U.S. Export-Import Bank Financing of Australian LNG Project Avoids Endangered Species Act Challenge – For Now

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In the K&L Gates’ Global Government Solutions 2014 Annual Outlook, we reported on a case filed in the U.S. District Court for the Northern District of California raising questions about whether inter-agency consultations required by U.S. law are implicated when the United States provides funding for extraterritorial energy projects. The case, brought by three environmental groups (Plaintiffs) against the Export-Import Bank of the United States (Ex-Im Bank), challenges the Ex-Im Bank’s decision to provide nearly $4.8 billion USD in financing for the development and construction of two liquefied natural gas (LNG) projects in Queensland, Australia. This alert provides an update on the case and discusses the Court’s 12 August 2014 decision (Decision) to dismiss the environmental groups’ challenges based on the U.S. Endangered Species Act (ESA).

The Ex-Im Bank is an independent U.S. federal agency that helps create and maintain U.S. jobs through a variety of mechanisms, including financing international oil and gas projects. One expectation is that by providing financing, U.S. companies may export equipment and services to support the financed projects. The ESA, in turn, requires that each federal agency “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 or result in the destruction or adverse modification of habitat of such species . . . .” Prior to 1986, the regulations implementing the ESA applied to “activities or programs in the United States, upon the high seas, and in foreign countries.” In 1986, the regulations were revised with the express purpose of limiting the geographic scope of the ESA. “Action” was defined to include “all activities or programs of any kind authorized, funded, or carried out, in whole or in part by Federal agencies in the United States or upon the high seas,” explicitly eliminating the reference to “foreign countries.”

The LNG projects at issue in this case will “include gas drilling, pipeline construction, construction of an LNG production facility and shipping terminal, and transport of LNG through the Great Barrier Reef.” As such, the Plaintiffs argue that the Ex-Im Bank funded the projects without properly consulting and considering the projects’ impacts on threatened and endangered species on the Great Barrier Reef World Heritage Area as required by the U.S. ESA, 16 U.S.C. § 1531 et seq., and the National Historic Preservation Act (NHPA), 16 U.S.C. § 470 et seq.

The Endangered Species Act

In response to the Ex-Im Bank’s motion to dismiss the ESA claims, the Plaintiffs argued that the projects include “activities . . . upon the high seas,” such that ESA consultation was required. In the Decision, the Court rejected this argument, finding that the Plaintiffs had not
alleged facts plausible to suggest that the transportation of LNG is part of the projects funded by the Ex-Im Bank.

To the contrary, the allegations in the [First Amended Complaint] demonstrate that transportation of LNG will occur after the Projects are completed. Furthermore, Defendants [Ex-Im Bank] have submitted environmental review documents that do not identify transportation of LNG as a component of either project.10

The Decision provides the Plaintiffs with the opportunity to amend their complaint, although the Court stated that it was unclear whether the Plaintiffs could allege additional facts sufficient to state a cognizable ESA claim.

The Decision is important in that it is authority for the proposition that Ex-Im Bank decisions to finance the development and construction of LNG infrastructure in foreign countries is not sufficient to trigger an extraterritorial application of the ESA.11 The Plaintiffs’ arguments also implicitly challenged the Australian government’s authority to manage the balance between commercial development and ecologic preservation. As the LNG projects at issue in this case include one of Australia’s largest capital infrastructure projects to produce LNG from coal-seam gas, the Decision, under which it was held that the Plaintiffs’ failed to establish that ESA consultation requirements apply to the projects, is likely to be well received by the Australian government and industry.

The National Historic Preservation Act

Although not a central issue, it is important to note that the Decision does not affect further consideration of Ex-Im Bank’s alleged failure under the NHPA to evaluate the projects’ impact on the Great Barrier Reef World Heritage Area. According to Plaintiffs, the NHPA required the Ex-Im Bank to (i) generate and consider information regarding the projects’ impacts on the Great Barrier Reef World Heritage Area, (ii) determine whether the effects will be adverse, (iii) develop modifications to avoid or mitigate those impacts, and (iv) consult with Australia and other interested entities.12

It is a particularly interesting time for a U.S. court to undertake consideration of this issue—whether or not it has any merit—because on 18 June 2014, UNESCO’s World Heritage Committee deferred for twelve months a decision on whether to inscribe the Great Barrier Reef to the List of World Heritage in Danger.13 The Committee’s concerns over the site relate to planned coastal developments, including development of ports and LNG facilities. It has asked Australia to submit an updated report on the state of conservation of the site by 1 February 2015. When a site is inscribed on the List, the World Heritage Committee will develop and adopt a program for corrective measures and monitor the situation at the site. While some countries seek inscription on the List as a way to obtain expert assistance in addressing the problems, others see it as a dishonor.14

Conclusion

Despite these challenges, progress has not been impeded for either project. Key milestones have been achieved in the development of both projects, with both the Queensland Curtis...
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LNG and Australia Pacific LNG projects on track to meet targets of delivering LNG exports in fourth quarter 2014 and mid-2015, respectively.

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5 50 C.F.R. § 402.01 (1978).
6 50 C.F.R. § 402.02 (2013).
8 First Amended Complaint, Ctr. for Biological Diversity, No. 12-6325, ECF No. 28 at ¶ 1 (FAC).
9 Id. ¶¶ 82, 92.
10 Order Granting Motion to Dismiss, Ctr. for Biological Diversity, No. 12-6325, ECF No. 62 at 8 (12 Aug. 2014).
11 For additional information on the history of extraterritorial application of the ESA, see our article in the K&L Gates Global Government Solutions 2014 Annual Outlook. It is also important to note, as the Court did in this case, that there was insufficient evidence that the financing was intended to include transportation. The case does not resolve the potential application of U.S. environmental laws to Ex-Im Bank decisions to finance projects that clearly involve transportation.
12 FAC ¶ 7.