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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FRIENDS OF THE EARTH, INC., et al., Plaintiffs, v. PETER WATSON, et al., Defendants.	Civ. No. 02-4106 (JSW)
	DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT
	Date: February 11, 2005 Time: 9 A.M. Courtroom 2, 17th Floor

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MOTION

Defendants, by and through their undersigned counsel, hereby move for summary judgment pursuant to Fed. R. Civ. P. 56. This motion shall be heard at 9 a.m. on February 11, 2005.

Defendants ask that this motion be granted because Plaintiffs cannot demonstrate standing to bring their claims, because Plaintiffs have failed to challenge "final agency action" under the Administrative Procedure Act, 5 U.S.C § 704, and, with respect to Defendant Peter Watson (President and Chief Executive Officer of the Overseas Private Investment Corporation), because the agency's organic statute is a statute that "precludes judicial review" under the Administrative Procedure Act, 5 U.S.C. § 701(a), and because the Overseas Private Investment Corporation is not subject to the National Environmental Policy Act, 42 U.S.C. §§ 4321, et seq. For these reasons as explained below, Defendants respectfully request that this Court grant their motion.[1]

STATEMENT OF THE ISSUE

The issues presented by Defendants' motion are whether Plaintiffs can demonstrate standing to bring their claims, whether Plaintiffs have challenged "final agency action" under the Administrative Procedure Act, 5 U.S.C. § 704, and, with respect to Defendant Peter Watson, whether the agency's organic statute is a statute that "precludes judicial review" under the Administrative Procedure Act, 5 U.S.C. § 701(a), and whether the Overseas Private Investment Corporation is subject to the National Environmental Policy Act, 42 U.S.C. §§ 4321, et seq.

MEMORANDUM

I. Introduction

Plaintiffs bring a broad challenge to the functions of two federal agencies – the Export Import Bank of the United States and the Overseas Private Investment Corporation – claiming that these agencies are violating the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, et seq., by approving financing and insurance arrangements pertinent to certain aspects of energy and fossil fuel projects in foreign countries without considering, under NEPA, the potential climate change

[1] The parties agreed to brief this matter in two stages, if necessary. This first stage concerns certain jurisdictional issues. If any issues remain after disposition of this motion, the parties will file a further case management statement.

implications of greenhouse gas emissions that might be associated with those projects. Plaintiffs' claims fail for four fundamental reasons.

First, while Plaintiffs' concerns regarding the implications of climate change for the world environment raise issues being taken seriously by the world community, they do not amount to the type of injury that the Supreme Court requires to support standing under Article III of the United States Constitution.

Second, the Administrative Procedure Act (APA), 5 U.S.C. § 704, the statute upon which Plaintiffs must base their claims, only allows judicial review of "final agency action." However, in lieu of challenging a final agency action that causes them harm as required by the APA, Plaintiffs mount a broad attack on an artificial grouping of each agency's portfolio, contending that each agency must be compelled to comply with NEPA for Plaintiffs' own self-defined grouping of actions and for unspecified future actions. The APA does not allow such an ill-defined or broad-based challenge.

Third, Plaintiffs' challenge fails to state a valid claim with respect to the Overseas Private Investment Corporation. As a threshold matter, the plain language of the agency's organic statute reveals that Congress chose to shield OPIC from judicial review of compliance with its various statutory obligations, including compliance with its obligation to consider the environmental implications of its proposed actions. As a result, the agency's decisionmaking is exempt from judicial review under the APA, 5 U.S.C. § 701(a), which does not waive sovereign immunity when judicial review is precluded by another statute.

Fourth, Congress decided not to apply NEPA to the Overseas Private Investment Corporation in favor of specific requirements tailored to the agency's foreign policy mission. It did so in part to avoid just what Plaintiffs attempt here – the entanglement of actions taken with respect to foreign projects in furtherance of the nation's foreign policy goals in domestic litigation.

Thus, as explained more fully below, Defendants' motion for summary judgment should be granted and this matter should be dismissed with prejudice.

II. Legal Background

A. The National Environmental Policy Act

The National Environmental Policy Act (NEPA) was enacted to "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; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation." NEPA, § 2, 42 U.S.C. § 4321. NEPA's mandate to agencies is "essentially procedural . . . It is to insure a fully informed and well-considered decision . . . ." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978) (citation omitted). "It is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). See also Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1355-56 (9th Cir. 1994).

NEPA provides that federal agencies should prepare a detailed Environmental Impact Statement (EIS) for "major Federal actions significantly affecting the quality of the human environment . . . ." 42 U.S.C. § 4332(2)(C). NEPA's EIS requirement is only triggered by "a definite recommendation for federal action." Izaak Walton League of America v. Marsh, 655 F.2d 346, 374 (D.C. Cir.), cert. denied, 454 U.S. 1092 (1981). In order to determine whether an action is one requiring an EIS, the agency may prepare an Environmental Assessment (EA). 40 C.F.R. § 1501.4(b). An EA is a concise public document that should briefly describe the proposal, examine alternatives, consider environmental impacts, and provide a listing of individuals and agencies consulted. 40 C.F.R. § 1508.9; 33 C.F.R. § 230.10. If a finding of no significant impact is made after the matter is analyzed in an EA, then NEPA does not require preparation of an EIS. Salmon River, 32 F.3d at 1356.

B. The Administrative Procedure Act

NEPA does not contain a waiver of sovereign immunity or create a private right of action. Lujan v. National Wildlife Federation, 497 U.S. 871, 882 (1990). Rather, review of Plaintiffs' claims may only proceed, if at all, pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. See 2nd Am. Compl. at ¶ 9. See also Clouser v. Espy, 42 F.3d 1522, 1528 n.5 (9th Cir. 1994) (review under

a framework statute such as the APA is the "sole means" for testing legality of federal action absent private right of action under substantive statute), cert. denied, 515 U.S. 1141 (1995); Committee to Save the Rio Hondo v. Lucero, 102 F.3d 445, 448 (10th Cir. 1996) ("Because [NEPA] does not contain a private right of action . . . a plaintiff must rely on the Administrative Procedure Act as the basis for its action . . . ."). The APA allows review of "agency action," dictating the type of agency action that is judicially reviewable, the timing of judicial review, the scope of review permitted, and the standard applied by a reviewing court. 5 U.S.C. §§ 701-706; Darby v. Cisneros, 509 U.S. 137, 146 (1993). See also Gallo Cattle Co. v. U.S. Dept. of Agriculture, 159 F.3d 1194, 1198 (9th Cir. 1998).

III. Factual Background

Plaintiffs have brought suit against two separate federal agencies – agencies with different missions, different statutory authorities, and different roles.

A. The Export Import Bank of the United States

The Export-Import Bank of the United States (Ex-Im Bank) is an independent agency of the Executive Branch and a wholly-owned government corporation. It is the official export credit agency of the United States. Ex-Im Bank's mission is "to aid in financing and to facilitate exports of goods and services . . . and in so doing contribute to the employment of United States workers." 12 U.S.C. § 635(a)(1). To accomplish its mission of creating and maintaining U.S. jobs, Congress directed Ex-Im Bank to provide its products "on terms and other conditions which are fully competitive with the Government-supported rates and terms and other conditions available for the financing of exports of goods and services from the principal countries whose exporters compete with United States exporters." 12 U.S.C. § 635(b)(1)(A). See also O'Boyle Decl. at ¶ 3 (Att. 1). In other words, a critical component of Ex-Im Bank's mission is to level the playing field for U.S. exporters that are competing against government-supported exports from other countries. Ex-Im Bank's competitiveness mandate is paramount to the successful pursuit of its mission and manifests itself in a number of ways. See 12 U.S.C. § 635(b)(1)(A). For example, in order to even the playing field for U.S. exporters, Ex-Im Bank has worked with major export credit agencies in other countries to adopt common guidelines "regarding minimum interest rates, maximum repayment terms, and minimum pricing for risk premiums as well

as common approaches for environmental criteria and anti-bribery protections." O'Boyle Decl. at ¶ 6.

Ex-Im Bank does not initiate, plan, develop, permit, approve, or regulate projects; Ex-Im Bank's role is limited to providing financing support for U.S. exports. "The exports for which Ex-Im Bank support is sought are as diverse as U.S. businesses themselves, including, for example, the export of soybean oil and dried milk to Mauritania, a cellular telecommunications equipment to Hong Kong, and fire alarms and other safety equipment for Chilean mines." Id. at ¶ 13.

Ex-Im Bank offers a variety of products in furtherance of its mission to support U.S. exports, including export credit insurance and guarantees. O' Boyle Decl. at ¶ 10. Ex-Im Bank's products supplement those provided by the private market by offering longer terms and covering "credit and political risks (especially in emerging market countries)" that are beyond the appetite of the private sector. Id. at ¶ 11. In a typical transaction, a foreign buyer is seeking to secure financing for the purchase of goods or services from a U.S. exporter, with which the buyer has signed contract. The Ex-Im Bank guarantee or insurance covers the risk that the foreign buyer will not pay back the loan. Id. at ¶ 9. Once the loan is repaid, the insurance or guarantee provided by Ex-Im Bank expires even though the project is expected to continue to operate. Id. at ¶ 12.

For over ten years, Ex-Im Bank has performed environmental reviews of transactions, and the agency has been "an active advocate" for the adoption of environmental review procedures by similar entities. O'Boyle Decl. at ¶ 23. The Bank's statute requires the agency to establish specific environmental procedures applicable to projects:

> (A) for which long-term support of $10,000,000 or more is requested from the Bank;
>
> (B) for which the Bank's support would be critical to its implementation; and
>
> (C) which may have significant environmental effects upon the global commons or any country not participating in the project, or may produce an emission, an effluent, or a principal product that is prohibited or strictly regulated pursuant to Federal environmental law.

12 U.S.C. § 635i-5(a)(1). Environmental review under these provisions is required only to the extent it is consistent with Bank's competitiveness mandate in Section 635(b)(1)(A), discussed above, and under the express terms of the statute, the environmental review procedures adopted pursuant to this section create no cause of action. 12 U.S.C. § 635i-5(d).

B. The Overseas Private Investment Corporation

The Overseas Private Investment Corporation (OPIC) is an independent government corporation whose mission is to "mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed countries and areas, and countries in transition from nonmarket to market economies, thereby complementing the development assistance objectives of the United States . . . ." 22 U.S.C. § 2191. OPIC's mission supports the foreign policy mission of the United States, and the agency is under the policy guidance of the Department of State. 22 U.S.C. § 2191. See also Himberg Decl. at ¶ 2 (Att. 2). OPIC has a fifteen-member Board of Directors, comprised of eight private citizens, the president of OPIC, and representatives from the Departments of State, Commerce, Labor, and Treasury, the Office of the U.S. Trade Representative, and the Agency for International Development. Id. Senior government officials provide guidance to OPIC on the foreign policy priorities of the United States.[2]/ Id. OPIC offers its insurance and loan guarantees only for projects that are in developing countries with which the President of the United States has entered into a bilateral agreement concerning OPIC activities. 22 U.S.C § 2197(a).

OPIC uses three basic products to accomplish its mission: (1) political risk insurance covering currency inconvertibility, expropriation, or political violence; (2) financing through loan guarantees that provide medium to long-term funding to ventures involving significant equity and/or management participation by U.S. businesses; and (3) direct loans to transactions involving small U.S. businesses.[3]/ 22 U.S.C. § 2194. OPIC has no role in the development, permitting, or approval of the projects for which an applicant might seek insurance or loan guarantees to cover the applicant's risk of project

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[2]/ On occasion, the President, Congress, or Department of State offers guidance that results in a special emphasis on a particular country or region. For example, OPIC has recently identified potential investments through outreach that emphasizes Sub-Saharan Africa, Afghanistan, and Iraq. Himberg Decl. at ¶¶ 12-13.

[3]/ OPIC is also authorized to make direct investments in certain circumstances. However, such authority is not at issue in this matter because OPIC's statute provides that no such loan may be made to finance any operation for the extraction of oil or gas. 22 U.S.C. § 2194(c). Thus, none of the "example"projects described by Plaintiffs in their complaint implicate OPIC direct loans or investment. See Himberg Decl. at ¶¶ 19-37. Similarly, the projects identified by Plaintiffs do not relate to OPIC's authority to encourage investment, administer and manage special projects and programs, provide additional insurance functions, conduct a pilot equity finance program, or issue local currency guarantees. See 22 U.S.C. §§ 2194(d)-(h).

participation. Himberg Decl. at ¶ 7.

While private financial institutions offer insurance and guarantees similar to those offered by OPIC, OPIC "complements the private sector by assuming country risks and credit risks that the private sector is unwilling or unable to accept." Himberg Decl. at ¶ 8. In addition, OPIC brings added protection to U.S. investors because the involvement of OPIC, as an agency of the U.S. government, can "serve as a deterrent to the developing country's taking actions that adversely discriminate against U.S. investors." Id. at ¶ 9. In the event of such adverse action, OPIC can use diplomatic channels to address disputes, on a sovereign to sovereign basis. Id. Thus, OPIC's participation in an overseas project "helps foster development of private markets in developing countries, which is an important foreign policy priority of the United States." Id.

OPIC's detailed credit and environmental review procedures apply to each application for OPIC political risk insurance or other assistance. Generally, with regard to environmental procedures, upon receipt of an application OPIC places a project into one of six categories which dictates the level of environmental review required. The categories range from Category A for transactions "likely to have significant adverse environmental impacts that are sensitive . . ., diverse, or unprecedented" to Category E for transactions that "have demonstrably beneficial impacts." Himberg Decl. at ¶ 11a. See also id. at ¶ 11b. Category F is reserved for projects that are "categorically" prohibited – projects for which OPIC does not offer political risk insurance or guarantees. Id. OPIC's compliance with its environmental review obligations is "*conclusively presumed* to be issued in compliance with the requirements" of the Foreign Assistance Act, 22 U.S.C. § 2197(j).

IV. Summary Judgment Is The Appropriate Means For Resolving This Matter

Summary judgment is appropriate if there is no genuine issue regarding any material fact and if the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A party opposing a summary judgment motion may not rest upon the allegations or denials in its pleadings, Fed. R. Civ. P. 56(e), but must demonstrate the existence of facts that could support a finding in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). In a case seeking review of agency action, such as this one, a summary judgment motion is the appropriate vehicle to bring legal claims before the

Court. See Resources Ltd., Inc. v. Robertson, 789 F. Supp. 1529, 1534 (D. Mont. 1991), rev'd on other grounds, 35 F.23d 1300 (9th Cir. 1993); Northern Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988).

V. Plaintiffs' Claim Fails The Most Basic Prerequisite To Judicial Review – Plaintiffs Cannot Satisfy The Constitutional Requirements For Standing

Plaintiffs allege a variety of future impacts from climate change, ranging from concerns about rising sea levels to concerns that maple trees will no longer thrive in Vermont to fears that coastal lots will become unsuitable for building.[4/] While Plaintiffs voice significant concerns about a range of possible future impacts of climate change, those concerns do not satisfy the Supreme Court's strict standing test as none of the Plaintiffs can demonstrate the facts necessary for standing. As this court has already held in a case involving alleged climate change impacts, "[t]he concerns presented regarding global warming are too general, too unsubstantiated, too unlikely to be caused by defendants' conduct, and/or too unlikely to be redressed by the relief sought to confer standing." Center for Biological Diversity v. Abraham, 218 F. Supp. 2d 1143, 1155 (N.D. Cal. 2002). As a result, this matter must be dismissed for lack of jurisdiction.

A. Plaintiffs Cannot Satisfy The Judicially Mandated "Strict Compliance" With The Standing Requirement

Under Article III, § 2 of the Constitution, this Court has jurisdiction to hear Plaintiffs' claims only if they give rise to a "case" or "controversy." Raines v. Byrd, 521 U.S. 811, 818 (1997). A party properly invoking the jurisdiction of a federal court must demonstrate with particularity that he or she will be affected by the challenged federal action to establish the standing necessary for Article III jurisdiction. See Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997). The Supreme Court has "always insisted on strict compliance with this jurisdictional standing requirement." Raines, 521 U.S. at 819. Indeed, Article III standing is an issue that courts must reach prior to considering the merits

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[4/] According to Plaintiffs, these impacts result from the agency actions that they challenge in their Complaint. However, as set forth below, Plaintiffs' Complaint challenges no "final agency action" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 704, and must be dismissed on this separate basis.

of a case. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94-96, 104 (1998).

In order to meet the standing requirements of Article III, the Supreme Court requires that plaintiffs show: (1) an "'injury in fact' – an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of - the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Bennett v. Spear, 520 U.S. 154, 167 (1997) (citation omitted). See also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Under this doctrine a "plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 738 (1984). The standing requirements serve "to ensure that 'legal questions presented to the court will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.'" Hall v. Norton, 266 F.3d 969, 975 (9th Cir. 2001), quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

The Ninth Circuit has assessed standing to bring a NEPA claim based on the analysis it applies to cases asserting a "procedural injury." Citizens for Better Forestry v. U.S Dep't of Agric., 341 F.3d 961, 970 (9th Cir. 2003). Because procedural injury alone is insufficient to support standing, a plaintiff alleging a procedural violation must show a threatened harm to a concrete interest. Id. at 971. Once a plaintiff has established injury in fact, the court must determine whether the allegations meet the causation and redressability requirements. Id. at 975. "The issue in the causation inquiry is whether the alleged injury can be traced to the defendant's challenged conduct, rather than to that of some other actor not before the court." Ecological Rights Foundation v. Pacific Lumber Co., 230 F.3d 1141, 1152 (9th Cir. 2000). With respect to redressability, while plaintiffs do not have to show that an ultimate decision following revised NEPA procedures "'will benefit them,'" they do have to show that "a revised [procedure] may redress [their] alleged injuries." Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1113 (9th Cir. 2002) (internal citations omitted).

"The party invoking federal jurisdiction bears the burden of establishing" the elements of standing. Defenders of Wildlife, 504 U.S. at 561. In a lawsuit challenging the legality of government action or inaction, where "the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but is ordinarily 'substantially more difficult' to establish." Id. at 562, quoting Allen 468 U.S. at 758. "A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action. And it is equally clear that the allegations must be true and capable of proof at trial." United States v. SCRAP, 412 U.S. 669, 688-89 (1973). "On a summary judgment motion, the plaintiff bears the burden of showing specific facts as to each element of standing." Churchill County v. Babbitt, 150 F.3d 1072, 1077 (9th Cir. 1998), amended and superceded on other grounds, 158 F.3d 491 (9th Cir. 1998). See also National Wildlife Federation, 497 U.S. at 884.

Plaintiffs cannot meet their burden in this case as articulated by the Supreme Court and as applied by the Ninth Circuit in NEPA cases. As explained below, Plaintiffs' allegations of injury are not sufficiently "concrete and particularized" or "actual or imminent" to support standing given the inability to connect the type of localized impacts that Plaintiffs allege will occur with actions by Ex-Im Bank or OPIC. Bennett, 520 U.S. at 167. Moreover, even if Plaintiffs could establish injury in fact, the causal chain between the alleged impacts and Defendants' activities is so attenuated as to be insufficiently substantial to provide the necessary causal link. Plaintiffs cannot demonstrate that the injuries they claim are fairly traceable to actions by the Defendants and not the result of some independent action by a third party not before the Court. Finally, Plaintiffs claims must fail based on redressability – Plaintiffs cannot show that the implementation of NEPA procedures by Ex-Im Bank or OPIC would have any chance of alleviating the injuries that they claim they suffer by even some marginal amount.

1. Plaintiffs Cannot Demonstrate An "Injury In Fact"

Plaintiffs allege a variety of injuries in their Complaint, from concern that maple tree populations will shift northward in ten to twenty years to fears that coastal building lots will be rendered useless or too costly to build on in the future to concerns about flash floods and drought conditions. 2nd Am.

Compl. ¶¶ 69, 76-78, 90. Plaintiffs' injury allegations apply to any emission of greenhouse gases into the atmosphere, no matter how small, and the most current scientific analyses do not support Plaintiffs' conclusive statements that the alleged injuries are occurring, or will imminently occur, due to greenhouse gas emissions from projects with which Ex-Im Bank and OPIC are associated in a limited capacity. Rather, while scientists have concluded that both the natural and human-induced emissions of greenhouse gases, including CO2, are likely to alter the atmosphere in ways that could impact the climate, it is not clear how, when, or even whether these possible impacts will manifest themselves as the types of threatened localized impacts that Plaintiffs describe.[5] See Cantrell v. City of Long Beach, 241 F.3d 674, 679 (9th Cir. 2001) (in a NEPA case the plaintiff must show "the invasion of a concrete and particularized interest"); Citizens for Better Forestry, 341 F.3d at 969 (plaintiff must show "some threatened concrete interest").

Plaintiffs' purported injuries are neither "concrete and particularized" nor "actual or imminent" so as to constitute injury in fact for Article III standing purposes. Bennett, 520 U.S. at 167. The climate change studies upon which Plaintiffs rely in their Complaint belie the certainty with which Plaintiffs describe their purported threatened injuries. Far from establishing a concrete and particularized injury attributable to Defendants' actions as the Ninth Circuit requires, the studies to which Plaintiffs refer in their Complaint emphasize the difficulty of identifying concrete injuries that threaten any particular region of the United States as a result of particular CO2 or other greenhouse gas emissions. As the National Research Council points out, observed climate variability can be generated by natural processes operating within the climate system— the periodic rapid warming trend in the eastern Pacific Ocean known as El Niño being perhaps the best known example. Each of these different processes produces climate variability with its own characteristic spatial and seasonal signature: some, like El Nino, over a matter of a few years, and others, such as the North Atlantic Oscillation, over decades to centuries.

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[5] As demonstrated in the examples provided by Plaintiffs in their Complaint, the projects of concern to Plaintiffs are located in foreign countries in places as widely scattered as Russia and Venezuela and Plaintiffs do not allege that any direct impacts from these projects will cause them harm. 2nd Am. Compl. at ¶¶ 177, 182. Rather, Plaintiffs allege that they will suffer injury by virtue of their use of areas in the United States that they claim will be affected by the climate change implications of the emission of greenhouse gases by overseas projects, underscoring the attenuated nature of their allegations as discussed further below.

2001 NAS Report at p.8 (Att. 4a).

How these natural cycles then interact with change triggered by greenhouse gas emissions from human activities is the subject of ongoing research. In fact, the National Research Council observed:

> Because there is considerable uncertainty in current understanding of how the climate system varies naturally and reacts to emissions of greenhouse gases and aerosols, current estimates of the magnitude of future warming should be regarded as tentative and subject to future adjustments (either upward or downward).

NAS Report at p. 1 (Att. 4a). The report also noted:

> Reducing the wide range of uncertainty inherent in current model predictions of global climate change will require major advances in understanding and modeling of both (1) the factors that determine atmospheric concentrations of greenhouse gases and aerosols, and (2) the so-called 'feedbacks' that determine the sensitivity of the climate system to a prescribed increase in greenhouse gases. There is also a pressing need for a global observing system designed for monitoring climate.

Id. Based in part on the Council's findings, the 2002 U.S. Climate Action Report, cited by Plaintiffs in their Complaint, summarizes the state of scientific knowledge:

> While current analyses are unable to predict with confidence the timing, magnitude, or regional distribution of climate change, the best scientific information indicates that if greenhouse gas concentrations continue to increase, changes are likely to occur. The U.S. National Research Council has cautioned, however, that "because there is considerable uncertainty in current understanding of how the climate system varies naturally and reacts to emissions of greenhouse gases and aerosols, current estimates of the magnitude of future warmings should be regarded as tentative and subject to future adjustments (either upward or downward)." Moreover, there is perhaps even greater uncertainty regarding the social, environmental, and economic consequences of changes in climate.

2002 U.S. Report at p. 4 (Att. 4a). See also id. at p. 6.

Thus, while some of the impacts alleged by Plaintiffs have been considered as possible results of climate change, there is no defined link, sufficient for standing purposes, between specific emissions of greenhouse gases to the atmosphere and specific impacts such as those alleged by Plaintiffs.[6] Even at the global scale, the Intergovernmental Panel on Climate Change (IPCC), which Plaintiffs cite, provides a range of estimates (1.4 – 5.8 degrees Celsius) for possible global average increase in

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[6] Plaintiffs' Complaint also alleges current impacts from climate change. In addition to the problems with such allegations addressed herein, "[b]ecause of the large and still uncertain level of natural variability inherent in the climate record and the uncertainties in the time histories of the various forcing agents (and particularly aerosols), a causal linkage between the buildup of greenhouse gases in the atmosphere and the observed climate change during the 20th century cannot be unequivocally established." NAS Report at 17 (Att. 4a).

temperature between 1990 and 2100. 2001 IPCC at p. 13 (Summary for Policymakers) (Att. 4c). This wide range results not only from uncertainty regarding future greenhouse gas emissions, but from uncertainty regarding fundamental aspects of the climate system, such as the modeling of radiative forcing from clouds or aerosols. Indeed, the 2001 National Research Council Report stated several key scientific questions that need to be addressed with further research, including questions specific to the details of local and regional climate change that potentially may result from greenhouse gases.[7]/

In addition, for injuries alleged by Plaintiffs, there is either questionable or simply no evidence that the specific impacts are likely to occur. For example, the IPCC notes that "(c)hanges globally in tropical and extra-tropical storm intensity and frequency are dominated by the inter-decadal to multi-decadal variations, with no significant trends evident over the 20th century." Similarly, "(n)o significant trends of Antarctic sea-ice extent are apparent since 1978, the period of reliable satellite measurements." IPCC at p. 5 (Summary for Policymakers) (Att. 4c). It is unclear as well whether the observed regional warming and decline of sea ice in the Arctic is due to human activities that increase greenhouse gases, natural variability in North Pacific ocean temperatures (resulting in the export of warmer water into the Arctic Ocean leading to the decay of sea ice and warmer local temperatures), or some combination of both. And with respect to sea level rise, it is clear that sea level has been rising gradually over the past 6,000 years following the termination of the last ice age and the melting of glaciers present during that time. IPCC Working Group 1: The Scientific Basis, Intergovernmental Panel on Climate Change, 2001 at p.659 (Att. 4d).

Furthermore, Plaintiffs cannot establish that the threatened harm is sufficiently "imminent" to

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[7]/ "Making progress in reducing the large uncertainties in projections of future climate will require addressing a number of fundamental scientific questions relating to the buildup of greenhouse gases in the atmosphere and the behavior of the climate system. Issues that need to be addressed include (a) the future usage of fossil fuels, (b) the future emissions of methane, (c) the fraction of the future fossil-fuel carbon that will remain in the atmosphere and provide radiative forcing versus exchange with the oceans or net exchange with the land biosphere, (d) the feedbacks in the climate system that determine both the magnitude of the change and the rate of energy uptake by the oceans, which together determine the magnitude and time history of the temperature increases for a given radiative forcing, (e) details of the regional and local climate change consequent to an overall level of global climate change, (f) the nature and causes of the natural variability of climate and its interactions with forced changes, and (g) the direct and indirect effects of the changing distributions of aerosols." 2001 NAS Report at p. 5 (Att. 4a).

confer standing under Bennett, 520 U.S. at 167. Based on Defenders of Wildlife, 504 U.S. 555, recent NEPA cases in the Ninth Circuit have articulated a standing test under which the "inquiry into the imminence of the threatened harm is less demanding." Hall, 266 F.3d at 976. See also Cantrell, 241 F.3d at 679. However, stretching that analysis to permit the type of conjectural future impacts that these Plaintiffs allege to satisfy Constitutional standing requirements would render meaningless "the irreducible constitutional minimum of standing" as established by the Supreme Court. Defenders of Wildlife, 504 U.S. at 560. Indeed, in Hall, 266 F.3d at 976, the Ninth Circuit acknowledged that a purported injury could be "too remote" to satisfy the Supreme Court's injury-in-fact requirement. The impacts that these Plaintiffs fear may occur far in the future are "too remote" to establish standing.

Thus, Plaintiffs cannot establish injury in fact. Plaintiffs' allegations of injury are not sufficiently "concrete and particularized" or "actual or imminent" to support standing given the inability to connect the type of localized impacts that Plaintiffs describe to particular projects which might purchase Bank-supported U.S. exports or which might involve participation by an entity that received OPIC insurance or guarantees.

2. Plaintiffs Cannot Demonstrate Causation

Plaintiffs fare no better with respect to the causation element of the standing inquiry. "The issue in the causation inquiry is whether the alleged injury can be traced to the defendant's challenged conduct, rather than to that of some other actor not before the court." Ecological Rights Foundation, 230 F.3d at 1152. The Ninth Circuit requires that the plaintiff establish "' the 'reasonable probability' of the challenged action's thereat to [his] concrete interest.'" Hall v. Norton, 266 F.3d 969, 976 (9th Cir. 2001) (internal citations omitted).[8] See also Douglas County v. Babbitt, 48 F.3d 1495, 1501 n. 6 (9th Cir. 1995). The causation requirement is "implicated where the concern is that an injury caused by a third party is too tenuously connected to the acts of the defendant." Citizens for Better Forestry, 341

[8]/ In Citizens for Better Forestry, 341 F.3d at 970, the Ninth Circuit assessed "reasonable probability" in the context of the injury in fact inquiry relevant to that case, stating that plaintiffs must show that "it is reasonably probable that the challenged action will threaten their concrete interests." Whether considered in the context of causation or injury in fact, in this instance the Plaintiffs cannot demonstrate that "it is reasonably probable" that it is Defendants' activities that threaten a demonstrable concrete interest.

F.3d at 975. "The causal connection put forward for standing purposes cannot be too speculative or rely on conjecture about the behavior of other parties." Ecological Rights Foundation, 230 F.3d at 1152. In particular with respect to challenges to agency activities, the "causation question concern[s] only whether plaintiffs' injury . . . is dependent upon [the agency's] policy, or is instead the result of independent incentives governing [[a] third part[y's]] decisionmaking process." Idaho Conservation League v. Mumma, 956 F.2d 1508, 1517-18 (9th Cir. 1992) quoting Wilderness Society v. Griles, 824 F.2d 418 (D.C. Cir. 1987), as amended 1992 U.S. App. LEXIS 9031.[9]/

As set forth below, Plaintiffs in this matter cannot establish causation. The chain of causation is too attenuated to support standing given the limited and narrow role played by the Defendants with respect to the projects of concern to Plaintiffs. Indeed, as explained below, these energy and oil and gas sector projects are the result of "independent incentives" relating to private business endeavors and do not depend upon Ex-Im Bank support of U.S. exports or upon OPIC commitments to a private participants to go forward. Furthermore, the connection that Plaintiffs' attempt to make between the Defendants and their alleged injuries is further undermined given the minimal amount of greenhouse gases emitted by the projects at issue, and, as explained above, given that the basic connection between human-induced greenhouse gas emissions and observed climate change itself has not been established.

a. Defendants Play A Limited Role In The Projects Of Concern To Plaintiffs

Defendants' link to projects for which support may be sought, either, in the case of Ex-Im Bank for insurance or guarantees to support U.S. exports purchases made in connection with a project or, in

[9]/ In Idaho Conservation League, 956 F.2d at 1518, a NEPA case, the court highlighted two cases where the Supreme Court denied standing on causation grounds because the alleged injuries were not caused by the defendants. First, in Allen v. Wright, 468 U.S. 737 (1984), the Supreme Court found the alleged injury, the diminished opportunity to attend racially integrated schools, was not fairly traceable to the IRS' grant of tax exemptions to racially discriminatory institutions. The Court noted that it was "entirely speculative" whether the withdrawal of the tax exemption would cause the school to change its policies and concluded that the "chain of causation" was "too weak" to sustain standing. Id. at 759. Similarly, in Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976), the Supreme Court held there was no standing to challenge a tax exemption to hospitals due to a lack of causal connection between the exemption and the alleged policy of not providing full hospital services to indigents. The same concerns regarding the weakness of the causal link are triggered by Plaintiffs' claims in this matter.

the case of OPIC for insurance or loan guarantees, is far removed from the degree of causation required to establish standing under Supreme Court and Ninth Circuit precedent. The injury that Plaintiffs claim is not attributable to these agencies, whose roles, pursuant to their respective governing statutes, are quite limited in any given project, but to private companies or other project sponsors that develop the projects at issue or, as explained further below, to unknown end users responsible for the combustion of fuel produced by the projects of concern to Plaintiffs. Neither OPIC nor Ex-Im Bank plan, permit or otherwise approve construction or operation of projects. Generally, for large energy-related projects such as those mentioned in the Complaint, third parties have completed the basic design and planning stages for the project before applying for financing support from Ex-Im Bank, which requires a signed contract prior to application, or OPIC. See e.g., O'Boyle Decl. at ¶ 41; Himberg Decl. at ¶ 19. Most large energy-related projects in which either agency is involved would proceed even if the requested financing is denied. O'Boyle Decl. at ¶ 30; Himberg Decl. at ¶¶ 8, 23, 29, 30, 37.

For example, in their Complaint, the Plaintiffs refer to loan guarantees provided by Ex-Im Bank to lenders financing U.S. exports to the Cantarell oil field in Mexico. 2nd Am. Compl. at ¶¶ 171-176. The Cantarell oil field is Mexico's largest oil field located off the coast of the Yucatan Peninsula, owned and operated by the Mexican national oil company, Pemex. O'Boyle Decl. at ¶ 35. The exports supported by Ex-Im Bank consist of a variety of goods and services provided by U.S. companies that successfully bid on the Pemex contracts in competition with foreign suppliers supported by their governments. The Cantarell oil field has been producing oil since 1980, long before Ex-Im Bank support for the U.S. exports to be used by Pemex to execute previously-planned upgrades and enhancements to the Cantarell field. Ex-Im Bank's involvement is a number of steps removed from the type of causal link that supports standing. Ex-Im Bank was not involved in planning, permitting or approving the upgrades to the Cantarell field. It was involved only in supporting U.S. exports through a guarantee to a commercial lender to enable Pemex to purchase U.S. exports.[10]/ Id. at ¶ 37. Any greenhouse gas emissions resulting from this project, even if Plaintiffs could link them to their claimed

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[10]/ Ex-Im Bank's involvement in the other transactions described by Plaintiffs is similarly attenuated from any ultimate emission of greenhouse gases. See O'Boyle Decl at ¶¶ 32-34, 40-47 (describing Chad-Cameroon pipeline, the Hamaca project, and the Dezhou coal fired power plant).

injuries which they cannot as discussed above, are not attributable to Ex-Im Bank financing support for U.S. exports meant to create U.S. jobs, but to third parties, such as Pemex, any end users of fuel, or other entities.

Plaintiffs' Complaint also purports to describe OPIC involvement in the Chad-Cameroon oil pipeline which serves the oil fields at Doba in southern Chad. 2nd Am. Compl. at ¶¶ 165-170. OPIC has no involvement in any financing arrangement related to the pipeline. Rather, OPIC's limited role relates to the Doba oil fields and consists of providing political risk insurance to a single subcontractor, Pride International Inc. Himberg Decl. at ¶ 19. In 2000, Pride was awarded a contract by Esso Exploration and Production Chad, Inc., to undertake certain drilling services at the Doba oil fields. Pride, one of many subcontractors participating, "became involved several years after the contractor made commitments to constructing the pipeline and developing the oil fields." Id. at ¶ 19. Pride's participation in the oil field exploration is limited to drilling services – if oil is located, Pride's involvement ceases and Pride has no interest in the oil or oil wells. Id. at ¶ 20. Pride sought and received political risk insurance from OPIC pursuant to a requirement of its contract with Esso. Id. at ¶¶ 21-22. The insurance covers the possibility that Pride would lose its equipment or would not be able to recover its income due to political violence, inconvertibility of Chad currency, expropriation, or other political risks. Id. As with Ex-Im Bank, the fact that OPIC exercises such a limited role militates against finding that Plaintiffs can demonstrate standing. The provision of political risk insurance to a company that in turn provides subcontracting services for a small portion of the operations of an already-designed and developing oil field is simply too attenuated from CO2 emissions produced by the ultimate combustion by an end use of oil produced from the field to support standing.[11]/ If such emissions can ultimately be attributed to any entity, that entity is not OPIC but some third party not before the Court.

In addition, while Ex-Im Bank and OPIC serve important U.S. interests, most projects would go forward without their involvement, albeit to the detriment of U.S. exports and investors. With respect

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[11]/ OPIC's role in the other projects described in Plaintiffs' Complaint is similar. See Himberg Decl at ¶¶ 24-37 (describing Sakhalin Oil Field and the West Seno I & II oil and gas field).

to Ex-Im Bank, almost all foreign buyers could purchase the necessary goods or services from a foreign competitor. In the energy and oil and gas sectors in particular, sponsors of large projects would likely have alternative sources of financing. In fact, with respect to the Cantarell oil field-related transactions, Pemex received a $1 billion commitment from Japan's export credit agency and the company regularly receives loans guarantied by the export credit agencies of Japan, Canada, Germany, the United Kingdom, and Italy. O'Boyle Decl. at ¶ 38. In the case of the only two applications turned down by Ex-Im Bank for environmental reasons, for guarantees related to U.S. exports for the Camisea pipeline in Peru and the Three Gorges project in China, the projects proceeded without Bank support of U.S. exports. O'Boyle Decl. at ¶ 30. See also Att. 4e at 34. In short, the only reasonably probably impact of a Ex-Im Bank decision not to provide financing support for U.S. exports to Cantarell or other energy sector purchases would be lost U.S. jobs and job creation in other countries.

Similarly, projects in the energy and oil and gas sectors could go forward without OPIC involvement given the financial strength of project sponsors and OPIC's limited role in light of the size of the projects and their significance to the economies of the foreign countries in which they take place. OPIC's involvement essentially gives U.S. business interests insurance against expropriation and political instability, but is not critical to the development of the project. Himberg Decl. at ¶ 8. For example, with respect to the Chad oil field described above, the only consequence of a decision not to provide political risk insurance to Pride would have been the inability of Pride to meet its contractual commitments to Esso – not a change in how or if oil would be produced from the field. Id. at ¶ 23. In the case of three applications related to oil and gas or energy projects turned down by OPIC for environmental reasons, the projects proceeded without agency involvement. Id. at ¶ 8.

Thus, the fact that Defendants exercise such limited roles in any particular project, with no control over the decision to carry out the project, militates against allowing standing in this instance. Not only is it "entirely speculative" whether a change in agency decisionmaking would have any impact on the project's viability and resulting greenhouse gas emissions, but the link between Defendants' insurance and guaranty products and any ultimate emission of greenhouse gases is so attenuated as to be "too tenuously connected to the acts of the defendant" to support standing. Citizens for Better

Forestry, 341 F.3d at 975.

b. The Projects' Contributions To Global CO2 Emissions Are Minimal

Plaintiffs describe specific projects in their Complaint that directly emit greenhouse gases such as a coal fired power plant and pipeline projects that may have minimal emissions incidental to their operation. Plaintiffs also generally allege that the Defendants "have supported numerous other fossil-fuel-fired power plants around the world." 2nd Am. Compl. at ¶ 45. However, even if Plaintiffs could attribute these emissions to Defendants' actions, which they cannot as established above, greenhouse gas emissions from the projects in which Ex-Im Bank and OPIC are involved cannot be connected to Plaintiffs' alleged injuries even to a degree of "reasonable probability" because of the minimal nature of direct emissions from such projects.

By their own estimates, each agency is involved in financial transactions related to projects that are, or will be once completed, responsible for substantially less than 1% per year of human-caused CO2 emissions (which constitute less than .03% of total global emissions when natural fluxes of carbon to the atmosphere from oceans and soils are included)[12]/ – a figure calculated using very conservative assumptions that likely overestimated the actual contribution. Att. 4e at 34 (Ex-Im Bank's Role in Greenhouse Gas Emissions and Climate Change), Att. 4f at 12 (Climate Change: Assessing Our Actions, OPIC).[13]/ Ex-Im Bank estimated a rise to a high of 0.5% per year for that agency by 2012 (pro-rating the predicted emissions among all project lenders).[14]/ Att. 4e at 34. OPIC estimates a rise to 0.43% by 2015.[15]/ Att. 4f at 12.

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[12]/ See IPCC Working Group 1 Report at p. 188-89 (Att. 4d.)

[13]/ The agencies calculated these figures in response to criticisms from certain groups, including some of the plaintiffs in this matter, that they were failing to consider significant environmental impacts that would allegedly result from greenhouse gas emissions from projects in which they are involved. See Att. 4e at i.

[14]/ For example, the Chad/Cameroon pipeline is expected to account for 750,000 tonnes/year of direct CO2 emissions. Ex-Im Bank support for U.S. exports for the pipeline accounts for 9.1% of the total project costs. Even under Plaintiffs' theory which, incorrectly, attempts to attribute CO2 emissions to Ex-Im Bank support, Plaintiffs could attribute only .000275% of total anthropogenic (man-made) emissions to Ex-Im Bank's activities related to the pipeline (750,000 x 9.1%, expressed as a percentage of 24.9 billion tonnes/year of anthropogenic CO2 emissions). O'Boyle Decl. at ¶ 49.

[15]/ Energy and oil and gas related projects are a declining portion of OPIC's portfolio and over the last several years the agency has participated in only one or two oil and gas or energy related

(continued...)

Thus, even assuming Plaintiffs are able to satisfy the injury-in-fact requirement, they cannot trace any alleged injury to the energy or oil and gas projects in which Defendants are involved in some limited capacity – either, in the case of Ex-Im Bank, through support of U.S. exports purchased by a project participant or, in the case of OPIC, through insurance or guarantees provided to cover an applicants risk of project participation. Since these projects represent only a small fraction of global human-induced CO2 emissions, there is no reasonable probability that these agencies cause or threaten to cause Plaintiffs' alleged injury.

c. Plaintiffs Overstate Potential CO2 Emissions From The Projects At Issue By A Significant Margin

Plaintiffs attempt to inflate CO2 emissions allegedly attributable to Defendants' actions by including estimated emissions that might result from the ultimate combustion of fuel, by cars or other end users, where such fuel is produced or transported by a project that allegedly implicates OPIC or Ex-Im Bank financial assistance – such as the Chad-Cameroon pipeline. See, e.g., 2nd Am. Compl. at ¶¶ 168-69. This approach suffers from two flaws which only emphasize the weakness of the causal chain upon which Plaintiffs rely to establish causation.

First, even if causation could be supported by projects that have more than minimal *direct* greenhouse gas emissions, which it cannot as explained above, possible future impacts to these Plaintiffs triggered by greenhouse gas emissions from a private vehicle operating somewhere in the world while burning fuel refined from oil that was produced from the oil fields in Chad described above, for example, is the very definition of an injury "too tenuously connected to the acts of the defendant" to support causation. Citizens for Better Forestry, 341 F.3d at 975. Not only do Defendants provide financing or support for only a portion of each project, or in the case of Ex-Im Bank, exports to projects, that might produce fossil fuel, projects which in and of themselves have minimal emissions, but Defendants have absolutely no involvement with the combustion of the fuel, which requires refinement, distribution through world markets for various purposes, and ultimate purchase by an end user.

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[15]/ (...continued)
transactions per year. Himberg Decl. at ¶ 17.

Second, Plaintiffs' basic premise – that downstream emissions should be attributed to the original producer of fossil fuel – is inconsistent with the way in which the world scientific community measures greenhouse gas emissions. Instead, "[m]easurements of GHG production by all national and international entities track the actual emissions at the time the fuel is burned" and efforts to reduce greenhouse gas emissions are directed at emitting sources. Att. 4e at 25. See also Att. 4f at 12.

Thus, the vast majority of the emissions upon which Plaintiffs rely to establish standing are even more removed from Defendants' actions than direct project emissions and are attributable to third parties not before the Court – including end users such as private individuals.

3. Plaintiffs Cannot Demonstrate Redressability

To satisfy the "redressability" requirement for constitutional standing, a plaintiff must show at least a "'substantial likelihood' that the relief requested will redress the injury claimed . . . ." Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 75 n.20 (1978). Redressability cannot be merely "speculative." Bennett, 520 U.S. at 167. Although a plaintiff need not show that the relief sought will prevent the threatened injury, since the substantive outcome of the decisionmaking process is not within the jurisdiction of the court, a plaintiff must show that additional NEPA process "*may* redress plaintiffs' alleged injuries." Kootenai Tribe, 313 F.3d at 1113 (emphasis added).

In this instance, as explained above, Plaintiffs cannot establish that the relief they are seeking (i.e., the preparation of "environmental assessments for each of [Defendants'] fossil fuel related projects") "may" alleviate the injuries that they claim they suffer, or will suffer, even by some marginal amount. The reasons that the redressability requirement is not met in this case are twofold. First, even assuming that there is a sufficient nexus between localized impacts and greenhouse gas emissions, Plaintiffs cannot show that a decision by these agencies not to provide financing support pertinent to particular projects, or, in the case of Ex-Im Bank support for exports to projects, of the type at issue in this case could have any incremental impact on the Plaintiffs. Simply stated, the greenhouse gas emissions associated with such projects are too insignificant with respect to total manmade emissions to conclude otherwise. Second, even if review under NEPA resulted in agency decisions not to provide, in the case of Ex-Im Bank, support of U.S. exports purchase by project participants or, in the case of

OPIC, insurance or guarantees provided to cover an applicant's risk of project participation, those projects would likely go forward in any event – in the case of Ex-Im Bank with goods and services sourced from other countries. See O'Boyle Decl. at ¶ 27; Himberg Decl. at ¶ 8.

B. Courts Have Rejected Alleged Impacts From Climate Change As Insufficient To Confer Standing

Few courts have addressed issues related to climate change. However, this court had the occasion to address the sufficiency of alleged impacts of climate change for standing purposes in Center for Biological Diversity v. Abraham, 218 F. Supp. 2d 1143 (N.D. Cal. 2002). In Abraham, the plaintiffs sought enforcement of the Energy Policy Act as it related to the acquisition of alternative fuel vehicles by the federal government. In support of their standing to bring their claims, the plaintiffs alleged climate change impacts resulting from vehicle emissions and the benefits that would result from reducing such emissions.[16]/ Id. at 1154. This court summarily rejected the plaintiffs' allegations, stating: "The concerns presented regarding global warming are too general, too unsubstantiated, too unlikely to be caused by defendants' conduct, and/or too unlikely to be redressed by the relief sought to confer standing." Id. at 1155.

Similarly, in Foundation on Economic Trends v. Watkins, 794 F. Supp. 395 (D. D.C. 1992), the plaintiffs claimed that NEPA required a number of federal agencies to consider the purported climate change impacts of particular federal activities. The court rejected purported impacts of climate change as a basis for standing, finding that "under [plaintiff's] allegations of environmental injury, 'the standing requirement [in NEPA cases] would, as a practical matter, [be] eliminated for anyone with the wit to shout 'global warming' in a crowded courthouse.'" Id. at 401, quoting City of Los Angeles v. National Highway Traffic Safety Administration, 912 F.2d 478, 484 (D.C. Cir. 1990), overruled on other grounds, Florida Audubon Society v. Bentsen, 94 F.3d 658 (D.C. Cir. 1996).

The lengthiest treatment of the issue of climate change and standing appears in a 1990 D.C.

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[16]/ As did the plaintiffs in Abraham, the Plaintiffs in this matter allege climate change impacts resulting from CO2 emissions from vehicles that might ultimately burn fuel that might be produced or transported by a project in which Defendants have some involvement. See e.g., 2nd Am. Compl. at ¶ 196. However, unlike in Abraham, which involved government-owned vehicles, as explained above the causal link in this instance is even farther removed from that required to support standing.

Circuit per curiam decision in a NEPA case, City of Los Angeles, 912 F.2d 478. In that decision, the majority of the panel concluded that allegations of impacts resulting from climate change *could* support Article III standing. However, in a lengthy dissent, the author of the majority's opinion disagreed with the rest of the panel's finding that plaintiffs in that case had established standing, explaining that while the alleged impacts of climate change "make out injury indeed, the [plaintiff] has failed to explain how that injury can be traced causally to the challenged decision and how the relief it seeks could redress the harm it foresees." City of Los Angeles, 912 F.2d at 483. The dissent noted that the plaintiff could make neither any showing of the "incremental harm wrought by the agency's decision" nor that a reduction in the emission of the greenhouse gases associated with the challenged action "would produce any marginal effect on the probability, the severity, or the imminence of global warming." Id. at 484. Allowing standing based on such impacts would, in the view of the dissent, confer standing on any individual to "challenge any agency decision that, in its view, does not do enough to address the alleged problem of global warming." Id. at 484. Six years later, the D.C. Circuit expressly reversed the reasoning relied upon by the City of Los Angeles majority in reaching their conclusion on standing, citing with approval the dissent's reasoning *rejecting* alleged impacts of climate change as sufficient to confer Article III standing. Florida Audubon Society v. Bentsen, 94 F.3d 658 (D.C. Cir. 1996).[17]/ The circumstances of this case compel the same conclusion.

VI. This Court Is Without Jurisdiction Over Plaintiffs' Claims Because Plaintiffs Have Failed To Identify Any Final Agency Action Fit For Judicial Review

Plaintiffs claim Ex-Im Bank and OPIC are conducting energy related "programs" without

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[17]/ A panel of the Ninth Circuit has recently contended that Florida Audubon Society is inconsistent with Ninth Circuit precedent in some respects. Citizens for Better Forestry, 341 F.3d at 974. But the objections raised therein can be distinguished because of the precise context (not applicable to the instant case) in which that case arose -- i.e., where what was involved was a challenge to a forest management plan prior to development of a site-specific project. Id. The panel in Citizens for Better Forestry specifically found that the chain of causation at issue there was "much more likely to occur" than the causation chain at issue in Florida Audubon Society. Id. at 974-75. The present case raises precisely the type of causation conjecture that was at issue in Florida Audubon and was not at issue in Citizens for Better Forestry. There is, therefore, no impediment created by Ninth Circuit precedent in properly concluding that the plaintiffs lack standing. In fact, a broad rejection of the principles set forth in Florida Audubon Society would only create an unnecessary inter-circuit conflict that can and should be avoided.

complying with NEPA and in violation of the APA. See 2nd Am. Compl. ¶¶ 154-161. Relatedly, Plaintiffs claim that even in the absence of a "program", that Defendants have failed to comply with NEPA for each individual energy and oil and gas sector-related application and that Defendants should be ordered to comply in the future. 2nd Am. Compl. ¶ 213. However, a threshold requirement for invoking the judicial review provisions of the APA, the statute upon which Plaintiffs must base their NEPA claims as explained above, is an "agency action." See e.g., Minnesota Pesticide Information & Education, Inc. v. Madigan, 857 F. Supp. 653, 654 (D. Minn. 1993) ("Therefore, a court considering a claim that an agency decision implicates NEPA must first determine whether the agency has undertaken any 'action' within the meaning of the statute."), citing State of South Dakota v. Andrus, 614 F. 2d 1190, 1193 (8th Cir.), cert. denied, 449 U.S. 822 (1980). Plaintiffs have not met that threshold requirement in this case. Ex-Im Bank and OPIC are both reactive agencies that respond to market demands for their specific type of financial involvement with respect to diverse private projects all over the world. Neither agency has a "program supporting energy projects" that could constitute a "final agency action" within the meaning of the APA. See O'Boyle Decl. at ¶ 28; Himberg Decl. at ¶¶ 12-17. Plaintiffs' challenge is precluded by Supreme Court precedent which does not allow "programmatic" review of agency functions in the absence of a "final agency action." Furthermore, Plaintiffs have not challenged any individual final agency action that could form the basis for judicial review under the APA. While Plaintiffs identify specific projects in their Complaint, they do so only as "examples" to support their sweeping challenge – an approach that the APA does not allow.

A. The APA Does Not Permit Plaintiffs' Programmatic Attack

The APA authorizes review only of "agency action" defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). The action must be "final agency action." 5 U.S.C. § 704. See Ecology Center, Inc. v. U.S. Forest Service, 192 F.3d 922, 924 (9th Cir. 1999). An agency action must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" or "in excess of statutory jurisdiction authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2). See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). The APA also waives sovereign

immunity to allow parties to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Pursuant to this latter provision, federal courts have authority to require a federal agency to take certain actions that the agency has failed to take. The action that the federal agency allegedly failed to take, however, must be based on a mandatory, well-defined nondiscretionary duty. Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373, 2379 (2004). Although Plaintiffs cite 5 U.S.C. § 706 generally, without specifying upon which portion they rely, their claim fails under either Section 706(1) or Section 706(2) since they have not challenged "agency action" within the meaning of the APA and because the Ninth Circuit has made clear that Section 706(1) applies in narrow circumstances not present here. See 2nd Am. Compl. at ¶ 9.

The Supreme Court's opinion in Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990), illustrates the nature of the APA's agency action requirement in the context of Section 706(2) and sets forth a prohibition on programmatic challenges such as the one that Plaintiffs attempt in this matter. In Lujan, the plaintiffs claimed that the Department of the Interior had violated NEPA in the course of implementing its "land withdrawal review program." In assessing whether the agency's program was agency action at all, much less final agency action, the Court noted that the subject of the plaintiffs' challenge was the agency's operations in "reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by the [Federal Land Policy and Management Act]." Id. at 890. The "program" extended to "'1250 or so individual classification terminations and withdrawal revocations.'" Id. The Supreme Court found this to be no more an agency action, or final agency action, than a "'weapons procurement program' of the Department of Defense or a 'drug interdiction program' of the Drug Enforcement Administration." Id. Judicial review must be upon a final action that is "an identifiable action or event." Id. at 899. As for the claim that the agency was violating the law within the "land withdrawal review program," the Supreme Court emphasized that the plaintiffs could not "seek *wholesale* improvement of this program by court decree . . . respondent must direct its attack against some particular 'agency action' that causes it harm." Id. at 891 (emphasis in original).

Cases applying Lujan confirm the scope of the APA's "final agency action" requirement, holding

that plaintiffs can obtain judicial review when "a discrete agency action is called for." Northcoast Environmental Center v. Glickman, 136 F.3d 660, 670 (9th Cir. 1998). See also High Sierra Hikers Ass'n v. Blackwell, 381 F.3d 886, 895 (9th Cir. 2004) (APA "requires that there be a specific final agency action which has an actual or immediate threatened effect."). In Sierra Club v. Peterson, 228 F.3d 559 (5th Cir. 2000)(en banc), the Fifth Circuit considered an environmental plaintiff's challenge to the Forest Service's even-aged timber management in national forests within Texas. Id. at 525. The plaintiffs there alleged that the Forest Service violated the National Forest Management Act, 16 U.S.C. 1600, et seq., and cited as the basis for their claim twelve allegedly ripe agency decisions concerning timber sales. The plaintiffs sought injunctive relief blocking all future timber sales or even-aged management in the "national forests of Texas." Id. at 563. The court ruled that Plaintiffs failed to challenge "an identifiable agency action or event," and "could not challenge an entire program by simply identifying specific allegedly-improper final agency actions within that program." Id. at 567.

Most recently, in a Supreme Court decision construing a court's authority under 5 U.S.C. § 706(1), Justice Scalia, writing for a unanimous court, reiterated that Sections 702, 704, and 706(1) of the APA all require that the subject matter of a claim be an "agency action," and that the definition of "agency action" in Section 551(13) is limited to "circumscribed, discrete agency actions." Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373, 2378 (2004). The Court further explained that APA Section 706(1) was intended to continue the practice, previously achieved through writs of mandamus, of obtaining judicial review by seeking the ordering of a "'precise, definite act . . . about which [an official] had no discretion whatever.'" Norton, 124 S. Ct. at 2379 (quoting United States ex rel. Dunlap v. Black, 128 U.S. 40 (1888)). By way of example, the Supreme Court explained that the limitation to discrete agency action precludes the type of broad, programmatic attack rejected in Lujan, 497 U.S. 871, as outside the scope of Section 706(2) of the APA. Id. at 2380. Furthermore, the Ninth Circuit has explained that with respect to Section 706(1), "[c]ourts have permitted jurisdiction under the limited exception to the finality doctrine only when there has been a genuine failure to act." Ecology Center, Inc. v. U.S. Forest Service, 192 F.3d 922, 926 (9th Cir. 1999). The Ninth Circuit refuses to allow a plaintiff "to evade the finality requirement with complaints about the sufficiency of an agency action

'dressed up as any agency's failure to act.'" Id. quoting Nevada v. Watkins, 939 F.2d 710, 714 n. 11 (9th Cir. 1991).

Application of these principles to this matter illustrates that the Plaintiffs have not challenged agency action, much less final agency action, within the meaning of the APA. Rather, this case presents precisely the type of challenge held nonjusticiable in Lujan and its progeny. Plaintiffs have not identified, nor could they identify, any programmatic agency action with respect to energy projects by either OPIC or Ex-Im Bank that is "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Rather, the supposed program supporting energy projects is no more than Plaintiffs' own artificially drawn subset of Defendants' portfolio.

Ex-Im Bank's business is driven by market demand. Within the energy and oil and gas sectors, U.S. exporters compete closely with exporters in a number of other countries. O'Boyle Decl. at ¶ 29. "Ex-Im Bank makes no effort to focus assistance to support any particular type of industry" and it cannot accurately predict what type of applications it might receive over a particular time period. Id. at ¶ 17. World events, the exchange rate, country-specific conditions, and the private market's interest in risk all affect the nature of applications Ex-Im Bank receives. Furthermore, transactions brought to the agency are approved on a first-come first-served basis and decided on a case-by-case basis. Id. Ex-Im Bank has no program supporting energy projects.

Similarly, OPIC's provision of insurance or guarantees for any particular project participant is reactive and depends upon many factors including "which developing country the proposed project is in, the investment climate of the developing country, the state of the U.S. and the developing country's economy, currency instability, political unrest, private market capacity and financial strength of the U.S. investor." Himberg Decl. at ¶ 16. OPIC assesses applications on a case-by-case basis, has adopted no policy addressing the development of energy sources, does not seek out energy projects, and "has no way of reliably predicting which types of overseas energy projects may involve U.S. investors or contractors who seek OPIC products and which of those transactions may involve political risk insurance coverage or investment guaranty." Id. at ¶ 15. As with Ex-Im Bank, OPIC cannot accurately

predict what types of applications it might receive in a given year because many factors affect both overseas investment and OPIC participation. Indeed, energy-related projects are a declining portion of OPIC's portfolio. Id. at ¶¶ 16-17. OPIC has no program supporting energy projects.

B. Plaintiffs Have Not Challenged Any Individual Final Agency Action

In their Complaint, Plaintiffs describe certain specific projects, four of which involved the purchase U.S. exports supported by Ex-Im Bank insurance or guarantees and three of which involved project participants that sought OPIC insurance or guarantees. Plaintiffs allege that Defendants failed to comply with NEPA before going forward with their respective financing decisions. See 2nd Am. Compl. at ¶¶ 163-203. However, the projects that Plaintiffs describe are provided as no more than examples of Defendants' purportedly illegal conduct and Plaintiffs' make no claim or request for relief based on these projects. See 2nd Am. Compl. at p. 47. Instead, with respect to individual projects, Plaintiffs' Complaint alleges generally that the Defendants "have violated and continue to violate NEPA by not preparing environmental assessments to determine whether individual projects may have a significant effect on the human environment of the United States." 2nd Am. Compl. at ¶ 213. However, as explained above, the APA authorizes review only of "agency action" defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Plaintiffs' claim fails to identify any such discrete action, or seek any relief with respect to individual agency decisions, and in essence does no more than re-state Plaintiffs' programmatic claim – again, precisely the type of claim that has been held nonjusticiable by the Supreme Court. Furthermore, Plaintiffs' approach – using allegedly illegal individual government actions as examples of supposedly continuing unlawful conduct – has been specifically rejected as a legitimate basis for invoking the judicial review provisions of the APA.[18]/ Sierra Club, 228 F.3d at 567.

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[18]/ Even if Plaintiffs' Second Amended Complaint could be construed as challenging the six projects it describes, four related to Ex-Im Bank assistance for U.S. exports and three that implicate OPIC provision of insurance or guarantees, that challenge would be moot and barred by laches since the agency commitments at issue have long since been made, the projects are operational, loans facilitated by the agency commitments are in the process of being paid back, and the agencies have collected substantial fees. O'Boyle Decl. at ¶¶ 34, 39, 42,47; Himberg Decl. at ¶¶ 19-37. See DeFunis v. Odegaard, 416 U.S. 312, 316 (1974); Marsh v. Oregon Natural Resources Council, 490

(continued...)

VII. Plaintiffs' Claims Against OPIC Must Fail Because OPIC's Actions Are Not Subject To Judicial Review Under The APA And Because The Agency Is Not Subject To NEPA

Plaintiffs' claims against OPIC suffer from two additional fatal weaknesses. As a threshold matter, the APA does not waive the government's sovereign immunity from suit for agency action where another statute precludes judicial review. In this instance, OPIC's organic statute precludes judicial review of its actions, including the sufficiency of the agency's environmental review of applications, barring Plaintiffs' challenge. Furthermore, even if OPIC's statute could be construed as allowing judicial review of Plaintiffs' claims, OPIC is not subject to the requirements of NEPA. Rather, Congress imposed certain very specific environmental review obligations on OPIC that are tailored to that agency's responsibilities; made those obligations subject to the President's authority; and exempted the agency from judicial review of its environmental analyses. The legislative history of the applicable statutory provision confirms that Congress adopted these provisions to avoid exactly what Plaintiffs have attempted here – the entanglement of OPIC's foreign policy mission with NEPA litigation in domestic courts – as well as any administrative delay that might be associated with NEPA.

A. OPIC's Organic Statute Precludes Judicial Review

The APA allows judicial review of agency action except where, as here, a statute precludes judicial review. Specifically, judicial review is barred where "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). "'[B]efore any review . . . may be had, a party must first clear the hurdle of § 701(a).'" FDIC v. Bank of Coushata, 930 F.2d 1122, 1127 (5th Cir.), cert. denied, 502 U.S. 857 (1991) quoting Heckler v. Cheney, 470 U.S. 821, 828 (1985). "Subsection (a)(1) is concerned with whether Congress expressed an intent to prohibit judicial review; subsection (a)(2) applies 'in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply."'" Webster v. Doe, 486 U.S. 592, 599 (1988) (citations omitted). With respect to Subsection (a)(1), "[t]he statutory preclusion of judicial review must be demonstrated clearly and convincingly . . . [and] [i]n the absence . . . of statutory language expressly

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[18]/ (...continued)
U.S. 360, 371-372 (1989); Sierra Club v. Penfold, 857 F.2d 1307, 1318 (9th Cir. 1988); Cold Mountain v. Garber, 375 F.3d 884, 893 (9th Cir. 2004).

precluding APA review, the Court must examine the structure and history of the statute to determine whether the requisite congressional intent to bar judicial review is clearly established." National Labor Relations Board v. United Food and Commercial Workers Union, 484 U.S. 112, 131 (1987). The presumption favoring judicial review is overcome "whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" Block v. Community Nutrition Institute, 467 U.S. 340, 351 (1984).

The express language of OPIC's statute demonstrates Congress's intent to preclude judicial review of OPIC's compliance with its environmental review obligations. In a subsection entitled "presumption of compliance," OPIC's organic statute provides:

> Each guaranty contract executed by such officer or officers as may be designated by the Board shall be *conclusively presumed* to be issued in compliance with the requirements of this chapter.

22 U.S.C. § 2197(j) (emphasis added). "Chapter" refers to the entire Foreign Assistance Act, Chapter 32 of Title 22 of the U.S. Code, which includes specific environmental review procedures applicable to OPIC that are set forth in 22 U.S.C. § 2151p(c) and 22 U.S.C. § 2191a. See 22 U.S.C. § 2199(g). Thus, the statute specifically precludes judicial review of OPIC's actions, including its environmental review of applications it receives, by deeming them to conclusively comply with the law.[19]/

The reasons behind the "presumption of compliance" provision are readily apparent from the nature of OPIC's mission and from the legislative history, confirming Congress' clear intent to preclude judicial review. The Committee Report on the addition of the language to the statute explains briefly that the "presumption of compliance" provision "will improve the marketability of loans guaranteed by the Corporation, thereby favorably affecting interest rates." H. Rep. No. 91-611, 91st Cong., 1st Sess. at 37 (1969) (Att. 4m).[20]/ Furthermore, when OPIC decides to enter into a particular transaction, in order to relieve U.S. investors from certain types of risk and further U.S. foreign policy, that decision

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[19]/ In their Complaint, Plaintiffs assert that OPIC's separate environmental review procedures do not "alter or conflict with NEPA . . ." implying that NEPA also applies to the agency. See 2nd Am. Compl. at ¶ 38. Even if NEPA could be construed to apply to OPIC, which it cannot as Defendants explain below, this would not change Congress' plain intent to prohibit judicial review of OPIC's environmental analysis of applications it receives.

[20]/ This language was in the Report of the Committee on Foreign Affairs for H.R. 14580, the bill that added the "presumption of compliance" provision. H.R. 14580 (Att. 4n).

implicates the full faith and credit of the United States "for the full payment and performance of such obligations." 22 U.S.C. § 2197(c). See also 22 U.S.C. §§ 2191, 2194(a)(1).

Private market investors from the United States, project sponsors, and foreign government officials all rely on OPIC's full faith and credit provision and the conclusive presumption of compliance in assessing the validity of OPIC's guarantees. Feeney Decl. at ¶ 6. "If the OPIC guaranty once executed could be invalidated for any reasons other than investor fraud, OPIC would either (1) not be able to facilitate participation of the capital market investors or (2) the capital market investors would price the risk higher than rates available from alternative lenders."[21] Feeney Decl at ¶ 8. This is because the removal of risk is the primary benefit of an OPIC commitment to a capital investor. If a new risk in introduced, this risk will make other opportunities more attractive to the investor, who would have no reason to seek OPIC assistance. Feeney Decl. at ¶¶ 8-9. In addition, OPIC must be able to act quickly to commit U.S. involvement in a project to further foreign policy goals and benefit U.S. business.[22] Otherwise, U.S. sponsors may lose opportunities to foreign competitors who can react more quickly. Himberg Decl. at ¶ 10. Thus, uncertainty associated with judicial review of OPIC's commitments would be contrary to Congressional intent, as expressed through the plain language of OPIC's statute, the statutory scheme, and the legislative history, of removing risk to U.S. investors in furtherance of U.S. foreign policy goals.

B. Even If The APA Could Be Construed To Waive OPIC's Sovereign Immunity From Suit, Congress Imposed Specific Environmental Review Obligations On OPIC, Displacing Any Obligations Under NEPA

In addition to being barred by sovereign immunity, Plaintiffs' allegations against OPIC must fail because they improperly assume that NEPA applies. It does not. Unsurprisingly, given the nature of

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[21] "OPIC fulfills its statutory mandate in part by mobilizing U.S. domestic institutional capital market investors (e.g., mutual funds, insurance companies, pension funds, banks) to participate in OPIC-supported projects who rely upon OPIC's loan guaranty." Feeney Decl at ¶ 3.

[22] OPIC operates in a developing country only after the President has entered into a bilateral agreement that allows OPIC involvement in local projects. 22 U.S.C. § 2197(a).

OPIC's activities and NEPA's lack of extraterritorial application,[23]/ Congress has set forth by statute the specific environmental review obligations that do apply to OPIC. As discussed more thoroughly below, even where NEPA otherwise might apply to an agency's activities, the Ninth Circuit recognizes that this type of specific statutory scheme serves to displace NEPA. In Merrell v. Thomas, 807 F.2d 776, 781 (9th Cir. 1986), cert. denied, 484 U.S. 848 (1987), the plaintiff sought to enjoin the Environmental Protection Agency from registering herbicides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) without first complying with NEPA. The court considered the legislative history of FIFRA, determined that Congress created two very different procedures in that statute and in NEPA, and found that even when Congress had the opportunity to do so, it did not apply NEPA to FIFRA. Merrell, 807 F.2d at 778-779. Instead, in FIFRA "Congress created a procedure that made the NEPA procedure 'superfluous.'" Douglas County v. Babbitt, 48 F.3d 1495, 1502, 1503 (9th Cir. 1995), cert. denied, 516 U.S. 1042 (1996). Similarly, in Douglas County, 48 F.3d 1495, the Ninth Circuit addressed the question of whether certain procedures in the Endangered Species Act (ESA) displaced NEPA. Finding that they did, the court reasoned that the legislative history for the ESA "convinces us that Congress intended that the ESA procedures for designating a critical habitat replace the NEPA requirements." Douglas County, 48 F.3d at 1503.

As explained below, as in Douglas County and Merrell, with respect to OPIC, Congress created a procedure that makes the NEPA process "superfluous" to the extent NEPA could be triggered by OPIC's actions. Unlike in those cases, Congress went further in the provision that is applicable to OPIC, going out of its way to specify in the relevant legislative history that it intended to displace NEPA

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[23]/ NEPA does not apply to United States activities outside of United States territory. See, e.g., Born Free v. Norton, 278 F. Supp. 2d 5 (D.D.C. 2003) (vacated as moot on appeal); NEPA Coalition of Japan v. Aspin, 837 F. Supp. 466 (D.D.C. 1993). See also Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 109 (1991) (extraterritorial application must be expressed through a "plain statement of extraterritorial statutory effect"). Instead, the environmental assessment of these activities, including on the "global commons" and on the environment of foreign countries, is governed by Presidential Executive Order. Executive Order 12114 (Jan. 4, 1979) ("Environmental Effects Abroad of Major Federal Actions"), 44 Fed. Reg. 1957. The Executive Order furthers the goals of NEPA, but was not promulgated under NEPA. Executive Order 12114, § 1-1. The executive order recognizes the flexibility federal agencies must have in evaluating effects from projects outside of the United States, and creates no private right of action. Id. §§ 2-5, 3-1.

with a separate statutory procedure.

1. The Plain Language Of The Statute Specifies The Environmental Process OPIC Is Required To Follow

In 1985, Congress added a variety of provisions relating to the environment to OPIC's organic statute to further the goal of ensuring consideration of the environmental consequences of OPIC's activities.[24] In the statement of purpose, Congress directed that OPIC

> (3) ensure that the project is consistent with the provisions of section 2151p of this title, section 2151p-1 of this title, and section 2151q of this title relating to the environment and natural resources of, and tropical forests and endangered species in, developing countries, and consistent with the intent of regulations issued pursuant to section 2151p of this title, section 2151p-1 of this title, and section 2151q of this title.

22 U.S.C. § 2191. These provisions, which are otherwise applicable to the United States Agency for International Development (U.S.AID.), express the need for cooperation between the United States and other governments "to achieve environmentally sound development," recognize the importance of tropical forests and tree cover, and call for the conservation and protection of endangered species. Under its authority, OPIC may refuse to participate in a project which the agency determines "will pose an unreasonable or major environmental, health or safety hazard, or will result in the significant degradation of national parks or similar protected areas." 22 U.S.C. § 2191(n). OPIC also must notify other countries of relevant guidelines of international organizations and environmental restrictions that would apply if the project were to take place in the United States and take into account all comments it receives on a project. 22 U.S.C. § 2197(m).

The 1985 additions to OPIC's statute include 22 U.S.C. § 2199(g), which makes applicable to OPIC a separate provision from the Foreign Assistance Act, "the Environment and Natural Resource Standards And Considerations Now Applicable to U.S. AID . . . . " H.R. Conf. Rep. 99-428 at 11 (Att. 41). The applicable provision, which was added to the Foreign Assistance Act in 1982, governs review of the environmental implications of relevant projects, and states as follows:

> (c) Implementation considerations applicable to programs and projects.

[24] These provision was added by the Overseas Private Investment Corporation Amendments Act of 1985, Pub. L. No. 99-204, sec. 4 (a), s. 231, 99 Stat. 1669.

(1) The President, in implementing programs and projects under this part and part X of this subchapter, shall take fully into account the impact of such programs and projects upon the environment and natural resources of developing countries. Subject to such procedures as the President considers appropriate, the President shall require all agencies and officials responsible for programs or projects under this part and part X of this subchapter –

(A) to prepare and take fully into account an environmental impact statement for any program or project under this part and part X of this subchapter significantly affecting the environment of the global commons outside the jurisdiction of any country, the environment of the United States, or other aspects of the environment which the President may specify; and

(B) to prepare and take fully into account an environmental assessment of any proposed program or project under this part and part X of this subchapter significantly affecting the environment of any foreign country. Such agencies and officials should, where appropriate, use local technical resources in preparing environmental impact statements and environmental assessments pursuant to this subsection.

(2) The President may establish exceptions from the requirements of this subsection of emergency conditions and for cases in which compliance with those requirements would be seriously detrimental to the foreign policy interest of the United States.

22 U.S.C. § 2151p(c).

In 1999, Congress added the following provision which institutes a public comment period for certain types of actions and restricts OPIC action until the end of that period:

(b) Environmental impact: The Board of Directors of the Corporation shall not vote in favor of any action to be taken by the Corporation that is likely to have significant adverse environmental impacts that are sensitive, diverse, or unprecedented, unless for at least 60 days before the date of the vote -

(1) an environmental impact assessment or initial environmental audit, analyzing the environmental impacts of the proposed action and of alternatives to the proposed action has been complete by the project applicant and made available to the Board of Directors; and

(2) such assessment or audit has been made available to the public of the United States, locally affected groups in the host country, and host country nongovernmental organizations.

22 U.S.C. § 2191a.

Thus, OPIC is subject to very detailed environmental review requirements that were applied to OPIC in 1985 and 1999 – many years after the enactment of NEPA. These requirements combine terms of art from NEPA and terms of art from Executive Order 12114, discussed above, with provisions

tailored to the agency's mandate. There would have been little point to these specially tailored additions to the statute – many years after NEPA was enacted – if NEPA otherwise applied to OPIC. This is especially so given that, as explained below, the terms diverge from NEPA in a number of respects.

2. OPIC's Statute Requires Procedures That Differ From Those Required By NEPA

While the statutory provisions in the Foreign Assistance Act use some terms that are common to NEPA, they require procedures and impose terms that differ from the NEPA obligations that Plaintiffs seek to impose on the agency. For example, using terms from NEPA and its implementing regulations, Section 2151p(c) requires the agency to prepare an "environmental impact statement" in certain circumstances and an "environmental assessment" in other circumstances. See 42 U.S.C. § 4332(2)(C), 40 C.F.R. §§ 1508.9, 1508.11. However, the "environmental assessment" requirement in Section 2151p(c) applies only to proposed programs or projects "significantly affecting the environment of any *foreign* country." 22 U.S.C. § 2151p(c)(1)(B) (emphasis added). Under NEPA's implementing regulations, agencies must conduct an environmental assessment, in appropriate circumstances, to determine whether a proposed action with impacts in the United States will significantly affect "the quality of the human environment" such that an EIS is required or whether the environmental assessment process can conclude with a finding of no significant impact. 40 C.F.R. § 1508.9. In contrast, Section 2151p(c) omits the environmental assessment requirement for projects with impacts on the United States, imposing only the environmental impact statement requirement.[25]/ 22 U.S.C. § 2151p(c)(1)(A).

Specific aspects of the section confirm that OPIC is not subject to NEPA, but that Congress imposed particular environmental review procedures that include a flexibility necessary to OPIC's implementation of its foreign policy mission. Reinforcing the foreign policy context of this provision,

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[25]/ The language of the 1999 amendment to OPIC's statute, which requires Board and public review prior to approving projects likely to have significant adverse impacts "that are sensitive, diverse, or unprecedented," further departs from NEPA, and from Section 2151p(c), by referring to "an environmental impact assessment or initial environmental audit" – types of review not found in NEPA or its regulations. 22 U.S.C. § 2191a(b).

1 2151p(c) establishes a role for the President in defining both the appropriate procedures and the types
2 of issues to consider in the course of environmental review of a project. 22 U.S.C. § 2151p(c)(1). In
3 addition, the President may exempt a particular project from any environmental review under the section
4 for foreign policy reasons. 22 U.S.C. § 2151p(c)(2). These aspects of Section 2151p(c) are inconsistent
5 with NEPA, which has procedural and substantive requirements that are not subject to the type of
6 discretion established by 2151p(c). While the Council on Environmental Quality (CEQ) may allow
7 "alternative arrangements" to the regulatory provisions in certain emergency circumstances, neither
8 NEPA nor its implementing regulations allows any official to exempt particular projects from its
9 requirements as does Section 2151p(c).[26]/ See Merrell, 807 F.2d at 780-81 (language in FIFRA differs
10 from NEPA in certain material respects, judges should not overturn "compromise adopted by Congress"
11 by applying NEPA).
12 The language of Section 2151p(c) has two additional consequences which further undermine
13 Plaintiffs' assertion that NEPA applies to OPIC. First, the President, who has the responsible role for
14 defining the nature of environmental review under the section, is not subject to NEPA. 40 C.F.R. §
15 1508.12 ("'federal agency' [subject to NEPA] . . . does not mean the Congress, the Judiciary, or the
16 President . . . ."). Second, actions of the President, in this case defining the nature and substance of
17 environmental review to be conducted, are not subject to review under the APA because the President
18 is not an "agency" within the meaning of the Act. Dalton v. Specter, 511 U.S. 462, 468-70, 476-77
19 (1994); Franklin v. Massachusetts, 505 U.S. 788, 796, 800-01 (1992). Thus, in Section 2151p(c),
20 Congress tailored the nature of OPIC's environmental review responsibility to the agency's mandate
21 and made the President the one who decides the nature of the environmental review to be conducted –
22

23 [26]/ In Douglas County, the court characterized the issue as whether the ESA procedures displaced NEPA. Another related inquiry, the court opined, is whether other statutory procedures
24 require the "functional equivalent" of NEPA analysis, thus exempting an agency from NEPA.
25 Douglas County, 48 F.3d at 1504, n.10. The court distinguished the two questions by stating that "displacement" involves the substitution of one procedure for another while "functional equivalence"
26 assumes that "one process requires the same steps as another." Id. While the OPIC provision does not require exactly "the same steps" as NEPA, it does provide "for orderly consideration of diverse
27 environmental factors ... and ... 'strike[s] a workable balance between some of the advantages and disadvantages of full application of NEPA.'" Amoco Oil Co. v. EPA, 501 F.2d 722, 750 (D.C. Cir.
28 1974) quoting Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 386 (D.C. Cir. 1973).

not NEPA or the CEQ regulations.[27] Furthermore, as explained above, OPIC's organic statute exempts it from judicial review by providing that its decisions are presumed to comply with the Foreign Assistance Act, which includes the environmental review procedures in Section 2151p(c). 22 U.S.C. § 2197(j).

It would make little sense to conclude that OPIC is subject to NEPA and to judicial review, when Congress has specifically committed environmental review to the discretion of the President and then further barred judicial review of the agency's compliance with its environmental review obligations pursuant to the terms of a more specific statute.

3. Legislative History Confirms That Congress Did Not Intend OPIC To Be Subject To NEPA

The legislative history for Section 2151p(c), the environmental review requirement described above which at the time of its enactment was applicable only to U.S. AID, confirms that Congress intended for that provision, even prior to the other detailed obligations imposed on OPIC by Congress described above, to replace NEPA and relieve foreign projects of the risk of being entangled in and administrative delay and domestic litigation. Section 2151p was added in the International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, Sec. 307, 95 Stat. 1533. Att. 4g. In the markup before the Committee on Foreign Affairs in the House of Representatives, there was extensive discussion of a specific *deletion* of a reference to NEPA that had been proposed for the original version of the section. *Foreign Assistance Legislation for Fiscal Year 1982: Markup before the Committee on Foreign Affairs of the House of Representatives*, 97th Congress, 1st Sess. 187-196 (1981) (Att. 4h). In essence, the participants in the markup hearing generally agreed that the proposed amendment was meant to codify U.S. AID's practice of environmental review as set forth in regulations that the agency had promulgated following a NEPA lawsuit brought in the 1970s.[28] See 22 C.F.R. Part 216. However,

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[27]/ Regulations promulgated by the Council on Environmental Quality, 40 C.F.R. §§ 1500-1508, provide guidance in the application of NEPA. Department of Transportation v. Public Citizen, 124 S. Ct. 2204, 2209 (2004).

[28]/ These regulations were promulgated pursuant to a settlement approved by the United States District Court for the District of Columbia in 1975 and include references to NEPA. See

(continued...)

1 the then-director of U.S. AID, Mr. Wheeler, objected to the reference to NEPA in the draft, arguing that
2 subjecting the agency to that statute would expose foreign projects to additional procedures and to
3 litigation in U.S. courts, implicating delays which would "make it extremely difficult for us to carry out
4 projects overseas." Att. 4h at 189.

5 Representative Bingham, who apparently had suggested the original version that included a
6 specific reference to NEPA, expressed confusion at the objection to his amendment. He noted that his
7 intention was only to adopt U.S. AID's practice of environmental review and that he understood that
8 the agency applied NEPA not to projects with solely foreign impacts, which could be assessed based
9 on the agency's more limited practice, but "only if the impact was on the global commons, worldwide,
10 or affected the environment of the United States, or something else the President believes is significant."
11 Id. at 190. Again, Mr. Wheeler responded that NEPA "does not and should not apply to the bilateral
12 program overseas", although the agency intended to continue following its practice of conducting its
13 own environmental review.[29]/ Id. at 190. Representative Lagomarsino agreed that overseas projects
14 should not be subject to NEPA's "rigid" standards because due to anticipated delays, "the effectiveness
15 of our AID program will be seriously hampered, at least in some countries on some projects." Id. at 191.

16 After additional discussion, Representative Bingham agreed to "accept the majority view of the
17 committee on this," referring to the deletion of the reference to NEPA, but again noted that U.S. AID's
18 regulations used NEPA-specific terminology, including a reference to the statute itself. Id. at 191.
19 Representative Lagomarsino responded that he did not wish to put oversight of foreign projects within
20 the purview of the courts by adding a specific reference to NEPA in the statute. Id. at 191. Later in the
21 discussion, Representative Fascell noted that the legislation could achieve the same goal as NEPA
22 without "the requirement of compliance with U.S. law on a project in another country." Id. at 193.
23

24 [28]/ (...continued)
25 Environmental Defense Fund v. U.S. AID, 6 Envtl. L. Rep. 20121 (1975). The regulations have not been revised since 1980 – prior to the enactment of Section 2151p(c). OPIC is not subject to the
26 requirements of U.S. AID's regulations although it is required to ensure that projects are "consistent with the intent of regulations issued pursuant to 2151p . . . ." 22 U.S.C. § 2191(3).

27 [29]/ Mr. Wheeler later expanded on this, explaining that under its regulations the agency did conduct "impact statements, but not under the precise terms of the National Environmental Policy
28 Act of 1969." Att. 4h at 194.

Representative Bingham finally agreed to delete the language and Mr. Wheeler agreed that "as long as it is clear that we are not expected to apply the [NEPA] in detail in our implementation of the environmental program in AID, then it would be acceptable to us." Id. at 193. With respect to how the act might ultimately be interpreted, another representative noted that "I think any court would notice that the amendment, Mr. Fascell's suggestion, eliminated the reference to this act. I think that would then unhook it, as Mr. Wheeler pointed out, from the precise requirements of the 1962 [sic] act." Id. at 194. The suggestion was made that language should be added to the ultimate House Report that would make it "explicitly clear." Id. at 194.

Following this discussion, the House Report described the amendment, including the specific deletion of the reference to NEPA, as follows:

> "Section 307 - Environment and natural resources. This section amends section 118 of the Foreign Assistance Act, "Environment and Natural Resources," in several respects."
>
> ****
>
> "Subsection (c) codifies AID's current practice of preparing environmental impact statements for U.S. aid programs which significantly affect the global commons or the U.S. environment, and more limited environmental impact assessments where the environment of a foreign country or countries would be significantly affected. In carrying out this mandate, AID is urged, where appropriate, to use local technical resources. The President may establish exceptions from these requirements for emergency conditions and for cases in which compliance with such requirements would be seriously detrimental to the foreign policy interests of the United States.
>
> In adopting this new language, the committee intended to underscore the urgency of seeking solutions to widespread problems of international environmental deterioration and to insure that AID continue its current practice of taking environmental considerations fully into account in its decisionmaking process. The committee does not, however, expect this amendment to section 118 to impose any more or fewer requirements on AID than are already set forth in AID's own environmental procedures (regulation 16, 22 CFR par. 216). *Indeed, the committee struck the specific reference in the original draft of the amendment to the 'National Environmental Policy Act of 1969" so as to avoid confusion on this point.* AID's procedures were first adopted in 1976 and most recently modified in 1980 to reflect operating experience."

House Rep. No. 97-58 (reporting H.R. 3566), 97th Cong., 1st Sess. 47 (1981) (Att. 4i) (emphasis added).

The Senate version of the amendment to the Foreign Assistance Act did not contain the environmental review provisions, and no discussion of them appears in the Senate records. See S. Rep. No. 97-83, 97th Cong., 1st Sess. (1981) (reporting S. 1196) (Att. 4j). The House Conference Report states: "The House Amendment (Sec. 307) Amends Section 118 of the Foreign Assistance Act to

Require Environmental Impact Statements and Environmental Assessments. The Senate Bill (Sec. 308) Does Not Contain a Comparable Section. The Conference Substitute is the Same as the House Provision." House Conf. Rep. No. 97-413 (reporting S. 1196), 97th Congr., 1st Sess. 71 (1981) (Att. 4k).

Thus, the legislative history reveals that Congress knowingly decided not to apply NEPA to U.S. AID in Section 2151p(c), allowing the agency to choose certain provisions and tailor them to its mandate, as set forth in its regulations, and then codifying the agency's general practice in a separate statute specific to U.S. AID's foreign policy mission. See Douglas County, 48 F.3d at 1503 ("Congress through debate and compromise forged a specific process for the Secretary to follow" in lieu of NEPA). While U.S. AID's regulations follow NEPA in certain respects, Congress, which expressed itself satisfied with U.S. AID's procedures, did not link the statutory obligation to NEPA in order to prevent the entanglement of foreign projects in administrative delay and potential litigation. This same provision – and this same rationale – applies to OPIC, compelling the conclusion that NEPA does not apply to the actions of that agency.

VIII. Conclusion

For the foregoing reasons, this Court should grant Defendants' motion for summary judgment and dismiss this matter with prejudice.

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Respectfully submitted,

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