum stating the EA was inadequate EA regulatory capacity was likely to be insufficient in Chad and Cameroon to manage the project, despite the loans for that purpose. At this point, Mr. Fitzgerald disclosed that violations had occurred, and were occurring, in the environmental review process required of the U.S. Government. Alongside these disclosures, information was passed regarding the gross waste and mismanagement of the projects required to be environmentally reviewed. These disclosures were made both to Congress and within the Tuesday Group, particularly as the levels of funding and the ability of Chad and Cameroon to disburse the funds was brought into question.

The U.S. Ambassador to Chad then asked USAID to change its position; USAID staff still recommended opposition, citing violations of the Pelosi Amendment as among the grounds for rejection. USAID maintained its position. It later altered the process for reaching these decisions, however, directing another office in the Policy and Planning Coordination Bureau to take charge of the final memoranda submitted to the Treasury Department. U.S. EPA then recommended abstention. Other agencies recommended support. The U.S. Treasury then spoke for the federal Government, and the project loans were approved.

- **Reaction to the Chad-Cameroon Pipeline’s Approval.** Within USAID, the pending reorganization shifted the CARPE director’s position to the Africa mission, causing Graham to retire. The environmental specialist/contractor, Fred Swartzendruber seeing his position was to be cut or moved to Africa, left USAID.

Fall, 2000: Lessons of the Chad-Cameroon Pipeline Loan Approval Process Disclosed in the Draft Report to Congress, November 7, 2000. Mr. Fitzgerald

incorporated his Interagency and Tuesday Group observations on the Chad-Cameroon (“Chad-Cam”) Pipeline Loan approval into his November 7, 2002 Draft Report to Congress on policies and loans. See Exhibit 8, roster of Tuesday Group members, through whom one of the four (4) disclosures were made. The draft report was submitted to Treasury for their review and sharing with the MDBs. The Draft Report also described many other problematic projects such as the K2R4 Ukrainian nuclear plant proposal and other hard projects as well as a two (2) structural adjustment loans, including Ecuador’s.

The appearance of the November 7, 2000 Draft Report at the same time as these sensitive projects led to a meeting with USAID staff and Assistant Administrator for PPC Tom Fox, called by Deputy Assistant Secretary of the Treasury William E. Scheurch. Scheurch angrily rejected the Draft Report’s “policy” observations and conclusions regarding the Ecuador structural loans, among other issues. Similar angry critiques continued in written edits of Draft Report versions. USAID staff — including Mr. Fitzgerald — entered into a series of professional exchanges, edited the Draft Report and finally agreed by the end of December, 2001, to split off the policy section (to be forwarded later as a memo to Treasury, but never released despite Mr. Fitzgerald’s recommendations). USAID sent the remainder to Congress in January, 2002. The effective date was September, 2001, when most of the last substantive changes were made. Thus at the Treasury Department’s request, the material summarizing questioning violation of the Pelosi Amendments and all concerns from the Tuesday Group regarding gross waste and mismanagement of federal funds were withheld from Congress.

K2R4 Nuclear Power Plant, Ukraine, European Bank for Reconstruction & Development, Nov./Dec. 2000. Following the Chad-Cam Loan’s environmental review and its concerns reflection in the November 7, 2000 Draft Report to Congress, Deputy Assistant Secretary William E. Scheurch decided to forego at least some of the interagency meetings which had previously raised concerns over the violation of the Pelosi Amendment. He held individual meetings with the agencies that have oversight

capacity for the K2R4 plants, for example. Based on the Chernobyl experience, Mr. Fitzgerald suggested (within USAID) that the federal Government's position require conditions pursuant to 22 U.S.C. § 262m-2 before any federal Government or European EBRD support be approved, including assignment of any funding for potential liabilities — insurance, performance bonds, etcetera.

Mr. Fitzgerald's K2R4 pre-loan approval requests were cut down to "clarify liability" by USAID's E&E Bureau, which had assumed the lead for the purposes of USAID review. The EBRD approved the K2R4 project on condition that K2R4 meet a list of conditions within a certain period. Later, the EBRD then withdrew support for K2R4 for failure to meet several of these conditions, but the U.S. Department of State has, as of mid-2002 been advocating the project loan, once again.

Many projects and several Bank policy revisions were reviewed by interagency staff and the Tuesday Group between 2000 and 2002. Among these were some which should have had the statutorily-required environmental assessments, including World Bank proposed actions implicating forest policy, water policy and other environmental impacts. The review documents which did exist for many project loans lacked many of the critical elements defining an "environmental assessment".

In many of these review meetings, Mr. Fitzgerald suggested that USAID, Treasury, and USEPA define not only the timing of environmental review, but also substantive Environmental Assessment ("EA") review criteria and the project management process used to track the extent to which each proposal met the substantive as well as the timing requirements of the Pelosi Amendment. Both the U.S. Department of the Treasury and the Inter-agency Group began to do this with more clarity at the staff level.

Bujagali Falls Dam, Uganda, WB/IFC, December 2001. Such was the state of U.S. Department of the Treasury and USAID compliance with the Pelosi Amendment in

late 2001, when the Bujagali Falls Dam project was referred for environmental review. Bujagali was to be one of the largest African projects in terms of cost. Within USAID, Mr. Fitzgerald led the Bujagali Falls Dam research effort. This research indicated that a viable geothermal option existed that is much less harmful to the African environment and equally economical to Uganda and its neighbors. Mr. Fitzgerald also said in the Interagency Group and within USAID that the Bujagali/EA was inadequate and should have included the geothermal option, as well as the cumulative impact analysis of both the dam and the geothermal options. He urged USAID to urge Treasury to urge the Bank to delay its decision until the conclusion of an Inspection Panel investigation into alleged violations of sound environmental and safety practices, and until clarification of corruption allegations regarding the Ugandan government. USAID's EGAT Bureau (Mr. Bill Sugrue) concurred with Mr. Fitzgerald. The AFR Bureau and the Ambassador disagreed. The Development Partners Office of the Planning and Policy Coordination Bureau (PPC/DP) took control of the position paper, and met with Assistant Administrator Cronin without Mr. Fitzgerald being present (sometime in May or June, 2002). The violations were downplayed and the project supported. Included in the final determination of USAID, however, was a recommendation to separate projects under investigation in the future.

Tropical Forest Budget Negotiations, converted into a pretext for retaliation against Mr. Fitzgerald. Following the Chad-Cam, K2R4, and Bujagli loan approvals and environmental reviews in violation of the Pelosi Amendment, Mr. Fitzgerald was sent to represent USAID in meetings with Deputy Assistant Secretary of the Treasury William E. Scheurch and the Deputy Assistant Secretary of State for the Environment Jeff Burnham. The meetings concerned the Tropical Forest Conservation budget. Fitzgerald, pre-warned by USAID to not make any financial commitments, relayed the position that he could not commit USAID to any proposed budget unless his superiors had a chance to review the terms. State's DAS/E Jeff Burnham took the same approach, postponing the budget agreement Deputy Assistant Secretary Scheurch had proposed.

Following the Tropical Forest budget negotiations, Deputy Secretary of Treasury John B. Taylor and Deputy Assistant Secretary William E. Scheurch met with USAID's chief executive, Administrator Andrew Natsios, and his then-Assistant Administrator, Patrick Cronin, and told them that Mr. Fitzgerald was a problem with which they must deal. At this point, USAID held Mr. Fitzgerald's policy memorandum to Treasury regarding systematic reforms in order to gain clearance from new political appointees.

On May 23, 2002, USAID sent a letter to USDA informing them that Mr. Fitzgerald's position would be terminated due to reorganization. Fitzgerald was informed verbally that the termination was due in large part to pressure from Deputy Assistant Secretary of the Treasury William E. Scheurch. Despite this retaliation, Mr. Fitzgerald continued the environmental review of the Bujagali Falls Dam project (MIGA June-July 2002) and recommended delaying a scheduled board decision to guarantee investments in AES Inc.'s Bujagali dam commitments, pending the careful inter-agency consideration of a report just completed by the Inspection Panel which was about to confirm several of the violations alleged by Mr. Fitzgerald. Treasury and USAID/PPC/DP would not await the new critique. The Bujagali dam came back to the Bank Board in the form of an Inspection Report confirming Fitzgerald's disclosures.

The Development Partners Office/PPC then took full control of the issue, and briefed Assistant Administrator Patrick Cronin without inviting any others, including Mr. Fitzgerald. PPC decided to support the Bujagali project unless "it is the worst thing ever to happen to Uganda." This applied a new ("worst thing") standard of environmental review to Bank projects, one in violation of the Pelosi Amendment. The Development Partners Office still included a paragraph noting USAID's desire to separate projects in the future pending investigations. On June 18th, the Board accepted management's response to findings of violations. It then delayed its decision to guarantee investment until mid-July according to Treasury. On July 3rd, the *Wall Street Journal* reported that the project was indefinitely delayed due to corruption allegations.

It is a violation of federal law to engage in a prohibited personnel practice in violation of the merit system principle codified under Title 5, Section 2301. Mr. Fitzgerald asserts a prohibited personnel practice under 5 U.S.C. § 2302(b) (12), and meets that assertion by substantiating a violation of the merit system principle at 5 U.S.C. § 2301(b)(2)(6)(8)&(9). A prohibited personnel practice is not established under § 2302(b) (12) merely by showing that an action violates the merit system principles. It must be shown by a two-step analysis that the agency:

- (i) violates a law, rule, or regulation,
? and—
- (ii) that the violated law, rule or regulation is one which 'implements' or which 'directly concerns' the merit system principles.

Wells v. Harris, 1 M.S.P.R. 208, 215 (1979).

Under Title 5, Section 2301, federal personnel management should be implemented consistent with several underlying principles, including:

- (2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.
- (6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.
- (8) Employees should be:
 - (A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes,

? and?

- (B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.
- (9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences:
 - (A) a violation of any law, rule, or regulation, or
 - (B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

5 U.S.C. § 2301(B)(2)(6)(8)&(9).

The principles enunciated in Title 5 are reflected at USAID in the establishment of an Environmental Policy Analyst position to manage review of MDB proposals and actions, including environmental assessments for loans to be extended by the World Bank and other MDBs. The intervention of the Office of Special Counsel is required in this instance to preserve the integrity of Congressional law. Mr. Fitzgerald's role in executing an essential government function in the review of environmental assessments is a critical link in the review of international development funding. See Exhibit 9, the World Bank's own internal review of its failed environmental assessment process, proving the Complainant to be serving an essential government function.

In 1987 then-World Bank President Barber Conable created a new set of bureaucratic mechanisms to ensure environmental quality in Bank lending. Specifically, the Bank converted the Environment, Science and Technology Unit into a centralized Environment Department. It created Regional Environment Divisions in each of the World Bank's regional vice presidencies. These changes greatly increased the Bank's complement of environmental staff. At the time, the move was widely hailed by environmentalists and Congress alike as a significant step forward. *See* Philip Shabecoff, *World Bank Offers Environment Projects*, N.Y. TIMES (May 6, 1987) at A14 (quoting

statement by Gus Speth, then President of the World Resources Institute, that the change was "a charter for a new day at the World Bank").

This reform had been one of Congress' earliest environmental demands of the MDBs. Conable clearly intended the restructuring to signal World Bank leadership on environmental issues and to counter congressional and environmentalist concerns. See The National Environmental Policy Act of 1969, 42 U.S.C. 4332 (requiring preparation of an environmental impact statement for federal actions and proposed legislation that significantly affects the environment); *The World Bank, 1995*, Hearing Before the Subcomm. on Domestic and Int'l Monetary Policy of the House Comm. on Banking and Financial Services, 104th Cong., 1st Sess. 21 (1995) (statement of Bruce Rich, Senior Attorney and Director, International Program, of the Environmental Defense Fund).

Mr. Fitzgerald has performed to an "outstanding" level of work accomplishment, and stands retaliated against for the partisan political and career purposes of Deputy Assistant Undersecretary of the Treasury William E. Scheurch and Deputy Secretary John B. Taylor. Fitzgerald's position – Environmental Policy Analyst – requires him to manage interagency and public outreach efforts leading to, and completing, environmental review. Environmental Impact Assessment is a basic, internationally accepted element of environmental policy and practice. Originally established in the United States, an assessment typically analyzes the potential environmental consequences of development activities, considers alternatives and their environmental impacts, and outlines mitigation measures to minimize environmental harm. Many countries have since adopted EIAs as part of their national environmental policies. International development agencies have also adopted EIA procedures for their own use in planning and decision making. At the 1992 Rio Earth Summit, representatives agreed that countries and international agencies should adopt and implement EIA policies. See United Nations, Rio Declaration on Environment and Development, Principle 17, in Earth Summit Agenda 21: The United Nations Programme of Action From Rio 11, U.N. Sales No. E.93.I.11 (1993). More than

150 nations are now required to do so under Article 14 of the Convention on Biological Diversity.

The EIA review process supervised by Mr. Fitzgerald was became an early an early Congressional priority. Congress essentially adopted USAID's early warning system to serve as a surrogate EIA procedure in the absence of strong policies at the banks themselves but also as an independent, substantive review under a separate and independent U.S. standard, in case the MDBs were to fail to implement their own with regard to any specific action. In 1986, Congress used appropriations legislation to direct the U.S. executive directors to promote changes in the banks to "eliminate or mitigate" the environmental impacts of destructive development projects. H.R.J. Res. 738, 539(h), 100 Stat. at 3341-235 to 3341-236; see also supra text accompanying note 69. In 1989, Congress went further, calling for management plans to ensure systematic environmental review of all projects. IDFA, 521, 103 Stat. at 2512 (codified as amended at 22 U.S.C. 262m-7-e). So Environmental Impact Assessments rank as one of Congress' highest policy priorities at the MDBs. The Pelosi Amendment is intended to prevent U.S. Executive Directors from voting on proposed MDB loans that have potentially significant environmental impacts unless an EIA has been made available to them at least 120 days in advance. 22 U.S.C. 262m-7. This policy, which took effect in December 1991, has had a significant effect in the development of the World Bank's EIA policy.

The violation of federal merit system principles (6) and (8) is best understood in the context of the Environmental Policy Analyst's role in providing neutral, dispassionate environmental review of Bank projects. To the extent that Mr. Fitzgerald is being pared out of a group of three (3) staff, two of whom are contractors much younger, less qualified, and less experienced than himself, there is a clear violation of federal merit principle (2). However, the most glaring violation of a federal merit principle lies in the violation of (9), in attacking the employment of the one federal employee most concerned with and assigned to ensure public accountability over MDB projects.

Lack of public access to information about World Bank projects has been a basic concern for NGOs and Congress since the beginning of environmental reform efforts. Although Congress enacted a wide range of legislation on the subject and the Treasury Department successfully pushed for a significant number of incremental improvements in the public's ability to gain access to World Bank documents, the most significant structural change was the creation of the World Bank Inspection Panel in 1994. See, e.g., Letter from Secretary of the Treasury Lloyd Bentsen to Representative Nancy Pelosi (July 29, 1994) (relaying the Treasury Department's efforts to change the International Finance Corporation's policy concerning the Environmental Impact Assessments associated with the Pelosi Amendment). The Inspection Panel was based in part on the experience of the Morse Commission in evaluating the environmental aspects of the Narmada dam project in India. Letter from Senator Patrick Leahy to Lewis Preston, President, World Bank (June 7, 1993). The panel is vested with the authority to investigate complaints of World Bank policy and procedural violations that materially affect parties and groups in borrowing countries. New Independent Inspection Panel Office Opens, The Inspection Panel News Release No. 1 (IBRD and IDA, Washington, D.C.), Sept. 7, 1994, at 1.

Congress played a major role in the creation of the Inspection Panel. After nearly a decade of work on information policy issues, Congress sought a process-oriented solution that would insure that existing policies were implemented. In June 1993, Appropriations Subcommittee Chairman Senator Patrick Leahy wrote a detailed letter to World Bank President Lewis Preston outlining congressional concerns about the declining performance of Bank projects. In his letter, Senator Leahy pointed to the experience of the Morse Commission in evaluating the Narmada project in India; he also suggested that "serious consideration should be given to establishing a permanent, independent commission for investigating public concerns about Bank-financed projects." Senator Leahy linked the creation of such an institution with efforts to address Congress' "waning tolerance for an institution supported with public funds that denies the

public access to relevant information, or to an impartial mechanism for investigating complaints about the use of those funds."

Senator Leahy's strongly worded letter was part of a concerted effort by Congress in 1993 to force creation of the Inspection Panel. See also, James V. Grimaldi, *Review of Public Bank Projects Weakened, Green Groups Say*, WASH. POST (Sept. 19, 2002) at A25. Congress succeeded that year during the authorization process for the tenth replenishment of the IDA. Congressman Barney Frank finally forced the issue with the World Bank. Ultimately, the World Bank agreed to create the Inspection Panel and Congress authorized two out of three years of appropriations for the IDA. See Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1995, tit. I, 108 Stat. at 1608; Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1994, tit. I., 107 Stat. at 931. Ian Bowles and Cyril Kormos, *Environmental Reform at the World Bank: The Role of Congress*, 35 VA. J. INT'L L. 777, 832-833 (1995).