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We Are Not Alone: How Extraterritorial Application of the Endangered Species Act Can Preserve International Endangered Species and Habitats

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WE ARE NOT ALONE:
HOW EXTRATERRITORIAL APPLICATION OF THE ENDANGERED
SPECIES ACT CAN PRESERVE ENDANGERED SPECIES AND HABITATS
BY:
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ABSTRACT

The Great Barrier Reef is the world's largest coral reef ecosystem and is currently in danger of irreparable destruction due to natural and human-made environmental disturbance. This paper focuses on a case, *Center for Biological Diversity v. Export-Import Bank*, concerning the extraterritoriality application of the Endangered Species Act to a Federal agency's funding of liquefied natural gas projects in Australia requiring, in part, the dredging of portions of the Great Barrier Reef. As the health of UNESCO World Heritage Sites and other environmentally protected and culturally important geography is jeopardized, United States' government activity in foreign jurisdictions raises the question as to whether agency activity (if it is agency action) can come under jurisdiction of United States' courts or whether the federal activity abroad remains untouchable by United States jurisprudence aimed at protecting endangered habitats and species. The *Center for Biological Diversity* case, at the time of this article pending appeal to the Court of Appeals for the Ninth Circuit, presents the opportunity for a court to consider application of the presumption against extraterritoriality on Federal agency activity that substantially jeopardizes the health and preservation of endangered and culturally significant ecosystems under the Endangered Species Act.

KEY TERMS

Administrative Law, Environmental Law, Endangered Species Act, Great Barrier Reef, International Law, Law of the Sea, & Jurisdiction.

I. INTRODUCTION

Growing economies, population, and modern technology have led to an increase in international competition for natural resources. However, the competition for oil, natural gas, and other natural resources has threatened the existence of one of the world's most biologically diverse habitats, the Great Barrier Reef. The Great Barrier Reef is the world's largest coral reef ecosystem, including more than 2,900 separate coral reefs.² It provides a protected habitat to diverse and endangered species, such as six out of seven species of marine turtles, important and endangered dugong³ populations, more than 1500 species of fish, and many other marine species that comprise this diverse and expansive ecosystem.⁴ Recent news articles have highlighted the widespread coral bleaching of the Great Barrier Reef, predominately due to environmental disturbance; but human impact will only exacerbate the effects on the Reef's ecosystem, resulting in detrimental impact to other species that depend on the Reef for sustenance.⁵

This article focuses on a case in the United States District Court for the Northern District of California (Oakland Division), *Center for Biological Diversity v. Export-Import Bank of the United States* ("Center").⁶ Center presents the question of whether a United States federal agency (Export-Import Bank), providing funding to international liquefied natural gas projects, must comply with the consultation requirements of Section 7 of the Endangered Species Act of 1973 ("ESA") before funding can be secured when the actions of the project occur on the "high seas."⁷ This comment suggests that Center's outcome could significantly impact the United States' funding of international projects by Federal agencies, the international community's role in securing the future of World Heritage Convention sites, the increased protection of endangered ecological habitats and species, as well as potentially straining the United States' relationship with international organizations.

Part II focuses on the applicable statutory background implicated in *Center*, predominately focusing on Section 7 of the ESA,⁸ in addition to the Administrative Procedure Act Section 706,⁹ and the Export-Import Bank Act of 1945.¹⁰ Part III addresses the *Center* case. I begin by summarizing the relevant facts and procedural posture of the case, highlighting Plaintiffs' primary arguments, objections and responses by the Export-Import Bank ("Defendant"), and the Trial Court's holding in *Center* on the parties' cross-motions for summary judgment. Finally, based on my analysis of *Center*'s outcome, Part IV discusses how

² *About the Reef: Biodiversity*, GREAT BARRIER REEF MARINE PARK AUTHORITY, <https://perma.cc/ZX9B-XGLV> (last visited Oct. 1, 2015).

³ Dugong, scientific name *Dugong dugon*, are related to manatees and commonly called "sea cows." Dugongs' strictly habitat shallow salt-water oceans of the Indian and western Pacific Oceans. *Dugong*, WORLD WILDLIFE FUND, <https://perma.cc/ZNM7-XATD> (last visited Oct. 1, 2015)

⁴ *Id.*; see also International Union for Conservation of Nature (IUCN), *World Heritage Nomination, IUCN Technical Review*, Recommendation, para. 5 (July rev. 1981) (on file with the World Heritage Centre List for the Great Barrier Reef, <https://perma.cc/46NW-VK5G>) (last accessed Oct. 1, 2015).

⁵ Euan McKirdy, *Study: Over 90% of Great Barrier Reef suffering from coral bleaching*, CNN (Apr. 20, 2016, 8:47 AM), <https://perma.cc/9AG5-9SS8>; Michael Slezak, *The Great Barrier Reef: a catastrophe laid bare*, THE GUARDIAN (June 6, 2016, 7:54 PM), <http://perma.cc/VTB5-F3A3>.

⁶ *Ctr. for Biological Diversity v. Export-Import Bank of the United States*, No. 4:12-cv-6325 SBA, 2015 U.S. Dist. LEXIS 21481 (N.D. Cal. Feb. 20, 2015).

⁷ Endangered Species Act of 1973 § 7, as amended 16 U.S.C.S. § 1531 *et seq.* (2015).

⁸ *Id.*

⁹ Administrative Procedure Act, 5 U.S.C. § 706 (1966) (as amended).

¹⁰ Export-Import Bank Act, 12 U.S.C.S. § 635 *et seq.* (2015).

Center fits into the broader legal framework of American jurisprudence on environmental issues and prior case law addressing Section 7 of the Endangered Species Act. Additionally, I discuss the potential impact *Center* could have on environmental litigation, especially the courts' interpretation of the extraterritoriality application of Section 7 of the ESA and the international and administrative law concerns implicated by *Center* regarding the United States' funding of international projects that threaten endangered species and habitats.

II. APPLICABLE STATUTORY BACKGROUND

A better understanding of the significance of *Center* requires a survey of the statutory and jurisprudential history implicated by Plaintiffs' argument challenging the presumption against extraterritoriality as applied to the Export-Import Bank's funding of international projects and failing to follow Section 7 consultation requirements pursuant to the ESA. In this section, I begin by outlining the history and protection of the Great Barrier Reef, pursuant to the World Heritage Convention,¹¹ which the United States is a signatory pursuant to the National Historic Preservation Act.¹² Next, I analyze Section 7 of the Endangered Species Act, particularly the language "on the high seas" and the consultation requirement.¹³ Finally, I discuss the Export-Import Bank Act of 1945,¹⁴ which authorized the creation of the independent agency, including the purpose and function of the Bank, and the Bank's "Environmental and Social Due Diligence Procedures"¹⁵ formulated to provide accountability and ensure the Bank's compliance with applicable statutory law with the purpose of reducing impact to the environment in accordance with the Bank's Charter and purpose of funding projects.¹⁶

A. UNESCO & The World Heritage Convention: The Great Barrier Reef

In 1981, the Government of Australia nominated the Great Barrier Reef ("Reef"), covering 348,700 square kilometers on the eastern coast of Queensland, Australia, to be listed as

¹¹ 54 U.S.C.A. § 300321 (2014).

¹² National Historic Preservation Act, 54 U.S.C. § 300101 *et seq.* (2014), 16 U.S.C. § 470a-2, providing that before any Federal action is taken "outside the United States which may directly and adversely affect a property which is on the World Heritage List . . . the head of a Federal agency . . . shall take into account the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects." 54 U.S.C. § 307101(e) (2014), 80 Stat. 915, 89 P.L. 665 (1966) (emphasis added); *see also* 54 U.S.C.S. § 300301 (1980) (providing that it is the explicit policy of the Federal Government of the United States to contribute, encourage, administer, and protect historic property for present and future generations); Exec. Order No. 11593, 36 Fed. Reg. 8921 (May 13, 1971) (Executive Order for the "Protection and Enhancement of the Cultural Environment," signed by President Richard Nixon, in the furtherance of the policies of the United States to administer, initiate, and consult with the requisite and necessary agencies to secure the protection of important and valuable historical sites, structures, and objects, in accordance with the National Environmental Policy Act, the Historic Sites Act, and the National Historic Preservation Act).

¹³ Endangered Species Act, *supra* note 7.

¹⁴ Export-Import Bank Act, 12 U.S.C.S. § 635 *et seq.* (2015).

¹⁵ "The Charter of the Export-Import Bank . . . requires the Bank to establish procedures to take into account the potential beneficial and adverse environmental effects of goods and services for which support is requested, consistent with the mandate to support U.S. jobs through exports." *Environmental and Social Due Diligence Procedures and Guidelines: Introduction*, EXPORT-IMPORT BANK (revised Dec. 12, 2013), <https://perma.cc/Y2F8-SDGF> (last visited Oct. 2, 2015) (emphasis added).

¹⁶ *See* Export-Import Bank, *EXIM Bank and the Environment*, <https://perma.cc/G4SS-4WLH> (last accessed Oct. 2, 2015); *see also* Export-Import Bank Act, *supra* note 12 at § 635(a)(1) (The Bank's objective is to provide funding to projects that will increase and contribute to employment for United States workers).

a World Heritage Site.¹⁷ In July 1981, the International Union for Conservation of Nature (IUCN)¹⁸ recommended that the Great Barrier Reef Marine Park “meets the criteria of the Convention and therefore should be placed on the World Heritage List.”¹⁹ Following IUCN’s recommendation to the World Heritage Committee, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) inscribed the Reef as property 154 to the World Heritage List.²⁰

The Reef provides a protected habitat for numerous endangered and threatened species of diverse marine life -- including marine turtles, a threatened dugong species, and over 250 species of coral.²¹ The United States is a party to the World Heritage Convention,²² thereby adopting the listing of the Great Barrier Reef as a World Heritage Site, codified and made applicable to the United States by the National Historic Preservation Act (NHPA).²³ The NHPA, codified at 16 U.S.C.S. §§ 470 *et seq.* and amended in 1980, provides the purpose of ensuring “the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans.”²⁴

The significant passage of the NHPA in the *Center* controversy provides a similar yet broader consultation requirement to the ESA:

Prior 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 . . . the head of a Federal agency . . . shall take into account the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects.²⁵

This language ensures that *any* Federal agency action that “may directly and adversely affect” property outside of the United States which is on the World Heritage List, “take into account the effect of the undertaking” to avoid “adverse effects.” As such, the NHPA could also provide extraterritorial application of the NHPA to World Heritage designated properties that may be affected by United States Federal agency action.

¹⁷ *World Heritage Nomination, IUCN Technical Review*, Recommendation at para. 2.

¹⁸ “IUCN co-drafted the World Heritage Convention text with U.N.E.S.C.O. in 1972 and is *explicitly recognized within the Convention as the technical Advisory Body* to the World Heritage Committee on natural World Heritage sites.” *World Heritage Facts and Figures*, IUCN (Dec. 17, 2012), <https://perma.cc/Q3KX-ZNTC> (last accessed Oct. 1, 2015) (emphasis added).

¹⁹ *World Heritage Nomination*, *supra* note 15 at para. 9.

²⁰ *Nominations to the World Heritage List (inscribed sites)*, World Heritage Comm., 5th Sess., 003 CONF. VIII.15, <https://perma.cc/K8C9-BGFN> (last accessed October 2, 2016).

²¹ Australian Government, Great Barrier Reef Marine Park Authority, *supra* note 2; *see also World Heritage Nomination*, *supra* note 2.

²² *States Parties Ratification Status*, WORLD HERITAGE CONVENTION, <https://perma.cc/YM98-Y72S> (last visited March 29, 2017).

²³ National Historic Preservation Act, *supra* note 10; *e.g.*, World Heritage Convention 54 U.S.C.A. § 300321 (2013).

²⁴ 16 U.S.C. § 470(b)(4).

²⁵ 16 U.S.C. § 470a-2 (emphasis added).

In 2015, the World Heritage Committee (“Committee”), after reviewing the “State of Conservation Report,”²⁶ issued a decision “not[ing] with concern the conclusion of the 2014 Great Barrier Reef Outlook Report that the *overall Outlook for the property is poor*, and that climate change, poor water quality and impacts from coastal development are *major threats to the property’s health and regrets that key habitats, species and ecosystem processes [. . .] have continued to deteriorate from the cumulative effects of these impacts.*”²⁷ The Committee also emphasized the potential for the Australian State to increase and prioritize efforts to prevent further industrial development, decrease in water quality, dredging of the property, and port expansions in order to institute and implement a robust “2050 Long-Term Sustainability Plan.”²⁸ Most importantly, the Long-Term Sustainability Plan provides for the “establishment of an 80% reduction in pollution run-off in the property by 2025 and the commitment of an initial additional investment of AUS 200 million dollars to accelerate progress in water quality improvements.”²⁹ This highlights the Committee’s grave concern regarding the Reef’s overall health in relation to the continued and increasing industrial development inside the property.

As a result of the Reef’s current jeopardized and threatened state of health, there is well-founded concern that any further, increased development in and surrounding the Reef is in direct conflict with the Committee’s welcoming of the Australian State and the international community’s efforts to increase protection of the Great Barrier Reef from further deterioration.

B. Section 7 of The Endangered Species Act of 1973

The Endangered Species Act’s “Congressional findings and declaration of purposes and policy” provides that “the United States has pledged itself *as a sovereign state in the international community* to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to—(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and (G) *other international agreements.*”³⁰ The broad breadth of the language in this section titled “findings,” supports the understanding that Congress explicitly intended the language of the ESA to include the United States’ policies on endangered or threatened wildlife and habitats as it applies to Federal agency action in the international community. The Supreme Court of the United States has stated that Congress explicitly intended the ESA to have broad application.³¹

Section 7(a)(2) of the ESA contains two key concepts at issue in the *Center* controversy: “agency action” and the “consultation” requirement for all agencies.³² The statute provides for the protection of endangered or threatened species or habitats stating,

²⁶ Submitted by the Government of Australia, Property ID N154, *State Party Report on the State of Conservation of the Great Barrier Reef World Heritage Area (Australia)*, in response to World Heritage Committee, WHC 38 Com 7B.63 (Jan. 30, 2015).

²⁷ U.N.E.S.C.O. World Heritage Comm., 39 Sess., 39 COM 7B.7, WHC-15/39, para. 3 (2015) <https://perma.cc/JQB4-SLWW> (last visited Oct. 1, 2015) (emphasis added).

²⁸ *Id.* at para. 4-7.

²⁹ *Id.* at para. 4(a).

³⁰ 16 U.S.C.S. § 1531(a)(4) (emphasis added).

³¹ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) (“As it was finally passed, the Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”)

³² 16 U.S.C.S. § 1536(a)(2); previously codified as Section 7(a)(2) of the Endangered Species Act of 1973; *see also* 42 U.S.C.S. § 4332(C)(v) (1970) “National Environmental Policy Act” (stating that “[p]rior to making any detailed

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an ‘agency action’) 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 which is determined by the Secretary[.]³³

The Secretary of the Interior and the Secretary of Commerce have the responsibility of enforcing and administering the consultation requirement.³⁴ The Secretaries have, in turn, delegated their responsibilities for the enforcement of the ESA to the United States Fish and Wildlife Service and the National Marine Fisheries Service (collectively, “Services”).³⁵

The Services have defined “Action” to mean “*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.*”³⁶ Furthermore, the Services have defined “Action area” to mean “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.”³⁷ The broad territorial application of the ESA by the Services, pursuant to the Secretaries’ delegated authority, reaffirms the purpose and policies of the ESA.

Pursuant to the delegated authority from the Secretary of the Interior, the United States Fish and Wildlife Service has defined prohibitions on the jeopardizing and threatening endangered species and habitats in requisite territory. Section 17.21 subsection (c), titled “Take,” provides that

it is unlawful to take endangered wildlife within the United States, within the territorial sea of the United States, *or upon the high seas*. The high seas shall be all waters seaward of the territorial sea of the United States, *except* waters officially recognized by the United States as the territorial sea of another country, under international law.³⁸

In so doing, this provision defines the “high seas,” with the exception of waters recognized by the United States, as the territorial sea of another sovereign pursuant to international law. However, the Services promulgated a final joint rule interpreting and limiting the extraterritorial

statement, the responsible Federal official *shall consult* with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise *with respect to any environmental impact involved.*”) (emphasis added).

³³ 16 U.S.C.S. § 1536(a)(2).

³⁴ “Interagency Cooperation—Endangered Species Act of 1973, as Amended,” 50 C.F.R. § 402.01(a) (2016) (“Section 7(a)(1) of the [Endangered Species] Act directs Federal agencies, in consultation with and with the assistance of the Secretary of the Interior or of Commerce, as appropriate, to utilize their authorities to further the purposes of the Act by carrying out conservation programs for listed species.”)

³⁵ *Id.* at subsec. (b).

³⁶ “Definitions,” 50 C.F.R. § 402.02 (2016) (emphasis added).

³⁷ *Id.*

³⁸ United States Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants, “Prohibitions,” 50 C.F.R. § 17.21(c)(1) (2016); *see also* 50 C.F.R. § 402.01(a) (2016) (“in the United States or *upon the high seas* [that] is not likely to jeopardize the continued existence of any listed species or results in the destruction or adverse modification of critical habitat.”) (emphasis added).

application of the ESA only to actions taken within the territorial United States or upon the high seas (thereby not requiring consultation in foreign countries).³⁹

Based on the policies and broad statutory language of the ESA and the Services joint rule reinterpreting the consultation language to extend to the “high seas,” Congress intended to provide sweeping protection of endangered habitats and species both in the United States and upon the high seas, given the irreversible harm that would come to the environment were the procedural requirements of the ESA not followed by the requisite agency before taking action.

C. *Export-Import Bank Act of 1945*

In 1945, Congress passed the Export-Import Bank Act creating the Export-Import Bank (“Bank”) corporation of the United States as a federal agency, tasked with the purpose of providing

aid in financing and to facilitate exports of goods and services, imports, and the exchange of commodities and services between the United States . . . and any foreign country . . . and in so doing to contribute to the employment of United States workers. The Bank’s objective in authorizing loans, guarantees, insurance, and credits shall be to contribute to maintaining or increasing employment of United States workers.⁴⁰

Therefore, the Bank’s primary responsibility is to providing funding to facilitate the export and import of goods and services with the ultimate objective of contributing or increasing employment for American citizens.

Due to the international implications of the Bank’s statutory authorization language, Congress provided a report to accompany the 1992 reauthorization of the Bank. This report indicates, amongst other issues, Congress’s concern regarding the environmental policy implications from the Bank’s funding of foreign projects. Therefore, the report amended the original Export-Import Bank Act to include Section 17 titled, “Environmental Policy and Procedures.”⁴¹

The current Export-Import Bank Act provides for “Environmental policy and procedures”⁴² using similar language proposed by the 102nd Congress, Second Session. Notably, the language provided for in section (a)(1) requires that the Bank “shall establish procedures to take into account the potential beneficial and adverse environmental effects of goods and services for which support is requested under its direct lending and guarantee programs . . . including remediation or mitigation plans and procedures, and related monitoring reports.”⁴³ Furthermore the statute requires that the environmental procedures must apply “to any transaction involving a project for which long-term support of \$10,000,000 or more is requested from the Bank; for which the Bank’s support would be critical to its implementation; *and which*

³⁹ 51 Fed. Reg. 19,926-01, 19,929-19,930 (Jun. 3, 1986) (“The scope of these regulations has been enlarged to cover Federal actions on the high seas but has not been expanded to include foreign countries. [. . .] [T]he Service maintains its strong commitment to the preservation of species and habitat worldwide.”)

⁴⁰ “Powers and functions of the Bank,” 12 U.S.C.S. § 635(a)(1) (1945).

⁴¹ 138 Cong. Rec. H11340 Daily Ed. (Oct. 4, 1992) (“Section 106, amended by adding at the end of the following new section Sec. 17. ‘Environmental Policy and Procedures.’”).

⁴² 12 U.S.C.A. § 635(i)-5 (2006).

⁴³ *Id.* at § 635(i)-5(a)(1).

may have significant environmental effects upon the global commons or any country not participating in its project.”⁴⁴ Therefore, the Bank must consider and publicly disclose environmental reports and assessments for a wide range of funded projects *at the international level*.⁴⁵

1. The Export-Import Bank’s Environmental and Social Due Diligence Procedures

Pursuant to the Bank’s “Environmental and Social Due Diligence Procedures,” in accordance with the Bank’s authorizing statute,⁴⁶ the Bank defined “environmental impacts” as the “project-related impacts on the local communities directly affected by the project and the people involved in the construction and operation of the project.”⁴⁷ Interestingly, however, the Bank has explicitly provided for environmental procedure review of “medium-term”⁴⁸ and “short-term”⁴⁹ transactions. For long-term projects, the Bank has provided an environmental review when the project is expected to “produce direct CO2 emissions greater than 25,000 tons [sic].”⁵⁰ Therefore, while the Bank has internal environmental and social procedures, the Bank is statutorily required⁵¹ to complete and publicly disclose an environmental assessment report, including mitigation and remediation plans, for any long-term project that *may have significant environmental impact*.

The statutory background, when taken in conjunction with the Bank’s internal social and environmental procedures, requires the Bank, as a U.S. Federal agency, to consult *before* funding projects that *may* significantly impact the environment. While conducting adequate consultation procedures may increase approval time for spending, Congress requires all federal agencies to follow this consultation procedure. The *Center* controversy challenges the extent to which the consultation procedure must be followed by a federal agency before funding is approved—namely, does a federal agency have a responsibility and mandate to consult when the agency funding will apply extraterritorially and on the “high seas?”

III. *CENTER FOR BIOLOGICAL DIVERSITY V. EXPORT-IMPORT BANK OF THE UNITED STATES*

The following discussion of the *Center* controversy is significant to American jurisprudence on the issues of the extraterritorial application of the ESA as it pertains to the high seas, the funding of foreign projects by American companies and Federal agencies, and the significance American courts place on the broad policy and impact of the ESA for securing the protection of endangered and threatened species and habitats. Although the Court ultimately granted Defendant’s motion for summary judgment on the grounds the Plaintiff lacked Article III

⁴⁴ *Id.* (emphasis added).

⁴⁵ *Id.* at subsec. (1)(A), (B), (C).

⁴⁶ *Id.*; 12 U.S.C.S. § 635(a)(1).

⁴⁷ EXPORT-IMPORT BANK OF THE UNITED STATES, *I. Overview of Ex-Im’s Environment and Social Due Diligence Procedures*, para. 3, <https://perma.cc/Y2F8-SDGF> (last visited Oct. 14, 2015).

⁴⁸ *Id.* at para. 4 (defined in footnote 2 as those projects with funding under \$10 million USD and projects that “have the potential for significant risks and impacts because they are to be carried out in a sensitive area or are likely to have an adverse impact on such an area.”).

⁴⁹ *Id.* at para. 5 (defined as having a “repayment term of less than two years.”).

⁵⁰ *Id.* at para. 9(1); *see* para. 8 (“when Ex-Im Bank receives and processes a final application for long-term financing for a project requiring review, it will follow the process set forth in 9 below.”).

⁵¹ 12 U.S.C.A. § 635(i)-5.

standing to sue, were the Ninth Circuit Court of Appeals to reverse or another court to address a similar issue in the future, the ultimate *Center* outcome could impact how the United States funds projects outside the territorial United States, especially in the energy sector, which jeopardize ESA protected habitats and species.

A. *Facts & Procedural Posture*

The Export-Import Bank of the United States, an independent federal agency,⁵² provided nearly \$4.8 billion USD to finance “the development and construction of two [LNG] projects [the Australia Pacific and Queensland Curtis LNG Projects] occurring partially in Australia’s Great Barrier Reef World Heritage Area The projects will each include gas drilling, pipeline construction, construction of an LNG production facility and shipping terminal, and transport of LNG through the Great Barrier Reef to markets abroad,”⁵³ including shipping on the high seas. In total, the LNG Projects will result in up to 16,000 coal-seam gas wells, install approximately 510 miles of pipeline to transport the gas, and dredge the adjacent harbor to allow for international shipping of LNG through the Great Barrier Reef.⁵⁴ Plaintiffs allege serious harm and damage to the Great Barrier Reef and endangered species and designated protected habitat including jeopardizing “high seas habitat for dugongs, sea turtles, [] several ESA-listed whales . . . and threatened saltwater crocodiles.”⁵⁵ Plaintiffs’ complaint sought declaratory and injunctive relief to bring Defendants into compliance with the consultation requirements of the ESA, halting further funding of the LNG projects before any further damage is done to the Great Barrier Reef, endangered species, and protected species’ habitats.

Plaintiffs, comprised of three environmental organizations, Center for Biological Diversity, Pacific Environment, and Turtle Island Restoration Network (“Plaintiffs”),⁵⁶ commenced action against the Bank in the United States District Court for the Northern District of California in which the Bank subsequently filed a motion to transfer venue to the United States District Court for the District of Columbia, which was ultimately denied.⁵⁷ Following the Court’s decision denying the motion to transfer venue, the Bank filed a motion to dismiss Plaintiffs’ initial complaint alleging the Bank’s failure to comply with the “consultation obligations under § 7(a)(2) of the ESA,”⁵⁸ contending that the Bank was “not required to consult [] prior to providing funding for the Projects because a federal agency funding a project in a *foreign country* does not have a duty to consult [] about the project’s impact on endangered species.”⁵⁹ As such, the Court granted the Bank’s motion to dismiss, holding that “it is unclear

⁵²*Ctr. for Biological Diversity, v. Export-Import Bank of the United States*, No. 4:12-cv-6325 SBA, 2013 U.S. Dist. LEXIS 133694, at *1 (N.D. Cal., Sept. 17, 2013); 12 U.S.C. § 635(a)(1), *supra* note 9.

⁵³*Ctr. for Biological Diversity*, No. 4:12-cv-12-6325 SBA, 2015 U.S. Dist. LEXIS 21481, at *3 (N.D. Cal., Feb. 20, 2015).

⁵⁴*Id.* at *4-5.

⁵⁵*Id.* at *4-6; *see also* 50 C.F.R. § 17.11 (1980), as amended by Fish and Wildlife Service final rule, 81 Fed. Reg. 8004-01 (Feb. 17, 2016).

⁵⁶*Ctr. for Biological Diversity*, 2013 U.S. Dist. LEXIS 133694, at *1.

⁵⁷*Id.* at *12, *27 (the Court concluded that the Bank failed to meet their burden to demonstrate sufficient transfer of the case based on the factors concerning convenience and justice including, a court’s docket load, localized interests, and the acknowledgement of a plaintiff’s choice in forum).

⁵⁸*Ctr. for Biological Diversity*, 2014 U.S. Dist. LEXIS 111762, at *10 (N.D. Cal., Aug. 12, 2014); *Cf. supra* note 28 (discussing the consultation requirement of the ESA, pursuant to the Secretary of the Interior and Commerce’s authority, as delegated to the Services).

⁵⁹*Id.* (emphasis added).

whether Plaintiffs can allege additional facts to state a cognizable ESA claim, Plaintiffs' ESA claim is dismissed with leave to amend."⁶⁰

In 2015, following the initial motion to dismiss, Plaintiffs amended their complaint (Second Amended Complaint) against the Bank for financing liquefied natural gas (LNG) projects in Queensland, Australia, to include failing to consult with the appropriate federal environmental agencies⁶¹ pursuant to and in violation of the ESA,⁶² the National Historic Preservation Act,⁶³ and the Administrative Procedure Act.⁶⁴ In response to the Plaintiffs second amended complaint, the Bank "move[d] to dismiss Plaintiffs' ESA claim for failure to state a claim upon which relief can be granted."⁶⁵ The Bank contends that the Plaintiffs have not alleged sufficient facts to show that the Bank took an agency action that would trigger the consultation requirement under the ESA.⁶⁶ Furthermore, the Bank argues that the shipping of the LNG on the high seas is not a component of the project for which the Bank provided funding.⁶⁷ On Defendant's motion to dismiss, the Court found that the facts as alleged by Plaintiffs, were plausible to show that the Bank failed to consult with the Services, pursuant to Section 7(a)(2) of the ESA, before funding the LNG projects that would result, *inter alia*, in the shipping of LNG on the high seas and that the term "agency action" is interpreted broadly, supporting a plausible inference that the Banks' actions could be subject to the ESA's consultation procedure.⁶⁸

After discussing the Plaintiffs ESA claim and the history of the ESA,⁶⁹ the Court held that "Plaintiffs have alleged sufficient facts to state a claim for relief under the ESA that is plausible on its face, Defendants' (Bank) motion to dismiss is denied."⁷⁰ In denying the Bank's motion to dismiss, the Court analyzed both the history and text of Section 7 of the ESA in order to determine the scope and applicability, particularly the extraterritoriality interpretation, of the "agency action" and "high seas" language,⁷¹ and whether the Bank, as a federal agency, properly followed the ESA consultation requirement. The Court stated that "Defendants have not pointed to any facts in the documents properly before the Court or cited any authority supporting the

⁶⁰ *Id.* at *17; *see, e.g.*, note 21.

⁶¹ *Id.* at *2.

⁶² ESA § 7 (1973).

⁶³ *Ctr. for Biological Diversity*, 2015 U.S. Dist. LEXIS 21481, at **6-7 ("According to Plaintiffs, the NHPA required [the] Bank to generate and consider information regarding the Projects' impacts on the World Heritage Area, determine whether the effects will be adverse, develop modification to avoid or mitigate those impacts, and consult with Australia and other interested entities"); *see, e.g.*, National Historic Preservation Act, 54 U.S.C. § 300101 et. seq. (2014); *Ctr. for Biological Diversity*, 4:12-cv-06325-SBA, Order on Cross-Motions for Summary Judgment, at *6, filed March 31, 2016 ("Plaintiffs further argue that the Bank's funding constitutes a 'Federal undertaking' that may affect the Great Barrier Reef World Heritage Area, thus triggering the NHPA's 'take into account' requirement.").

⁶⁴ 5 U.S.C. § 706 (2)(D) (providing for the "Scope of Review" by the reviewing court that "shall hold unlawful and set aside agency action, findings, and conclusions found to be—without observance of procedure required by law).

⁶⁵ *Center for Biological Diversity v. Export-Import Bank of the United States*, 2014 WL 6685739 at *1 (Oct. 10, 2014, N.D. Cal.).

⁶⁶ *Id.* at *5.

⁶⁷ *Id.* at *6-7 (pdf version).

⁶⁸ *Center for Biological Diversity v. Export-Import Bank of the United States*, 2015 WL 738641 at *6 (Feb. 20, 2015, N.D. Cal.).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at *4, 6.

conclusion that the scope of Export-Import Bank's actions is limited to construction-related activities occurring within Australia and its territorial seas."⁷²

Since the Court's denial of the motion to dismiss, Plaintiffs filed a motion for summary judgment in March 2015, after which the Defendants filed a cross-motion for summary judgment. In Defendant's Opposition and Cross-Motion, their primary argument is that the action is not a justiciable controversy within the bounds of Article III standing.⁷³ However, as a fall back argument, Defendants allege that the ESA does not require consultation under these circumstances and that the Bank took into account of the effect of the Projects' environmental impact.⁷⁴ Conversely, citing *Lujan v. Defenders of Wildlife*,⁷⁵ Plaintiffs argue that their "allegations are harms tied to procedural violations" and, therefore, according to *Lujan*, "the causation and redressability elements are relaxed" and can satisfy the standing requirements.⁷⁶

B. Case Analysis & Outcome

The primary issue in the *Center* case is whether a United States federal independent agency can be found in violation of United States law for the funding of LNG projects upon the high seas that, allegedly, harms a number of endangered species and habitats in UNESCO Great Barrier Reef World Heritage Site.⁷⁷

Specifically, Plaintiffs allege that the Bank's funding of nearly \$4.8 billion dollars for the construction of two LNG projects in Queensland, Australia,⁷⁸ partially in the Great Barrier Reef, constitute agency action on the high seas, pursuant to the ESA,⁷⁹ by providing funding for dredging the harbor in order to develop shipping lanes through the Reef for the export of LNG.⁸⁰ Furthermore, Plaintiffs allege that the Bank, as a federal agency, failed to consult with the Services and "take into account" the environmental impact that the LNG Projects would have on the Great Barrier Reef, endangered and threatened species, and habitats in the project area.⁸¹

However, before addressing the merits of a case, Article III standing is a threshold matter and the Court was required, based on Defendant's motion, to determine whether Plaintiffs had satisfied Article III standing requirements, thereby presenting a justiciable controversy for the court to resolve.⁸² The United States Supreme Court articulated three elements that must be satisfied for a Federal court to hear a "case or controversy" under Article III powers of the

⁷² *Id.*

⁷³ *Ctr. for Biological Diversity*, Defendant's Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment No. 4:12-cv-06325-SBA, at *5 (May 20, 2015).

⁷⁴ *Id.* at *13.

⁷⁵ *Ante* at note 82, 504 U.S. at 572 n.7.

⁷⁶ *Id.*

⁷⁷ *Ctr. for Biological Diversity*, 2015 U.S. Dist. LEXIS 21481, at **3-6; *accord Nominations to the World Heritage List*, *supra* note 15.

⁷⁸ *Id.* at *3.

⁷⁹ *Id.* at *14; *see also* 16 U.S.C.S. § 1536(a)(2); 50 C.F.R. 402.02 (defining "agency action").

⁸⁰ *Id.*

⁸¹ *Id.*; *see also* 50 C.F.R. § 17.21(c) (defining the extraterritorial application of "upon the high seas" language of the ESA); 50 C.F.R. 402.01; *But cf.* 51 Fed. Reg. 19,926-01, 19,929-19,930 (Services promulgated joint rule limiting the extraterritorial application of "upon the high seas" and ESA language to not apply to foreign territories).

⁸² *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (stating that standing to "invoke the authority of a federal court" is a "core component."); *see also, Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93 (1998) (standing is a prerequisite before a court will address the merits of a case presented).

United States Constitution.⁸³ To satisfy the standing requirements, a plaintiff must show, at any point throughout the course of litigation,

First, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized [. . .] and (b) “actual or imminent”[.] Second, there must be a causal connection between the injury and the conduct complained of[.] Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”⁸⁴

In summary, the plaintiff must establish (1) an injury in fact that is directly related to the agency action, (2) the plaintiff’s injury is causally connected to the agency action complained of, and (3) there must be redressability by the court. If the plaintiff fails to establish any of these three elements, a court will dismiss for lack of jurisdiction.⁸⁵

A modification to the injury requirement set forth in *Lujan* is the “procedural injury” requirement where a plaintiff must show that the “procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.”⁸⁶ On the parties’ cross-motions for summary judgment, Plaintiffs argued that they had a “recreational, economic, scientific, and aesthetic interest in the species and habitats of the Gladstone area and on the high seas” that is threatened by the “construction and operation of the Projects and the potential impact of the same on local species and habitat.”⁸⁷ Defendants did not dispute that Plaintiffs could satisfy the causation requirement but argued that the Plaintiffs failed to establish causation and redressability.⁸⁸

On parties’ cross-motions for summary judgment, the Court analyzed whether Plaintiff had shown a causal connection between the injury and conduct such that the injury was “fairly traceable to the challenged action of the defendant.”⁸⁹ To establish redressability, a plaintiff must show that the injury can be “redressed by a favorable decision.”⁹⁰ The Court noted that “a showing of procedural injury lessens their burden on the causation and redressability prongs of the Article III standing inquiry [such that] a party alleging procedural injury need only show a reasonable probability that the challenged action will threaten their concrete interests.”⁹¹ The Court’s causation analysis focused on whether the Plaintiffs had shown that the alleged unlawful lack of regulation could be sufficiently shown by Plaintiffs that the third party in this case, the operators of the Projects, could be responsive, e.g., suffer harm, were the Bank to cut funding to

⁸³ U.S. Const. art. III, § 2, cl. 1.

⁸⁴ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

⁸⁵ *Id.* at 561 (“Since [the standing requirements] are not mere pleading requirements but rather an indispensable part of the plaintiff’s case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof.”).

⁸⁶ *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 341 F.3d 961, 969 (9th Cir. 2003).

⁸⁷ *Ctr. for Biological Diversity*, Order on Cross-Motions for Summary Judgment No. 4:12-cv-06325-SBA, at *8 (May 31, 2016).

⁸⁸ *Id.* at *9.

⁸⁹ *Id.* at *8. (citation omitted); *Lujan*, 504 U.S. at 560-61 (citation omitted).

⁹⁰ *Id.* (citation omitted).

⁹¹ *Id.* at *9 (citations omitted).

the Projects.⁹² To support this analysis, the Court cited *St. Johan's United Church of Christ v. FAA*, stating that the outcome in that case was analogous to the facts as presented in *Center*.⁹³ The Court found that, as in *FAA*, plaintiffs challenging the agency's funding of \$29.3 million for the Chicago O'Hare Project could not satisfy the redressability requirement because the critical inquiry was "what would Chicago do" as a third party, not what would the agency do otherwise had it followed proper procedures.⁹⁴

Therefore, the Court found that the Plaintiffs had to provide "some basis for finding that the non-agency activity—construction and operation of the Projects—will be altered or affected."⁹⁵ The Court concluded that, based on Defendants' presented evidence, "the Projects very likely will continue unimpeded, even if Plaintiffs obtain the relief sought" given the developers of the Projects and their "substantial commitment" and investment in the Projects.⁹⁶ The Court found it significant that the Defendant's role in the Projects consisted of "approximately 10.5 percent and 9 percent of the total costs of the APLNG and QCLNG Projects, respectively[,]" as well as the fact that the QCLNG Project were already 46 percent complete by the time the Bank authorized the loan.⁹⁷ The Court concluded that

[g]iven the financial resources of the developers, their substantial commitment to the Projects, the relatively small fraction of the overall costs financed by Ex-Im Bank, and the availability of other funding sources, the Court finds that there is no reasonable probability the Projects will be halted if further financing by the Bank is impeded.⁹⁸

Although it would appear that the Court combined the causation and redressability analysis, the Court factually found that Plaintiffs failed to satisfy Article III standing requirements and ordered Plaintiffs' motion for summary judgment denied and granted Defendants' cross-motion.⁹⁹ Plaintiffs filed a notice of appeal on May 26, 2016.¹⁰⁰

IV. *CENTER'S* IMPACT ON FUTURE LITIGATION

Center is an important case for American and International jurisprudence for a number of reasons, including the potential for the United States Court of Appeals for the Ninth Circuit to apply the extraterritoriality canon of construction to the "high seas" language of Section 7 of the ESA, given the significance of the environmental issues at stake in *Center* regarding the erosion of a World Heritage Site, as well as the role that United States Federal agencies have in

⁹² *Id.* at *10 (citing *Lujan*, 504 U.S. at 562, "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else . . . causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well.").

⁹³ *Id.* at *11.

⁹⁴ *Id.* (citing *St. John's United Church of Christ v. FAA*, 520 F.3d 460, 462-63 (D.C. Cir. 2008)).

⁹⁵ *Id.*

⁹⁶ *Id.* at *12.

⁹⁷ *Id.* at *13.

⁹⁸ *Id.* at *14.

⁹⁹ *Id.* at *18.

¹⁰⁰ *Center for Biological Diversity v. Export-Import Bank*, Notice of Appeal No. 4:12-cv-06325-SBA, at *2 (May 26, 2016).

significantly financing international projects and the impact that failure to follow proper consultation procedures has on judicial resources and the environment.

A. “Agency Action” Analysis

Although the Court granted Defendant’s motion for summary judgment on the grounds that Plaintiffs failed to satisfy Article III standing, a key outstanding question is whether a court (particularly the Court of Appeals for the Ninth Circuit) will interpret “agency action” to include the Bank’s funding of the two LNG projects. I contend that because the ESA has been interpreted broadly, including the term “agency action,” this issue would likely resolve in favor of the Plaintiffs provided they survive the standing inquiry.¹⁰¹ The Bank argued, in their Opposition Brief and Cross-Motion for Summary Judgment, that the funding “applies only to . . . development of gas fields in south central Queensland . . . and construction and operation of an LNG facility on Curtis Island at Gladstone.”¹⁰² Because the Bank’s funding did not apply to the shipping of the LNG on the high seas, the Defendants argued that the Bank’s “agency action” did not trigger the Section 7 consultation procedure. At most, the Bank argued, the “shipping of the LNG from the [Australia Pacific] Project to other countries [on the high seas] is a separate interrelated or interdependent action.”¹⁰³

However, the tension occurs with Congress’ broad definition of “agency action,” routinely upheld by courts including the Ninth Circuit, which seems to include the Bank’s funding as a necessary collateral consequence of the Projects—dredged and liquefied natural gas—requiring the LNG to be shipped elsewhere via the high seas for consumption and use outside of the United States’ jurisdiction. Further, the Bank’s funding of nearly \$4.8 billion dollars to the Projects could be considered a substantial federal action taken by the Bank as a federal agency.

1. Interpretation of “Agency Action”

The Court in *Center* reiterated the broad interpretation of “agency action” under Section 7(a)(2) of the ESA. Significantly, the Court found that, in considering the Plaintiffs alleged facts,

it is reasonable to infer that exporting LNG [liquefied natural gas] to destinations abroad is one of the primary objectives/components of the Projects, and because the term ‘agency action’ is interpreted broadly, Plaintiffs have pled facts plausibly showing that the . . . Bank violated § 7(a)(2) [of the ESA] by failing to consult with the Services.¹⁰⁴

The broad language and interpretation of “agency action” includes “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United

¹⁰¹ See *supra* note 77, 50 C.F.R. 402.02 (2009) (defining “action” to expressly 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.*”) (emphasis added).

¹⁰² *Ctr. for Biological Diversity*, Defendant’s Opposition to Plaintiffs’ Motion for Summary Judgment and Cross-Motion for Summary Judgment No. 4:12-cv-06325-SBA, at *16 (May 20, 2015).

¹⁰³ *Id.* at *18.

¹⁰⁴ *Ctr. for Biological Diversity*, 2015 U.S. Dist. LEXIS 21481, at *20.

States or upon the high seas.”¹⁰⁵ The “agency action” in this case, by the Export-Import Bank, is the funding of nearly \$4.8 billion USD to finance the construction, development, and export of LNG projects in Queensland and Curtis Island, Australia, and within the Great Barrier Reef World Heritage Area, resulting in the exporting of LNG across the high seas to various international markets.

Congress promulgated a final rule on June 3, 1986, articulating interagency cooperation, under the Endangered Species Act, with the Secretary of the Interior and Commerce to ensure the consultation requirement of Section 7 is satisfied. 50 C.F.R. Part 402 provides that “the consultation process is designed to assist Federal agencies in complying with the requirements of section 7 and provides such agencies with advice and guidance from the Secretary on whether an action complies with the substantive requirements of section 7.”¹⁰⁶ Further, this final rule addressed many of the general comments proposed, including a thorough analysis of the section 7’s consultation requirement. Notably, the analysis provides that

Section 7 consultation will analyze whether the ‘effects of the action’ on listed species, plus any additional, cumulative effects of State and private actions which are reasonably certain to occur in the action area, are likely to jeopardize the continued existence of that species. Based on this analysis, the Federal agency determines whether it can proceed without exceeding the jeopardy standard. If the jeopardy standard is exceeded, the proposed Federal action cannot proceed without an exemption. . . . Congress did not intend that Federal actions be precluded by such speculative actions.¹⁰⁷

As such, it is clear that the Congressional intent for the passing of the Endangered Species Act and subsequent Agency interpretation and promulgated rules under the ESA provide for broad protection of endangered species and habitats through the use of agency consultation *before* agency action occurs.

Further, 50 C.F.R. Part 402, under the heading *Section 402.14 Formal Consultation*, outlines that Section 7 and this rule affirm the requirement that “Federal agencies to review their actions to determine whether they ‘*may affect*’ listed species or critical habitat. . . . Federal agencies have an obligation under section 7(a)(2) of the Act to determine whether their actions may affect listed species and whether formal consultation is required under these regulations.”¹⁰⁸ The Ninth Circuit has articulated that “actions that have any chance of affecting listed species or critical habitat—even if it is later determined that the actions are ‘not likely’ to do so—*require at least some consultation under the ESA.*”¹⁰⁹

In order for Federal agency action to be exempt from Section 7(a)(2) consultation requirements, the agency must submit an application for exemption after which, the Secretary shall determine that the Federal agency as the exemption applicant has (i) “carried out the consultation responsibilities in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed

¹⁰⁵ *Supra* note 34, 50 C.F.R. 402.02 “Definitions.”

¹⁰⁶ 51 Fed. Reg. 19,926 (June 3, 1986).

¹⁰⁷ “Section 402.02 Definitions,” 51 Fed. Reg. 19,957 (June 3, 1986).

¹⁰⁸ “Formal Consultation,” 51 Fed. Reg. 19,961 (June 3, 1986) (emphasis added).

¹⁰⁹ *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (en banc).

agency action which would not violate subsection (a)(2),” (ii) “conduct any biological assessment required by subsection (c),” and (iii) “refrain from making any irreversible or irretrievable commitment of resources prohibited by subsection (d).”¹¹⁰ In *Center*, the Bank did not apply for an exemption from the ESA’s consultation requirement under section 1536(g)(3)(A).

In the future, it is reasonable for a court to find that an agency’s funding constitutes “action” under the meaning of the ESA. This could provide an avenue for environmental organizations or other litigants to challenge environmentally detrimental policies, provided the plaintiff could satisfy jurisprudential requirements such as standing, ripeness, or mootness.

B. *Extraterritoriality Application of the Endangered Species Act’s Consultation Requirement*

The Supreme Court has long articulated that Congressional legislation will not extend beyond the jurisdiction of the United States absent express Congressional intent—this is the basic premise behind the presumption against extraterritoriality canon.¹¹¹ This canon of construction is the standard by which courts analyze statutes.¹¹² However, courts have found statutes to require extraterritorial reach, based on Congressional intent to apply to international jurisdictions, including the Endangered Species Act. The Administrative Procedure Act (APA) allows for judicial review of agency action if taken “without observance of procedure required by law.”¹¹³

In *Defenders of Wildlife v. Hodel*,¹¹⁴ the Plaintiffs brought a challenge to the Secretary of the Interior’s promulgated regulation that limited the extraterritoriality application of the consultation provision of Section 1536 of the ESA. The U.S. District Court for the District of Minnesota found that Section 1536 of the ESA, titled “Interagency cooperation,”¹¹⁵ required federal agency cooperation and consultation with the Secretary “regarding any action which could jeopardize any endangered or threatened species. The language and mandate is all inclusive; it could not be more broad Endangered species exist outside the boundaries of the United States *and high seas*.”¹¹⁶

Further, the Court stated that “Congress’ concern with the international aspects of the endangered species problem is unmistakable and appears repeatedly throughout the statute. . . . [The] broad definition of ‘endangered species,’ combined with the general international concern of the entire ESA, must be considered in interpreting the consultation requirements of Section

¹¹⁰ 16 U.S.C. § 1536(g)(3)(A).

¹¹¹ *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (“It is a longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1957))

¹¹² *Id.* (“In applying this rule of construction, we look to see whether ‘language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control.’”) (quoting *Foley Bros.*, 336 U.S. at 285); *See also Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010).

¹¹³ 5 U.S.C.S. § 706(2)(A) (“arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”), (C) (“short of statutory right”), and (D) (“without observance of procedure required by law.”)

¹¹⁴ *Defenders of Wildlife v. Hodel*, 707 F.Supp. 1082 (D. Minn. 1989), *rev’d*, 911 F.2d 117 (8th Cir. 1990), *rev’d*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (the Supreme Court dismissed for lack of jurisdiction because Plaintiffs lacked standing).

¹¹⁵ 16 U.S.C. § 1536 (1988).

¹¹⁶ *Hodel*, 707 F. Supp. at 1084. (emphasis added).

1536.”¹¹⁷ Although the *Hodel* decision was dismissed by the Supreme Court in *Lujan* for Plaintiffs’ lack of standing, the extraterritoriality application of the ESA, pursuant to express Congressional intent, has importance with the *Center* decision given the international location of the Projects in the Great Barrier Reef.

The “high seas” language, expressly included by Congress in defining “action” broadly, necessarily has extraterritoriality impact, requiring the United States, under the normative theory of *jus cogens*¹¹⁸ (an international theory of norms and obligations by the international community that are held for necessity purposes), to ensure that their legislative or law-making impact does not detrimentally affect the environment or endangered species, whether action occurs on the high seas¹¹⁹ (area that is under no State’s control or legal reach) or under international jurisdiction.

For instance, in *Kiobel v. Royal Dutch Petroleum Co.*,¹²⁰ the Court held that the Alien Tort Statute¹²¹ did not apply extraterritorially and claims were barred as applying outside of the jurisdictional territory of the United States when conduct occurred only in foreign sovereign territory.¹²² However, the Court articulated that the presumption is typically applied “to discern whether an Act of Congress regulating conduct applies abroad. . . . It [] allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law.”¹²³ Although the Court was constrained in this instance to hold that the presumption precluded a finding that the Alien Tort Statute did not apply extraterritorially, the Court did note that the principle underlying this presumption is to prevent the “danger of unwarranted judicial interference in the conduct of foreign policy[.]”¹²⁴

Justice Alito, in his concurrence, noted that unless the domestic conduct is sufficient to violate an international law norm “that satisfies *Sosa*’s requirements of definiteness and acceptance among civilized nations . . . the cause of action will fall within the scope of the presumption against extraterritoriality.”¹²⁵ Although the *Sosa* and *Kiobel* cases were concerned with extraterritorial application of the Alien Tort Statute, the principles motivating the Court to decline application of U.S. law to international jurisdiction is of continued significance for *Center*.

As in *Hodel*, the extraterritorial application of the consultation requirements of Section 7 of the ESA is in accordance with not only express and broad Congressional intent but also with international law norms under *jus cogens*, as a universally held norm—to protect the world in which we live from preventative manmade environmental and biological destruction. Because the Great Barrier Reef in *Center* is a UNESCO World Heritage Site, recognized and codified in

¹¹⁷ *Id.* at 1085.

¹¹⁸ *Vienna Convention on the Law of Treaties* art. 53, May 23, 1969, 1155 U.N.T.S. 331; *see also Yousuf v. Samantar*, 699 F.3d 763, 775 (4th Cir. 2012) (“A *jus cogens* norm, also known as a ‘peremptory norm of general international law,’ can be defined as ‘a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’”).

¹¹⁹ United Nations Convention on the Law of the Sea, Part VII, art. 86., 1833 U.N.T.S. 3. (1982) (“The Provisions of this Party apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters or an archipelagic State.”).

¹²⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

¹²¹ Codified at 28 U.S.C. § 1350 (1948) *et. seq.*

¹²² *Kiobel* 133 S.Ct. at 1670.

¹²³ *Id.* at 1664.

¹²⁴ *Id.*

¹²⁵ *Id.* at 1670.

U.S. law, the presumption against extraterritorial application is overridden by the express intent and recognition that the funding of the LNG Projects by the Export-Import Bank, as a federal agency taking action, could be in violation of the consultation procedure required by the Endangered Species Act.

Perhaps the most compelling U.S. Supreme Court precedent encouraging extraterritorial application for the ESA is *RJR Nabisco, Inc. v. European Community*,¹²⁶ wherein the Court addressed whether the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, applied extraterritorially to “events occurring and injuries suffered outside the United States.”¹²⁷ The Court stated that “[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application.”¹²⁸ The Court reiterated that unless the statute gives clear indication that Congress intended the statute to apply extraterritorially, the statute will be read to apply to conduct within the United States.¹²⁹

The Court summarized two cases in the past six years in which the Court was asked to determine whether the statute at issue applied extraterritorially: *Morrison* and *Kiobel*.¹³⁰ In *Morrison*, the issue before the Court was whether the Securities Exchange Act of 1934, section 10(b), applied to the purchase or sale of securities on foreign exchanges.¹³¹ The Court held that section 10(b) did not provide clear Congressional intent for the statute to apply to extraterritorial action since the statute’s focus was domestic securities transactions.¹³² In *Kiobel*, the Court addressed whether the Alien Tort Statute permits a federal court to have jurisdiction over three foreign corporations who committed international-law violations in Nigeria.¹³³ Again, the Court concluded that the statute lacked any clear Congressional intent to extend the prohibited conduct to actions outside the jurisdiction of the United States.¹³⁴

In *Nabisco*, the Court emphasized the two-step framework adopted in *Morrison* and *Kiobel* for determining whether the presumption against extraterritoriality applied:¹³⁵

1. Has the presumption against extraterritoriality been rebutted—does the statute at issue provide a clear, affirmative indication it applies extraterritorially?
2. If not, does the case involve a domestic application of the statute or did the conduct occur in a foreign country?

The Court noted in *Nabisco* that if the answer at the second step involves foreign conduct then the presumption against extraterritoriality applies and the analysis ends due to an “impermissible extraterritorial application” of the statute.¹³⁶ However, if at step one the statute gives clear “extraterritorial effect,” then the issue for a court “turns on the limits Congress has (or has not) imposed on the statute’s foreign application, and not on the statute’s ‘focus.’”¹³⁷ In so doing, the Court in *Nabisco* found that RICO plainly defined “racketeering activity to include a number of predicates that plainly apply to at least some foreign conduct.”¹³⁸ The RICO statute includes

¹²⁶ *RJR Nabisco, Inc. v. European Community*, 136 S.Ct. 2090 (2016).

¹²⁷ *Id.* at 2096.

¹²⁸ *Id.* at 2100 (citing *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010)).

¹²⁹ *Id.*

¹³⁰ *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010); *Kiobel*, 133 S.Ct. 1659 (1970).

¹³¹ *Morrison*, 561 U.S. at 262.

¹³² *Id.* at 265.

¹³³ *Kiobel*, 133 S.Ct. 1659, 1662 (2013).

¹³⁴ *Id.* at 1669.

¹³⁵ *Nabisco*, 136 S.Ct. at 2101.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

examples of criminal activity such as assassinating U.S. Government officials, when the defendant is a United States' citizen but conduct occurs outside the United States, and if a hostage is a United States citizen.¹³⁹ Thus, the Court held that the RICO statute rebuts the presumption against extraterritorial application by giving clear, affirmative Congressional intent to apply to foreign conduct in certain circumstances.¹⁴⁰

As in *Nabisco*, the “high seas” language of the ESA provides clear Congressional intent, on the face of the statute, that the statute was intended to apply to a narrow range of foreign conduct (involving agency action that could jeopardize endangered species and habitats) and should be sufficient to rebut the presumption against extraterritoriality, contrary to the Court’s holding in *Center*. Based on my analysis of courts’ interpretations of Section 7 consultation requirements, as well as the recent Supreme Court holding in *RJR Nabisco* extending extraterritorial application of the RICO Act (albeit in part), the Bank’s funding would likely constitute “agency action” as defined by Congress under the ESA because Congress broadly wrote the ESA with the intention of granting broad authority to the Secretary of the Interior to protect endangered species and habitats. Furthermore, the Ninth Circuit Court of Appeals and the U.S. Supreme Court have interpreted the ESA to apply extraterritorially given broad express Congressional intent.¹⁴¹

1. High Seas Discussion

Since the high seas are not subject to the law of a sovereign territory or state, the turning point for extraterritoriality application of the ESA will depend on the language of the ESA and Congressional intent to determine whether the canon of construction for the presumption against extraterritoriality applies in this matter.¹⁴² More importantly, as it applies to Section 7 of the ESA, Congress has defined “action” broadly to mean “*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.*”¹⁴³ As such, there is no question that when a court is faced with determining whether the agency action required consultation, the action will be interpreted broadly to include a presumptive extraterritoriality reach. The question then becomes whether the agency properly

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 2102.

¹⁴¹ See generally *Hodel*, 707 F.Supp. 1082 (D. Minn. 1989).

¹⁴² The Supreme Court has held that there is a presumption against extraterritoriality application of statutes, unless there is explicit Congressional intent to the contrary. See generally MARK WESTON JANIS & JOHN E. NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY 921 (West Academic Publishing, American Casebook Series, 5th ed. 2006). *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-56 (1909) (“No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep, to some extent, the old notion of personal sovereignty alive.”) (emphasis added); *E.g., Blackmer v. United States*, 284 U.S. 421, 437 (1932) (“[U]nless the contrary [Congressional] intent appears, [the legislation] is construed to apply only within the territorial jurisdiction of the United States, . . .”); *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (the canon of construction for the presumption against extraterritoriality application “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.” (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963))); see also *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949) (echoing the canon of construction that presumes against extraterritoriality application unless explicit Congressional intent to the contrary).

¹⁴³ 50 C.F.R. § 402.02 (2009) (emphasis added).

complied with the consultation procedure requirement or satisfied the exemption requirements under § 1536(g)(3)(A).

The United Nations Convention on the Law of the Sea (UNCLOS) has defined what area constitutes the “high seas,”¹⁴⁴ although it is important to note that the United States has not ratified the Convention at this time.¹⁴⁵ Article 86 of UNCLOS titled, “Application of the provisions of this Part,” provides that the high seas are, “not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.”¹⁴⁶ Article 87 provides, under the heading “Freedom of the high seas,” that the “high seas are open to all States, whether coastal or land-locked. . . . These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas[.]”¹⁴⁷

In the *Center* case, the Court’s finding of facts, regarding the high seas and application of the ESA, centered on Export-Import Bank’s funding of the two liquefied natural gas projects that require shipping of the gas across the high seas. However, in denying Defendant’s motion to dismiss, the Court did find that Plaintiffs sufficiently pled facts that could plausibly show that the funding will provide for shipping of the liquefied natural gas across the high seas.¹⁴⁸ Because Section 7 of the ESA has been interpreted to include “the high seas,”¹⁴⁹ a plaintiff could argue that the ESA consultation clause requires extraterritorial application when triggered by “agency action.”

C. Broader Implications

1. How *Center* Fits Within Existing Case Law

Three Ninth Circuit cases¹⁵⁰ and a Supreme Court case¹⁵¹ provide a historical and contextualized jurisprudential framework for understanding the outcome of *Center*. *Tennessee Valley Authority v. Hill*¹⁵² is one of the most influential Supreme Court cases involving the ESA. The Court stated that, “the Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”¹⁵³ *TVA v. Hill* is particularly applicable to the *Center* controversy because the Plaintiffs brought a challenge to enjoin the construction of a “virtually completed [Tellico] dam”¹⁵⁴ due to the failure of the

¹⁴⁴ U.N. Conventions on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3; JANIS & NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY, *supra* note 140, at 818.

¹⁴⁵ Stewart M. Patrick, (Almost) Everyone Agrees: The U.S. Should Ratify the Law of the Sea Treaty, THE ATLANTIC (Jun. 10, 2012), <https://perma.cc/AS2R-NP4D> (last accessed Nov. 15, 2015).

¹⁴⁶ U.N. Conventions on the Law of the Sea, *supra* note 117, at art. 86.

¹⁴⁷ *Id.* at art. 87.

¹⁴⁸ *Ctr. for Biological Diversity*, 2015 U.S. Dist. LEXIS 21481, at *20 (the Court held, in denying the Defendant’s motion to dismiss, that the Plaintiffs “pled facts plausibly showing that the scope of Ex-Im Bank’s actions entail . . . post-construction shipping activities occurring upon the high seas such that it is plausible Ex-Im Bank violated § 7(a)(2) by failing to consult with the Services.”); *see also* “Plaintiffs’ Motion for Summary Judgment and MPA in Support” at *10, (2015) (Docket Number 4:12-cv-06325-SBA).

¹⁴⁹ *See* 16 U.S.C.S. § 1536(a)(2); “Definitions,” 50 C.F.R. § 402.02 (2016).

¹⁵⁰ *Karuk Tribe of Cal. v. U.S. Forest Service*, 681 F.3d 1006 (9th Cir. 2011); *Friends of the Earth, Inc. v. Mosbacher*, 488 F.Supp.2d 889 (N.D. Cal. 2007); *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988).

¹⁵¹ *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

¹⁵² *Id.*

¹⁵³ *Id.* at 180.

¹⁵⁴ *Id.* at 156, 172-73.

Tennessee Valley Authority to properly conduct environmental impact studies, pursuant to the NEPA and ESA, which, had the studies been conducted, would have shown that a new species of perch, the snail darter, existed.¹⁵⁵

The Court ultimately affirmed the Sixth Circuit Court of Appeals decision to enjoin the completion of the Tellico Dam by relying on the fundamental principle of separation of powers, concluding that “once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.”¹⁵⁶ The Court’s holding in *TVA v. Hill*, upholding the constitutionality of the ESA’s consultation requirements, has direct implications on the *Center* controversy by recognizing the separation of powers and significance of the ESA’s purpose to provide robust protections for the environment and endangered species.

In *Karuk Tribe of Cal. v. United States Forest Service*,¹⁵⁷ the Ninth Circuit Court of Appeals reversed the district court’s denial of summary judgment on the grounds that “There is ‘agency action’ under Section 7 of the ESA whenever an agency makes an affirmative, discretionary decision about whether, or under what conditions, to allow private activity to proceed.”¹⁵⁸ The “may affect” language of Section 7 of the ESA applies broadly to any agency action.¹⁵⁹ In this case, the Court held that because the mining activities “may affect critical habitat of coho salmon in the Klamath River system[,] [t]he Forest Service therefore had a duty . . . to consult with the relevant wildlife agencies before approving the [notices of intent].”¹⁶⁰

By reversing the district court’s decision, the Ninth Circuit affirmed the Supreme Court’s precedent in *TVA v. Hill* that Section 7 of the ESA was congressionally intended to require *any* federal agency who takes *any action*, including issuing notices of intent, to consult with the respective agencies if the agency action *may affect* any biological or environmental habitat.

Going one step further, in *Friends of the Earth, Inc. v. Mosbacher*,¹⁶¹ the Court addressed whether the Defendants’ (the Export-Import Bank’s acting President and Chairman) funding of an international project that emitted greenhouse gases were in violation of the National Environmental Policy Act. At the summary judgment stage, the Court dismissed Plaintiffs’ motion and granted the Defendants’ motion (in part) because the Court could not “determine whether or not the individual projects identified [. . .] qualify as major federal actions [and therefore], the Court cannot determine whether any of these actions would qualify as ‘cumulative actions’ that would require a single EIS [Environmental Impact Study] under NEPA.”¹⁶² Most notably, however, the Court found that the “Plaintiffs’ claims did not involve extraterritorial application of NEPA” because Plaintiffs made

clear that they seek to apply NEPA because the projects that Defendants support purportedly significantly affect the *domestic*

¹⁵⁵ *Id.* at 157-58.

¹⁵⁶ *Id.* at 195 (“[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with ‘common sense and the public weal.’ Our Constitution vests such responsibilities in the political branches.”).

¹⁵⁷ *Karuk Tribe of Cal. v. United States Forest Service*, 681 F.3d 1006 (9th Cir. 2011) (of interest, the trial was heard in the same District Court by the same Judge in *Center*, Judge Sandra B. Armstrong).

¹⁵⁸ *Id.* at 1030.

¹⁵⁹ *Id.* at 1027 (“Once an agency has determined that its action ‘may affect’ a listed species or critical habitat, the agency *must consult*, either formally or informally, with the appropriate expert wildlife agency.”) (emphasis added).

¹⁶⁰ *Id.* at 1030.

¹⁶¹ *Friends of the Earth, Inc. v. Mosbacher*, 488 F.Supp.2d 889 (N.D. Cal. 2007).

¹⁶² *Id.* at 919.

environment. In addition, Defendants do not claim that the decision about whether or not to support such projects occur abroad. . . . Finally, notwithstanding Defendant' arguments regarding foreign policy relations, there is evidence to suggest that the Defendants may have control over the manner in which these projects operate.¹⁶¹

Mosbacher suggests that because the Bank provided funding and, arguably, maintains some significant amount of control over the projection operations, the issue of extraterritoriality application of the ESA in *Center* seems to be minimized by the Court's denial of the Bank's motion for summary judgment in *Mosbacher*. This is based on the Court's application of the presumption against extraterritoriality in *Mosbacher* and the ESA's broad statutory language expressly providing for "high seas" application.

In *Conner v. Burford*,¹⁶³ a U.S. Court of Appeals for the Ninth Circuit case, the Plaintiffs, wildlife activists, brought suit against the Director of the Bureau of Land Management and Oil Companies for leasing oil and gas projects on 1.3 million acres of nationally protected forest land in Montana without the Bureau conducting an environmental impact study under the ESA and NEPA.¹⁶⁴ Most applicable to *Center*, the Court in *Conner* highlighted the district court's ruling that the

biological opinions of the FWS (the Fish and Wildlife Service, the designated federal agency under the ESA) were *inadequate to satisfy the ESA* because they failed to address the effects of oil and gas activities beyond the lease sale phase. The court reasoned *this failure would lead to a piecemeal evaluation of the project consequences and a progressive 'chipping away' of important habitat.*¹⁶⁵

Further, the Court's ESA discussion highlighted the failure of the Forest Service to notify the Secretary of the Interior of the sale of oil and gas leases that "might affect threatened and endangered species living there, including the grizzly bear, the bald eagle, the peregrine falcon, and the gray wolf."¹⁶⁶ Most notably, however, the Court discussed the scope of the biological opinions or environmental studies, pursuant to the ESA, including the interpretation of "agency action."¹⁶⁷ In so doing, the Court emphasized the scope of the ESA requirement applies "broadly"¹⁶⁸ and that the "scope of the agency action is crucial because the ESA requires the biological opinion to analyze the effect of the entire agency action."¹⁶⁹ The Court concluded that

¹⁶¹ *Id.* at 908.

¹⁶³ *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988).

¹⁶⁴ *Id.* at 1443.

¹⁶⁵ *Id.* at 1444-45 (emphasis added).

¹⁶⁶ *Id.* at 1452.

¹⁶⁷ *Id.* at 1453.

¹⁶⁸ *Id.* (citing *TVA v. Hill*, 437 U.S. at 173).

¹⁶⁹ *Id.* (citing *North Slope Borough v. Andrus*, 642 F.2d 589, 608 (D.C. Cir. 1980))

the ESA requires comprehensive consultation and issuance of biological opinions and does not permit “incremental” studies.¹⁷⁰

The above cases are consistent with my argument that ESA, as interpreted, applies to any agency action, in the broadest sense, and mandates that the agency complete the necessary impact studies at every step of the funding. This is supported by the above analysis of courts holding that Congress’ purpose in passing the ESA was to ensure broad and comprehensive protection for endangered species and the environment and, in so doing, requires the Secretary of the Interior to ensure federal agency compliance with the ESA consultation requirement.

An analogous case to the issue of standing presented in *Center* that could result in the Ninth Circuit reversing the District Court’s order granting Defendant’s motion for summary judgment is *Friends of the Earth, Inc. v. Watson*.¹⁷¹ In *Friends of the Earth, Inc. v. Watson*, a recent case from the United States District Court for the Northern District of California, a group of Plaintiffs alleged adverse environmental impact associated with global warming and climate changes caused by two federal agencies—the Export-Import Bank and OPIC (Overseas Private Investment Corporation)—funding projects throughout the country without complying with the NEPA, 42 U.S.C. §§ 4321-4335, and the APA.

In *Watson*, the Court denied the defendants’ motion for summary judgment holding that Plaintiffs had standing.¹⁷² To satisfy the injury prong, the Court held that the Plaintiffs demonstrated “that it is reasonably probable that the challenged action will threaten their concrete interests . . . the only uncertainty is with respect to how great the consequences will be, and not whether there will be any significant consequences.”¹⁷³ Significantly, the Court reiterated the “lower threshold for causation in procedural injury cases” as applied to Plaintiffs for a challenge under the NEPA and the APA, stating “when a plaintiff asserts a procedural injury, such as a plaintiff challenging an agency’s failure to prepare an environmental impact statement for a proposed dam, the [] plaintiff would have standing to challenge the agency’s conduct[.]”¹⁷⁴ To meet the third prong of redressability, the Court found that Plaintiffs sufficiently demonstrated that “the agency’s decision *could be influenced* by the environmental considerations that [the relevant public statute] requires an agency to study.”¹⁷⁵ Most notably, Plaintiffs identified seven projects funding by OPIC and Ex-Im, including building a pipeline for transportation of oil from Chad-Cameroon, a coal power plant in China, an offshore oil and gas production facility in Indonesia, crude oil development in Venezuela, oil and gas production facilities in Mexico, and offshore gas and oil fields in Russia.¹⁷⁶ The Court ultimately denied parties’ cross motions for summary judgment on the issue of extraterritorial application.

¹⁷⁰ *Id.* at 1457-58 (“We conclude that the ESA does not permit the incremental-step approach under the MLA advocated by appellants. The biological opinions *must* be coextensive with the agency action.”) (emphasis added).

¹⁷¹ *Friends of the Earth, Inc. v. Watson*, No. C 02-4106 JSW, 2005 U.S. Dist. LEXIS 42335 (N.D. Cal. August 23, 2005).

¹⁷² *Id.* at *4-5.

¹⁷³ *Id.* at *9-10.

¹⁷⁴ *Id.* at *13.

¹⁷⁵ *Id.* at *16. (quoting *Citizens for Better Forestry v. U.S. Dept. of Agric.*, 341 F.3d 961, 975 (9th Cir. 2003)) (emphasis in original).

¹⁷⁶ *Friends of the Earth, Inc. v. Watson*, Second Amended Complaint No. 302CV04106 2004 WL 5584704, at ¶¶ 162-211 (N.D. Cal. Jan. 16, 2004).

Although *Watson* ended in a settlement,¹⁷⁷ *Watson* provides a significant lens through which to analyze the post-*Center* implications, especially on appeal to the Ninth Circuit, regarding standing for environmental organizations to challenge agency action and failure to comply with the consultation procedures of environmental statutes. Specifically, by applying a more relaxed causation requirement for asserted procedural injuries, it seems that the hurdle for establishing Article III third-party standing is to prove that the plaintiffs and their members have a distinct and cognizable injury in fact. Additionally, if on appeal, the Ninth Circuit affirms the *Center* judgment granting Defendant's Motion for Summary Judgment, *Watson* seems to indicate that the NEPA and its potential to reach activities abroad could provide an alternative avenue for challenging environmentally detrimental government action, especially considering the trial court concluded that the Plaintiffs in *Watson* satisfied standing and permitted the jurisdictional issue of whether the NEPA could apply to foreign conduct by government agencies to proceed to trial.¹⁷⁸

2. Administrative Law and Policy Concerns

Post-*Center*, it is likely that extraterritorial application of the consultation procedures under the ESA will occur in factually limited circumstances and only extended to situations in which the endangered environment is another UNESCO World Heritage Site or another significantly held species or habitat of great cultural importance that would be irrevocably altered or destroyed by the federal agency action.

The statutory construction of the ESA has been relatively consistent and stable since *TVA v. Hill*. An interesting question will arise if the Department of Fish and Wildlife promulgates a rule adverse to recent federal court holdings interpreting the ESA broadly. Post-*Center*, it is likely that an extraterritorial application of statutes, absent an express statement by Congress, will not be a likely successful avenue for environmental non-profits and other organizational plaintiffs to challenge United States federal action abroad. However, this prediction runs counter to the ESA's broad application and grant of authority intended by Congress. Further, the purpose of the ESA is to protect endangered species and habitats from irreversible destruction caused by federal agencies. Most notably, the issues in *Center* are not what the agency has power to do but what the agency *did* by failing to consult. Further, I would contend that the Bank funded a project that would *directly* impact the Great Barrier Reef—a designated World Heritage Site—thereby taking an obvious risk by failing to consult funding, potentially jeopardizing the Reef and the protected habitat and species residing therein.

3. International Law

A final impact post-*Center* is the significance of the Great Barrier Reef and U.S. recognition of the United Nations, particularly the recognition of culturally and historically significant properties or landmarks throughout the world. Interestingly, the United States is not a party to the UNCLOS.¹⁷⁹

¹⁷⁷ See *Settlement by Federal Agencies Accepts Obligations to Take Global Warming Into Account in Supporting Overseas Projects*, ARNOLD & PORTER LLP, <https://perma.cc/5KZN-C38B>, (last visited Nov. 14, 2016); Jeffrey Thaler and Dustin Till, *Treatment of Greenhouse Gases Under the National Environmental Policy Act*, § 1.01, at 12.

¹⁷⁸ See generally, *Watson*, 2005 WL 2035596.

¹⁷⁹ *Supra* note 117.

Part of the UNESCO Site designation is to protect cultural and historically significant sites from destruction.¹⁸⁰ Specifically, the UNESCO World Heritage website states that UNESCO “seeks to encourage the identification, protection and preservation of cultural and natural heritage around the world considered to be of outstanding value to humanity. This is embodied in an international treaty called the Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted by UNESCO in 1972.”¹⁸¹ Currently, there are 1,031 properties on the World Heritage List, residing in 163 party States, with 48 sites currently in danger and 802 sites designated as having cultural value.¹⁸² Without UNESCO and global environmental nonprofit organizations, these 1,031 (and growing) sites would likely be destroyed by war, environmental decay (both natural and human-made), and human destruction, whether intentional or inadvertent. The important component to this analysis, however, is the impact that international law and U.S. jurisprudence has in ensuring the protection of endangered environments and species from intentional or secondary destruction by human action that *could have been prevented*.

V. CONCLUSION

The Endangered Species Act was enacted in 1973 with the express purpose of broadly protecting endangered species and their endangered habitats from governmental agencies funding and constructing projects that irreversibly cause detrimental harm to protected species, habitats, and the environment. Challenges to the application and interpretation of the ESA’s broad statutory language have caused courts to strike a balance between the protection of endangered habitats and species and deferring to federal agency action. The United States Supreme Court has held that “[t]he plain intent of Congress in enacting this statute [ESA] was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.”¹⁸³

The Great Barrier Reef is a protected UNESCO World Heritage Site home to some of the world’s most diverse species of dugong, coral reefs, and marine turtles,¹⁸⁴ as well as a cultural and social heritage site for Australians and other indigenous populations in the area. Given broad Congressional intent for the ESA to apply to any “agency action,” including on the “high seas,” the Export-Import Bank’s funding of nearly \$4.8 billion USD for two LNG projects in the Great Barrier Reef is likely to be enjoined by the Court until the Bank completes the consultation obligation pursuant to the ESA and NHPA.

When the World Heritage Site listed the Great Barrier Reef, pursuant to Criterion X, UNESCO emphasized the unique, breathtaking, and expansive quality of the Reef, noting the “enormous size and diversity of the GBR means it is one of the richest and most complex natural

¹⁸⁰ See Mission Statement, UNESCO, <https://perma.cc/P8JR-2TNG> (last visited Feb. 18, 2016); see also Ingrid Brostrom, *The Cultural Significance of Wildlife: Using the National Historic Preservation Act to Protect Iconic Species*, 12 Hastings W. N.W. J. Env. L. & Policy 147 (Spring 2006) (discussing the potential impact and use of the NHPA to preserve endangered culturally significant species from destruction).

¹⁸¹ *Id.*, UNESCO, Mission Statement.

¹⁸² World Heritage List, UNESCO, <https://perma.cc/J48R-Q9JP> (last visited Feb. 18, 2016).

¹⁸³ *TVA v. Hill*, 437 U.S. at 184.

¹⁸⁴ See *supra* notes 2-4; see also Kristin Kushlan, *Coral Reefs: The Failure to Regulate at the International Level*, 33 *Environ. L. & Policy J.* 317 (Spring 2010) (discussing the implications of failure to adequately protect coral reefs under U.S. domestic legislation that could have broader international affects for preserving coral reefs worldwide).

ecosystems on earth, and one of the most significant for biodiversity conservation. The amazing diversity supports tens of thousands of marine and terrestrial species, many of which are of global conservation significance.”¹⁸⁵ It cannot be overstated how culturally and environmentally important the Great Barrier Reef is to global society to ensure preservation of this World Heritage Site.

It is intuitively reasonable that, pursuant to the ESA, the Export-Import Bank, as an independent federal agency, is required to follow the statutorily mandated consultation procedures before and during the financing of the projects to ensure that no further damage or destruction occurs to this unique and internationally protected ecosystem. The more difficult question for courts is to what extent will a U.S. federal agency be held responsible for failing to comply with American law extraterritorially? I think the answer to this question relies on the intersection of Administrative, International, and Environmental jurisprudence.

The outcome in *Center* is not a surprising decision and is well within courts standing analysis, especially considering the argument of extraterritorial application of the ESA. However, I contend that due to the growing number of endangered species and habitats, especially those added every year to the World Heritage and UNESCO classifications,¹⁸⁶ the funding of projects by American agencies will require an increase in assurance that the agencies are following proper consultation procedure in accordance with the broad Congressional protections afforded by Section 7 of the ESA. Although *Center* was decided on the basis of Article III standing, this case could be extremely influential for environmental organizations to develop a litigation strategy aimed at encouraging the Federal government to develop more environmentally protective policies.

¹⁸⁵ *The Great Barrier Reef Description*, UNITED NATIONS EDUCATIONAL, SCIENTIFIC, AND CULTURAL ORGANIZATION WORLD HERITAGE CONVENTION, <https://perma.cc/MV6W-4QX7> (last visited February 10, 2016).

¹⁸⁶ *Supra* note 181.