

ClientAlert

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There May Be Trouble Ahead

Legal Challenges on Home Turf Threaten US Ex-Im Bank Funding for Foreign Mining Projects

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The Export-Import Bank of the United States (Ex-Im Bank) is facing a new wave of legal challenges related to the financing of natural resource projects outside of the US, and which threaten to de-rail one of Western Australia's most promising financing deals.

In the past two years, environmental non-governmental organisations (NGOs) have attempted to block Ex-Im Bank funding for a number of foreign projects. One recent objection was directed against Ex-Im Bank funding of the Roy Hill iron-ore project in WA's Pilbara region, which is one of the largest development projects in the global mining sector.

These challenges seek to apply US environmental laws to non-US projects, and force Ex-Im Bank to analyse the local environmental effects of those projects before making financing decisions.

While none of these challenges has yet succeeded, if they were to prevail, it could block the individual loans in question and force Ex-Im Bank to engage in more thorough and time-consuming environmental reviews of mining projects outside of the US.

In the mining industry, where the permitting and development timeline is often a key driver of the feasibility of a project, the implications of the resultant delays to mining projects reliant on Ex-Im Bank funding are potentially far-reaching.

Ex-Im Bank is an agency of the US federal government, which provides financing related to non-US projects to facilitate exports by US companies. In recent years, it has become a significant source of financing for mining and energy projects throughout the world, and seeks to fill gaps in private sector trade financing.

All US federal agencies are subject to procedural laws that require evaluation of the environmental impacts of projects before final decisions are made, such as decisions to issue loans.

The primary law is the National Environmental Policy Act (NEPA), which requires agencies to prepare lengthy environmental impact statements (EIS) for any "major federal action significantly affecting the quality of the human environment."

EISs typically take three to five years to complete, require intensive examination of the environmental impacts of proposals and alternatives to those proposals, and the identification of potential mitigation measures.



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The Endangered Species Act (ESA) requires all federal agencies to ensure that any action they authorise or fund is unlikely to jeopardise the continued existence of any species on the US threatened and endangered species list, and in particular, requires them to consult with US wildlife bodies.

The National Historic Preservation Act (NHPA) requires agencies to consider the effect of any proposed undertaking on certain designated historic sites.

An agency's compliance with these laws can be challenged in US courts by any person who claims to be injured as a result of the proposed action, and courts regularly set aside agency actions made without full compliance with these laws.

Environmental NGOs often use these laws to try to slow down or block projects they do not support, and to force agencies to condition their project approvals in ways that reduce environmental impacts.

These US laws do not expressly limit their reach to environmental impacts in the US. Ex-Im Bank and other federal agencies have interpreted these statutes in ways that limit their applicability to foreign projects.

In particular, Ex-Im Bank has interpreted NEPA to apply "only to the relatively rare cases where Ex-Im Bank financing of US exports may affect environmental quality in the US, its territories or possessions."

Moreover, federal wildlife agencies have interpreted the ESA to require interagency consultation only for federal agency actions "in the United States or upon the high seas".

Environmental challenges

Over the past two years, environmental NGOs have launched a wave of challenges directed at Ex-Im Bank's financing decisions, seeking to block funding for foreign projects.

In 2012, several environmental NGOs challenged Ex-Im Bank's decision to provide approximately US\$4.8 billion in financing for two liquefied-natural-gas projects in Australia, claiming that the agency did not adequately consider the effect of the projects on endangered species or the Great Barrier Reef World Heritage Area, and alleged that it had therefore violated the ESA and the NHPA. This case is pending.

In December 2013, the same environmental NGOs submitted written objections to Ex-Im Bank's preliminary approval of a US\$694 million loan to Australia's Roy Hill iron-ore mine, alleging similar violations of the ESA and NEPA.

Such objection letters typically signal an intention to file legal proceedings. Other cases have been filed in recent years against Ex-Im Bank for financings of US and foreign energy and mining projects, including a challenge to a US mine intended to produce coal for export and a challenge to the agency's consideration of greenhouse gas emissions in the financing of foreign energy projects.

These challengers face an uphill battle if they are to succeed. Courts generally defer to agencies' interpretation of the statutes they administer, and for many years Ex-Im Bank and other agencies have interpreted that NEPA and the ESA do not apply to projects where the environmental impacts occur in other countries.

It can also be difficult for environmental NGO challengers to establish that they have the necessary standing to challenge these loan decisions, or that the courts otherwise have jurisdiction to adjudicate the merits of the claims.

It helps, of course, that Ex-Im Bank conducts other types of environmental reviews of the projects it finances, although these are not pursuant to the legal strictures of NEPA or the ESA.

While these challenges face significant hurdles, there have been instances where challengers making similar claims have had some limited success in the courts.

However, it should be noted that some of these favourable court decisions have been overturned on appeal, suggesting there are no guarantees that Ex-Im Bank is certain to prevail.

If any of these environmental challenges does prove successful, it could have a significant effect on Ex-Im Bank financing related to non-US mining projects.

In the case of the Roy Hill project, it could result in the Ex-Im Bank's financing decision being set aside by a court until there was further environmental review.

Environmental review under NEPA and the ESA can be quite detailed and time consuming.

Such a review could result in Ex-Im Bank second-guessing local environmental regulators by placing more conditions on its financing approvals.

Project opponents would also have a new forum where they could seek to challenge large mining projects around the world, by seeking to block part of the financing in US courts.

Non-US project sponsors would then be put in the same position as US mine sponsors, which have to ensure that US agencies properly analyse the environmental impacts of their projects and also intervene in legal proceedings to defend their interests.

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