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20
21 UNITED STATES DISTRICT COURT
22 NORTHERN DISTRICT OF CALIFORNIA
23 SAN FRANCISCO DIVISION

24
25 FRIENDS OF THE EARTH, INC., et al.,)
26 Plaintiffs,) Civ. No. C 02-4106 JSW
27 v.)
28) Date: March 31, 2006
29) Time: 9:00 AM
30 ROBERT MOSBACHER, JR, et al.,) Courtroom 2, 17th Floor
31)
32 Defendants.)
33)
34)
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36)
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38)

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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1 **I. INTRODUCTION.**
2

3 This matter’s merits are straightforward and there is little in actual dispute. NEPA
4 requires all federal agencies to assess whether major actions they take may have a
5 significant impact on the domestic environment. All reasonably probable impacts must be
6 assessed for such significance.

7 There is no dispute that OPIC and Ex-Im are federal agencies, and that their
8 decisions to provide millions of dollars of financing to fossil-fuel projects are major federal
9 actions. There is also no dispute that Greenhouse Gas (GHG) emissions and climate
10 change are reasonably probable impacts of such actions. OPIC and Ex-Im both recognize
11 this in issuing reports detailing their activities’ contributions to climate change.

12 Indeed, it is reasonable to assume that GHG will be emitted from fossil-fuel-fired
13 power plants. OPIC and Ex-Im themselves admit that direct emissions from projects they
14 finance amount to over 260 million tonnes of CO₂ emissions per year, or approximately
15 1.0% of annual global emissions. Likewise, it is reasonable to assume that GHG will be
16 emitted as a result of oil field development or transportation projects (pipelines). Why else
17 recover and transport oil if it will not be consumed? When, as required by the National
18 Environmental Policy Act (NEPA), these indirect emissions are counted, GHG emissions
19 from projects financed by these two agencies alone amount to an astounding 7.3% of
20 annual worldwide emissions.¹

¹ See Supplemental Declaration of Richard Heede at ¶13 (Pls.’ Exh. 1). Plaintiffs attach Mr. Heede’s declaration to provide a full estimate of direct, indirect and cumulative emissions attributable to projects financed and insured by OPIC and Ex-Im. Such extra-record evidence is appropriate when, as here, an agency has failed to consider relevant factors. See *Southwest Ctr. for Biological Diversity v. United States Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996).

1 Further, there is no dispute that climate change may have significant worldwide
2 impacts, including impacts on the domestic U.S. environment. As OPIC explained in its
3 report *Climate Change: Assessing our Actions*:

4 With emissions of CO₂ and other GHGs expected to increase – especially
5 in developing regions – current forecasts suggest that atmospheric
6 concentrations of CO₂ could double by 2060 with a resulting global
7 average temperature increase of as much as 2° to 6.5° F over the next
8 century. Such rapid temperature increase could have potentially grave
9 economic and environmental impacts.

10
11 *Climate Change: Assessing Our Actions* at 49 (OPIC Administrative Record
12 (“A.R.”) Tab 1); *see also, Ex-Im Climate Change Report* at 4 (Ex-Im A.R. Tab 1) (“The
13 global impact could include changes in weather patterns and rises in sea level. The
14 changes in turn can result in major consequences to ecological systems, human health and
15 socioeconomic sectors such as agriculture, coastal resources, forests, energy and
16 transportation.”).

17 The only dispute is whether OPIC and Ex-Im violated NEPA by refusing to prepare
18 Environmental Assessments (EAs) to determine whether their contributions to climate
19 change may have significant impacts on the domestic environment. Neither agency has
20 ever assessed their contributions to climate change under NEPA, and each adamantly
21 persists in its refusal to apply NEPA’s procedures. This matter seeks to resolve whether
22 this refusal is illegal.

23 **II. BACKGROUND/STATUTORY FRAMEWORK.**

24 NEPA serves as our nation’s “basic national charter for protection of the
25 environment.” 40 C.F.R. § 1500.1(a). It “declares a broad national commitment to
26 protecting and promoting environmental quality,” and ensures such protection through
27 “important ‘action-forcing’ procedures.” *Robertson v. Methow Valley Citizens Council*,

1 490 U.S. 332, 348-49 (1989); *see also Anderson v. Evans*, 314 F.3d 1006, 1016 (9th Cir.
2 2002) (“NEPA is a statute that aims to promote environmentally sensitive governmental
3 decision-making”). These procedures require all federal agencies to prepare a detailed
4 statement on the potential environmental impacts of every major federal action
5 significantly affecting the quality of the human environment. 42 U.S.C. § 4332 (2).² All
6 federal agencies must comply with NEPA unless existing law applicable to the agency’s
7 operations expressly prohibits or makes compliance impossible. 40 C.F.R. § 1500.6.

8 In order to implement NEPA, the Council on Environmental Quality (CEQ) issued
9 regulations in 1978 that are binding on all federal agencies. 40 C.F.R. § 1500-1508. These
10 regulations define “agency action” and the process for determining whether an action or
11 program significantly affects the quality of the human environment. 40 C.F.R. § 1505.1.
12 Under CEQ regulations, “actions” include: “new and continuing activities, including
13 projects and programs entirely or partly financed, assisted, conducted, regulated, or
14 approved by federal agencies.” 40 C.F.R. § 1508.18.

15 Major federal actions that will have a significant effect on the environment require
16 a detailed Environmental Impact Statement (EIS). If it is unclear whether an action’s

² 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.

42 U.S.C. § 4332(2)(C).

1 impacts will be significant, CEQ regulations direct federal agencies to prepare an
2 environmental assessment (EA) to evaluate the action’s potential impacts. An agency *must*
3 prepare an environmental assessment to determine whether an action is likely to have
4 “significant” environmental effects. 40 C.F.R. § 1501.4(b) (“[i]n determining whether to
5 prepare an environmental impact statement the Federal agency *shall* ... prepare an
6 environmental assessment.”) (emphasis added); 40 C.F.R. § 1508.9; *Klamath-Siskiyou*
7 *Wildlands Ctr. v. BLM*, 387 F.3d 989, 993 (9th Cir. 2004). If the agency concludes,
8 through its environmental assessment, that the impacts are likely to be significant, it must
9 then prepare a full EIS. Conversely, if the EA results in a finding of no significant impact,
10 an EIS is not required. The Ninth Circuit has previously emphasized that “[a]n agency
11 cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity
12 it wishes to pursue will have an insignificant effect on the environment.” *Alaska Ctr. for*
13 *the Environment v. United States Forest Service*, 189 F.3d 851, 859 (9th Cir. 1999). It must
14 prepare an EA to make this determination.³

³ The only exception to this requirement is where the proposed major federal action falls within a previously promulgated “categorical exclusion.” 40 C.F.R. § 1501.4(a)(2); *The Steamboaters v. FERC*, 759 F.2d 1382, 1393 (9th Cir. 1985). An agency may propose categorical exclusions for certain minor actions that do not generally have a significant effect on the human environment. 40 C.F.R. § 1508.4. Such actions typically include ministerial or administrative activities. For example, federal agencies have issued categorical exclusions for personnel training, *see* 10 C.F.R. § 1041, and landscaping activities. *See e.g.*, 23 C.F.R. § 771.117. CEQ regulations require an agency to promulgate rules identifying categorical exclusions. 40 C.F.R. § 1508.4. In order to properly invoke a categorical exclusion for any particular action, the agency’s record of decision for that action must assert that the categorical exclusion applies, and must provide a reasoned explanation for its reliance on the categorical exclusion. *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1095 (11th Cir. 2004) (“Documentation of reliance on a categorical exclusion need not be detailed or lengthy. It need only be long enough to indicate to a reviewing court that the agency indeed considered whether or not a categorical exclusion applied and concluded that it did.”).

1 As part of any environmental assessment an agency must consider all reasonably
2 foreseeable impacts of the proposed action, including all foreseeable direct and indirect
3 impacts of the action, and the cumulative impacts of past, present, and reasonably
4 foreseeable future actions. 40 C.F.R. §§ 1508.8, 1508.7.⁴ In addition, the agency must
5 consider reasonable alternatives to the proposed action, including a “no action” alternative,
6 40 C.F.R. § 1508.9(b); and it must provide an opportunity for public review and input on
7 the assessment. 40 C.F.R. § 1506.6.

8 CEQ regulations also direct federal agencies to prepare “programmatic” NEPA
9 evaluations when a series of related actions may have significant environmental effects.
10 Under CEQ regulations, an agency’s adoption of a program or approval of a group of
11 concerted actions to implement a specific policy or executive directive is a major federal
12 action. 40 C.F.R. § 1508.18(b)(3). For such systematic and connected actions CEQ
13 regulations direct each agency to determine, in compliance with NEPA, whether such
14 actions may have significant impact on the human environment, and if so, to prepare a
15 programmatic EIS. *See* 40 C.F.R. § 1508.18(b). CEQ regulations likewise direct a
16 programmatic EIS to be prepared where distinct individual projects have similar
17 cumulative impacts (so-called “cumulative actions”). *See* 40 C.F.R. § 1508.25.

⁴ 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). 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. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7.

1 “Cumulative actions” are defined as actions “which when viewed with other proposed
2 actions have cumulatively significant impacts and should therefore be discussed in the
3 same impact statement.” 40 C.F.R. § 1508.25.

4 Together, these provisions and procedures serve an important purpose: they ensure
5 that environmental considerations will be infused into the ongoing programs and actions of
6 the federal government. *High Sierra Hikers Ass'n v. Blackwell*, 381 F.3d 886, 900 (9th Cir.
7 2004). NEPA’s procedures guarantee that an agency will have available, and will carefully
8 evaluate, detailed information concerning the potentially significant environmental impacts
9 of its actions. They also ensure that the relevant information will be made available to the
10 public, so that the public may meaningfully participate in the agency decisionmaking
11 process. *Robertson*, 490 U.S. at 349. In this case, both OPIC and Ex-Im refuse to comply
12 with these important policies and procedures; Plaintiffs seek to compel each agency to
13 satisfy its obligations under NEPA.

14 **III. OPIC AND EX-IM HAVE TAKEN MAJOR FEDERAL**
15 **ACTIONS WHICH MAY AFFECT THE DOMESTIC**
16 **ENVIRONMENT.**
17

18 OPIC and Ex-Im have each taken major federal actions which may affect the
19 domestic environment, but neither agency has prepared an individual or programmatic
20 environmental assessment to evaluate whether the impact of these actions will be
21 significant. The failure to prepare any NEPA evaluation for these major federal actions
22 violates NEPA. The facts supporting this allegation are clear and undisputed: (1) both
23 OPIC and Ex-Im are federal agencies subject to NEPA; (2) each Defendant has taken, and
24 continues to take, major federal actions which individually, cumulatively, and indirectly
25 may have significant environmental impacts on the domestic environment; (3) each agency

1 has acknowledged a reasonably foreseeable link between its actions, increased GHG
2 emissions, and climate change, which may have significant environmental impacts on the
3 domestic U.S. environment; and (4) each Defendant determined – without preparing an EA
4 or any other NEPA evaluation – that its energy programs, in the “aggregate” or on a
5 “portfolio-wide” basis, would have a cumulative but insignificant impact. *See Ex-Im*
6 *Climate Change Report* at 33 (Ex-Im A.R. Tab 1); *OPIC’s Response to Plaintiffs’ Demand*
7 *Letter* (OPIC A.R. 4368-70).

8 NEPA explicitly requires federal agencies to use an environmental assessment to
9 determine whether impacts of a proposed action may be significant. 40 C.F.R. § 1508.9.
10 That determination – whether the impact of a major federal action is significant – is the
11 purpose of an EA. *See id.* Contrary to the agencies’ suggestion, bald claims of
12 insignificance made wholly outside of the NEPA process do not obviate their NEPA
13 duties. Emissions from Defendants’ projects have reasonably foreseeable direct, indirect
14 and cumulative impacts on the Earth’s climate, and OPIC and Ex-Im must prepare EAs to
15 evaluate the significance of these reasonably foreseeable impacts on the domestic U.S.
16 environment.

17 **A. Both OPIC and Ex-Im are Federal Agencies Subject to NEPA.**

18 *1. Ex-Im is a Federal Agency Subject to NEPA.*

19 The Ex-Im Bank is “an agency of the United States of America . . . [whose] objects
20 and purposes . . . [are] to aid in financing and to facilitate exports of goods and services,
21 imports, and the exchange of commodities and services between the United States and . . .
22 any foreign country” 12 U.S.C. § 635. NEPA specifies that “major federal actions”
23 include “projects or programs entirely or partly financed, assisted, . . . or approved by
24
25

1 federal agencies.” 40 C.F.R. § 1508.18(a). Ex-Im thus promulgated rules to implement
2 NEPA to the extent that any of its projects or programs may have a significant impact on
3 the domestic environment. 12 C.F.R. pt. 408. *See also* 12 U.S.C. § 635i-5(a) (authorizing
4 Ex-Im Bank to consider and withhold assistance based on “potential environmental effects
5 of a project.”). These rules recognize that “historically” few of Ex-Im’s projects involve
6 effects on the United States environment. 12 C.F.R. § 408.3. However, they clearly and
7 affirmatively call for NEPA’s application “where Eximbank financing of U.S. exports may
8 affect environmental quality in the United States, its territories or possessions.” *Id.*; 12
9 C.F.R. § 408.4(b) (Environmental Assessment required for financing of projects that may
10 affect domestic environment).

11 Ex-Im’s NEPA rules specify that an EA is normally required for direct lending that
12 assists projects that may significantly affect the domestic environment. 12 C.F.R. §§
13 408.4(b) and 408.6. These rules further require that Ex-Im independently determine
14 whether an EA or EIS is required for any other agency proposal. 12 C.F.R. § 408.6(b).
15 Consistent with NEPA, such an “agency proposal” must include major actions (projects or
16 programs) that may have a significant effect on the domestic environment. 40 C.F.R. §
17 1500.3. *See also* Ex-Im Bank Environmental Procedures at ¶ 12 (Ex-Im A.R. Tab 2).

18 *2. OPIC is a Federal Agency Subject to NEPA.*

19
20 OPIC, like Ex-Im, engages in “major federal actions” as defined by 40 C.F.R. §
21 1508.18(a). OPIC is “an agency of the United States of America” created in order to
22 “mobilize and facilitate the participation of United States private capital and skills in the
23 economic and social development of less developed countries and areas, and countries in
24 transition from nonmarket to market economies.” 22 U.S.C. § 2191. OPIC has procedures

1 to implement Executive Order 12114⁵ and its separate statutory obligations under 22
2 U.S.C. § 2151(p), which require OPIC to consider the environmental impacts of its actions.
3 OPIC has not promulgated rules specifically implementing NEPA for projects that have
4 domestic environmental effects. However, as this Court properly concluded in its August
5 23, 2005 Order, OPIC’s procedures requiring consideration of extraterritorial impacts do
6 not displace OPIC’s obligations under NEPA. *See* August 23, 2005 Order at 13
7 (“Although Defendants argue that the legislative history of OPIC’s statute evinces the
8 same Congressional intent to displace NEPA as in *Merrell* and *Douglas County*, the record
9 reveals otherwise.”).⁶

10 **B. Ex-Im and OPIC have Taken Major Federal Actions Subject to**
11 **NEPA.**
12

13 Both OPIC and Ex-Im have approved an overwhelming number of direct loans and
14 financial guarantees for projects that directly or indirectly result in GHG emissions,

⁵ In 1979, the President issued Executive Order 12114, titled “Environmental Effects Abroad of Major Federal Actions.” The Order requires federal agencies to put into place procedures for reviewing and considering their extraterritorial environmental impacts. It applies to agencies taking major federal actions that have “significant effects on the environment outside the geographical borders of the United States and its territories and possessions.” E.O. 12114.

⁶ OPIC continues to contest this conclusion, and Plaintiffs anticipate that OPIC will attempt to introduce additional documents – documents that due diligence could have previously uncovered – in an effort to re-litigate this issue. The Court properly decided this matter in its August 23, 2005 Order. The plain language of NEPA clearly applies to OPIC, and the Court should not engage in the selective review of documents that OPIC will seek to introduce. Such methods of statutory construction are only appropriate when the plain language of the statute is ambiguous; that is not the case here, and OPIC does not suggest otherwise. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (“When the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”) (internal quotation marks omitted). Simply put, the slew of documents which Plaintiffs anticipate OPIC will attempt to produce do not, and cannot, support the agency’s purported exemption from NEPA. Plaintiffs address OPIC’s expected effort to re-litigate this issue in further detail below. *See* Section V, *infra*.

1 including oil and gas fields, pipelines, oil refineries and power plants. Each agency's
2 actions to approve financial support for these projects constitute major federal actions
3 subject to NEPA.

4 *1. Ex-Im has Taken Major Federal Actions Subject to NEPA.*

5
6 The Government Accounting Office (GAO) estimates that between 1990 and 2001
7 Ex-Im approved 474 separate transactions for fossil fuel projects, providing more than \$25
8 billion in loans and financial guarantees to energy projects worldwide. *Export-Import*
9 *Bank, Energy Financing Trends Affected by Various Factors, U.S. General Accounting*
10 *Office, September 2002* at 5 (Ex-Im A.R. Tab 7). With respect solely to power plants, Ex-
11 Im's own accounting indicates that it approved 86 separate transactions between 1987 and
12 1999, issuing more than \$7.8 billion in support for projects in the thermal power plant
13 sector alone. *Ex-Im Climate Change Report* at 26 (Ex-Im A.R. Tab 1). Ex-Im estimates
14 that these projects are responsible for 204 million tonnes of direct CO₂ emissions annually.
15 *Id.* at 27.

16 Since 1999, Ex-Im has approved at least 45 additional transactions for fossil fuel
17 projects that contribute to climate change – providing another \$6 billion in financial
18 assistance for oil and gas development projects and power plants. *See* Ex-Im A.R. Tab 28
19 (summary of Ex-Im Bank supported fossil-fuel projects between 2000-2003); *see also*, Ex-
20 Im A.R. Tabs 24, 25, 26, and 27 (providing documentation on individual projects approved
21 in 2000, 2001, 2002, and 2003, respectively). Individual transactions approved by Ex-Im
22 during this four-year period included, among other major commitments, a \$200 million
23 loan guarantee in connection with development of the Chad-Cameroon oil pipeline, a \$300
24 million loan guarantee in connection with development of the Cantarell oil fields in

1 Mexico, and a \$627.7 million loan guarantee in connection with development of the
2 Hamaca oil project in Venezuela. *See Defendants' Answer to Plaintiffs' Second Amended*
3 *Complaint* at ¶¶ 163, 171, 177. Ex-Im estimates that direct emissions associated with these
4 45 projects will result in more than 7 million tonnes of CO₂ annually. Ex-Im A.R. Tab 28
5 at 2. Ex-Im has not estimated indirect emissions associated with operation of these
6 facilities.

7 In order to facilitate these transactions, Ex-Im operates specific programs for
8 financing projects in the oil and gas sector as well as the thermal power plant sector –
9 activities that the agency has collectively described as its “energy” program. *See* Ex-Im
10 A.R. Tab 3 at 10 (page 10 of Ex-Im’s 1999 Annual Report); Ex-Im A.R. Tab 4 at sheet 3
11 (under the “energy” heading Ex-Im’s 2000 Annual Report states “Ex-Im Bank supported
12 25 transactions involving U.S. exports to foreign energy production and transmission
13 projects in FY 2000, including electric generation and transmission, and oil and gas
14 exploration and refineries”); Ex-Im A.R. Tab 5 at 14 (describing FY 2001 energy
15 transactions); Ex-Im A.R. Tab 6 at 19 (describing FY 2002 energy transactions). It is
16 undisputed that Ex-Im is continuing to finance such projects.

17 Each of the individual actions in Ex-Im’s energy program constitutes a major
18 federal action subject to NEPA. 40 C.F.R. § 1508.18(a) (“major federal actions” include
19 “projects or programs entirely or partly financed, assisted, . . . or approved by federal
20 agencies”); *see also, Mason County Medical Ass'n v. Knebel*, 563 F.2d 256, 259 (6th Cir.
21 1977) (REA assumed EIS would be required for potential loan guarantee); *Crosby v.*
22 *Young*, 512 F. Supp. 1363, 1370 (D. Mich. 1981) (same); *Woida v. United States*, 446 F.
23 Supp. 1377, 1381 (D. Minn. 1978) (“because financing the CU project [with loans and

1 | loan guarantees] constitutes a major federal action, the REA is required to comply with the
2 | provisions of the National Environmental Policy Act...”); *Silva v. Romney*, 473 F.2d 287
3 | (1st Cir. 1973) (assumed without argument that EIS required when HUD provided
4 | mortgage guarantee). Ex-Im has not conducted an EA or an EIS for a single one of these
5 | transactions, nor has it evaluated the cumulative environmental impact of its energy
6 | program in a programmatic NEPA document.

7 | 2. *OPIC has Taken Major Federal Actions Subject to NEPA.*
8 |

9 | Like Ex-Im, OPIC has also approved an extensive number of direct loans and
10 | financial guarantees for projects that result in GHG emissions, including oil and gas fields,
11 | pipelines, oil refineries and power plants. Between 1990 and 2000, OPIC provided
12 | financial support to at least 52 power projects. *Assessing our Actions* at 15 (OPIC A.R.
13 | Tab 1). OPIC estimated that these projects –which it described as its “power portfolio”–
14 | were responsible for more than 56 million tons in direct CO₂ emissions on an annual basis.
15 | *Id.* at 16. Since 2000, OPIC has approved at least 12 additional fossil fuel power projects,
16 | which OPIC estimates will contribute 23.8 million tonnes of direct CO₂ emissions
17 | annually. *Defendants’ Answer to Plaintiffs’ Second Amended Complaint* at ¶ 206.

18 | As part of its “power portfolio” OPIC also operates a specific program to provide
19 | financial support to projects in the oil and gas sector. As explained in OPIC’s “Program
20 | Handbook,” the agency operates several special insurance programs, which are “tailored to
21 | meet the specific insurance needs associated with certain types of international
22 | investments.” OPIC A.R. Tab 3 at 000054 (page 11). Among these “special insurance
23 | programs” is an oil and gas program that is specifically designed to “encourage petroleum
24 | exploration, development and production in developing countries.” *Id.* at 15. Individual oil

1 and gas projects approved by OPIC include, among other major commitments, a \$250
2 million insurance guarantee in connection with development of the Chad-Cameroon oil
3 pipeline, a \$116 million loan guarantee in connection with development of an oil and gas
4 field off the coast of Sakhalin Island in Russia, and a two loans totaling over \$350 million
5 for development of the West Seno I & II oil and gas development projects in Indonesia.
6 *Defendants' Answer to Plaintiffs' Second Amended Complaint* at ¶¶ 165, 182, 177. OPIC
7 has never estimated the indirect CO₂ emissions attributable to oil and gas development
8 facilities supported by OPIC. It is also undisputed that OPIC is continuing to fund such
9 projects.

10 Each of the individual actions in OPIC's energy program – or “power portfolio” -
11 constitutes a major federal action requiring compliance with NEPA. 40 C.F.R. §
12 1508.18(a) (“major federal actions” include “projects or programs entirely or partly
13 financed, assisted, . . . or approved by federal agencies.”). *See also, Mason County Medical*
14 *Ass'n v. Knebel*, 563 F.2d 256, 259 (6th Cir. 1977) (REA assumed EIS would be required
15 for potential loan guarantee); *Crosby v. Young*, 512 F. Supp. 1363, 1370 (D. Mich. 1981)
16 (same); *Woida v. United States*, 446 F. Supp. 1377, 1381 (D. Minn. 1978) (“because
17 financing the CU project [with loans and loan guarantees] constitutes a major federal
18 action, the REA is required to comply with the provisions of the National Environmental
19 Policy Act...”); *Silva v. Romney*, 473 F.2d 287 (1st Cir. 1973) (assumed without argument
20 that EIS required when HUD provided mortgage guarantee). OPIC has not conducted an
21 EA or EIS for a single one of these transactions, nor has it evaluated the cumulative
22 environmental impact of its power portfolio in a programmatic NEPA document.

1 **C. Defendants Concede that Climate Change and Resulting**
2 **Domestic Impacts are a Reasonably Foreseeable Impact of**
3 **Their Actions, and Case Law Supports that Conclusion.**
4

5 NEPA requires an agency to consider all reasonably foreseeable environmental
6 effects of a proposed major federal action, including both direct and indirect effects.⁷ 40
7 C.F.R. §§ 1508.8, 1508.25(c); *Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975). “As
8 in other legal contexts, an environmental effect is ‘reasonably foreseeable’ if it is
9 ‘sufficiently likely to occur that a person of ordinary prudence would take it into account in
10 reaching a decision.’” *Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d
11 520, 548 (8th Cir. 2003) (quoting *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir.
12 1992)).

13 Defendants here concede that increased GHG emissions are a reasonably
14 foreseeable effect of their decisions to finance and insure projects in each agency’s energy
15 programs – including coal, oil, and gas power plants, and oil and gas fields. *See e.g., Ex-*
16 *Im Climate Change Report* at 29 (Ex-Im A.R. Tab 1) (noting that “the 425 million tons of
17 CO₂ that is predicted to be produced by Ex-Im Bank supported power projects by 2012
18 will cause *Ex-Im Bank’s contribution* to global CO₂ production to peak at 1.4%”)
19 (emphasis added); *Assessing Our Actions* at 12 (OPIC A.R. Tab 1) (“in order to assess the
20 cumulative *GHG* and climate implications of its activities, OPIC evaluated the number and
21 types of projects that have received finance or political risk insurance support”) (emphasis
22 added).

⁷ Adverse environmental “effects” include both “direct effects” and “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.*

1 OPIC and Ex-Im likewise concede that GHG emissions contribute to climate
2 change, and that climate change may result in significant worldwide environmental
3 impacts. In *Assessing Our Actions*, OPIC explains:

4 Climate change represents a serious global environmental challenge. Since
5 the dawn of the industrial age, man has been emitting increasing quantities
6 of heat-absorbing GHGs primarily through the combustion of fossil fuels.
7 As a result, atmospheric concentrations of CO₂ – the most important GHG
8 – are now at their highest levels in more than 160,000 years and global
9 temperatures are rising. With emissions of CO₂ and other GHGs expected
10 to increase – especially in developing regions – current forecasts suggest
11 that atmospheric concentrations of CO₂ could double by 2060 with a
12 resulting global average temperature increase of as much as 2° to 6.5° F
13 over the next century. Such rapid temperature increase could have
14 potentially grave economic and environmental impacts.

15
16 *Assessing Our Actions* at 49 (OPIC A.R. Tab 1).⁸ Ex-Im similarly recognizes the
17 contribution of GHG emissions to climate change. *Ex-Im Climate Change Report* at 3 (Ex-
18 Im A.R. Tab 1) (“the information presented ... leads one to conclude that GHG
19 concentrations have indeed risen and that there is a reasonable likelihood that the increased
20 concentrations of these gases will result in increased average global temperatures during

⁸ OPIC’s *Briefing Book for the White House Conference on Climate Change* further emphasized:

The scientific consensus is clear that (1) greenhouse gases are rapidly building up in the atmosphere as a result of human actions; (2) that these increased concentrations will change our climate; and (3) that these changes could have serious adverse and disruptive consequences. . . . In addition, compelling scientific evidence indicates that the human effect on climate change is apparent today. . . . Scientists agree that global warming and resulting climate disruptions could seriously harm human health. . . . increase the incidence and intensity of floods and droughts, raise sea levels enough to inundate up to 7,000 square miles of U.S. coastline, decrease food production in some of the world’s poorest nations, and threaten the survival of many plant and animal species.

OPIC A.R. Tab 12 at 3610.

1 the coming decades”). And Ex-Im likewise acknowledges the potential for climate change
2 to cause significant environmental impacts:

3 [t]he direct regional environmental impact of such a climate change could
4 include changes in temperature and precipitations levels, with
5 corresponding changes to the properties and moisture content of soil. The
6 global impact could include changes in weather patterns and rises in sea
7 level. The changes in turn can result in major consequences to ecological
8 systems, human health and socioeconomic sectors such as agriculture,
9 coastal resources, forests, energy and transportation.

10
11 *Id.* at 4.

12 These reports both demonstrate that Defendants’ actions may have an impact on the
13 domestic environment. Each agency’s recognition that climate change may result in
14 worldwide environmental impacts necessarily acknowledges that the domestic U.S.
15 environment may be affected as well.⁹ In fact, neither OPIC nor Ex-Im disputes that their
16 actions may have impacts on the domestic environment; rather, they claim that the extent
17 of the impacts will be insignificant. *See Ex-Im Climate Change Report* at 33 (Ex-Im A.R.
18 Tab1) (“[Ex-Im] has not determined that Ex-Im Bank actions to support power projects
19 could represent a significant adverse effect on the environment of the US”); *Assessing our*

⁹ Outside of their own reports, each agency’s administrative record contains references to potential climate change impacts in the U.S. *See, e.g.*, OPIC A.R. Tab 12 at 3610 (“Scientists agree that global warming and resulting climate disruptions could . . . raise sea levels enough to inundate up to 7,000 square miles of U.S. coastline.”); Ex-Im A.R. Tab 45 at sheet 4 (explaining that among “potential effects of global warming” a “estimated 50 cm rise in sea level by the year 2100, could inundate more than 5,000 square miles of dry land and an additional 4000 square miles of wetlands in the U.S.”). The conclusion that the U.S. domestic environment will suffer environmental harm as a result of the Defendants’ contributions to climate change is further supported by Plaintiffs’ expert testimony. *See, e.g.*, Declaration of Dr. Michael MacCracken at ¶ 22 (Exhibit 2 in *Pls.’ Opp’n to Defs.’ Mot. for Summary Judgment*) (noting that the “location of emission is not important in considering the potential climatic impacts,” and explaining that “emissions of CO₂ 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.”).

1 | *Actions* at 6 (OPIC A.R. Tab 1) (“OPIC is not a substantial contributor to global GHG
2 | emissions or climate change”).¹⁰ Indeed, it is only the extent to which Defendants’ actions
3 | will affect the U.S. domestic environment that is unknown, and NEPA requires that OPIC
4 | and Ex-Im prepare an EA to answer that question. 40 C.F.R. § 1501.4(b); *see also, Mid*
5 | *States Coalition for Progress*, 345 F.3d at 549 (“When the *nature* of the effect is
6 | reasonably foreseeable but its *extent* is not ... the agency may not simply ignore the
7 | effect.”).

8 | Courts have expressly held that NEPA requires federal agencies to evaluate the
9 | impact of CO₂ emissions attributable to federal actions, even for projects where the total
10 | emissions were significantly smaller than the cumulative amounts at issue here. For
11 | example, in *Mid States Coalition*, 345 F.3d at 532, plaintiffs challenged the Surface
12 | Transportation Board’s approval of a new rail line to service coal mining operations in
13 | Wyoming’s Powder River Basin. Plaintiffs alleged that the Board violated NEPA by
14 | failing to consider the indirect impacts resulting from eventual combustion of coal
15 | delivered by the rail line. *Id.* at 549. The court agreed, finding that the eventual

¹⁰ As discussed further below, OPIC and Ex-Im’s claim of “insignificance” is based on a legally inadequate assessment of the effect of their actions. *See* Section IV(B), *infra*. In evaluating their contributions to climate change, both agencies have only considered the direct emissions associated with their activities - neither has assessed indirect emissions, which are a relevant factor under NEPA. 40 C.F.R. § 1508.8(b). When the full spectrum of direct *and* indirect emissions are cumulatively evaluated – as required by NEPA – the extent of each agency’s contribution to global greenhouse gas emissions is exponentially greater. OPIC and Ex-Im acknowledge the direct emissions of the projects they finance and insure amount to approximately 1.0% of current annual global CO₂ emissions, and will rise to almost 2.0% of total annual global CO₂ emissions by 2012-2015. *See Assessing Our Actions* at 19 (OPIC A.R. Tab 1) (noting that OPIC emissions will rise to 0.43% of global emissions in 2015); *Ex-Im Climate Change Report* at 29 (Ex-Im A.R. Tab 1) (noting that 2001 Ex-Im emissions will rise to 1.4% of global emissions by 2012). An evaluation of direct *and* indirect emissions demonstrates that OPIC and Ex-Im projects are, in fact, currently responsible for more than 7.3% of global annual CO₂ emissions. *See* Supplemental Declaration of Richard Heede, at ¶13 (Pls.’ Exh. 1).

1 combustion of the coal was not “speculative” – as the Board claimed – but instead “almost
2 certain.” *Id.* Based on the fact that combustion of the fuel was reasonably foreseeable, the
3 court concluded that the defendant was legally required to consider the project’s indirect
4 CO₂ emissions in its NEPA analysis. *Id.*

5 Similarly, in *Border Power Plant Working Group v. DOE*, 260 F. Supp. 2d 997
6 (S.D. Cal. 2003), the court found that the Department of Energy (DOE) was required to
7 evaluate the GHG emissions of a single 500 MW gas-turbine power plant– despite the fact
8 that the plant’s contribution to climate change may have been minor, and despite the fact
9 that the plant was located in Mexico. *See id.* at 1029 (“Because these emissions have
10 potential environmental impacts and were indicated by the record, the Court finds that the
11 EA’s failure to disclose and analyze their significance is counter to NEPA.”). The CO₂
12 emissions resulting from the 500 MW power plant at issue in *Border Power* are dwarfed
13 by both OPIC and Ex-Im’s individual energy portfolios, yet for purposes of NEPA, DOE’s
14 failure to consider these relatively minor emissions still rendered its decision inadequate.
15 *Id.* Measured against these projects, OPIC and Ex-Im’s refusal to evaluate the reasonably
16 foreseeable impact of GHG emissions in an environmental assessment is clearly
17 inconsistent with each agency’s obligations under NEPA.

18 **D. Defendants Concede that Each Agency’s Energy Projects Have**
19 **Cumulative Impacts.**

20 CEQ regulations also require a programmatic evaluation where distinct individual
21 projects have similar cumulative impacts – so-called cumulative actions. 40 C.F.R §
22 1508.25. “Cumulative actions” are defined as actions “which when viewed with other
23 proposed actions have cumulatively significant impacts and should therefore be discussed
24

1 in the same impact statement.” 40 C.F.R. § 1508.25.¹¹ If substantial questions are raised
2 as to whether the group of actions will have a cumulative impact, a single EA must be
3 prepared to determine the significance of those cumulative actions. *See Klamath-Siskiyou*
4 *Wildlands Ctr. v. BLM*, 387 F.3d 989, 993 (9th Cir. 2004) (cumulative NEPA analysis
5 must be “done in a single document when the record raises ‘substantial questions’ about
6 whether there will be ‘significant environmental impacts’ from the collection of anticipated
7 projects.”); *Blue Mountains Biodiv. Project v. Blackwood*, 161 F.3d 1208, 1215 (9th Cir.
8 1998); *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985).

9 In this case, both agencies readily concede that each individual project adds to the
10 cumulative impact on climate change. Indeed, each agency has conceded that the impact
11 of these projects should be evaluated at the program or portfolio level. Thus OPIC
12 “recognized that carbon dioxide emissions and climate change impacts are global and that
13 the assessment of such impacts should not be limited to the project-specific level, but must
14 be done on a cumulative basis.” OPIC Press Release, *Landmark OPIC Report Shows Way*
15 *for Government and Business to Demonstrate Accountability for Climate Impacts*, October
16 30, 2000 (OPIC A.R. Tab 17 at 4384).

17 Based on this recognition, OPIC prepared an analysis of cumulative carbon dioxide
18 emissions associated with the agency’s “power portfolio” including its investment in and
19 insurance of power plants. *Assessing Our Actions* at 12, 16-20 (OPIC A.R. Tab 1). OPIC,
20 however, did not prepare an EA of its energy portfolio. It did not consider the impacts of

¹¹ 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.

1 indirect emissions – such as those associated with eventual combustion of fossil fuel
2 extracted from projects financed or insured by OPIC. *See* 40 C.F.R. § 1508.8 (NEPA
3 analysis must include consideration of “indirect effects”). OPIC also did not consider
4 alternatives to its power portfolio investments, 40 C.F.R. § 1502.14; did not invite
5 comments from other federal agencies, including EPA, *see* 40 C.F.R. § 1503.1; and did not
6 publish its analysis for public comment. *Id.*

7 Ex-Im has also acknowledged that carbon dioxide emissions associated with its
8 projects contribute to global warming, and has determined that the impact of its own
9 energy program investment must be assessed at an “aggregate” level: “the aggregate
10 contribution from ... global point sources of [CO₂] from manmade activity appears to be
11 triggering some effect on earth’s climate. Hence Ex-Im Bank’s ‘role’ in the [Greenhouse
12 Gas] emission and climate change issue must be assessed by examining the aggregation of
13 its actions taken to finance projects which produce CO₂ emissions.” *Ex-Im Climate
14 Change Report* at 33 (OPIC A.R. Tab 1). Ex-Im, like OPIC, conducted a limited analysis
15 of the aggregate direct impact of its actions on climate change. *Id.* But Ex-Im also refused
16 to use NEPA procedures for this analysis. It did not conduct an EA; it did not consider
17 indirect emissions associated with combustion of fossil fuels; it failed to present
18 alternatives to its energy program investments; it did not invite comments from other
19 federal agencies with expertise in the area; and it failed to publish its limited analysis for
20 public comment.

1 **IV. OPIC AND EX-IM HAVE VIOLATED NEPA.**

2
3 **A. OPIC and Ex-Im Must Each Prepare An Environmental**
4 **Assessment to Determine Whether the Impacts of their Actions**
5 **will be Significant.**
6

7 It is undisputed that neither agency has prepared an individual or programmatic EA
8 or EIS to assess the significance of the environmental impacts associated with each
9 agency’s actions or portfolios. *See Defs’ Reply to Pls.’ Opp’n to Defs’ Mot. for Summary*
10 *Judgment* at 18 (“As Plaintiffs point out, neither agency has conducted a NEPA analysis
11 for the projects described in the Complaint or for a purported program supporting energy
12 projects. There could be no FONSI marking the conclusion of a NEPA process that never
13 took place.”). Nor have the agencies prepared individual EAs for each project that
14 consider the direct, indirect, and cumulative impacts of all reasonably foreseeable past,
15 present, and future actions. *See id.* Instead, both agencies have declared that they have no
16 NEPA obligation unless they first determine that their actions “could, in fact, cause a
17 significant impact.” *Ex-Im Climate Change Report* at 33 (Ex-Im AR Tab 1); *OPIC’s*
18 *Response to Plaintiffs Demand Letter* (OPIC AR 4368-70) (arguing that NEPA review is
19 only triggered if “OPIC’s contribution to GHGs meets the ‘significance’ test”). This
20 position – which is the only justification either agency offers in the record for not
21 complying with NEPA – is patently wrong.

22 Under NEPA, an environmental assessment must be prepared in order to make an
23 initial determination of “significance.” 40 C.F.R. § 1501.4(b) (“In determining whether to
24 prepare an environmental impact statement the Federal agency *shall* ... prepare an
25 environmental assessment.”) (emphasis added). OPIC and Ex-Im entirely ignore this
26 obligation. Indeed, under the interpretation they offer, environmental assessments would

1 | serve no purpose – they would never be prepared, and CEQ’s extensive rules on when and
2 | how to prepare EAs would be superfluous. NEPA demands more. “An agency cannot
3 | avoid its statutory responsibilities under NEPA merely by asserting that an activity it
4 | wishes to pursue will have an insignificant effect on the environment.” *Alaska Ctr. for the*
5 | *Environment v. United States Forest Service*, 189 F.3d 851, 859 (9th Cir. 1999). Quite
6 | simply, an EA must be prepared for this determination, and a finding of no significant
7 | impact may *only* be made after preparation of an EA. *See* 40 C.F.R. § 1508.13 (“[finding
8 | of no significant impact] *shall* include the environmental assessment ...”) (emphasis
9 | added). The failure to prepare either individual or programmatic EAs violates each
10 | agency’s legal obligations under NEPA.

11 | **B. The Climate Change Reports Defendants have Produced Fail to**
12 | **Consider Relevant Factors, are Arbitrary and Capricious, and**
13 | **do not Satisfy Defendants’ NEPA Obligations.**
14 |

15 | The reports produced by each agency – OPIC’s *Climate Change: Assessing our*
16 | *Actions* (OPIC A.R. Tab 1), and *Ex-Im Bank’s Role in Greenhouse Gas Emissions and*
17 | *Climate Change* (Ex-Im A.R. Tab 1) – do not, and cannot, satisfy the agencies’ obligations
18 | under NEPA. This is not a trivial dispute over the form of each agency’s evaluation of
19 | climate change impacts – the deficiencies in each report are substantive and significant.

20 | NEPA requires, among other things, that each agency take a “hard look” at all
21 | reasonably foreseeable impacts of a proposed action, including both direct and indirect
22 | effects of the action, and the cumulative impacts of past, present, and reasonably
23 | foreseeable future actions. 40 C.F.R. §§ 1508.8, 1508.7. In addition, the agency must
24 | consider reasonable alternatives to the proposed action, including a “no action” alternative,
25 | 40 C.F.R. § 1508.9(b); and must provide an opportunity for public review and input on the

1 assessment. 40 C.F.R. § 1506.6. And these procedural obligations place a “continuing”
2 responsibility on federal agencies to consider environmental effects of on-going federal
3 actions, particularly when the extent of a action’s impacts are uncertain, and the science on
4 the matter is evolving. 40 C.F.R. §§ 1508.27(b)(5); 1509.2(c)(1); *see also*,
5 *Utahns for Better Transp. v. United States DOT*, 180 F. Supp. 2d 1286, 1288-1289 (D.
6 Utah 2001) (“NEPA imposes a continuing duty upon the agencies to evaluate new and
7 changed information, and to supplement earlier analysis with the consideration of more
8 recent data.”).

9 In spite of these clear obligations, each agency’s one-time evaluation of climate
10 change simply ignore critical aspects of NEPA’s basic requirements. Neither agency
11 considered the impact of indirect emissions; indeed, each agency explicitly limited its
12 evaluation to direct emissions. *See Assessing our Actions* at 13-15 (OPIC A.R. Tab 1)
13 (explaining OPIC’s methodology for evaluating direct emissions from power plants); *Ex-*
14 *Im Climate Change Report* at ii (Ex-Im A.R. Tab 1)(“[Ex-Im] only addressed Bank
15 supported projects that directly emit GHG. ‘Equivalent’ amounts of GHG associated with
16 fuel ‘made available’ from extraction projects were not counted.”). By refusing to consider
17 indirect effects, each agency has failed to consider a relevant factor, and consequently has
18 not fully evaluated the impacts of their actions, as required by NEPA.

19 Nor did either agency actually evaluate the potential domestic impacts of its
20 actions. Each agency acknowledged that climate change could have significant worldwide
21 impacts, but did not discuss, let alone evaluate, the potential scope of those impacts on the
22 domestic U.S. environment. NEPA requires that each agency take a “hard look” at such
23 impacts. *Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957, 963 (9th Cir. 2002)

1 (“Agencies must adequately consider the project's potential impacts and the consideration
2 given must amount to a ‘hard look’ at the environmental effects.”).

3 Furthermore, both OPIC & Ex-Im failed to provide any evaluation of alternatives to
4 the proposed actions, including a “no action” alternative. Consideration of alternatives has
5 been described as the “heart” of NEPA analysis. 40 C.F.R § 1502.14. Presentation of
6 alternatives in an EA provides the public important information on the nature of a project’s
7 environmental impacts, and is an indispensable component of NEPA’s broader purpose.
8 *Sierra Club v. Marsh*, 744 F.Supp. 353, 364 (D. Me. 1990) (“the ‘reasonable alternatives’
9 analysis is designed to provide decisionmakers *and the public* with a project ‘benchmark’
10 against which the environmental costs and economic benefits of the project may be
11 measured and less environmentally expensive alternatives to the proposed action may be
12 identified”) (emphasis added). *See also Forty Most Asked Questions Concerning CEQ’s*
13 *NEPA Regulations*, 46 Fed. Reg. 18026, # 3 (1981). Such an analysis is entirely absent
14 from the reports produced by OPIC and Ex-Im.

15 Finally, neither agency provided opportunity for public comment on the reports
16 they produced, nor sought comments from other government agencies with expertise in the
17 area, as required by NEPA. The Defendants’ failure to subject their reports to public
18 scrutiny undermines the very purpose of NEPA, and deprives organizations and
19 individuals, like the Plaintiffs, the opportunity to influence government decisions of
20 environmental significance. Indeed, courts have previously explained that preventing
21 public involvement constitutes a direct environmental harm under NEPA. The “...harm
22 consists of the added *risk* to the environment that takes place when governmental
23 decisionmakers make up their minds without having before them an analysis (with prior

1 public comment) of the likely effects of their decision upon the environment.” *Sierra Club*
2 *v. Marsh*, 872 F.2d at 500-501 (emphasis in original). Such is the case here.

3 Despite these substantive and procedural deficiencies, OPIC and Ex-Im continue to
4 rely on their wholly inadequate, one-time, evaluation of climate change as justification for
5 not applying NEPA, and as justification for continuing to approve projects which
6 contribute to climate change.¹² Defendants’ climate change reports do not, and cannot,
7 satisfy each agency’s continuing obligations. NEPA demands more.

¹² Each agency’s environmental evaluations of individual projects – to the extent that there are any project-specific environmental evaluations in the record – suffer from even more serious problems than the climate change reports prepared by OPIC and Ex-Im. For example, with respect to some of the individual projects listed in Plaintiffs’ Complaint, there are no environmental evaluations of any kind in the record. OPIC’s administrative record contains no environmental analysis for the Chad-Cameroon oil pipeline project, the Sakhalin oil field project, or the West Seno I & II projects. There is no evaluation of each project’s contribution to climate change; no “hard look” at potential climate change impacts on the domestic environment; no discussion of each project’s indirect impacts; no evaluation of the project’s cumulative impacts; no evaluation of alternatives to the proposed project; no discussion of potential mitigation measures, and no NEPA process to allow the public to evaluate and comment on the environmental impacts of the project before OPIC committed to funding each project. Ex-Im’s administrative record contains some limited environmental analysis of individual projects, but even these reports fail to meet the basic requirements of NEPA: there is no “hard look” at potential climate change impacts on the domestic environment; no discussion of each project’s indirect contributions to climate change; no evaluation of the project’s cumulative impacts, no evaluation of alternatives to the proposed project; no discussion of potential mitigation measures; and no NEPA process to allow the public to evaluate and comment on the environmental impacts of the project before Ex-Im committed to funding each project.

1 **V. OPIC IS NOT EXEMPT FROM NEPA.**¹³
2

3 By default, NEPA plainly applies to all federal agencies. There are only two
4 possible exceptions to this rule: (1) if it is “impossible” for an agency to comply; or (2) if
5 the law governing an agency’s operations “expressly” prohibits compliance. 40 C.F.R.
6 1500.6. As this Court properly determined in its August 23, 2005 Order, neither exception
7 exists in this case.

8 Plaintiffs anticipate that OPIC will attempt to overcome NEPA’s clear statutory
9 language by shoveling up a handful of disparate internal memos and letters that purport to
10 show that OPIC has previously rejected NEPA. Based on these documents, OPIC will
11 make grandiose claims: OPIC *clearly* interpreted NEPA not to apply; Congress was *fully*
12 *informed* about OPIC’s *agency action*; Congress *implicitly adopted* OPIC’s supposed
13 rejection of NEPA. Even assuming, for the sake of argument, that these documents
14 support OPIC’s exaggerated claims, they are not equal to “agency actions” deserving of
15 deference. Congressional silence in the face of agency correspondence carries no
16 significance, and it certainly does not trump NEPA’s plain language. The Court should
17 reject OPIC’s continuing attempt to find some excuse for its failure to comply with NEPA.

18
19

¹³ In the August, 23, 2005 Order, this Court analyzed OPIC’s efforts to exempt itself from NEPA, and rejected them, holding that NEPA applied to OPIC. OPIC attempted to re-litigate this issue through a motion for reconsideration, which was properly rejected by this Court, and OPIC has indicated that it intends to re-raise this issue in its cross-motion for summary judgment. By addressing OPIC’s anticipated argument, Plaintiffs do not waive their right to object to OPIC’s attempt to re-litigate this argument, nor do they waive the right to contest the introduction of any documents on which OPIC may rely.

1 **A. NEPA’s Plain Language Applies to OPIC.**

2
3 Statutory construction begins with the plain language of the statute. “When the
4 statute’s language is plain, the sole function of the courts—at least where the disposition
5 required by the text is not absurd—is to enforce it according to its terms.” *Hartford*
6 *Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000)(internal
7 quotation marks omitted) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S.
8 235, 241 (1989) (in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

9 The plain language of NEPA states that “*all* agencies of the Federal Government
10 *shall* [apply NEPA] to the *fullest extent possible*.” 42 U.S.C. § 4332 (emphases added).
11 OPIC is a federal agency. Congress has never exempted OPIC from NEPA. Interpretation
12 should end there. The plain language of the statute dictates that NEPA applies to OPIC.
13 Furthermore, the Foreign Assistance Act (“FAA”) plainly requires OPIC to compile an
14 Environmental Impact Statement if one of its actions may affect the domestic environment.
15 22 U.S.C. § 2151p(c)(1)(A). “Environmental Impact Statement” is a term of art specific to
16 NEPA. The FAA therefore reinforces the general rule that NEPA applies to OPIC. These
17 statutes are clear and unambiguous, and an express exemption from NEPA is not to be
18 found.¹⁴

19
¹⁴ OPIC’s enabling authority is functionally quite similar to that of its sister agency Ex-Im; and Ex-Im has conceded that it is subject to NEPA. *Compare* 22 USCS § 2191 with 12 U.S.C. § 635 and 12 C.F.R. part 408. Neither mentions NEPA, and both include some implementing tools ensuring that the respective entities can consider environmental impacts in their work. There is no apparent reason that NEPA should apply to Ex-Im and not to OPIC, a similar and related agency. Additionally, OPIC has consistently accepted the application of Executive Order 12114, 3 C.F.R. 356 (1980) (EO 12114), which implements NEPA abroad. It makes no sense for OPIC to affirmatively implement EO 12114 for extraterritorial impacts, and then claim exemption under NEPA in regard to domestic impacts.

1 **B. Congressional Silence Does not Except OPIC from NEPA.**

2
3 Plaintiffs anticipate that, in an effort to overcome NEPA’s plain language, OPIC
4 will now seek to present a handful of documents that purport to show that OPIC has
5 previously rejected NEPA. According to OPIC, congressional silence in the face of these
6 documents acts to broadly exempt the agency from NEPA. As emphasized above, the
7 Court need not engage in this exercise. The methods of statutory construction advocated by
8 OPIC are only appropriate when the plain language of the statute is ambiguous; that is not
9 the case here, and OPIC cannot suggest otherwise. *See Hartford Underwriters Ins. Co. v.*
10 *Union Planters Bank, N. A.*, 530 U.S. at 6.

11 Regardless, OPIC’s congressional silence claim fails. As this court implicitly
12 recognized in its August 23, 2005 Order, one should not credit Congressional silence with
13 changed Congressional intent. *See United States v. Wells*, 519 U.S. 482, 496 (U.S. 1997)
14 (refusing to give any weight to congressional silence). “Congressional inaction cannot
15 amend a duly enacted statute.” *Patterson v. McLean Credit Union*, 491 U.S. 164, 175, n. 1
16 (1989). “It is at best treacherous to find in congressional silence alone the adoption of a
17 controlling rule of law.” *Girouard v. United States*, 328 U.S. 61, 69 (1946).

18 Silence has never been accepted as conclusive evidence of congressional intent, and
19 courts have been very demanding in the few cases where they give silence *any* weight. For
20 example, in *Zuber v. Allen*, congressional silence, plus knowledge, plus an exchange on the
21 house floor demonstrating that some congressmen shared the agency’s views, was not
22 deemed to be sufficient to infer congressional intent. *Zuber v. Allen*, 396 U.S. 168 (U.S.
23 1969). In *Commodities Futures Trading Commission v. Schor*, 478 U.S. 833, the Court
24 used congressional inaction in the face of *formal* agency action as supporting evidence (not

1 stand alone evidence) that the agency correctly interpreted a congressional mandate. *See*
2 *Commodities Futures Trading Commission v. Schor*, 478 U.S. 833, 847 (Congress had
3 “abundant evidence” including promulgated agency rules and an explicit act of Congress
4 giving the agency the authority to determine the scope of its jurisdiction). The Court went
5 out of its way to point out that it did not need to “rely” on silence, reinforcing the general
6 rule that silence is a poor guide. *See id.*

7 Furthermore, silence and reenactment together do not change a statute. Attempting
8 to bolster its silence claim, OPIC will likely claim “adoption through reenactment,”
9 asserting that when Congress reenacts a statute that includes the agency authorization
10 which has previously been interpreted, Congress implicitly adopts that agency
11 interpretation. This is not true. At the very least, there must be evidence that Congress
12 was aware of, and considered, an agency interpretation when it reenacted the statute. Such
13 evidence should include, at a minimum, formal agency action of the sort Courts would
14 offer deference. *See Commodity Futures Trading Com.*, 478 at 843 (distinguishing
15 between promulgated regulations, which receive deference, and proposed regulations,
16 which “it goes without saying... do[] not represent an agencies considered interpretation”).
17 Mere letters and internal memoranda do not rise to the level of documents typically seen as
18 embodying agency interpretations. *See United States v. Mead Corp.*, 533 U.S. 218, 233
19 (U.S. 2001). In the absence of such evidence, the reenactment is given *no* weight. “In
20 such circumstances we consider the . . . re-enactment to be without significance.” *United*
21 *States v. Calamaro*, 354 U.S. 351, 359 (1957).

22 In *Brown v. Gardner*, the Supreme Court rejected a much stronger argument that
23 Congress, by reenacting the organic Veteran Affairs (VA) statute, had implicitly adopted a

1 | longstanding rule promulgated by the VA. Despite the fact that the VA had promulgated a
2 | rule expressing its interpretation of the statute, the Court nevertheless dismissed the
3 | Government’s argument with the “obvious trump to the reenactment argument” that
4 | ““where the law is plain, subsequent reenactment does not constitute an adoption of a
5 | previous administrative construction.”” *Brown v. Gardner*, 513 U.S. 115, 121 (U.S. 1994)
6 | (quoting *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991)).

7 | Following OPIC’s argument, and giving an agency’s correspondence and internal
8 | documents sufficient weight to change statutory law, would lead to absurd results in
9 | statutory interpretation cases. Any active agency is always swathed in paper. There will
10 | always be letters, memos, notes, and millions of recorded actions of agency employees
11 | (like surveys) that could be used to support almost any argument about the agency’s
12 | position. Likewise, Congress lives in reams of paper. Every one of the 535 Congressmen
13 | and women sheds paper, letters, memos, and speeches on a daily basis. If the types of
14 | communication OPIC intends to present were to be considered “agency action providing
15 | notice to Congress” Congress would have to be on full alert constantly for shuffling
16 | paperwork that might be deemed to have subverted the carefully crafted plain language of
17 | its statutes.

18 | The Supreme Court has previously rejected this argument, and held that single
19 | statements by individual Congressmen and women are insufficient to overcome a statute’s
20 | plain language. As the Supreme Court held in *Zuber v. Allen*, 396 U.S. 168, 185 (U.S.
21 | 1969), rejecting the dissent’s claim that a colloquy between two Congressmen on the house
22 | floor should be given weight, “[f]loor debates reflect at best the understanding of
23 | individual Congressmen.” Only certain kinds of documents and actions carry the weight

1 needed for Agency or Congressional action, and OPIC has uncovered nothing approaching
2 those documents or actions here. “The value, if any, of ... post-enactment [congressional]
3 materials should be decided case by case, ... *but should always be ingested with a healthy*
4 *dose of skepticism.*” *Strickland v. Commissioner, Me. Dep't of Human Servs.*, 48 F.3d 12,
5 18 (1st Cir. 1995) (emphasis added).

6 **C. The Council on Environmental Quality Assumes NEPA applies**
7 **to OPIC.**

8
9 The agency responsible for NEPA’s implementation, the Council on Environmental
10 Quality (CEQ), has long interpreted NEPA to apply to OPIC. The CEQ has formally
11 promulgated a rule stating that NEPA must apply unless it is impossible, which is not the
12 case here, or the agency’s operations prohibit it, which is also not the case here. “[E]ach
13 agency of the Federal Government shall comply with [NEPA] unless existing law
14 applicable to the agency’s operations *expressly prohibits* or *makes compliance impossible.*”
15 40 C.F.R. 1500.6 (emphasis added).

16 In this case, CEQ has consistently affirmed that NEPA applies to OPIC. Several
17 Federal Register notices published by CEQ list OPIC among the agencies subject to
18 NEPA. *See, e.g.*, 46 Fed. Reg. 51385-51387 (May 7, 1981); 45 Fed. Reg. 19294-19295
19 (Mar. 25, 1980); 44 Fed. Reg. 72622-72623 (Dec. 14, 1979). These Federal Register
20 publications affirmative demonstrate that CEQ did not interpret OPIC to be broadly
21 exempt from NEPA.¹⁵ Rather, it assumed that OPIC was subject to its provisions. These
22 indicia of CEQ’s interpretations firmly undermine OPIC’s alleged exemption, and

¹⁵ CEQ, not OPIC, is charged with implementing NEPA, and it is CEQ’s interpretations that deserve deference. “[C]onsiderable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer” *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).

1 reinforce NEPA’s plain language: “*all* agencies of the Federal Government *shall* [apply
2 NEPA] to the *fullest extent possible*.” 42 U.S.C. § 4332 (emphases added).

3 OPIIC’s anticipated attempt to overturn clear congressional language with a
4 collection of correspondence must fail. In short, NEPA applies to every agency, unless
5 Congress acts to exempt it. Despite OPIIC’s strained efforts to manufacture an exemption,
6 there is no evidence that Congress acted to exempt OPIIC from NEPA’s statutory regime.

7 **VI. CONCLUSION.**
8

9 For the reasons stated, Plaintiffs’ Motion for Summary Judgment should be granted.
10

11 December 23, 2005

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13 Greenpeace, Inc.
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15 City of Oakland, CA
16 City of Arcata, CA
17 City of Santa Monica, CA

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