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17 **IN THE UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA
18 **SAN FRANCISCO OR OAKLAND DIVISIONS**

19 CENTER FOR BIOLOGICAL DIVERSITY,) Case No.:
20 PACIFIC ENVIRONMENT, and TURTLE)
ISLAND RESTORATION NETWORK,) **COMPLAINT FOR DECLARATORY AND**
21) **INJUNCTIVE RELIEF**
Plaintiffs,)
22 v.)
)
23 EXPORT-IMPORT BANK OF THE)
24 UNITED STATES and FRED P.)
HOCHBERG, in his official capacity as)
25 Chairman and President of the Export-Import)
Bank of the United States,)
26)
27 Defendants.)

INTRODUCTION

1
2 1. This case challenges the Export-Import Bank of the United States' ("Ex-Im Bank")
3 decision to provide \$2.95 billion USD in financing for the development and construction of the Australia
4 Pacific Liquefied Natural Gas ("LNG") Project within Australia's Great Barrier Reef World Heritage
5 Area. Ex-Im Bank, a U.S. federal agency, funded this massive fossil fuel project, which will include gas
6 drilling, pipeline construction, construction of an LNG production facility and terminal, and transport
7 through the Great Barrier Reef, without properly consulting and considering the Project's substantial
8 impacts on threatened and endangered species and the Great Barrier Reef World Heritage Area, as
9 required by the U.S. Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, and the National
10 Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 *et seq.*

11 2. Specifically, the Australia Pacific LNG Project ("the Project") is located in Queensland,
12 Australia and will comprise the entire process of liquefied natural gas production. The Project's
13 proponents will drill up to 10,000 coal-seam gas wells in interior Queensland, install nearly 300 miles of
14 pipeline to transport the gas to the coast, construct and operate a massive LNG facility to condense the
15 gas to liquid and prepare it for transport, dredge the adjacent harbor, and then ship directly through the
16 Great Barrier Reef to export the gas around the world.

17 3. The LNG processing facility and terminal will be located on and near Curtis Island,
18 within the boundaries of the Great Barrier Reef World Heritage Area, which is renowned for its beauty
19 and rare species habitat. The LNG facility is also located within designated habitat for the dugong, a
20 species listed under the U.S. ESA as "endangered," and is located within habitat for U.S. threatened-
21 listed green sea turtles, endangered loggerhead sea turtles, and threatened saltwater crocodiles.

22 4. Despite the serious impacts that this Ex-Im Bank-funded project will have on ESA-listed
23 species, Ex-Im Bank did not initiate or complete consultations with the U.S. wildlife agencies as
24 required by the ESA. 16 U.S.C. § 1536(a)(2). The ESA consultation process is triggered whenever a
25 U.S. federal agency, like Ex-Im Bank, "fund[s] . . . in whole or in part" an activity that "may affect" a
26 listed species. 50 C.F.R. §§ 402.02; 402.14. This consultation may have resulted in mitigation of the
27 Project's wildlife impacts.

1 **INTRADISTRICT ASSIGNMENT**

2 11. Pursuant to Local Rules 3-5(b) and 3-2(c) and (d), assignment of this case to the San
3 Francisco or Oakland Division is appropriate. Plaintiffs Center for Biological Diversity and Pacific
4 Environment maintain their main offices in San Francisco County, and Plaintiff Turtle Island
5 Restoration Network maintains its main office in Marin County.

6 **PARTIES**

7 12. Plaintiff Center for Biological Diversity (“the Center”) is a 501(c)(3) non-profit
8 corporation incorporated in the State of California. The Center’s main office is located in San Francisco,
9 although the Center also maintains other offices across the country. Through science, policy, and
10 environmental law, the Center advocates for the protection of threatened, endangered, and rare species
11 and their habitats throughout the United States and abroad. The Center has programs that focus
12 specifically on ocean protection and combating climate change.

13 13. The Center has more than 39,000 active members and 474,000 online activists. Center
14 members reside throughout the United States and in many other countries, including Australia. The
15 Center has several members who live in Queensland and in the Gladstone area. For example, Center
16 members work in the fishing industry in the Gladstone Harbour/Port Curtis area and rely on these waters
17 for their income. These Center members regularly recreate on Gladstone Harbour and the broader Great
18 Barrier Reef World Heritage Area, including walking the beach every morning and attempting to view
19 sea turtles, dugongs, and other rare wildlife species. These members are very concerned that the
20 Australia Pacific LNG Project and the associated dredging in Gladstone Harbour has harmed and will
21 continue to harm marine life, including the fisheries that support their livelihoods, but also the species
22 they enjoy viewing recreationally. These members believe the water in Gladstone Harbour has become
23 visibly muddier and less attractive and are concerned these aesthetic impacts will worsen as dredging
24 associated with the Project continues. These members have specific plans to continue their regular visits
25 and recreation in this area.

26 14. Other Center members live near Brisbane in Queensland, but visit the Gladstone area
27 each year or more frequently to meet with patients, friends, and colleagues and to view the area’s
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1 aesthetics, wildlife, and environment. For example, one Center member works for a wildlife protection
2 organization and visits Gladstone several times each year as part of her advocacy against the various
3 LNG facilities being constructed on Curtis Island. Another member is a doctor who visits patients in
4 Gladstone who are affected by contamination in the Harbour. When visiting Gladstone, these members
5 recreate in and around the Harbour and the broader Great Barrier Reef World Heritage Area, including
6 camping in the Area, to enjoy the aesthetics and to view or attempt to view dugongs, sea turtles,
7 crocodiles, and other rare wildlife species. These members have specific plans to continue their regular
8 visits and recreation in this area.

9 15. In addition, other Center members and staff reside in the United States but have specific
10 plans to visit both the Great Barrier Reef World Heritage Area generally and the Gladstone area
11 specifically to recreate and to view and enjoy the scenery. These members particularly plan to attempt to
12 view dugongs, sea turtles, saltwater crocodiles, and other wildlife that may be impacted if the Australia
13 Pacific LNG Project goes forward as planned. For example, one member who has traveled around the
14 world to view dugongs in the past plans to visit the northern portion of Curtis Island to view the World
15 Heritage Area and the Australia Pacific LNG Project site and attempt to view dugongs and other wildlife
16 in March of 2013.

17 16. Plaintiff Pacific Environment is a non-profit environmental organization whose mission
18 is to protect the living environment of the Pacific Rim. Based in San Francisco, Pacific Environment
19 achieves its mission by strengthening democracy, supporting grassroots activism, empowering local
20 communities, and redefining international policies. Pacific Environment is particularly dedicated to
21 promoting international efforts to protect biodiversity and to protect rare and endangered species. Pacific
22 Environment has hundreds of supporters in the United States, many of whom live in California. As part
23 of Pacific Environment's broader mission to protect the Pacific Rim, it seeks to hold public finance
24 institutions, particularly Ex-Im Bank, accountable to local communities and the environment through
25 project monitoring to ensure that public money is used to support best environmental protection
26 practices.

1 17. Further, Pacific Environment members and staff live in the United States and have visited
2 the Gladstone area. For example, one Pacific Environment member visited Gladstone Harbour in
3 October of 2012. He took a boat-based tour of the Australia Pacific LNG Project site and the habitat
4 surrounding the site, visited Curtis Island, and attempted to view wildlife, including dugongs and sea
5 turtles, in the area. That member has specific plans to return to Gladstone again to view the area and its
6 wildlife late next year.

7 18. Plaintiff Turtle Island Restoration Network (“Turtle Island”) is a non-profit corporation
8 with its principal place of business in Marin County, California. Turtle Island operates the Sea Turtle
9 Restoration Project, which is dedicated to the protection and restoration of endangered and threatened
10 species of sea turtles. Turtle Island has over 6,300 members, including members in Australia, and more
11 than 70,000 online activists and supporters who follow and take action on its campaigns, and each shares
12 a commitment to the study, protection, enhancement, conservation, and preservation of the world’s
13 marine ecosystems and the wildlife that inhabits the oceans. Turtle Island has worked extensively to
14 conserve and protect sea turtles in the Pacific from a variety of threats, including efforts to conserve sea
15 turtles and other marine wildlife in Australia.

16 19. Turtle Island has members and staff members who regularly visit Australia, including the
17 Great Barrier Reef World Heritage Area. For example, one Turtle Island member is a sea turtle expert
18 who has studied both green and loggerhead sea turtles that inhabit Australia. This member lives in the
19 United States but has visited Australia numerous times, including as recently as September 2012. She
20 has attended several sea turtle conferences in Australia. She has also assisted with research at a major
21 loggerhead sea turtle rookery south of Gladstone during both turtle nesting and hatching seasons, and to
22 reach this rookery, the loggerheads migrate through the Great Barrier Reef near Gladstone. This member
23 has also sailed along a large portion of the Great Barrier Reef World Heritage Area, including the
24 portion of the Reef outside of Gladstone, and snorkeled and looked for wildlife, including sea turtles and
25 dugongs, on this trip. She has also closely followed other LNG facilities that are proposed or are being
26 constructed in other parts of Australia, and she has visited and toured these sites to evaluate the
27 facilities’ impacts on the areas’ wildlife and aesthetics. The member has specific plans to return to
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1 Australia next year to visit Gladstone Harbour in order to view wildlife, including sea turtles, as well as
2 the Australia Pacific LNG facility site, and meet with other sea turtle and wildlife experts regarding the
3 facility's effects. She is also likely to visit the Great Barrier Reef outside of Gladstone, including Heron
4 Island, to view the area and its wildlife during this visit.

5 20. In May of 2012, Ex-Im Bank authorized a \$2.95 billion USD loan to the proponents of
6 the Australia Pacific LNG Project. Ex-Im Bank's funding of the Australia Pacific LNG Project has and
7 will cause harm to Plaintiffs' staff and members' recreational, economic, scientific, and aesthetic
8 interests in the species and habitats of the Gladstone area.

9 21. Construction and operation of the Australia Pacific LNG Project, facilitated and made
10 possible by Ex-Im Bank's funding, will harm endangered and threatened dugongs, sea turtles,
11 crocodiles, and other wildlife, as well the species' habitats. Specifically, construction and operation of
12 the Australia Pacific LNG Project will substantially diminish water quality and clarity, increase
13 underwater noise, cause vessel strikes, destroy and degrade habitat including through contamination of
14 the area with dredged toxic heavy metals, and otherwise harm dugongs, sea turtles, and other wildlife, or
15 cause wildlife to leave the area. The Project's construction and operation will also alter the aesthetic
16 view of Curtis Island and the habitat in and around the Project site. Dredging associated with the Project
17 will increase turbidity, making the water appear muddier and diminishing the Harbour's aesthetics, and
18 also harming some members' economic interests in the fishing industry. The Project will also alter the
19 Great Barrier Reef World Heritage Area by harming dugong, sea turtles, and other wildlife for which the
20 Area was designated and the species' habitats, by degrading water quality and clarity, and by increasing
21 shipping traffic through the Area.

22 22. Plaintiffs' staff and members are concerned that the Australia Pacific LNG Project's
23 impacts will reduce their ability to view and study wildlife in the Gladstone Harbour/Port Curtis area
24 and in the broader Great Barrier Reef World Heritage Area; diminish the aesthetic view of the area, of
25 the water, and of impacted habitat; harm the wildlife populations that they study; and degrade their
26 recreational experience and enjoyment. Further, these members are concerned that the Australia Pacific
27 LNG Project will degrade their recreational, scientific, and aesthetic enjoyment of the Great Barrier Reef
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1 World Heritage Area by decreasing their ability to view species and diminishing the water quality. By
2 causing this harm to species, habitat, and the Great Barrier Reef World Heritage Area, Ex-Im Bank's
3 funding will injure Plaintiffs' staff and members' by negatively impacting their recreational, aesthetic,
4 scientific, and economic interests.

5 23. Further, Ex-Im Bank has full authority to require mitigation of the Project's
6 environmental impacts. Were Ex-Im Bank directed to complete the required ESA consultation and
7 NHPA processes, Ex-Im Bank might require additional environmental mitigation of the Project's
8 impacts as a condition of its funding. Further, in order to conduct the required ESA and NHPA
9 processes without irreversibly committing resources, Ex-Im Bank may delay its provision of financing
10 for the Project, and thus delay the Project's construction or operation, or even cause the cancelation of
11 the Project. Cancelation or delay of the Project or implementation of additional environmental
12 mitigation measures would lessen and thus redress Plaintiffs' staff and members' injuries associated
13 with the Australia Pacific LNG Project.

14 24. Additionally, if Ex-Im Bank had complied with all ESA and NHPA procedures, the
15 process would have generated additional information on the Project's impacts to ESA-listed species and
16 the Great Barrier Reef World Heritage Area. Plaintiffs and their members would have access to this
17 information and be better informed about the Project and its impacts, improving their ability to
18 participate in decisionmaking and to suggest potential mitigation.

19 25. Defendant Export-Import Bank of the United States ("Ex-Im Bank") is the official export
20 credit agency of the United States. Ex-Im Bank offers a variety of financial products, including direct
21 loans and loan guarantees, to support U.S. exporters. The Export-Import Bank Act of 1945, 12 U.S.C.
22 §§ 635 *et seq.*, is Ex-Im Bank's charter and governing statute. The agency is responsible for complying
23 with other statutory and regulatory mandates related to its financing decisions, including ESA and
24 NHPA requirements.

25 26. Defendant Fred. P. Hochberg is President and Chairman of the Export-Import Bank of
26 the United States. Mr. Hochberg is the federal official with the ultimate authority and responsibility for
27 ensuring Ex-Im Bank's compliance with the law, including ESA and NHPA requirements.

LEGAL BACKGROUND

A. The Endangered Species Act

27. Congress enacted the Endangered Species Act (“ESA”) in 1973 “to provide a program for the conservation of . . . endangered species and threatened species.” 16 U.S.C. § 1531(b).

28. The ESA requires the U.S. Fish & Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS,” or collectively, “the Services”) to “determine whether any species is an endangered species or threatened species.” *Id.* § 1533(a)(1). The Services have listed numerous foreign species as threatened or endangered. 50 C.F.R. § 17.11.

29. Once listed as an endangered species, the ESA prohibits the “take” or the harassment, harm, hunting, or killing of a member of that species by any person, entity, or agency. 16 U.S.C. §§ 1538(a); 1532(19). The Services have also extended the take prohibitions to all threatened species automatically upon listing, unless the Services issue a species-specific rule providing alternative protections. 50 C.F.R. § 17.31(a).

30. The ESA also establishes that it is “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes” of the ESA. *Id.* § 1531(c)(1).

31. To implement this policy, Section 7(a) of the ESA requires that “[e]ach Federal agency shall, in consultation with . . . the [Services], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species.” 16 U.S.C. § 1536(a)(2). The Services’ joint regulations define an agency “action” to mean “all activities or programs of any kind authorized [or] funded . . . , in whole or in part, by Federal agencies . . .” 50 C.F.R. § 402.02; *see also id.* § 402.03 (“Section 7 . . . appl[ies] to all actions in which there is discretionary Federal involvement or control.”).

32. To implement Section 7’s consultation requirements, an “agency shall . . . request” from the Services information regarding whether any listed species “may be present” in a proposed action area, and if so, the “agency shall conduct a biological assessment” to identify the species likely to be affected. 16 U.S.C. § 1536(c); *see also* 50 C.F.R. § 402.12(b) (requiring preparation of a biological

1 assessment for “major construction activities”). An agency must then initiate formal consultation with
2 the Services if a proposed action “may affect” a listed species. 50 C.F.R. § 402.14(a). The “may affect”
3 threshold is extremely low; consultation is triggered by “[a]ny possible effect, whether beneficial,
4 benign, adverse, or of an undetermined character.” 51 Fed. Reg. 19,926 (June 3, 1986).

5 33. After formal consultation, FWS or NMFS issues a biological opinion that evaluates “the
6 current status of the listed species,” identifies the “effects of the action” including any “cumulative
7 effects,” and concludes whether the agency action is likely to “jeopardize” any species’ existence. 50
8 C.F.R. § 402.14(g); 16 U.S.C. § 1536(b). If the Services find jeopardy, the biological opinion may
9 specify reasonable and prudent alternatives to the action that will avoid jeopardy. 16 U.S.C.
10 § 1536(b)(3); 50 C.F.R. § 402.14(h). If the Services conclude jeopardy will not occur, the Services may
11 “suggest modifications” to the action to “avoid the likelihood of adverse effects.” 50 C.F.R. § 402.13.

12 34. Further, under ESA Section 7(d), once a federal agency initiates consultation on an
13 agency action, the agency “shall not make any irreversible or irretrievable commitment of resources
14 with respect to the agency action which has the effect of foreclosing the formulation or implementation
15 of any reasonable and prudent alternative measures.” 16 U.S.C. § 1536(d). The Section 7(d) prohibition
16 remains in effect until consultation has concluded.

17 35. The ESA does not limit the geographical scope of Section 7’s applicability. 16 U.S.C.
18 § 1536(a)(2) (“Each Federal agency shall . . . insure that *any* action . . . is not likely to jeopardize . . . any
19 endangered species or threatened species . . .”) (emphasis added).

20 36. The Services’ original Section 7 regulations, promulgated in 1978, expressly required
21 consultation for all agency actions “in the United States, upon the high seas, and in foreign countries.”
22 50 C.F.R. § 402.02 (1978); 43 Fed. Reg. 870 (Jan. 4, 1978).

23 37. However, in 1986, the Services amended their regulations and purported to limit Section
24 7’s scope to agency actions “in the United States or upon the high seas.” 50 C.F.R. §§ 402.01; 402.02;
25 51 Fed. Reg. 19,926 (June 3, 1986).

26 38. Several groups challenged the agencies’ 1986 regulatory amendment as unlawful, and
27 both the district and appeals courts held the agencies’ decision to exempt agency actions in foreign
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1 countries from Section 7 consultation violated the ESA’s plain language. *Defenders of Wildlife v. Hodel*,
2 707 F. Supp. 1082 (D. Minn. 1989), *aff’d Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990).
3 However, the Supreme Court granted review and found the plaintiffs had failed to establish standing,
4 and without reaching the merits, reversed the lower court decisions. *Lujan v. Defenders of Wildlife*, 504
5 U.S. 555 (1992). The Services have not amended their unlawful 1986 regulations.

6 **B. The National Historic Preservation Act**

7 39. In 1973, the United States ratified the World Heritage Convention. *See* Convention
8 Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37. The
9 Convention recognizes that “parts of the cultural or natural heritage are of outstanding interest and
10 therefore need to be preserved as part of the world heritage of mankind,” and that “in view of the
11 magnitude and gravity of the new dangers threatening them, it is incumbent on the international
12 community as a whole to participate in the protection of” this heritage. *Id.*

13 40. Under the Convention, Parties nominate and the UNESCO World Heritage Committee
14 selects cultural and natural heritage properties that have “outstanding universal value” for the World
15 Heritage List. *Id.* Art. 11(1), (2). Parties then commit “to set up . . . services for the protection [and]
16 conservation” of cultural and natural heritage within their borders. *Id.* Art. 5. Further, “[e]ach State Party
17 . . . undertakes not to take any deliberate measures which might damage directly or indirectly the
18 cultural and natural heritage . . . situated on the territory of other States Parties.” *Id.* Art. 6.

19 41. In 1980, Congress amended the National Historic Preservation Act of 1966 (“NHPA”) to
20 implement the United States’ World Heritage Convention obligations. The NHPA requires that, “[p]rior
21 to the approval of any Federal undertaking outside the United States which may directly and adversely
22 affect a property which is on the World Heritage List,” each agency “shall take into account the effect of
23 the undertaking . . . for purposes of avoiding or mitigating any adverse effects.” 16 U.S.C. § 470a-2.

24 42. The NHPA defines an “undertaking” as “a project, activity, or program funded in whole
25 or in part under the direct or indirect jurisdiction of a Federal agency, including . . . those carried out
26 with Federal financial assistance.” 16 U.S.C. § 470w(7). Further, an undertaking may affect a World
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1 Heritage site if it alters the property’s characteristics, including destroying or damaging part of the
2 property. *See* 36 C.F.R. § 800.5(a).

3 43. Further, to properly “take into account” the effects of an undertaking on a World Heritage
4 site, an agency must: (1) generate, collect, consider, and weigh information on how the undertaking will
5 affect the listed property, (2) determine whether the effects will be adverse, (3) if necessary, develop and
6 evaluate alternatives or modifications to avoid or mitigate adverse effects, and (4) consult with the host
7 nation and other entities regarding the effects. *See* 36 C.F.R. Part 800.

8 **C. The Export-Import Bank Act of 1945**

9 44. Ex-Im Bank was created pursuant to the Export-Import Bank Act of 1945. 12 U.S.C.
10 §§ 635 *et seq.* The statute authorizes Ex-Im Bank to provide loans, loan guarantees, insurance, and
11 credits to facilitate the export of U.S. goods and services. *Id.* § 635(a)(1).

12 45. Ex-Im Bank provides export financing products that fill gaps in trade financing. The
13 agency assumes credit and country risks that the private sector is unable or unwilling to accept.

14 46. Ex-Im Bank’s organic statute requires the agency to “establish procedures to take into
15 account the potential beneficial and adverse environmental effects of goods and services for which
16 support is requested under its direct lending and guarantee programs.” *Id.* § 635i-5(a)(1).

17 47. To implement this requirement, in 1992, Ex-Im Bank adopted and later amended its
18 Environmental Procedures and Guidelines. Pursuant to these Procedures and Guidelines, Ex-Im Bank
19 “screen[s] and categorize[s]” all applications that “ha[ve] the potential for adverse environmental
20 effects” and for which Ex-Im Bank’s financial exposure exceeds \$10 million. *Env’tl Procedures &*
21 *Guidelines* § I(2). All applicants for “[l]arge” projects must submit an “Environmental Impact
22 Assessment” or equivalent documentation sufficient for Ex-Im Bank “to evaluate the nature and extent
23 of the environmental effects of a project, and effectiveness of proposed mitigation measures.” *Id.* §§ II;
24 I(6), (7).

25 48. Further, Annex A of the Procedures & Guidelines provides “the scope of the
26 environmental guidelines applicable to projects.” *Id.* § I(8). These “Performance Standards” require an
27 applicant to “[p]rotect and conserve biodiversity.” *Id.* Annex A, Performance Std. No. 6. Specifically, in
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1 areas of natural habitat, the project “will not significantly convert or degrade” natural habitats unless
2 there are no viable alternatives. *Id.* Further, “[i]n areas of critical habitat,” a project may not cause
3 “measurable adverse impacts” to the habitat. *Id.* The Performance Standards also require pollution
4 mitigation and the protection of “cultural heritage.” *Id.* Annex A, Performance Std. Nos. 3 and 8.

5 49. An applicant must also submit an “Environmental and Social Management Plan” and an
6 “Action Plan” to Ex-Im Bank, setting out “specific mitigation measures and actions . . . required for the
7 project to comply with application laws, regulations and the requirements of the [] Performance
8 Standards.” *Id.* Annex A, Performance Std. No. 1.

9 50. Ex-Im Bank’s Board of Directors may “withhold financing from a project for
10 environmental reasons.” 12 U.S.C. § 635i-5(a)(2). Further, “[i]f a project does not meet the applicable
11 environmental guidelines,” the Board of Directors may “provide financial support conditioned on the
12 implementation of measures to mitigate the project’s adverse environmental effects.” *Env’tl Procedures*
13 *& Guidelines* § I(15).

14 51. Finally, Ex-Im Bank must “monitor the environmental performance of . . . projects . . . ,
15 particularly those aspects of projects subject to any Ex-Im Bank financing conditions pertaining to the
16 implementation of measures to mitigate a project’s environmental impacts.” *Id.* § V. The agency “shall
17 provide for the public disclosure of environmental assessments and supplemental environmental reports
18 required to be submitted to the Bank, including remediation or mitigation plans and procedures, and
19 related monitoring reports.” 12 U.S.C. § 635i-5(a)(1); *see also Env’tl Procedures & Guidelines* § I(7)(c)
20 (requiring Ex-Im Bank to provide “a comprehensive summary of the material environmental
21 requirements associated with its financial support” on its website and all environmental reports that
22 demonstrate compliance with Ex-Im Bank’s environmental guidelines and required mitigation
23 measures).

24 **FACTUAL BACKGROUND**

25 **A. The Great Barrier Reef and Its Endangered Species**

26 52. Stretching more than 1600 miles along the northeastern Australian coast, the Great
27 Barrier Reef is the world’s largest coral reef ecosystem. Renowned for its spectacular natural beauty, the
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1 Great Barrier Reef also supports a diverse array of habitats, accounting for a tremendous range in
2 biodiversity, including numerous rare, threatened, and endangered species.

3 53. The dugong (*Dugong dugon*) is a large, herbivorous marine mammal related to the
4 manatee. Dugongs can grow up to 10 feet long and weigh over 550 lbs. The dugong diet is largely
5 restricted to seagrass, and dugongs are typically found in wide, shallow, and protected bays, mangrove
6 channels, or on the lee shore of islands containing seagrass meadows. 68 Fed. Reg. 70,185 (Dec. 17,
7 2003).

8 54. The dugong was first listed as endangered in 1970 under the ESA’s precursor statute and
9 was subsequently included on the endangered list following the ESA’s enactment. 35 Fed. Reg. 18,319
10 (Dec. 2, 1970); 39 Fed. Reg. 1171 (Jan. 4, 1974). The species is listed as endangered throughout its
11 range. 68 Fed. Reg. 70,185 (Dec. 17, 2003). The dugong is also considered “Vulnerable” by the
12 International Union for Conservation of Nature and Natural Resources (“IUCN”). The species’ primary
13 threats include hunting and habitat destruction, as seagrass is extremely sensitive to human influence.
14 Seagrass beds can be destroyed from dredging and inland and coastal clearing, as these actions cause
15 turbidity and sedimentation. Underwater noise and vessel strikes are also threaten the dugong.

16 55. A large portion of the world’s dugongs inhabit Australia, including the Great Barrier
17 Reef. Dugongs occur in Port Curtis and Gladstone Harbour and near Curtis Island. In recent years, the
18 number of dugong strandings along the Queensland coast has increased, and the Gladstone area is
19 considered a hot spot for these strandings. Between January 2011 and September 2012, the Queensland
20 Department of Environment and Heritage Protection documented 17 dugong strandings in the Gladstone
21 area alone and a total of 41 dugong strandings throughout the state.

22 56. In 1997, Australia designated the Rodds Bay Dugong Protection Area B, which includes
23 the entire Port Curtis area, to protect dugong habitat.

24 57. The green sea turtle (*Chelonia mydas*) derives its common name from the green fat
25 underneath the turtles’ shells. Green sea turtles, like other sea turtles, can live up to 80 years and migrate
26 long distances between their foraging grounds and nesting beaches.

1 58. While green sea turtles are found in tropical and subtropical seas worldwide, one
2 breeding population nests in the southern Great Barrier Reef, including a major nesting area on the
3 islands of the Capricorn Bunker Groups, located immediately east of Gladstone. These islands include
4 Heron, Northwest, Wreck, Tryon, Masthead, Erskine, Fairfax, North Reef, and Wilson Islands. Minor
5 breeding aggregations also occur at Bushy Island, the Percy Islands, Bell Cay, and Lady Elliott Island,
6 on the mainland coast from Bustard Head to Bundaberg, and the northern part of Fraser Island. Very
7 low-density nesting can occur on almost any other beach within this area. Adult and juvenile green sea
8 turtles may occur in Port Curtis/Gladstone Harbour and near Curtis Island

9 59. Green sea turtle breeding colony populations in Florida and on the Pacific coast of
10 Mexico are listed as endangered under the ESA, while all other populations of green sea turtle, including
11 those in Australia, are listed as threatened. 43 Fed. Reg. 32,800 (July 28, 1978). The IUCN has also
12 deemed the entire species “endangered” and to have a “decreasing” population trend.

13 60. The loggerhead sea turtle (*Caretta caretta*) reaches up to 3 feet in length and has a
14 reddish-brown, slightly heart-shaped top shell.

15 61. While the loggerhead sea turtle is found in subtropical and tropical areas around the
16 world, loggerhead nesting aggregations in Oman, the United States, and Australia account for about 88
17 percent of nesting worldwide. Major loggerhead rookeries are found in the Great Barrier Reef, including
18 major nesting concentrations in the thirteen islands of the Capricorn Bunker Groups (especially Wreck,
19 Tryon, and Erskine Islands) immediately east of Gladstone. Loggerhead sea turtles may occur in Port
20 Curtis/Gladstone Harbour and near Curtis Island.

21 62. Listed as “endangered” by the IUCN, nine Distinct Population Segments (“DPS”) of
22 loggerhead sea turtles are listed under the ESA, including the South Pacific Ocean DPS in eastern
23 Australia, which is listed as endangered. 76 Fed. Reg. 58,868 (Sept. 22, 2011). Based on nest count data
24 from the mid-1970s through the early to mid-2000s, the South Pacific Ocean DPS is at risk and thus
25 likely to decline in the future.

26 63. Sea turtles in Australia, including both green and loggerhead sea turtles, face numerous
27 threats. In addition to bycatch in fisheries and vessel strikes, habitat degradation at nesting beaches and
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1 feeding areas plays a significant role in the species' declines. Habitat-related harm includes the presence
2 of lights in nesting areas, beach erosion, increased effluent and water contamination, and increased
3 underwater noise. Further, green sea turtles use seagrass habitats for foraging, and the degradation or
4 destruction of seagrass habitat may harm sea turtles.

5 64. Like the dugong, sea turtles in Queensland have experienced high levels of mortality
6 recently. The Queensland Department of Environment and Heritage Protection documented 296 sea
7 turtle strandings in the Gladstone area alone between January 2011 and September 2012.

8 65. The saltwater crocodile in Australia is listed as a threatened species under the ESA.
9 61 Fed. Reg. 32,356 (June 24, 1996). The species inhabits estuaries, mangrove swamps, and tidal
10 reaches of rivers. The saltwater crocodile reaches lengths well over 20 feet, making it the largest
11 crocodylian species. Exploitation for hides significantly reduced the species' wild population. Although
12 saltwater crocodiles are not common in the area, the species may be found near Port Curtis/Gladstone
13 Harbour.

14 66. Several other ESA-listed wildlife species inhabit the Great Barrier Reef, including
15 endangered humpback whales and endangered sperm whales. Humpback whales have also been sited
16 within Gladstone Harbour.

17 67. The Great Barrier Reef World Heritage Area was added to the World Heritage List in
18 1981 due to its remarkable beauty and biodiversity, including rare fauna like dugong and several species
19 of sea turtles. In recommending the site for listing, the Advisory Body to the World Heritage Committee
20 specifically noted: "[t]he site includes major feeding grounds for the endangered dugong (*Sirenia:*
21 *Dugong dugon*) and nesting grounds of world significance for two endangered species of marine turtle,
22 the green (*Chelonia mydas*) and the loggerhead (*Caretta caretta*), . . . [and] given the severe pressures
23 being placed on these species elsewhere, the Great Barrier Reef may be their last secure stronghold."
24 World Heritage Nomination, IUCN Technical Review (July 1981).

25 68. Although the Great Barrier Reef World Heritage Area largely coincides with the Great
26 Barrier Reef Marine Park, it extends beyond the Park's boundaries in some areas. The waters to the west
27 of Curtis Island are included in the Great Barrier Reef World Heritage Area. The Great Barrier Reef
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1 World Heritage Area includes not only reef habitats, but also seagrass beds, sandy or muddy sea beds,
2 continental slope, and deep oceanic water habitats.

3 **B. The Australia Pacific LNG Project**

4 69. The Australia Pacific LNG Project (“the Project”) will be located in Queensland,
5 Australia. The Project is a joint venture between Origin Energy, ConocoPhillips, and the China
6 Petrochemical Corporation (Sinopec).

7 70. The Project includes several components. In the “upstream” portion of the Project,
8 proponents will drill up to 10,000 coal-seam wells in the interior Surat and Bowen Basins west of
9 Brisbane. A nearly 300-mile underground pipeline will be installed to transport the gas to the coast,
10 including a marine crossing over the Narrows, a channel that separates the coast and Curtis Island. The
11 marine crossing will include dredging and direct destruction of seagrass beds.

12 71. The “downstream” portion of the Project includes the construction of an 18-million
13 metric tons per year-capacity LNG facility on Curtis Island to process gas, condense it to liquid, and
14 store it for transport. The LNG facility will also include a marine loading jetty to transport the liquefied
15 gas to tankers for shipping. The LNG facility will occupy 740 acres of land and over 800 acres of
16 seabed. Construction will require dredging and destruction of mangrove and seagrass habitat.

17 72. The Project also requires dredging of Gladstone Harbour to facilitate tanker access. Once
18 operational, tankers will transport the LNG across Port Curtis and typically, through the Great Barrier
19 Reef to destinations worldwide. At maximum capacity, the Project may increase shipping through the
20 Great Barrier Reef Marine Park by 13 percent.

21 73. Construction and operation of the Australia Pacific LNG Project will emit substantial
22 amounts of greenhouse gases. The Australia Pacific LNG Project will emit over 11 million tons of
23 carbon dioxide equivalents (“CO₂e”) per year at maximum capacity.

24 74. The Project’s proponents published an Environmental Impact Statement (“EIS”) in 2010
25 to document likely impacts from the Project’s construction and operation. This EIS was submitted to Ex-
26 Im Bank and constitutes the Project’s Environmental Impact Assessment or equivalent documentation,
27 pursuant to Ex-Im Bank’s Procedures and Guidelines. However, this EIS was not issued by Ex-Im Bank
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1 in conformance with National Environmental Policy Act (“NEPA”) procedures, and thus does not
2 constitute compliance with that statute.

3 75. The Australia Pacific LNG Project will adversely impact the environment, including both
4 marine and terrestrial habitat and wildlife species.

5 76. The Project is located within the Great Barrier Reef World Heritage Area. The Project is
6 also located in the Rodds Bay Dugong Protection Area.

7 77. The Project may impact marine wildlife in the Port Curtis/Gladstone Harbour area
8 through the destruction or degradation of habitat from dredging, construction, and reclamation,
9 diminished water quality, vessel strikes, lighting impacts, and underwater noise. Dugongs, green and
10 loggerhead sea turtles, saltwater crocodiles, or humpback and sperm whales may be affected by the
11 Project.

12 78. The construction and operation of the Australia Pacific LNG Project may directly and
13 adversely affect the Great Barrier Reef World Heritage Area.

14 79. In addition to the Australia Pacific LNG Project, at least two other LNG facilities have
15 been proposed or are being constructed on Curtis Island.

16 80. In 2011, the UNESCO World Heritage Committee expressed “extreme concern”
17 regarding Australia’s approval of liquefied natural gas facilities on Curtis Island and requested an
18 official monitoring mission to assess the impacts. The resulting report, issued in June 2012, found that
19 “the developments in Gladstone Harbour and on Curtis Island,” including the various LNG facilities and
20 associated dredging, “do have a negative impact on the OUV [Outstanding Universal Value] of the
21 property.” World Heritage Committee Mission Report, Reactive Monitoring to Great Barrier Reef:
22 WHC-12/36.COM/7B (June 2012). In response, the World Heritage Committee requested that Australia
23 formally report on the status of the Great Barrier Reef World Heritage Area, “with a view to
24 considering, in the absence of substantial process, the possible inscription of the property on the List of
25 World Heritage in Danger.”
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1 91. Ex-Im Bank failed to initiate or complete consultation with the Services regarding the
2 impacts of its action on ESA-listed species, as required by the ESA. 16 U.S.C. § 1536(a)(2).

3 92. By failing to comply with the procedural mandates of Section 7 of the ESA, Ex-Im Bank
4 has failed to ensure its actions do not jeopardize any listed species, including dugong, loggerhead and
5 green sea turtles, saltwater crocodiles, and humpback and sperm whales. 16 U.S.C. § 1536(a)(2).

6 93. Defendants' failure to comply with Section 7's consultation requirements constitutes a
7 violation of the ESA.

8 **SECOND CLAIM FOR RELIEF**

9 **Violation of the National Historic Preservation Act and the Administrative Procedure Act**

10 94. Plaintiffs hereby incorporate by reference the allegations presented in all preceding
11 paragraphs.

12 95. Ex-Im Bank's funding of the Australia Pacific LNG Project constitutes an "undertaking"
13 that "may directly and adversely affect" the Great Barrier Reef World Heritage Area, pursuant to the
14 NHPA. 16 U.S.C. § 470a-2.

15 96. Ex-Im Bank failed to "take into account the effect . . . for purposes of avoiding or
16 mitigating any adverse effects" of the Project on the Great Barrier Reef World Heritage Area, prior to
17 approving funding for the Project. *Id.*

18 97. Ex-Im Bank failed to generate and collect information regarding the Project's effects on
19 the Great Barrier Reef World Heritage Area, failed to determine whether the effects will be adverse,
20 failed to consider mitigation to avoid those effects, and failed to properly consult with all parties
21 regarding the effects.

22 98. Defendants' failure to properly take into account the Project's effects on the Great Barrier
23 Reef World Heritage Area violates the NHPA, is arbitrary, capricious, and otherwise not in accordance
24 with law, and/or constitutes an action unlawfully withheld under the APA. *Id.*; 5 U.S.C. §§ 551; 706.

25 **RELIEF REQUESTED**

26 For the reasons stated above, Plaintiffs respectfully request that the Court grant the following
27 relief:

1 1. Declare that Ex-Im Bank violated Section 7 of the ESA, 16 U.S.C. § 1536, by failing to
2 ensure through consultation that its funding of the Australia Pacific LNG Project did not jeopardize any
3 ESA-listed species;

4 2. Declare that Ex-Im Bank violated the NHPA, 16 U.S.C. § 470a, and the APA, 5 U.S.C.
5 § 706, by failing to properly take into account the effects of the Australia Pacific LNG Project on the
6 Great Barrier Reef World Heritage Area;

7 3. Issue permanent injunctive relief compelling Ex-Im Bank to consult with the Services
8 regarding its funding of the Australia Pacific LNG Project and suspending any actions that might
9 constitute irreversible and irretrievable commitments of resources pending completion of that
10 consultation, and compelling Ex-Im Bank to properly take into account the Project's effects on the Great
11 Barrier Reef World Heritage Area;

12 4. Award Plaintiffs their costs of litigation, including reasonable attorneys' fees; and

13 5. Grant Plaintiffs such other relief as the Court deems just and proper.

14
15
16 Dated: December 13, 2012

Respectfully submitted,

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