Ronald A. Shems (*pro hac vice*)
SHEMS DUNKIEL KASSEL & SAUNDERS PLLC
91 College Street
Burlington, VT 05401
802 860 1003 (voice)
802 860 1208 (facsimile)

Richard Roos-Collins (Cal. Bar no. 127231)
NATURAL HERITAGE INSTITUTE
100 Pine Street, 15th floor
San Francisco, CA 94111
415 693 3000 (voice)
415 693 3178 (facsimile)

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FRIENDS OF THE EARTH, INC., *et al*., Plaintiffs, v. PETER WATSON, *et al*., Defendants.	Civ. No. C 02-4106 JSW Date: April 29th, 2005 Time: 9 A.M Courtroom 2, 17th Floor

PLAINTIFFS' SURREPLY TO DEFENDANTS' REPLY MEMORANDUM

I. Plaintiffs have Established Standing.

Plaintiffs have established standing to challenge the Defendants' failure to comply with NEPA. Plaintiffs and members of the Plaintiff organizations have alleged injuries to their concrete interests; they have demonstrated – based on the Defendants' own admissions in the Administrative Records – that it is reasonably probable that Defendants' actions contribute to an increased risk of injury to Plaintiffs' interests; and they have established that a court order requiring compliance with NEPA will redress the Plaintiffs' injuries. *See* Pls.' Opp'n at 9-27.

In response, Defendants essentially concede that Plaintiffs have established both injury-in-fact and redressability, and instead focus on causation, relying in large part on three new declarations. *See Declaration of Thomas Schehl* (Att. A to Def. Reply); *Declaration of James Mahoney* (Att. B to Def. Reply); *Declaration of Dr. David Legates* (Att. C to Def. Reply).[1] Defendants' causation argument, and its reliance on these new affidavits, distorts the nature of the Court's inquiry at this stage of the litigation.[2] For example, relying on Dr. Legates' largely immaterial opinions, Defendants mistakenly assert that Plaintiffs must somehow trace each CO_2 molecule emitted from projects financed by the agencies directly to the particular impacts alleged by Plaintiffs. *See* Def. Reply at 8 (citing Legates Decl. at ¶11). However:

> traceability does not mean that plaintiffs must show to a scientific certainty that defendant's effluent . . . caused the precise harm suffered by the plaintiffs. . . . If scientific certainty were the standard, then plaintiffs would be required to supply costly, strict proof of causation to meet a threshold jurisdictional requirement – even where, as here, the asserted cause of action does not itself require such proof. Thus, the 'fairly traceable' standard is not equivalent to a requirement of tort causation.

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 161 (4th Cir. 2000) (internal citations and quotations omitted).

[1] The Defendants have effectively engaged Dr. Legates to undermine the conclusions of the Government's own scientists at the EPA and the National Academy of Sciences. Dr. Legates is listed as an "expert", "scholar" or "advisor" with the Competitive Enterprise Institute, National Center for Policy Analysis, George Marshall Institute and Tech Central Station. These organizations have received significant funding from ExxonMobil Corporation and/or the American Petroleum Institute, and take issue with the Government's climate change reports. *See* ExxonMobil Annual Corporate Giving Reports, http://www.exxonmobil.com/Corporate/files/corporate/giving_report.pdf; *New York Times*, May 28, 2003, Jennifer Lee, "Exxon Backs Groups That Question Global Warming"; *New York Times*, April 26, 1998, John Cushman "Industrial Group Plans to Battle Climate Treaty"

[2] Defendants' new affidavits should be struck as they are both immaterial to the Court's analysis and are also improper extra-record evidence. *See* Pls.' Motion to Strike (3/14/05).

Consistent with *Gaston Copper*, the Ninth Circuit has firmly established that a plaintiff does not need to provide strict proof of "but for" causation to survive summary judgment on standing. Instead, a plaintiff need only aver facts that demonstrate that the defendant's actions *contribute* to an increased risk of harm to plaintiff's concrete interests. *Ocean Advocates v. United States Army Corps of Eng'rs*, 2004 U.S. App. LEXIS 28034, *17-18 (9th Cir. 2005) (finding that plaintiff had standing where plaintiff alleged that defendant's actions would contribute to the increased risk of harm to plaintiffs' interest, despite the fact that other independent causes may also increase risk of harm to plaintiffs' interest); *see also Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1234-1235 (D.C. Cir. 1996) (defendant's contribution to an increased risk of fire sufficient to establish standing, notwithstanding other multiple causes contributing to an increased risk).

Furthermore, the Ninth Circuit has emphasized that while the causal connection put forward for standing purposes cannot be too speculative "it need not be so airtight at [the standing] stage of litigation as to demonstrate that the plaintiffs would succeed on the merits." *Ocean Advocates,* 2004 U.S. App. LEXIS 28034, *18. Thus, within the framework of a procedural injury case, Plaintiffs' obligation to establish causation is relaxed – they need only demonstrate a "reasonable concern" of harm and a "reasonable probability" that Defendants' actions contribute to an increased risk of such harm. *Friends of the Earth, Inc. v. Laidlaw,* 528 U.S. 167, 184 (2000); *Citizens for Better Forestry v. USDA*, 341 F.3d 961, 972 (9th Cir. 2003)

Here, Plaintiffs' concerns reflect scientific consensus and are thus reasonable even in light of Dr. Legates claims of mere "uncertainty."[3] Indeed, the Administrative Record amply

[3] *N.b.,* Dr. Legates' does not assert that anthropomorphic carbon emissions *do not* contribute to climate change. Rather, he notes only that, in his opinion, the role of anthropomorphic carbon emissions in climate change is "uncertain". *See e.g.,* Legates Decl. at ¶

documents the reasonableness of Plaintiffs' concerns, and provides sufficient facts for this Court to conclude with reasonable probability that each agency's actions contribute to some increased risk of harm to Plaintiffs' concrete interests.[4]

---

44. Even if taken to be true, the "uncertainty" alleged by Dr. Legates does not defeat Plaintiffs' standing, particularly within the context of NEPA. To the contrary, Dr. Legates emphasizes Plaintiffs' "reasonable concern," *Laidlaw*, 528 U.S. at 184, that Defendants' actions contribute to an increased risk to their concrete interests by repeatedly conceding that Plaintiffs' concerns are "often cited" impacts of climate change. *See e.g.,* Legates Decl. at ¶¶ 36, 40. Further, NEPA actually demands *more* rigorous analysis where the extent of a project's impacts are "uncertain." *See* 40 C.F.R. § 1508.27(b)(5) (impact may be significant where "the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.").

[4] With respect to OPIC s*ee Assessing Our Actions* at 7, 28 (acknowledging recent studies which conclude "that human activity is the dominant force behind the sharp global warming trend seen in the 20th century," and noting "there is a strong and growing scientific consensus that these steady additions of GHGs have tipped a delicate balance and begun to impact our climate and may be the dominant force driving recent warming trends."); *id* at 6 (summary finding that OPIC is a "contributor" to global GHG emissions and climate change, although concluding that contribution is not significant); *id.* at 49 ("Climate change represents a serious global environmental challenge. Since the dawn of the industrial age, man has been emitting increasing quantities of heat-absorbing GHGs primarily through the combustion of fossil fuels. As a result, atmospheric concentrations of CO_2 – the most important GHG – are now at their highest levels in more than 160,000 years and global temperatures are rising. With emissions of CO_2 and other GHGs expected to increase – especially in developing regions – current forecasts suggest that atmospheric concentrations of CO_2 could double by 2060 with a resulting global average temperature increase of as much as 2º to 6.5º F over the next century. Such rapid temperature increase could have potentially grave economic and environmental impacts.").

With respect to Ex-Im Bank *see Ex-Im Climate Change Report* at 4 ("the information presented … leads one to conclude that GHG concentrations have indeed risen and that there is a reasonable likelihood that the increased concentrations of these gases will result in increased average global temperatures during the coming decades."); *id.* at 3 (noting that "[t]he direct regional environmental impact of such a climate change could include changes in temperature and precipitations levels, with corresponding changes to the properties and moisture content of soil. The global impact could include changes in weather patterns and rises in sea level. The changes in turn can result in major consequences to ecological systems, human health and socioeconomic sectors such as agriculture, coastal resources, forests, energy and transportation."); *id.* at 29 (noting that "the 425 million tonnes of CO_2 that is predicted to be produced by Ex-Im Bank supported power projects by 2012 will cause *Ex-Im Bank's contribution* to global CO_2 production to peak at 1.4%") (emphasis added).

Defendants also submit new affidavits contesting Plaintiffs' evidence on indirect or downstream GHG emissions from OPIC and Ex-Im projects. *Declaration of Thomas Schehl* (Att. A to Def. Reply); *Declaration of James Mahoney* (Att. B to Def. Reply). Both Schehl and Mahoney attack calculations of emissions prepared by Plaintiffs' expert, Richard Heede, asserting that Heede's inclusion of indirect emissions is inappropriate because it is "inconsistent with internationally recognized protocols." Schehl Decl. at ¶¶16-20; Mahoney Decl. at ¶¶9-12.

NEPA, however, demands consideration of the indirect effects of federal actions – regardless of what other protocols may require. 40 C.F.R. §§ 1508.8(b). Indeed, "NEPA does not recognize any distinction between primary and secondary effects" of federal actions, and therefore indirect greenhouse gas emissions must be taken into consideration. *Border Power Plant Working Group v. DOE*, 260 F. Supp. 2d 997, 1015 (S.D. Cal. 2003) (evaluation of proposed power line on U.S./Mexico border violated NEPA because, among other things, the Department of Energy failed to consider the indirect greenhouse gas emissions of a 500 MW gas-turbine power plant located in Mexico that would be connected to the power line). As neither Mr. Schehl nor Mr. Mahoney offer an alternative accounting of total indirect emissions resulting from Defendants' action, Plaintiffs' uncontroverted evidence on the indirect GHG emissions from Defendants' action must be taken as true.[5] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (for purposes of summary judgment plaintiffs' facts must be taken as true); *Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065, 1068-69 (9th Cir. 1997) (same).

[5] While NEPA requires consideration of indirect impacts, the agencies' own calculations of their direct "contribution" to climate change alone is more than adequate to support Plaintiffs' standing, further demonstrating that the Schehl and Mahoney Declarations are immaterial. *See* Pls.' Opp'n at 17-18.

Defendants also persist in the hypothetical argument that OPIC and Ex-Im projects could potentially go forward without OPIC or Ex-Im support. Def. Reply at 4-6. Again, Defendants' misstate the appropriate inquiry. A project is considered a major federal action subject to NEPA when it receives federal funding. *See* 40 C.F.R. § 1508.18 ("Actions include new and continuing activities, *including projects and programs entirely or partly financed, assisted*, conducted, regulated, or approved by federal agencies.") (emphasis added). And here, the challenged projects did, in fact, proceed with substantial federal funding. The hypothetical of what may have happened is immaterial to this Court's consideration of standing. In any event, Defendants do not claim that the particular projects challenged by Plaintiffs in this case would have gone forward without their support – nor can they.[6]

II. Plaintiffs have Challenged Final Agency Actions.

Despite the Administrative Record's clear support of Plaintiffs' claims, the Defendants persist in their argument that the Complaint fails to specify final agency action. Further, Defendants insist that final agency action must be determined without resort to the Administration Record that memorialized the action (or inaction) at issue here. And now Defendants argue for the first time that the Record provided to Plaintiffs in 2003 may not be the appropriate Record. Def. Opp'n to Pls' Mot. to Strike at 6, n. 7.

It is basic that the F.R.Civ.P. 8 "notice" pleading standard does not require the Complaint to state detailed facts, but need only put Defendants on fair notice of Plaintiffs' claim. 2 Moore's Federal Practice § 8.04[1] (3d ed. 2001). Information on claims is not required from pleadings

[6] *See* O'Boyle Decl. at ¶¶31-45 (no specific allegation that Chad-Cameroon Pipeline, Cantarell Oil Field, Hamaca project, or Dezhou project would have proceeded without Ex-Im support). The absence of such allegations is telling, and considering the substantial percentage of funding provided by Ex-Im for these multi-billion dollar projects, it is understandable why the agency has not proffered such allegations.

because it is developed through disclosures and discovery, or in this case, production of the record. *Id*.; *Bodine Produce, Inc. v. United Farm Workers*, 494 F.2d 541, 561-62 (1974) (complaint should be developed through discovery and other pretrial procedures). Indeed, this Court and the Ninth Circuit have repeatedly held that finality is determined by examination of the Administrative Record. *Northcoast Env. Ctr v. Glickman*, 1996 U.S. Dist. LEXIS 22845 (N.D. Ca. 1996) ("It is not necessary to go beyond the administrative record submitted by defendants to determine whether the POC Program constitutes final agency action.") *aff'd Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 665 (9th Cir. 1998) (District Court properly struck extra-record evidence and determined finality only on administrative record); *Northwest Resource Inf. Ctr. v. P.U.D. No. 2*, 25 F.3d 872, 874-75 (9th Cir. 1994) ("Only where what petitioner challenged was not a final agency action *based upon an administrative record* have we found against jurisdiction in this court.") (emphasis added).

Never has a Court held that the administrative record is irrelevant to determining finality. Quite to the contrary, an administrative record may be *supplemented* – not ignored – if it is insufficient to explain agency inaction. *See id.*

Final agency action includes an agency's "grant of money [or] assistance . . . or taking of other action on the application or petition of, and beneficial to, a person." 5 U.S.C. § 551(11). Here, the Complaint alleges that Defendants have, and continue to finance fossil fuel projects without first complying with NEPA. 2d Amd. Cmplt. at ¶¶ 151-211. In addition, the Complaint specifies particular financing decisions taken by Defendants. *Id*.

The Defendants admit having taken such final action. Answer to Pls' 2d. Amd. Cmplt at ¶¶ 163, 165, 167, 171, 172, 175, 177, 179, 182, 184, 189, 190, 199 (admitting that OPIC and ExIm boards have taken final decisions approving financing for particular projects that are

anticipated to emit greenhouse gases). Further, the Administrative Records produced are replete with final actions that Defendants' boards have taken to finance or otherwise assist fossil fuel projects. Ex-Im Record, Vol. 2, Tab 28 (detailing project, financing "amount authorized," and CO_2 emissions FY 2000-2003); *see also* Appendix I, of OPIC's *Assessing Our Actions* Report (detailing CO_2 emissions from OPIC financed projects). Defendants' failure to apply NEPA, whether to the individual agency actions listed in the Record, or to the "aggregate" or "portfolio" of such projects is final agency action. *Catron County Comm'rs v. U.S. Fish and Wildlife Service*, 75 F.3d 1429, 1434 (10th Cir. 1996). Indeed, the finality of these actions is, perhaps, best exemplified by Defendants' assertion of a laches defense claiming that moneys for several of these projects have been disbursed and that the projects are under construction. *See* Def. Mot. at 28, n.18 (asserting laches defense).

Defendants also admit that all such actions were taken without regard to NEPA. "As Plaintiffs point out, neither agency has conducted a NEPA analysis for the projects described in the Complaint or for a purported program supporting energy projects. There could be no FONSI marking the conclusion of a NEPA process that never took place." Def. Reply at 18. In other words, Defendants argue that their complete and continuing failure to comply with NEPA can never be subject to review because it is never final. An "alleged failure to comply with NEPA constitutes 'final agency action' 5 U.S.C. § 551(13)." *Catron County*, 75 F.3d at 1434.

III. OPIC Is Subject To Judicial Review.

Agency actions are subject to judicial review under the APA unless review is expressly precluded by statute. 5 U.S.C. § 701(a)(1). Defendants continue to argue that a "conclusive presumption of compliance" amounts to express preclusion. However, when Congress intends to

insulate an agency from judicial review, it does so by express reference to "judicial review."[7] Pls.' Opp'n at 41-42.

Defendants also argue that Congress intended "guaranty contracts" – language found in section 2197(j), which does not reference other OPIC functions such as insurance, financing, and reinsurance – to refer to all of OPIC's "fundamental actions." Def. Reply at 24-25. A plain reading of the statute reveals the obvious flaw in this reasoning – sections 2197(i) and (k), which bracket the provision in question, refer to guaranty contracts *and* insurance *and* reinsurance. These are clearly distinct terms. Defendants now introduce new legislative history that actually supports Plaintiffs' position. Congress describes "investment insurance" authority as "identical with the specific risk guaranty authority," yet insurance and guarantees are treated in different sections of the Report. H. Rpt. No. 91-611, 91st Cong., 1st Sess. 30-31 (1969). While OPIC's authority over insurance and guaranty contracts may be identical, Congress clearly separated the two terms, and reference to "guaranty" does not equate to a reference to "insurance."

Furthermore, Defendants do not actually respond to Plaintiffs' argument that Congress specifically anticipated judicial review in the context of guaranty contracts. Defendants state: "This means only that a claimant under an OPIC contract may not benefit from the claimant's own wrongdoing." Def. Reply at 25. Absent a mechanism for review, however, there would be no way to enforce this policy.

OPIC's treatment of NEPA is similarly flawed. The environmental review requirements of the OPIC Act do not "displace" the agency's duties under NEPA. Defendants misread Plaintiffs' "fundamental premise." Def. Reply at 20-21. OPIC must analyze environmental

[7] Defendants have correctly identified an error in Plaintiffs' opening brief. Def. Reply at 24, n. 28. Plaintiffs intended to cite the Voting Rights Act of 1965, which states: "A determination or certification of the Attorney General or of the Director of the Census under this section . . . *shall not be reviewable in any court*." 42 U.S.C. § 1973b(b) (emphasis added).

impacts both at home and abroad, and in particular it must follow NEPA when its actions affect the U.S. environment. "[E]ach agency of the Federal Government shall comply with [NEPA] unless existing law . . . expressly prohibits or makes compliance impossible." 40 C.F.R. § 1500.6. As Defendants concede, "The [OPIC] statute does not reference NEPA . . . ." Def. Reply at 21. Defendants also concede that the OPIC Act relies on "terms of art from NEPA." Def. Mem. at 34. Thus, the OPIC Act does not prohibit or interfere with NEPA compliance.

Defendants defeat their own argument by relying on legislative history – this acknowledges that compliance with NEPA is not "expressly prohibited." The legislative history, which explains how reference to NEPA was deleted from the OPIC Act, shows that Congress did not intend to completely exempt OPIC from its duties under NEPA. Def. Mem. at 37-40.

OPIC misconstrues the record. "[I]t is our understanding that [NEPA] does not and should not apply to the bilateral program *overseas*; and that if there is a *global commons* question, that that should be dealt with through international negotiation . . . ." *Foreign Assistance Legislation for Fiscal Year 1982: Markup before the Committee on Foreign Affairs of the House of Representatives*, 97th Congress, 1st Sess. 187-196 (emphasis added). This discussion explicitly refers to overseas impacts and impacts on the global commons, but not impacts on the U.S. environment. Thus, even if Congress intended to exempt certain OPIC activities from NEPA, it clearly did not intend to alter OPIC's obligations to protect the domestic environment. *See Sierra Club v. Adams*, 578 F.2d 389 (D.D.C. 1978) (NEPA applies to federal actions that are principally overseas but that result in impacts on the U.S. environment).; *Nat'l Org. for the Reform of Marijuana Laws (NORML) v. U.S.*, 452 F.Supp. 1226 (D.D.C. 1978) (same).

WHEREFORE, Defendants' Motion for Summary Judgment should be denied.

March 14, 2005

Friends of the Earth, Inc.

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

by: _____/s/_____

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

by: _____/s/_____

Richard Roos-Collins (Cal. Bar no. 127231)
NATURAL HERITAGE INSTITUTE
100 Pine Street, 15th floor
San Francisco, CA 94111
415 693 3000 (voice)
415 693 3178 (facsimile)

Attorneys for plaintiffs

CITY OF BOULDER, COLORADO

by: _____/s/_____

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

CITY OF OAKLAND, CALIFORNIA

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

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

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

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

CITY OF SANTA MONICA, CALIFORNIA
Marsha Jones Moutrie, City Attorney
Joseph P. Lawrence, Assistant City Attorney
Adam Radinsky, Deputy City Attorney

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

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