Ronald A. Shems (*pro hac vice*)
Geoffrey H. Hand (*motion for pro hac vice to be filed)*
SHEMS DUNKIEL KASSEL & SAUNDERS PLLC
91 College Street
Burlington, VT 05401
802 860 1003 (voice)
802 860 1208 (facsimile)

Richard Roos-Collins (Cal. Bar no. 127231)
Julie Gantenbein (Cal. Bar no. 224475)
NATURAL HERITAGE INSTITUTE
2140 Shattuck Avenue, 5th floor
Berkeley, CA 94704
510 644 2900 (voice)
510 644 4428 (facsimile)

Attorneys for Plaintiffs

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. C 02-4106 JSW Date: April 29, 2005 Time: 9 A.M Courtroom 2, 17th Floor

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Cases

Circuit Court Cases

District Court Cases

Statutes

Regulations

Other Authorities

MEMORANDUM

I. INTRODUCTION AND SUMMARY OF ARGUMENT.

OPIC and Ex-Im are federal agencies that provide insurance, loans, and loan guarantees for overseas projects or to U.S. companies that invest in or provide products for overseas projects. These projects include oil and gas fields, pipelines, oil refineries and power plants that result in the direct, indirect, and cumulative emission of billions of tons of greenhouse gases (GHG). Indeed, OPIC and Ex-Im supported projects are directly or indirectly responsible for 8% of the annual world-wide GHG emissions – the equivalent of 31.7% of annual U.S. GHG emissions.[1] Defendants acknowledge that greenhouse gas emissions may contribute to global warming, and that such climate change may have adverse impacts on the domestic environment.[2] This action seeks to compel Defendants to comply with NEPA to analyze the significance of impacts on the domestic environment traceable to their respective actions in support of energy projects that emit greenhouse gases.

OPIC and Ex-Im have taken specific final actions providing the basis for this lawsuit. Plaintiffs sent demand letters requesting that OPIC and Ex-Im analyze in a NEPA document whether their respective actions to fund overseas energy projects contribute to global warming.

---

[1] *See* Declaration of Richard Heede at ¶ 14, n.11 ("Heede Decl.") (Pls.' Exh. 1); *see also* Declaration of Dr. Michael MacCracken at ¶ 41 ("MacCracken Decl.") (Pls.' Exh. 2).

[2] Plaintiffs attach expert affidavits to describe the impacts of global warming on the domestic environment. *See generally* MacCracken Decl. Plaintiffs acknowledge that facts in administrative appeals such as this matter are normally limited to those established by the administrative record. Plaintiffs, however, may provide extra-record materials to establish standing. *See Friends of the Earth v. Laidlaw*, 528 U.S. 167, 181 (2000); *EPIC v. Blackwell*, 2004 U.S. Dist. LEXIS 20717 *128 (N.D. Ca. 2004) ("Ninth Circuit case law indicates that a plaintiff may submit a declaration on standing without it being considered improper extra-record evidence."). Plaintiffs may also submit extra-record evidence to demonstrate that an agency did not consider relevant factors. *See Southwest Ctr. for Biological Diversity v. United States Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996). Plaintiffs' declarations fit within both of these exceptions to the record rule.

In response, each agency issued a finding that its actions, both individually (on a project-by-project basis) and cumulatively (as a portfolio of similar projects), do not have significant impacts. Each agency made this finding in a final report and in its reply to the Plaintiffs' demand letters. Each finding is final: in reliance, OPIC and Ex-Im have not applied NEPA to their respective actions on either a portfolio-wide basis or in individual applications for energy projects. However, neither agency prepared an EA to support its finding of no significant impact, nor did they follow required procedures, including response to public comments and consultation with other federal agencies.

OPIC and Ex-Im's claims that their actions do not give rise to Plaintiffs' standing have no merit. In the face of overwhelming scientific evidence that their actions contribute to global warming – including record evidence that Defendants themselves have compiled – they now claim that "the basic connection between human-induced greenhouse gas emissions and observed climate change itself has not been established." Defs.' Mem. at 15. This extreme position is not supported by any scientific evidence in the record, but by the defense attorneys' selected excerpts from an extra-record report. Based on these selected excerpts (but not the full report's conclusions) they argue that Plaintiffs do not have the requisite injury for standing. Further, Defendants attempt to turn the standing inquiry on its head by arguing that Plaintiffs' standing is defeated by the grossly speculative notion of whether the injury could have occurred without government action. The appropriate focus of this inquiry is on the Defendants' affirmative actions, and Plaintiffs amply demonstrate the reasonable concern that their concrete interests are harmed by Defendants' actions.

Defendants also strain to recast Plaintiffs' claims as an effort to have the Courts micro-manage Defendants' discretionary administration of their programs. This "straw-man" argument

fails because Plaintiffs' claims, as fully supported by the administrative record, challenge Defendants' discrete and mandatory obligation to comply with NEPA. Likewise, OPIC's claim that nebulous legislative history – not express statutory language – somehow immunizes it from suit is without merit. As expressly recognized by Ex-Im's own rule, Defendants must apply NEPA to assess whether their actions may have an impact on the domestic environment.

Moreover, all material facts proffered by defendants are controverted by facts in either the Administrative Record, Plaintiffs' declarations, or both. Defendants' Motion should be denied.

II. BACKGROUND/STATUTORY FRAMEWORK.

NEPA serves as our nation's "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It "declares a broad national commitment to protecting and promoting environmental quality," and ensures such protection though "important 'action-forcing' procedures." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-49 (1989); *see also Anderson v. Evans*, 314 F.3d 1006, 1016 (9th Cir. 2002) ("NEPA is a statute that aims to promote environmentally sensitive governmental decision-making"). These "action-forcing" procedures require all federal agencies to prepare a "detailed statement … on the environmental impact" for every "major federal action [ ] significantly affecting the quality of the human environment." 42 U.S.C. § 4332 (2).[3] All federal agencies must comply with NEPA "unless

[3] This "detailed statement" must include, among other things, a discussion of:

(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

existing law applicable to the agency's operations expressly prohibits or makes compliance impossible." 40 C.F.R. § 1500.6.

In order to implement NEPA's requirements, the Council on Environmental Quality (CEQ) issued regulations in 1978 that are binding on all federal agencies. 40 C.F.R. § 1500-1508. These regulations clearly define what constitutes agency action and the process for determining whether the action or program significantly affects the quality of the human environment. 40 C.F.R. § 1505.1. Under CEQ regulations, "actions" are defined to include: "new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies." 40 C.F.R. § 1508.18.[4]

An agency must prepare an EA to determine whether an action is likely to have "significant" environmental effects. 40 C.F.R. § 1501.4(b) ("[i]n determining whether to prepare an environmental impact statement the Federal agency *shall* ... prepare an environmental assessment.") (emphasis added); 40 C.F.R. § 1508.9; *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 993 (9th Cir. 2004). An Environmental Impact Statement (EIS) must be prepared if the EA concludes that the impact is significant. 40 C.F.R. § 1501.4. If, after the EA, the agency concludes that the action will not have a significant effect on the environment, the agency may issue a Finding of No Significant Impact (FONSI) and may then proceed with the action. 40 C.F.R. § 1508.13. *Klamath-Siskiyou*, 387 F.3d at 993.

An agency must take a "hard look" at the environmental effects of a proposed action in an EA to determine if the action's impacts are significant. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989). As a part of this hard look, the agency must consider all reasonably

---

42 U.S.C. § 4332(2)(C).

[4] "Actions" under NEPA also expressly include the circumstance where the responsible officials fail to act. 40 C.F.R. § 1508.18

foreseeable impacts caused by the proposed action, including, among other things, all foreseeable direct and indirect impacts of the action. 40 C.F.R. §§ 1508.8, 1508.25(c); *City of Davis v. Coleman*, 521 F.2d 661, 679-80 (9th Cir. 1975). Indeed, "NEPA does not recognize any distinction between primary and secondary effects." *Border Power Plant Working Group v. DOE*, 260 F. Supp. 2d 997, 1015 (S.D. Cal. 2003) (citing *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 816-817 (9th Cir. 1987), *rev'd on other grounds*, *Methow Valley Citizens Council*, 490 U.S. 332).

Direct impacts are defined as those impacts "which are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a). Indirect impacts, on the other hand, include those impacts "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." 40 C.F.R. § 1508.8(b).

The agency must also consider the cumulative impacts of past, present, and reasonably foreseeable future actions. *See* 40 C.F.R. § 1508.8; *Hall v. Norton*, 266 F.3d 969, 978 (9th Cir. 2001). Cumulative impacts refer to the "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such action." 40 C.F.R. § 1508.7.

When considering whether the direct, indirect, and cumulative impacts of an action are significant, CEQ regulations require federal agencies to evaluate both the "context" and "intensity" of the impact. The question of "context" focuses on the significance of the action in its particular setting, and "means that the significance of an action must be analyzed in several

contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." 40 C.F.R. § 1508.27 (a). "Intensity," on the other hand addresses the *severity* of the action. With regard to intensity, CEQ regulations require the agency to consider a range of relevant factors including, among others:

> (1) the "degree to which the effects on the quality of the human environment are likely to be highly controversial;"
>
> (2) the "degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks;"
>
> (3) "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts . ..;"

40 C.F.R. §§ 1508.27(b)(4), (5), (7).

In reaching a conclusion regarding the significance of an impact, the agency must "[set] forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action." *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1375 (2d Cir. 1977), cert. denied 434 U.S. 1064 (1978).

CEQ regulations expressly provide that an agency's adoption of a program or approval of a group of concerted actions to implement a specific policy or executive directive is a major federal action.[5] For such systematic and connected, actions CEQ regulations direct each agency to determine, in compliance with NEPA, whether such actions may have significant impact on the human environment, and if so, prepare a programmatic EIS. *See* 40 C.F.R. § 1508.18(b). CEQ regulations likewise direct a programmatic EIS to be prepared where distinct individual

[5] The term "major federal action" includes, among other things, the "[a]doption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive." 40 C.F.R. § 1508.18(b)(3).

projects have similar cumulative impacts (so-called "cumulative actions"). *See* 40 C.F.R. § 1508.25. "Cumulative actions" are defined as actions "which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." 40 C.F.R. § 1508.25.

As the Ninth Circuit has previously explained, the only exception to NEPA's requirement for preparation of an EA or an EIS is where the proposed major federal action falls within a previously identified "categorical exclusion."[6] *The Steamboaters v. FERC*, 759 F.2d 1382, 1393 (9th Cir. 1985) ("The *only exception* to this requirement is where the proposed project 'normally does not require either an environmental impact statement or an environmental assessment. ...'") (quoting 40 C.F.R. § 1501.4(a)(2)) (emphasis added). If the proposed action does not fall within a previously promulgated categorical exception, the agency *must prepare an EA or an EIS. Steamboaters*, 759 F.2d at 1393; *see also* 40 C.F.R. § 1501.4(b) (EA required if action is not categorically excluded). "An agency cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment." *Alaska Ctr. for the Environment v. United States Forest Service*, 189 F.3d 851, 859 (9th Cir. 1999) (quoting *Steamboaters*, 759 F.2d at 1393). NEPA demands preparation of an EA for this determination.

[6] An agency may propose categorical exclusions for certain actions that do not generally have a significant affect on the human environment. 40 C.F.R. § 1508.4. "Categorical exclusion" means: "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." *Id.* CEQ regulations require an agency to promulgate rules identifying categorical exclusions. *See* 40 C.F.R § 1508.4. Neither OPIC nor Ex-Im have issued a categorical exclusion for the type of projects at issue here.

III. PLAINTIFFS HAVE STANDING TO SUE.

To establish Article III standing, Plaintiffs must show: (1) injury-in-fact, (2) causation, and (3) redressability. *Friends of the Earth, Inc. v. Laidlaw,* 528 U.S. 167, 180-81 (2000); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). In a NEPA case, the causation and redressability standards are relaxed. *Defenders of Wildlife*, 504 U.S. at 573, n.7 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."); *Public Citizen v. DOT*, 316 F.3d 1002, 1006 (9th Cir. 2003) *rev'd on other grounds*, 541 U.S. 752 (2004); *Comm. To Save the Rio Hondo v. Lucerno*, 102 F.3d 445, 452 (10th Cir. 1996) (same).

A court need only determine that one of the several plaintiffs has standing for this matter to proceed. *Watt v. Energy Action Educ. Found*., 454 U.S. 151, 160 (1981) ("Because we find California [one of three plaintiffs] has standing, we do not consider the standing of the other plaintiffs.") (citing *Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252, 264, and n. 9 (1977)); *Public Citizen*, 316 F.3d at 1014-15 ("We need only find that one petitioner has standing to allow a case to proceed.").

An organization has standing to sue on behalf of its members when a member would have standing to sue in his or her own right, the interests at issue are germane to the organization's purpose, and participation of the individual is not necessary to the claim or requested relief. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Public Citizen*, 316 F.3d at 1019. As is demonstrated by the discussion below and attached declarations, the members represented by the organizational Plaintiffs all have standing. The issues are germane to the organizations' purposes – the organizations are all environmental groups dedicated to such issues. *See generally* Dean Declaration (Pls.' Exh. 15); Passacantando

Declaration (Pls.' Exh. 16). And, the individual participation of the members is not necessary to the claims or requested relief.

Additionally, Courts have created a prudential standing requirement that a plaintiff's interests fall within the "zone of interests" protected by the statute on which the claim is based. *Bennett v. Spear,* 520 U.S. 154, 162 (1997). NEPA, the statute at issue here, protects environmental interests – the very interests in which the Plaintiffs are injured.

Defendants allege that their actions, funding and insuring overseas energy projects that emit greenhouse gases, have not been proven to harm the Plaintiffs' interests in the domestic environment, and that Plaintiffs therefore do not have standing to pursue this Complaint. They fundamentally misconstrue the Complaint and, as a result, the requirements for standing. Plaintiffs do not seek a remedy to limit emissions associated with Defendants' actions, or to halt approval of energy project applications. Plaintiffs acknowledge that, as with most environmental impacts, the impacts of the greenhouse gas emissions traceable to Defendants' actions are not yet known with absolute precision. However, the administrative record, as supplemented by Plaintiffs' declarations, reasonably demonstrates that the physical impacts of Defendants' actions harm the Plaintiffs' concrete interests. That showing is adequate for standing to bring the Complaint, which seeks compliance with NEPA procedures for the express purpose of assuring that Defendants thereafter make informed decisions about whether their respective actions cause (or, through a reasonably foreseeable causal linkage, contribute to) adverse impacts on the domestic environment, and if so, whether the impacts are significant.[7]

[7] At the standing stage, Plaintiffs need not *prove* that Defendants' actions have or will cause a particular environmental effect.

> To require that plaintiffs prove particular environmental effects for standing purposes is overmuch and "would in essence be requiring that the plaintiff

A. Plaintiffs Have Alleged Actual or Imminent Injury to Their Concrete and Particularized Interests

"To satisfy the injury in fact requirement, a plaintiff asserting a procedural injury must show that 'the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.'" *Public Citizen*, 316 F.3d at 1015 (quoting *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001)); *Defenders of Wildlife*, 504 U.S. at 573 n.8. In this analysis, a plaintiff need not present evidence of actual environmental harm. *Laidlaw*, 528 U.S. at 182; *Ocean Advocates v. United States Army Corps of Eng'rs*, 361 F.3d 1108, 1120 (9th Cir. 2004) ("'To require actual evidence of environmental harm … misunderstands the nature of environmental harm' and would unduly limit the enforcement of statutory environmental protections.") (quoting *Ecological Rights Fund. v. Pacific Lumber Co.,* 230 F.3d 1141, 1151 (9th Cir. 2000)); *Citizens for Better Forestry v. USDA*, 341 F.3d 961, 972 (9th Cir. 2003) ("Were we to agree … that a NEPA plaintiff's standing depends on 'proof' that the challenged federal project will have particular environmental effects, we would in essence be requiring that the plaintiff conduct the same environmental investigation that he seeks in his suit to compel the agency to

---

> conduct the same environmental investigation that he seeks in his suit to compel the agency to undertake." *City of Davis*, 521 F.2d at 670-671; *see also Ecological Rights Found. v. Pac. Lumber Co*., 230 F.3d 1141, 1151 (9th Cir. 2000) ("requiring the plaintiff to show actual environmental harm as a condition for standing confuses the jurisdictional inquiry . . . with the merits inquiry").

Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1112 (9th Cir. 2002); Rather Plaintiffs need only demonstrate a reasonable fear that such actions may result in injury to the Plaintiffs' recreational, aesthetic, and economic interests. *Laidlaw*, 528 U.S. at 183 ("Here, injury in fact was adequately documented by the affidavits and testimony of FOE members asserting that Laidlaw's pollutant discharges, and the affiants' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests."); *see also Friends of the Earth, Inc. v. Gaston Copper Recycling Corp*., 204 F.3d 149, 157 (4th Cir. 2000) ("Further, CLEAN has presented ample evidence that [plaintiff's] fears are reasonable and not based on mere conjecture."); To require more inappropriately confuses standing with this matter's merits. *Kootenai Tribe*, 313 F.3d at 1112.

undertake.") (citations omitted). Instead, a plaintiff need only demonstrate (1) the agency violated its procedural obligations; (2) these procedural obligations were designed to protect plaintiff's concrete interests; and (3) it is reasonably probable that the challenged action will threaten plaintiffs' concrete interests. *See Citizens for Better Forestry*, 341 F.3d at 972; *see also Rio Hondo,* 102 F.3d at 451-52.

1. Defendants Have Violated NEPA's Procedural Obligations

Plaintiffs allege that each Defendant violated NEPA by failing to prepare an EA to determine whether its actions financing and insuring overseas energy projects, either project-by-project or as a portfolio, may have significant impacts on the domestic environment. 2d Amend. Complaint at Count 1. Defendants acknowledge that climate change is occurring, and do not dispute that their actions funding and insuring energy projects *may* contribute to climate change to some extent. *Ex-Im Bank's Role in Greenhouse Gas Emissions and Climate Change* at 29-30 (Ex-Im AR at Tab 1) (hereinafter "*Ex-Im Climate Change Report.*"); *Climate Change: Assessing Our Actions* at 16-20, 49 (OPIC AR at 5) (hereinafter "*Assessing our Actions*").[8] However, they assert that NEPA compliance is not required because each has found that the impacts of its actions are insignificant. *Ex-Im Climate Change Report* at 33; *Letter from Mildred O. Caller to Daphne Wysham, February 8, 2000* (OPIC AR 004368-70) (hereinafter "*OPIC's Response to Plaintiffs' Demand Letter*"); *Letter from James A. Mahoney to Jon Sohn & Brian Dunkiel*, June

[8] The full *Climate Change: Assessing our Actions* report is oddly absent from OPIC's administrative record. *See* OPIC AR 05 (cover page only). For the Court's convenience, the full report has been reproduced as Plaintiffs' Exh. 3. Plaintiffs will ask Defendants to supplement the record.

16, 2000 (hereinafter "*Ex-Im's Response to Plaintiffs' Demand Letter*").[9] As explained below, OPIC and Ex-Im each violates NEPA by not making that finding in a form (EA) and through the comment and consultation procedures required by NEPA. *See* 40 C.F.R. § 1501.4(b) ("[i]n determining whether to prepare an environmental impact statement the Federal agency *shall* ... prepare an environmental assessment.") (emphasis added).

OPIC and Ex-Im's violation deprived Plaintiffs of the opportunity to participate in the EA and FONSI or EIS process.

> Standing may properly hinge on this type of injury. We have determined that an environmental plaintiff was "surely … harmed [when agency action] precluded the kind of public comment and participation NEPA requires in the EIS process," and that this type of "procedural" injury is tied to a substantive "harm to the environment" "'the harm consists of added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with public comment) of the likely effects of their decision on the environment. NEPA's object is to minimize that risk, the risk of uninformed choice. …'" *West v. Secretary of the DOT*, 206 F.3d 920, 930 n.14 (9th Cir. 2000) (quoting *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989)). The same can be said for failure to allow any public input in the EA/FONSI process, which is, after all, the threshold step for determining whether to prepare an EIS in the first place.

Citizens for Better Forestry, 341 F.3d at 971.

2. Defendants' Procedural Violations Threaten Injury to Plaintiffs' Concrete Interests

NEPA's procedural obligations are designed to protect the very aesthetic, recreational and economic interests that Plaintiffs allege are injured by the Defendants' uninformed decision making. *See id.* at 971; *Rio Hondo,* 102 F.3d at 451-52. In the context of NEPA the "concrete interest" test focuses on whether there is "a 'geographic nexus' between the individual asserting the claim and the location suffering an environmental impact." *Public Citizen*, 316 F.3d at 1015

[9] Ex-Im has not included its response to Plaintiffs' demand letter in its administrative record. Plaintiffs have reproduced a copy of this response for the Court's convenience as Plaintiffs' Exh. 4

(quoting *Douglas County v. Babbitt*, 48 F.3d 1495, 1500 n.5 (9th Cir. 1995)). Thus, "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Laidlaw*, 528 U.S. at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). Plaintiffs' declarations satisfy these criteria. They demonstrate that the Defendants' actions result in greenhouse gas emissions which contribute, to some extent, to the adverse impacts of global warming on Plaintiffs' interests.

Members of the Plaintiff organizations use and enjoy areas that are, or will, be affected by climate change. *See* Dustan Decl. at ¶¶ 4, 10. 12 (Pls.' Exh. 5); Duchin Decl. at ¶¶ 5, 6, 8, 9 (Pls.' Exh. 6); Pam Williford Decl. at ¶¶ 2, 4 (Pls.' Exh. 7); Jesse Williford Decl. at ¶¶ 2, 4 (Pls.' Exh. 8). Plaintiffs have alleged that these areas are, or will, be affected by climate change, and have provided specific expert testimony to support these allegations. *See* MacCracken Decl. at ¶¶ 27-39 (Pls.' Exh. 2). The members' use and enjoyment of these areas will be diminished by the impacts of climate change. *See* Dustan Decl. at ¶ 10; Duchin Decl. at ¶¶ 5, 6, 9; Pam Williford Decl. at ¶ 4; Jesse Decl. at ¶ 4. The professional interests of members of the Plaintiff organizations will also be harmed by climate change. *See* Dustan Decl. at ¶¶ 4, 9 ("Climate change is currently harming and will continue to harm me because its effects contribute to diminished opportunities for fundamental biological research and my ability to pursue my profession.").

Members of the Plaintiff organizations also own property in areas that will be affected by climate change. *See* Pam Williford Decl. at ¶ 2; Jesse Williford Decl. at ¶ 2; Dustan Decl. at ¶ 12; Berndt Decl. at ¶¶ 1,6 (Pls.' Exh. 9). Plaintiffs have alleged that these areas are, or will, be affected by climate change, and have provided specific expert testimony to support these

allegations. *See* MacCracken Decl. at ¶¶ 27-39. The effects of climate change will negatively impact these members' economic interests. *See* Pam Williford Decl. at ¶ 3; Jesse Williford Decl. at ¶ 3; Berndt Decl. at ¶¶ 5, 8; Dustan Decl. at ¶ 13. Each of the member Plaintiffs expresses a belief that the Defendants' actions increase the risk that their concrete interests will be harmed. *See* Pam Williford Decl. at ¶ 6; Jesse Williford Decl. at ¶ 6; Berndt Decl. at ¶ 10; Dustan Decl. at ¶ 14; Duchin Decl. at ¶ 10.

The municipal Plaintiffs likewise satisfy the criteria for concrete interest. A city may establish standing to sue the federal government "when a harm *to the city itself* has been alleged." *City of Olmsted Falls v. FAA*, 292 F.3d 261, 268 (D.C. Cir. 2002). The municipal Plaintiffs own property in areas that are being and/or will be adversely affected by climate change. *See* Andre Decl. at ¶¶ 7-14 (Pls.' Exh. 10); Johnson Decl. at ¶¶ 11,12, 18, 19 (Pls.' Exh. 11); Hayes Decl. at ¶¶ 5, 10, 11, 13, 15, 16 (Pls.' Exh. 12). The municipalities also allege that critical infrastructure components are, or will be, affected by climate change, limiting their ability to provide municipal services, such as water and sewer service, and requiring up-grades to existing infrastructure. *See* Johnson Decl. at ¶¶ 14, 15, 21, 24, 25; Andre Decl. at ¶ 11; Hayes Decl. at ¶¶ 5, 10, 11, 13, 15, 16; Ellinghouse Decl. at ¶ 4 (Pls.' Exh. 13). One municipality further alleges that the impacts of global warming will dramatically increase air pollution in the city, making it more difficult for the city to comply with the Clean Air Act. *See* Hayes Decl. at ¶ 17; *see also City of Los Angeles v. National Highway Traffic Safety Admin.,* 912 F.2d 478, 484-85 (D.C. Cir. 1990), *overruled in part; Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996) (City has standing to sue federal government where federal vehicle air emission standards would adversely affect air quality in the city, making it more difficult for the city to comply with the CAA); *Churchill County v. Babbitt*, 150 F.3d 1072, 1079 (9th Cir. 1998) (finding standing

where action "will cause environmental harm to … City lands, including fire hazards, airborne particles, erosion, unknown changes to the underground water supply system, and reduced quality of local drinking water.").

Plaintiffs provide expert declarations demonstrating that these areas are and/or will be affected by climate change. MacCracken Decl. at ¶¶ 27-39. These impacts will adversely affect the municipalities' economic interests as well as the health and safety of the cities' residents. *See* Johnson Decl. at ¶¶ 10-20, 24-26; Ellinghouse Decl. at ¶¶ 3, 4, 7, 8; Andre Decl. at ¶¶ 7-9, 11-12, 14; Hayes Decl. at ¶¶ 10, 11, 13, 15, 16. Declarations submitted on behalf of the municipal Plaintiffs express the reasonable belief that the Defendants' actions increase, to some extent, the risk that each city's interests will be harmed by global warming. *See* Johnson Decl. at ¶ 28; Ellinghouse Decl. at ¶ 8, 9; Andre Decl. at ¶ 16; Hayes Decl. at ¶ 4, 18, 19.

3. There is a Reasonable Probability that Defendants' Uninformed Decisionmaking Will Increase the Risk of Harm to Plaintiffs' Interests.

"Environmental plaintiffs 'seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs, … can establish standing 'without meeting all the normal standards for … immediacy.'" *Citizens for Better Forestry*, 341 F.3d at 972 (quoting *Hall*, 266 F.3d at 975) (internal citations omitted); *see also Defenders of Wildlife*, 504 U.S. at 572 & n.7. Thus Plaintiffs need only demonstrate a reasonable probability that Defendants' actions threaten to increase the risk of injury to their concrete interests. *See Citizens for Better Forestry*, 341 F.3d at 972; *Rio Hondo,* 102 F.3d at 451-52. The question of reasonable probability deals with the likelihood of harm, *not with its cause*. *See Citizens for Better*

Forestry, 341 F.3d at 973, n.8 ("It is common to confuse the issue of the *likelihood* of harm with its *cause*.").[10]

The attached declarations amply demonstrate the likelihood of harm to Plaintiffs' concrete interests as a result of climate change, and likewise demonstrate that the Defendants' actions may contribute to this injury. Indeed, OPIC and Ex-Im concede that global warming is occurring and concede that their actions contribute to global warming, thus increasing risk of harm to Plaintiffs' interests by some degree. *See Ex-Im Climate Change Report* at 29-30, 33; *Assessing Our Actions* at 16-20, 49.

Dr. MacCracken's declaration further documents the scientific consensus that climate change is occurring, anthropomorphic GHG emissions are the dominant factor in this change, climate change will have impacts in the U.S., and these impacts will affect the areas Plaintiffs use and enjoy. Dr. MacCracken concludes, "there can be no doubt that the human-induced changes in atmospheric composition are intensifying the natural greenhouse effect and causing global warming that is larger and much longer lasting than could be induced by natural oscillations." MacCracken Decl. at ¶ 15. Further, "natural influences alone cannot explain the very sharp warming of the late 20th century." *Id.* at 17. "The IPCC has looked particularly closely at climate change during the 20th century, and found that the increase in greenhouse gas concentrations is very likely [90-99% chance] the dominant cause of the increase in average global surface temperatures of approximately 0.6ºC during this period." *Id.* at ¶ 16.

[10] The causation question, on the other hand "concerns only whether plaintiffs injury is dependent upon the agency's policy, or is instead the result of independent incentives governing the third parties' decisionmaking process.'" *Citizens for Better Forestry*, 341 F.3d at 973, n.8 (quoting *Idaho Conservation League v. Mumma*, 956 F.2d at 1517-18) (internal quotations and citations omitted).

The "location of emission is not important in considering the potential climatic impacts," and "emissions of CO_2 anywhere on Earth affect the climate everywhere on Earth, causing consequences for everyone. … In that respect, emissions outside of the U.S. will contribute to global warming impacts in the U.S." *Id.* at ¶ 22. In addition, "[i]t is not only the amount of warming, but also its very rapid rate that pose unprecedented challenges to the extant environment and the society and communities that have developed in the world. The need to limit emissions is thus to both reduce the amount of change and to slow the onset of the change, creating a greater likelihood that adaptation is possible and will cost less." *Id.* at ¶ 26.

Dr. MacCracken details the associated U.S. impacts that can be expected as a result of this warming. These impacts include, among others: significant sea level rise; increased ocean temperatures and loss of arctic sea ice; more frequent and intense extreme weather events; an increase in local flooding and coastal inundation; increased droughts and wild fires; reduction in snowpack; decreased water and air quality; increased pest and disease outbreaks; severe threats to coral habitats; and changes in the composition of forests. *See id*. at ¶¶ 27-38. In Dr. MacCracken's expert opinion, these impacts will affect the specific areas used by Plaintiffs. *See id.* at ¶ 27-39.

OPIC and Ex-Im both acknowledge that their actions contribute to GHG emissions and global climate change. Based only on a limited analysis of the direct emissions from power-plants, the agencies themselves estimate that they currently contribute approximately 1.0% of total global CO2 emissions. *See Assessing Our Actions* at 19 (noting that 1999 OPIC emissions equal 0.24% of global emissions); *Ex-Im Climate Change Report* at 29 (noting that 2001 Ex-Im emissions equal 0.80% of global emissions). They also acknowledge that by 2012-15 this amount will likely rise to 2.0% of total global CO2 emissions. *See Assessing Our Actions* at 19

(noting that OPIC emissions will rise to 0.43% of global emissions in 2015); *Ex-Im Climate Change Report* at 29 (noting that 2001 Ex-Im emissions will rise to 1.4% of global emissions by 2012).[11] This level of emissions increases global temperatures. *See Ex-Im Climate Change Report* at 29. Therefore, even ignoring the indirect contribution of CO2 from OPIC/Ex-Im projects, the agencies' own estimates of their actions demonstrate an increased risk of harm to Plaintiffs' interests.

Plaintiffs are not required to "conduct the same environmental investigation that [they seek] to compel the agency to undertake" in order to establish standing. *Citizens for Better Forestry*, 341 F.3d at 972. However, in order to provide the Court a more complete understanding of direct, indirect and cumulative emissions associated with OPIC and Ex-Im energy projects, Plaintiffs' experts have undertaken an analysis of GHG emissions from projects financed and insured by the agencies. *See generally* Heede Decl. and accompanying spreadsheets (Pls.' Exh. 1). This accounting of direct, indirect and cumulative CO2 emissions from OPIC/Ex-Im projects indicates an annual combined contribution of 507 million tonnes of carbon (MtC), an amount equal to almost 8% of annual global CO2 emissions in 2002. Heede Decl. at ¶ 13, 14, n.10. Over their full life-cycle, OPIC and Ex-Im projects will cumulatively contribute 14,000 MtC (or 14 GtC) – an amount equivalent to *eight times* total U.S. Carbon

[11] Defendants attempt to minimize the magnitude of these numbers by comparing them to the "natural flux of carbon in the atmosphere." Defs.' Mem. at 19. Climate change experts explain that this comparison has no scientific basis, and is, quite simply, illogical. "Because of how the carbon cycle works, it is the ratio of a given contribution to the total human-induced emissions of carbon that is of importance, not the ratio to the gross emissions from the oceans and the biosphere that are naturally balanced by uptake by these two carbon reservoirs." MacCracken Decl. at ¶ 21.

emissions in 2003, and more than twice the amount of *all global carbon emissions in 2002*.[12] *See* Heede Decl. at ¶ 14; MacCracken Decl. at ¶ 41. Emissions of this magnitude clearly provide a reasonable probability of increased risk to Plaintiffs' interests. *See* MacCracken Decl. at ¶ 41("[e]mission of 14,000 [MtC] is a large amount and will lead to larger changes in the climate and a greater risk that various climatic thresholds will be exceeded."); ¶ 45 ("eliminating or greatly reducing the substantial amount of carbon emissions associated with OPIC/EX-IM projects would help ensure that critical climatic thresholds are not exceeded and would be an important component of efforts to significantly reduce and delay the projected adverse consequences of global warming resulting from present and future emissions.").

4. The Government's Argument that Plaintiffs Cannot Establish Injury in Fact is Without Merit

In the face of overwhelming scientific evidence, and the Defendants' admission that climate change is occurring *and* that their actions contribute to such change, the Government's attorneys now make the remarkable *post hoc* argument that climate change is speculative, and that Plaintiffs' injuries are not sufficiently "imminent," or are too conjectural to confer standing. Defs.' Mem. at 11-14. These claims are entirely without merit.

It should first be noted that the Defendants cannot rely on extra-record evidence or rationale to defend their final actions. *See* Plaintiffs' Motion to Strike Extra-Record Evidence. In any event, the Defendants' claim that "the basic connection between human-induced greenhouse gas emissions and observed climate change has not been established" is directly rebutted by their own administrative record. Defs.' Mem. at 15. OPIC, for example, acknowledges recent studies which conclude "that human activity is the dominant force behind

[12] This estimate assumes *no* growth in either agencies' current energy portfolio. *See* Heede Decl. at ¶ 14.

the sharp global warming trend seen in the 20th century," and notes that "there is a strong and growing scientific consensus that these steady additions of GHGs have tipped a delicate balance and begun to impact our climate and may be the dominant force driving recent warming trends." *Assessing Our Actions* at 7, 28; *see also Ex-Im Climate Change Report* at 4 ("the information presented … leads one to conclude that GHG concentrations have indeed risen and that there is a reasonable likelihood that the increased concentrations of these gases will result in increased average global temperatures during the coming decades."). This scientific consensus is likewise documented by Plaintiffs' expert testimony. *See generally* MacCracken Decl.[13]

Further, the Government's claim fails to address the correct inquiry. Standing cannot be defeated by Defendants' speculation in a brief on whether climate change is caused by natural variations. Rather, Plaintiffs demonstrate standing upon showing that it is reasonably probable that climate change threatens their concrete interests. *Laidlaw*, 528 U.S. at 184 (plaintiffs' "reasonable" concern is enough for injury in fact). Plaintiffs amply meet this burden.

The Government also suggests that Plaintiffs' injuries are not sufficiently concrete or particularized to support standing because plaintiffs have not identified injuries that threaten any

[13] The Government does not, and cannot, offer any record evidence to refute the scientific consensus that anthropomorphic GHG emissions are the dominant force behind global warming. Instead, the Government's attorneys offer their own non-expert opinion of "uncertainty," citing selected portions of an extra-record report for support of their misplaced suggestion. Defs.' Mem. at 12 (citing National Academy of Science/National Research Council Report) (Defs.' Att. 4a). Contrary to the Government's suggestion, the NAS study *does not* conclude that the connection between human-induced GHG emissions and climate change is uncertain. In fact, the very first sentence of the report *emphasizes* the connection and acknowledges that effects are *already occurring*: "[g]reenhouse gases are accumulating in the Earth's atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise. Temperatures are, in fact, rising." *See* NAS Report at p. 1 (Defs.' Att 4a.). The report goes on to specifically note that current policy decisions --such as those within the scope of OPIC and Ex-Im's authority -- *will* affect the extent of damage caused by global warming: "national policy decisions made now and in the longer-term future will influence the extent of any damage suffered by vulnerable human populations and ecosystems …" *Id.*

particular region of the U.S., Defs.' Mem. at 11, and because there is "no evidence that the specific impacts are likely to occur." Defs.' Mem. at 13. Defendants' argument that Plaintiffs must provide specific proof of actual environmental harm finds no support in Ninth Circuit case law. *See Ocean Advocates,* 361 F.3d at 1120 ("To require actual evidence of environmental harm … misunderstands the nature of environmental harm' and would unduly limit the enforcement of statutory environmental protections.") (internal quotations and citations omitted). Furthermore, contrary to the Government's implication, Plaintiffs have specifically alleged particularized harm, and have responded with expert evidence demonstrating the reasonable probability of increased risk of harm. *See* MacCracken Decl. at ¶¶ 27-39; 40-45. Plaintiffs need not "conduct the same environmental investigation that [they seek] to compel the agency to undertake" simply to establish standing. *Citizens for Better Forestry*, 341 F.3d at 972; *see also Rio Hondo*, 102 F.3d at 451 ("[NEPA] was not intended to require the plaintiff to show with certainty, or even with a substantial probability, the results of agency action; those examinations are left to an environmental impact statement.").

Defendants' also dispute Plaintiffs' standing by asserting that their injuries are "too remote" or too conjectural to confer standing. Defendants, however, overlook several important points. First, because Plaintiffs claim a procedural injury, they can "establish standing without meeting all the normal standards for … immediacy." *Id.* at 972 (internal quotations and citations omitted). Furthermore, in this case Plaintiffs have not only alleged that the impacts of global warming will occur in the future, but also that such impacts are *already* affecting Plaintiffs' interests. *See, e.g.,* Ellinghouse Decl. at ¶ ¶ 4, 8; Hayes Decl. at ¶ 18; Dustan Decl. at ¶¶ 10, 12; Duchin Decl. at ¶¶ 4, 5; Berndt Decl. at 5; MacCracken Decl. at ¶¶ 24, 32, 38, 45. Thus Plaintiffs' injuries are "actual" and not "remote."

Finally, the alleged impacts are not conjectural. Defs.' Mem. at 14. Defendants themselves expressly acknowledge that the very impacts alleged to injure Plaintiffs are likely to result from global warming. *See, e.g., Ex-Im Climate Change Report* at 3 ("The direct regional environmental impact of such a climate change could include changes in temperature and precipitations levels, with corresponding changes to the properties and moisture content of soil. The global impact could include changes in weather patterns and rises in sea level. The changes in turn can result in major consequences to ecological systems, human health and socioeconomic sectors such as agriculture, coastal resources, forests, energy and transportation."). The fact that government studies and statements confirm the Plaintiffs' allegations weighs in favor of finding standing. *See Central Delta Water Agency v. United States*, 306 F.3d 938, 947-48 (9th Cir. 2002) (concluding that plaintiffs successfully alleged a credible threat of future injury based, in part, on the fact that the government's own studies confirmed plaintiff's allegations); *see also Baur v. Veneman*, 352 F.3d 625, 631 (2d Cir. 2003) (same).

B. Increased Harm to Plaintiffs' Interests Is Fairly Traceable to Defendants Uninformed Decisionmaking

"'Once a plaintiff has established an injury in fact under NEPA, the causation and redressability requirements are relaxed.'" *Public Citizen*, 316 F.3d at 1016 (quoting *Cantrell*, 241 F.3d at 682). Unlike an ordinary causation analysis, a petitioner asserting a procedural injury "need only show its increased risk is fairly traceable to the agency's failure to comply with [NEPA]." *Rio Hondo*, 102 F.3d at 451; *see also Public Citizen*, 316 F.3d at 1016.

> traceability 'does not mean that plaintiffs must show to a scientific certainty that defendant's [emissions] . . . caused the precise harm suffered by the plaintiffs.' *Natural Resources Defense Council, Inc. v. Watkins,* 954 F.2d 974, 980 n.7 (4th Cir. 1992). . . . If scientific certainty were the standard, then plaintiffs would be required to supply costly, strict proof of causation to meet a threshold jurisdictional requirement -- even where, as here, the asserted cause of action does not itself require such proof. Thus, the "fairly traceable" standard is "'not

> equivalent to a requirement of tort causation.'" Id. . . . Rather than pinpointing the origins of particular molecules, a plaintiff "must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged" in the specific geographic area of concern. *Watkins,* 954 F.2d at 980 (internal quotation marks omitted). In this way a plaintiff demonstrates that a particular defendant's discharge has affected or has the potential to affect his interests. *See* 954 F.2d at 980-81.

Gaston Copper, 204 F.3d at 161 (internal quotations and citations omitted).

Further, "[u]nder the National Environmental Policy Act, an injury results not from the agency's decision, but from the agency's *uninformed* decisionmaking. The increased risk of adverse environmental consequences is due to the agency's 'failure substantively to consider the environmental ramifications of its actions in accordance with NEPA.'" *Rio Hondo*, 102 F.3d at 452 (emphasis in original) (quoting *Catron County v. United States Forest Service*, 75 F.3d 1429, 1433 (10th Cir. 1996)). In this case, Plaintiffs' increased risk of injury is traceable to OPIC and Ex-Im's failure to consider the environmental impact of CO_2 emissions from projects they finance and insure.

The Government argues the chain of causation in this case is too attenuated to confer standing. In particular, the Government claims that the Plaintiff cannot establish causation because most projects would go forward without OPIC/Ex-Im's involvement, and that their contribution to global GHG emissions is minimal.[14] Defs.' Mem. at 14-21. This argument stands the causation analysis on its head, and assumes as a predicate the very conclusion that NEPA analysis is designed to answer – i.e., whether the program's impacts are significant.

[14] Defendants further suggest that causation cannot be established because "the basic connection between human-induced greenhouse gas emissions and observed climate change itself has not be established." Defs.' Mem. at 15. This argument is addressed *supra* as part of Plaintiffs' injury in fact analysis.

As an initial matter, the correct inquiry is the impact of Government action – not speculation of whether the impact would occur in the absence of government action. And, as OPIC and Ex-Im both acknowledge, projects they finance emit greenhouse gases. *See Assessing Our Actions* at 16-20; *Ex-Im Climate Change Report* at 29-30.

Furthermore, the agencies' very purpose contradicts the notion that these projects would have gone forward even without the agencies' assistance.[15] First, OPIC and Ex-Im invariably describe themselves as lenders, financers, and insurers of "last resort." *See, e.g., 2000 Ex-Im Annual Report* at 2 (Ex-Im AR at Tab 4) ("By targeting financing gaps and officially supported competition, Ex-Im Bank supports export sales that *otherwise would not have gone forward.")* (emphasis added); *2001 Ex-Im Bank Annual Report* at 1 (Ex-Im AR at Tab 5) ("Ex-Im Bank supports U.S. exports sales that otherwise would not go forward."). Consequently, the agencies purportedly only become involved in transactions where private markets are unable or unwilling to bear the risks associated with each transaction. OPIC's *2005 Congressional Budget Request* emphasizes OPIC's directive to not compete with private finance and insurance markets, and specifically identifies the following management goal for OPIC projects: "[e]valuate new projects to ensure that they would not have gone forward *but for* OPIC's involvement."[16] *OPIC 2005 Congressional Budget Request* at 10 (Pls.' Exh. 14).

---

[15] As explained in Plaintiffs' Motion to Strike, these *post hoc* allegations should be struck.

[16] Emphasizing the convenient inconsistency in the Government's position on this point, OPIC has also previously argued to Congress that is not possible to determine whether a particular investment would or would not be made without OPIC support. *See* H. Rep. No. 97-83, 97th Congress, 1st Sess. at 25 (1981) ("The Committee added an amendment … which would require OPIC when deciding whether or not to support investments in developing countries to consider whether the investment is likely to be made without OPIC support. The amendment assumes that OPIC ought to limit its support to those investments in developing countries which would probably not be made without benefit of OPIC support. OPIC opposed the amendment on

The Defendants' assertion that the impacts are too attenuated also has no support in this record. To the contrary, OPIC and Ex-Im expressly recognize that their financing of a fossil-fuel-fired power plant results in GHG emissions. *See Assessing Our Actions* at 16-20; *Ex-Im Climate Change Report* at 29-30. Ex-Im also recognizes that its financing of oil and gas extraction projects leads to GHG emissions. *Ex-Im Climate Change Report* at 30, Appendix B; *2000 Ex-Im Bank Annual Report* at 17 (Ex-Im AR at Tab 4) ("petroleum sector projects supported by Ex-Im Bank represent a second significant source of carbon dioxide."). Indeed, the entire purpose of financing oil field development is to bring oil to market for combustion. Combustion is not only "reasonably foreseeable," *see* 40 C.F.R. § 1508.8(b), but intended. Thus, it is not too attenuated.

As a result, this case is unlike *Florida Audubon,* and other cases cited by the Defendant, in which the court has found the chain of causation too attenuated to establish standing. First, unlike *Florida Audubon,* causation in this case does not turn on speculation over the independent behavior of third parties in response to a shift in tax policy.[17] *Florida Audubon Soc'y v. Bentsen*,

---

the grounds that it is impossible to determine whether a particular investment will or will not be made and why.").

[17] The Court *Florida Audubon*, outlined the extremely attenuated nature of plaintiffs argument in the following paragraph:

> For the tax credit to pose a substantial probability of a demonstrably increased risk of particularized environmental damage, the credit must prompt third-party fuel producers to undertake the acquisition of production facilities for ETBE and begin to produce ETBE in such quantities as to increase the demand for ethanol from which the ETBE is derived. This increased demand for ethanol must then not simply displace existing markets for currently-produced ethanol, but in fact increase demand for the agricultural products from which ethanol is made. Again, this demand must not be filled by existing corn or sugar supplies, but instead spur new production of these products by farmers, who must be shown to have increased production at least to some measurable extent because of the tax credit, rather than any one of other innumerable farming considerations, including

94 F.3d 658, 669-670 (D.C. Cir. 1996). In this case, the third party action – combustion of fossil fuel – is the intended purpose of these projects. *Florida Audubon* is therefore inapplicable. Second, the court in *Florida Audubon* rejected the "protracted chain of causation" in that case solely because "plaintiffs have put forward no parallel testimony supporting each step of their attenuated causal path." *Id.* at 671. Here Petitioners' have submitted just such testimony, detailing each step in the short, logical chain connecting the Defendants' actions to the increased risk to Plaintiffs' interests. *See generally* MacCracken and Heede Decls. And, unlike *Florida Audubon*, Defendants here *do not dispute* the essential elements of causation in this case – that their actions result in GHG emissions, that these GHG emissions contribute to climate change, and that climate change will have the type of impacts alleged by Plaintiffs. *See, e.g., Ex-Im Climate Change Report* at 3, 29-30, 33-34. Given Defendants' admissions, the facts before this Court amply support a finding that Plaintiffs' injuries can be "fairly traced" to Defendants' uninformed decision-making. *Rio Hondo*, 102 F.3d at 451; *Gaston Copper*, 204 F.3d at 161.

C. Plaintiffs Satisfy Redressability Requirements

With respect to redressability, the Plaintiffs need not demonstrate that the agencies' consideration of their direct, indirect, and cumulative GHG emissions would actually change the

---

> weather, the availability of credit, and existing subsidy programs. Moreover, any agricultural pollution from this increased production must be demonstrably more damaging than the pollution formerly caused by prior agricultural production or other prior use of land now cultivated because of the ETBE tax credit. Finally, the farmers who have increased production (and pollution) as a result of the tax credit must include farmers in the regions visited by appellants, and they must use techniques or chemicals in such fashion and to such extent as to threaten a demonstrably increased risk of environmental harm to the wildlife areas enjoyed by appellants.

Florida Audubon, 94 F.3d at 669-670. Such speculation is entirely absent here. The cases of *Allen v. Wright,* 468 U.S. 737 (1984) and *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976), cited by the Government for support, likewise turned on speculative third-party responses to a change in tax policy, and therefore are similarly distinct from the current matter.

result of the agencies' decisions. *See Rio Hondo*, 103 F.3d at 452. A petitioner "'who asserts inadequacy of a government agency's environmental studies … need not show that further analysis by the government would result in a different conclusion. It suffices that … the [agency's] decision *could be influenced* by the environmental considerations that [the relevant statute] requires an agency to study.'" *Citizens for Better Forestry*, 341 F.3d at 976 (quoting *Public Citizen*, 316 F.3d at 1019) (internal citation omitted; emphasis in original). OPIC and Ex-Im are required by statute to "insure that … environmental amenities and values … be given appropriate consideration in [administrative] decisionmaking." 42 U.S.C. § 4332(2)(B). Plaintiffs therefore "have a relatively easy burden to meet in this case." *Citizens for Better Forestry*, 341 F.3d at 976. Here, NEPA's fundamental purpose is to influence decisionmaking by providing important information. Plaintiffs' burden is thus met.

IV. THE APA PROVIDES JURISDICTION OVER DEFENDANTS' NEPA VIOLATIONS.

The Defendants rely on *Norton v. Southern Utah Wilderness Alliance*, ___ U.S. ___, 124 S.Ct. 2373, 2379 (2004) ("*SUWA*") and *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) for the notion that this matter presents no final agency action over which this Court has jurisdiction. Defs.' Mem. at 23-28. Defendants' reliance on *SUWA* and *Lujan* is misplaced for at least two reasons. First, what the Defendants characterize as a broad "programmatic attack" is actually a claim that OPIC and Ex-Im violated a discrete and non-discretionary legal obligation to prepare an EA. This NEPA violation falls well within the scope of the courts' jurisdiction under 5 U.S.C. § 706(1). *Catron County*, 75 F.3d at 1434. Second, *SUWA* is not controlling because, unlike *SUWA*, this action also challenges affirmative agency action that is not in

accordance with the law. 5 U.S.C. § 706(2); *EPIC v. Blackwell*, 2004 U.S. Dist. LEXIS 20717 *101-*103 (N.D. Ca. 2004).

Plaintiffs describe below the violations that will be challenged. In short, Plaintiffs will challenge, *inter alia*, Defendants' affirmative and final finding that their aggregate energy portfolios do not have significant environmental impacts. Plaintiffs will also challenge Defendants' affirmative approval of specific projects that will directly or indirectly emit greenhouse gases, in the absence of the documentation and procedures required by NEPA. These violations are all established by the Administrative Record. After describing these actions, Plaintiffs explain why these actions are final and subject to judicial review.

A. The Administrative Record Demonstrates that Defendants' Failure to Prepare an Environmental Assessment Violates NEPA.

OPIC and Ex-Im have violated NEPA by failing to prepare an EA to determine whether the direct, indirect and cumulative impacts of their actions have a significant effect on the human environment. *See* 2d Amd. Cmplt. at ¶¶ 151-152 and request for relief. The facts supporting this allegation are clear and undisputed: (1) each defendant looked to see whether their actions contribute to climate change, s*ee generally Assessing our Actions; Ex-Im Climate Change Report*; (2) each agency determined that it only makes sense to do so in the aggregate or on a portfolio-wide basis, *see, e.g., Ex-Im Climate Change Report* at 33 ("Hence, Ex-Im Bank's 'role' in the GHG emission and climate change issue must be assessed by examining the aggregation of its actions taken to finance projects which produce CO_2 emissions."); *Assessing Our Actions* at 16 (evaluating "OPIC Power Portfolio CO_2 emissions" in order "to assess the cumulative GHG and climate implications of [OPIC's] investment activities"); (3) each agency affirmatively found that their cumulative energy portfolios result in GHG emissions, but concluded that they do not have a significant environmental impact; and (4) neither agency supported this finding

with an EA. On the basis of that conclusion, Defendants concluded that NEPA does not apply. *See Ex-Im Climate Change Report* at 33 (Ex-Im AR at Tab 1); *OPIC's Response to Plaintiffs' Demand Letter* (OPIC AR 4368-70).

NEPA explicitly requires preparation of an EA to determine whether impacts of a proposed action will be significant. 40 C.F.R. § 1508.9. That determination – whether the impact is significant – is the sole purpose of an EA. *See id.* Contrary to the agencies' suggestion, bald claims of insignificance do not obviate their NEPA duties. The direct, indirect and cumulative emissions from Defendants' project have a reasonably foreseeable cumulative impact on the earth's climate, and OPIC and Ex-Im must prepare an EA to evaluate the significance of these reasonably foreseeable impacts. Their failure to do so violates NEPA, and each violation is a final agency action

1. Defendants' Concede that Greenhouse Gas Emissions are a Reasonably Foreseeable Impact and Case Law Supports that Conclusion

NEPA requires that federal agencies consider "any adverse environmental effects" of their "major ... actions," 42 U.S.C. § 4332(C), and CEQ regulations, which are binding on the agencies, explain that "effects" include both "direct effects" as well as "indirect effects." 40 C.F.R. § 1508.8. Indirect effects are defined as those that "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.* "Indirect effects may include ... effects on air and water and other natural systems, including ecosystems." *Id.* An agency therefore must consider, as part of its analysis all reasonably foreseeable impacts caused by the proposed action. *See* 40 C.F.R. §§ 1508.8, 1508.25(c); *City of Davis*, 521 F.2d at 676. "As in other legal contexts, an environmental effect is 'reasonably foreseeable' if it is 'sufficiently likely to occur that a person of ordinary prudence would take it into account in

reaching a decision.'" *Mid States Coalition for Progress v. Surface Transp. Bd*., 345 F.3d 520, 548 (8th Cir. 2003) (quoting *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992)).

Defendants here concede that GHG emissions are a reasonably foreseeable impact of their decisions to finance and insure projects in their energy programs – including coal, oil, and gas power plants, and oil and gas fields. *Ex-Im Climate Change Report* at 30, 33; *Assessing Our Actions* at 16. They likewise concede that GHG emissions contribute to climate change. *See id.* Indeed, it is only the *extent* of the Defendants' contributions to Climate Change that is disputed. "When the *nature* of the effect is reasonably foreseeable but its *extent* is not … the agency may not simply ignore the effect." *Mid States Coalition for Progress,* 345 F.3d at 549.

Courts have expressly required federal agencies to evaluate the *extent* of indirect CO_2 emissions from federal projects significantly smaller than the massive financing and insurance programs at issue here. For example, in *Mid States Coalition,* 345 F.3d at 532, plaintiffs challenged the Surface Transportation Board's approval of a new rail line to service coal mining operations in Wyoming's Powder River Basin. Plaintiffs alleged that the Board's failure to consider the air pollution impacts resulting from eventual combustion of coal delivered by the rail line violated NEPA. *Id.* at 549. The court agreed, and finding that the eventual combustion of the coal was not "speculative" – as the Board claimed – but instead "almost certain," the court concluded that the defendant was legally required to consider the project's indirect CO_2 emissions. *Id.*

Similarly, in *Border Power Plant Working Group v. DOE*, 260 F. Supp. 2d 997 (S.D. Cal. 2003), the court found that the Department of Energy (DOE) was required to evaluate the GHG emissions of *a single 500 MW gas-turbine power plant*– despite the fact that the plant's contribution to climate change may be minor, and despite the fact that the plant was located in

Mexico. *See id.* at 1029 ("Because these emissions have potential environmental impacts and were indicated by the record, the Court finds that the EA's failure to disclose and analyze their significance is counter to NEPA."). The $C0_2$ contributions of the 500 MW project at issue in *Border Power* are no doubt dwarfed by OPIC and Ex-Im's total energy portfolio, yet, for the purpose of NEPA, DOE's failure to consider these reasonably foreseeable emissions still rendered its decision "inadequate under NEPA." *Id.*

2. Defendants Concede that Each Agency's Energy Projects Have Cumulative Impacts.

CEQ regulations require a programmatic EIS to be prepared where distinct individual projects have similar cumulative impacts -- so-called cumulative actions. 40 C.F.R § 1508.25. "Cumulative actions" are defined as actions "which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." 40 C.F.R. § 1508.25. Cumulative impacts are likewise described as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions …. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7. If substantial questions are raised as to whether the group of actions will have a cumulative impact, a single EA must be prepared to determine the significance of those cumulative actions. *See Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 998 (cumulative NEPA analysis must be "done in a single document when the record raises 'substantial questions' about whether there will be 'significant environmental impacts' from the collection of anticipated projects."); *Blue Mountains Biodiv. Project v. Blackwood*, 161 F.3d 1208, 1215 (9th Cir. 1998); *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985).

In this case, both agencies readily concede that each individual project adds to the cumulative impact on climate change. Indeed, each agency has conceded that the impact of these projects should be evaluated at the program or portfolio level. Thus OPIC "recognized that carbon dioxide emissions and climate change impacts are global and that the assessment of such impacts should not be limited to the project-specific level, but must be done on a cumulative basis." OPIC Press Release, *Landmark OPIC Report Shows Way for Government and Business to Demonstrate Accountability for Climate Impacts*, October 30, 2000 (OPIC AR 4384).

Based on this recognition, OPIC prepared an analysis of cumulative carbon dioxide emissions associated with the agency's "power portfolio" including its investment in and insurance of power plants. *Assessing Our Actions* at 12, 16-20. OPIC, however, did not prepare an EA of its energy portfolio, nor did it consider the impacts of indirect emissions – such as those associated with eventual combustion of fossil fuel extracted from projects financed or insured by OPIC. *See* 40 C.F.R. § 1508.8 (NEPA analysis must include consideration of "indirect effects"). OPIC likewise did not consider alternatives to its power portfolio investments, *see* 40 C.F.R. § 1502.14; did not invite comments from other federal agencies, including EPA, *see* 40 C.F.R. § 1503.1; and did not publish its analysis for public comment. *Id.*

Ex-Im has also acknowledged that carbon dioxide emissions associated with its projects contribute to global warming, and has determined that the impact of its own energy program investment must be assessed at an "aggregate" level: "the aggregate contribution from … global point sources of [CO_2] from manmade activity appears to be triggering some effect on earth's climate. Hence Ex-Im Bank's 'role' in the [Greenhouse Gas] emission and climate change issue must be assessed by examining the aggregation of its actions taken to finance projects which produce CO_2 emissions." *Ex-Im Climate Change Report* at 33. Ex-Im, like OPIC, conducted a

limited analysis of the aggregate direct impact of its actions on climate change. *Id.* But Ex-Im also refused to use NEPA procedures for this analysis – it did not consider indirect emissions associated with combustion of fossil fuels, it failed to present alternatives to its energy program investments, it did not invite comments from other federal agencies with expertise in the area, and it failed to publish its limited analysis for public comment.

3. Defendants' Failure to Prepare an Environmental Assessment Violates NEPA

It is undisputed that neither agency has prepared a programmatic EA or EIS to assess the significance of the environmental impacts associated with each agency's portfolios. Nor have the agencies prepared individual EAs for each project that consider the direct, indirect, and cumulative impacts of all reasonably foreseeable past, present, and future actions. Instead, both agencies have declared that they have no NEPA obligation unless they first determine that their actions "could, in fact, cause a significant impact." *See e.g., Ex-Im Climate Change Report* at 33 (Ex-Im AR Tab 1); *OPIC's Response to Plaintiffs Demand Letter* (OPIC AR 4368-70) (arguing that NEPA review is only triggered if "OPIC's contribution to GHGs meets the 'significance' test").

This position is patently wrong. Under such an interpretation, EAs would simply serve no purpose – they would never be prepared, and CEQ's extensive rules on when and how to prepare EAs would be superfluous. NEPA demands more. "An agency cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment." *Alaska Ctr. for the Environment v. United States Forest Service*, 189 F.3d 851, 859 (9th Cir. 1999) (quoting *Steamboaters*, 759 F.2d at 1393). An EA must be prepared for this determination. Indeed, a FONSI may *only* be made after preparation of an EA. *See* 40 C.F.R. § 1508.13 ("[FONSI] shall include the environmental

assessment …"). This failure to prepare an EA violates the agencies legal obligations under NEPA.

B. Defendants' Failure to Prepare a Programmatic Environmental Assessment is a Discrete Violation of their Ministerial Legal Obligation Under NEPA.

The scope of the parties' disagreement is narrow. As explained above, Plaintiffs allege that OPIC and Ex-Im are required to determine whether their actions have a significant environmental impact through preparation of an EA, but the agencies have refused to comply with NEPA. 2d Amd. Cmplt. at ¶¶ 151-152. The record demonstrates that Defendants agree that GHG emissions are a reasonably foreseeable result of their actions, and that they should determine if their role in climate change may significantly affect the environment, thus triggering NEPA review. *Ex-Im Climate Change Report* at 33 (Ex-Im AR at Tab 1); *Assessing Our Actions* at 5. Indeed, Ex-Im acknowledges, "Ex-Im Bank's Environmental Procedures call for a NEPA triggered environmental review for 'those projects which may significantly affect the quality of the human environment of the US.'" *Ex-Im Climate Change Report* at 33; 12 C.F.R. § 408.4(b)(1). Further, the agencies *fully agree* with the notion that GHG emissions from projects they sponsor must be looked at in the "aggregate" and "portfolio-wide" – or in NEPA parlance, "programmatic" basis. *Assessing Our Actions* at 16 (evaluating GHG contribution of OPIC's "power portfolio"); *see also* OPIC Press Release, *Landmark OPIC Report Shows Way for Government and Business to Demonstrate Accountability for Climate Impacts*, October 30, 2000 (OPIC AR 4384) ("assessment of [climate change] impacts should not be limited to the project-specific level, but must be done on a cumulative basis."); *Ex-Im Climate Change Report* at 33 (Ex-Im AR at Tab 1); ("Hence, Ex-Im Bank's 'role' in the GHG emission and climate change

issue *must be assessed by examining the effects of the aggregation of its actions* taken to finance projects which produce CO2 emissions.") (emphasis added).

They therefore did just that. OPIC and Ex-Im each looked at their programmatic actions and concluded, erroneously, that they do not have to comply with NEPA because these programmatic actions do not have a significant impact on the environment. *Ex-Im Climate Change Report* at 33-34; *Assessing Our Actions* at 20, 49. Indeed, the record demonstrates that the agencies' exclusive rationale for their refusal to apply NEPA is that their programmatic actions do not have significant impacts on the domestic environment:

> However, our own analysis of project emissions from projects actually supported by OPIC during this period . . . indicates that the total annual share of 1996 global CO2 emissions that can be attributed to OPIC-supported projects is no more than 0.5 percent. This observation is corroborated by a more comprehensive analysis conducted by Ex-Im bank. ("Ex-In Bank's Role in Greenhouse Gas Emissions and Climate Change," August 31, 1999). Therefore, we question whether the assumption that OPIC's contribution to GHGs meets the "significance" test that could, under your interpretation, trigger a PEIS [programmatic environmental impact statement] under NEPA, or, for that matter, an EIS pursuant to EO 12114.

OPIC Response to Plaintiffs' Demand Letter at 2 (AR 4369).

> It should be noted that, as stated in response to Issue # 3, Ex-Im Bank has previously concluded that its role in the production of greenhouse gases through the projects it finances is not significant with respect to its potential effect on the environment with respect to concerns associated with climate change.

Ex-Im Response to Plaintiffs' Demand Letter at 6 (Pls.' Exh. 4). Ex-Im's response to "Issue # 3. " " Greenhouse Gas Emissions" is, in part,

> Ex-Im Bank, in its response to the report Ex-Im & Climate Change: Business as Usual?, examined its ongoing and projected cumulative role in Greenhouse gas production through the year 2012 and concluded that this role did constitute a significant impact . . . For this reason, [Ex-Im] concludes that the cumulative impact on global climate change resulting from the projected greenhouse gas production from Ex-Im supported projects is insignificant. For additional information regarding Ex-Im Bank's assessment of its role in global greenhouse gas production, I refer you to the report Ex-Im Bank's Role in Greenhouse Gas

> Emissions and Climate Change, which was issued initially in June 1999 and revised on August 31, 1999.

Id. at 4.

The dispute arises, however, because the Defendants failed to employ the required EA process to determine the significance of their actions' impacts. 40 C.F.R. § 1508.9. NEPA rules require that a FONSI "shall include the environmental assessment." 40 C.F.R. § 1508.13. The Defendants refuse to perform an EA.

The APA provides that "the reviewing court *shall* compel agency action unlawfully withheld." 5 U.S.C. § 706(1) (emphasis added). *SUWA* and *Lujan* held that action falling within this provision's scope must be discrete and legally required.[18] *SUWA*, 124 S.Ct at 2378-79. The Defendants' failure to prepare an EA constitutes a discrete failure to perform a legally required act. *Catron County*, 75 F.3d at 1434 ("alleged failure to comply with NEPA constitutes final agency action"). A failure to act "is simply the omission of an action without formally rejecting a request." *SUWA*, 124 S.Ct. at 2379. Here, OPIC and Ex-Im's failures to act are discrete. As established above, they specifically determined that they would not apply NEPA because their actions purportedly do not have a significant impact. But, they failed to prepare an EA in support of that decision. The specific failure to prepare an EA in support of this conclusion is a discrete failure to act.

[18] *SUWA* observed that 5 U.S.C. § 706(1) codified the traditional use of mandamus to remedy an agency's failure to act. *SUWA*, 124 S.Ct. at 2379. Plaintiffs also seek mandamus under 28 U.S.C. § 1361. 2d Amd. Cmplt. at ¶ 9. Mandamus is available when: (1) the plaintiff's claim is clear and certain; (2) the defendant official's duty is ministerial and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available. *R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1065 n. 5 (9th Cir. 1997). As explained in the text, Plaintiffs' claim that an EA is needed to support the Defendants' FONSI is clear and certain, and Defendants obligation to perform an EA is non-discretionary. A mandamus should issue if the APA fails to provide an adequate remedy.

The agency action that Plaintiffs seek to compel is also legally required. *See id*.; *Catron County*, 75 F.3d at 1434. An EA is the exclusive mechanism used to determine whether impacts are significant. "[T]he Federal agency *shall*: … prepare an environmental assessment" to determine whether an impact is significant. 40 C.F.R. § 1501.4 (emphasis added); *see also* 40 C.F.R. § 1508.9 ("'Environmental Assessment' means a concise public document … that serves to briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact."). And, any FONSI shall be supported by an EA. *See* 40 C.F.R. § 1508.13. Therefore, OPIC and Ex-Im failed to perform the discrete, legally required act of preparing an EA to support its FONSI. Such acts may be compelled under the APA. *See Catron County*, 75 F.3d at 1434.

C. Defendants' Affirmative Acts Violate NEPA and are Subject to Review Under 5 U.S.C. § 706(2).

Separate from an agency's failure to act, the APA also authorizes the courts to determine whether an agency's affirmative actions were "in accordance with the law." 5 U.S.C. § 706(2). Review of an agency's affirmative actions are not limited by *SUWA*. *See EPIC*, 2004 U.S. Dist. LEXIS 20717 at *102 ("The instant case entails not a *failure* to act as in *Norton*; rather, this involves a challenge to an affirmative final agency *action.* Therefore, *Norton* [*SUWA*] is not controlling here."). Affirmative "agency action" includes "the whole or part of an agency … order … sanction, relief, or the equivalent or denial thereof." 5 U.S.C. § 551(13).

Two affirmative final agency actions are clearly presented here. First, each agency has effectively issued a FONSI. They have concluded that their cumulative actions do not have a significant impact, and on that basis have rejected Plaintiffs' demand for preparation of an EA. These FONSIs, however, are not in accordance with the law because they are not based on an EA, as required by NEPA. 40 C.F.R. §§ 1508.8, 1508.13. Second, the agencies' decisions to

finance particular projects constitute final agency action. These individual actions are not in accordance with the law because OPIC and Ex-Im did not consider their impacts under NEPA.

Agency action is "final" if two conditions are satisfied: "First, the action must mark the consummation of the agency's decisionmaking process - it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined, or from which legal consequences will flow." *Bennett,,* 520 U.S. at 177-78 (citation and internal quotes omitted). Both of these affirmative actions constitute final action that may be reviewed pursuant to 5 U.S.C. § 706(2).

1. Defendants' FONSIs are affirmative final agency actions subject to judicial review under 5 U.S.C. § 706(2).

The above-described FONSIs are final affirmative actions that are not in accordance with the law. NEPA "simply guarantees a particular procedure, not a particular result. Hence a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." *Ohio Forestry Ass'n v. Sierra Club***,** 523 U.S. 726, 737 (1998); *see also Southwest Williamson County Cmty. Ass'n, Inc. v. Slater*, 173 F.3d 1033, 1037 (6th Cir. 1999) ("issuance of a FONSI is final agency action and provides notice that [the agency] has completed its evaluation of the environmental impact of the action in question").

OPIC and Ex-Im's climate change reports, and their subsequent rejection of Plaintiffs' demand letters, are FONSIs – they mark the consummation of the agencies' decisions that NEPA is not applicable to their actions. *See Makua v. Rumsfeld*, 136 F. Supp. 2d 1155, 1161 (D. Haw., 2001) ("The Finding of No Significant Impact Marked the Culmination of Defendants' Decisionmaking Process."). As evidenced by this matter, Defendants are refusing to further consider NEPA's applicability.

The FONSIs also determine obligations and the legal consequences flowing from this obligation. *Bennett*, 520 U.S. at 177-78. OPIC and Ex-Im have decided that they are not obligated to apply NEPA. They thus have not provided the process and analysis required by NEPA. Indeed, the record produced by Defendants unequivocally demonstrates that, after having made their FONSIs, OPIC and Ex-Im continued to pursue their energy portfolios or programs without regard to NEPA. *See e.g.,* OPIC Environmental Clearance Documents (OPIC AR 190-1362) (no NEPA review); Ex-Im Project Engineering Evaluations (Ex-Im AR Tabs 24-28) (no NEPA review). Therefore, the Defendants' affirmative finding that their actions do not result in significant impacts are final actions not in accordance with the law, and thus subject to review under 5 U.S.C. § 706(2).

2. Defendants' decisions to finance particular projects are final agency actions subject to judicial review.

Final agency action includes the grant of money or assistance. 5 U.S.C. § 551(11)(A). The Defendants' decisions to finance or otherwise assist the projects identified in the complaint and record constitute final agency action. Defendants do not dispute that these actions are final, nor do they dispute Plaintiffs' claim that these projects were not subjected to NEPA review. Indeed, the record is devoid of any NEPA review for these projects.

Rather, Defendants persist in their "straw man" argument that Plaintiffs are mounting a broad challenge to the discretion exercised in the administration of their program. *See* Defs.' Mem. at 28 (citing *Sierra Club v. Peterson*, 228 F.3d 559, 567 (5th Cir. 2000)). As established above, Plaintiffs are not mounting such a challenge and *Sierra Club v. Peterson* is irrelevant to this matter. Further, the fact that Defendants have failed to apply NEPA to all of their actions does not prevent Plaintiffs from selecting particular individual actions to challenge. That is exactly what Plaintiffs do here.

The Defendants also argue that laches bars the challenges to the particular projects identified in the Complaint. *See* Defs.' Mem. at 28-29, n. 18. However, Plaintiffs do not even attempt to claim that this matter meets the elements necessary to claim laches. *See Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1381 (9th Cir. 1997) ("the party seeking to invoke [laches] must show: (1) that the opposing party lacked diligence in pursuing its claim; and (2) that prejudice resulted from that lack of diligence."). These elements are not met here. And, "'we have repeatedly cautioned against application of the equitable doctrine of laches to public interest environmental litigation. … This approach has found unanimous support in the other circuits.'" *Id.* (quoting *Portland Audubon Soc'y v. Lujan,* 884 F.2d 1233, 1241 (9th Cir. 1989)).

Further, the cases cited by Defendants in support of their laches argument address mootness – not laches. However, Defendants fail to develop a mootness argument other than to generically state that commitments for unspecified projects have been made and monies have been partially or fully disbursed or are in the process being repaid. *See* Defs.' Mem. at 28, n. 18. No project-specific analysis is provided. *Id*. This mere footnote fails to meet the particularly heavy burden required to demonstrate mootness:

> When evaluating the issue of mootness in NEPA cases, we have repeatedly emphasized that if the completion of the action challenged under NEPA is sufficient to render the case nonjusticiable, entities "could merely ignore the requirements of NEPA, build its structures before a case gets to court, and then hide behind the mootness doctrine. Such a result is not acceptable." *West*, 206 F.3d at 925 (quoting *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 592 n.1 (9th Cir. 1981)). Accordingly, defendants in NEPA cases face a particularly heavy burden in establishing mootness.

Cantrell v. City of Long Beach, 241 F.3d 674, 678 (9th Cir. 2001). This is especially important, where as here, specific projects are, by Defendants' admission, still active and Defendants' failure to comply with NEPA is on-going. Indeed, it is undisputed that the

Defendants continue to assist projects without first applying NEPA. Defendants' violations are thus capable of repetition, yet evading review. *See Anderson v. Evans*, 371 F.3d 475, 479 (9th Cir. 2004) (en banc). Defendants' mootness argument is without merit.

V. OPIC'S ACTIONS ARE SUBJECT TO JUDICIAL REVIEW UNDER THE APA, AND OPIC IS SUBJECT TO NEPA

Federal agencies are subject to judicial review of their actions under the APA unless another statute specifically precludes review. OPIC's organic statute does not contain express language that precludes review, and legislative history does not suggest that Congress intended to exempt the agency from review. Furthermore, OPIC is subject to the requirements of NEPA. NEPA requirements apply to all federal agencies. *See* 42 U.S.C. § 4332. The requirements set forth in NEPA are "supplementary to those set forth in existing authorizations of Federal agencies." 42 U.S.C. § 4335. OPIC is subject to specific environmental review requirements that are tailored to the agency's overseas operations. *See* 22 U.S.C. § 2151p(c)(1)(A). NEPA supplements these procedures – they do not supplant NEPA. Legislative history helps to explain the relationship between these requirements, but history does not suggest that Congress intended to divorce OPIC and NEPA procedures, as Defendants suggest. Rather, the absence of express language to that effect demonstrates that NEPA applies.

A. OPIC's Organic Statute Does Not Preclude Judicial Review

The APA, 5 U.S.C. § 702, allows judicial review of agency action for persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action.…" Section 702 is applicable unless judicial review is expressly precluded by statute. *See* 5 U.S.C. § 701(a)(1). "In the absence of express statutory language," the Supreme Court has "reserved that exception for cases in which the existence of an alternative review procedure provided 'clear and

convincing evidence' … of a legislative intent to preclude judicial review." *Franklin v. Massachusetts*, 505 U.S. 788, 820 (1992) (citation omitted).

OPIC's organic statute does not contain express language that precludes judicial review, nor does it contain an "alternate review procedure." Furthermore, legislative history does not indicate that Congress intended for OPIC to be immune from judicial review.

Defendants confuse the two threshold requirements for determining reviewability. For a statute to preclude judicial review, it must offer express language or alternative evidence of congressional intent. Defendants seek to stitch pieces of these separate requirements into a single standard. Defendants argue that the "express language" of OPIC's organic statute "*demonstrates Congress's intent* to preclude judicial review of OPIC's compliance with its environmental review obligations." Defs.' Mem. at 30 (emphasis added). Statutory text may be termed "express" when it offers a clear statement whose meaning does not require additional evidence to discern. *See, e.g., Mountain States Telephone and Telegraph Company v. Pueblo of Santa Ana*, 472 U.S. 237, 276 (1985). An examination of Congressional intent should not be necessary to interpret express language. Defendants cannot point to express language in OPIC's statute to support their position.

The section that Defendants rely upon reads: "Each guaranty contract executed by such officer or officers as may be designated by the Board shall be conclusively presumed to be issued in compliance with the requirements of this chapter." 22 U.S.C. § 2197(j). This section contains no express reference to judicial review or an "alternate review procedure," and the language bears little resemblance to other express statutory provisions that purport to insulate agencies from judicial review. For example, the Intermodal Surface Transportation Efficiency Act (ISTEA), Pub. L. No. 102-240, 105 Stat. 1914 (1991), provides: "[A]ny decision by the

Secretary concerning a plan or program described in this section *shall not be considered to be a Federal action subject to review* under [NEPA]." 23 U.S.C. § 134(o) (emphasis added). According to the Sixth Circuit, "This language specifically precludes judicial review of *certain* actions under NEPA." *Southwest Williamson County Community Ass'n,* 173 F.3d at 1038 (emphasis added). Thus, even with clear language exempting "any decision" under ISTEA from review, the court found preclusion to be limited. Other statutes that preclude review similarly provide explicit direction that agency actions "shall not be reviewable in any court." *See, e.g.*, Ethics in Government Act of 1978, 2 U.S.C. § 288i; Transportation Equity Act for the 21st Century, 23 U.S.C. § 135; Voting Rights Act of 1965, 42 U.S.C. § 1973(b); Regional Rail Reorganization Act of 1973, 45 U.S.C. § 716. OPIC's organic statute clearly does not exempt the agency from judicial review.

Defendants argue that the statute's "presumption of compliance" is sufficient express language. This phrase, however, does not appear in OPIC's organic statute. It is a basic tenet of administrative law that agency decisions are presumptively valid. But that basic premise does not amount to blanket immunity from review. Defendants rely solely on legislative history and their own experts to carry their point. Yet even the legislative history does not expressly exempt OPIC from judicial review. The congressional records provide no more explicit language than the OPIC statute. A House Committee Report explains that guaranty contracts are presumed to be in compliance with statutory requirements. This explanation mirrors the accepted statutory text, and it does little to clarify Congress' intent. It is important to note, moreover, that the legislative history fails to make reference to the applicability (or lack thereof) of judicial review.

A close reading of the legislative history in fact suggests the opposite. The Committee Report states that despite the "presumption of compliance," "a claimant would not, however, be

protected if execution of the contract was induced by fraud or misrepresentation." H. Rep. No. 91-611, 91st Cong., 1st Sess. at 37 (1969). Thus, even guaranty contracts that carry a "presumption of compliance" are not entirely shielded from review. By defining the applicability of the "presumption of compliance," Congress anticipated the necessity for some investigation to determine if a contract was "induced by fraud or misrepresentation." Thus, not only does the OPIC statute *not* preclude review, it provides for a specific situation when review is required.

In addition, Defendants' arguments fail because they confuse the intended beneficiaries of the "presumption of compliance." A House Committee Report indicates that this presumption is intended to protect contract claimants, not OPIC. As Defendant asserts, OPIC's clients may rely on the "presumption of compliance" when "assessing the validity of OPIC's guarantees." Defs.' Mem. at 31.

Additional legislative history suggests that OPIC actions are indeed subject to judicial review. In 1992, an amendment was proposed to transfer OPIC operations to the Office of Management and Budget (OMB). 138 Cong. Rec. H7494-03, at 32. The amendment failed, but the record of discussion sheds some light on OPIC's susceptibility to review. The proposed revision provides: "Orders and actions of the Director of the [OMB] in the exercise of functions of the [OPIC] shall be subject to judicial review to the same extent and in the same manner as if such orders and actions had been by the [OPIC]." *Id.* Clearly, the Representatives participating in that conversation assumed that OPIC was subject to judicial review.

Finally, OPIC's arguments fail when exposed to strict statutory interpretation. Even if a "presumption of compliance" is deemed to equal a prohibition on judicial review, Defendants have highlighted a very narrow provision as express language. A plain reading of section

2197(j) clearly indicates a treatment of guaranty contracts. OPIC's activities extend beyond guaranty contracts, however. The specific reference to guaranty contracts, and none of OPIC's other functions, demands a limited treatment of that section's applicability. The agency's organic statute provides: "The requirements of section 2151p(c) of this title relating to environmental impact statements and environmental assessments shall apply to any investment which the Corporation *insures, reinsures, guarantees, or finances*…." 22 U.S.C. § 2199(g) (emphasis added). Thus, even if Congress intended to immunize guaranty contracts from review, there is nothing in OPIC's statute or legislative history to suggest that immunity is extended to all of the agency's actions. Defendants have not established the "clear and convincing evidence" of Congress' intent to preclude all of OPIC's actions from judicial review under the APA.

B. OPIC Is Subject to NEPA Requirements

Even if the OPIC statute does preclude judicial review, the agency must still conform to the requirements of NEPA. "[E]ach agency of the Federal Government shall comply with [NEPA] unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible." 40 C.F.R. § 1500.6. Defendants argue that OPIC's statutory requirements supplant NEPA. Rather than supplanting NEPA requirements, however, the OPIC statute gives the agencies directions on how to apply NEPA. As Defendants state, the environmental assessment and environmental impact statement are not unique to OPIC, but are "terms of art from NEPA." Defs.' Mem. at 34.

OPIC's environmental mandates apply to overseas – not domestic – environmental impacts. Therefore, as with application of NEPA to Ex-Im, OPIC's statutory requirements are supplemental and complementary to the agency's duties under NEPA. This principle is supported by case law, legislative history, and a plain reading of the pertinent legislative texts.

The Ninth Circuit has recognized two tests to exempt agency action from NEPA requirements. When an agency has NEPA-like procedures in place, but declines to apply actual NEPA procedures to its actions, courts may apply a "displacement" test or a "functional equivalent" test. "The 'displacement' argument asserts that Congress intended to displace one procedure with another. The "functional equivalent" argument is that one process requires the same steps as another." *Douglas County,* 48 F.3d at 1504 n. 10. Defendants argue that Congress intended to "displace" NEPA requirements with procedures specifically tailored to OPIC, and that the NEPA process is therefore "superfluous." Defs.' Mem. at 32. These cases are inapposite because review of impacts abroad does not render domestic review superfluous.[19]

Further, *Merrell* and *Douglas County* may be distinguished from the instant matter because the respective defendants in those cases are agencies with a "responsibility to protect the environment." Courts provide a more flexible application of NEPA to such agencies. In *Merrell*, the court approved of a statement taken from the legislative history of the Federal Insecticide, Fungicide, and Rodenticide Act, which stated: Because the basic thrust and principal responsibility of [the Environmental Protection Agency] are to protect the environment, [Congress] does not see a need to [apply NEPA]." *Merrell*, 807 F.2d at 780 (citation omitted). In *Douglas County*, the court found that "NEPA does not require an [environmental impact statement] for actions that preserve the physical environment." *Douglas County*, 48 F.3d at 1505. The agency action at issue in *Douglas County* "furthers the purpose of NEPA," and requiring additional NEPA procedures "would only hinder its efforts at attaining the goal of

[19] Defendants rely primarily on *Douglas County* and *Merrell v. Thomas*, 807 F.2d 776 (9th Cir. 1986), to advance these arguments. *Douglas County* has been specifically rejected by the Tenth Circuit and the District Court for the District of Columbia. *See Catron County*, 75 F.3d 1429; *Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior*, 2004 WL 2430095 (D.D.C. 2004), 34 Envtl. L. Rep. 20,136.

improving the environment." *Id.* at 1506 (citing *Pacific Legal Foundation v. Andrus*, 657 F.2d 829, 837 (6th Cir. 1981).

OPIC has an economic mission, and it is not an environmental protection agency. Thus, unlike the defendants in *Merrell* and *Douglas County*, OPIC's actions are not presumed to further the goal of "improving the environment," and its environmental review procedures do not displace NEPA.

Furthermore, in *Douglas County*, the court found that the Endangered Species Act "has an important mandate that distinguishes it from NEPA. … This mandate conflicts with the requirements of NEPA because in cases where extinction is at issue, the Secretary has no discretion to consider the [other] environmental impact[s] of his or her actions." *Douglas County*, 48 F.3d at 1503. In other words, Congress had specifically given preference to endangered species protection, to the exclusion of other environmental considerations.

OPIC, however, is required to: "refuse to insure, reinsure, guarantee, or finance any investment in connection with a project which the Corporation determines will pose an unreasonable or major environmental, health, or safety hazard, or will result in the significant degradation of national parks or similar protected areas." 22 U.S.C. § 2191(n). Contrary to *Douglas County*, OPIC lacks the discretion to *not* consider the environmental impacts of its actions.

OPIC also argues that its organic statute displaces NEPA because it sets forth a specific procedure for environmental review that is different from the NEPA process. Defendants argue that there would be "little point" to OPIC's specific procedural requirements if NEPA otherwise applied. Defs.' Mem. at 35. These additional requirements were intended to clarify OPIC's duties under NEPA, however, not to supplant them. Similarly, the public comment procedures

set forth at 22 U.S.C. § 2191a serve to further define OPIC's statutory commitments, rather than curtailing them.

The OPIC Act requires "an environmental impact statement for any program or project … significantly affecting the environment of the global commons outside the jurisdiction of any country [or] the environment of the United States." 22 U.S.C. § 2151p(c)(1)(A). An EA is required for "any proposed program or project … significantly affecting the environment of any foreign country." 22 U.S.C. § 2151p(c)(1)(B). Under most circumstances, NEPA requires the preparation of an EIS for agency actions that affect the environment of the United States. Thus, the OPIC statute does not conflict with NEPA. The requirement of an EA for projects outside of the United States simply adds to the demands of NEPA. Rather than supplanting NEPA requirements, as Defendants suggest, the OPIC statute gives the agencies directions on how to apply NEPA. As Defendants state, the EA and EIS are not unique to OPIC, but are "terms of art from NEPA." Defs.' Mem. at 34.

In a further explication of OPIC's relationship to NEPA, Congress granted to the President power to exempt *individual* OPIC projects from environmental review. *See* 22 U.S.C. § 2151p(c)(2). This section balances the President's interest in foreign policy with the requirements of NEPA. It shows that Congress did anticipate that NEPA would generally apply to OPIC's actions. The section does not suggest, however, that Congress intended to exempt all of OPIC's activities from NEPA review.

Defendants argue that Congress intended to divorce OPIC's environmental review responsibilities from its responsibilities under NEPA. Legislative history suggests, however, that Congress intended to define OPIC's environmental review process via reference to NEPA. A House Committee Report on the International Security and Development Cooperation Act of

1981 (ISDCA) discusses the environmental review procedures that are applicable to OPIC. As Defendants correctly point out, OPIC is synonymous with U.S. AID in the text: "[t]he committee does not … *expect* this amendment to section 118 to impose any more or any fewer requirements on AID than are already set forth in AID's own environmental procedures (regulation 16, 22 CFR par. 216)." H. Rep. No. 97-58, 97th Cong., 1st Sess. 47 (1981) (emphasis added).

This does not amount to an express statutory exemption. *See* 40 C.F.R. § 1500.6. To the contrary, the U.S. AID regulations clearly anticipate NEPA's applicability to the agency's actions. Thus, NEPA requirements do not violate the "no more, no less" provision in the above statement. U.S. AID's requirements are laid out in implementing regulations, which provide: "These procedures are consistent with Executive Order 12114 … and the purposes of the National Environmental Policy Act of 1970 …. *They are intended to implement the requirements of NEPA* as they effect the A.I.D. program." 22 C.F.R. § 216.1(a) (emphasis added). These regulations clearly correlate the NEPA process with OPIC's own environmental review process. The regulations further define the EIS that is required by AID procedures: "It is a specific document having a definite format and content, as provided in NEPA and the CEQ Regulations." 22 C.F.R. § 216.1(c)(5).

These regulations reflect Congress' specific intent to apply NEPA to OPIC actions. The reference to U.S. AID procedures in the legislative history relied upon by Defendants provides "clear and convincing evidence" that OPIC is subject to NEPA. The fact that the Committee Report on the ISDCA excluded a specific reference to NEPA for that statute does not belie this point. Reference to NEPA was struck "so as to avoid confusion." H. Rep. No. 97-58, 97th Cong., 1st Sess. 47 (1981). The agency regulations referred to in the statute already describe the agency's duties under NEPA, so additional reference to NEPA may have cast those procedures

into question. The excision does not indicate that Congress sought to modify those regulations and exclude OPIC from its responsibilities under NEPA.

VI. CONCLUSION.

For the reasons stated, Defendants' Motion for Summary Judgment should be denied.

January 10, 2005

Friends of the Earth, Inc.
Greenpeace, Inc.
City of Boulder, Colorado
City of Oakland, CA
City of Arcata, CA
City of Santa Monica, CA

by: _____/s/_____
Ronald A. Shems
Geoff Hand
SHEMS DUNKIEL KASSEL & SAUNDERS
91 College Street
Burlington, Vermont 05401
(802) 860 1003 (voice)
(802) 860 1208 (facsimile)
rshems@sdkslaw.com

by: _____/s/_____
Richard Roos-Collins (Cal. Bar no. 127231)
Julie Gantenbein (Cal. Bar no. 224475)
NATURAL HERITAGE INSTITUTE
2140 Shattuck Avenue, 5th floor
Berkeley, CA 94704
(510) 644-2900
(510) 644-4428 (fax)

Attorneys for Plaintiffs

CITY OF BOULDER, COLORADO

by: _____/s/_____
Ariel Pierre Calonne #35414 (CO)
Sue Ellen Harrison, #5770 (CO)

Office of the City Attorney
City of Boulder
Box 791
Boulder CO 80306
303-441-3020 (voice)
303-441-3859 (facsimile)
harrisons@ci.boulder.co.us

CITY OF OAKLAND, CALIFORNIA

BY: _____/s/_____
JOHN A. RUSSO, City Attorney (Cal. Bar #129729)
BARBARA J. PARKER, Assistant City Attorney (Cal. Bar #069722)
MARK T. MORODOMI, Supervising Attorney (Cal. Bar #120914)
J. PATRICK TANG, Deputy City Attorney (Cal. Bar no. #148121)

City of Oakland
One Frank Ogawa Plaza, 6th Fl.
Oakland, CA 94612
(510) 238-6523 (voice)
(510) 238-3000 (facsimile)
jptang@oaklandcityattorney.org

CITY OF ARCATA, CALIFORNIA

by: _____/s/_____
Nancy Diamond, (Cal Bar #130963)
Arcata City Attorney
Gaynor and Diamond
1160 G. Street
Arcata, CA 95521

Nancy Diamond
Law Offices of Gaynor and Diamond
1160 G Street
Arcata, California 95521
Phone: (707) 826-8540
Fax: (707)826-8541

CITY OF SANTA MONICA, CALIFORNIA

Marsha Jones Moutrie, City Attorney
Joseph P. Lawrence, Assistant City Attorney
Adam Radinsky, Deputy City Attorney

by_____/s/_____
Adam Radinsky, Deputy City Attorney (Cal. Bar No. 126208)

Office of the City Attorney
1685 Main Street, third floor
Santa Monica, CA 90401
(310) 458-8336 (voice)
(310) 395-6727 (fax)
adam-radinsky@santa-monica.org