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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FRIENDS OF THE EARTH, INC., et al.,
Plaintiffs,
v.
ROBERT MOSBACHER, JR., et al.,
Defendants.

No. C 02-04106 JSW

**ORDER DENYING PLAINTIFFS’
MOTION FOR SUMMARY
JUDGMENT AND GRANTING IN
PART AND DENYING IN PART
DEFENDANTS’ MOTIONS FOR
SUMMARY JUDGMENT**

I. INTRODUCTION.

This matter comes before the Court upon consideration of: (1) the motion for summary judgment filed by Plaintiffs¹; (2) the cross-motion for summary judgment filed by Defendant Robert Mosbacher, Jr., in his capacity as President and Chief Executive Officer of the Overseas Private Investment Corporation (“OPIC”); and (3) the cross-motion for summary judgment filed by Defendant Phillip Merrill, in his capacity as President and Chairman of the Export-Import Bank (“Ex-Im”).² Having carefully considered the parties’ pleadings, relevant legal authority, the record in this case, and having had the benefit of oral argument, the Court **HEREBY DENIES** Plaintiffs’ motion for summary judgment, and **GRANTS IN PART AND DENIES IN**

¹ Plaintiffs are Friends of the Earth, Inc. (“FOE”), Greenpeace, Inc. (“Greenpeace”), and the cities of Boulder, Colorado, and Arcata, Oakland, and Santa Monica, California (collectively “Plaintiffs”).

² Plaintiffs also filed a motion to strike portions of Defendants’ briefs and to strike evidence, which is addressed in a separate order issued this date.

1 PART OPIC’s cross-motion for summary judgment, and GRANTS IN PART AND DENIES IN
2 PART Ex-Im’s cross-motion for summary judgment.

3 **II. BACKGROUND.**

4 This case arises out of Plaintiffs’ desire to have the Defendants take a hard look at the
5 impact greenhouse gases, emitted by projects for which the Defendants provide financial
6 support, have on the domestic environment. Global warming and its effects on our planet
7 clearly have gained increased public attention. The Intergovernmental Panel on Climate
8 Change is set to release its fourth assessment report about the human contribution to climate
9 change. *See, e.g.,* www.sfgate.com, Kay, *A Warming World: Climate Change Report*, San
10 Francisco Chronicle (Feb. 3, 2007). The documentary on global climate change, “*An*
11 *Inconvenient Truth*,” received an Academy Award® this year. California has instituted a
12 lawsuit against automakers seeking damages based on greenhouse gases emitted by
13 automobiles. *See, e.g.,* www.sfgate.com, Egelko, *A.G. Brown pushes ahead with global*
14 *warming suit against automakers*, San Francisco Chronicle (Feb. 1, 2007). The issue of
15 whether the Environmental Protection Agency can be compelled to regulate greenhouse gas
16 emissions is pending before the United States Supreme Court. *See Massachusetts v. EPA*, 415
17 F.3d 50 (D.C. Cir. 2005), *cert. granted*, __ U.S. __, 126 U.S. 2690 (2006).

18 The Court does not doubt that the consequences of global warming will remain a matter
19 of public interest for some time, and it recognizes the importance of the issues raised by this
20 case. As always, in rendering its decision, the Court must interpret the law in light of the facts
21 and record presented by the parties.

22 **A. Procedural History.**

23 Plaintiffs initiated this action against OPIC and Ex-Im pursuant to the National
24 Environmental Policy Act, 42 U.S.C. §§ 4321-4335 (“NEPA”) and the Administrative
25 Procedure Act, 5 U.S.C. §§ 701-706 (“APA”). Plaintiffs generally allege that each of these
26 agencies have provided, and continue to provide, financial support to international fossil fuel
27 projects that emit greenhouse gases (“GHGs”). Plaintiffs contend these GHG emissions cause
28 climate changes that significantly affect the domestic environment. (Second Amended

1 Complaint (“SAC”) ¶¶ 146-211.) Plaintiffs assert that before they agree to provide financial
2 support for these projects, OPIC and Ex-Im are required to conduct an environmental review
3 under NEPA. In particular, Plaintiffs assert that each Defendant has an energy “program” that
4 is subject to NEPA’s requirements. Plaintiffs also identify seven “illustrative” projects financed
5 by either OPIC or Ex-Im or by both agencies and contend that each of these seven projects are
6 subject to NEPA’s requirements. (*Id.* ¶¶ 162-203.)

7 Plaintiffs ask for: (1) “a declaration that defendants violated and are in violation of
8 NEPA and the APA for failing to comply with NEPA;” (2) a declaration that “defendants’
9 programs of financing projects that directly or indirectly emit [carbon dioxide (“CO₂”)] and
10 each financing decision for particular projects that directly or indirectly emit CO₂ are subject to
11 NEPA;” (3) an injunction “requiring the defendants to fully comply with NEPA;” (4) an
12 injunction requiring “defendants to prepare programmatic environmental assessments of [their]
13 support of energy projects;” and (5) an injunction “requiring defendants to prepare
14 environmental assessments for each of [their] fossil fuel related projects including, but not
15 limited to fossil fuel extraction projects and pipelines.” (*See id.* at p. 47.)

16 On August 23, 2005, the Court denied a motion for summary judgment filed by
17 Defendants and found that: (1) Plaintiffs had standing to pursue their claims against OPIC and
18 Ex-Im; (2) Plaintiffs challenged final agency actions; and (3) OPIC had not demonstrated that
19 its organic statute, the Foreign Assistance Act, precluded judicial review of Plaintiffs’ claims
20 under the APA. The Court also concluded, based on the record then before the Court, that
21 OPIC had not demonstrated that Congress did not intend NEPA to apply to OPIC. (*See* Docket
22 117 at 10-13 (hereinafter “August 23 Order”).)

23 The motions for summary judgment now pending address the merits of Plaintiffs’
24 claims.

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1 **B. Factual Background.**³

2 **1. Overseas Private Investment Corporation.**

3 OPIC is an agency of the United States created “[t]o mobilize and facilitate the
4 participation of the United States private capital and skills in the economic and social
5 development of less developed countries and areas, and countries in transition from nonmarket
6 to market economies.” 22 U.S.C. § 2191. As part of its statutory mission, OPIC insures
7 investments overseas against a broad range of political risks, finances business overseas through
8 loans and loan guarantees, finances private investment funds that provide equity to businesses
9 overseas, and advocates the interests of the American business community overseas. (*See*
10 Answer ¶ 18; OPIC Ex. 6 (Declaration of Harvey Himburg dated November 3, 2004
11 (hereinafter “Himburg Decl.”) ¶¶ 3-7).) Although OPIC may make direct loans, it may do so
12 “only for projects that are sponsored by or significantly involve United States small business or
13 cooperatives.” OPIC cannot provide direct loans “to finance any operation for the extraction of
14 oil or gas.” 21 U.S.C. § 2194(c). OPIC also is “required by statute to operate its programs in a
15 manner consistent with” section 117 of the Foreign Assistance Act (22 U.S.C. § 2151p), which
16 sets forth the environmental requirements applicable to the United States Agency for
17 International Development (“US AID”). (*See, e.g.*, OPIC Administrative Record (“OPIC
18 A.R.”) Tab 2 at 000013.)

19 In 1999, having considered comments from OPIC’s users, members of the public,
20 members of Congress, and “general policy initiatives announced by President Clinton at the
21 United Nations Special Session on the Environment in June of 1997,” OPIC published an
22 environmental handbook (“OPIC Handbook”). (OPIC A.R. Tab 2 at 000008; *see also* OPIC
23 Exs. 10-1S.) The OPIC Handbook was “intended to provide information to OPIC’s users, as
24 well as the interested public, with respect to the general environmental guidelines, assessment
25 and monitoring procedures that OPIC applies, in its discretion, to prospective and ongoing
26 investment projects.” (*Id.* Tab 2 at 000008; *see also* Himburg Decl. ¶ 11.) As further set forth
27 in the OPIC Handbook, “[t]he standards and procedures described [herein] generally reflect

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³ Unless otherwise noted, the facts are undisputed.

1 existing practice at OPIC as it has evolved since the enactment in 1985 of statutory
2 environmental provisions applicable to OPIC.” (OPIC A.R. Tab 2 at 000008.)

3 In its handbook, OPIC also states that it is required “to provide some degree of
4 [environmental assessment] to every project considered for insurance or finance in determining
5 whether to provide support for the project.” (*Id.* at 000014.) “OPIC cannot provide a final
6 commitment to a project ... until its environmental assessment is complete and a determination
7 is made by OPIC that the environmental health and safety impacts of the project are
8 acceptable.” (*Id.*) It is undisputed that OPIC does not conduct these environmental assessments
9 under the auspices of NEPA.

10 As set forth in the OPIC Handbook, the first step in OPIC’s environmental screening
11 procedures is to review an application to determine whether financial support “would violate
12 any categorical prohibition required by OPIC’s organic statute or policy.” (*Id.* at 000009,
13 000011-12.) When a project is not categorically ineligible for OPIC’s support, OPIC continues
14 the screening process to “determine the level of environmental sensitivity associated with the
15 industry sector or site involved.” OPIC’s Environmental Unit assigns a given project to one of
16 six categories, denominated Categories A-F. (*Id.*)

17 If a project is identified as a “Category A” project, OPIC requires an “Environmental
18 Impact Assessment” or an “Initial Environmental Audit” or both. (*Id.* at 000009.) “Category
19 A” projects are “likely to have significant adverse environmental impacts that are sensitive (e.g.
20 irreversible, affect sensitive ecosystems, involve involuntary resettlement, etc.), diverse, or
21 unprecedented.” (*Id.* at 000011.) Crude oil refineries, large thermal power projects (200
22 megawatts or more), major oil and gas developments, and oil and gas pipelines, are among the
23 general types of projects that OPIC states would qualify as “Category A” projects. (*Id.* at
24 000044-45.)

25 Projects identified by OPIC as “Category B” projects “are subject to internal OPIC
26 assessment based on information supplied by the applicant that need not take the form of an
27 [Environmental Impact Assessment].” (*Id.* at 000009.) “Category B” projects are “projects
28 likely to have adverse environmental impacts that are less significant than those of Category A

1 projects, meaning that few if any of the impacts are likely to be irreversible, that they are site-
2 specific, and that mitigatory measures can be designed more readily than for Category A
3 projects.” (*Id.* at 000011.) OPIC’s environmental assessment process for such projects
4 “normally consists of a limited environmental review, an environmental mitigation or action
5 plan, an environmental audit, or a hazard assessment and incorporating them into the project.”
6 (*Id.*) Both Category A and Category B projects are subject to internal OPIC environmental
7 assessment, which permits OPIC’s “environmental staff [to] assess the impacts of the project
8 and the standards and mitigative conditions applicable to OPIC support.” (*Id.* at 000009.)

9 Once OPIC approves financing for a particular project, OPIC will monitor “project
10 compliance with contractual conditions throughout the term of the OPIC loan agreement or
11 insurance contract.” (*Id.* at 000010.) In a section of the OPIC Handbook entitled “Monitoring
12 and Compliance,” OPIC states that it “reserves the right to monitor projects’ compliance with
13 environmental representations and undertakings throughout the term of its insurance or
14 financing. Monitoring may take the form of self-reporting ... [or] third party evaluation... .”
15 (*Id.* at 000027.) OPIC also states that it “routinely conducts on-site monitoring of projects,
16 using OPIC staff and/or consultants, for environmental and environmentally based social
17 impacts as well as U.S. economic and host country development effects. OPIC endeavors to
18 monitor all Category A projects on-site at least once during the first three years of project
19 commitment, and more frequently depending on the environmental sensitivity of the project.”
20 (*Id.*) OPIC also requires third-party independent compliance audits for Category A projects. In
21 general, such audits are designed to take place “after an OPIC supported project begins
22 construction or is operational.” (*Id.*)

23 In the Monitoring and Compliance section, OPIC further sets forth what actions it may
24 take if a recipient of OPIC aid fails to comply with these provisions:

25 Material misrepresentation or non-compliance with environmental
26 undertakings may constitute an event of default under the terms of OPIC
27 insurance contracts and loan agreements. Depending on the severity and
28 reversibility of the environmental impact and the investor’s responsibility
and due diligence in attempting to prevent the default and in curing the
problem, OPIC may treat the default as curable or incurable. In the case
of a curable default, OPIC works with the investor to develop a feasible
timetable for remediation. *In the case of an incurable default, OPIC may*

1 competition, Ex-Im Bank may provide its guarantee or insurance to enable
 2 the foreign buyer to purchase the U.S. exports. For eligible transactions,
 3 the Ex-Im Bank insurance or guarantee covers the risk that the foreign
 4 buyer will not (or cannot) pay back the loan for any reason. In the event
 5 the borrower does not repay the loan, the guaranteed lender/insured may
 6 make a claim against Ex-Im Bank to be compensated for the loss.

7 (O'Boyle Decl. ¶ 9.)

8 Like OPIC, Ex-Im also has adopted environmental review procedures. According to
 9 Ex-Im's Environmental Procedures and Guidelines ("Ex-Im Guidelines"), "those projects which
 10 may significantly affect the quality of the human environment of the U.S., its territories or
 11 possessions, or Antarctica, ... require adherence to [NEPA's] environmental review
 12 procedures." (Ex-Im A.R. Tab 2 (Ex-Im Guidelines) at 3.) Pursuant to the Ex-Im Guidelines,
 13 Ex-Im requires that all limited recourse project finance ("Project Finance") and long-term loans
 14 and guarantees ("Long-Term") undergo an environmental screening process. In contrast, Ex-Im
 15 generally does not require prior environmental review for medium-term transactions, credit
 16 guarantee facilities, short-term insurance, or for its working capital guarantee program. (*Id.* at
 17 4, 10-11.)

18 For any Project Finance or Long-Term transaction that requires prior environmental
 19 review, Ex-Im will categorize the transaction a "N," "A," "B," or "C." (*Id.* at 4-5.)⁴ Category
 20 A transactions encompass those transactions that are "categorically excluded from review
 21 because individual cases do not raise significant environmental issues." (*Id.*) Examples of
 22 Category A projects are (1) exports not identified with any particular project, or (2) the export is
 23 identified with a project, the project is not in category B or C, and the project "is one of the
 24 following: aircraft, locomotives, railway signaling, telecommunications equipment involving
 25 only a nominal element of civil works, radar equipment for existing airports, air traffic control
 26 systems, satellite projects, electronic data processing equipment for existing facilities, hospital
 27 equipment, and consulting services including environmental studies and feasibility studies."
 28 (*Id.*)

⁴ Category N projects are transactions associated with nuclear power projects and are subject to separate procedures and guidelines. (Ex-Im Guidelines at 4.)

1 Category B transactions are those that involve “exports for projects that will be
2 constructed in, or sufficiently near to have perceptible environmental effects in, the following
3 locations: primary forests, tropical forests, nationally designated wetlands, protected wetlands,
4 national parks, nationally-designated refuges, coral reefs or mangrove swamps, nationally-
5 designated seashore areas, habitat of endangered species, properties on the World Heritage List,
6 areas reserved for ethnic minorities or indigenous peoples, or areas in which the projects will
7 require large-scale resettlement.” (*Id.* at 5.)

8 Category C transactions include “all Long-Term transactions that are not classified as
9 Category A or B. [Ex-Im’s Engineering & Environment Division (“E&E”)] staff will conduct a
10 case-by-case review of all transactions included in Category C. For review of Category C
11 transactions, Ex-Im ... requires submission of environmental information sufficient to establish
12 whether the project meets Ex-Im Bank’s environmental objectives and guidelines,” as set forth
13 in Annex A to the Ex-Im Guidelines. (*Id.*)

14 If Ex-Im “determines that a project satisfies the Ex-Im Bank environmental guidelines in
15 all respects, including quantitative and qualitative, Ex-Im Bank support for exports will not be
16 rejected on environmental grounds.” (*Id.* at 3.) If, however, a given project “does not meet all
17 Ex-Im Bank environmental guidelines, the Ex-Im Bank Board of Directors will review the
18 environmental effects of the project on a case-by-case basis, taking account of significant
19 mitigating effects and circumstances.” (*Id.*) As set forth in the Ex-Im Guidelines, “[f]inancing
20 may be conditioned on the implementation of mitigating measures.” (*Id.*) The Ex-Im
21 Guidelines contain a section entitled “Project Financing,” which states that “E&E staff will
22 provide guidance to the [project] applicant to help identify significant environmental problems
23 and to assist in determining how the project can be designed, including mitigation measures, to
24 meet Ex-Im Bank’s environmental objectives and guidelines.” (*Id.* at 5.)

25 In the Ex-Im Guidelines, Ex-Im states that “[t]o assist in the management of global
26 greenhouse gas emissions, beginning in fiscal year 1999, Ex-Im will track the estimated amount
27 of [CO₂] emissions from projects it supports in the power sector and, to the extent practical,
28 from projects in other sectors that may cause significant production of CO₂. The estimated

1 annual amount of the aggregate greenhouse gases from these projects will be reported annually
2 in Ex-Im's Annual Report." (*Id.* at 3.)

3 **3. The Projects Identified in the SAC.**

4 Plaintiffs have identified seven "illustrative" projects, in the SAC, that they claim are
5 subject to NEPA requirements. These projects are: (1) the Chad-Cameroon Oil Pipeline
6 Project; (2) the Sakhalin Oil Field Project; (3, 4) the West Seno I and II Oil and Gas Fields
7 Project; (5) the Cantarell Oil Field Project; (6) the Hamaca Heavy Crude Oil Development
8 Project; and (7) the Dezhou Coal-Fired Power Plant Project.

9 **a. Chad-Cameroon Pipeline Project.**

10 The Chad-Cameroon Pipeline Project ("Chad-Cameroon Project") involves "a 1,070 km
11 pipeline" from Doba, Chad to Kribi, Cameroon. (Himburg Decl. ¶ 19; O'Boyle Decl. ¶ 32;
12 SAC ¶ 164.) It is part of a larger project, which involves the development of oil fields in Chad
13 and offshore oil-loading facilities located off the Cameroon coastline, known as the
14 Chad/Cameroon Petroleum Development and Pipeline Project (the "Development Project").
15 (*See* OPIC Ex. 13 (Declaration of Harvey Himburg dated January 20, 2006 (hereinafter "Supp.
16 Himburg Decl.") ¶ 5); OPIC Ex. 1NN at 66.) According to OPIC, the total cost of the larger
17 Development Project is estimated at \$3.5 billion. (Supp. Himburg Decl. ¶ 5; OPIC Ex. 1NN.)
18 Ex-Im attests that the total cost of the Chad-Cameroon Project is estimated at \$2.2 billion.
19 (O'Boyle Decl. ¶ 33.)

20 OPIC is involved with the Chad-Cameroon Project because it approved up to \$250
21 million in political risk insurance coverage for Pride International, Inc. ("Pride"), a
22 subcontractor on the Chad-Cameroon Project that provides drilling and related services in the
23 oil fields at Doba. (Himburg Decl. ¶ 19; Supp. Himburg Decl. ¶ 3; OPIC Exs. 1LL-1NN.)
24 According to Mr. Himburg, the contract between OPIC and Pride provides for a maximum
25 payout of \$100 million, and Pride pays OPIC \$1.1 million a year for the coverage. (Himburg
26 Decl. ¶ 22.)

27 OPIC designated the Chad-Cameroon Project as a Category B project and conducted an
28 environmental assessment under its environmental guidelines before approving the transaction.

1 (*Id.*; OPIC Ex. 1MM (Commitment Letter); OPIC Ex. 1NN (OPIC environmental assessment,
2 explaining that Chad-Cameroon Project was evaluated as Category B but that the Development
3 Project “was reviewed as a Category A project by the World Bank and IFC prior to Board
4 Approval”).) According to OPIC’s environmental assessment, “OPIC is not involved in
5 financing or providing direct insurance support to the” Development Project. (OPIC Ex. 1NN
6 at 66.)

7 The financing contract between Pride and OPIC contains the following provision:

8 The Insured [Pride] shall take, and shall cause the contractor [Pride
9 Forasol, SAS] to take, each of the following actions, it being agreed that
10 the failure in any material respect to do so shall constitute a default:

- 11 (i) perform all project activities in compliance with the Oil and
12 Gas (Onshore) Guidelines as published in the World Bank Group’s
13 Pollution Prevention and Abatement Handbook, dated July 1998 (attached
14 hereto as Exhibit A) and the agreement as applicable to the project; and,
15 (ii) notify OPIC immediately, and in no event later than 24 hours
16 after the Insured becomes aware, or should have become aware through
17 the exercise of reasonable diligence and care, of an accident that results in
18 the loss of human life or that has or that could reasonably be foreseen to
19 have a material adverse impact on the environment.

20 (OPIC Ex. 1NN at 87; *see also* OPIC Ex. 1MM at 83-84.)

21 Ex-Im also is involved with the pipeline portion of the Chad-Cameroon Project, which it
22 designated as a “Category B” project. (Ex-Im A.R. Tab 24 at 8.) Ex-Im provided ABN AMRO
23 Bank N.V. with a \$200 million loan guaranty but did not provide financing for the Development
24 Project. (O’Boyle Decl. ¶ 32.) According to Ms. O’Boyle, the loan guaranty “covered political
25 risks (primarily war and civil unrest, expropriation and transfer risks) during the construction of
26 the pipeline and comprehensive (non-payment for any reason) guarantee when the pipeline was
27 completed and operating.” (*Id.* ¶ 33.) Ex-Im attests that the guaranty “represents
28 approximately 9.1% of the \$2.2 billion development costs of the pipeline system.” (*Id.*) The
record in this case does not include any of the terms of that guaranty.

Ex-Im performed an environmental review of the Chad-Cameroon Project, in
accordance with its environmental guidelines. (Ex-Im Ex. 4 (Declaration of James Mahoney
dated January 20, 2006 (hereinafter “Supp. Mahoney Decl.”) ¶ 6); *see also* Ex-Im A.R. Tab 24
at 8.) A complete copy of the Ex-Im environmental review is not part of the record. Ex-Im has

1 included a copy of an Engineering Evaluation for the project. The Engineering Evaluation does
2 not set forth what conditions, if any, Ex-Im imposed on financing nor does it provide any
3 substantive analysis of the project. (*See* Ex-Im A.R. Tab 24 at 8.)

4 **b. Sakhalin Oil Field Project.**

5 The Sakhalin Oil Field Project (“Sakhalin Project”) involves the development of an oil
6 and gas extraction project of the Piltun-Astokhskoye offshore oil and gas field, which is located
7 east of Sakhalin Island in far-east Russia. (Himburg Decl. ¶¶ 24-25; OPIC Ex. 1KK; SAC ¶¶
8 182, 185.) This project consists of the “modification of an existing, ... mobile arctic offshore
9 drilling rig (Molikpaq), construction of a ... subsea pipeline, and ... utilization of ... storage and
10 offloading unit (FSO) from which oil will be offloaded to shuttle tankers.” (OPIC Ex. 1KK at
11 121 (ellipses denote redactions in exhibit).) The Sakhalin Energy Investment Company
12 (“SEIC”), which is a joint venture between, *inter alia*, Shell Development Sakhalin B.V., Mitsui
13 Sakhalin Development Co., and Mitsubishi, operates the Sakhalin Project. (Himburg Decl. ¶
14 24; OPIC Ex. 1KK at 121.) OPIC avers that the total cost for the Sakhalin Project is \$1.5
15 billion. (Supp. Himburg Decl. ¶ 9.)

16 OPIC is involved with the Sakhalin Project because it approved a \$116 million loan
17 guaranty to three U.S. mutual funds, which in turn loaned funds to SEIC for the project.
18 (Himburg Decl. ¶ 26; Supp. Himburg Decl. ¶ 7.) OPIC designated the project as a Category A
19 project and conducted an environmental assessment under its environmental guidelines before it
20 approved the transaction. (*Id.* ¶ 26; OPIC Ex. 1KK at 154.) The OPIC environmental
21 assessment contains a number of recommendations, including a recommendation that “the
22 project must operate strictly by the plans that have been established in the attached
23 [Environmental Action Plan].” (OPIC Ex. 1KK at 154.) The Environmental Action Plan states
24 that it “was developed in response to environmental investigations (in most cases, findings
25 arising from audits or assessments carried out by [SEIC] as part of the Senior Lenders’ due-
26 diligence requirement).” (*Id.* at 158.) The Environmental Action Plan also shows that the
27 senior lenders on the project have required an audit program. (*Id.* at 164.)
28

1 be included in the finance agreement.” (*Id.*)⁵ Mr. Himburg also attests that the loan guaranty
 2 requires the sponsor of the project, Union Oil Company of California, to “operate in accordance
 3 with the applicable World Bank Group Standards for the Offshore Oil and Gas Industry,”
 4 however a copy of the guaranty is not in the record. (Himburg Decl. ¶ 36.)

5 **d. Cantarell Oil Field Project.**

6 The Cantarell Oil Field Project (“Cantarell Project”) is part of Mexico’s largest oil field
 7 “located in the Bay of Campeche off the coast of Yucatan.” (O’Boyle Decl. ¶ 35; SAC ¶ 173.)
 8 Plaintiffs’ specific challenge pertains to an enhancement of “an offshore petroleum complex,
 9 owned and operated by Pemex (the Mexican national oil company),” which has been producing
 10 oil since 1980. (O’Boyle Decl. ¶¶ 35, 37; SAC ¶ 171.) The enhancement project involved “the
 11 installation of 56 new platforms of various sizes, modification and upgrade of 36 existing
 12 platforms, laying of approximately 250 miles of new in-field pipelines, installation of an
 13 extensive nitrogen injection system and drilling of over 218 new wells.” (O’Boyle Decl. ¶ 35.)

14 Ex-Im is involved in the Cantarell Project because it approved three guarantees for U.S.
 15 exporters. The exports consisted of “engineering, procurement and construction services and
 16 major capital equipment supplied by Solar Turbine Inc., Steward & Stevenson, Baroid Drilling
 17 Fluids, Bechtel International, Kellogg Brown and Root, and over 30 other U.S. companies.”
 18 (*Id.* ¶ 36; *see also* SAC ¶ 171.) Ex-Im approved a total of \$1,075,300 in guarantees between
 19 1998 and 2001, and Ex-Im attests this amounts to “approximately one-third of the \$3.3 billion
 20 enhancement program costs.” (O’Boyle Decl. ¶ 37.) The Administrative Record does not
 21 include copies of the guarantees. Ex-Im also attests it performed an environmental review of
 22 the Cantarell Project, in accordance with its environmental guidelines. (Supp. Mahoney Decl. ¶
 23 6.) The Administrative Record does not include Ex-Im’s environmental review, but it does
 24 include copies of the Engineering Evaluations. Again, those Engineering Evaluations do not set
 25 forth what conditions, if any, Ex-Im imposed on financing. (*See, e.g.*, Ex-Im A.R. Tab 25 at 8,
 26 Tab 26 at 5.) Plaintiffs contend that approximately 40% of the oil from the Cantarell oil field
 27 will be shipped to the United States. (SAC ¶ 174.)

28 _____
 5 The majority of the recommendations are redacted. (*See id.* at 53-54).

1 Shandong province of China. (O’Boyle Decl. ¶ 43; *see also* SAC ¶ 199.) The total costs for the
2 expansion are estimated at \$933 million. (O’Boyle Decl. ¶ 44.)

3 Ex-Im is involved with this project because it approved a \$76 million guaranty to
4 Citibank International plc, in connection with the export of steam turbines as well as related
5 goods and services that General Electric provided to the Dezhou Project. (*Id.* ¶¶ 43-45; *see also*
6 SAC ¶¶ 199-200.) According to Ms. O’Boyle, the Ex-Im loan guaranty represents 8.2% of the
7 total costs for the Dezhou Project, which also was financed with funds from other countries,
8 including Germany and China. (O’Boyle Decl. ¶ 45.) Ex-Im attests it performed an
9 environmental review of the Dezhou Project in accordance with the Ex-Im Guidelines. (Supp.
10 Mahoney Decl. ¶ 6.) The Administrative Record does not include the terms of the loan
11 guaranty and does not include a copy of Ex-Im’s environmental review.

12 4. The Defendants’ Climate Change Reports.

13 In 2000, OPIC published a report that “evaluate[d] the cumulative climate implications
14 of all OPIC finance and political risk insurance projects since 1990,” with respect to CO₂
15 emissions.⁶ (OPIC A.R. Tab 1 (“Climate Change: Assessing Our Actions” (“*Assessing Our*
16 *Actions*”) at 6, 9); *see also id.* Tab 4 (OPIC’s Annual Environmental Report for Fiscal Year
17 2002) at 000056.) In *Assessing Our Actions*, OPIC stated that “while power projects have
18 considerable economic and social developmental benefits, they are also responsible for a
19 significant share of the anthropogenic emissions of [GHGs] ... that threaten the stability of the
20 global climate system.” (*Assessing Our Actions* at 7.) OPIC also stated that “[t]he consumption
21 of fossil fuels, which provides electricity, heat and steam to the industrial, commercial and
22 residential sectors, and fuel to the transportation sector, is by far the largest contributor to global
23 [CO₂] emissions.” (*Id.*) In addition, OPIC stated that “[t]here is a strong and growing scientific
24 consensus that these steady additions of GHGs have tipped a delicate balance and begun to

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26
27 ⁶ This report, dated October 2000, is listed on the index of OPIC’s
28 Administrative Record as Tab 1. OPIC only included the cover page in its Administrative
Record. However, because Plaintiffs submitted the report as Exhibit 3 to their opposition to
Defendants’ initial motion for summary judgment (*see* Docket No. 92), it has been made a
part of the record in this case, and the Court has considered it in its entirety.

1 impact our climate and may be the dominant force driving recent warming trends.” (*Id.*) OPIC
 2 also stated:

3 Greenhouse gases generally persist for long periods in the atmosphere.
 4 While many conventional pollutants may persist in the atmosphere for
 5 only a matter of hours or days, many important GHGs persist for
 6 decades or even hundreds of years. For example, CO₂ has an
 7 estimated atmospheric persistence of 120 years and some
 8 [chloroflourocarbons] may persist for as long as 400 years. As a
 9 result, these gases accumulate, become very well mixed in the
 10 atmosphere and have a global impact that is mostly independent of
 11 where they were emitted. GHG persistence has significant policy
 12 implications because the gases we emit today may impact the climate
 13 system for hundreds of years.

14 (*Id.* at 22.) OPIC asserted that “[c]urrent CO₂ emissions from OPIC-supported projects
 15 represent approximately 0.24% of global CO₂ emissions,” and concluded, however, that “OPIC-
 16 supported projects ‘are *not* a major contributor to global greenhouse gas emissions or climate
 17 change.’” (*Id.* at 1, 5 (emphasis in original).)

18 In response to a report issued by FOE, among others, Ex-Im also prepared a report on its
 19 role in the production of GHGs. (Ex-Im A.R. Tab 1 (“Ex-Im’s Role in Greenhouse Gas
 20 Emissions and Climate Change” (hereinafter “Ex-Im Report”) at i.) Ex-Im’s Report “only
 21 addressed [Ex-Im] projects that directly emit GHG.” (*Id.*) Ex-Im did not address “equivalent
 22 CO₂ that results from extraction projects such as ... oil & gas productions, pipelines and oil
 23 refineries, all of which make fossil fuels to end users.” (*Id.* at ii, 25 (providing reasons for
 24 excluding latter from report).)⁷ Ex-Im concluded that “[t]he GHG production from Ex-Im Bank
 25 supported projects is not considered to be ‘significant’ with respect to the global environment.”
 26 (*Id.*) In that report, Ex-Im also acknowledged that “GHG concentrations have indeed risen and
 27 that there is a reasonable likelihood that the increased concentration of these gases will result in
 28 increased average global temperatures during the coming decades.” (*Id.* at 4.)

⁷ Ex-Im stated that “examination of Ex-Im Bank supported oil and gas extraction projects and the equivalent emissions to be produced from these fuel sources may be useful from a policy perspective,” and therefore included “a list of recently supported oil and gas sector projects (including pipelines) and the equivalent emissions expected from the burning of those products,” in Appendix B to the report. (Ex-Im Report at 25.)

1 According to the Ex-Im Report, “Ex-Im has supported \$7.8 billion in exports to 86
2 projects in the fossil fuel power sector,” which “produce (or will produce) ... 0.8% of the
3 predicted global production of CO₂ in 2001.” Ex-Im also predicted that, with respect to projects
4 it supports, the “contribution to global CO₂ production will peak at 1.4% in year 2012.” (Ex-Im
5 Report at ii; *see also id.* at 24-31 & App. C thereto.) Ex-Im concluded that the effect of Ex-Im
6 supported projects on climate change was insignificant. (*Id.* at 30-31.)

7 Plaintiffs dispute these conclusions and argue that Defendants failed to account for
8 indirect GHG omissions. Further, Plaintiffs assert that GHG emissions from projects financed
9 by OPIC and Ex-Im amount to 7.3% of annual world wide emissions, and they argue that
10 Defendants’ calculations do not account accurately for all indirect emissions and do not include
11 estimates of all direct emissions. (Plaintiffs’ Ex. 1 (Supplemental Declaration of Richard Heede
12 (hereinafter “Heede Supp. Decl.”) ¶¶ 4, 11-13 & Att. A).)

13 **III. ANALYSIS.**

14 **A. Legal Standards Applicable to Motions for Summary Judgment.**

15 Summary judgment is proper when the “pleadings, depositions, answers to
16 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
17 genuine issue as to any material fact and that the moving party is entitled to judgment as a
18 matter of law.” Fed. R. Civ. P. 56(c). A principal purpose of the summary judgment procedure
19 is to identify and dispose of factually unsupported claims. *Celotex Corp. v. Cattrett*, 477 U.S.
20 317, 323-24 (1986). “In considering a motion for summary judgment, the court may not weigh
21 the evidence or make credibility determinations, and is required to draw all inferences in a light
22 most favorable to the non-moving party.” *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir.
23 1997).

24 The party moving for summary judgment bears the initial burden of identifying those
25 portions of the pleadings, discovery, and affidavits which demonstrate the absence of a genuine
26 issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party meets this initial
27 burden, the non-moving party must go beyond the pleadings and by its own evidence “set forth
28 specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). The

1 non-moving party must “identify with reasonable particularity the evidence that precludes
2 summary judgment.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (quoting *Richards v.*
3 *Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995)) (stating that it is not a district court’s task
4 to “scour the record in search of a genuine issue of triable fact”). If the non-moving party fails
5 to make this showing, the moving party is entitled to judgment as a matter of law. *Celotex*, 477
6 U.S. at 323. The Court must evaluate each party’s motion on its own merits. *See, e.g., Fair*
7 *Housing Council of Riverside Co., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001).

8 **B. NEPA Requirements.**⁸

9 NEPA “establishes a ‘national policy [to] encourage productive and enjoyable harmony
10 between man and his environment,’ and was intended to reduce or eliminate environmental
11 damage and to promote ‘the understanding of the ecological systems and natural resources
12 important to’ the United States.” *Department of Transportation v. Public Citizen*, 541 U.S. 752,
13 756 (2004) (quoting 42 U.S.C. § 4321) (hereinafter “*Public Citizen*”). NEPA does not mandate
14 particular results. Rather “it imposes only procedural requirements on federal agencies with a
15 particular focus on requiring agencies to undertake analyses of the environmental impact of
16 their proposals and actions.” *Id.* (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S.
17 332, 349-51 (1989)).

18 At the heart of NEPA is a requirement that federal agencies
19 “include in every recommendation or report on proposals for legislation
20 and other major Federal actions significantly affecting the quality of the
21 human environment, a detailed statement by the responsible official on -
22 (i) the environmental impact of the proposed action, (ii) any adverse
23 environmental effects which cannot be avoided should the proposal be
24 implemented, (iii) alternatives to the proposed action, (iv) the relationship
25 between local short-term uses of man’s environment and the maintenance
26 and enhancement of long-term productivity, and (v) any irreversible and
27 irretrievable commitments of resources which would be involved in the
28 proposed action should it be implemented.” 42 U.S.C. § 4332(2)(c).

This detailed statement is called an Environmental Impact Statement (EIS). The Council of Environmental Quality (CEQ), established by NEPA with authority to issue regulations interpreting it, has promulgated regulations to guide federal agencies in determining what actions are subject to that statutory requirement. ... The CEQ regulations

⁸ NEPA does not contain a separate provision for judicial review and, thus, an agency’s compliance with NEPA is reviewed under the APA. *Ka Makani ’O Kohala Ohana, Inc. v. Water Supply*, 295 F.3d 955, 959 (9th Cir. 2002) (hereinafter “*Ka Makani*”).

1 allow an agency to prepare a more limited document, an Environmental
2 Assessment (EA), if the agency’s proposed action neither is categorically
3 excluded from the requirement to produce an EIS nor would clearly
require the production of an EIS.

4 *Public Citizen*, 541 U.S. at 757-58 (citations omitted); *see also High Sierra Hikers Ass’n v.*
5 *Blackwell*, 390 F.3d 630, 639 (9th Cir. 2004) (hereinafter “*High Sierra*”) (“As a preliminary
6 step, the agency may prepare an [EA] to determine whether the environmental impact of the
7 proposed action is significant enough to warrant an EIS.”). Thus, as the Supreme Court stated
8 in the *Robertson* case, “[o]ther statutes may impose substantive environmental obligations on
9 federal agencies, but NEPA merely prohibits uninformed – rather than unwise – agency
10 action.” *Robertson*, 490 U.S. at 351.

11 When it determines whether to prepare an EIS, a federal agency shall:

12 (a) Determine under its procedures supplementing these regulations ...
13 whether the proposal is one which:

14 (1) Normally requires an environmental impact statement; or

15 (2) Normally does not require either an environmental impact
16 statement or an environmental assessment (categorical exclusion).

17 (b) If the proposed action is not covered by paragraph (a) of this section,
18 prepare an environmental assessment ... The agency shall involve
19 environmental agencies, applicants, and the public, to the extent
20 practicable, in preparing assessments required by § 1508.9(a)(1).

21 (c) Based on the environmental assessment make its determination
22 whether to prepare an environmental impact statement.

23 (d) Commence the scoping process ..., if the agency will prepare an
24 environmental impact statement.

25 (e) Prepare a finding of no significant impact ..., if the agency determines
26 on the basis of the environmental assessment whether or not to prepare a
27 statement. ...

28 40 C.F.R. § 1501.4(a)-(e).

In general, an agency’s decision not to prepare an EA or EIS can be set aside “only upon
a showing that [the decision] was ‘arbitrary, capricious, an abuse of discretion, or otherwise not
in accordance with law.’” *Public Citizen*, 541 U.S. at 763 (quoting 5 U.S.C. § 706(2)(A)); *see*
also Great Basin Mine Watch v. Hankins, 456 F.3d 955, 961-62 (9th Cir. 2006) (hereinafter
“*Great Basin*”). However, the Ninth Circuit has held that when, without conducting an EA, an

1 agency decides that a project does not require the preparation of an EIS, the agency's decision
2 is reviewed under a reasonableness standard. *High Sierra*, 390 F.3d at 640 (citing, *inter alia*,
3 *Ka Makani*, 295 F.3d at 959 n.3). In such a case, a court "will defer to an agency's decision
4 only if it is 'fully informed and well considered.'" *Id.* (quoting *Save the Yaak Comm. v. Block*,
5 840 F.2d 714, 717 (9th Cir. 1988)). If an agency has taken action without observing procedure
6 that is required by law, a court must also set that action aside. *Id.*

7 When a court applies the "arbitrary and capricious" standard, it must "'consider whether
8 the decision was based on a consideration of the relevant factors and whether there has been a
9 clear error of judgment.' ... [Courts] must also ensure that the agency 'took a hard look at the
10 environmental consequences of its action.'" *Great Basin*, 456 F.3d at 962 (citations omitted).
11 A court may reverse an agency decision under the arbitrary and capricious standard "only if the
12 agency has relied on factors Congress has not intended it to consider, entirely failed to consider
13 an important aspect of the problem, offered 'an explanation [for its decision] that runs counter
14 to the evidence before the agency, or is so implausible that it could not be ascribed to a
15 difference in view or the product of agency expertise.'" *Id.* (quoting *Sierra Club v. EPA*, 346
16 F.3d 955, 961 (9th Cir. 2003) (noting standard), *amended by* 352 F.3d 1186 (9th Cir. 2003)
17 (brackets in original)).

18 "The standard for determining whether the implementation of a proposal would
19 significantly affect the human environment," and thereby trigger the need to prepare an EIS, "is
20 whether 'the plaintiff has alleged facts which, if true, show that the proposed project may
21 significantly degrade some human environmental factor.'" *Foundation for North American*
22 *Wild Sheep v. USDA*, 681 F.2d 1172, 1177-78 (9th Cir. 1982) (hereinafter "*Wild Sheep*")
23 (quoting *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 597 (9th Cir.
24 1981)). The plaintiff need not show that significant effects will in fact occur, but if the plaintiff
25 raises substantial questions about whether a project may have a significant effect, an EIS must
26 be prepared. See *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th
27 Cir. 1998) (hereinafter "*Blue Mountains*") (citing *Idaho Sporting Cong. v. Thomas*, 137 F.3d
28 1146, 1150 (9th Cir. 1998)); *Wild Sheep*, 671 F.2d at 1178.

1 Finally, “[n]either the language nor the history of NEPA suggest that it was intended to
 2 give citizens a general opportunity to air their policy objections to proposed federal actions.
 3 The political process, and not NEPA, provides the appropriate forum in which to air policy
 4 disagreements.”⁹ *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766,
 5 777 (1983).

6 **C. OPIC Has Not Established That It Is Not Exempt From NEPA’s**
 7 **Requirements.**

8 In its August 23 Order, the Court addressed OPIC’s argument that the environmental
 9 procedures in OPIC’s organic statute displaced NEPA. (August 23 Order at 11:17-13:11.)
 10 When it determined that OPIC had not put forth evidence that Congress acceded to OPIC’s
 11 interpretation of its organic statute, the Court implicitly rejected OPIC’s arguments regarding
 12 the plain language of that statute. In the August 23 Order, the Court also discussed *Merrell v.*
 13 *Thomas*, 807 F.2d 776 (9th Cir. 1986) and *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir.
 14 1995) and rejected OPIC’s argument that the legislative history of OPIC’s organic statute
 15 “evinces the same Congressional intent to displace NEPA as in *Merrell* and *Douglas County*.”
 16 (August 23 Order at 13:2-3.) The basis for the Court’s conclusion was that “[c]onspicuously
 17 absent from the record is any evidence that Congress amended OPIC’s [organic] statute *after*
 18 OPIC interpreted its statute to displace NEPA.” (August 23 Order at 13:6-7 (emphasis in
 19 original).)¹⁰

20 _____
 21 ⁹ There are references in Defendants’ respective Administrative Records that
 22 suggest this litigation really is a policy dispute between Plaintiffs and Defendants about the
 23 nature of the projects the Defendants support. (*See, e.g.*, OPIC A.R. Tab 14 at 3723, 3731,
 3743, 3745, 3781-85, 3786-3801; Ex-Im A.R. Tab 9.)

24 ¹⁰ In its first motion for summary judgment, OPIC attempted to support its
 25 position that NEPA does not apply to it by relying on legislative history relating to
 26 amendments to 22 U.S.C. § 2151p (“Section 2151p). In 1985 OPIC’s organic statute was
 27 amended to apply the provisions of Section 2151p to OPIC. *See* 22 U.S.C. § 2191(g). (*See*
 28 *also* OPIC Ex. 10, Excerpt from House Conference Report on P.L. 99-204 (“The House
 amendment applies to OPIC projects the environment and natural resource standards and
 considerations now applicable to AID projects....”). OPIC renewed that argument in the
 instant motion, and the Court has determined that it would not revisit this issue. (*See* Order
 Granting in Part and Denying in Part Plaintiffs’ Motion to Strike.) However, to the extent
 the Court did not make explicit the reason it found OPIC’s argument unpersuasive in its
 August 23 Order, it provides that reasoning herein.

1 In the instant motion, OPIC submits additional evidence, Exhibits 1A-1DD and 1FF, to
2 support its argument on this point. Some of this evidence consists of internal OPIC documents
3 or other materials that contain statements either about OPIC's belief that it is not subject to
4 NEPA or are silent on the issue. The Court finds that these exhibits do not establish as a matter
5 of law that Congress was aware of and acceded to OPIC's position. (*See, e.g.*, OPIC Exs. 1C,
6 1G, 1L, 1N, 1BB, 1 EE; *see also* OPIC A.R. Tab 14 at 3968.) Other exhibits apparently were
7 sent to individual members of Congress but these exhibits do not support an inference that
8 OPIC's views were communicated to Congress as a whole. (*See, e.g.*, Exs. 1M, 1DD.) Again,
9 the Court finds these exhibits to be immaterial to determining the issue of whether Congress
10 was aware of and acceded to OPIC's view that it is not subject to NEPA.

11 OPIC also submits exhibits that reflect OPIC's belief that none of its projects triggered
12 NEPA's requirements, because the projects were located overseas, OPIC did not control them,
13 and the projects did not affect the domestic environment. (*See, e.g.* OPIC Ex. 1F ("OPIC has no
14 projects of its own"), 1H ("OPIC's programs are operated solely within an international context
15

16 Section 2151p sets forth the environmental requirements applicable to the US AID.
17 The legislative history on which OPIC relied contains debate about removing a reference to
18 NEPA from 22 U.S.C. § 2151p. This legislative history also suggests that US AID did not
19 perform environmental impact statements "under the precise terms of" NEPA. (*See* OPIC
20 Ex. 11 ("We do impact statements, but not under the precise terms of [NEPA]. What we
21 want to avoid is a hooking into that act and all of the procedures it requires because we
22 believe for some projects it would make the time period and the development of the project,
23 including the environmental assessment, the environmental impact – if that is required – just
24 too long.").

21 The debate on which OPIC relied occurred well before Section 2151p was made
22 applicable to OPIC. Further, US AID *is* required to comply with NEPA in appropriate
23 circumstances. *See* 22 C.F.R. § 216.1(a) (stating that purpose of regulations is to implement
24 the requirements of NEPA as they effect the US AID program); 44 Fed. Reg. 56378
25 (proposed amendments to US AID regulations); 45 Fed. Reg. 70239 (discussing amended
26 regulations and noting that US AID had agreed that as a matter of law, NEPA applied to its
27 projects that significantly affected the domestic environment); *Environmental Defense Fund*
28 *v. US AID*, 6 Env. L. Rptr. 20121 (Dec. 5, 1975) (Order approving stipulation wherein US
AID agreed to "propose, solicit and consider public comments on, and adopt environmental
regulations, to assist AID in implementing the requirements of NEPA"). In addition, US
AID's environmental regulations state that the terms "environment" and "significant effect"
have the same meaning as in CEQ's NEPA regulations and also state that when US AID
prepares an EIS, it "will generally follow the CEQ regulations, but will take into account the
special considerations and concerns of" US AID. 22 C.F.R. § 216.7(b)-(c). Accordingly, the
Court concluded that this legislative history did not establish as a matter of law that OPIC is
not subject to NEPA.

1 and are not ‘federal actions’ within the meaning of NEPA, since OPIC has no projects of its
2 own, but merely gives assistance to projects within developing countries.”), Ex. II (“Since
3 OPIC does not conduct federal actions having effects on the environment within the United
4 States, OPIC activities do not give rise to the domestic application of NEPA.”); *see also* 1V,
5 1W, 1Y.) These exhibits, however, do not imply that OPIC adopted the position that it is never
6 required to comply with NEPA, and the Court finds them immaterial to the issue of whether
7 Congress was aware of and acceded to OPIC’s view that it is not subject to NEPA.

8 OPIC also relies on the fact that it published versions of its environmental handbook in
9 the Federal Register in 1997 and 1998 to evidence the fact that Congress was aware of and
10 acceded to its views. *See, e.g.*, 62 Fed. Reg. 5645-01 at *5645 (Feb. 6, 1997); 63 Fed. Reg.
11 9696-01 at *9697 (Feb. 25, 1998). OPIC argues that these proposed handbooks do not
12 reference NEPA as authority for its environmental procedures and, thus, would have signaled to
13 Congress OPIC’s position that it is not subject to NEPA. OPIC also submits correspondence
14 between its staff and Speaker of the House Nancy Pelosi and members of her staff, regarding
15 her comments on the environmental procedures set forth in drafts of the OPIC Handbook.¹¹
16 (*See* Exhibits 1O - 1S, 1FF.) However, none of this correspondence reflects OPIC’s belief that
17 it is not subject to NEPA. Rather, most of the correspondence pertains to Speaker Pelosi’s
18 concern that OPIC maintain transparency during the approval process and to her concern that
19 the timing allowed for public comment on OPIC projects was insufficient. This correspondence
20 cannot be read to suggest that Speaker Pelosi, let alone all members of Congress, acquiesced in
21 OPIC’s view that it is not subject to NEPA. (*See also* Plaintiffs’ Reply Ex. 5 (Letter from
22 Speaker Pelosi to OPIC President Mosbacher).)

23 OPIC also relies on its Exhibit 1M and its Exhibit 5 in support of its position that
24 Congress was aware of, and acceded to, its view that it is not subject to NEPA. OPIC Exhibit 5
25 is a copy of a proposed amendment to NEPA that would have required agencies to give “full
26 consideration of the environmental impacts of their actions on the oceans, the atmosphere, and
27

28 ¹¹ The correspondence between OPIC and Speaker Pelosi predates her tenure as
Speaker of the House.

1 other geographic areas *outside the jurisdiction* of the United States, its territories, and its
2 possessions.” (OPIC Ex. 5 at 5 (emphasis added).) OPIC Exhibit M sets forth OPIC’s
3 objections to the proposed legislation. Those objections do not include an assertion that OPIC
4 is not subject to NEPA. Rather, OPIC argued that the proposed legislation would be redundant
5 because OPIC already was required to consider the impact of its projects on the global
6 commons, *i.e.* areas outside the jurisdiction of the United States, by virtue of Executive Order
7 12114 and its own organic statute. (*See* OPIC Ex. 1M.)

8 Finally, OPIC submits two documents prepared by the General Accounting Office
9 (“GAO”) entitled “1985 Reference Manual of Corporations Authorized or Established by
10 Congress” (“1985 Reference Manual”) and “Profiles of Existing Government Corporations
11 (“1988 Report”).” (OPIC Exs. 3, 4.) OPIC contends that these documents were submitted to
12 Congress before OPIC’s organic statute was amended in 1985 and again in 1988. The 1985
13 Reference Manual provides that the “manual contains legal, financial, and other information on
14 44 corporations authorized or established by the Congress,” and “cites federal laws the
15 corporations consider themselves subject to, or, if they are not, whether these legal requirements
16 have been administratively adopted.” (OPIC Ex. 3, Preface.) The 1985 Reference Manual
17 purportedly was prepared “in response to a request from the Chairman of the House
18 Government Operations Committee,” for the purpose of assisting “the Committee in its study of
19 the need to revise basic corporate control laws.” (*Id.* & at 2.) Similarly, the 1988 Report
20 purportedly was prepared to assist the Government Operations Committee “in fulfilling its
21 oversight responsibilities.” (OPIC Ex. 4, Preface.)

22 Each of the corporations identified in the reports were asked to provide “their views as
23 to whether they are subject to various federal laws, and if not, whether the corporations have
24 administratively adopted legal requirements contained in these laws.” (OPIC Ex. 3 at 4; *see*
25 *also* OPIC Ex. 4, Preface.) In each of the reports, OPIC stated that it is “[n]ot subject to and did
26 not administratively adopt [NEPA’s] requirements.” (OPIC Ex. 3 at Att. II at 1, Ex. 4 at 236,
27 248.) The 1985 Reference Manual summarizes each corporation’s response, but it does not
28 include the actual responses provided by each corporation. (Ex. 3 at 4.)

1 OPIC argues that because Congress had these reports, it knew OPIC believed it is not
 2 subject to NEPA. Thus, OPIC argues, because Congress did not amend OPIC's organic statute
 3 after receiving these reports, to expressly state that NEPA is applicable to OPIC, Congress
 4 acceded to the view that NEPA does not apply to OPIC. The 1985 Report is undated and, thus,
 5 the Court cannot determine whether it was presented to the Government Operations Committee,
 6 let alone the entire Congress, before or after the 1985 amendments to OPIC's organic statute.
 7 In contrast, the 1988 Report is dated December 1988 and its preface makes reference to the fact
 8 that it was "released to serve as a reference document for our congressional colleagues." (OPIC
 9 Ex. 4, Preface.) The 1988 Report better supports OPIC's position but absent from the record is
 10 OPIC's response to the questionnaire, which would articulate the rationale for OPIC's views.

11 The Court has considered the new evidence submitted by OPIC and concludes that it
 12 does not, as a matter of law, establish that Congress was aware of OPIC's view that it is not
 13 subject to NEPA and that Congress acquiesced in that view. Accordingly, the Court finds no
 14 reason to revisit its conclusions on the applicability of the *Merrell* and *Douglas County* cases to
 15 the instant litigation. OPIC's cross-motion is DENIED to the extent it rests on this argument.
 16 The Court assumes for the remainder of this Order, that OPIC is subject to NEPA.

17 **D. Plaintiffs' Claims Do Not Involve Extraterritorial Application of NEPA.**

18 Ex-Im and OPIC argue that this Court must grant judgment in their favor because
 19 Plaintiffs improperly seek to apply NEPA to projects that are located in foreign countries.¹²
 20 Plaintiffs, however, make clear that they seek to apply NEPA because the projects that
 21 Defendants support purportedly significantly affect the *domestic* environment. In addition,
 22 Defendants do not claim that the decisions about whether or not to support such projects occur
 23 abroad. *Cf. Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 532-33 (D.C. Cir.
 24 1993) (rejecting extraterritoriality argument with respect to actions impacting Antarctica on the
 25 grounds that decision making occurred within the United States and because NEPA imposed no

26
 27 ¹² Unlike OPIC, Ex-Im does not dispute that it may be subject to NEPA, and it
 28 has adopted supplementing regulations to implement NEPA "in the relatively rare cases
 where [Ex-Im] financing of U.S. exports may affect environmental quality in the United
 States, its territories or possessions." 12 C.F.R. § 408.3.

1 substantive requirements that could be interpreted to govern conduct abroad). Finally,
2 notwithstanding Defendants' arguments regarding foreign policy relations, there is evidence to
3 suggest that the Defendants may have control over the manner in which these projects operate.
4 *See* Section III.E.3, *infra*. As such, Defendants' arguments appear to be better directed to
5 whether Plaintiffs can establish the requisite causation. The Court DENIES Defendants'
6 motions to the extent they are premised on the extraterritoriality argument.

7 **E. Major Federal Actions.**

8 "Under NEPA, an agency is required to provide an EIS only if it will be undertaking a
9 'major federal actio[n],' which 'significantly affect[s] the quality of the human environment.'" *Public Citizen*, 541 U.S. at 763; *see also Sierra Club v. Watkins*, 808 F. Supp. 852, 859 (D.D.C.
10 1991) (stating that the CEQ regulations "require a federal agency proposing major federal
11 action that does not have a significant impact on the environment to file an [EA] that explains
12 how the agency reached that conclusion") (citing 40 C.F.R. § 1508.13)).

13 "Major Federal action' is defined to 'includ[e] actions with effects that may be major
14 and which are potentially subject to Federal control and responsibility.'" *Public Citizen*, 541
15 U.S. at 763-64 (quoting 40 C.F.R. § 1508.18). NEPA's implementing regulations further
16 explain the meaning of major federal actions and state that "[m]ajor reinforces but does not
17 have a meaning independent of significant (§ 1508.27)." 40 C.F.R. § 1508.18. "Actions" may
18 "include new and continuing activities, including projects and programs entirely or partly
19 financed, assisted, conducted, regulated or approved by federal agencies" *Id.* § 1508.18(a).
20 Major federal actions also include the "[a]pproval of specific projects, such as construction or
21 management activities located in a defined geographic area." 40 C.F.R. § 1508.18(b)(4).
22 Finally, the "[a]doption of programs, such as a group of concerted actions to implement a
23 specific policy or plan; systematic and connected agency decisions allocating agency resources
24 to implement a specific statutory program or executive directive," can qualify as a major federal
25 action under NEPA. 40 C.F.R. § 1508.18(b)(3) (emphasis added).
26

27 **1. The Court Is Not Precluded From Considering The Major Federal**
28 **Action Argument.**

1 It is undisputed that neither Ex-Im nor OPIC prepared either an EA or an EIS under the
2 auspices of NEPA for any of the projects identified in the SAC. OPIC and Ex-Im contend that
3 none of the projects identified in the SAC or in the Administrative Record qualify as a “major
4 federal action.” (See OPIC Cross-Motion at 25; Ex-Im Cross-Motion at 11.) Plaintiffs argue
5 that this argument is a *post hoc* rationale, because Defendants did not argue that their projects
6 are not major federal actions in their climate change reports. Because Plaintiffs attempt to
7 equate Defendants’ climate change reports to FONSI’s under NEPA, they argue that the Court
8 can look only to the rationale set forth therein, namely that Defendants believed that the projects
9 they support have an insignificant impact on global warming. (See Plaintiffs’ Opp. at 3:15-
10 4:10.)

11 “The rule barring consideration of *post hoc* agency rationalizations operates where an
12 agency has provided a particular justification for a determination at the time the determination
13 is made, but provides a different justification for that same determination when it is later
14 reviewed by another body.” *Independence Mining Co., Inc. v. Babbitt*, 105 F.3d 502, 511 (9th
15 Cir. 1997) (citing *Industrial Union Dep’t, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607,
16 631 n.31 (1980) and *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943)). As the Ninth Circuit
17 noted in *Independence Mining*, “this rule has been developed in the context of a court’s duty to
18 set aside a ‘final agency decision’ if based on a *post hoc* rationalization. Such a ‘final agency
19 decision,’ ... provides the court with a date certain by which by which it can analyze the
20 agency’s justifications.” *Id.*

21 In this case, however, Plaintiffs are proceeding in part under 5 U.S.C. § 706(1) and
22 contend that Defendants have never complied with NEPA. Defendants raise the major federal
23 action argument in support of their position that they were not required to comply with NEPA
24 in the first instance. Accordingly, the Court concludes that the rule against *post hoc*
25 rationalizations does not apply here.¹³

27 ¹³ At oral argument, Plaintiffs stated that they ask for a declaration that each
28 Defendant’s conclusion about the “insignificance” of their actions is contrary to law. (See
April 14, 2006 Transcript (“Tr.”) at 90-91.) Because Plaintiffs contend that Defendants
never complied with NEPA, the Court cannot equate the climate change reports with NEPA

1
2 **2. Defendants Do Not Have Energy “Programs.”**

3 Plaintiffs contend that each of the Defendants operate an energy program and that this
4 program is a “major federal action” for purposes of NEPA. In moving for summary judgment,
5 Plaintiffs refer the Court only to Ex-Im Annual Reports and to OPIC’s “Program” Pamphlet.
6 (See Ex-Im A.R. Tabs 3-6; OPIC A.R. Tab 3.) With their opposition to Defendants’ cross-
7 motions, however, Plaintiffs submit a document, dated May 2001, that is entitled “National
8 Energy Policy: Report of the National Energy Policy Development Group” (“National Energy
9 Policy”). (See Plaintiffs’ Opp., Ex. 4.) Plaintiffs argue that this evidence establishes that
10 Defendants have energy programs, which qualify as major federal actions, and that these
11 programs require a programmatic EIS under NEPA.

12 In order to establish that Defendants have a “program” for NEPA purposes, Plaintiffs
13 must demonstrate that Defendants have engaged in “a *group of concerted actions* to implement
14 a *specific* policy or plan” or have made “*systematic and connected agency decisions* allocating
15 agency resources to implement a *specific* statutory program or executive directive.” 40 C.F.R. §
16 1508.18(b)(3) (emphasis added). This they have not done. With the exception of the National
17 Energy Policy, Plaintiffs do not support their motion with a citation to any such statutory
18 program, executive directive, plan or policy. As to Ex-Im, the Annual Reports cited by
19 Plaintiffs merely document the total amount of funding Ex-Im provided to energy projects.
20 They do not establish that Ex-Im chose to finance these projects pursuant to a specific
21 “statutory program or executive directive” or to a “specific policy or plan.” Plaintiffs’ reference
22 to Ex-Im’s statement that it is a “key player” in implementation of policy, as set forth in its
23 2002 Annual Report, refers to Ex-Im’s role in U.S. trade strategy in general and not to the
24 National Energy Policy. (See Ex-Im A.R. Tab 6 at 3.) Further, Ms. O’Boyle, who is Ex-Im’s
25 Vice President of the Structured Financing Division, attests that Ex-Im’s business is driven by
26 market demand and that it “makes no effort to focus its support on any particular type of
27

28 _____
FONSI, and the Court DENIES Plaintiffs’ motion to the extent they base their claims on
conclusions set forth in Defendants climate change reports.

1 industry.” (O’Boyle Decl. ¶¶ 1, 13-20, 26-30.) Nor does Ex-Im set any “limits or goals for any
2 particular type of transaction, export or country, other than the statutory goal of 20% for direct
3 support of small business export transactions.” (*Id.* ¶ 17.)

4 As to OPIC, it admits that it has a “power portfolio,” and *Assessing Our Actions* is a
5 voluntary assessment of that portfolio. (*See* OPIC A.R. Tab 17 at 4382.) In the context of
6 investments, a “portfolio” is “the collective term for all the securities (which may consist of
7 various types) held by one person or institution.” *See, e.g.*, Blacks Law Dictionary at 1162 (6th
8 Ed. 1990)). The fact that OPIC may have what it describes as a “power portfolio” does not
9 establish that it has created that portfolio pursuant to a “group of concerted actions to
10 implement a specific policy or plan” or pursuant to “systematic and connected agency decisions
11 allocating agency resources to implement a specific statutory program or executive directive.”
12 40 C.F.R. § 1508.18(b)(3). Mr. Himburg also attests that OPIC does not have a formal energy
13 program and that its support of projects abroad is “reactive in nature and depend[s] upon the
14 interest of eligible U.S. investors and other sponsors of development activities engaging in
15 business in markets in which political and associated commercial risks are perceived to be
16 great.” (Himburg Decl. ¶¶ 6-10, 12-17.)

17 Nor does OPIC’s Program Handbook establish that OPIC has a “program” to support
18 energy projects. OPIC does state therein that it “has a comprehensive insurance program to
19 encourage petroleum exploration, development, and production in developing countries.”
20 (OPIC A.R. Tab 3 at 11.) However, Mr. Himburg explains that the “insurance program”
21 discussed in the pamphlet is offered “to address the special needs of investors” in the oil and
22 gas field. (*Id.* ¶ 14.)

23 Finally, although Defendants approved the Hamaca, Cantarell, Chad-Cameroon and
24 West Seno Projects in 2001 and 2002, after the National Energy Policy Report was released, it
25 would be pure speculation to find that this timing alone, without more, demonstrated that the
26 Defendants took these actions “pursuant to” that policy. The Court concludes that Plaintiffs
27 have not demonstrated that either Ex-Im or OPIC has an energy “program” as that term is
28 understood in NEPA parlance.

1 The Court finds support for this conclusion in *Foundation on Economic Trends v. Lyng*,
2 817 F.2d 882 (D.C. Cir. 1987) (hereinafter “*Lyng*”). In that case, the court held that the
3 USDA’s research “program” on animal productivity research was not a “program” requiring a
4 programmatic EIS under NEPA. The court noted that the research projects conducted under the
5 auspices of the “program” were extremely broad and diverse in their in scope, and they also
6 were “discrete and independent in nature.” *Lyng*, 817 F.2d at 885. Given those facts, the court
7 concluded that even though the research was conducted pursuant to an underlying USDA
8 policy, “[t]he CEQ guidelines, require more: the agency’s actions must be ‘concerted’ or
9 ‘systematic and connected,” and found the plaintiffs had not established that the research was
10 concerted or connected. *Id.*

11 Here too the record establishes that each Defendant finances energy projects in varied
12 and scattered foreign locales, that these projects are not dependent upon one another, and that
13 the approval of any given project does not necessarily insure that another power project will be
14 approved in the future. *See id.*; *see also Watkins*, 808 F. Supp. at 863 (concluding that
15 programmatic EIS was not required where two programs served “same non-proliferation policy
16 goals” because a common objective was insufficient to establish the need for a programmatic
17 EIS). In sum, the Court concludes that OPIC and Ex-Im have neither adopted “a group of
18 concerted actions to implement a specific policy or plan” nor engaged in “systematic and
19 connected agency decisions allocating agency resources to implement a specific statutory
20 program or executive directive.” *See* 40 C.F.R. § 1508.18(b)(3).

21 Accordingly, Plaintiffs are not entitled to a declaration that Defendants have energy
22 programs that require a programmatic analysis under NEPA, and Plaintiffs’ motion is DENIED.
23 Defendants’ cross-motions are GRANTED IN PART on this basis.

24 **3. The Court Cannot Determine As A Matter of Law Whether**
25 **Individual Projects Are Major Federal Actions.**

26 **a. Projects identified in the SAC.**

27 Plaintiffs argue that each of the projects identified in the SAC qualify as major federal
28 actions. This argument is based upon the amount of financing Defendants provide to the

1 projects, as well as the fact that Defendants’ environmental guidelines provide that Defendants
2 may impose environmental conditions in connection with financing. (*See, e.g.*, Plaintiffs’ Mot.
3 at 9:13-13:22.) In essence, Plaintiffs argue that the level of financing Defendants’ provide is so
4 great that these projects are dependent upon the financing to go forward. The Defendants assert
5 this is not so.¹⁴

6 In some instances, “significant federal funding can turn what would otherwise be a state
7 or local project into a major federal action.” *Ka Makani*, 295 F.3d at 960 (quoting *Alaska v.*
8 *Andrus*, 591 F.2d 537, 540 (9th Cir. 1979) and *Almond Hill Sch. v. USDA*, 768 F.2d 1030, 1039
9 (9th Cir. 1985)) (internal quotation marks omitted). Where, as here, non-federal actors are
10 involved, “[t]here are no clear standards for defining the point at which federal participation
11 transforms a state or local project into a major federal action.’ ... ‘The matter is simply one of
12 degree.’” *Ka Makani*, 295 F.3d at 960 (quoting *Almond Hill*, 768 F.2d at 1039 and omitting
13 citations)). Thus, to determine whether a particular project qualifies as a major federal action
14 for NEPA purposes, a court should consider both the nature of the federal funds used and the
15 extent of federal involvement. *Id.* (quoting *Sierra Club v. Penfold*, 857 F.2d 1307, 1314 (9th
16 Cir. 1988)). This is because “[t]he purpose of NEPA is to ‘bring environmental considerations
17 to the attention of federal decision makers.’” *Id.* (quoting *Friends of the Earth v. Coleman*, 518
18 F.2d 323, 329 (9th Cir. 1975) (emphasis omitted).

19 It is undisputed that Ex-Im approved a \$200 million loan guaranty in connection with
20 the Chad-Cameroon Project, loan guarantees in the amount of \$847.6 million, \$400 million, and
21 \$300 million in connection with the Cantarell Project, a \$627 million loan guaranty in
22 connection with the Hamaca Project, and a \$76 million loan guaranty in connection with the
23

24 ¹⁴ Ex-Im also asserts that “all of the projects described in Plaintiffs’ [SAC] are
25 for guarantees,” which “normally do not require EAs or EISs.” (Ex-Im’s Cross-Motion for
26 Summary Judgment and Opposition (“Ex-Im Br.”) at 6-7 (citing, *inter alia*, 12 C.F.R. §
27 408.6, 40 C.F.R. § 1508.4, and O’Boyle Decl., ¶¶ 33, 37, 41, 44-45).) Plaintiffs assert that
28 this is another *post hoc* rationale that cannot be considered by the Court. Although the Court
could consider this argument, in light of the fact that Plaintiffs argue Ex-Im never complied
with NEPA, Ex-Im has not provided a sufficient basis for the Court to conclude that the
decision to categorically exclude guarantees from NEPA coverage would be reasonable.
Accordingly, Ex-Im’s motion is DENIED to the extent it rests on this argument, and the
Court shall not revisit this issue.

1 Dezhou Project. (Plaintiffs’ Mot. at 10-11; O’Boyle Decl. ¶¶ 33, 37, 41, 44-45; SAC ¶¶ 163,
 2 171, 177, 199; Answer ¶¶ 163, 171.) Ex-Im attests that its \$200 million loan guaranty for the
 3 Chad-Cameroon Project was 9.1% of the \$2.2 billion cost for the transportation system.
 4 (O’Boyle Decl. ¶ 33.) Ex-Im also attests that the loan guarantees it issued with respect to the
 5 Hamaca Project and the Dezhou Project represent 14% and 8.2%, respectively, of the total costs
 6 of the projects. (O’Boyle Decl. ¶¶ 40-47.) In contrast to these projects, Ex-Im attests that, with
 7 respect to the Cantarell Project, it provided loan guarantees representing “approximately one-
 8 third of the \$3.3 billion enhancement program costs.” (*Id.* ¶ 37.)

9 It is also undisputed that OPIC provided a \$250 million loan guaranty in connection
 10 with the Chad-Cameroon Project, a \$116 million loan guaranty in connection with the Sakhalin
 11 Project, and a loan guaranty of \$350 million in connection with the West Seno I Project.
 12 (Plaintiffs’ Mot. at 13; Himburg Decl. ¶¶ 22, 26, 34; SAC ¶¶ 165, 182, 189, 190; Answer ¶¶
 13 165, 182, 189, 190.)¹⁵ OPIC attests that the total cost of the Chad-Cameroon Project is
 14 estimated to be \$3.5 billion, which, according to OPIC, is approximately 350 times greater than
 15 the annual value of the contract for the U.S. investor participating in the contract. (Supp.
 16 Himburg Decl. ¶¶ 3-6.) OPIC also attests that the value of its \$116 million loan guaranty for
 17 the Sakhalin Project is less than \$20 million and attests that the total cost of that project is
 18 estimated to be \$1.5 billion. (*Id.* ¶¶ 7-10.) OPIC attests that this is “12 times more than the
 19 maximum possible payout under OPIC’s original loan guaranty and 75 times greater than the
 20 actual value of the guarantee for the private U.S. investors participating in the project.” (*Id.* ¶
 21 9.) As to the West Seno I Project, Mr. Himburg attests that the value of its \$300 million loan
 22 guaranty is only \$10 million, but provides no basis for that statement, and he attests that the
 23 total costs of that project were estimated to be \$550 million. (*Id.* ¶¶ 11-12.)

24 If the Court were to look only at the level of financing Defendants provide, the Court
 25 cannot say whether the financing Defendants provided in connection with the Chad-Cameroon,
 26 Hamaca, Dezhou, and Sakhalin Projects would be sufficient to render the projects major federal

27
 28 ¹⁵ OPIC no longer has any financial obligations with respect to the Sakhalin
 Project and the West Seno I Project. (*See* Declaration of Caroline M. Tunison filed in
 support of Defendants’ Notice of Changed Factual Circumstances.)

1 actions for purposes of NEPA. *See Ka Makani*, 295 F.3d at 960; *Coleman*, 518 F.2d at 329
2 (finding that state funded projects did not constitute major federal action where federal
3 contributions to other related development projects “amount[ed] to less than 10% of the total
4 expenditures”). With respect to the West Seno I and Cantarell Projects, the Court cannot say
5 that the financial support provided by OPIC and Ex-Im, respectively, is marginal. *See Sierra*
6 *Club v. United States Fish and Wildlife Serv.*, 235 F. Supp. 2d 1109 (D. Ore. 2002) (federal
7 funding that amounted to 75% of project costs “probably” sufficient to federalize project)
8 (hereinafter “*Fish and Wildlife*”). The Court, however, also must consider the nature of
9 Defendants involvement in each these seven projects. *Ka Makani*, 295 F.3d at 960.

10 In *Ka Makani*, the plaintiff sought to enjoin work on a water diversion system until the
11 Department of Housing and Urban Development (“HUD”) and the United States Geological
12 Survey (“USGS”) prepared an EIS under NEPA. *Ka Makani*, 295 F.3d at 957. USGS was
13 involved in the projects because it provided “partial funding of and participat[ed] in a series of
14 preliminary studies designed to assess the groundwater availability in the basal aquifer of the
15 North Kohala area and a program of test drilling and test pumping in the aquifer.” *Id.* at 958.
16 In total, USGS provided approximately \$800,000 to fund the studies and the interpretation of
17 the data collected therefrom. *Id.* USGS also consulted with the state agency about the project’s
18 design and, at the request of the state agency, conducted further studies on the environmental
19 impact of the project on other areas. *Id.*

20 HUD was involved with the project because it provided advice regarding an application
21 for a federal grant to be used for the project. Approximately \$30,000 of the \$500,000 grant was
22 allocated to the water project. HUD recommended that “the scope of the activities proposed to
23 be funded by the grant to those exempted from NEPA requirements in order to expedite the
24 approval process.” *Id.* In total, the two federal agencies provided approximately \$1.3 million
25 for the project. However, the federal funding constituted “less than two percent of the estimated
26 total project cost of \$80 million.” *Id.* at 960.

27 The court concluded that “the federal funding contribution alone could not transform the
28 entire Kohala Project into a ‘major federal action.’” *Id.* The court then analyzed whether or not

1 USGS and HUD had a sufficient “degree of decision-making power, authority or control over
2 the Kohala Project needed to render it a major federal action.” *Id.* Notwithstanding the fact
3 that USGS played an advisory role in the planning of the project, the “final decision-making
4 power remained at all times” with the state agency. Accordingly, the Ninth Circuit held that
5 “USGS involvement was not sufficient to constitute ‘major federal action.’” *Id.* at 961. The
6 Ninth Circuit also held that HUD’s “provision of advice and information” to the state agency
7 “regarding its application for HUD’s special purpose grant ‘did not constitute discretionary
8 involvement or control over’ the entire Kohala Project” and, therefore, did not render the
9 project a major federal action. *Id.*

10 The Ninth Circuit’s opinion in *Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995)
11 (hereinafter “*Sierra Club*”) also is instructive with respect to the question of whether an agency
12 has the ability to influence a private actor’s decision making process. In that case, the Bureau
13 of Land Management (“BLM”) entered into a reciprocal right-of-way agreement with a private
14 company that allowed the company to use existing logging roads on BLM forest land and
15 allowed the company to construct new roads over specified BLM forest lands, subject to certain
16 conditions, to access the company’s private property. *Id.* at 1505. BLM and the company
17 entered into this agreement before NEPA was enacted. The agreement then was assigned to a
18 new company, Seneca Sawmill Company (“Seneca”), on the condition that Seneca “comply
19 with ... ‘[a]ll other applicable State and Federal environmental laws, regulations and
20 standards.’” *Id.* at 1506 (bracket in original). If Seneca failed to do so, the BLM could
21 “discontinue all construction or other operations under the permit upon written notice....” *Id.*
22 (internal quotations and brackets omitted.) However, the court concluded that the assignment
23 did not alter BLM’s discretion under the original agreement, which limited its ability to
24 influence construction to three specified conditions, none of which addressed effects on
25 protected species. *Id.* at 1508 n.7 & 1510-11.

26 Following the assignment, Seneca sought to construct a new access road. BLM
27 conducted an EA and noted that the construction might affect the spotted owl and its habitat.
28 The biologist who prepared the EA recommended that BLM consult with the United States Fish

1 and Wildlife Service, pursuant to the Endangered Species Act (“ESA”). Ultimately, however,
2 BLM determined that the environmental requirements in the Seneca assignment did give it
3 additional discretion beyond the three conditions outlined in the original agreement.
4 Accordingly, BLM approved the construction without an ESA consultation, because it
5 concluded that it could not exercise control over Seneca with respect to the protection of the
6 spotted owl. *Id.* at 1506-07.

7 The plaintiffs sought to halt construction of the access road and argued that BLM
8 violated the ESA by failing to consult with the Fish and Wildlife Service, and that BLM
9 violated NEPA because its EA was inadequate. *Id.* at 1507. The Ninth Circuit rejected both of
10 plaintiffs’ claims. The court focused on the ESA claim and concluded that BLM did not violate
11 the ESA because Seneca had a preexisting right to construct the access road and because, under
12 the agreement, BLM did “not possess the ability to implement measures that inure to the benefit
13 of the spotted owl.” *Id.* at 1508-09.

14 The court then found that resolution of the ESA claim largely “dictate[d] the resolution
15 of the NEPA claim” and held that BLM did not violate NEPA. *Id.* at 1512-13. The court again
16 noted that none of the three conditions that would have permitted BLM to halt or modify the
17 project were related to protecting the spotted owl or its habitat. *Id.* at 1512. Therefore, the
18 court held that “[t]he BLM’s inability meaningfully to influence Seneca’s right-of-way
19 construction,” in a manner that would benefit the spotted owl, “leads us to conclude that the
20 procedural requirements of NEPA do not apply to this case.” *Id.* at 1513.

21 In contrast is the *Fish and Wildlife* case. There, the plaintiffs filed suit to enjoin the
22 United States Fish and Wildlife Service (“FWS”) from proceeding with a study relating to
23 Oregon’s elk population, which the Oregon Department of Fish and Wildlife would conduct but
24 which the FWS would fund, in part. 235 F. Supp. 2d at 1117. The defendants asserted that
25 NEPA was not implicated because FWS’s involvement was not sufficient to federalize what
26 was otherwise a state run project. *Id.* at 1120. Relying on *Ka Makani*, the district court
27 concluded otherwise. It first noted that it was undisputed that “federal monies ... account for
28 seventy-five percent of the elk study budget,” and stated that “[g]iven the overwhelming

1 percentage of federal dollars involved, and the fact that the amount itself, regardless of the
2 percentage it represents is more than \$3 million, the federal funding contribution alone is
3 probably sufficient to ‘federalize’ the project.” *Id.* at 1121. The court, however, also examined
4 FWS’s ability to control the project and found that while the decision to fund the project did not
5 give rise to the requisite control and responsibility, FWS had the ability to control the project
6 through its oversight function:

7 The elk study is a project involving wildlife research and thus, the
8 Secretary does not disburse funds under the [Wildlife Restoration Act]
9 unless the study is being conducted in compliance with its plans and
10 specifications. Monitoring to ensure compliance demonstrates the ability
11 to control the manner in which the study is being conducted because if the
12 study is not being conducted in compliance with the plan as proposed, the
13 implication is that the FWS will no longer fund it.

14 *Id.* at 1121.

15 The lesson this Court draws from these cases is that where non-federal activity is
16 involved, a court must look to whether an agency that provides financing to a project can
17 influence or does possess actual power to control non-federal activity.¹⁶ Therefore, the Court
18 must consider carefully the nature of Defendants’ involvement in these projects and particularly
19 what conditions, if any, the agencies impose in connection with financing.¹⁷

20 ¹⁶ See also *United States v. Southern Florida Water Mgmt. Dist.*, 28 F.3d 1563,
21 1572 (11th Cir. 1994) (“The touchstone of major federal activity constitutes a federal
22 agency’s authority to influence non-federal activity.”); *Sierra Club v. Hodel*, 848 F.2d 1068,
23 1089 (10th Cir. 1988) (“The touchstone of major federal action ... is an agency’s authority to
24 influence significant nonfederal activity. This influence must be more than the power to give
25 nonbinding advice to the nonfederal actor. ... Rather, the federal agency must possess actual
26 power to control the nonfederal activity.”), *overruled on other grounds*, *Village of Los
27 Ranchos de Albuquerque v. Marsh*, 956 F.2d 970, 973 (10th Cir. 1992).

28 ¹⁷ Plaintiffs also contend that each agencies own rules and procedures
demonstrate that these projects qualify as “major federal actions.” (Plaintiffs’ Reply at 9-
11.) For example, Plaintiffs note that OPIC defines a “major action,” as any “contractual
commitment by OPIC to provide assistance under an OPIC program involving at least \$1
million of insured investment, loan guaranties or direct loans.” (See OPIC A.R. Tab 2 at
00032.) That statement is qualified by the requirement that the applicant “has or will have
sufficient control over the design and/or operation of the project to mitigate environmental
concerns raised by OPIC.” (*Id.*) Even if OPIC intended its definition of “major action” to be
equated with a “major federal action” in NEPA parlance there is insufficient evidence in the
record to show that the applicants for the projects identified in the SAC “have sufficient
control over the design and/or operation of the project to mitigate environmental concerns,”
if any, that were raised by OPIC.

1 In their moving papers, Plaintiffs make no effort to show Defendants have decision
2 making authority over the projects in question. In their opposition to Defendants' cross-
3 motions, Plaintiffs argue that the Defendants admit in their annual reports that, without
4 Defendants' financing many of the projects would not have gone forward. (*See* Ex-Im A.R. Tab
5 4 at 2; OPIC A.R. Tab 3 at 000053; Plaintiffs' Ex. 3.) Plaintiffs also rely on the "Monitoring
6 and Compliance" provision of the OPIC Handbook, which provides that failure to comply with
7 conditions imposed in connection with financing can constitute a material default. (*See* OPIC
8 A.R. Tab 2 at 000028.) This evidence only reflects general statements by the Defendants and
9 does not address specific projects. (*See also* Ex-Im A.R. Tab 2 at 3; OPIC A.R. Tab 2 at
10 000026-28; OPIC A.R. Tab 4 at 80.)

11 OPIC endeavors to establish that it does not have the requisite control and responsibility
12 by putting forth Mr. Himburg's declaration. He states that "[t]here is no doubt that full
13 development of the oil fields at Doba in southern Chad would have happened without OPIC
14 insurance to this particular subcontractor, Pride – as the project was previously committed to by
15 the prime contractor and financed by the World Bank. The only operational result of not having
16 OPIC's insurance may have been Pride's inability to undertake its commitments as a
17 subcontractor for Esso." (Himburg Decl. ¶ 23.) Mr. Himburg makes similar statements about
18 the Sakhalin and West Seno I Projects. (Himburg Decl. ¶ 29 ("Based on the financial strength
19 of the project sponsors and the participation of other lenders and insurers, the Sakhalin II
20 project could have gone forward without the OPIC loan guaranty."), ¶ 37 (The "West Seno I
21 Project could have gone forward without OPIC because of the financial strength of Unocal and
22 Unocal's decades of experience in doing similar transactions in Indonesia.")) However,
23 although Mr. Himburg may have knowledge of OPIC's operating procedures and operations, it
24 is not clear that he has the requisite knowledge or expertise to offer a conclusive opinion on
25 whether these projects would, in fact, have gone forward without OPIC's support. Further, as to
26 Ex-Im projects generally, the Ex-Im Report states that "virtually all of the projects would have
27 gone forward even if Ex-Im Bank financing had not been forthcoming." (Ex-Im A.R. Tab 2 at
28 34.)

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5 Moreover, OPIC submitted portions of contracts relating to the Chad-Cameroon, West
6 Seno I and Sakhalin Projects. (See OPIC Exs. 1GG-1NN.)¹⁸ The OPIC environmental
7 assessment for West Seno I and II, recommends that “UML [the operator of the project] *shall*
8 *conduct its operations in accordance with the following...*” (OPIC Ex. II at 53 (emphasis
9 added).) The recommendations do not follow, but the mandatory nature of the statement
10 supports Plaintiffs’ position that OPIC exercised a level of control over the non-federal actors’
11 decision making process. With respect to the Sakhalin and Chad-Cameroon Projects, OPIC
12 submitted similar evidence that shows it may have been able to influence non-federal actors.
13 (OPIC Exs. 1KK at 154 (“OPIC has required that discharge requirements for air emissions ...
14 meet both Russian and World Bank requirements. Further OPIC will require that U.S. Federal
15 regulations be met for produced water and a revised monitoring plan be submitted prior to
16 drilling that will evaluate the application of other U.S. Federal water regulations to the
17 project.”); 1LL at 87 (“[t]he Insured shall take, and shall cause the contractor to take, each of
18 the following actions, it being agreed that the failure in any material respect shall constitute a
19 default: (i) perform all project activities in compliance with the Oil and Gas (Onshore)
20 Guidelines as published in the World Bank Group’s Pollution Prevention and Abatement
21 Handbook, dated July 1998 ...”); 1MM at 83-84 (“The contract of insurance will require that
22 Pride shall cause Pride Forasol to undertake the Project fully consistent with the International
23 Finance Corporation’s 1998 Environmental Health and Safety Guidelines for Oil and Gas
24 (Onshore) and environmental, health and safety provisions contained or referenced in the

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26 ¹⁸ Exhibit 1GG is a chart that is excerpted from “the Board Paper for the West
27 Seno Project.” (See OPIC Ex. 1 (Declaration of Connie Downs ¶ 37).) This chart does
28 contain any information about OPIC’s level of control over the West Seno I Project.
Exhibits 1HH, and 1JJ are incomplete copies the contracts relating to OPIC financing for the
West Seno I and Sakhalin Projects, which do not include what conditions, if any, were
imposed as part of the financing. Thus, apart from placing the surrounding exhibits in
context, these documents are not material to the resolution of these motions.

1 Contract.”); IMM at 74 (OPIC environmental assessment for Chad Cameroon Project, which
2 makes recommendations as to what conditions should be included in insurance contract).

3 With respect to Ex-Im, it is authorized by statute to “withhold financing from a project
4 for environmental reasons or to approve financing after considering the environmental effects of
5 a project.” 12 U.S.C. § 635i-5(a)(2). Consistent with this statutory authority, Ms. O’Boyle
6 states that “[a]s part of the engineering and environmental review for” the application for the
7 Dezhou Project, “Ex-Im ... required the particulate emissions to be reduced to the Ex-Im ...
8 guideline limit through greater efficiency.” (O’Boyle Decl. ¶ 44.) This statement suggests that
9 Ex-Im may have had the ability to exercise some influence over non-federal actors. As such,
10 these facts support Plaintiffs’ argument that Defendants can influence decision making by
11 granting or withholding support for the projects.

12 Assuming that a recipient of OPIC or Ex-IM financing materially defaulted on a loan
13 guaranty by failing to perform either the project within either agency’s environmental
14 guidelines, if the level of financing would not impact the project’s operations or if the
15 applicants could have found financing elsewhere, the Court cannot say the conditions imposed
16 to receive the financing would give the Defendants sufficient control and responsibility to
17 render those projects major federal action. In this respect, because none of the projects
18 involved are financed primarily by Defendants, the Court concludes that the *Fish and Wildlife*
19 case, and its conclusion regarding major federal action, is distinguishable, and the Court cannot
20 find in favor of the Plaintiffs. The Court also finds that the information in the record is in
21 conflict and is insufficient to conclusively resolve the issue of Defendants’ ability, or lack
22 thereof, to influence the decision making process.

23 Therefore, the Court finds that Plaintiffs have failed to show, as a matter of law, that any
24 of the projects identified in the SAC qualify as major federal action. The Court also finds that
25 Defendants have not shown, as a matter of law, that any of the projects identified in the SAC do
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1 not qualify as major federal action. The parties' cross-motions are DENIED as to each of the
2 projects identified in the SAC.¹⁹

3 **b. Projects not identified in the SAC.**

4 In their SAC, Plaintiffs generally allege that "OPIC and Ex-Im have supported
5 numerous other fossil-fuel-fired power plants around the world." (*Id.* ¶¶ 204-211 (alleging that
6 Ex-Im has supported 101 projects and that OPIC has supported 61 projects).) In their motion,
7 Plaintiffs again assert, generally, that "between 1990 and 2001 Ex-Im approved 474 separate
8 transactions for fossil fuel projects, providing more than \$25 billion in loans and financial
9 guarantees to energy projects world wide," and that "[s]ince 1999, Ex-Im has approved at least
10 45 additional transactions for fossil fuel projects ... providing another \$6 billion in financial
11 assistance for oil and gas development projects and power plants." (Plaintiffs' Mot. at 10.)
12 With respect to OPIC, Plaintiffs assert that "[b]etween 1990 and 2000, OPIC provided financial
13 support to at least 52 power projects," and that "[s]ince 2000, OPIC has approved at least 12
14 additional fossil fuel power projects." (Plaintiffs' Mot. at 12.)

15 Defendants argue that Plaintiffs have failed to identify with sufficient specificity these
16 other projects. Plaintiffs respond that the Administrative Record contains references to such

17
18 ¹⁹ Defendants urge the Court to find that the impacts of global warming on the
19 domestic environment, alleged to be caused by the projects they support, are too remote and
20 speculative to be considered for purposes of NEPA. (*See* OPIC Mot. at 36:13-42:9; Ex-Im
21 Mot. at 24:17-30:4.) However, it is undisputed that these projects do emit GHGs. Further,
22 based on the statements in their climate change reports regarding the effects of GHGs on
23 climate change, it would be difficult for the Court to conclude that Defendants have created a
24 genuine dispute that GHGs do not contribute to global warming. (*See Assessing Our Actions*
25 at 7 ("There is a strong and growing scientific consensus that these steady additions of GHGs
26 have tipped a delicate balance and begun to impact our climate and may be the dominant
27 force driving recent warming trends."), 22 (acknowledging that GHGs become "very well
28 mixed in the atmosphere and have a global impact that is mostly independent of where they
were emitted); Ex-Im Report at 4 ("GHG concentrations have indeed risen and that there is a
reasonable likelihood that the increased concentration of these gases will result in increased
average global temperatures during the coming decades.")) The question, however,
becomes whether Defendants are a "but for" cause of these GHG emissions. *See, e.g., Public
Citizen*, 541 U.S. at 770 (concluding that where an agency has limited authority over the
relevant action to prevent a certain effect, agency "cannot be considered a legally relevant
'cause' of the effect). Because the Court is unable to determine whether the alleged actions
would have gone forward without Defendants' participation and cannot determine whether
Defendants could exercise control over the projects, the Court cannot determine whether
Defendants are a legally relevant cause of the alleged effects on the domestic environment.

1 projects, citing to, *inter alia*, Ex-Im A.R. Tabs 24-28. Ex-Im A.R. Tabs 24-27 are Engineering
2 Evaluations, which do not set forth any information about the total cost of a specific project or
3 the percentage of funding provided by Ex-Im. Similarly, Ex-Im A.R. Tab 28 is a chart entitled
4 “CO2 Emissions for Projects Financed by Ex-Im Bank Fiscal Years 2000 thru 2003 (present).”
5 The last column of that chart sets forth the total amount of financing authorized by Ex-Im for 45
6 particular projects, but provides no information about what percentage of the total project costs
7 these figures represent. For the reasons set forth in the preceding section, the Court cannot
8 determine whether these various projects would qualify as major federal actions based on that
9 evidence. *See Ka Makani*, 295 F.3d at 960 (“consideration must be given to a ‘great disparity in
10 the expenditures forecast for the state [and county] and federal portions of the *entire* program”)
11 (emphasis in original).

12 Accordingly, although Plaintiffs correctly note that there are a number of other projects
13 listed by name in the Defendants’ Administrative Records, there is insufficient information
14 about what the total costs of these projects are and what level of control and responsibility, if
15 any, OPIC or Ex-Im have over these projects. The Court therefore DENIES the motions to the
16 extent the parties move for summary judgment in their favor with respect to those projects listed
17 in the Administrative Record that are not identified in the SAC.

18 **4. The Court Cannot Determine Whether The Actions Identified in the**
19 **SAC Are Cumulative Actions Requiring A Single EIS.**

20 Plaintiffs also contend that Defendants must prepare a single environmental impact
21 statement under NEPA for the projects identified in the SAC. CEQ regulations require that
22 “two or more agency actions must be discussed in the same impact statement where they are
23 ‘connected’ or ‘cumulative’ actions.” *Klamath-Siskiyou Wildlands Center v. Bureau of Land*
24 *Management*, 387 F.3d 989, 999 (9th Cir. 2004) (citing 40 C.F.R. § 1508.25.) Plaintiffs do not
25 contend the challenged actions are “connected.” Rather, they argue that the actions are
26 “cumulative.”

27 Section 1508.25 defines cumulative actions, as “actions, which when viewed with other
28 proposed actions have cumulatively significant impacts and should therefore be discussed in the

1 same impact statement.” 40 C.F.R. § 1508.25(a)(2). A cumulative impact is defined as ‘the
2 impact on the environment which results from the incremental impact of the action when added
3 to other past, present, and reasonably foreseeable future actions. ... Cumulative impacts can
4 result from individually minor but collectively significant actions taking place over a period of
5 time.’” *Great Basin*, 456 F.3d at 971 (quoting 40 C.F.R. § 1508.7.)

6 Because the Court cannot determine whether or not the individual projects identified in
7 the SAC qualify as major federal actions, the Court cannot determine whether any of these
8 actions would qualify as “cumulative actions” that would require a single EIS under NEPA.
9 The Court does note, however, that in general the Ninth Circuit has determined that a single EIS
10 addressing “cumulative actions” is required when there is either a geographical or temporal
11 nexus among the proposed actions or where there is some suggestion that an agency
12 intentionally divided a project into multiple actions. *Compare Earth Island Inst. v. United*
13 *States Forest Serv.*, 351 F.3d 1291, 1304-06 (9th Cir. 2003) (concluding that single statement
14 was not required where boundary determination predated the agency’s decision and timber sales
15 were not announced simultaneously and were to proceed on different timetables) *with Blue*
16 *Mountains*, 161 F.3d at 1215 (single EIS required and actions determined to be cumulative
17 where timber sales were located in same area, were part of a single project, and were announced
18 simultaneously).

19 **5. Plaintiffs Are Not Entitled to an Injunction Directing Defendants to**
20 **Prepare An EA or an EIS for Each and Every Fossil Fuel Project**
They May Approve In the Future.

21 Plaintiffs also seek an injunction from this Court that would require the Defendants to
22 prepare an EA or an EIS for any future fossil-fuel related projects that they may approve in the
23 future. An agency is required to prepare an environmental impact statement or an
24 environmental assessment only for those “major Federal actions significantly affecting the
25 quality of the human environment.” 42 U.S.C. § 4332(c). As is evident from the discussion in
26 the preceding section, the determination of whether a given project will qualify as a major
27 federal action is a fact intensive inquiry, especially given Plaintiffs’ theory that Defendants
28 exercise control over the projects the support through their ability to grant, deny or withhold

1 financing during the course of a project. Accordingly, the Court cannot find as a matter of law
2 that each and every fossil fuel related project that Ex-Im or OPIC may undertake in the future
3 will trigger NEPA's requirements. Therefore, to the extent Plaintiffs seek prospective
4 injunctive relief and a declaration that all fossil-fuel related projects the Defendants finance are
5 subject to NEPA, their motion is DENIED, and Defendants' cross-motions are GRANTED IN
6 PART on this basis.

7 **IV. CONCLUSION**

8 For the foregoing reasons, Plaintiffs' motion for summary judgment is DENIED.
9 Defendants' cross-motions are GRANTED IN PART AND DENIED IN PART. The parties
10 are HEREBY ORDERED to appear for a case management conference on April 27, 2007 at
11 1:30 p.m. The parties shall submit a joint case management statement setting forth their
12 respective positions on how this case shall proceed and whether any party intends to seek an
13 interlocutory appeal of this Order by April 20, 2007.

14 If any party wishes to participate in the case management conference by telephone, they
15 shall submit an administrative request to the Court by no later than April 20, 2007.

16 **IT IS SO ORDERED.**

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1 Dated: March 30, 2007

JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

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