UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE EARTH U.S., et al., Plaintiffs, v. EXPORT-IMPORT BANK OF THE UNITED STATES, et al., Defendants.	Civil Action No. 25-2235 (CJN)

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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Defendants the Export-Import Bank of the United States ("EXIM" or the "Bank"); James Cruse, in his official capacity as Acting President and Chairman; James Burrows Jr., in his official capacity as Acting First Vice President and Vice Chairman; and Spencer Bachus III, in his official capacity as Member of the Board of Directors; through undersigned counsel, respectfully oppose Plaintiffs Friends of the Earth U.S. and Justiça Ambiental's motion for a preliminary injunction (the "Motion"; ECF No. 13) under Federal Rule of Civil Procedure ("Rule") 65 and Local Civil Rule 65.1.[1]

In September 2019, the Bank's Board of Directors authorized a direct loan of up to $5 billion to support the export of U.S. goods and services from multiple states for the development and construction of an integrated liquefied natural gas ("LNG") project located on the Afungi Peninsula in northern Mozambique ("Project"). Upon completion of subsequent financing documents and agreements, in early 2021, the Bank made its loan facility operative, thereby allowing the Project borrower to draw upon the loan that the Bank's Board committed to fund in 2019. By 2024, it became apparent that because the Project was delayed, certain dates pertaining to project completion, disbursement, and repayment in the executed credit agreement and other transaction documents needed to be extended by four years. Thus, in March 2025, the Bank's Board approved an "amendment" that would extend those dates to reflect the Project's new timeline (hereinafter, the "2025 Amendment").

Now, nearly six years after the Bank considered and finally approved the Project's application for funding, Plaintiffs, who are environmental issue advocacy organizations, ask this Court to enjoin the Bank's disbursement of funds. Plaintiffs' suit and the instant Motion purports

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[1] Plaintiffs' Motion also moved for partial summary judgment. The Bank is simultaneously moving to stay consideration of that untimely motion.

to challenge under the Administrative Procedure Act the Board's March 2025 approval of the amendment extending transaction dates, but as explained below, Plaintiffs fail to establish that they have standing, that they are likely to succeed on the merits, that they have suffered irreparable harm, or that the equities balance in favor of a preliminary injunction.

BACKGROUND

I. Friends of the Earth U.S. and Justiça Ambiental

Plaintiff Friends of the Earth United States ("FOE") is an issue advocacy organization whose "primary mission is to defend the environment and champion . . . environmental and social justice . . . and respect for human rights[.]" Declaration of Kate DeAngelis ("FOE Decl.") ¶¶ 5, 7, 9; ECF No. 13-3. Justiça Ambiental is an affiliate of Friends of the Earth International whose "mission" is to work "through environmental protection actions" in Mozambique. Declaration of [Sealed] ("JA Decl.").

II. Export-Import Bank of the United States

The Bank is an independent agency of the United States. *See* Bank Act, 12 U.S.C. § 635 *et seq*. It is the official export credit agency of the United States established by Congress in 1945 with the primary goal of supporting U.S. employment by financing and facilitating U.S. exports. The Bank accomplishes its mission through a variety of programs including direct loans, guarantees, and insurance. Declaration of Paula Swain ("Swain Decl.") ¶ 2.

III. Project Application and Approval

On April 10, 2015, Anadarko Petroleum Corporation ("Anadarko") submitted an application requesting the Bank provide a direct loan in the amount of up to $5 billion to purchase U.S. goods and services for the development, financing, construction, and operation of an integrated LNG project located in northern Mozambique on the Afungi Peninsula in the Cabo Delgado province. Swain Decl. ¶ 9, Ex. 1 (Application); Sep. 16, 2019, Board Memo (ECF

No. 13-4 at 2). Over the next four years, Bank staff performed due diligence and participated in term sheet negotiations until a financing structure had been sufficiently developed to bring the transaction to the Bank's Board of Directors for consideration. Swain Decl. ¶¶ 4, 5, 10.

The Project was first presented to the Bank's Board of Directors on August 22, 2019. *Id.* ¶ 11; Sep. 16, 2019, Board Memo (ECF No. 13-4 at 2). At that meeting, the Board "approved this transaction for referral to Congress . . . and publication in the Federal Register." Sep. 16, 2019, Board Memo (ECF No. 13-4 at 3). The referral to Congress was in accordance with statute stating no loan of $100 million or more shall be "finally approved by the Board" unless a "detailed statement describing and explaining the transaction" is submitted to Congress and Congress was given the shorter of "25 days of continuous session of the Congress" or 35 calendar days "prior to the date of final approval" of the transaction. 12 U.S.C. § 635(b)(3); Swain Decl. ¶ 7. The 35-day period expired on September 25, 2019. Sep. 16, 2019, Board Memo (ECF No. 13-4 at 3); Swain Decl. ¶ 12.

Similarly, and also by statute, "[b]efore any meeting of the Board for final consideration of a long-term transaction the value of which exceeds $100,000,000 . . . the Bank shall provide a notice and comment period." 12 U.S.C. § 635a(c)(10)(A). Specifically, the application to the Bank must be noticed in the Federal Register and provide at least 25 days for submission of comments on the application. *Id.* § 635a(c)(10)(C)(i). This transaction appeared in the Federal Register on August 23, 2019. *See* Application for Final Commitment for a Long-Term Loan or Financial Guarantee in Excess of $100 Million: AP087889XX, 84 Fed. Reg. 44304-01 (Aug. 23, 2019), https://www.federalregister.gov/d/2019-18153. The notice informed the public that the Bank "received an application for final commitment for a long-term loan or financial guarantee" for the Project, that comments received within the comment period would be presented to the Board "prior to final action on this Transaction," and that further information regarding "the final decision for this transaction" would be posted to the Bank's website. *Id*. The public comment period extended until September 17, 2019. Sep. 16, 2019, Board Memo (ECF No. 13-4 at 3); Swain Decl. ¶ 12.

Plaintiffs note that the Bank must consider certain economic, environmental, and social impacts of the Project, and the Bank did that prior to the Board's final approval of the loan application. The presentation to the Board included a Memorandum to the Board of Directors ("Board Memo") prepared by Bank staff. Although referred to as a Board Memo, it is a compendium of analyses of the application. For example, Appendix I provided the Economic Impact Analysis and Appendix E provided Engineering and Environmental Evaluations. Swain Decl. ¶ 11, Ex. 2.

On September 26, 2019, the Board finally approved the Project application for a loan to fund up to $5 billion in U.S. goods and services for the development and construction of the onshore portion of an integrated liquefied natural gas project. *Id*. ¶ 13, Ex. 3 (Board Minutes, Sep. 26, 2019). The Board's approval is referred to as a Final Commitment because through that approval the Board commits the Bank's funds to the proposed transaction subject to the completion of satisfactory documentation implementing the financing. *Id*. ¶¶ 6, 8.

At the time "[t]he Project was presented to, and final approval was given by, EXIM's Board of Directors on September 26, 2019," it was contemplated that a separate request to finance equipment and services for the offshore component of the Project would be made later. *Id*. ¶ 14, Ex. 4 (May 14, 2020, Board Memo at 2). On May 14, 2020, the Board voted in favor of an amendment to the transaction that approved financing for offshore equipment estimated at $1.8 billion but decreased the overall amount authorized to $4.7 billion from $5 billion. *Id*. ¶ 14, Exs. 4 (Board Minutes, May 14, 2020), 5 (May 14, 2020, Board Memo at 1-2). The Board approved other changes to the transaction, including the Project's capital structure, ability to incur additional debt, transfer of Project sponsorship,[2] and ability to develop neighboring gas fields. *Id*.

On July 15, 2020, the Bank and the Project borrower executed the Credit Agreement, which documents the agreed financing terms and all related disbursement and repayment requirements to implement the Board's Final Commitment. Swain Decl. ¶ 15. The Credit Agreement also sets out a list of agreed and binding "conditions precedent" required to be provided to the Bank before the borrower may request a disbursement of the loan. *Id*. Having determined that all conditions precedent documents had been delivered to the Bank, on March 24, 2021, the Bank's transactional team informed Total that the Bank's loan facility was "operative" and could be drawn on for disbursement. *Id*. ¶ 16. Total was able to reach "financial close" with other Export Credit Agencies and lenders as well. *Id*.

IV. <u>March 2025 Amendment</u>

In 2024, Total requested that the executed Credit Agreement and other finance documents be revised to extend the loan's Project Completion date, Final Disbursement date, and the First Principal Repayment date, and other repayment dates, by four years beyond the dates previously approved by the Board. *Id*. ¶ 17. The Bank's staff sought the Board's approval of these new dates because of a Board Resolution on Individual Delegated Authority, dated May 30, 2019 ("IDA Board Resolution"), that limited the scope of Bank staff's ability to amend previously approved transactions. *Id*. Ex. 8 (March 13, 2025, Board Memo at 1). The IDA Board Resolution sets forth the delegated authority of Bank officers for certain activities. *Id*. Ex. 6 (IDA Board Resolution, May 30, 2019). Article V of the IDA Board Resolution addresses "amendments" of medium and

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[2] TotalEnergies EP Mozambique Area 1, Limitada (hereinafter "Total"), a subsidiary of Total S.A., replaced Anadarko as the lead sponsor and operator of the Project. Swain Decl. ¶ 14.

long-term transactions (referred to as "MLT"). *Id*. Senior Officers of the Bank are "authorized to effect amendments" listed in Article V.A(i), including the extension of the Final Disbursement Date "for up to two (2) years beyond" the date previously approved by the Board or an individual acting pursuant to delegated authority. *Id*. Similarly, pursuant to Article V.A(iii), Senior Officers of the Bank could "[c]hange loan repayment schedules" provided that "no installment may be deferred more than two (2) years" from the last previously approved by the Board or an individual acting pursuant to delegated authority. *Id*. Thus, extending the project's disbursement and repayment dates more than two years exceeded the delegated authority of Bank officers and required Board approval.

Other aspects of the amendment did not require Board approval under the IDA Board Resolution. Swain Decl. ¶ 18. These revisions are summarized in Appendix E to the Board Memo. *Id*. Ex. 8 (March 13, 2025, Board Memo, Appendix E at 2-8).

V. Statutory Provisions Identified by Plaintiffs

The Bank addresses the primary statutory provisions cited by Plaintiffs in their Motion. Plaintiffs assert that before funding a project the Bank's Board must consider any adverse economic effects on the United States and conduct a detailed economic analysis, relying on 12 U.S.C. §§ 635(b)(1)(B) and 635(e). *See* Pls.' Mot. at 21-22. The Bank conducted this economic analysis prior to its decision to approve the loan application in 2019. Swain Decl. ¶ 11, Ex. 2. The Detailed Economic Impact Analysis is Appendix I to the August 22, 2019, Board Memo. Further, the Bank published a notice in the Federal Register of its intent to conduct such a detailed economic impact analysis, in accordance with § 635(e)(7)(B)(i). *See* Intent to Conduct a Detailed Economic Impact Analysis, 83 Fed. Reg. 61379-01 (Nov. 29, 2018), https://www.federalregister.gov/d/2018-25535.

Only if "a material change is made to an *application* for a loan or guarantee," must the Bank publish a revised notice of intent and provide for a comment period. 12 U.S.C. § 635(e)(7)(B)(iii)(I) (emphasis added). A "material change" with "respect to an application" is statutorily defined as "a change of at least 25 percent in the amount of a loan or guarantee requested in the application" or "a change in the principal product to be produced as a result" of the activity facilitated by the loan. 12 U.S.C. § 635(e)(7)(B)(iii)(II). No such changes to an application are alleged, nor could be alleged, by Plaintiffs, because the Board's March 2025 vote was plainly an amendment to financing documents of an already-approved loan.

Plaintiffs contend that the Bank must consider potential environmental and social effects of a project, relying on 12 U.S.C. § 635i-5. Pls.' Mot. at 23-24. The Bank conducted this analysis prior to its decision to approve the Project borrower's loan application in 2019 and included its analysis in Section VII of the August 22, 2019, Board Memo, and in Appendix E to the Memo. Swain Decl. Ex. 2.

Plaintiffs also contend that the Bank failed to share "statutorily mandated information" prior to the 2025 Amendment. *See* Pls.' Mot. at 27-28. This contention, however, is based on the provisions discussed above, and none of those provisions establish that the Bank was required to disclose certain information prior to the 2025 Amendment. One provision, 12 U.S.C. § 635i-5(a)(1), states that the Bank shall establish procedures to consider "environmental effects" of funded projects. The Bank's Environmental and Social Due Diligence Procedures and Guidelines are available online.[3] The same statutory provisions add that such procedures "shall provide for the public disclosure" of certain environmental information submitted to the Bank. *Id*. This was accomplished when, on January 20, 2016, the Bank posted the Environmental and Social Impact

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[3] https://www.exim.gov/policies/exim-bank-and-environment/procedures-and-guidelines.

Assessment on the Bank website. Swain Decl. Ex. 2 (Aug. 22, 2019, Board Memo at 32, 85). The August 22, 2019, Board Memo notes that Friends of the Earth provided the Bank with its views in response to the assessment. *Id.* The other statutory provisions cited (12 U.S.C. § 635a(c)(10)(C)(i)(I) & (ii), 635(e)(7)(B)(i) & (iii)(I)) pertain to publication in the Federal Register, which again, took place in 2019 as statutorily required. Plaintiffs also argue that the Bank's Environmental and Social Due Diligence Procedures and Guidelines require various disclosures, but Plaintiffs do not cite any provision that requires additional disclosures for the 2025 Amendment.

VI. Status of the Board of Directors

By statute, "[t]here shall be a Board of Directors of the Bank consisting of the President of the Export-Import Bank of the United States, who shall serve as Chairman, the First Vice President who shall serve as Vice Chairman, and three additional persons appointed by the President of the United States by and with the advice and consent of the Senate." 12 U.S.C. § 635a(c)(1). As stated, two of the five positions serve on the Board by virtue of their positions at the Bank, President and First Vice President. *Id.* There must be "at least three members" to have a quorum of the Board. *Id.* § 635a(c)(6)(A). On March 13, 2025, the Board had a quorum consisting of Acting President and Chairman James C. Cruse, Acting First Vice President and Vice-Chair James Burrows, and Director Spencer Bachus III. Swain Decl. Ex. 7 (Board Minutes, Mar. 13, 2025).

PROCEDURAL HISTORY

Plaintiffs filed suit on July 14, 2025. *See generally* Compl., ECF No. 1. They bring nine claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*[4] They allege that, in approving the 2025 Amendment, the Bank violated:

1. Section 706(2)(A) and (C) of the APA because two of the three board members were not Senate-confirmed and therefore there was no quorum. Compl. ¶¶ 349-56.

2. Section 706(2)(A) and (C) of the APA because the Project would allegedly over-subsidize U.S. exporters rather than just neutralize the effect of foreign export credit agencies. *Id.* ¶¶ 357-63.

3. Section 706(2)(A) and (D) of the APA because the Bank allegedly should have provided a notice and comment period before approving the 2025 Amendment. *Id.* ¶¶ 364-68.

4. Section 706(2)(A) and (D) of the APA because the Bank allegedly failed to analyze the adverse economic effects the Project would have in the United States when production would begin. *Id.* ¶¶ 369-74.

5. Section 706(2)(A) of the APA because the Project would allegedly cause "substantial injury" in the United States by producing thirty-four times the amount of liquefied natural gas produced in the United States. *Id.* ¶¶ 375-78.

6. Section 706(2)(A) and (D) of the APA because the Bank allegedly failed to consider the Project's environmental, humanitarian, human rights, and social risks and to provide an opportunity to comment. *Id.* ¶¶ 379-90.

7. Section 706(2)(A) of the APA because in light of the alleged environmental, humanitarian, human rights, and social risks connected to the Project, no amount of investigation or further inquiry could justify financing the Project. *Id.* ¶¶ 391-92.

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[4] Plaintiffs claim violations of the National Environmental Policy Act and the Export-Import Bank Act, but neither statute provides a private right of action, so the claims are properly reviewed under the APA. *Sierra Club v. Fed. Energy Regul. Comm'n*, 867 F.3d 1357, 1367 (D.C. Cir. 2017) ("because NEPA does not create a private right of action, we can entertain NEPA-based challenges only under the [APA] and its deferential standard of review"); *Delta Air Lines, Inc. v. Exp.-Imp. Bank of the U.S.*, 718 F.3d 974, 977 (D.C. Cir. 2013) ("In sum, the Bank's actions in this case are subject to judicial review to determine whether the Bank complied with the Bank Act or otherwise acted in an arbitrary and capricious manner.").

8. NEPA and the APA because the Bank allegedly failed to consider the effects that the Project will have on climate change, including in the United States. *Id.* ¶¶ 393-96.

9. Section 706(1) of the APA because the Bank failed to provide statutorily required information. *Id.* ¶¶ 397-400.

On July 21, 2025, Plaintiffs moved for a preliminary injunction. Shortly thereafter, on July 24, 2025, TotalEnergies EP Mozambique Area 1, Limitada moved to intervene, which the Court granted on August 5, 2025. *See* Min. Order (Aug. 5, 2025).

LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. The moving party bears the burden of persuasion and must demonstrate "by a clear showing" that the requested relief is warranted. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

Before the Supreme Court decided *Winter*, courts weighed these factors on a "sliding scale," allowing "an unusually strong showing on one of the factors" to overcome a weaker showing on another. *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011). Now, it "is questionable that the sliding scale approach remains good law." *Clevinger v. Advoc. Holdings, Inc.*, 134 F.4th 1230, 1235 (D.C. Cir. 2025). The D.C. Circuit has explained that *Winter* "can be read to require movants to establish each preliminary injunction factor independently." *Id.* Regardless, "a movant's failure to show any irreparable harm is . . . grounds for refusing to issue a preliminary injunction, even if the other three factors . . . merit such relief." *Id.* at 1236.

ARGUMENTS

I. Plaintiffs Have Not Established Standing

Defendants begin with the principle that "[f]ederal courts are courts of limited jurisdiction" and that "[i]t is to be presumed that a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Central to this limitation is Article III, Section 2, which limits judicial authority to "Cases" or "Controversies." U.S. Const. art. III, § 2. As the Supreme Court has explained, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (internal quotation marks and citations omitted). "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Id*.

As the party invoking federal jurisdiction, Plaintiffs bear the burden of establishing standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). And in the context of a motion for preliminary injunction, a plaintiff must establish a "substantial likelihood of standing." *Elec. Priv. Info. Ctr. v. Dep't of Com.*, 928 F.3d 95, 104 (D.C. Cir. 2019). To satisfy Article III's standing requirements, Plaintiffs must show (1) each suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of Defendants; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id*. at 560-61 (internal quotation marks and citations omitted).

Plaintiffs assert that their injuries "flow from procedural violations" by the Bank. Pls.' Mot. at 29. Plaintiffs then assert incorrectly that there are "diminished causation and redressability requirements" where injury is predicated on a procedural violation. *Id*. The law instead is that courts may "relax the imminence and redressability requirements," but "the procedural-rights plaintiff must still satisfy the general requirements of the constitutional standards of particularized injury and causation." *Ctr. for L. & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1159 (D.C. Cir. 2005). "Appellants must show *both* (1) that their procedural right has been violated, *and* (2) that the violation of that right has resulted in an invasion of their concrete and particularized interest. [A] prospective plaintiff must demonstrate that the defendant caused the particularized injury, and *not just* the alleged procedural violation." *Id.* (cleaned up). Accordingly, Plaintiffs' burden is far from diminished. In fact, when, as here, "the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562 (citations omitted).

A. Organizational Standing

Plaintiffs contend that they, as organizations, have been harmed by the Bank's action. Establishing organizational standing is both similar to and distinct from establishing individual standing. "[L]ike an individual plaintiff," an organization must "show actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (quoting *Equal Rts. Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011)). But to establish organizational standing, (1) the challenged conduct must have "injured the [organization's] interest" and (2), the organization must have "used its resources to counteract that harm." *PETA v. Dep't of Agric.*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) (quoting *Equal Rts. Ctr.,* 633 F.3d at 1140). Importantly, to establish an injury to an organization's interest, an organization must show that the challenged conduct "perceptibly impair[s] the organization's ability to provide services" or causes an "inhibition of [its] daily operations." *Food & Water Watch*, 808 F.3d at 919. It is not enough to show that the organization's objectives or mission has been frustrated. *Id.*

Plaintiffs proffer a variety of alleged injuries that they contend provide a basis for finding organizational standing. Plaintiffs first contend that the 2025 Amendment deprived them of an avenue to seek redress through formal notice and comment procedures. Pls.' Mot. at 30-31. But as established above, there is no legal authority requiring the Bank to engage in notice and comment prior to changing disbursement, completion, and repayment dates associated with an already-approved project funding application. The notice and comment provisions relied on by Plaintiffs pertain to the Board's review of *applications* for Bank funding, not amendments to already approved funding. *See supra* Background Section V.

According to Plaintiffs, they suffered the same injury as the plaintiffs in *PETA*, but that is plainly not so. In *PETA*, the plaintiffs had shown that the Agriculture Department had failed to apply the Animal Welfare Act to birds as legally obligated to do, and by not applying the Act to birds, and consequently not creating bird-related inspection reports, PETA could not redress bird mistreatment through filing complaints or educating the public. *PETA*, 797 F.3d at 1090-91. Unlike in *PETA*, where there was no dispute that the Agriculture Department failed to apply the Animal Welfare Act to birds, or in *National Federation of the Blind* (another case cited by Plaintiffs),[5] where there was a "right . . . to submit comments" on an agency manual prior to its adoption, Plaintiffs cannot show that they had a statutory right to notice published in the Federal Register and to submit comment prior to the 2025 Amendment. *United States v. Facebook, Inc.*, 456 F. Supp. 3d 105, 113 (D.D.C. 2020) ("Because [intervenor] has no right to comment, it cannot manufacture standing by alleging that the [agency] wrongfully denied it the opportunity to do so.").

Even if Plaintiffs had a right to submit formal comments, the "mere inability to comment effectively or fully, in and of itself, does not establish an actual injury." *See, e.g.*, *Int'l Bhd. of*

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5 *Nat'l Fed'n of the Blind v. Dep't of Educ.*, 407 F. Supp. 3d 524, 533 (D. Md. 2019).

Teamsters v. Transp. Sec. Admin., 429 F.3d 1130, 1135 (D.C. Cir. 2005) (rejecting a claim of organizational injury premised on an agency's failure to provide public notice of the agency action in dispute, "thereby depriving [the organization] of the opportunity to comment thereon") (internal quotation marks and citation omitted). Plaintiffs must establish an impairment of their organization's ability to provide services or operate, which they have failed to do. Formal comment is just one route for Plaintiffs to advocate against the Project, but an injury to an organization's advocacy efforts is generally not considered to be a concrete injury-in-fact in this Circuit. *See, e.g.*, *Chesapeake Climate Action Network v. Exp.-Imp. Bank of the U.S.*, 78 F. Supp. 3d 208, 238 (D.D.C. 2015) ("[C]ase law in this circuit has cast significant doubt on the viability of a claim of organizational injury premised solely on injury to an organization's advocacy efforts.") (citations omitted). Further, the notion that Plaintiffs were denied an opportunity to share their views with the Bank is belied by the ample evidence of Plaintiffs sharing their views about the Project with the Bank for roughly a decade regardless of the existence of formal comment periods. Both Plaintiffs have shared their views on the Project through written comments, complaints, and letters, as well as multiple meetings with Bank officials. FOE Decl. ¶¶ 19-25; JA Decl. ¶¶ 45-51.

Justiça Ambiental, though not Friends of the Earth, contends that it is harmed because the 2025 Amendment will increase the need for Justiça Ambiental's "services." Pls.' Mot. at 32-33. Specifically, Justiça Ambiental argues that it will have to "engage in remedial work," such as helping families whose lands Justiça Ambiental predicts will be seized, which Justiça Ambiental further predicts will require "more frequent trips" to Cabo Delgado and in turn an increased risk of attack from insurgents. *Id*. This alleged injury is predicated on a "speculative chain of possibilities" that fails to establish that Justiça Ambiental's potential injury is certainly impending or is fairly traceable to the 2025 Amendment. *Clapper*, 568 U.S. at 410. These alleged harms are speculative, not concrete and imminent injuries, because they are explicitly based on "*if* . . . the Project proceeds," which to date it has not. Pls.' Mot. at 36; JA Decl. ¶ 64. And then, *if* the Project proceeds, Justiça Ambiental predicts more people will be displaced from their homes, and that these people will rely on Justiça Ambiental for unidentified "services," which in turn will cause Justiça Ambiental to devote more time and resources to helping these individuals. JA Decl. ¶ 64.

Further, each link in the chain of possibilities is largely dependent on independent third parties not before the Court. The causation element of standing requires that the asserted injury be fairly traceable to the defendant's allegedly unlawful conduct, as opposed to an injury that "results [from] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560-61. Justiça Ambiental's prophesized increase in services "depends on the unfettered choice made by independent actors"—the Project's sponsors and a variety of actors in Mozambique (*e.g.*, the government, individuals in nearby communities, and insurgents)—"whose exercise of . . . discretion the courts cannot presume either to control or predict." *Id.* at 562. Thus, Justiça Ambiental fails to establish that the hypothesized future increase in services are fairly traceable to the Bank's movement of certain transaction dates. *See Elec. Priv. Info. Ctr. v. Fed. Aviation Admin.*, 892 F.3d 1249 (D.C. Cir. 2018) (finding allegation that new FAA regulations will lead to the operation of more drones leading to invasions of peoples' privacy to be insufficient to support causation and standing); *Am. Sports Council v. Dep't of Educ.*, 850 F. Supp. 2d 288 (D.D.C. 2012) (denying standing to organization that failed to connect injury to defendant's conduct as opposed to independent third parties).

Finally, even if the hypothetical increase in services materialized, it is not an impairment of Justiça Ambiental's mission or activities. Helping with displaced individuals, monitoring the Project's environmental impact, and conducting outreach to and visiting impacted communities are activities that Justiça Ambiental has been doing for "over two decades." *See, e.g.*, JA Decl. ¶¶ 9, 15, 17-18, 26, 69, 144. Justiça Ambiental is not injured by activities in which it ordinarily engages. *See Nat'l Ass'n for Latino Cmty. Asset Builders v. Consumer Fin. Prot. Bureau*, 581 F. Supp. 3d 101 (D.D.C. 2022) ("Expenditure of resources in response to agency action alone is not enough to establish a cognizable injury . . . . Case law in this Circuit makes clear that there must be a separate perceptible impairment of the organization's ability to provide services[.]"); *Ctr. for Democracy & Tech. v. Trump*, 507 F. Supp. 3d 213, 221 (D.D.C. 2020) (ruling "[plaintiff] cannot assert Article III standing by claiming the activities that it would otherwise engage in now injure it"); *Coal. for Humane Immigrant Rts. v. Dep't of Homeland Sec.*, Civ. A. No. 25-0943 (TNM), 2025 WL 1078776, at *5 (D.D.C. Apr. 10, 2025) ("When a nonprofit merely expands its operations to address increased demands in the communities it serves, its activities have not been tampered with. Arguably, these enhanced advocacy efforts are a *fulfillment* of an organization's mission." (citation omitted) (emphasis in original)); *Safari Club Int'l v. Zinke*, Civ. A. No. 15-1026 (RCL), 2017 WL 8222114, at *5 (D.D.C. May 2, 2017) (ruling organization's alleged harm was insufficient because it was "part and parcel" of its mission and "normally expended operational costs"). Providing services to communities in Mozambique is a "core part of [Justiça Ambiental's] mission," JA Decl. ¶ 8, it is not an impairment of the organization's activities or operations.

Plaintiffs also contend that they were injured through a failure to "share statutorily mandated information" and, because of this supposed lack of information from the Bank, they have had to "fill the gap by seeking information from other sources and conducting independent research." Pls.' Mot. at 34-35. As explained above, Plaintiffs are incorrect in stating that they were denied statutorily mandated information. *See supra* Background Section V. In any event, conducting independent research is not an injury—it is what Plaintiffs ordinarily do. The declarations make this abundantly clear by identifying such research efforts and explaining how Plaintiffs have used those efforts to advocate before the Bank and other entities. JA Decl. ¶¶ 15, 17-19, 24-25, 45-51; FOE Decl. ¶¶ 26-34. The declarations simply fail to explain how Plaintiffs' activities were perceptibly impaired by the amendment. *See Chesapeake Climate*, 78 F. Supp. 3d at 238 (D.D.C. 2015) (where plaintiff was allegedly "denied the opportunity to comment publicly on the loan guarantee," allegation that organization had to "expend additional effort to inform the public" was unspecific and "[indistinguishable] from the group's ordinary programmatic work").

Finally, Plaintiffs argue that they have organizational standing because "EXIM's financing will force Plaintiffs to divert scarce resources away from previously planned projects." Pls.' Mot. at 35 (internal quotation marks omitted). Again, the amendment in March 2025 did not approve "financing"—that occurred in 2019—and consequently, there is no causal connection between the challenged action of the Bank changing dates in the already-approved financing for the Project and the alleged "diversion" of resources injury.

Regardless, the alleged diversion of resources injury is a conclusory attempt to mirror the language of one element of the organizational standing legal standard. For example, the Friends of the Earth declaration asserts that because of their "work on the Project, Friends of the Earth has not had enough time" to work on "fighting other fossil fuel projects," FOE Decl. ¶ 38, but this assertion is conclusory and by its terms linked to the overall Project rather than tied to the challenged 2025 Amendment. Justiça Ambiental makes an even more conclusory assertion that it will have to shift resources away from unidentified "core activities" and also fails to link this to the challenged amendment in March 2025. JA Decl. ¶ 65. *See Viasat, Inc. v. Fed. Commc'ns Comm'n*, 47 F.4th 769, 781 (D.C. Cir. 2022) (finding "affidavit is too conclusory to establish organizational standing" where diversion of resources contention was unsupported by specifics, such as "which personnel and resources, and to where were they redeployed"); *Keyhanpoor v. Blinken*, 633 F. Supp. 3d 88, 93 (D.D.C. 2022) (allegation that organization diverted significant resources from other services deemed "merely a conclusory allegation that mirrors the legal standard").

But perhaps a more fundamental flaw in Plaintiffs' case is that "[t]he diversion itself cannot alone constitute the harm." *Ctr. for Responsible Sci. v. Gottlieb*, 346 F. Supp. 3d 29, 41 (D.D.C. 2018), *aff'd*, 809 F. App'x 10 (D.C. Cir. 2020). There must be an impairment of the organization. And an advocacy organization's decisions regarding how to allocate its resources does not constitute an injury-in-fact. *See Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Fed. Deposit Ins. Corp.*, Civ. A. No. 14-953 (GK), 2016 WL 7376847 (D.D.C. Dec. 19, 2016) (rejecting contention that diverting resources from "its traditional issue advocacy and engage in a new type of advocacy to respond" to challenged agency action is cognizable Article III injury).

B. Informational Standing

Plaintiffs begin their argument that they possess "informational standing" with the unfounded premise that the Bank "denied Plaintiffs information it was required to make public." Pls.' Mot. at 38. As demonstrated above, *see supra* Background Section V, Plaintiffs have not identified a single disclosure that the Bank was legally obligated to make prior to amending the previously approved transaction's completion, disbursement, and repayment dates. Accordingly, Plaintiffs' reliance on informational standing fails at the outset.

The D.C. Circuit explained that "[a] plaintiff suffers a sufficiently concrete and particularized informational injury" only if "(1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure." *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016). In *Friends* *of Animals* there was a disclosure requirement, but the statutorily required publication in the Federal Register was not triggered until after the agency made a given finding or decision, which had not yet come to pass. *Id.* at 993. The Circuit ruled that Friends of Animals did not have informational standing because the "disclosure requirement Friends of Animals points to as the source of its informational injury does not impose any obligations on the Secretary until a later time." *Id*. at 992.

Similarly, the statutory provisions that Plaintiffs cite as the source of their informational injury do not impose any disclosure obligations on the Bank prior to amending the completion, disbursement, and repayment dates in the previously approved transaction. For example, 12 U.S.C. § 635a(c)(10)(C) requires publication of a notice in the Federal Register with respect to "an application for a loan or financial guarantee," but there was no application being considered by the Board in March 2025. Likewise, 12 U.S.C. § 635(e)(7)(B) requires publication of a notice in the Federal Register "[i]f . . . the Bank conducts an economic impact analysis" to consider the "economic effects of proposed transactions," but there was no proposed transaction before the Board in March 2025. Both statutory provisions provide for additional notice in the Federal Register "if a material change is made to an application for a loan or guarantee," with material change "with respect to an application" defined as a change of at least 25 percent of the loan or guarantee requested in the application or a change in the principal product to be produced by the transaction facilitated by the loan or guarantee. *See* 12 U.S.C. §§ 635(e)(7)(B)(iii), 635a(c)(10)(D). Given that the Board's vote in March 2025 was on an amendment to financing documents for the already-approved loan, Plaintiffs do not and could not show such a change here. And 12 U.S.C. §§ 635i-5(a)(1) only directs that the Bank "establish procedures" for considering environmental effects and that "[s]uch procedures shall provide for the public disclosure" of environmental assessments "required to be submitted to the Bank." The Bank made those disclosures prior to approval in 2019. *See supra* Background Section V. As in *Friends of Animals*, Plaintiffs cannot claim informational standing based on disclosure provisions that are plainly not applicable. *Ctr. for Biological Diversity v. Int'l Dev. Fin. Corp.*, 77 F.4th 679, 686 (D.C. Cir. 2023) ("when a plaintiff claims an informational injury with no statutory support, standing will be in jeopardy").

And lastly, Plaintiffs fail to explain how they "suffer[] . . . the type of harm Congress sought to prevent by requiring disclosure." *Friends of Animals*, 828 F.3d at 992. It garners nothing more than a conclusory sentence in their Motion. *See* Pls.' Mot. at 38. Even if the Court does not consider an argument on this prong of the analysis waived, Plaintiffs cannot satisfy this element of the analysis. The purpose of the cited Federal Register provisions, for example, is to inform the public of proposed applications for financing and economic analysis of proposed transactions. With respect to the 2025 Amendment, which did not concern an application for proposed financing, Plaintiffs did not suffer the type of harm Congress sough to prevent by requiring disclosure.

C. Third-Party Standing

A plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Nonetheless, Plaintiffs attempt to rely on the Supreme Court's limited "recogni[tion] that there may be circumstances where it is necessary to grant a third party standing to assert the rights of another." *Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004). These circumstances, however, are quite limited, and usually only found in three contexts: attorney-client, vendor-vendee, and employer-employee. *See id*. at 129. In other words, not the context presented by Plaintiffs.

In assessing third-party standing, the Court weighs three "prudential considerations": "(1) '[t]he litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute,' (2) 'the litigant must have a close relation to the third party,' and (3) 'there must exist some hindrance to the third party's ability to protect his or her own interests.'" *Lepelletier v. Fed. Deposit Ins. Corp.*, 164 F.3d 37, 43 (D.C. Cir. 1999) (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)).

As established above, Plaintiffs fail to demonstrate the existence of their own cognizable injury-in-fact, and therefore, they do not satisfy the first element of third-party standing. Further, Plaintiffs fail to satisfy the second element because they cannot show that they have the requisite "close relation" to the putative third-party. Plaintiffs argue they "share community members' interest in ensuring EXIM follows the law," Pls.' Mot. at 37, but merely sharing the same goals and desires as a third party does not create the requisite close relationship. Another Court in this District explained that "Supreme Court precedent makes clear that merely sharing the same goals and desires as a third party does not create the requisite relationship." *Am. for Immigrant Just. v. Dep't of Homeland Sec.*, Civ. A. No. 22-3118 (CKK), 2023 WL 1438376, at *10 (D.D.C. Feb. 1, 2023) (concluding legal services organizations do not have third-party standing in the absence of an actual attorney-client relationship). Further, Plaintiffs have not even identified the third parties beyond vague references to "community members" in Mozambique, and thus it is unclear if there is a relationship, much less a sufficiently close one, between Plaintiffs and community members beyond Plaintiffs' *ipse dixit*. In sum, there is no question that the limited exception to the general prohibition on premising standing on the interests of third parties not before the Court has not been met.

* * *

In sum, now that its sponsors may restart the Project after a multi-year delay, Plaintiffs have presented nothing more than a "frustration of its purpose" going back many years to derail the Project. Indeed, Plaintiffs tellingly admit that "allow[ing] the Project to move forward" is what they believe "will harm Plaintiffs." Pls.' Mot. at 29. Yet such "frustration of an organization's objectives" is "the type of abstract concern that does not impart standing." *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995).

II. The Court Should Deny Plaintiffs' Motion for a Preliminary Injunction

A. Plaintiffs Are Not Likely to Succeed on the Merits

Plaintiffs advance nine claims under the Administrative Procedure Act. Compl. ¶¶ 349-400. Under the APA, generally, a court "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The APA does not apply when "statutes preclude judicial review" or when "agency action is committed to agency discretion by law." *Id.* § 701(a). Judicial review is limited, further, to "[a]gency action made reviewable by statute" or "final agency action for which there is no other adequate remedy in a court." *Id.* § 704.

Additionally, while the Court may no longer defer to an agency's interpretation of an ambiguous statute, *see generally Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), "Section 706 *does* mandate that judicial review of agency policymaking and factfinding be deferential," *id.* at 392 (emphasis in original). Agency action is arbitrary or capricious if the agency "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency." *Huntsman Petrochemical LLC v. Env't Prot. Agency*, 114 F.4th 727, 735 (D.C. Cir. 2024) (citation omitted). An agency also acts arbitrarily and capriciously when it fails to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.*

Here, Plaintiffs are not likely to succeed on the merits of any of their APA claims. First, the Bank's approval of the 2025 Amendment did not violate, as alleged by Plaintiffs, the Bank Act and Federal Vacancies Reform Act ("Vacancies Act"). Plaintiffs contend that the Board "lacked a quorum of Senate confirmed members and thus had no authority to approve" the amendment in March 2025. Pls.' Mot. at 15. By statute, a "quorum of the Board of Directors shall consist of at least three members." 12 U.S.C. § 635a(c)(6)(A). There is no dispute that the Board had three members in March 2025: Spencer Bachus, who was a Presidentially appointed, Senate confirmed Member of the Board; Acting President James Cruse; and Acting First Vice President James Burrows Jr.

Cruse and Burrows Jr. were "members" of the Board by virtue of their positions. The Bank Act states that the Board shall consist of "the President . . . who shall serve as Chairman, the First Vice President who shall serve as Vice Chairman, and three additional persons appointed by the President . . . with the advice and consent of the Senate." 12 U.S.C. § 635a(c)(1). Thus, the President and Vice President of the Bank are executive officers with independent positions who serve on the Board as ex officio members—Chairman and Vice Chaiman—because of their executive positions, as opposed to the three other persons who are appointed to the Board directly. *See* Member Ex Officio, Black's Law Dictionary (12th ed. 2024) ("A member who serves on a board or committee by virtue of holding an office and whose membership will therefore pass with the office to his or her successor.").

Center for Biological Diversity v. U.S. International Development Finance Corp., 77 F.4th 679, 687-90 (D.C. Cir. 2023) is instructive. There, the issue was whether the CEO of the agency, who served on the board by virtue of his position, was ex officio, which would mean the agency was not a "Sunshine Act" agency. The D.C. Circuit explained that it was "insignificant whether a Board member is appointed and confirmed to a non-Board position within the same agency or in another agency—both count as ex officio." *Id.* at 688. The Court continued, while the "CEO may have concurrent Board duties, their responsibilities do not mean that they were appointed to the

Board itself." *Id.* The Court finished that it saw "no reason to read the [statute at issue] to treat the President's appointment and the Senate's confirmation to one position to count simultaneously for another unmentioned position in which that person serves ex officio," *id.* at 690, before concluding that the agency was not a "Sunshine Act" agency.

Unless an exception applies, the Vacancies Act is the "'exclusive means' for authorizing acting service" for executive agency senior officials. *English v. Trump*, 279 F. Supp. 3d 307, 319 (D.D.C. 2018). Plaintiffs nonetheless argue that "the Vacancies Act does not provide authority for acting appoints to EXIM's Board," and cite to 5 U.S.C. § 3349(c)(1), which excludes from the Vacancies Act "any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity" that "is composed of multiple members" and "governs an independent establishment or Government corporation." But this provision does not apply here because Cruse and Burrows Jr. were not appointed *to* the Board, they were appointed to Bank leadership positions, Acting President and Acting First Vice President, and serve on the Board solely by virtue of their office, also known as, ex officio. The Bank Act clearly states that there "shall be a President of the Export-Import Bank of the United States, . . . who shall serve as chief executive officer of the Bank." 12 U.S.C. § 635a(b). There shall also "be a First Vice President of the Bank, . . . who shall serve as President of the Bank during the absence or disability of or in the event of a vacancy in the office of President of the Bank[.]" *Id.* These are executive positions separate and apart from the Board positions, which are specified in a separate statutory provision, and Plaintiffs fail to contend in their Motion that their appointments to the Bank positions did not comply with the Vacancies Act in March 2025.

Plaintiffs' additional contention that the Bank violated the Bank Act by not complying with 12 U.S.C. § 635a(c)(6)(B) is also without merit. That provision states that if there is "an insufficient number of directors to constitute a quorum . . . for 120 consecutive days during the term of a President of the United States, a temporary Board," consisting of certain listed officials shall act as the Board. Plaintiffs do not and cannot establish that the Board was without a quorum for 120 days, which would trigger that provision. Cruse and Burrows Jr. had the authority to perform the functions and duties of their positions temporarily in an acting capacity. 5 U.S.C. § 3345(a)(2). When the Board approved of the 2025 Amendment to the loan application, the Acting President and Acting Vice President had been in their positions for less than 210 days,[6] and thus, they complied with the time limitations of the Vacancies Act. 5 U.S.C. § 3346(a)(1). And along with the Spencer Bachus, who was a Presidentially appointed, Senate confirmed Member of the Board, the three formed a quorum. 12 U.S.C. § 635a(c)(6)(A). The actions taken by them in March 2025, therefore, were lawful. *Cf. English*, 279 F. Supp. 3d at 317-18 (finding Vacancies Act applied to CFPB Director despite ex officio membership on the FDIC's board).

Second, Plaintiffs are not likely to succeed on the merits of their other claims that the Bank should have engaged in another notice and comment process and another round of economic impact analysis and environmental assessments. *See* Pls.' Mot. at 17-25. As explained above, the crux of Plaintiffs' argument here rests on an incorrect premise. Plaintiffs often characterize the 2025 Amendment as though it was an original application for a loan, and then by extension, they complain that the Bank did not perform certain environmental, economic, and social due diligence that would typically occur when considering a new application for Bank funding. *See, e.g.*, Pls.' Mot. at 13 ("EXIM believes it can ignore Congress's mandates by calling the 2025 loan an

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6 *See* President Trump Strengthens Export-Import Bank of the United States, Supports U.S. Jobs by Establishing Board Quorum Through Acting Appointments, EXIM (Feb. 28, 2025), at https://www.exim.gov/news/president-trump-strengthens-export-import-bank-united-states-supports-jobs-establishing-board.

'amendment,' since it approved Project funding in 2019 and 2020, which was never disbursed."). Plaintiffs, however, are again mistaken.

As explained above, by March 2025, the Board had already approved financing for the Project and, through subsequent contracts, made the loan facility operative and available for the Project borrower to draw upon. *See supra* Background Section III. In March 2025, the only changes that required Board approval were the extensions of a dates previously approved by the Board by four years. Swain Decl. ¶ 17. According to the relevant statute, another notice and comment process is only necessary if "a material change is made to an *application* for a loan or guarantee." 12 U.S.C. § 635(e)(7)(B)(iii)(I) (emphasis added); *see also* 12 U.S.C. § 635a(c)(10)(D)(i) ("[i]f a material change is made to an application"). The statute defines a material change to an application as "a change of at least 25 percent in the amount of a loan or guarantee requested in the application" and "a change in the principal product to be produced as a result of any transaction that would be facilitated by the provision of the loan or guarantee." 12 U.S.C. § 635(e)(7)(B)(iii)(II). Plaintiffs do not argue that either occurred here because neither did. The Board's only action was to approve the extension of dates in financing documents that, pursuant to a previous Board Resolution on Individual Delegated Authority, could not be extended by Bank staff. Plaintiffs are unlikely to succeed on the merits of their APA claims by mischaracterizing an amendment to an already-approved finance transaction that had received the Board's Final Commitment years before as a new loan (e.g., what Plaintiffs mistakenly call "the 2025 loan").

Plaintiffs are also unlikely to succeed on their claim that the Bank failed to comply with NEPA. Pls.' Mot. at 25-27. NEPA ensures federal agencies consider the environmental consequences of "major federal actions" significantly affecting the environment. 42 U.S.C.

§§ 4321, 4331. Absent major federal action, NEPA does not apply. *See Min. Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 53 n.27 (D.D.C. 2003) ("If there is no 'major Federal action,' that is the end of the inquiry.") (citing *Citizens Against Rails–to–Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C. Cir. 2001)); *Fund for Animals, Inc. v. Thomas*, 127 F.3d 80, 84 (D.C. Cir. 1997).

Plaintiffs simply fail to explain how the Board's amendment of dates in an already-approved finance transaction qualifies as a "major federal action" under NEPA triggering the preparation of an environmental impact analysis.[7] *See generally* Pls.' Mot. at 25-27. Instead, Plaintiffs appear focused on challenging a 2016 decision by the Bank that NEPA did not apply to the Project when the application was under consideration. *Id.* at 26. The statute of limitations for challenging that decision has long passed. 28 U.S.C. § 2401(a) ("every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues").

And even if the statute of limitations had not run, Plaintiffs must confront the fact that Congress defined "major federal action" to exclude, among other things: (1) "loans, loan guarantees, or other forms of financial assistance where a Federal agency does not exercise sufficient control and responsibility over the subsequent use of such financial assistance or the effect of the action[,]" 42 U.S.C. § 4336e(10)(B)(iii); and (2) "extraterritorial activities or decisions, which means agency activities or decisions with effects located entirely outside of the jurisdiction of the United States[,]" *id.* § 4336e(10)(B)(vi). Congress left it to the agency to reasonably "determine[ ]" whether the action "is subject to substantial Federal control and responsibility," and whether extraterritorial decisions with effects located outside of the United

7 To the extent Plaintiffs are basing their NEPA argument on the Council of Environmental Quality's former regulations, rather than the statute, those regulations have been rescinded. *See* 90 C.F.R. § 10610-01.

States are excluded from the definition of major federal action. *Id.* § 4336e(10)(A). Plaintiffs may believe this determination "receives no deference," Pls.' Mot. at 26, but the Supreme Court disagrees. *Seven Cnty. Infrastructure Coal. v. Eagle Cnty., Colorado*, 145 S. Ct. 1497, 1511-12 (2025) ("The agency is better equipped to assess what facts are relevant to the agency's own decision than a court is. As a result, 'agencies determine *whether and to what extent* to prepare an EIS[.]'" (emphasis in original)).

Finally, Plaintiffs' reliance on the Environmental Guidelines fairs no better. Plaintiffs presume that they carry the force of law, but the Environmental Guidelines are non-binding agency guidance for the Bank's review of transactions. *See Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014) (concluding EPA guidelines were unreviewable policy statements)*; Delta Air Lines, Inc. v. Exp.-Imp. Bank of U.S.*, 85 F. Supp. 3d 436, 440 (D.D.C. 2015) (Bank's economic impact procedures, used to assess the economic effects of potential transactions, would "more accurately be described as non-binding internal guidelines"). Regardless, the Bank's Board was presented with analysis of the potential environmental and social consequences of the Project in 2019 and received an update on those issues in 2025. Swain Decl., Exs. 2, 9.

For the reasons above, Plaintiffs are not likely to succeed on the merits of their APA claims.

B. Plaintiffs Have Not Shown Irreparable Harm

The D.C. Circuit has set a "high standard for irreparable injury." *Clevinger v. Advoc. Holdings, Inc.*, 134 F.4th 1230, 1234 (D.C. Cir. 2025) (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)). First, the injury "must be both certain and great; it must be actual and not theoretical." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297 (quoting *Wisc. Gas Co. v. Fed. Energy Regul. Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985)). The moving party must show "the injury complained of is of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Id.* (citation modified).

Second, "the injury must be beyond remediation." *Id.* "The key word in this consideration is irreparable." *Id.* (quoting *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)). "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Clevinger*, 134 F.4th at 1234 (quoting *Va. Petroleum Jobbers*, 259 F.2d at 925). The "possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Id.*

Here, Plaintiffs have not met this standard. Assuming Plaintiffs could show any harm under Article III—which the Bank contests through its standing arguments above—Plaintiffs have failed to show that the purported harm is "certain," "great," "actual," and "imminent." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297. For example, Plaintiffs state in their brief, "[w]ith disbursement *presumably* beginning soon and construction *anticipated* to begin as soon as this summer," Pls.' Mot. at 52, which shows that they do not satisfy the imminence requirement. Plaintiffs' "presumptions" and "anticipations" about the start of the project are insufficient to meet the first prong of the irreparable harm analysis. *Cf. Appalachian Voices v. Chu*, 725 F. Supp. 2d 101, 106 (D.D.C. 2010) (finding no "ongoing or imminent irreparable injury" because operation of new plant was "not scheduled to begin for at least two years"); *Fisheries Survival Fund v. Jewell*, 236 F. Supp. 3d 332, 337 (D.D.C. 2017) (finding purported injuries were not imminent or certain where construction and operation of wind energy facility was "years in the future and subject to further government approval"). And as explained above, many of Plaintiffs' alleged injuries are speculative, such as what independent third parties would do regardless of whether the Bank finances the Project. *See supra* Argument Section IA.

Further, Plaintiffs have not shown that any purported harm is "irreparable" or "beyond remediation." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297. For example, Plaintiffs complain that the 2025 Amendment will increase the need for Justiça Ambiental's "services," Pls.' Mot. at 32-33, and that, "EXIM's financing will force Plaintiffs to divert scarce resources away from previously planned projects," Pls.' Mot. at 35. And even if the Bank did not engage in another notice and comment process before the 2025 Amendment, "the plaintiffs' allegations of harm based on the defendants' alleged procedural violations alone are insufficient to demonstrate irreparable injury." *Appalachian Voices*, 725 F. Supp. 2d at 106. Rather, even though there was no requirement to engage in another notice and comment period, Plaintiffs submitted their own comments nonetheless about alleged human rights violations in a December 19, 2024, letter to various export credit agencies. *See* Swain Decl. Ex. 8 (Mar. 13, 2025, Board Memo at 3) ("The ECAs received a letter dated December 19, 2024, from NGOs including Friends of the Earth, BankTrack, Justiça Ambiental and others alleging certain human rights violations at the project site and Cabo Delgado.").

In fact, the evidence shows that since the 2019 loan approval, the Project sponsors have continued to engage in efforts to address environmental, economic, and social concerns about the Project. For example, after Total declared force majeure, it engaged Dr. Jean-Christophe Rufin (an independent expert on humanitarian action and human rights) in late 2022 to carry out an investigation to assess the situation in Cabo Delgado, where the Project is located, and produce a report ("Rufin Humanitarian Report"). Swain Decl. Ex. 8 (Mar. 13, 2025, Board Memo at 3). The Rufin Humanitarian Report was shared with the lenders in May 2023 and is publicly available on Total's website and widely reported in the press. *See* https://totalenergies.com/media/news/press-releases/totalenergies-publishes-jcrufins-report-human-rights-cabo-delgado. Total and the Project have produced and made public an action plan based on the Report that they have committed to implementing. Swain Decl. Ex. 8 (Mar. 13, 2025, Board Memo at 3). The action plan includes establishing a $200 million foundation, acceleration of compensation to families, access to agricultural areas, transportation for resettled fishermen, and other recommendations. *Id.*

Efforts such as the one described above weigh heavily against irreparable harm. *See, e.g.*, *Comm. for a Constructive Tomorrow v. Dep't of Interior*, Civ. A. No. 24-0774 (LLA), 2024 WL 2699895, at *4 (D.D.C. May 24, 2024) (finding no irreparable harm where "extensive measures [were] already in place to minimize potential harm to the Right Whale during construction" and "Defendants have agreed to five different mitigation plans to protect species, including the Right Whale, during in-water construction"); *Powder River Basin Res. Council v. Dep't of Interior*, Civ. A. No. 22-2696 (TSC), 2023 WL 7298815, at *14 (D.D.C. Nov. 6, 2023) ("[The plaintiffs] ignore language in the final [environmental impact statement] explaining that many of these impacts are temporary or subject to mitigation, and therefore not irreparable."); *S. Utah Wilderness All. v. Bernhardt*, 512 F. Supp. 3d 13, 22–23 (D.D.C. 2021) ("But the Court is not completely convinced that any harm resulting from the approved work will be entirely beyond remediation. The Court expects strict compliance with the mitigation and reclamation measures outlined in the [Record of Decision] to ensure that damage is minimized to the extent possible and that the area is repaired as required after project completion.").

For the reasons above, Plaintiffs cannot show irreparable harm. Further, Plaintiffs' "failure to show any irreparable harm is . . . grounds for refusing to issue a preliminary injunction, even if the other three factors . . . merit such relief." *Clevinger*, 134 F.4th at 1236.

C. The Balance of Equities and Public Interest Do Not Favor Plaintiffs

When the government is an opposing party, the third and fourth factors merge "because the government's interest *is* the public interest." *Pursuing Am.'s Greatness v. Fed. Election*

Comm'n, 831 F.3d 500, 511 (D.C. Cir. 2016) (emphasis in original) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Here, these factors do not favor Plaintiffs.

As a preliminary matter, it bears mentioning that "a party requesting a preliminary injunction must generally show reasonable diligence." *Benisek v. Lamone*, 585 U.S. 155, 159 (2018). A plaintiff's "unnecessary, years-long delay in asking for preliminary injunctive relief weigh[s] against their request." *Id.* In *Benisek v. Lamone*, the appellants did not move for a preliminary injunction in the district court until six years after the alleged unlawful agency action occurred. *Id.* at 157, 159. As a result, the Supreme Court affirmed the district court's denial of a preliminary injunction, noting that this delay tilted against the appellants' request. *Id.* at 158-60.

Numerous other courts over the years have similarly found that a delay weighs against a party seeking a preliminary injunction. *See, e.g.*, *Comm. for a Constructive Tomorrow v. Dep't of Interior*, Civ. A. No. 24-0774 (LLA), 2024 WL 2699895, at *5 (D.D.C. May 24, 2024) (denying preliminary injunction for plaintiffs who "waited until the eve of in-water construction to file their motion"); *Powder River Basin Res. Council v. Dept of Interior*, Civ. A. No. 22-2696 (TSC), 2023 WL 7298815, at *14 (D.D.C. Nov. 6, 2023) (denying preliminary injunction for conservation group and non-profit that waited twenty-one months after government's decision on drilling operations); *Standing Rock Sioux Tribe v. Army Corps of Eng'rs*, 239 F. Supp. 3d 77, 87–88 (D.D.C. 2017) (finding preliminary injunction was barred by laches because it came "long after Cheyenne River learned of the pipeline's proposed route, was invited to offer feedback, articulated *other* specific environmental and cultural issues, and filed suit on other claims"); *Dallas Safari Club v. Bernhardt*, 453 F. Supp. 3d 391, 403 (D.D.C. 2020) (noting that the "D.C. Circuit has held that a delay of forty-four days before bringing action for injunctive relief was 'inexcusable,' and 'bolstered' the 'conclusion that an injunction should not issue,' before noting plaintiffs' delay and denying preliminary injunction).[8]

Here, as explained above, the Bank originally approved a $5 billion direct loan to finance the Mozambique project in September 2019. The Bank then approved of an amendment in May 2020. Regardless of which date the Court uses as a starting point, Plaintiffs waited over five years to move for a preliminary injunction. Even if the Court were to use the 2025 Amendment date as a starting point, Plaintiffs waited over four months to move for a preliminary injunction. Plaintiffs' delay in seeking a preliminary injunction—whichever date the Court uses—weighs strongly against granting one.

Even so, the balance of the equities and public interest do not support a preliminary injunction. The mission of the Bank is to support American jobs by facilitating the export of U.S. goods and services. 12 U.S.C. § 635(a)(1). When private sector lenders are unable or unwilling to provide financing, the Bank fills in the gap for American businesses by equipping them with the financing tools necessary to compete for global sales. *See* https://www.exim.gov/about. In doing so, the Bank levels the playing field for U.S. goods and services going up against foreign competition in overseas markets, so that American companies can create more good-paying American jobs. *Id.*

Here, in addition to the loan being repaid at the end of the repayment term and generating an estimated $600 million in interest and fees for the U.S. Treasury, the Project financing will support an estimated 16,400 American jobs which support workers and families at more than sixty-

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8 Some courts include this argument under the irreparable harm factor, *see, e.g.*, *Powder River Basin Res. Council*, 2023 WL 7298815, at *14; *Dallas Safari Club*, 453 F. Supp. 3d at 403, but the Supreme Court included it under the balance of equities factor, *Benisek*, 585 U.S. at 158-60, so Defendants include it under this section.

eight companies across fourteen states including Texas, Louisiana, Oklahoma, New York, Pennsylvania, Georgia, Tennessee, Florida, Illinois, South Carolina, New Jersey, California, Nevada, Colorado, and the District of Columbia. https://www.exim.gov/news/exim-board-directors-votes-proceed-47-billion-lng-equipment-and-services-transaction-after; *see also Nat. Res. Def. Council v. Kempthorne*, 525 F. Supp. 2d 115, 127 (D.D.C. 2007) (denying preliminary injunction against drilling where "the project as a whole [was] projected to generate $10 million in royalties for the federal government, an additional $7 million in royalties and taxes to Wyoming, and almost $11 million in taxes to Carbon County").

In 2024, numerous executives of U.S. companies, including manufacturers and service providers who plan to utilize U.S. subcontractors and the domestic supply chain of goods and services for the Mozambique project, contacted the Bank and the U.S. Congress in support of the Project. https://www.exim.gov/news/exim-board-directors-votes-proceed-47-billion-lng-equipment-and-services-transaction-after.[9] The executives emphasized the critical role the Bank financing played in the successful completion of the project while noting the effects the continued

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[9] The executives who wrote to the former Bank Chairman Reta Jo Lewis on behalf of their employees and subcontractors so that thousands of U.S. jobs in support of the project could be assured included: Mr. Lorenzo Simonelli, Chairman & CEO, Baker Hughes, Houston, TX ; Mr. Peter de Laat, CEO, Brunel Energy Inc., Houston, TX; Mr. Mark D. Butts, CEO, CB&I, Houston, TX; Mr. Shane Reph, COO, Ebara Elliott Energy, Jeannette, PA; Mr. Lee Jordan, CEO, Gate Energy, Houston, TX; Ms. Kathryn Renee Eberwein, CEO, Global Edge Group, LLC, and its affiliate companies, The Woodlands, TX; Mr. Ken West, President and CEO, Energy & Sustainability Solutions, Honeywell, Charlotte, NC; Mr. James J. Kirchdorfer, Jr., CEO, ISCO industries, Inc., Louisville, KY; Captain William G. Schubert, President & CEO, International Trade & Transportation, Inc., Pineville, TX; Mr. Jonathan Motherwell, President, Jonathan T. Motherwell and Associates, LLC, The Woodlands, TX; Mr. Michael McKelvy, President and CEO, McDermott, Houston, TX; Mr. Paul Jacob, General Manager, Ocean Flow International, LLC, Houston, TX; Mr. Felipe Gonzalez, President, PERC Engineering, LLC, Houston, TX; Ms. Mary Zappone, CEO, Sundyne, LLC, Arvada, CO; Mr. Douglas Pferdehirt, CEO, TechnipFMC, Houston, TX; Mr. Quintin Kneen, President & CEO, Tidewater Inc., Houston, TX; Mr. Donnie Smith, CEO, W-Industries, Spring, TX; and Mr. Darton Zink, President & CEO, Zeeco, Inc., Tulsa, OK.

delay of the project's start could have on U.S. companies looking to do business in the region, stating that "without EXIM's approval of the amendment allowing the restart of construction, we consider that the project as currently defined will be jeopardized. Any potential new project would require new contractual arrangements and potentially new project participants with different geopolitical interests, an outcome that would be disadvantageous to all U.S. corporations that may compete for project contracts." *Id.*; *see also Nat. Res. Def. Council*, 525 F. Supp. 2d at 127 (denying preliminary injunction against drilling project where interested parties had already invested in the project and stood to lose millions of dollars if the preliminary injunction were granted).

Additionally, the Project advances other national interests. In addition to American jobs, the liquefied natural gas will provide energy security to allies in Europe and Asia. Swain Decl. Ex. 8 (Mar. 13, 2025, Board Memo at 1). Revenue from international sales is also critical to United States oil and gas service and equipment companies to continue research and development and evolution of technology which had led to United States energy dominance. *Id.* Three of the top U.S. oil and gas service and equipment companies, Halliburton, SLB and Baker Hughes each generate more than 50% of their revenue from international sales. *Id.*; *see also Nat. Res. Def. Council*, 525 F. Supp. 2d at 127 ("The development of domestic energy resources is of paramount public interest and will be harmed (at least to some extent) if that development is delayed.").

The Project also remains of critical importance to Mozambique. The estimated return to Mozambique via royalties, production bonuses, taxes and duties and dividends to be paid to Empresa Nacional de Hidrocarbonetos (the national oil and gas company of Mozambique) is an estimated $16.4 billion over term of the Project's debt and $51.2 billion over the life of the Area 1 concession term. This does not include the other benefits to the country from increased employment and economic opportunity associated with this major energy project investment. https://www.mozambiquelng.co.mz/about-the-mozambique-liquefied-natural-gas-project/ (explaining that the Project will help to "[d]evelop a qualified workforce for construction and operation," "[d]evelop experts in the field," "[f]oster the emergence of small and medium companies across Capo Delgado province," and "[g]enerate revenue that will contribute to the country's socioeconomic development.").

Thus, for the reasons above, the balance of equities and public interest do not favor Plaintiffs.

III. The Court Should Require Plaintiffs to Post Security

Rule 65(c) provides: "The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the Court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). To the extent that the Court grants relief to Plaintiffs, Defendants respectfully requests that the Court require Plaintiffs to post security in an amount the Court considers proper given the scope of any preliminary injunction issued.

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CONCLUSION

The Bank respectfully requests that the Court deny Plaintiffs' motion for a preliminary injunction for the reasons above.

Date: August 15, 2025
Washington, DC

Respectfully submitted,

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