ARNOLD & PORTER LLP

CLIENT ADVISORY

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SETTLEMENT BY FEDERAL AGENCIES ACCEPTS OBLIGATIONS TO TAKE GLOBAL WARMING INTO ACCOUNT IN SUPPORTING OVERSEAS PROJECTS

On February 6, 2009, two federal agencies announced an historic settlement of litigation brought by environmental groups and local governments by which the agencies undertook to take actions to combat greenhouse gas emissions related to their activities that go far beyond any prior settlement by the federal government. These agencies provide financial and other support for projects located abroad and export transactions by US businesses; under the settlement, among other things, they must:

- Disclose greenhouse gas emissions of projects and transactions that they will support,
- Cut emissions stemming from supported projects by 20% over the next 10 years and develop a carbon policy to reduce future carbon dioxide (CO_2) emissions from supported transactions, and
- Spend US$500 million collectively to promote renewable energy projects.

Although coming only weeks after President Obama's inauguration, this settlement reflects some six years of litigation and negotiations. Its importance stems both from (1) the quite substantial actions that the two agencies have agreed to take to minimize greenhouse gas emissions related to projects and transactions receiving US government support, and (2) from the lessons that the settlement may offer concerning federal agencies' willingness to accept obligations to address climate change impacts attributable to their activities.

BACKGROUND AND SUMMARY

A. The Parties to the Settlement

Plaintiffs in this lawsuit, *Friends of the Earth* v. *Watson*, 02-04106, are two environmental groups, Friends of the Earth, Inc. and Greenpeace, Inc., who were joined by the cities of Arcata, California; Oakland, California;

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and Santa Monica, California; as well as the City Council of Boulder, Colorado. *Friends of the Earth* v. *Mosbacher*, 488 F. Supp. 2d 889 (N.D. Cal. 2007), settled February 2009. Defendants are two agencies of the federal government, the Overseas Private Investment Corporation (OPIC) and Export-Import Bank (Ex-Im).[1]

OPIC and Ex-Im are in the business of supporting global projects and export transactions by US businesses. OPIC facilitates the participation of United States private capital in the economic and social development of less developed countries through the provision of insurance, financing through loan guarantees, and encouraging the investment of private funds for equity to business overseas. Ex-Im, on the other hand, facilitates the ability of buyers abroad to purchase US goods and services through export transactions by means of financial guarantees and the provision of insurance.

B. The Nature and Basis of Plaintiffs' Claims

In 2002, Plaintiffs brought this action alleging violations of the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA). Specifically, Plaintiffs alleged that Defendants provided financial and other support to overseas projects and activities that emit greenhouse gases (GHGs), that such GHGs emissions produce climate changes that significantly affect the environment, and that Defendants conducted these activities without conducting the environmental analyses and disclosures required under NEPA. Under NEPA, if an action by an agency constitutes as a major federal action with a significant environmental impact, the agency is required to produce an Environmental Impact Statement (EIS), analyzing in considerable detail how the project may impact the environment. Preparation of an EIS serves "(1) 'to inject environmental considerations into the federal agency's decisionmaking process' and (2) 'to inform the public that the agency has considered environmental concerns…'"[2] Judicial review is limited to determining whether, in the EIS, the agency has adequately evaluated the project's environmental impacts.

A number of cases have addressed NEPA claims against federal agencies arising in contexts other than OPIC and Ex-Im.[3] In *Center for Biological Diversity* v. *National Highway Traffic Safety Administration*, the Ninth Circuit observed: "[t]he impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct." 508 F.3d 508, 550 (9th Cir. 2007), *amended in* 538 F.3d 1172 (9th Cir. 2008). To date, a recent informal survey of federal EISs indicates that while many contain some mention of climate change, "[m]ost of the EISs provided only the unsurprising and not especially useful information that the emissions of greenhouse gases (GHGs) from the particular project would be an insignificant portion of global emissions."[4] As discussed below, the OPIC and Ex-Im settlements require federal actions going substantially beyond including such a mention of climate change in a project's EIS.

C. The Terms of the Settlement

The principal terms of the settlement are summarized in the following chart. While the OPIC settlement terms are

1 This, and other climate change lawsuits, are discussed in a chart available on the Internet created by Arnold & Porter LLP lawyers Michael B. Gerrard and J. Cullen Howe, and is updated regularly. *See* www.climatecasechart.com. Since January 2009, Mr. Gerrard has been the Director of Columbia Law School's Center for Climate Change Law and a professor at the Law School. He remains counsel to Arnold & Porter.

2 *Catron County* v. *US Fish & Wildlife*, 75 F.3d 1429, 1434 (10th Cir. 1996) (quoting *Weinberger* v. *Catholic Action of Hawaii*, 454 U.S. 139, 143 (1981)).

3 Such cases are analyzed in the recent article by Michael B. Gerrard, "Climate Change and the Environmental Impact Review Process," *Natural Resources & Environment*, Volume 22, Number 3, Winter 2008, at 20-22. *Available at* http://www.arnoldporter.com/resources/documents/NR&E-Winter2008_Article_MGerrard.pdf.

4 *Id.*

separate and distinct from those accepted by the Ex-Im, there is much common ground between them:

OPIC Settlement Requires OPIC to:	Ex-Im Settlement Requires Ex-Im to:
■ Treat applications for projects that emit more than 100,000 tons of CO_2 as Category A projects, requiring preparation of an Environmental Impact Assessment analyzing both the project's GHG emissions and potential mitigation measures. ■ Publicly report on its website GHG emissions from active projects that emit more than 100,000 tons of CO_2 per year. ■ Substantially increase support to projects that promote the use of renewable energy over a 10-year period, including allocating US$250 million to projects that provide renewable energy and offering preferential financing terms for such projects. ■ Reduce by 20% over the next 10 years GHG emissions associated with projects that emit more than 100,000 tons of CO_2 per year. ■ Propose energy efficient requirements to be included in OPIC's *Environmental Handbook*, including encouraging applicants seeking OPIC support to evaluate energy use, explore opportunities to reduce energy requirements, and explore opportunities to use renewable energy sources in project design.[5]	■ Implement a staff directive to provide to the Board of Directors, for all financing applications submitted, information about CO2 emissions for fossil fuel projects. This will include, for Category A and B projects, a determination of whether NEPA review is necessary and the basis for the determination. Additionally, non-privileged environmental review materials for projects will be posted on Ex-Im Bank's website for comment. ■ Ex-Im will work with Plaintiffs to develop a carbon policy which will provide incentives to reduce CO2 emissions, such as through financing incentives, and a US$250 million renewable energy loan guarantee program. ■ Ex-Im will take a leadership role to promote consideration of climate change issues within the Organization for Economic Cooperation and Development (OECD) in a manner that maintains competition but encourages mitigation measures.[6]

D. Litigation Proceedings Leading up to the Settlement

In proceedings prior to the settlement, the US District Court addressed several complex issues presented by summary judgment motions filed by both sides. In August 2005, the court denied Defendants' motion challenging Plaintiffs' Article III standing to bring their claims. Recognizing that the gravamen of Plaintiffs' claims was Defendants' failure to comply with *procedural* requirements arising under NEPA, the court applied a relaxed version of traditional standing analysis. Under this standard, the court found that Plaintiffs had sufficiently established the injury in fact, causation, and redressibility elements of Article III standing.[7]

5 In addition to the above-mentioned terms, the OPIC settlement requires payment of US$100,000 to Plaintiffs for attorneys fees, costs, and expenses.

6 As with the OPIC settlement, the Ex-Im settlement also requires payment of US$100,000 to Plaintiffs for attorneys fees, costs, and expenses.

7 Order Denying Def.'s Mot. Summ. J., Aug. 23, 2005 (finding no requirement for "proof that the challenged federal project will have particular environmental effects"; "[i]nstead, the asserted injury is that environmental consequences might be overlooked").

Later, in March 2007, the court ruled on cross motions for summary judgment brought by Defendants and Plaintiffs. In considering whether projects and transactions supported by Defendants' activities but carried out by private parties constituted "major federal actions," the court held that each project must be examined based on its individual circumstances, including both of the level of financing provided by Defendants and the levels of control by Defendants over the project. On the record before it, the court was unable to make this determination as to any of the projects at issue. In addition, the court could not determine as a matter of law whether Defendants' actions constitute cumulative actions requiring a single EIS. Following these rulings, the court encouraged the parties to engage in settlement discussions.

E. Impact of the Settlement: What Does This All Mean?

What lessons may be drawn as to how this settlement affects the landscape of federal agencies' obligations to address the potential climate change impacts of their activities? First, it is important to remember that this development arose in the context of a litigation settlement.[8] As part of the written settlement agreements between the parties, its terms are not binding on any federal agency other than OPIC and Ex-Im. Accordingly, unlike a court ruling, the settlements cannot be cited as precedent in any future proceeding.

Second, the commitments undertaken by the two agencies involved are unquestionably substantial, and go beyond any prior settlement by the federal government. Significantly, these commitments were made notwithstanding that, as discussed in the "Litigation Proceedings" section, the plaintiff environmental groups and cities faced the significant reservations voiced in the court's March 2007 ruling as to whether the projects at issue—supported by the defendant agencies but being conducted by private businesses—constituted "major federal actions" as required to trigger NEPA review. In future lawsuits addressing projects or proposals being conducted directly by federal agencies, plaintiffs will argue that their cases are stronger in this significant respect.

Third, and most fundamentally, the settlements appear to reflect a new willingness by federal agencies (which may or may not be tied to the transition to the Obama Administration) to accept an obligation to thoughtfully consider climate change impacts attributable to their missions and projects.[9] Notably, the commitments made here include plans to spend significant money (up to a total of US$500 million between the two agencies) to promote renewable energy programs. Similar spending commitments undoubtedly will be sought in future NEPA litigation.

While it remains to be seen whether the approach reflected in the February 6, 2009 settlements will be followed in future cases, it seems clear that, in such cases, parties challenging federal actions on the grounds of climate change impacts will push strongly for federal agencies to undertake obligations to analyze, disclose, and take affirmative steps addressing such impacts comparable to those reflected in these settlements.

We hope that you have found this client advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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8 Notably, the California Attorney General has also settled a number of lawsuits under the California Environmental Quality Act (CEQA) that require analysis and substantive GHG reductions, not unlike the OPIC and Ex-Im settlement. *See* "Climate Change and the Environmental Impact Review Process," *supra*, at 22.

9 A valuable listing of key questions likely to be presented as federal agencies develop procedures to consider climate change impacts when preparing an EIS can be found in "Climate Change and the Environmental Impact Review Process," *supra*, at 24.