



**VIA CERTIFIED MAIL AND EMAIL**

August 2, 2012

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**Re: Notice of Export-Import Bank's Violations of U.S. Environmental Laws in Financing the Australia Pacific LNG and Queensland Curtis LNG Projects**

Dear President Hochberg,

The Center for Biological Diversity, Pacific Environment, and Turtle Island Restoration Network provide notice that the Export-Import Bank of the United States ("Ex-Im") has violated or is likely to imminently violate U.S. environmental law by financing the Australia Pacific Liquefied Natural Gas ("LNG") Project and the Queensland Curtis LNG Project, both located in northeastern Australia. We believe Ex-Im has or is likely to finance these Projects without first complying with all environmental review requirements, including those mandated by the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*; the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*; and the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 *et seq.* This letter also serves as formal 60-day notice of our intent to sue, as required by the ESA's citizen suit provision. 16 U.S.C. § 1540(g).

Ex-Im is currently considering financing two large LNG facilities, both located on Curtis Island in Queensland, Australia, within the Great Barrier Reef World Heritage Area. The Projects' proponents admit the construction, dredging, operation, and shipping associated with these facilities will diminish water quality, destroy habitat, and otherwise harm several ESA-listed species, including endangered dugongs, threatened green and loggerhead sea turtles, and

threatened saltwater crocodiles. Yet we believe Ex-Im has failed to comply with basic, mandatory environmental review procedures that could result in substantial mitigation of these harms. We request that Ex-Im delay any financial commitments for these Projects until all environmental requirements are satisfied.

## The LNG Projects

### A. The Australia Pacific LNG Project

The Australia Pacific LNG Project will be located in Queensland, Australia and is a joint venture between Origin Energy, ConocoPhillips, and the China Petrochemical Corporation (Sinopec). *APLNG EIS Exec. Summ.* at 2.<sup>1</sup> The Project includes four components: (1) drilling of up to 10,000 wells in the Surat and Bowen Basins west of Brisbane, including the use of controversial “fracking” methods, (2) installation of a 530-kilometer underground pipeline between the gas field and the coast, including a “marine crossing” to Curtis Island, (3) construction of an 18-million metric tons per year-capacity LNG facility to process gas, condense it to liquid, and load it for shipping, and (4) “enhancement” of existing shipping channels<sup>2</sup> with an eventual increase in shipping activity, including through the Great Barrier Reef. *Id.* at 4, 9, 44.

The Australia Pacific LNG Project will significantly impact the environment, particularly affecting highly sensitive marine habitat. The Project is located directly within the Great Barrier Reef World Heritage Area, as well as the Rodds Bay Dugong Protection Area, an area designated for its high quality dugong habitat. *APLNG EIS Vol. 4, Chap. 10*, at 14. Curtis Island, on which the LNG facility will be constructed, contains rare and ecologically-significant mangrove and seagrass habitat. The proponents’ EIS documents the Project’s serious, unmitigated impacts to the area and to several U.S. ESA-listed species, including endangered dugongs, threatened green and loggerhead sea turtles, and threatened saltwater crocodiles.<sup>3</sup> *Id.* at 13-17. These impacts include habitat destruction from dredging and reclamation, diminished water quality, vessel strikes, lighting impacts, and underwater noise. *See, e.g., id.* at 22-28, 35. Further, the land-based drilling and pipeline construction will remove and fragment habitat for numerous terrestrial species. *EIS Vol. 2, Chap. 23; Vol. 3, Chap. 23*. The proponents also estimate the entire Project will emit over 11 million tons of carbon dioxide equivalents (CO<sub>2</sub>e) per year at maximum capacity. *EIS Vol. 2, Chap. 14*, at 18.

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<sup>1</sup> The Australia Pacific LNG proponents’ 2010 Environmental Impact Statement (“EIS”) is available at: <http://www.aplng.com.au/environment/our-environmental-impact-statement>. *See also* Australia Pacific LNG Environmental and Social Management Plan (July 2012), available at: <http://www.aplng.com.au/environment/environmental-and-social-management-plans>.

<sup>2</sup> Shipping channel construction and dredging for the Australia Pacific LNG Project, “including an approach channel for the LNG facility,” is being evaluated in a separate EIS prepared by Gladstone Ports Corporation. *APLNG EIS Exec. Summ.* at 44.

<sup>3</sup> The Project EIS does not fully evaluate impacts from dredging of shipping lanes or increased shipping due to the eventual operation of Australia Pacific LNG facility, but the Project may also affect listed humpback whales. *APLNG EIS Vol. 4, Chap. 10*, at 17. There may be additional ESA-listed species affected by the Project that are not fully identified or described in the EIS.

On May 3, 2012, Ex-Im's Board authorized \$2.95 billion in direct loans for the Australia Pacific LNG Project.<sup>4</sup> This "transaction [wa]s Ex-Im's second-largest single-project financing in history." According to communications with Ex-Im personnel, notwithstanding the board vote, Ex-Im has not yet finalized its commitments for this Project.

## **B. The Queensland Curtis LNG Project**

The Queensland Curtis LNG facility will also be located on Curtis Island, immediately south of the Australia Pacific LNG site, and will be developed by QGC Limited, a subsidiary of the British BG Group. Like the Australia Pacific Project, the Queensland Curtis LNG Project also includes four components: (1) drilling of up to 6,000 wells in the Surat Basin, west of Brisbane, (2) installation of a 380-kilometer underground pipeline between the gas fields and Curtis Island, including a marine crossing, (3) a 12-million metric tons per year-capacity LNG facility and export jetty, and (4) development of new shipping channels and additional shipping activity locally and within the Great Barrier Reef. *CQLNG EIS Exec. Summ.* at 1, 22; *Vol. 5, Chap. 1*, at 23; *Vol. 5, Chap. 8* at 5.<sup>5</sup>

The Queensland Curtis LNG Project will likewise have significant environmental impacts. The Project is located within the Great Barrier Reef World Heritage Area and the Rodds Bay Dugong Protection Area, and the Project area similarly contains rare mangrove and seagrass habitat. *Id.* at 37, 56. The Queensland Curtis EIS also documents significant impacts to water quality and species, including dugongs, green and loggerhead sea turtles, and saltwater crocodiles. *See, e.g., CQLNG EIS Vol. 5, Chap. 8*, at 80-94. The proponents estimate the Project will emit roughly 4.5 million tons of CO<sub>2e</sub> per year. *EIS Vol. 7, Chap. 2*, at 9, 16.

Ex-Im has announced that it is considering financing this Project, but has provided no information regarding the type or extent of its potential commitments. However, according to communications with Ex-Im personnel, Ex-Im's Board will be considering the Queensland Curtis LNG Project for approval in the next two months.

## **Ex-Im's Violations of U.S. Environmental Laws**

### **A. The Endangered Species Act**

Enacted in 1973, the ESA seeks to conserve threatened and endangered species and the ecosystems upon which those species depend. 16 U.S.C. § 1531(b); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978). To implement this purpose, ESA Section 7 requires all federal agencies to "consult" with the Fish & Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS," or collectively, "the Services") to "insure that *any action* authorized, *funded*, or carried out" by an agency "is not likely to jeopardize the continued existence" of any listed species. 16 U.S.C. § 1536(a)(2) (emphasis added); 50 C.F.R. § 402.02 (defining "agency action" to mean "all activities or programs of any kind authorized, funded . . . in whole or in part").

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<sup>4</sup> See Ex-Im Press Release (May 8, 2012), available at: <http://www.exim.gov/pressrelease.cfm/C7085CF2-091E-501C-6563779FECDD63/>.

<sup>5</sup> The Queensland Curtis LNG proponents' EIS is available at: [http://www.qgc.com.au/01\\_cms/details.asp?ID=427](http://www.qgc.com.au/01_cms/details.asp?ID=427).

To facilitate compliance with Section 7, 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 species likely to be affected. 16 U.S.C. § 1536(c); *see also* 50 C.F.R. § 402.12(b) (requiring preparation of a BA for “major construction activities”). An agency must then initiate formal consultation with the Services if a proposed action “may affect” a listed species. 50 C.F.R. § 402.14(a). The “may affect” threshold is extremely low; consultation is triggered by “[a]ny possible effect, whether beneficial, benign, adverse or of an undetermined character.” 51 Fed. Reg. 19,926 (June 3, 1986). After formal consultation, the Services issue a biological opinion to determine whether the agency action is likely to “jeopardize” any species’ existence. If so, the opinion may specify reasonable and prudent alternatives to avoid jeopardy. 16 U.S.C. § 1536(b). Even if jeopardy will not occur, the Services may “suggest modifications” to the action to “avoid the likelihood of adverse effects.” 50 C.F.R. § 402.13.

Here, we believe Ex-Im has or will imminently approve financing for the Australia Pacific LNG and Curtis Queensland LNG Projects without first consulting with the Services, and thus violate the ESA. Ex-Im’s funding of the LNG Projects constitutes an “agency action” triggering consultation. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02. Further, the LNG Projects, which include major construction, clearly “may affect” ESA-listed species, including dugongs, green and loggerhead sea turtles, and saltwater crocodiles. *Id.* § 402.14(a). Proponents of both Projects frankly acknowledge substantial, short- and long-term impacts, including habitat destruction, vessel strikes, noise disturbance, and lighting impacts. *See, e.g., APLNG EIS Vol. 4, Chap. 10, at 22-28; CQLNG EIS Vol. 5, Chap. 8, at 80-94.* Accordingly, Ex-Im is required to consult with both FWS and NMFS regarding the Projects’ impacts on listed species.<sup>6</sup>

Further, Ex-Im is required to consult, despite the Projects’ Australian location. While the Services’ consultation regulations purport to limit Section 7’s applicability to agency actions “in the United States or upon the high seas,” the regulation clearly conflicts with the ESA’s plain language and is therefore unlawful. 50 C.F.R. §§ 402.01(a); 402.02; *see Defenders of Wildlife v. Lujan*, 911 F.2d 117, 125 (8th Cir. 1990) (rejecting the regulation because “Congress intended for the consultation obligation to extend to all agency actions affecting endangered species, whether within the United States or abroad”), *rev’d on other grounds by Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Accordingly, Ex-Im cannot rely on the Services’ regulation to avoid consultation, as Section 7 clearly applies to federal agency actions in foreign countries.

Additionally, even if the Services’ regulatory limitation were valid, Ex-Im is still required to consult regarding the Projects’ impacts. Specifically, Ex-Im’s deliberation and ultimate decision to fund the two Projects has occurred or will occur within the United States, and thus the ESA applies. *See Env’tl Def. Fund v. Massey*, 986 F.2d 528, 532 (D.C. Cir. 1993) (finding NEPA applies to agency project in Antarctica because “the decisionmaking processes of federal agencies take place almost exclusively in this country”). Further, portions of both LNG Projects occur on the “high seas,” including increased international shipping activities and potentially,

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<sup>6</sup> We note further that, during consultation, Ex-Im is prohibited from “mak[ing] any irreversible or irretrievable commitment of resources” toward a project that would “foreclos[e] the formulation or implementation of any reasonable and prudent alternative measures.” 16 U.S.C. § 1536(d).

noise impacts. 50 C.F.R. § 402.01(a); *see, e.g., CQLNG EIS Vol. 5, Chap. 1*, at 23. Accordingly, the ESA requires Ex-Im to consult regarding the Projects' impacts.

## **B. The National Environmental Policy Act**

NEPA requires each federal agency, including Ex-Im, to produce an “environmental impact statement” to evaluate “every . . . major Federal action[ ] significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). “Major federal actions” include “projects or programs entirely or *partly financed*, assisted, . . . or approved by federal agencies.” 40 C.F.R. § 1508.18(a) (emphasis added). Further, NEPA applies to agency conduct, such as financing, that “occurs within the United States . . . , [e]ven where the significant effects of the regulated conduct are felt outside U.S. borders.” *Massey*, 986 F.2d at 532. Additionally, because the Projects' substantial greenhouse gases emissions will mix in the atmosphere, climate change impacts from the Projects will be felt not only in Australia, but also in the United States. *See Friends of the Earth v. Mosbacher*, 488 F. Supp. 2d 889 (N.D. Cal. 2007) (finding climate impacts of foreign project occur within the U.S., triggering NEPA).

Here, we believe Ex-Im has or will imminently approve financing for the Australia Pacific LNG and Curtis Queensland LNG Projects without first fully evaluating the Projects' impacts as required by NEPA.<sup>7</sup> Ex-Im's financing, which will likely represent a considerable portion of the overall investment for each Project, constitutes a “major Federal action,” and the Projects “significantly [e]ffect [ ]” the environment, including rare habitats, ESA-listed species, water resources, and the global climate. 40 C.F.R. § 1508.18(a). Accordingly, Ex-Im has failed to fully comply with NEPA.

## **C. The National Historic Preservation Act**

In 1980, Congress amended the NHPA to implement the United States' obligations under the World Heritage Convention. The NHPA requires that, “[p]rior to the approval of any Federal undertaking outside the United States which may directly and adversely affect a property which is on the World Heritage List,” each agency “shall take into account the effect of the undertaking . . . for purposes of avoiding or mitigating any adverse effects.” 16 U.S.C. § 470a-2. An “undertaking” is defined as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including . . . those carried out with Federal financial assistance.” 16 U.S.C. § 470w(7). Further, an undertaking “may . . . affect” a World Heritage property if it “may alter . . . any of the characteristics of” the property, including “destruction or damage to . . . part of the property.” *Dugong v. Gates*, 543 F. Supp. 2d 1082, 1102 (N.D. Cal. 2008), citing 36 C.F.R. § 800.5(a)(1) (domestic NHPA regulations).

Here, both the Australia Pacific LNG Project and the Queensland Curtis LNG Project occur within the boundaries of the Great Barrier Reef World Heritage Area. *APLNG EIS Vol. 4, Chap. 10*, at 14; *QCLNG EIS Vol. 5, Chap. 8*, at 2. The Great Barrier Reef was added to the

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<sup>7</sup> While each proponent produced an “Environmental Impact Statement” for the Projects, these documents do not meet NEPA's environmental review requirements, as they are not issued by Ex-Im and fail to provide sufficient detail or opportunity for public input. *See, e.g.*, 40 C.F.R. §§ 1502.15; 1502.16; 1503.1.

World Heritage List in 1981 for its remarkable natural beauty and unique habitats, and the nomination expressly highlighted the area's rare dugong and sea turtle habitat.<sup>8</sup>

Unfortunately, the Great Barrier Reef's outstanding values have been compromised by ongoing development, diminished water quality, and climate change. In March 2012, in response to "extreme concern" over the LNG Projects' potential effects on the Reef, UNESCO and the IUCN undertook a monitoring mission to evaluate the site's current status and the LNG Projects' impacts. The resulting Report questioned Australia's conclusion that the LNG Projects "do not have unacceptable impacts" on the Great Barrier Reef World Heritage Area.<sup>9</sup> The Report also raised concerns regarding water quality and species impacts and criticized the Projects' "mitigation" measures as insufficient.<sup>10</sup> The Report recommended Australia "[c]ommission an independent review of all environmental concerns of consented developments . . . on Curtis Island." At its June 2012 meeting, the UNESCO World Heritage Committee adopted the Report's recommendations, including the request for an independent review.<sup>11</sup> The Committee further requested that Australia report on the Reef's status by February 2013, "with a view to consider, in the absence of substantial progress, the possible inscription of the property on the List of World Heritage in Danger."

Despite the clear applicability of the NHPA's provisions, and the acknowledged need to "avoid[ ] or mitigat[e]" the Projects' "adverse impacts" to the Great Barrier Reef World Heritage Area, we believe Ex-Im has not properly "take[n] into account the effect of" its financing decisions. 16 U.S.C. § 470a-2. As the court found in *Dugong v. Gates*, the required NHPA "accounting" requires Ex-Im to: (1) generate, collect, consider, and weigh information on how the Projects will affect the Great Barrier Reef World Heritage Area, (2) determine whether the effects will be adverse, and (3) if necessary, develop and evaluate alternatives or modifications to avoid or mitigate those effects. 543 F. Supp. 2d at 1104. Further, Ex-Im must "engage[ ] the host nation and other relevant private organizations and individuals" in its analysis. *Id.* Because Ex-Im has not complied with these requirements, the agency will violate the NHPA if it approves financing for the Australia Pacific LNG and the Queensland Curtis LNG Projects.

## Organizations Giving Notice

The following organizations are providing this notice:

Center for Biological Diversity  
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San Francisco, CA 94104

Turtle Island Network  
P.O. Box 370  
Forest Knolls, CA 94933

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<sup>8</sup> See World Heritage List, available at: <http://whc.unesco.org/en/list/154>; see also UNESCO Advisory Body Evaluation (1981) (noting in summary, "The site includes major feeding grounds for the endangered dugong (*Sirenia: Dugong dugon*) and nesting grounds of world significance for two endangered species of marine turtle, the green (*Chelonia mydas*) and the loggerhead (*Caretta caretta*), as well as habitat for four other species of marine turtle, given the severe pressures being placed on these species elsewhere, the Great Barrier Reef may be their last secure stronghold."), available at: [http://whc.unesco.org/archive/advisory\\_body\\_evaluation/154.pdf](http://whc.unesco.org/archive/advisory_body_evaluation/154.pdf).

<sup>9</sup> See UNESCO/IUCN Mission Report, Great Barrier Reef (Australia) (N 154) (June 2012), available at: <http://whc.unesco.org/document/117104>, at 53.

<sup>10</sup> *Id.* at 53-54.

<sup>11</sup> Decisions Adopted by the World Heritage Committee at its 36<sup>th</sup> Session (Saint-Petersburg, 2012), available at: <http://whc.unesco.org/document/117760>.

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## **Conclusion**

As described above, Ex-Im's financing of the Australia Pacific LNG and Queensland Curtis LNG Projects will violate the ESA, NEPA, and the NHPA. If Ex-Im does not correct these violations before finalizing any financial commitments for the Projects, the Center for Biological Diversity, Pacific Environment, and Turtle Island Restoration Network intend to file suit. We welcome discussion regarding this letter and invite you to correct any misapprehensions we may have regarding the Projects or the agency's environmental compliance. Thank you for your prompt attention to this matter.

Sincerely,



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