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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FRIENDS OF THE EARTH, INC., et al., Plaintiffs, v. PETER WATSON, et al., Defendants.	Civ. No. 02-4106 (JSW) **DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Date: April 29, 2005 Time: 9 A.M. Courtroom 2, 17th Floor

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I. Introduction

To advance their arguments in opposition to Defendants' Motion for Summary Judgment, Plaintiffs stubbornly fail to recognize that they have sued two separate federal agencies with significantly different missions, different statutory authorities, and different records relevant to this matter. However, Plaintiffs cannot rely on their arguments with respect to one agency to suffice with respect to the other. In order to continue to the merits of this matter with respect to either Defendant, the Court must find that it has jurisdiction over each Defendant separately and that Plaintiffs have stated a viable claim with respect to each Defendant separately. Because Plaintiffs have failed to satisfy their burden in this regard with respect to either Defendant, this matter must be dismissed.

With respect to the Export-Import Bank of the United States (Ex-Im Bank), Plaintiffs have failed to establish either the necessary Constitutional prerequisites to bring this suit or the necessary waiver of the government's sovereign immunity from suit. First, Plaintiffs have failed to satisfy Article III's requirements for standing by failing to show that insurance, guarantees or loans provided by Ex-Im Bank to support U.S. export purchases made in connection with an overseas project threaten the Plaintiffs with the impacts from climate change that they allege. Second, Plaintiffs have not shown that they challenge any "final agency action" within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. § 704, without which the Court cannot adjudicate Plaintiffs' substantive claims. Plaintiffs' claims against the Ex-Im Bank must be dismissed.

Plaintiffs' claims against the Overseas Private Investment Corporation (OPIC) also suffer from the defects described above, in addition to other jurisdictional flaws. As with their claims against Ex-Im Bank, Plaintiffs have not shown that insurance or investment guarantees, provided in connection with overseas projects to further the foreign policy interests of the United States, threaten Plaintiffs with the particular impacts that they allege. Nor have they shown that their complaint in this matter challenges any action taken by OPIC that could be construed as "final agency action" within the meaning of the APA. In addition, Defendants have established that the APA cannot be construed to waive OPIC's sovereign immunity from suit given that, in the agency's statute, Congress decided to preclude judicial review of the agency's compliance with its environmental analysis obligations. That obligation for environmental review is found not in the National Environmental Policy Act as Plaintiffs allege, but in

OPIC's own statute – further depriving Plaintiffs of any foundation for their claims. As a result, Plaintiffs' claims against OPIC must be dismissed.

II. Plaintiffs Have Failed To Establish Standing To Bring Their Claims

In arguing in favor of their standing to bring this matter, Plaintiffs confuse the merits of their claim under the National Environmental Policy Act (NEPA) with the required showing for standing, argue such a dilution of the test for Article III standing so as to make it virtually meaningless, and fundamentally fail to address significant portions of Defendants' arguments. Moreover, despite the Plaintiffs' approach and the conclusions of their declarants, the evaluation of whether Plaintiffs have established the facts necessary to support standing does not require the Court to decide whether human-induced climate change is occurring with the results alleged by Plaintiffs. Rather, the Plaintiffs must show that they have particular concrete interests that are threatened by the specific actions that they challenge. See, e.g., Churchill County v. Babbitt, 150 F.3d 1072, 1079 (9th Cir. 1998). Plaintiffs have fundamentally failed to connect their specific alleged injuries with any specific project, groupings of projects, or particular percentage of greenhouse gas emissions – much less to an Ex-Im Bank decision to support particular U.S. exports or to an OPIC decision to provide insurance or guarantees to a U.S. lender, investor or contractor.

As an initial matter, Plaintiffs argue repeatedly that they need not prove actual environmental harm to support standing. See, e.g., Plf. Opp. at pp. 9-10. Defendants have not suggested that they must. Rather, Plaintiffs must satisfy the familiar standards to establish Article III standing that are set forth in Defendants' opening brief and further discussed herein. As the Ninth Circuit has recently said when reviewing a NEPA claim, the "nature of the Article III standing inquiry *is not fundamentally changed* by the fact that in many of its causes of action [the plaintiff] asserts a 'procedural,' rather than 'substantive,' injury." City of Sausalito v. O'Neill, 386 F.3d 1186. 1197 (9th Cir. 2004) (emphasis added). "Whether substantive or procedural injury is alleged, a plaintiff must show a 'concrete interest' that is threatened by the challenged action" in addition to alleging a procedural violation in the decisionmaking process leading up to the action. Id. Plaintiffs have failed to meet this burden.[1]/

[1]/ In both their standing argument and their argument concerning "final agency action," (continued...)

A. Plaintiffs Have Failed To Show A Reasonable Probability That The Challenged Actions Pose A Threat To Their Concrete Interests

As set forth in Defendants' opening brief, Plaintiffs cannot satisfy any of the three prongs of the Article III standing inquiry – injury-in-fact, causation, or redressability. In opposition, Plaintiffs have failed to substantiate their claims that their alleged injuries meet these Constitutional requirements.[2]/ In particular, Plaintiffs have not established "'the 'reasonable probability' of the challenged action's threat to [their] concrete interest.'" Hall v. Norton, 266 F.3d 969, 976 (9th Cir. 2001) (internal citations omitted). Pursuant to this standard, Defendants explained that they play a limited and narrow role in the projects of concern to Plaintiffs and that their actions are too tenuously connected to Plaintiffs' alleged injuries to support causation.[3]/ Def. Mem. at 15-21.

In response, Plaintiffs address only two aspects of Defendants' arguments. Plaintiffs claim that the projects at issue could not go forward absent agency involvement and that both OPIC and Ex-Im Bank "expressly recognize that their financing of a fossil-fuel-fired power plant results in GHG

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[1]/ (...continued)
discussed below, Plaintiffs argue that Defendants have violated NEPA. However, this question is not before the Court at this stage. Rather, before turning to the merits of this matter, Plaintiffs must overcome Defendants' motion for summary judgment. See Civil Minutes (March 12, 2004), Case No. 02-4106 (JSW). See also Sausalito, 386 F.3d at 1199, 1206-1207 (considering Article III standing before turning to review of merits of NEPA claim); Scott v. Pasadena Unified School District, 306 F.3d 646, 653-54 (9th Cir. 2002) (court must establish jurisdiction before turning to merits). Therefore, Defendants do not address, but certainly do not concede, the merits of Plaintiffs' allegation that such a violation has occurred.

[2]/ In this reply, Defendants focus on the causation prong of the standing inquiry, but do not concede that Plaintiffs have established either injury-in-fact or redressability. As discussed further herein, the Declaration of Dr. Legates confirms the scientific uncertainty inherent in assessing the potential for climate change caused by anthropogenic emissions of greenhouse gases and the difficulty of connecting any particular alleged impacts to such emissions given the lack of data much less the impossibility of connecting any particular alleged impacts to the emissions from specific projects or groups of projects or Defendants' role in such projects. See Def. Mem. at 10-14 (discussing injury-in-fact). Furthermore, Plaintiffs misstate the standard applicable to the redressability prong of the standing inquiry – essentially rendering it meaningless in a case involving a NEPA claim. Plf. Opp. at 26-27. The Ninth Circuit has stated that while plaintiffs do not have to show that an ultimate decision following revised NEPA procedures "'will benefit them,'" they do have to show that "a revised [procedure] may redress [their] alleged injuries." Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1113 (9th Cir. 2002). As set forth in Defendants' opening brief, and confirmed by the Mahoney, Schehl, and Legates Declarations submitted herewith, Plaintiffs cannot even establish that a decision, following NEPA analysis, not to participate in any particular transaction "may" alleviate the injuries they claim by even some marginal amount.

[3]/ The Ninth Circuit has specific precedent governing the analysis of standing in NEPA cases. Def. Mem. at 14-15. However, Plaintiffs rely substantially upon a case from the Tenth Circuit, Committee to Save the Rio Hondo v. Lucero, 102 F.3d 445 (10th Cir. 1996). It provides no relevant standards different from applicable Ninth Circuit case law.

emissions." Plf. Opp. at 25. This response fails to address the substance of Defendants' argument regarding the limited role that each Defendant has with respect to the overseas projects. Furthermore, not only have Plaintiffs failed to show a sufficient link between the specific impacts that they allege and the anthropogenic emission of greenhouse gases given the significant degree of uncertainty in the relevant science and the lack of any supporting data, but Plaintiffs have not shown what they must to pursue their specific claims in this matter – the "reasonable probability" that actions taken by Ex-Im Bank or OPIC, or even emissions from any particular project or grouping of projects, could cause their specific injuries.[4]/

1. Plaintiffs' Alleged Injuries Are Too Tenuously Connected To Either The Acts Of OPIC Or ExIm Bank To Support Causation

Plaintiffs have not, and cannot, refute the tenuous link between their alleged injuries and actions taken by either defendant with respect to the projects in foreign countries that involve some participation by a U.S. exporter receiving financing support from Ex-Im Bank, or a U.S. investor, lender or contractor who purchases insurance or a guarantee from OPIC. Neither OPIC nor Ex-Im Bank approves, permits, designs, or otherwise controls the overseas projects at issue. Def. Mem. at 16. See also Def. Mem., O'Boyle Decl. at ¶ 41.[5]/ With respect to Ex-Im Bank, which provides insurance, guarantees or loans to support U.S. export purchases made in connection with an overseas project, Defendants provided a detailed explanation of Ex-Im Bank's limited involvement in and attenuated relationship to the energy projects described in Plaintiffs' Complaint – such as approving a guarantee for a loan to finance the purchase of U.S. manufactured equipment, without which the foreign buyer would purchase equipment

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[4]/ Citing Citizens for Better Forestry v. U.S. Dept. of Agriculture, 341 F.3d 961 (9th Cir. 2003), Plaintiffs argue that the "reasonable probability" standard is related to the likelihood of harm and injury-in-fact – not causation. Plf. Opp. at 15. While in Citizens for Better Forestry, the Ninth Circuit did use the standard in the context of analysis of injury-in-fact, the Ninth Circuit also uses the standard in assessing causation. See, e.g., Hall v. Norton, 266 F.3d 969, 976 (9th Cir. 2001) (using "reasonable probability" in causation analysis), Douglas County v. Babbitt, 48 F.3d 1495, 1501 n. 6 (9th Cir. 1995) (referring to the standard in the context of causation). Whether considered in the context of injury-in-fact, as Plaintiffs do, or causation, Defendants have established that it is not "reasonably probable" that it is Defendants' activities that threaten a demonstrable concrete interest.

[5]/ Plaintiffs state throughout their brief that Defendants' cannot reply on supposed "extra-record" evidence to support their motion for summary judgment on threshold and jurisdictional issues. See, e.g., Plf. Opp. at 19. However, as fully explained in Defendants' Opposition to Plaintiffs' Motion to Strike Evidence, filed on January 27, 2005, the Court's review is not confined to an administrative record for consideration of the issues now before the Court.

made elsewhere. Def. Mem. at 16-17. See also O'Boyle ¶¶ 32-47. With respect to OPIC, Defendants also explained how OPIC's role may be limited to providing political risk insurance to a drilling subcontractor whose role ends upon the location of oil. Def. Mem. at 17, Himberg Decl. at ¶¶19-20. See also Schehl Decl. at ¶ 14 (limited role in privatization of already operating facility) (Att. A).

Plaintiffs do not contradict, or even address, this explanation but prefer to continue to myopically attribute responsibility for entire oil field developments, for example, to Defendants and claim, in essence, that the purpose of each agency is to ensure that such overseas projects at issue go forward. Plf. Opp. at 24. Plaintiffs' argument fails to recognize the entities who are in fact responsible for the viability of an overseas project – investors, power companies, and foreign governments, among others. Furthermore, in making their argument, Plaintiffs fundamentally misconstrue the statutory mission of each agency, which is set forth in detail in Defendants' opening brief, as well as the business reality facing applicants to OPIC or Ex-Im Bank. Def. Mem. at 15-18. Specifically, the purpose of Ex-Im Bank is not to ensure the viability of overseas projects, but to encourage the export of U.S. products and services to contribute to the employment of U.S. workers. 12 U.S.C. § 635(a)(1). While U.S. exporters may be unable to participate in particular projects absent Ex-Im Bank financing support, the overseas projects themselves would likely go forward with goods purchased from foreign competitors, which may be financed by one of Ex-Im Bank's foreign counterparts. Def. Mem. at 18.

OPIC has a distinct mission that supports the foreign policy objectives of the United States – "to mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed countries and areas . . . ." 22 U.S.C. § 2191. OPIC does this by providing insurance and guarantees that the private market may be unwilling to offer due to risk associated with the project. Himberg ¶¶ 8-9. However, the consequences of lack of OPIC involvement do not include the termination of the particular overseas project as Plaintiffs claim – rather, given the size and importance of the various projects of concern to Plaintiffs, they can, and do, go forward without OPIC involvement.[6]/ Himberg ¶¶ 8, 23.

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[6]/ Plaintiffs allege that a budget report submitted by OPIC to Congress undermines this conclusion. Plf. Opp. at 24. However, Plaintiffs imbue the statement that they quote from that report with meaning that it does not possess. Where OPIC states a project would not go forward but (continued...)

The Court's inquiry should end at this point given the tenuous chain that connects either defendant to possible impacts from climate change resulting from greenhouse gas emissions. See Idaho Conservation League v. Mumma, 956 F.2d 1508, 1517-18 (9th Cir. 1992) ("causation question concern[s] only whether plaintiffs' injury . . . is dependent upon [the agency's] policy, or is instead the result of independent incentives governing [[a] third part[y's]] decisionmaking process.").

2. Plaintiffs' Efforts To Attribute Substantial Greenhouse Gas Emissions To A Particular Grouping Of Projects And To Defendants Is Unavailing

Even if the Court were to consider, from a causation perspective, the extent of greenhouse gas emissions that may be associated with projects of concern to Plaintiffs, Plaintiffs' argument also fails in this regard. Based on the Declaration of Richard Heede, Plaintiffs attribute 8% of the world's emissions of greenhouse gases to OPIC and Ex-Im Bank. However, the Heede Declaration provides no basis for the Court to conclude that Defendants' actions constitute a sufficient threat to Plaintiffs' interests to support standing, even assuming that project emissions could be attributed to OPIC and Ex-Im Bank, which they cannot as discussed above. The Heede Declaration is a result-oriented analysis that rests upon mistaken assumptions and faulty data. See Schehl Decl. (Att. A), Mahoney Decl. (Att. B).

Errors and exaggerations in the Heede Declaration are numerous and he applies a methodology and assumptions that are not supported by internationally recognized protocols for accounting emissions. For example, Heede includes downstream emissions in his totals, emissions resulting from the ultimate burning of fossil fuel by end users, despite the fact that the accepted methodology of accounting for CO2 attributes such emissions only to the ultimate user of the fuel. Schehl ¶ 5, 16-20, Mahoney ¶ 4, 9-12. Heede includes projects that never went forward and projects that never went forward with OPIC or Ex-Im Bank involvement, while missing others. Schehl ¶ 4, 11-15, Mahoney ¶ 4, 6-8. Heede more than doubles the expected life of power plant projects to sixty years, even though the original equipment critical for plant operation, for which OPIC or Ex-Im Bank support might be sought, would be retired and replaced with new equipment at 20-25 year cycles. Schehl ¶ 6, 21-24, Mahoney ¶ 4, 13-15. Heede uses capacity factor estimates (how close to full capacity a plant will run) that do not reflect actual plant

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6/ (...continued)
for OPIC participation, the "project" refers to the particular investor's investment. While a project may go forward, the particular U.S. investor may not participate without OPIC.

operations. Schehl ¶ 25-30, Mahoney ¶ 4, 16-17. Heede double counts projects – adding emissions from a project twice if both OPIC and Ex-Im Bank have some involvement. Schehl ¶ 7-10, Mahoney ¶ 26.

OPIC evaluated the Heede Declaration and determined that the proper percentage of CO2 emissions attributable *to the projects* of concern to Plaintiffs is 0.14%. Schehl ¶ 33. Ex-Im Bank evaluated the Heede Declaration and determined that the proper percentage of CO2 emissions attributable *to projects* of concern to Plaintiffs is 1.2% of anthropogenic CO2 emissions. Mahoney ¶ 32. However, total project emissions fail to address the question of whether such emissions could be attributed to Defendants. As discussed above, they cannot. Moreover, despite Heede's attribution of 100% of project emissions to Defendants, Defendants are aware of no international protocols that suggest attribution of greenhouse gas emissions to parties that finance, insure, or guarantee projects or parts of projects. Schehl ¶ 31, Mahoney ¶ 18-19. Furthermore, the international protocols upon which Heede claims to rely in his declaration, if they were applicable, contemplate that companies that account for greenhouse gas emissions can either: (1) count only that portion of emissions that corresponds to the company's actual financial stake in the project; or (2) count only emissions from projects that a company controls operation of the project by virtue of the dominance of its financing. Schehl ¶ 31, Mahoney ¶ 20-25. If these protocols applied to Defendants, which they do not, even OPIC and Ex-Im Bank's own estimates of emissions which Plaintiffs then attribute to actions by the two agencies would be dramatically lower (0.3 to 0.4% in the case of Ex-Im; 0.02% in the case of OPIC) under the pro rata approach and to zero under the control approach. Schehl ¶ 33, Mahoney ¶ 33.

Thus, the Heede Declaration provides no basis for the Court to conclude that the projects at issue result in any more than minimal emissions – even if such emissions could be attributed to either Defendants' limited relationship to any project. See, generally, Schehl Decl., Mahoney Decl.

3. The Impacts Alleged By Plaintiffs Cannot Be Attributed To Greenhouse Gas Emissions From The Projects Of Concern To Plaintiffs

In addition to the Heede Declaration, Plaintiffs submit declarations from various representatives of the plaintiff organizations and municipalities detailing their alleged injuries, as well as an expert declaration, by Michael MacCracken, that purports to substantiate those allegations. Given the minimal emissions at issue and the lack of any degree of certainty regarding alleged impacts of such emissions,

Plaintiffs cannot establish a "reasonable probability" that any particular project, or grouping of projects, could cause the injuries that they allege.

As an initial matter, the declarations by Plaintiffs' representatives make definitive statements – that the declarants use areas that "are, or will, be affected by climate change" and that OPIC and Ex-Im Bank's actions contribute to such affects – without any more support than the declarant's stated belief that affects will occur. Plf. Opp. at 13. See, also, Plf. Ex. 5 at ¶¶13-14. None of these declarations establish the threat to Plaintiffs' concrete interests from Defendants' actions necessary to support standing. To survive a summary judgment motion, Plaintiffs must "submit affidavits or other evidence showing, through specific facts," not only that a particular threat from the challenged action exists, *but that they would be "'directly' affected* apart from their 'special interest in the subject.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992) (internal citations omitted) (emphasis added).

Nor does the MacCracken Declaration provide the Court with a sufficient basis to conclude that Defendants' actions pose a reasonably probable threat to Plaintiffs' concrete interests. Not only is the MacCracken Declaration premised on the faulty assumption that the projects of concern to Plaintiffs are responsible for 8% of worldwide greenhouse gas emissions, but it fails to acknowledge the significant uncertainties behind the conclusions that it draws regarding links between greenhouse gas emissions from the projects of concern to Plaintiffs and their alleged injuries. See MacCracken, Plf. Ex. 2 at ¶ 15. The attached Declaration of Dr. David R. Legates explains that based on actual data from observations, which MacCracken does not assess, and taking into account the significant unreliability in climate modeling, "it is impossible to connect emissions of greenhouse gases from any specific source or group of sources to an increased risk of any particular outcome."[7]/ Legates ¶ 11 (Att. C).

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[7]/ Dr. David R. Legates is a climatologist who focuses on assessing climate variability and change. His declaration reviews and analyzes the conclusions drawn in the MacCracken Declaration, as well as in the declarations submitted by Plaintiffs' various representatives, based on his own experience and based on data from peer-reviewed publications. Legates ¶3. For example, Dr. Legates explains that the MacCracken Declaration relies only on the most extreme climate models to support its assertions of dramatic continuing climate change that it attributes, in part, to actions by OPIC and Ex-Im Bank. Legates ¶7-10. Other models, developed by international panels of experts, predict less dramatic changes. Id. While MacCracken attributes changes in climate predominantly to anthropogenic emissions of greenhouse gases, again relying only on the most dramatic estimates of future greenhouse gas emissions, observed climate variability can be attributed to natural processes within the climate system as well as to the unreliability of both observations and climate modeling.

(continued...)

With respect to the particular impacts alleged by Plaintiffs, from concerns about increasing storms to loss of maple syrup production, Dr. Legates explains that data does not support the general conclusions drawn by the MacCracken Declarations and by the declarations submitted by Plaintiffs' representatives. Legates ¶11-47. For example, "virtually no evidence exists to support" the notion that tropical cyclones and non-tropical storms will increase dramatically in frequency and intensity due to climate change. Legates ¶ 18. Data relating to Arctic temperature trends reflect not consistent effects of warming attributable to anthropogenic emissions, but temperature fluctuations "extending back several centuries," conflicting research, inconsequential trends in long term changes in Arctic sea ice, and air temperatures in the 1930s as high as present.[8]/ Id. at ¶ 29-35. Data relating to rise in sea levels along the California and Carolina coasts, areas of concern to Plaintiffs, reflect the lowest such trends for coastal regions anywhere in the world, with the rate decreasing dramatically along the Carolina coast in recent years, suggesting that other factors contribute to sea level changes in these regions. Id. at ¶ 36-38. Data relating to maple syrup production shows a decrease in production in Vermont from 1916 to the early 1980s, relatively constant production in Vermont since the early 1980s, a significant *increase* in production in Canada since 1977, and regional air temperatures which show no trend at all from 1915 to 1998. Id. at ¶ 42-43. Data relating to other impacts alleged by Plaintiffs reveal similar weaknesses in claims that such impacts are attributable to emissions from specific projects. Id. at ¶13-17, 22-28, 39, 40-41.

Thus, the impacts alleged by Plaintiffs cannot be attributed to greenhouse emissions from the projects of concern to Plaintiffs with any degree of "reasonable probability." See Legates ¶ 44-47. The uncertain state of current knowledge, unreliable and widely varying climate models, and data that contradicts Plaintiffs' summary conclusions continue to compel the conclusion that "[t]he concerns presented regarding global warming are too general, too unsubstantiated, too unlikely to be caused by defendants' conduct, and/or too unlikely to be redressed by the relief sought to confer standing." Center for Biological Diversity v. Abraham, 218 F. Supp. 2d 1143, 1155 (N.D. Cal. 2002).

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[7]/ (...continued)
Id. at ¶6, 9 See also Def. Mem. at 11-14.

[8]/ One of Plaintiffs' declarants expresses concern about the extinction of polar bears due to climate change. Plf. Ex. 6 at ¶ 7. Dr. Legates explains that temperatures were as high as they presently are in the 1930s and that current population data actually shows an increase in polar bear populations in areas that have experienced a recent increase in temperature. Legates ¶35.

B. Neither Defendant Has Suggested That Their Actions Result in Greenhouse Gas Emissions

Finally, the notion advanced by Plaintiffs that either OPIC or Ex-Im Bank has suggested that "*their financing* of a fossil-fuel-fired power plant *results in GHG emissions*" or that their actions may contribute to climate change, even if relevant to the Plaintiffs' burden to establish standing, is flatly contradicted by an accurate reading of the agencies' good faith efforts to consider climate change issues – an effort undertaken in response to a critical report issued by plaintiff Friends of the Earth, among other groups.[9]/ Plf. Opp. 11, 16-17, 18 (emphasis added). In *Climate Change: Assessing Our Actions*, OPIC does not conclude or imply that its decisions result in CO2 or other greenhouse gas emissions, or more importantly in any resulting environmental impacts, and Plaintiffs quote no language suggesting otherwise. Rather, in the report the agency reviews the emission potential of projects involving some participation by a U.S. investor, lender, or contractor who purchases financial services from OPIC, recognizing that such projects result in CO2 emissions, in broad terms without considering the question presented here – whether any resulting such emissions can be attributed to OPIC decisions so as to support causation. See, e.g., Plf. Ex. 3 at 49. Similarly, in *Ex-Im Bank's Role in Greenhouse Gas Emissions and Climate Change*, Ex-Im Bank considers "greenhouse gas emissions of Ex-Im Bank supported projects," without accepting, or even considering, that its own actions *cause* such emissions and any future impacts.[10]/ See, e.g., Att. D-1a at 24.

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[9]/ Moreover, this assertion, which Plaintiffs repeat throughout their brief, assumes the critical conclusion – that greenhouse gas emissions cause the impacts that Plaintiffs allege. Without the ability to make this ultimate connection, which is addressed above, the mere fact that the projects of concern to Plaintiffs emit a particular substance is irrelevant to their ability to show causation or a threatened harm. Nowhere in either the OPIC or Ex-Im Bank report does either agency suggest that their actions result in any particular environmental impact related to CO2 emissions.

[10]/ Plaintiffs argue that OPIC and Ex-Im Bank have admitted, via their respective reports on climate change, that, as a general matter, climate change is occurring with the potential impacts that Plaintiffs allege. Plf. Opp. at 11, 20. While both reports take a cautious approach to the issue for purposes of assessing the CO2 emissions from relevant projects, both reports acknowledge the uncertain state of science and the inability to attribute specific impacts to emissions from the projects described in the reports. In *Climate Change: Assessing Our Actions*, OPIC notes that "how much of the recent warming is due to human influences and how much is due to natural climate variations is the focus of much current research." Plf. Ex. 3 at 21. The report goes on to explain scientific uncertainty surrounding the relationship between CO2 emissions and natural climate cycles and potential impacts of increased atmospheric concentrations of CO2 based on particular forecasts. Id. at 28-29. Similarly, in *Ex-Im Bank's Role in Greenhouse Gas Emissions and Climate Change*, Ex-Im Bank states that "[a]lthough it is accepted that human activities have contributed to the increase in atmospheric CO2 concentrations, scientific opinions about the relationship between the increased

(continued...)

III. Defendants Have Established That The APA Prohibits Plaintiffs' Programmatic Attack And That Plaintiffs Have Not Challenged Any Final Agency Action Fit For Judicial Review

Plaintiffs' Complaint makes two straightforward claims – that OPIC and Ex-Im Bank are conducting energy related "programs" without complying with NEPA and that each agency has failed to comply with NEPA for individual energy and oil and gas sector-related applications. 2nd Am. Coml. ¶¶ 154-161, 213. However, before the Court may evaluate the merits of the Plaintiffs' claim that Defendants have violated NEPA in taking such alleged actions, it is a matter of blackletter law that Plaintiffs must establish that they are challenging "final agency action" within the meaning of the Administrative Procedure Act, 5 U.S.C. §§ 551(13), 704. Defendants demonstrated in their opening brief that Plaintiffs' claims do not meet this fundamental prerequisite to suit – neither Ex-Im Bank nor OPIC has a "program supporting energy projects" that constitutes final agency action within the meaning of the APA and Plaintiffs' Complaint does not even purport to challenge any specific individual application. Def. Mem. at 23-28. As a result, the United States has not waived sovereign immunity from suit and this Court is without jurisdiction over Plaintiffs' claims.

In opposition, Plaintiffs make three arguments, but fail to identify any final agency action which this Court could review. First, they argue a reversal of the relevant inquiry – claiming that Ex-Im Bank and OPIC have each violated NEPA and that each such violation constitutes final agency action. Second, Plaintiffs argue that certain letters sent by OPIC and Ex-Im Bank, as well as the climate change reports described above, constitute final agency action. Third, Plaintiffs claim that their Complaint does challenge certain individual final agency actions and does not mount a prohibited programmatic attack. Plaintiffs' arguments fundamentally misconstrue the relevant legal standards and fail to establish that there is any final agency action properly before the Court.

A. Plaintiffs Have Confused The Relevant Analysis – The Court Must First Determine That Plaintiffs Have Challenged A Final Agency Action Before Considering The Merits Of Plaintiffs' NEPA Allegations

Plaintiffs' assertion that their Complaint does challenge final agency action subject to judicial

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[10]/ (...continued)
GHG concentration and induced temperature change and resulting environmental consequences are not consistent ... [t]he extent of temperature change and related adverse impact of this effect remains unclear." Att. D-1a. Furthermore, both reports were written before the issuance of many of the leading reports on the issue and without benefit of more recent research upon which Defendants rely to contest Plaintiffs' standing. See, generally, Legates. See also Def. Mem. at 11-13.

review turns on the faulty premise that they have alleged violations of NEPA and that such violations are subject to judicial review. Plf. Opp. at 28-40. However, an alleged violation of NEPA, in and of itself, does not constitute final agency action within the meaning of the APA. Rather, a court must first determine whether the purported agency action challenged constitutes a "final agency action" subject to judicial review *before* turning to the question of whether in taking that action, the agency violated a substantive statute such as NEPA. See, e.g., Norton v. Southern Utah Wilderness Alliance, 124 S.Ct. 2373 (2004) (assessing whether suit authorized under APA before turning to merits of NEPA claim); Lujan v. National Wildlife Federation, 497 U.S. 871, 890-894 (1990) (assessing whether challenge to supposed "land withdrawal review program" constituted challenge to "agency action" so as to allow APA review of alleged violations of a substantive statute);ONRC Action v. Bureau of Land Management, 150 F.3d 1132 (9th Cir. 1998) (same).[11]/ Even allegations, such as those made by these Plaintiffs, that "violation of the law is rampant within" an agency program are irrelevant if a plaintiff has not challenged a final agency action that causes it harm.[12]/ Lujan, 497 U.S. at 891.

In determining whether a plaintiff has challenged a final agency action, courts look not to the substantive obligations that an agency has allegedly violated, as these Plaintiffs urge, but to the character of the underlying action. A plaintiff must establish both that the action challenged meets the definition of "agency action" set forth in 5 U.S.C. § 551(13) *and* that the action in question is a "final" action of the agency, 5 U.S.C. § 704. Neither requirement implicates the terms of a substantive statute such as NEPA. Rather, an "agency action" is defined as "the whole or part of an agency rule, order, license,

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[11]/ See also Sierra Club v. Peterson, 228 F.3d 559, 569-70 (5th Cir. 2000) ("Under the APA, the district court only had jurisdiction over challenges to identifiable final agency actions. Here, the district court acted outside its jurisdiction in reaching the merits of the environmental groups' programmatic challenge, thereby ignoring the critical limits on judicial review which define the role of courts in the modern administrative state.").

[12]/ Plaintiffs also argue, based on Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 737 (1988), that they may complain about these alleged NEPA violations now because once they occur "the claim can never get riper." In so doing, they misuse Ohio Forestry. That case did not purport to establish an exception to the APA's final agency action requirement. Rather, the Supreme Court was simply contrasting the situation in Ohio Forestry, where the timbering plans at issue were subject to further refinement, with a situation where a claim raised at the planning stage should be heard by a court. The Court used the example of the denial of a NEPA procedure, but did not say that all NEPA claims are of a type that can never get riper. Indeed, such a holding would contradict the Supreme Court's Lujan decision, discussed above. Furthermore, despite the dicta that Plaintiffs cite, and despite the fact that the petitioners brought a programmatic challenge under NEPA, the Supreme Court remanded the case with instructions to dismiss the suit in its entirety for lack of ripeness. Id. at 731, 739.

sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Whether such an action, is a final one for purposes of the APA turns on whether the action marks "the consummation of the agency's decisionmaking process . . . – it must not be of a merely tentative or interlocutory nature" – and whether the action is one "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow' . . . ." Bennett v. Spear, 520 U.S. 154, 177 (1997) (internal citations omitted).

B. Plaintiffs Cannot Base Their Claims on Section 706(1) Of The APA & The Supreme Court's Opinion In Norton v. SUWA Provides No Authority To The Contrary

Plaintiffs claim, based on the Supreme Court's recent decision on Norton v. SUWA, that their claims can be brought based on Section 706(1) of the APA. See Plf. Opp. at 35-36. However, Plaintiffs' basic misunderstanding of APA's requirements is highlighted by their characterization of the relevance to this matter of that decision. In Norton v. SUWA, the Supreme Court reiterated that the judicial review provisions of the APA can be triggered only by a claim seeking review of "circumscribed, discrete, agency actions . . . ." Norton v. SUWA, 124 S. Ct. at 2378. This is true whether a plaintiff challenges an agency action as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2), or whether a plaintiff seeks "to compel agency action unlawfully withheld or unreasonably delayed" 5 U.S.C. § 706(1).[13]/ Norton v. SUWA, 124 S. Ct. at 2378. At the same time, the Supreme Court confirmed its prior holding in Lujan v. National Wildlife Federation, 497 U.S. 871, that under either portion of Section 706, the APA does not allow a "broad programmatic attack", but requires a challenge to "discrete agency action." Norton v. SUWA, 124 S. Ct. at 2379-80.

While Norton v. SUWA is instructive for its affirmance of the scope of the APA's "final agency action" requirement, its meaning does not stretch far enough to encompass Plaintiffs' application of the decision to this matter. Plaintiffs argue that under Norton v. SUWA and based on Section 706(1) of the APA, they are asking the Court to compel a mandatory and discrete duty – the preparation of an Environmental Assessment (EA) under NEPA by each agency to assess each agency's alleged

[13]/ As set forth in Defendants' opening brief, Plaintiffs' Complaint does not specify whether they seek review under 5 U.S.C. § 706(1) or 706(2). Def. Mem. at 24-25. Nonetheless, Defendants explained the differences between these two mechanisms for judicial review and the conclusion that Plaintiffs could not satisfy the APA's prerequisites to suit for either provision. Id. Both allow review only of "agency action" which is defined identically for purposes of both sections. 5 U.S.C. § 701(b)(2).

"programmatic actions."[14]/ Plf. Opp. at 35. However, this claim does no more than repackage their essential complaint – that OPIC and Ex-Im Bank each conduct supposed energy programs without complying with NEPA – which is based on the premise that each agency has taken some action "not in accordance with law" and thus which must be reviewed, if at all, under 5 U.S.C. § 706(2). Plaintiffs' claim is unlike legitimate claims brought under Section 706(1) which seek to compel an agency to take a specific nondiscretionary action that it has not taken, rather than seeking to review the legal sufficiency of actions taken. See, e.g., Fallini v. Hodel, 783 F.2d 1343, 1345 (9th Cir. 1986) (statute imposes mandatory duty to remove wild horses from private land once request for removal made).

The Ninth Circuit has confirmed that Section 706(1) applies "only when there has been a genuine failure to act" and that such a "genuine failure" does not include "complaints", such as the one before this Court, "about the sufficiency of agency action . . . ." Ecology Center, Inc. v. Forest Service, 192 F.3d 922, 926 (9th Cir. 1999). This result makes sense because an EA is not itself "final agency action" within the meaning of the APA. Standing alone, it does not create rights or obligations or produce other legal consequences. See Bennett, 520 U.S. at 177-78. Indeed, it is not even the final step in the NEPA process when an EA is prepared – an EA is followed by either a decision that an EIS is required or a Finding of No Significant Impact. See 40 C.F.R. §§ 1508.9, 1508.13. An EA is a procedural prerequisite to taking some other step that may, in turn, qualify as "final agency action" reviewable under Section 706(2) of the APA. Such intermediate agency action is "not directly reviewable under the APA" although it "is subject to review on the review of the final agency action." 5 U.S.C. § 704. See also Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 345-46 (reviewing adequacy of NEPA analysis in context of challenge to final agency decision to issue permit for ski area).

Thus, in order to continue to pursue their claims that OPIC and Ex-Im Bank have violated NEPA, Plaintiffs must establish with respect to each agency that they have challenged a "circumscribed, discrete" and final agency action within the meaning of the APA. Norton v. SUWA, 124 S. Ct. at 2378.

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[14]/ Notably, NEPA itself does not direct the preparation of Environmental Assessments (EA), which are creatures of regulation. See 42 U.S.C. § 4332(2)(C) (concerning only the preparation of Environmental Impact Statements), 40 C.F.R. § 1501.4(b) (defining when to prepare an EA). In Norton v. SUWA, 124 S. Ct. at 2384 n. 5, the Supreme Court expressly did not address whether Section 706(1) could be used to enforce a duty created by regulation. Moreover, even the regulations do not address the preparation of a "programmatic" EA such as the one that Plaintiffs seek.

Because they have failed to do so, their claims must be dismissed.

C. Plaintiffs Have Failed To Establish That Their Complaint Challenges Any "Agency Action"

Pursuant to the principles explained above, Defendants have established that neither of the claims set forth in Plaintiffs Amended Complaint – that OPIC and Ex-Im Bank are conducting energy related "programs" without complying with NEPA and that each agency has failed to comply with NEPA for individual energy and oil and gas sector-related applications – challenge final agency action within the meaning of the APA. Def. Mem. at 23-28.

With respect to the supposed programs challenged in Plaintiffs' Complaint, Defendants showed them to be no more than Plaintiffs' own artificially drawn subset of each agency's portfolio – not "the whole or a part of an agency rule, order licence, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). See Def. Mem. at 27-28. Plaintiffs failed to offer any response to Defendants' description of the separate functions of Ex-Im Bank and OPIC. Similarly, Plaintiffs made no attempt to substantiate their claim that each agency has an energy related "program." Instead, Plaintiffs raise a new basis for their claim, not described in their Complaint, asserting that in conducting climate change reports each agency separately agreed that emissions "must be looked at in the 'aggregate' and 'portfolio-wide' – or in NEPA parlance, 'programmatic' basis." Plf. Opp. at 34. However, that OPIC and Ex-Im Bank each took a look at projected CO2 emissions from a particular sub-set of projects in their existing portfolios, contributes nothing to the resolution of the question before the Court – whether either agency has a energy related "program" that constitutes final agency action within the meaning of the APA. Plaintiffs have shown no programmatic action, by either Ex-Im Bank or OPIC, that is "an identifiable action or event" and their attempt to seek "wholesale improvement" of the agencies' functions by court order should be rejected.[15]/ Lujan, 497 U.S. at 891.

With respect to individual actions, Plaintiffs' efforts are similarly weak. They allege that decisions "to finance particular projects are final agency actions subject to judicial review," but identify

[15]/ The Supreme Court has explained that the "case-by-case approach that this requires is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of our Nation's wildlife and the streams and forests that support it. But this is the traditional, and remains the normal, mode of operation of the courts. Except where Congress explicitly provides for our correction of the administrative process at a higher level of generality, we intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has as actual or immediately threatened effect." Lujan, 497 U.S. at 894.

no such specific decisions. Plf. Opp. at 39-40. Neither Defendants nor the Court should have to guess at whether such hypothetical decisions exist and whether they might satisfy the APA's threshold requirements for suit. Rather, it is Plaintiffs' burden to identify the subject of their claims and explain how it is final agency action. Col. Farm Bureau Fed'n v. U.S. Forest Service, 220 F.3d 1171, 1173 (10th Cir. 2000). Plaintiffs have failed to meet this burden. If Plaintiff object to a particular decision, they may seek to challenge it after the decision is made, but in advance of the action at issue. Prior to that time, "the defect in appellants' challenge lies in its generality." Foundation on Economic Trends v. Lyng, 817 F.2d 882, 885 (D.C. Cir. 1987).

Finally, Plaintiffs do not contradict Defendants' explanation that a description of various projects in the Complaint is intended to do no more than provide examples of allegedly illegal conduct, providing no basis for a finding that a final agency action has been properly challenged, since they seek no relief with respect to those specific projects.[16]/ Sierra Club v. Peterson, 228 F.3d 559, 567 (5th Cir. 2000). See also Def. Mem. at 28. Instead, Plaintiffs argue that any challenge to those projects, if they had brought any such challenge, would not be moot because of Defendants' "heavy burden" of showing mootness in a NEPA case. Plf. Opp. at 40. Since Plaintiffs have brought no such challenge, and sought no remedy with respect to individual projects, mootness is not relevant to the Court's review of Plaintiffs' claims. However, even if relevant, Defendants have shown, with facts uncontradicted by Plaintiffs, that the agency commitments at issue have long since been made, the projects are operational, direct financial commitments have been almost entirely disbursed, loans facilitated by agency commitments are in the process of being paid back, and the agencies have collected substantial fees.[17]/ O'Boyle ¶¶ 34, 39, 42, 47; Himberg ¶¶ 19-37. Plaintiffs have failed to explain how effective relief could be granted in this instance with respect to the particular projects described in their Complaint – projects entirely under the

[16]/ Indeed, Plaintiffs' standing argument, which aggregates all energy-related projects across both agencies for support and does not relate to any particular project, emphasizes that they do not challenge any individual project, but seek broad programmatic relief.

[17]/ Review of a claim rendered moot by the completion of the activity or the expiration of an action is particularly inappropriate in the NEPA context. "NEPA permits the public and other governmental agencies to react to the effects of a proposed action at a meaningful time." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989). See also Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 779 (1983).

control of parties not before this Court.[18]/ See Sierra Club v. Penfold, 857 F.2d 1307, 1317-18 (9th Cir. 1988); Cantrell v. City of Long Beach, 241 F.3d 674, 678 (9th Cir. 2001).

D. The Reports & Letters Upon Which Plaintiffs Now Focus Are Not Final Agency Action

In lieu of establishing that the purported actions that they actually challenge in their Complaint constitute "final agency action" subject to review, Plaintiffs now allege that they are challenging "FONSIs" issued by OPIC and Ex-Im Bank – purported actions not mentioned anywhere in Plaintiffs' Complaint. A FONSI, or finding of no significant impact, is an action contemplated by the regulations implementing NEPA. It may follow the preparation of an Environmental Assessment and is "a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared." 40 C.F.R. § 1508.13. See also 40 C.F.R. § 1508.9(a)(1). According to Plaintiffs, each Defendant has "effectively issued a FONSI" in the form of separate letters from each Defendant, which respond to assertions regarding Defendants' supposed role in greenhouse gas emissions, and in the form of the climate change review produced by each Defendant. Plf. Opp. at 37. Neither the letters nor the reports can be considered either "FONSIs" or final agency action.

As an initial matter, the Court should disregard Plaintiffs' argument that it is challenging actions that are "effectively" FONSIs. This supposed claim is mentioned nowhere in Plaintiffs' Complaint, which challenges only a purported "program supporting energy projects," undefined "individual projects," and alleged general continued violations of by the APA by failing to comply with NEPA. 2nd Am. Compl. at p. 46. Indeed, Plaintiffs' Complaint does not even refer to either of the letters that Plaintiffs' now characterize as FONSIs subject to challenge. In two of the 214 paragraphs in the Complaint, Plaintiffs quote small portions of the climate change reviews issued by OPIC and Ex-Im Bank in 2000 and 1999 respectively, but nowhere challenge these reports as agency action or assert that the

[18]/ Plaintiffs summarily assert that Defendants' actions are capable of repetition yet evading review. Plf. Opp. at 41. See Alaska Fish and Wildlife Federation and Outdoor Council v. Dunkle, 829 F.2d 933, 939 (9th Cir. 1987). However, Plaintiffs fail to substantiate this claim and it finds no support in the record before the Court. Decisions to approve authority for a proposed transactions are posted on each agency's website and precede the contract between the agency and private party. See www.exim.gov/articles.cfm/board%20minute/,www.opic.gov/foia/BoardResolutions/resolutions_05.htm. Furthermore, many of the approvals that Plaintiffs purport to describe in their Complaint significantly pre-date the filing of the Complaint. See O'Boyle ¶¶ 34, 39, 42, 47; Himberg ¶¶ 19-37.

reports themselves are actions subject to NEPA.[19]/ 2nd Am. Compl. at ¶¶ 205, 207.

Furthermore, the argument that these documents are essentially FONSIs is no more than a red herring to distract attention from the only relevant inquiry before the Court – is there a properly challenged final agency action. As set forth above, a FONSI is a specific form of agency decisionmaking that is precisely defined by regulation and that follows a review conducted pursuant to NEPA. None of the documents described by Plaintiffs purport to be FONSIs, conclude review of any type under NEPA, or satisfy the regulatory definition. As Plaintiffs point out, neither agency has conducted a NEPA analysis for the projects described in the Complaint or for a purported program supporting energy projects. There could be no FONSI marking the conclusion of a NEPA process that never took place.

More significantly, neither the letters nor the reports can be considered final agency action within the meaning of the APA. Such an action must be both "the whole or a part of any agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act," 5 U.S.C. § 551(13), and "final," 5 U.S.C. § 704. All of the specific examples of "agency action" given in Section 551(13) are discrete products of a focused decisionmaking process – such as the promulgation of a rule, the issuance of an order, the grant or denial of a license, the imposition of a sanction or the refusal to impose one, or the allowance or withholding of relief.[20]/ 5 U.S.C. § 551. A "final" agency action must both mark "the 'consummation' of the agency's decisionmaking process" and it must determine "'right or obligations'" or a be a decision from which "'legal consequences will flow.'" Bennett, 520 U.S. at 177-78 (internal citations omitted). See also Ecology Center v. U.S.F.S., 192 F.3d 922, 924-925 (9th Cir. 1999).

Neither the Ex-Im Bank letter nor the Bank's climate change report has any of the hallmarks of an "agency action," much less one that is "final." The letter to which Plaintiffs refer concerns only the

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[19]/ Plaintiffs could not argue that investigation was required to discover these supposed actions such that their new claims – advanced for the first time in opposition to Defendants' motion for summary judgment – could be encompassed within the notice pleading rule set forth in Federal Rule of Civil Procedure 8. As Plaintiffs themselves describe, they previously received the letters at issue and the reports were issued and made publicly available in response to criticism by a group that included one of the plaintiffs in this matter. See Att. D-1a at i.

[20]/ Plaintiffs never explain which category of "agency action" they believe covers the letters and reports. None of the definitions of possible agency actions cover these documents. See 5 U.S.C. § 551 (definitions of rule, order, license, sanction, relief). It is clear that these categories were not meant to cover any and all actions taken by an agency or its staff, as Plaintiffs' argument implies. See, e.g., Industrial Safety Equipment Ass'n, Inc. v. EPA, 837 F.2d 1115, 1120 (D.C. Cir. 1988) ("Clearly Congress did not intend the APA definition of a rule to be construed so broadly that every agency action would be subject to judicial review).

Chad Cameroon Pipeline Project and is a staff-level response. Plf. Opp. at Ex. 4. It does not purport to make any broad reference to the applicability of NEPA to any broad class of applications, as Plaintiffs now allege. Plf. Opp. at 35. While the letter states that Ex-Im Bank staff does not believe the particular application at issue triggers any obligations under NEPA, it concludes only that the writer cannot "*recommend* that Ex-Im Bank postpone or stay action with respect to any decision to support the project as proposed." Plf. Opp. at Ex. 4, p. 7 (emphasis added). "[A]gency recommendations are not reviewable as final agency actions." Ecology Center, 192 F.3d at 925. No legal consequences to Plaintiffs, the Bank, or the applicant for Ex-Im Bank support flowed from the letter and it did not create any "rights or obligations." Bennett, 520 U.S. at 177. See also San Diego v. Whitman, 242 F.3d 1097 (9th Cir. 2001) (EPA letter response to inquiry regarding applicability of statute to certain project not final agency action, only once agency takes final action on application for project would agency's interpretation be subject to review). Final decisions, including those related to the approval of an Ex-Im Bank guarantee in support of the financing of U.S. exports to be used by the Chad Cameroon Pipeline project, are made by Ex-Im Bank's Board of Directors. 12 U.S.C. § 635.

The Climate Change report produced by Ex-Im Bank similarly presents a review by staff within the agency of projects using U.S. exports supported by Ex-Im Bank from October 1, 1987 through the date of the report and making certain general projections based on those already approved transactions. Att. D-1a at ii. The purpose of the report was to "inform and sensitize interested parties" – not to constitute any final agency action on any particular pending action or on the applicability of NEPA. Att. D-1b at 38. Indeed, the report anticipates ongoing consideration of future applications which might result in a *recommendation* by the staff for particular action by the Board.[21]/ Att. D-1a at iii. See also Att. D-1b at 38 (environment and engineering division will "monitor the issue of climate change closely and continue to recommend appropriate measures . . . ."). Thus, the Ex-Im Bank report does not meet either the "agency action" or "finality" requirements of the APA so as to allow Plaintiffs' claims against Ex-Im Bank to proceed on this basis. See Bennett, 520 U.S. at 178 (reports that are "purely advisory" and have

[21]/ In contrast, cases where a court has found that an agency statement of policy constitutes final agency action involve situations where no subsequent agency action or decision was anticipated to implement a particular policy or position. See, e.g., Student Loan Marketing Ass'n v. Riley, 104 F.3d 397 (D.C. Cir. 1997).

no "direct and appreciable legal consequences" are not final agency action).

Similarly, the OPIC letter Plaintiffs cite is not final agency action. The letter merely "questions the assumption" that OPIC's contribution to greenhouse gas emissions is significant and states that additional internal review is warranted before making a decision regarding detailed study of the issue. Att. D-2. The OPIC climate change report states merely that projects where U.S. participants purchase financial services from OPIC, as such projects existed at the time the report was prepared, are not "a substantial contributor to climate change." Plf. Ex. 3 at 5. As for the future, the report does not purport to pre-determine any agency position or decision, but explains that:

> prospective projects receive a thorough environmental assessment . . . In determining whether a project will pose an unreasonable or major environmental, health, or safety hazard, OPIC generally relies on guidelines and standards adopted by international organizations such as the World Bank. All prospective projects having potentially significant environmental impacts must submit an EIA, undergo a 60-day public comment period, submit annual environmental monitoring reports and undergo at least one independent compliance audit within the first three years of project operation.

Plf. Ex. 3 at 44. Neither the OPIC letter nor the report constitutes "the whole or a part of any agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act," 5 U.S.C. § 551(13). Nor can they be said to be "final" positions of the agency marking the "'consummation'" of any decisionmaking process that fix "'right or obligations'" or generate "'legal consequences . . . .'" Bennett, 520 U.S. at 177-78. The letter contemplates additional consideration, and the report does no more than consider the agency's then-existing portfolio, contemplating future review of prospective projects.

IV. Defendants Have Established That OPIC Is Not Subject To NEPA

Defendants established in their opening brief that OPIC is not subject to NEPA and that Congress imposed specific environmental review procedures on the agency tailored to its mission. Both the plain language of the statute and its legislative history compel this conclusion. Def. Mem. at 31 - 40. In response, Plaintiffs essentially make three broad arguments: (1) that the relevant statute only directs OPIC to assess the extraterritorial impacts of its actions, leaving NEPA applicable to potential domestic impacts; (2) that the specific environmental review procedures to which OPIC is subject merely "clarify" NEPA; and (3) that these specific procedures could not displace or supplant NEPA because OPIC is not charged with protecting the environment. Plaintiffs are wrong in each respect.

The fundamental premise of Plaintiffs' opposition – that OPIC's statutory scheme applies only

to the assessment of the extraterritorial impacts of OPIC's actions leaving NEPA to govern the review of potential impacts on the U.S. environment – rests solely upon a simple mistaken reading of the statute. See Plf. Opp. at 45. As set forth in Defendants' opening brief, the statute directs an environmental impact statement, in certain circumstances, for projects "significantly affecting the environment of the global commons outside the jurisdiction of any country, *the environment of the United States*, or other aspects of the environment which the President may specify." 22 U.S.C. § 2151p(c)(1)(A) (emphasis added). This is in addition to the separate subsection directing an environmental assessment, in certain circumstances, for projects "significantly affecting the environment of *any foreign country*." 22 U.S.C. § 2151p(c)(1)(B). Thus, Plaintiffs are simply incorrect – these unique statutory procedures govern assessment of both domestic and extraterritorial impacts.

Plaintiffs' second point, the bald assertion made without benefit of supporting citation that OPIC-specific environmental procedures merely "clarify" NEPA, finds no support in the plain language of the statute or the legislative history.[22]/ Plf. Opp. at 47. The statute does not reference NEPA or otherwise suggest that the specific obligations set forth therein are in addition to obligations contained elsewhere.[23]/ See 22 U.S.C. §§ 2151, 2191, 2197, 2199. Rather, it provides a comprehensive environmental impact review scheme, addressing both domestic and extraterritorial impacts and imposing its own public review requirement *only* when an action "is likely to have significant adverse environmental consequences that are sensitive, diverse, or unprecedented ...." 22 U.S.C. § 2191a(b). This latter provision is in contrast to NEPA's implementing regulations which requires public review of any Environmental Impact Statement (EIS), regardless of whether expected impacts might be "sensitive, diverse, or unprecedented" and, according to the Ninth Circuit, requires public involvement even where review is based on an Environmental Assessment (EA) and the action is expected to have no significant

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[22]/ Plaintiffs assert that "case law" supports this conclusion, but fail to cite to any case law concerning procedures that purport to "clarify" NEPA, discussing only cases cited by Defendants that establish that Congress can impose environmental procedures separate from NEPA in appropriate circumstances. See Plf. Opp. at 45-46.

[23]/ Plaintiffs argue that the President's ability to exempt particular projects from review establishes that NEPA applies because this exemption must be invoked on a project-specific basis. Plf. Opp. at 48. However, Plaintiffs fail to acknowledge the illogical implication of their argument – that a project could remain subject to NEPA, which is not mentioned in the OPIC statute, but be exempted from these separate environmental review procedures under 22 U.S.C. § 2151p. See Def. Mem. at 35-36.

impact. See 40 C.F.R. §§ 1502.19,1503. See also Citizens for Better Forestry, 341 F.3d at 970-971.

Plaintiffs' attempt to reconcile the relevant legislative history with their position is similarly unavailing. Specifically, Plaintiffs allege that the legislative history establishes that Congress intended to define the OPIC-specific environmental review process "via reference to NEPA." Plf. Opp. at 48. Plaintiffs find support for this assertion primarily in the environmental review regulations adopted by the U.S. Agency for International Development (A.I.D.), to which Congress referred when it enacted the provision that, at the time, applied only to A.I.D.[24]/ Plf. Opp. at 49. The preamble to the A.I.D. regulations state that they are "intended to implement the requirements of NEPA as they affect the A.I.D. program." 22 C.F.R. § 216.1(a). However, Plaintiffs ignore that this language was written *prior* to Congressional adoption of the statutory provision now applicable both to A.I.D. and OPIC and that the A.I.D. regulations were not amended after the enactment of that provision.[25]/ Thus, the preamble language could not be evidence of A.I.D's interpretation of this later-enacted language. Instead, the legislative history is clear that while Congress was satisfied with the environmental review procedures set forth in the regulations, Congress did not want to subject the agency, or subsequently OPIC, to NEPA itself because of the possibility of entangling crucial overseas projects in administrative delay and domestic litigation. See Def. Mem. at 37-40. Plaintiffs simply ignore the relevant legislative history that verifies this intention.

Finally, the notion that Congress could not impose a separate environmental review procedure on OPIC because the agency's mission is not one of environmental protection is mere sophistry. Plf. Opp. at 47. Plaintiffs cite to no authority for this proposition and nothing compels Congress to impose NEPA on every government action carried out by an agency without environmental protection as its primary mission. Indeed, as explained in Defendants' opening brief, it is unsurprising that Congress chose to impose a separate environmental review procedure on OPIC given the nature of the agency's activities and NEPA's lack of extraterritorial application – which Plaintiffs do not even attempt to

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[24]/ As explained in Defendants' opening brief, Congress subsequently applied this statutory provision to OPIC. Def. Mem. at 33-34.

[25]/ Compare 41 Fed. Reg. 12896 (March 29, 1976) (proposed A.I.D. procedures), 41 Fed. Reg. 26913 (June 30, 1976) (final A.I.D. rules), 45 Fed. Reg. 70239 (October 23, 1980) (amendment) with Pub. L. No. 97-113, Sec. 307, 95 Stat. 1533 (International Security and Development Cooperation Act of 1981, adding 22 U.S.C. § 2151p(c)).

contradict. Def. Mem. at 32, n. 23.

Nor do the circumstances of Douglas County v. Babbitt , 48 F.3d 1495 (9th Cir. 1995), and Merrell v. Thomas, 807 F.2d 776 (9th Cir. 1986), compel a contrary conclusion as Plaintiffs argue. Plf. Opp. at 46-47. According to Plaintiffs, those cases, in which the Ninth Circuit found that separate environmental review procedures applied instead of NEPA, are simply different and may be distinguished because the defendant agencies in those cases were charged with environmental protection. Plf. Opp. at 46-47. These factual differences do nothing to lessen the applicability of the basic premise for which Defendants cited them – that the Ninth Circuit has recognized that Congress may craft specific procedures to apply to a particular agency instead of NEPA. Def. Mem. at 32-33. Furthermore, the holdings in both cases were carefully based on the plain language of the statutes at issue as well as their legislative history – not upon the mission of the defendants. See Douglas County, 48 F.3d at 1501-1505; Merrell, 807 F.2d 777-781.[26]/ Finally, while OPIC's core mission is not one of environmental protection, Congress has given it the authority to reject applications for environmental reasons that might have come to light during the environmental review procedures in OPIC's statute, 22 U.S.C. § 2191(n), – procedures that allow it to consider potential environmental impacts as appropriate to a particular application.

Plaintiffs have fundamentally failed to show that Defendants' interpretation of the relevant statutory language is incorrect. Indeed, their central tenet – that OPIC's statute requires only analysis of extraterritorial impacts, staying silent on the issue of potential domestic impacts – is plain wrong. The OPIC procedures specifically cover both situations. Thus, with respect to OPIC, "Congress through debate and compromise forged a specific process for the Secretary to follow," but knowingly decided not to apply NEPA to the agencies' activities. Douglas County, 48 F.3d at 1503.

V. Defendants Have Established That The APA Precludes Judicial Review Of OPIC's Actions

In response to Defendants' argument that OPIC's statute precludes judicial review of its compliance with the terms of the Foreign Assistance Act, including environmental review procedures, see 5 U.S.C. § 701(a)(1) (judicial review is barred under the APA where "statutes preclude judicial

[26]/ In addition, the language Plaintiffs quote from Douglas County comes from the second portion of the court's opinion – after it has already concluded that NEPA does not apply based on the plain language and legislative history of the statute. Compare Plf. Opp. at 46 with Douglas County, 48 F.3d at 1505-1506. Neither decision purports to suggest that Congress *must* apply NEPA to an agency without a core environmental protection mission as Plaintiffs suggest.

review"), Plaintiffs argue that the statute does not contain express language stating that judicial review is precluded and that legislative history undermines Defendant' position.[27]/ Plf. Opp. at 42. However, Plaintiffs' reading of the statute, which in their view only restates the "presumption of compliance" that generally applies to federal decisionmaking when reviewed under the APA, relies on omission of the key word. The statute provides that OPIC's actions are "*conclusively* presumed to be issued in compliance with the requirements of this chapter." 22 U.S.C. § 2197(j). This language states Congress's "conclusive" determination that the action complies with the relevant chapter – a chapter that includes the specific environmental review procedures, discussed further below, to which OPIC is subject.[28]/ Def. Mem. at 29-31. See also Block v. Community Nutrition Institute, 467 U.S. 340, 349 (1984) (presumption favoring judicial review "may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent"). Plaintiffs do not explain, nor could they, how a court could override this "conclusive" determination.

Plaintiffs also claim that the provision applies only to "guaranty contracts" while the environmental review requirements of the Foreign Assistance Act apply to any investment that OPIC insures, guarantees, or finances. Plf. Opp. at 45. However, the legislative history makes clear that all of these terms refer to the same fundamental actions – Congress simply used broad language in one instance relying on an early description of that authority, and more specific language in later enactments. In 1968, the current identical authority called "Investment Insurance" under the Foreign Assistance Act were called "guarantees." 22 U.S.C. § 2181 (1968), amended by 22 U.S.C. § 2181 (1969). See also H. Rpt. No. 91-611, 91st Cong., 1st Sess. 30-31 (1969) (Att. D-3). In 1969 in the context of referring to

[27]/ Plaintiffs also argue that OPIC's statute does not provide an "alternate review procedure" that would replace access to the courts. However, in the case that Plaintiffs cite for this proposition, the Supreme Court notes that courts only look for an alternative review procedure to provide evidence of an intent to replace judicial review in the absence of express language in the statute. Franklin v. Massachusetts, 505 U.S. 788, 820 n. 21 (1992). In this instance, the language is express, establishing a conclusive presumption of compliance.

[28]/ Plaintiffs cite to several statutes as supposed examples of the language required to preclude judicial review. Plf. Opp. at 42-43. The first one, 23 U.S.C. § 134(o), exempts agency actions only from NEPA – not from judicial review. Others impose a broader exemption from judicial review, providing that certain actions will not be reviewable in any court for any reason. 2 U.S.C. § 288i, 45 U.S.C. § 716(d)(3). In contrast, the language at issue in this case provides that agency actions are conclusively presumed to comply with the Foreign Assistance Act specifically, including the Act's environmental review obligations. A third is similar to the OPIC provision, exempting certain actions from judicial review in certain circumstances. 23 U.S.C. § 135(c)(2). The remaining provision cited by Plaintiffs does not reference judicial review. 42 U.S.C. § 1973(b).

"insurance" as "guarantees," Congress enacted Section 2197(j) using the term "guarantees." Additionally in 1969, "guarantees" were separated into "investment insurance" and "investment guarantees" for purposes of subsequent additions to the statute. 22 U.S.C. § 2194 (1969).

With respect to legislative history, Plaintiffs argue that it shows that Congress anticipated the potential for judicial review by recognizing that "a claimant would not be protected if execution of a contract was induced by fraud or misrepresentation for which he was responsible." H. Rep. No. 91-611, 91st Cong., 1st Sess. at 37 (1969). See also Plf. Opp. at 43-44. This means only that a claimant under an OPIC contract may not benefit from the claimant's own wrongdoing. It in no way negates Congress's explicit statement precluding judicial review of OPIC's compliance with the Foreign Assistance Act.[29]/

Finally, this provision bolsters the conclusion, discussed above, that NEPA does not apply to OPIC. See Def. Mem. at 31-40. It would make little sense for Congress to establish a conclusive presumption that an action satisfies the environmental review procedures in the Foreign Assistance Act and then leave the same action open to challenge under NEPA.

VI. Conclusion

For the foregoing reasons, as well as those set forth in Defendants' opening brief, Defendants' motion for summary judgment should be granted and this matter should be dismissed.

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Respectfully submitted,

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[29]/ Also based on the legislative history, Plaintiffs assert that the intended beneficiary of the conclusive presumption of compliance is a contract claimant – not OPIC. Plf. Opp. at 44. This assertion supports Defendants' position. The purpose of the provision is to provide certainty to the private market investors who rely on the validity of OPIC's actions. Def. Mem. at 31.