ATTACHMENT 2

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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.

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No. C 02-4106 JSW

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, 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.[1]

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

[1] 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.

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U.S.C. §§ 701-706 ("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."), ¶¶ 2, 7.) To support exports, Ex-Im provides a variety of products, including export credit insurance and guarantees. (O'Boyle Decl., ¶ 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., ¶ 9.)

In their complaint, Plaintiffs detail climate changes associated with the effects of global warming and allege continuing 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. Cattrett*, 477 U.S.

317, 323-24 (1986). "In 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 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 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 Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (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 who has been accorded a procedural right to protect [his or her] concrete interests' . . . and (2) that

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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 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).[2]

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."), ¶ 6b.) Moreover, Plaintiffs present

[2] 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.

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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, ¶ 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 widespread environmental impacts, (4) and that these impacts have and will effect areas used and owned by Plaintiffs. (MacCracken Decl., ¶¶ 6, 12-39; Declaration of Dr. Phillip Dustan, ¶¶ 5-13; Declaration of Randall L. Hayes, ¶¶ 5-17; Declaration of Brian Jeffrey Johnson, ¶¶ 10-26; Declaration of Mark Andre, ¶¶ 5-14; Declaration of Carol D. Ellinghouse, ¶¶ 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.[3]

2. Plaintiffs Sufficiently Demonstrate Causation and Redressability.

In cases asserting a procedural challenge, once a plaintiff establishes an injury in fact, the

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[3] 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.

1 causation and redressability standards are relaxed. *Defenders of Wildlife*, 504 U.S. at 572 n.7;
2 *see also Citizens for Better Forestry*, 341 F.3d at 975. Defendants contend that Plaintiffs have
3 not demonstrated causation or redressability.

4 **a. Causation.**

5 Causation is only implicated where there is a concern that "an injury caused by a third
6 party is too tenuously connected to the acts of the defendant." *Citizens for Better Forestry*, 341
7 F.3d at 975 (citing *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1518 (9th Cir.
8 1992)). Here, any concern that Plaintiffs' asserted injuries are caused by third parties must be
9 evaluated in light of lower threshold for causation in procedural injury cases. *See Public Citizen*
10 *v. Dep't of Transp.*, 316 F.3d 1002,1017-18 (9th Cir. 2003), *rev'd on other grounds*, *Dep't of*
11 *Transp. v. Public Citizen*, 541 U.S. 742 (2004); *see also Cantrell*, 241 F.3d at 682 (holding
12 district court erred by failing to acknowledge the plaintiff's reduced burden to prove causation
13 and redressability). In *Defenders of Wildlife*, the Supreme Court explained when a plaintiff
14 asserts a procedural injury, such as a plaintiff challenging an agency's failure to prepare an
15 environmental impact statement for a proposed dam, they plaintiff would have standing to
16 challenge the agency's conduct "even though he cannot establish with any certainty that the
17 statement will cause the license to be withheld or altered and even though the dam will not be
18 completed for many years." *Id*. at 572 n.7. The fact that it was uncertain whether the company
19 seeking the agency's approval would ever build the dam even if the license were granted also
20 did not undermine such a plaintiff's standing. *Public Citizen*, 316 F.3d at 1018 (commenting on
21 the example in *Defenders of Wildlife*). Morever, because the asserted injury in a procedural
22 injury case is that environmental consequences might be overlooked, to demonstrate standing a
23 plaintiff need not show that the ultimate outcome would be different if the procedures were
24 followed. *Idaho Conservation League*, 956 F.2d at 1518.

25 Nevertheless, Defendants argue that Plaintiffs cannot demonstrate causation because the
26 Ex-Im's and OPIC's role with respect to the projects which produce the greenhouse gas
27 emissions is too limited and attenuated. Defendants submit evidence to demonstrate that
28 generally, for the large energy-related projects referenced in Plaintiffs' complaint, third parties

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1 have already completed basic design and planning stages for the projects before applying for
2 financial support from Ex-Im or OPIC. (Boyle Dec., ¶ 41; Declaration of Harvey Himberg
3 ("Himberg Decl."), ¶ 19.) Defendants further argue that most large energy-related projects in
4 which either agency is involved would proceed without their support. (Br. at 16; Boyle Dec., ¶
5 30; Himberg Decl., ¶¶ 8, 23, 29, 30, 37.) However, Plaintiffs submit evidence demonstrating a
6 stronger link between the agencies' assistance and the energy-related projects. For example, Ex-
7 Im has stated that it "supports export sales that otherwise would not have gone forward." (Ex-
8 Im Administrative Record, Tab 4 at 2 and Tab 5 at 2.) And OPIC has stated that when it
9 determines which projects to support, it evaluates them "to ensure they would not have gone
10 forward but for OPIC's participation." (Plaintiffs' Ex. 14 at 10.)[4] Defendants have not
11 submitted any authority demonstrating, in light of the reduced standard for procedural injuries,
12 that Plaintiffs' have not met their burden regarding causation. Considering the lower threshold
13 for causation in procedural injury cases, the Court concludes that Plaintiffs have sufficiently
14 demonstrated causation.

15 **b. Redressability.**

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

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26

27 [4] In response, Defendants attempt to discredit this evidence by submitting additional evidence to demonstrate the true meaning of the agencies' statements. Again, "[i]n
28 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.

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. National Wildlife Federation*, 497 U.S. 871, 882 (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 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 (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 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

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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, 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 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

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1 significant environmental impact. (Ex-Im Administrative Record, Tab 1; Plaintiffs' Ex. 3.)
2 Neither Ex-Im nor OPIC conducted environmental assessments in making these determinations.
3 In fact, both agencies have concluded that NEPA does not apply to their project approvals. (*Id.*;
4 OPIC Administrative Record at 4368-370.) Merely because Plaintiffs' suit concerns the
5 environmental impact of the projects supported by Ex-Im and OPIC as a group, rather than
6 individually, does not convert Plaintiffs' challenge into a broad programmatic attack prohibited
7 by *National Wildlife Federation*. As the Supreme Court itself noted in *National Wildlife*
8 *Federation*, it would be appropriate to challenge a "universe" of particular orders under the
9 APA. *National Wildlife Federation*, 497 at 890. Plaintiffs' suit does not broadly challenge the
10 day-to-day operations of Ex-Im or OPIC, but rather, challenges those agencies' discrete
11 determinations that the projects they support do not, on a cumulative basis, have a significant
12 environmental impact. Accordingly, the Court denies Defendants' motion for summary
13 judgment on this basis.

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

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

21 Defendants contend that the plain language of OPIC's organic statute reveals that
22 Congress intended to shield OPIC from judicial review of compliance with various statutory
23 obligations, including its obligation to consider environmental implications of its proposed
24 actions. To demonstrate such intent, Defendants cite a portion of OPIC's statute which
25 provides: "Each guaranty contract executed by such officer or officers as may be designated by
26 the Board shall be conclusively presumed to be issued in compliance with the requirements of
27 this chapter." (Br. at 30, quoting 22 U.S.C. § 2197(j).) Because the OPIC statute also includes
28 environmental review procedures, Defendants argue that the above provision deems all

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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), 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 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

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1 NEPA, and reflected a compromise between environmentalists, farmers, and manufacturers. *Id.*
2 at 778. Congress then amended FIFRA again in 1975, 1978 and 1984 when it was clear that
3 EPA had interpreted FIFRA as not requiring compliance with NEPA. The court noted that
4 "when Congress revisits a statute giving rise to a longstanding administrative interpretation
5 without pertinent change, the congressional failure to revise or repeal the agency's interpretation
6 is persuasive evidence that the interpretation is the one intended by Congress." *Id.* (quotations
7 and citiations omitted). Moreover, the court found it significant that the 1978 amendments were
8 designed to lighten the regulatory burdens. *Id.* Thus, the court held that Congress did not intend
9 NEPA to apply to FIFRA registrations. *Id.* at 781.

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

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physical environment. *Id*. at 1505.

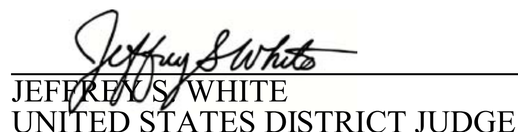
Although Defendants argue that the legislative history of OPIC's statute evinces the same Congressional intent to displace NEPA as in *Merrell* and *Douglas County*, the record reveals otherwise. In essence, Defendants point to legislative history indicating, at most, that Congress provided that OPIC 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; (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 no 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