

2005 U.S. Dist. LEXIS 42335, \*; 35 ELR 20179

FRIENDS OF THE EARTH, INC.; GREENPEACE, INC.; CITY OF BOULDER, COLORADO; CITY OF ARCATA, CALIFORNIA; and CITY OF OAKLAND, CALIFORNIA, Plaintiffs, v. PETER WATSON and PHILLIP MERRILL, Defendants.

No. C 02-4106 JSW

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2005 U.S. Dist. LEXIS 42335; 35 ELR 20179

August 23, 2005, Decided

August 23, 2005, Filed

**SUBSEQUENT HISTORY:** Summary judgment denied by, Summary judgment granted, in part, summary judgment denied, in part by [Friends of the Earth, Inc. v. Mosbacher, 2007 U.S. Dist. LEXIS 24268 \(N.D. Cal., Mar. 30, 2007\)](#)

**CORE TERMS:** environmental, judicial review, causation, summary judgment, agency action, redressability, emissions, environmental impact, non-moving, greenhouse, warming, habitat, global, concrete interests', demonstrating, challenging, forests, credibility, designating, withdrawal, favorable, displace, climate, export, environmental consequences, environmental assessment, government agency, injury cases, genuine issue, moving party

**COUNSEL:** [\*1] For Friends of the Earth, Inc., Greenpeace, Inc., Plaintiffs: Richard Roos-Collins, Natural Heritage Institute, San Francisco, CA; Ronald A. Shems, Brian Dunkiel, Shems Dunkiel & Kassel PLLC, Burlington, VT; Geoff Hand, Shems Dunkiel Kassel and Saunders, Burlington, VT.

For City of Boulder, Colorado, Plaintiffs: Joseph N. Raismes, Office of the City Attorney, Boulder, CO; Richard Roos-Collins, Natural Heritage Institute, San Francisco, CA; Sue Ellen Harrison, Office of the City Attorney City of Boulder, Boulder, CO; Ronald A. Shems, Brian Dunkiel, Shems Dunkiel & Kassel PLLC, Burlington, VT; Geoff Hand, Shems Dunkiel Kassel and Saunders, Burlington, VT.

For City of Arcata, California, Plaintiffs: Nancy Diamond, Law Offices of Nancy Diamond, Arcata, CA; Richard Roos-Collins, Natural Heritage Institute, San Francisco, CA; Ronald A. Shems, Brian Dunkiel, Shems Dunkiel & Kassel PLLC, Burlington, VT; Geoff Hand, Shems Dunkiel Kassel and Saunders, Burlington, VT.

For City of Oakland, California, Plaintiffs: Richard Roos-Collins, Natural Heritage Institute, San Francisco, CA; Ronald A. Shems, Brian Dunkiel, Shems Dunkiel & Kassel PLLC, Burlington, VT; Geoff Hand, Shems Dunkiel [\*2] Kassel and Saunders, Burlington, VT.

For City of Santa Monica, Plaintiff: Ronald A. Shems, Shems Dunkiel & Kassel PLLC, Burlington, VT; Geoff Hand, Shems Dunkiel Kassel and Saunders, Burlington, VT.

For Peter Watson, in his official capacity as President and Chief Executive Officer of the Overseas Private Investment Corporation, Eduardo Aguirre, in his official capacity as Vice Chairman and First Vice President of the Export-Import Bank of the United States, Philip Merrill, in his official capacity as President and Chairman of the Export-Import Bank of the United States, Defendant: Ann D. Navaro, Environment and Natural Resources Div. US Department of Justice, Washington, DC; Kevin V. Ryan, United States Attorney, San Francisco, CA; James A. Coda, Office of the United States Attorney, San Francisco, CA; Brian C. Toth, US Dept of Justice Env't & Natural Resources Div General Litigation Section, Washington, DC.

**JUDGES:** JEFFREY S WHITE, UNITED STATES DISTRICT JUDGE.

**OPINION BY:** JEFFREY S WHITE

## **OPINION**

### **ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Now before the Court is the motion for summary judgment on standing and other jurisdictional issues filed by Defendants Peter Watson, [\*3] in his official capacity as President and Chief Executive Officer of the Overseas Private Investment Corporation ("OPIC"), and Peter Merrill, in his official capacity as Vice Chairman and First Vice President of [the Export-Import Bank](#) of the United States ("Ex-Im"). Having carefully reviewed the parties' papers, and the relevant legal authority, and good cause appearing, the Court DENIES Defendants' motion. <sup>1</sup>

## **FOOTNOTES**

- <sup>1</sup> Also before the Court are Plaintiffs' two pending motions to strike and Plaintiffs' motion for leave to file a surreply. The Court HEREBY DENIES both motions to strike and GRANTS the motion for leave to file a surreply. The surreply brief attached to Plaintiffs' motion for leave is deemed filed.

## **FACTUAL BACKGROUND**

Plaintiffs initiated this action against Defendants pursuant to the National Environmental Policy Act of 1969, [42 U.S.C. §§ 4321- 4335](#) ("NEPA") and the Administrative Procedure Act, [5 U.S.C. §§ 701- 706](#) [\*4] ("APA"). OPIC, an independent government corporation, offers insurance and loan guarantees for projects in developing countries. [22 U.S.C. § 2197\(a\)](#). OPIC

provides political risk insurance covering currency inconvertibility, expropriation or political violence, financing through loan guarantees, and direct loans. [22 U.S.C. § 2194](#). Ex-Im, an independent governmental agency and wholly-owned government corporation, provides financing support for exports from the United States. (Declaration of Barbara O'Boyle ("O'Boyle Decl."), PP 2, 7.) To support exports, Ex-Im provides a variety of products, including [export credit insurance](#) and guarantees. (O'Boyle Decl., P 10.) In a typical Ex-Im transaction, a foreign buyer, who has a contract to buy goods or services from a United States' exporter, seeks financing to purchase such goods or services. Ex-Im's guarantee or insurance covers the risk that a foreign buyer will not pay back a loan to purchase goods or services from a United States' exporter. (O'Boyle Decl., P 9.)

In their complaint, Plaintiffs detail climate changes associated with the effects of global warming and allege continuing [\*5] adverse environmental impact resulting in injury to their members throughout the country. Specifically, they allege that OPIC and Ex-Im have provided assistance to particular projects that contribute to climate change without complying with the requirements of the NEPA and the APA. Plaintiffs seek declaratory and injunctive relief against Defendants.

Defendants now move for summary judgment on the following grounds: (1) lack of standing; (2) lack of final agency action; (3) OPIC's organic statute precludes judicial review; and (4) OPIC is not subject to NEPA.

## ANALYSIS

### A. Legal Standard.

Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." [Fed. R. Civ. P. 56\(c\)](#). A principal purpose of the summary judgment procedure is to identify and dispose of factually unsupported claims. [Celotex Corp. v. Catrett](#), 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "In considering a motion for summary judgment, the court [\*6] may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party." [Freeman v. Arpaio](#), 125 F.3d 732, 735 (9th Cir. 1997).

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits which demonstrate the absence of a genuine issue of material fact. [Celotex](#), 477 U.S. at 323. Once the moving party meets this initial burden, the non-moving party must go beyond the pleadings and by its own evidence "set forth specific facts showing that there is a genuine issue for trial." [Fed. R. Civ. P. 56\(e\)](#). The non-moving party must "identify with reasonable particularity the evidence that precludes summary judgment." [Keenan v. Allan](#), 91 F.3d 1275, 1279 (9th Cir. 1996) (quoting [Richards v. Combined Ins. Co.](#), 55 F.3d 247, 251 (7th Cir. 1995)) (stating that it is not a district court's task to "scour the record in search of a genuine issue of triable fact"). If the non-moving party fails to make this showing, the moving party is entitled [\*7] to judgment as a matter of law. [Celotex](#), 477 U.S. at 323.

## B. Plaintiffs Have Standing to Bring Their Claims.

Defendants contend that Plaintiffs' alleged injuries regarding the implications of climate change do not amount to the type of injury required to support standing. (Br. at 2.) In order to demonstrate Article III standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." [\*Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. \(TOC\), Inc.\*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 \(2000\)](#) (quoting [\*Lujan v. Defenders of Wildlife\*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 \(1992\)](#))).

When, as here, a plaintiff seeks to challenge a procedural violation, some uncertainty about redressability and causality is allowed. [\*Defenders of Wildlife\*, 504 U.S. at 573 n.7](#). A plaintiff challenging a procedural violation need only show "(1) that he or she is a 'person [\*8] who has been accorded a procedural right to protect [his or her] concrete interests' . . . and (2) that the plaintiff has 'some threatened concrete interest . . . that is the ultimate basis of [his or her] standing.'" [\*Douglas County v. Babbitt\*, 48 F.3d 1495, 1500 \(9th Cir. 1995\)](#) (quoting [\*Defenders of Wildlife\*, 504 U.S. at 573 n.7](#)). The threat must derive at least in part from the actions at issue in the case and not from some cause or party not before the court. [\*Ecological Rights Foundation v. Pacific Lumber Co.\*, 230 F.3d 1141, 1152 \(9th Cir. 2000\)](#). Defendants contend that Plaintiffs have not demonstrated an injury in fact, causation or redressability.

### 1. Plaintiffs Sufficiently Demonstrate An Injury In Fact.

To demonstrate standing in cases raising procedural issues, environmental plaintiffs need not show that substantive environmental harm is imminent. [\*Cantrell v. City of Long Beach\*, 241 F.3d 674, 679 n.4 \(9th Cir. 2001\)](#) (citing [\*Defenders of Wildlife\*, 504 U.S. at 572 n.7](#)). Moreover, such plaintiffs need not present proof that the challenged federal project will have particular environmental [\*9] effects. To do so "would in essence be requiring the plaintiff to conduct the same environmental investigation that he seeks in his suit to compel the agency to undertake." [\*Citizens for Better Forestry v. U.S. Dept. of Agriculture\*, 341 F.3d 961, 972 \(9th Cir. 2003\)](#). Instead, the "'asserted injury is that environmental consequences might be overlooked' as a result of deficiencies in the government's analysis under environmental statutes." [\*Id.\* at 971-72](#) (quoting [\*Salmon River Concerned Citizens v. Robertson\*, 32 F.3d 1346, 1355 \(9th Cir. 1994\)](#)). Thus, Plaintiffs only need to demonstrate that "it is reasonably probable that the challenged action will threaten their concrete interests." See [\*Citizens for Better Forestry\*, 341 F.3d at 969-70](#); see also [\*City of Sausalito v. O'Neill\*, 386 F.3d 1186, 1197 \(9th Cir. 2004\)](#).<sup>2</sup>

## FOOTNOTES

<sup>2</sup> A plaintiff must also demonstrate that a government agency violated certain procedural rules and that these rules protect a plaintiff's concrete interests. See [\*Citizens for Better Forestry\*, 341 F.3d at 969-70](#). However, because these aspects of the injury in fact test are not

disputed here, the Court need not address them.

[\*10] Plaintiffs have done so here. While they concede that the impact of greenhouse gas emissions traceable to projects supported by OPIC and Ex-Im are not yet known with absolute certainty (Opp. Br. at 9), Plaintiffs contend the only uncertainty is with respect to how great the consequences will be, and not whether there will be any significant consequences. (Declaration of Dr. Michael C. MacCracken ("MacCracken Decl."), P 6b.) Moreover, Plaintiffs present evidence demonstrating that projects supported by OPIC and Ex-Im are directly or indirectly responsible for approximately 1,911 million tonnes of carbon dioxide and methane emissions annually, which equals nearly eight percent of the world's emissions and is equivalent to one-third of the total carbon emissions from the United States in 2003. (Declaration of Richard Heede, P 14.) Plaintiff's evidence, if true, further demonstrates that: (1) increased greenhouse gases are the major factor that caused global warming in the twentieth century, (2) global warming that has already occurred has had significant environmental consequences, (3) continued increases in greenhouse gas emissions would continue to increase global warming with consequent [\*11] widespread environmental impacts, (4) and that these impacts have and will effect areas used and owned by Plaintiffs. (MacCracken Decl., PP 6, 12-39; Declaration of Dr. Phillip Dustan, PP 5-13; Declaration of Randall L. Hayes, PP 5-17; Declaration of Brian Jeffrey Johnson, PP 10-26; Declaration of Mark Andre, PP 5-14; Declaration of Carol D. Ellinghouse, PP 3-8).

Defendants contest the credibility of Plaintiffs' evidence. (Reply Br. at 6-9.) However, "[i]n considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party." [Freeman, 125 F.3d at 735](#). The Court concludes that Plaintiffs' evidence is sufficient to demonstrate it is reasonably probable that emissions from projects supported by OPIC and Ex-Im supported projects will threaten Plaintiffs' concrete interests.<sup>3</sup>

## FOOTNOTES

<sup>3</sup> Defendants reliance on [Center for Biological Diversity v. Abraham, 218 F. Supp. 2d 1143, 1155 \(N.D. Cal. 2002\)](#), for the proposition that Plaintiffs' concerns regarding global warming are insufficient to demonstrate standing, is misplaced. First, although the district court held that concerns regarding global warming in that case were "too general, too unsubstantiated, too unlikely to be caused by defendants' conduct, and/or too unlikely to be redressed by the relief sought to confer standing," *id.*, the district court did not describe the evidence on which it based this decision. Without such a description, this Court cannot make a comparison to the evidence before it in this matter. Second, and more importantly, *Center for Biological*

*Diversity* was decided before the Ninth Circuit clarified in *Citizens for Better Forestry* that environmental plaintiffs raising procedural concerns need not present proof that the challenged federal project will have particular environmental effects. [Citizens for Better Forestry, 341 F.3d at 972](#) .

**[\*12] 2. Plaintiffs Sufficiently Demonstrate Causation and Redressability.**

In cases asserting a procedural challenge, once a plaintiff establishes an injury in fact, the causation and redressability standards are relaxed. [Defenders of Wildlife, 504 U.S. at 572 n.7](#); see also [Citizens for Better Forestry, 341 F.3d at 975](#). Defendants contend that Plaintiffs have not demonstrated causation or redressability.

**a. Causation.**

Causation is only implicated where there is a concern that "an injury caused by a third party is too tenuously connected to the acts of the defendant." [Citizens for Better Forestry, 341 F.3d at 975](#) (citing [Idaho Conservation League v. Mumma, 956 F.2d 1508, 1518 \(9th Cir. 1992\)](#)). Here, any concern that Plaintiffs' asserted injuries are caused by third parties must be evaluated in light of lower threshold for causation in procedural injury cases. See [Public Citizen v. Dep't of Transp., 316 F.3d 1002, 1017-18 \(9th Cir. 2003\)](#), *rev'd on other grounds, Dep't of Transp. v. Public Citizen, 541 U.S. 752, 124 S. Ct. 2204, 159 L. Ed. 2d 60 (2004)*; see also [Cantrell, 241 F.3d at 682](#) (holding [\*13] district court erred by failing to acknowledge the plaintiff's reduced burden to prove causation and redressability). In *Defenders of Wildlife*, the Supreme Court explained when a plaintiff asserts a procedural injury, such as a plaintiff challenging an agency's failure to prepare an environmental impact statement for a proposed dam, they plaintiff would have standing to challenge the agency's conduct "even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered and even though the dam will not be completed for many years." [Id. at 572 n.7](#). The fact that it was uncertain whether the company seeking the agency's approval would ever build the dam even if the license were granted also did not undermine such a plaintiff's standing. [Public Citizen, 316 F.3d at 1018](#) (commenting on the example in *Defenders of Wildlife*). Moreover, because the asserted injury in a procedural injury case is that environmental consequences might be overlooked, to demonstrate standing a plaintiff need not show that the ultimate outcome would be different if the procedures were followed. [Idaho Conservation League, 956 F.2d at 1518](#). [\*14]

Nevertheless, Defendants argue that Plaintiffs cannot demonstrate causation because the Ex-Im's and OPIC's role with respect to the projects which produce the greenhouse gas emissions is too limited and attenuated. Defendants submit evidence to demonstrate that generally, for the large energy-related projects referenced in Plaintiffs' complaint, third parties have already completed basic design and planning stages for the projects before applying for financial support from Ex-Im or OPIC. (Boyle Dec., P 41; Declaration of Harvey Himberg ("Himberg Decl."), P 19.) Defendants further argue that most large energy-related projects in which either agency is involved would proceed without their support. (Br. at 16; Boyle Dec., P 30; Himberg Decl., PP

8, 23, 29, 30, 37.) However, Plaintiffs submit evidence demonstrating a stronger link between the agencies' assistance and the energy-related projects. For example, Ex-Im has stated that it "supports export sales that otherwise would not have gone forward." (Ex-Im Administrative Record, Tab 4 at 2 and Tab 5 at 2.) And OPIC has stated that when it determines which projects to support, it evaluates them "to ensure they would not have gone forward [\*15] but for OPIC's participation." (Plaintiffs' Ex. 14 at 10.)<sup>4</sup> Defendants have not submitted any authority demonstrating, in light of the reduced standard for procedural injuries, that Plaintiffs' have not met their burden regarding causation. Considering the lower threshold for causation in procedural injury cases, the Court concludes that Plaintiffs have sufficiently demonstrated causation.

## FOOTNOTES

<sup>4</sup> In response, Defendants attempt to discredit this evidence by submitting additional evidence to demonstrate the true meaning of the agencies' statements. Again, "[i]n considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party." [Freeman, 125 F.3d at 735](#) .

### b. Redressability.

With respect to redressability, a plaintiff "who asserts inadequacy of a government agency's environmental studies . . . need not show that further analysis by the government would [\*16] result in a different conclusion. It suffices that the [agency's] decision *could be influenced* by the environmental considerations that [the relevant public statute] requires an agency to study." [Citizens for Better Forestry, 341 F.3d at 975](#) (emphasis in original). Here, Plaintiffs are asserting that OPIC and the Ex-Im failed to conduct an environmental assessment under NEPA. The Court finds that Plaintiffs have demonstrated that OPIC and Ex-Im's decisions *could be* influenced by further environmental studies, Plaintiffs' have sufficiently demonstrated redressability.

### C. Plaintiffs Challenge A Final Agency Action.

When, as here, Plaintiffs seek review of an agency's conduct under the general review provisions of the APA, rather than pursuant to specific authorization in the substantive statute, such as NEPA, Plaintiffs must demonstrate the agency action they are challenging was a "final agency action." [Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882, 110 S. Ct. 3177, 111 L. Ed. 2d 695 \(1990\)](#) (citing [5 U.S.C. § 704](#) ("Agency action made reviewable by statute and *final* agency action for which there is no other adequate remedy [\*17] in a court are subject to judicial review") (emphasis added)).

Citing [National Wildlife Federation, Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55,](#)

[124 S. Ct. 2373, 159 L. Ed. 2d 137 \(2004\)](#), and [Sierra Club v. Peterson, 228 F.3d 559 \(5th Cir. 2000\)](#), Defendants argue that Plaintiffs are making a broad programmatic challenge that does not qualify as "final agency action" as required under the APA. Under the APA, a plaintiff cannot seek wholesale improvement of a program, but rather, must direct his or her suit against some particular "agency action" that causes him or her harm. [National Wildlife Federation, 497 U.S. at 891](#).

In *National Wildlife Federation*, the plaintiff alleged that government agencies violated the Federal Land Policy and Management Act of 1976 ("FLPMA") and NEPA in the course of administering what the plaintiff called the "land withdrawal review program" of the Bureau of Land Management ("BLM"). [Id. at 875](#). The plaintiff claimed the agencies violated FLPMA by failing to "develop, maintain, and when appropriate, revise land use plans which provide by tract or areas for use of the public lands," by failing [\*18] to consider multiple uses for the lands at issue, and failing to provide public notice of decisions. The plaintiff further asserted that the agencies violated NEPA by failing to provide environmental impact statements on their proposed actions. [Id. at 879](#). The Court found that the so called "land withdrawal review program" was not derived from any statutory language and did not refer to any "single BLM order or regulation, or even a completed universe of particular BLM orders or regulations." [Id. at 890](#). Rather, the "land withdrawal review program" was "simply the name by which [the agencies] have occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans." *Id.* The Court likened the plaintiff's claim to one attempting to challenge a "'weapons procurement program' of the Department of Defense or a 'drug interdiction program' of the Drug Enforcement Agency." Accordingly, the Court held that the plaintiff's challenge was too broad and generic to constitute "final agency action." *Id.*

Similarly, [\*19] in *Southern Utah Wilderness Alliance*, the Supreme Court again rejected a challenge to agency action that was not sufficiently discrete or specific. [Southern Utah Wilderness Alliance, 124 S. Ct. at 2381](#). The plaintiff asserted, *inter alia*, that the "BLM violated its mandate to 'continue to manage [wilderness study areas] . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness,' by allowing degradation caused by off-road vehicles." [Id. at 2380](#). The Court concluded that the plaintiff was improperly seeking to compel compliance with broad statutory mandates, which would require pervasive judicial oversight of the agency's day-to-day activities. Therefore, the Court held that the plaintiff could not pursue the claim. [Id. at 2381](#).

In *Sierra Club*, the plaintiffs sought "wholesale improvement" of the Forest Service's timber management "program" in the Texas forests, "objecting to Forest Service practices throughout the four National Forests in Texas and covering harvesting from the 1970s to timber sales which have not yet occurred." [Sierra Club, 228 F.3d at 566](#). In finding the plaintiffs were [\*20] not challenging a final agency action, the Fifth Circuit reasoned that "as in *Lujan*, the environmental groups have impermissibly attempted to 'demand a general judicial review of the [Forest Services's] day-to-day operations.'" *Id.* (quoting [National Wildlife Federation, 497 U.S. at 899](#)).

Here, Plaintiffs challenge Ex-Im's and OPIC's determinations that the projects they support do not have significant environmental impacts and thus, have not conducted any environmental

assessments. Plaintiffs point to evidence demonstrating that both Ex-Im and OPIC: (1) evaluated whether the projects they support contribute to the production of greenhouse gases and climate change; (2) conducted these evaluations based on the aggregate portfolios of projects they support, as opposed to on an individual project basis; and (3) determined that their cumulative projects result in greenhouse gas emissions but do not have a significant environmental impact. (Ex-Im Administrative Record, Tab 1; Plaintiffs' Ex. 3.) Neither Ex-Im nor OPIC conducted environmental assessments in making these determinations. In fact, both agencies have concluded that NEPA does not apply to their project [\*21] approvals. (*Id.*; OPIC Administrative Record at 4368-370.) Merely because Plaintiffs' suit concerns the environmental impact of the projects supported by Ex-Im and OPIC as a group, rather than individually, does not convert Plaintiffs' challenge into a broad programmatic attack prohibited by [National Wildlife Federation](#). As the Supreme Court itself noted in *National Wildlife Federation*, it would be appropriate to challenge a "universe" of particular orders under the APA. [National Wildlife Federation, 497 at 890](#). Plaintiffs' suit does not broadly challenge the day-to-day operations of Ex-Im or OPIC, but rather, challenges those agencies' discrete determinations that the projects they support do not, on a cumulative basis, have a significant environmental impact. Accordingly, the Court denies Defendants' motion for summary judgment on this basis.

#### **D. OPIC's Organic Statute Does Not Preclude Judicial Review.**

A statute may preclude judicial review under the APA. [5 U.S.C. § 701\(a\)\(1\)](#). However, "[t]he statutory preclusion of judicial review must be demonstrated clearly and convincingly." [N.L.R.B. v. United Food and Commercial Workers Union Local 23, 484 U.S. 112, 131, 108 S. Ct. 413, 98 L. Ed. 2d 429 \(1987\)](#). [\*22] If there is no "statutory language expressly precluding APA review, the Court must examine the structure and history of the statute to determine whether the requisite congressional intent to bar judicial review is clearly established." *Id.*

Defendants contend that the plain language of OPIC's organic statute reveals that Congress intended to shield OPIC from judicial review of compliance with various statutory obligations, including its obligation to consider environmental implications of its proposed actions. To demonstrate such intent, Defendants cite a portion of OPIC's statute which provides: "Each guaranty contract executed by such officer or officers as may be designated by the Board shall be conclusively presumed to be issued in compliance with the requirements of this chapter." (Br. at 30, quoting [22 U.S.C. § 2197\(j\)](#).) Because the OPIC statute also includes environmental review procedures, Defendants argue that the above provision deems all environmental review by OPIC to be in compliance with the law and not subject to judicial review. (Br. at 30.)

In [Spencer Enterprises, Inc. v. United States, 345 F.3d 683, 695 \(9th Cir. 2003\)](#), [\*23] the court held judicial review under the APA was precluded by a statute which provided "no court shall have jurisdiction to review." Similarly, in [Southwest Williamson County Community Ass'n, Inc. v. Slater, 173 F.3d 1033, 1038 \(6th Cir. 1999\)](#), the court held that a statute, which stated that "any 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]," precluded judicial review. The statutory provisions precluding judicial review in [Spencer Enterprises](#) and [Southwest Williamson County](#) are clear and direct. In contrast, the provision pointed to by Defendants in OPIC's statute merely references what presumption the agency's conduct is given. It is silent with

respect to judicial review. Defendants have not provided any authority demonstrating that similar language has been found to preclude judicial review. The Court thus concludes that this provision does not "clearly and convincingly" demonstrate Congressional intent to preclude judicial review. See [United Food and Commercial Workers Union, 484 U.S. at 131](#).

#### **E. Environmental Procedures [\*24] In OPIC's Statute Do Not Displace NEPA.**

Finally, Defendants argue that Congress decided not to apply NEPA to OPIC. In two cases, the Ninth Circuit has held that NEPA did not apply to actions taken pursuant to other environmental statutes. See [Merrell v. Thomas, 807 F.2d 776 \(9th Cir. 1986\)](#); [Douglas County v. Babbitt, 48 F.3d 1495 \(9th Cir. 1995\)](#). The court in *Merrell* held that the Environmental Protection Agency ("EPA") does not need to comply with NEPA when it registers pesticides pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act, [7 U.S.C. § 136- 136y](#) ("FIFRA"). [Merrell, 807 F.2d at 777](#). In 1972, after NEPA was enacted, Congress comprehensively amended FIFRA, in part to respond to increasing public concern over environmental protection. At this time, Congress gave no indication that it thought NEPA would apply, but instead, created a registration procedure within FIFRA to ensure consideration of environmental impacts. The FIFRA procedure did not exactly mirror the procedures in NEPA, and reflected a compromise between environmentalists, farmers, and manufacturers. [\*25] [Id. at 778](#). Congress then amended FIFRA again in 1975, 1978 and 1984 when it was clear that EPA had interpreted FIFRA as not requiring compliance with NEPA. The court noted that "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Id.* (quotations and citations omitted). Moreover, the court found it significant that the 1978 amendments were designed to lighten the regulatory burdens. *Id.* Thus, the court held that Congress did not intend NEPA to apply to FIFRA registrations. [Id. at 781](#).

In *Douglas County*, the Ninth Circuit held that NEPA did not apply to a decision by the Secretary of the Interior to designate critical habitat under the Endangered Species Act, [16 U.S.C. § 1533](#) ("ESA"). [Douglas County, 48 F.3d at 1504](#). The court found that ESA's legislative history demonstrated the same Congressional intent that NEPA did not apply as exhibited by FIFRA's legislative intent examined [\*26] by the court in *Merrell*. Eight years after NEPA was enacted, Congress amended the ESA to provide a procedure for designating critical habitat. The committee report indicated that members wished to introduce some flexibility into the stringent ESA requirements. [Id. at 1503](#). The *Merrell* court found that the procedures created by Congress in ESA displaced NEPA's procedural and informational requirements and thus, made the NEPA procedure superfluous. *Id.* Moreover, aspects of the ESA mandate as amended conflicted with NEPA's requirements. The *Merrell* Court also found it significant that Congress amended ESA again, after another circuit court held that NEPA did not apply when the Secretary of the Interior listed a species as threatened or endangered and suggested in dicta that the process of designating critical habitat might be the functional equivalent of NEPA procedures, and after the Secretary of the Interior announced that he was not going to follow NEPA before making critical habitat designations. Yet, Congress did not provide that NEPA applied to designating critical habitat under ESA. [Id. at 1504](#). Therefore, the court concluded that Congress [\*27] did not intend NEPA to be applicable. The court also found that NEPA did not apply for an additional reason -- designating critical habitat does nothing to alter the natural physical environment. [Id. at 1505](#).

Although Defendants argue that the legislative history of OPIC's statute evinces the same Congressional intent to displace NEPA as in *Merrell* and *Douglas County*, the record reveals otherwise. In essence, Defendants point to legislative history indicating, at most, that Congress provided that OPIC should follow some procedures to protect the environment. Conspicuously absent from the record is any evidence that Congress amended OPIC's statute *after* OPIC interpreted its statute to displace NEPA. Defendants' only evidence evincing any Congressional intent on this issue is a discussion regarding the deletion of a reference to NEPA, but this discussion occurred at the time when the statute was not yet applicable to OPIC. (Defendants' Ex. 4h.) Based on this record, the Court cannot conclude that Congress intended NEPA not to apply to OPIC.

## **CONCLUSION**

For the foregoing reasons, the Court finds that (1) Plaintiffs sufficiently demonstrate standing; [\*28] (2) Plaintiffs are challenging final agency actions; (3) OPIC's statute does not preclude judicial review; and (4) Environmental procedures in OPIC's statute do not displace NEPA. Accordingly, the Court DENIES Defendants' motion for summary judgment.

## **IT IS SO ORDERED.**

Dated: August 23, 2005

JEFFREY S WHITE

UNITED STATES DISTRICT JUDGE

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