

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON ,)
)
 Plaintiff,)
)
 v.)
)
 DONALD J. TRUMP, *et al.*,)
)
 Defendants,)
)
)

CASE NO. 2:19-cv-01502-BJR

ORDER ON CROSS MOTIONS
FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter comes before the Court on the parties’ cross motions for summary judgment. The State of Washington (“Washington,” “the State,” or “Plaintiff”) brings this lawsuit—and the instant motion for summary judgment—to enjoin Defendants¹ from diverting \$88.96 million in funding from a construction project located at the Naval Submarine Base Bangor (“the Bangor

16
17
18
19
20
21
22
23
24
25

¹ The Defendants in this lawsuit are: Donald J. Trump, in his official capacity as President of the United States, Steven T. Mnuchin, in his official capacity as United States Secretary of the Treasury, Mark T. Esper, in his official capacity as the United States Secretary of Defense, Ryan D. McCarthy, in his official capacity as Acting United States Secretary of the Army, Richard V. Spencer, in his official capacity as United States Secretary of the Navy, Matthew Donovan, in his official capacity as Acting United States Secretary of the Air Force, David Bernhardt, in his official capacity as United States Secretary of Interior, the United States of America, the United States Department of the Treasury, the Department of Defense, and the Department of Homeland Security (collectively “Defendants”).

1 Project”) on the Kitsap Peninsula in Washington, to construction of a wall along the United
2 States-Mexico border. Defendants cross move for summary judgment and seek dismissal of the
3 State’s claims, arguing among other things that the State lacks Article III standing to pursue the
4 claims, and that their actions are authorized by statute.

5 The circumstances in which this conflict arises are well-known. President Trump has
6 long advocated for a border wall between the United States and Mexico; Congress has refused to
7 appropriate the funds he requested to build the wall. This impasse led to the nation’s longest
8 government shutdown, beginning in December 2018 and ending 35 days later on January 25,
9 2019 when Congress passed, and the President signed, a stopgap spending measure to reopen the
10 government for three weeks while a bipartisan committee negotiated an agreement on border
11 security. On February 14, 2019, Congress passed the Consolidated Appropriations Act of 2019
12 (“CAA”) in which it appropriated \$1.375 billion to the Department of Homeland Security for
13 border security. This amount was far less than the \$5.7 billion President Trump had requested.
14

15 The President signed the CAA into law, but concurrently issued a proclamation under the
16 National Emergencies Act, 50 U.S.C. §§ 1601-1651, in which he declared that a national
17 emergency existed at the southern border of the United States. Pursuant to this proclamation, the
18 President invoked 10 U.S.C. § 2808, a military construction funding provision that according to
19 the Trump Administration allows the Department of Defense to “reprogram” funds appropriated
20 by Congress for military construction projects away from those projects and instead use the
21 monies to build the border wall. Thereafter, the Department of Defense identified which military
22 construction projects it intends to defer in order to fund the border wall. The Bangor Project is
23 among the deferred projects.
24
25

1 Washington's arguments are based on both statutory and constitutional grounds. First,
2 because the Trump Administration is implementing its plan through its federal executive
3 departments—namely, the Department of Defense and the Department of Homeland Security—
4 Washington challenges the Defendants' actions through the familiar legal framework of the
5 Administrative Procedures Act ("APA"), which grants federal courts oversight over the actions
6 of these departments. The State contends that the decision to reprogram the Bangor Project funds
7 must be set aside pursuant to the APA on three independent grounds: first, 10 U.S.C. § 2808
8 does not authorize Defendants' actions, and therefore the decision is "in excess of statutory ...
9 authority;" second, the actions are barred by the CAA and therefore "not in accordance with the
10 law;" and third, the decision is "arbitrary [or] capricious." 5 U.S.C. § 706(2)(A),(C)). The State
11 also argues that Defendants' actions run afoul of the separation of powers enshrined in the
12 Constitution, and in particular that Defendants' actions violate, *inter alia*, the Appropriations
13 Clause and the Presentment Clause.² Washington asks this Court to permanently enjoin
14 Defendants' efforts to reprogram the military construction funds.
15
16

17 Having reviewed the cross motions for summary judgment, the responsive pleadings,
18 amici curiae briefs³, the record of this case, and the relevant legal authorities, and having heard
19 oral argument,⁴ the Court will grant in part Washington's motion and deny Defendants' motion.

20 The reasoning for the Court's decision follows.
21
22

23 ² Because the Court resolves the controversy before it on statutory grounds, as discussed below, it does not reach
24 Plaintiff's constitutional claims. *See infra*, § IV.C.

25 ³ The following amici curiae filed briefs, all in support of the State of Washington: (1) sixty former officials in the
U.S. government who have worked on national security and homeland security issues (dkt. no. 20); (2) the
Northwest Immigrant Rights Project and National Immigration Law Center (dkt. no. 26); (3) the Brennan Center for
Justice at NYU School of Law (dkt. no. 33); (4) the United States House of Representatives (dkt. no. 36); and (5) a
bipartisan group of more than 100 former Members of the House of Representatives (dkt. no. 37).

⁴ The Court held a hearing on the cross motions for summary judgment on January 23, 2020.

II. FACTUAL BACKGROUND

A. The President's Negotiations with Congress

As stated above, the President campaigned on the promise to build “The Wall” between the United States and Mexico. Five days after taking the oath of office, President Trump issued an Executive Order stating that it is the policy of the Executive Branch to “secure the southern border of the United States through the immediate construction of a physical wall on the southern border, monitored and supported by adequate personnel so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism.”⁵

Upon taking office, President Trump sought \$2.6 billion in appropriations from Congress for barrier construction along the southern border.^{6,7} Congress declined to appropriate the amount requested, instead allocating \$1.571 billion for border security.⁸ Members of Congress introduced several bills throughout 2018 that would have appropriated additional billions for border barrier construction along the southern border, but ultimately Congress declined to pass any of these bills. *See Sierra Club v. Trump*, 929 F.3d 670, 677 (9th Cir. 2019) (listing bills). In fact, between 2017 and 2018, Congress considered and rejected at least ten additional bills to fund the border wall. *Id.*

Unhappy with Congress's repeated refusal to appropriate the funds he requested for the border wall, in December 2018, President Trump declared that he would not sign any government funding bill that did not allocate substantial funding for a physical barrier along the

⁵ Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

⁶ *See, e.g., Budget of the U.S. Government: A New Foundation for American Greatness: Fiscal Year 2018*, Office of Mgmt. & Budget 18 (2017), <https://www.whitehouse.gov/wp-content/uploads/2017/11/budget.pdf> (requesting “\$2.6 billion in high-priority tactical infrastructure and border security technology, including funding to plan, design, and construct a physical wall along the southern border”).

⁷ Office of Mgmt. & Budget, Exec. Office of the President, *Budget of the United States Government, Fiscal Year 2018* at 18 (2017).

⁸ Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. F, tit 11, § 230(a) (2018).

1 United States' southern border.⁹ He also repeatedly stated that he was willing to declare a
2 national emergency in order to obtain funding for the wall if Congress refused to allocate the
3 funds.¹⁰

4 Congress did not pass a funding bill with the President's requested border barrier
5 appropriations, and as a result, the United States entered the longest partial federal government
6 shutdown in its history. During the shutdown, the President "request[ed] \$5.7 billion for
7 construction of a steel barrier" of approximately "234 miles of [a] new physical barrier" along
8 "the Southwest border" of the United States.¹¹ As stated above, the government shutdown ended
9 without an agreement on the amount to be provided for border barrier funding.¹² Instead,
10 Congress passed and the President signed a stopgap spending measure to reopen the federal
11 government for three weeks, *Sierra Club*, 929 F.3d at 678 (citing H.R.J. Res. 28, 116th Cong.
12 (2019)), and a bipartisan committee of House and Senate lawmakers was created to "put together
13 a Homeland Security package" within the "next 21 days" for the President to "sign into law."¹³
14

15 **B. The Consolidated Appropriations Act of 2019**

16 On February 14, 2019, Congress passed the Consolidated Appropriations Act of 2019
17 ("CAA"). Pub. L. No. 116-6, div. A, 133 Stat. 13 (2019). The CAA consolidated into one bill
18
19

20 ⁹ Erica Werner et al., *Trump Says He Won't Sign Senate Deal to Avert Shutdown, Demands Funds for Border*
21 *Security*, Wash. Post (Dec. 21, 2018), https://wapo.st/2EIpkHu?tid==ss_tw&utm_term=.6e7c259f6857.

22 ¹⁰ *Remarks by President Trump During Roundtable Discussion with State, Local, and Community Leaders on*
23 *Border Security and Safe Communities* (Jan. 12, 2019) [https://www.whitehouse.gov/briefings-statements/remarks-](https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-congressional-leadership-border-security/)
24 [president-trump-meeting-congressional-leadership-border-security/](https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-senate-minority-leader-chuck-schumer-house-speaker-designate-nancy-pelosi/); see also, *Remarks by President Trump in*
25 *Meeting with Senate Minority Leader Chuck Schumer and House Speaker-Designate Nancy Pelosi*, The White
House (Dec. 11, 2018, 11:40 A.M.), [https://www.whitehouse.gov/briefings-statements/remarks-president-trump-](https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-senate-minority-leader-chuck-schumer-house-speaker-designate-nancy-pelosi/)
[meeting-senate-minority-leader-chuck-schumer-house-speaker-designate-nancy-pelosi/](https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-senate-minority-leader-chuck-schumer-house-speaker-designate-nancy-pelosi/).

¹¹ Letter from Russell T. Vought, Acting Dir. Of the Office of Mgmt. and Budget, to Richard Shelby, Chairman of the Senate Comm. on Appropriations (Jan. 6, 2019).

¹² *Remarks Delivered by President Trump on the Government Shutdown* (Jan. 25, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-government-shutdown/>.

¹³ *Remarks by President Trump on the Government Shutdown* (Jan. 25, 2019) <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-government-shutdown/>.

1 appropriations acts related to different federal agencies, including the Department of Homeland
2 Security Appropriations Act for Fiscal Year 2019. *See id.*, div. A. The CAA made available
3 \$1.375 billion—less than one quarter of the \$5.7 billion sought by the President—for border
4 barrier security. Further, the CAA placed several limitations on how the funds could be spent.¹⁴

5 Most importantly, being well-aware of President Trump’s repeated threats to declare a
6 national emergency if Congress did not provide him with the full \$5.7 billion he requested to
7 build the border wall, Congress included § 739 in the CAA. Section 739 provides:

8 None of the funds made available in this or any other appropriations Act may be
9 used to increase, eliminate, or reduce funding for a program, project, or activity as
10 proposed in the President’s budget request for a fiscal year until such proposed
11 change is subsequently enacted in an appropriations Act, or unless such change is
12 made pursuant to the reprogramming or transfer provisions of this or any other
13 appropriations Act.

14 *Id.* at § 739. President Trump signed the CAA into law the following day.

15 **C. The President Issues Proclamation No. 9844**

16 The same day that the President signed the CAA into law, he issued Proclamation No.
17 9844 under the National Emergencies Act, declaring that “a national emergency exists at the
18 southern border of the United States”:

19 The current situation at the southern border presents a border security and
20 humanitarian crisis that threatens core national security interests and constitutes a
21 national emergency. The southern border is a major entry point for criminals, gang
22 members, and illicit narcotics. The problem of large-scale unlawful migration
23 through the southern border is long-standing, and despite the executive branch’s
exercise of existing statutory authorities, the situation has worsened in certain
respects in recent years. In particular, recent years have seen sharp increases in the
number of family units entering and seeking entry to the United States and an

24 ¹⁴ First, the funds can only be used to construct “pedestrian fencing, including levee pedestrian fencing.” *Id.* at §
25 230(a)(1). Second, the fencing must be of a design that was “deployed as of the date of the Consolidated
Appropriations Act, 2017 (Public Law 115-31), such as currently deployed steel bollard designs, that prioritize agent
safety.” *Id.* at § 230(b). Third, the CAA provides that “[n]one of the funds made available by this Act or prior Acts
are available for the construction of pedestrian fencing” within various specified wildlife refuges and parks. *Id.* at §
231.

1 inability to provide detention space for many of these aliens while their removal
2 proceedings are pending. If not detained, such aliens are often released into the
3 country and are often difficult to remove from the United States because they fail
4 to appear for hearings, do not comply with orders of removal, or are otherwise
5 difficult to locate. In response to the directive in my April 4, 2018, memorandum
6 and subsequent requests for support by the Secretary of Homeland Security, the
7 Department of Defense has provided support and resources to the Department of
8 Homeland Security at the southern border. Because of the gravity of the current
9 emergency situation, it is necessary for the Armed Forces to provide additional
10 support to address the crisis.

11 Proclamation No. 9844, 84 Fed. Reg. 4,949. As he repeatedly stated he would do, along with the
12 Proclamation, President Trump invoked 10 U.S.C. § 2808, which provides that the Secretary of
13 Defense may authorize military construction projects if three criteria are met: (1) the President
14 has declared a national emergency that (2) requires use of the armed forces and (3) the
15 authorized projects will support the armed forces. *See* 10 U.S.C. § 2808(a). Specifically, the
16 White House declared that, among other funding sources, “[u]p to \$3.6 billion” will be
17 “reallocated from Department of Defense military construction projects” previously appropriated
18 by Congress and instead used for barrier construction along the southern border pursuant to §
19 2808 and “the President’s declaration of a national emergency.”¹⁵

20 Congress sought to terminate the national emergency on two occasions, but each time the
21 President vetoed the joint resolution and Congress failed to override the President’s veto. *See*
22 165 Cong. Rec. H2799, H2814-15 (2019); S.J. Res. 54, 116 Cong. (2019).

23 **D. Defendants Divert Military Construction Funding from a Project Located in** 24 **Washington State**

25 On September 3, 2019, the Secretary of Defense gave notice to Congress that, pursuant to
the Proclamation, he had “authorized and directed the Acting Secretary of the Army to

¹⁵ *President Donald J. Trump’s Border Security Victory*, The White House (Feb. 15, 2019),
<https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory/>

1 undertake” the building of eleven border barrier projects in California, Arizona, New Mexico,
2 and Texas. *See California v. Trump*, 407 F. Supp. 3d 869, 880 (N.D. Cal. 2019). Collectively, the
3 eleven projects total \$3.6 billion and include 175 miles of border barrier construction. *Id.* The
4 eleven projects include two on the Barry M. Goldwater Range in Arizona, seven on federal
5 public domain land that is under the jurisdiction of the Department of Interior, and two on non-
6 public land that would need to be acquired through either purchase or condemnation before
7 construction could begin. *Id.* at 880-81.

8
9 Two days later, on September 5, 2019, the Department of Defense announced that it
10 would obtain the \$3.6 billion necessary to build the eleven border barrier projects by diverting
11 funds from 127 military construction projects pursuant to 10 U.S.C. § 2808. *Id.* at 881. Included
12 in the list of 127 military construction projects is the Bangor Project, for which Congress had
13 appropriated \$88.96 million. Bangor is home to the United States Pacific Fleet of Trident
14 Ballistic Missile Submarines, nuclear powered submarines that carry nuclear warheads. Dkt. No.
15 1, at 30. Congress authorized funding for the Bangor Project as part of the John S. McCain
16 National Defense Authorization Act to address what the Navy described as deficiencies at the
17 strategically important Base. Pub. Law No. 115-232, Sec. 2201 (Aug. 13, 2018). The Project
18 includes constructing a pier for two 250-foot blocking vessels, a boat shop capable of supporting
19 30 vessels, a fueling station, and a fuel storage tank.

21 **E. Procedural History**

22 On September 19, 2019, the State filed this lawsuit to enjoin Defendants from diverting
23 the military funds Congress appropriated for the Bangor Project to the eleven boarder barrier
24 projects. Dkt. No. 1. Washington filed an amended complaint on October 25, 2019, as well as the
25 instant motion for summary judgment. Dkt. Nos. 15 and 16. Defendants filed a cross motion for

1 summary judgment on November 15, 2019 and further agreed not to obligate the \$88.96 million
 2 appropriated for the Project until February 1, 2020. Dkt. Nos. 10 and 43. The Court held oral
 3 argument on the motions on January 23, 2019. Thereafter, Defendants agreed to delay obligating
 4 the \$88.96 million until March 1, 2020. *Id.* The motions are now ripe and ready for resolution.¹⁶

5 III. STANDARD OF REVIEW

6 “[S]ummary judgment is appropriate when ‘there is no genuine dispute as to any material
 7 fact and the movant is entitled to judgment as a matter of law.’” *Albino v. Baca*, 747 F.3d 1162,
 8 1168 (9th Cir. 2014)(quoting Fed. R. Civ. P. 56(a)). Where, as here, the material facts are not
 9

11 ¹⁶ There are three cases that are related to the instant case: *State of California v. Trump*, No. 19-cv-00872-
 12 HSG and *Sierra Club v. Trump*, No. 19-cv-00892-HSG, both filed in the Northern District of California and both
 13 before the Honorable Haywood S. Gilliam, Jr., and *El Paso County v. Trump*, No. EP-19-cv-66-DB before the
 14 Honorable David Briones in the Western District of Texas. Each case is filed against essentially the same defendants
 15 as those in the instant case and each case challenges the Trump Administration’s diversion of military construction
 16 funding to the eleven border barrier projects along the southern border of the United States. The cases raise
 17 substantially similar but not identical issues and arguments. Differences include the type of plaintiff and injuries
 18 alleged, as well as the source of funding and the statutes the defendants rely on to divert the funding.

19 On May 24, 2019, Judge Gilliam issued a permanent injunction against Defendants in *Sierra Club*, barring
 20 them from using § 8005 of the Department of Defense Appropriations Act of 2019 to reprogram approximately \$2.5
 21 billion from the Department of Defense to the Department of Homeland Security for purposes of building the border
 22 barrier projects. *Sierra Club v. Trump*, 379 F. Supp. 3d 883 (N.D. Cal. May 24, 2019). Defendants filed an
 23 emergency motion requesting a stay of the permanent injunction, which the Ninth Circuit denied on July 3, 2019.
 24 *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019). On July 26, 2019, the Supreme Court stayed the permanent
 25 injunction pending resolution of the Trump Administration’s appeal before the Ninth Circuit and any subsequent
 writ of certiorari. *Trump v. Sierra Club*, 140 S. Ct. 1 (2019). In the one-paragraph decision, the Supreme Court
 stated that “the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to
 obtain review of the Acting Secretary’s compliance with Section 8005.” *Id.*

On December 11, 2019, Judge Gilliam issued a permanent injunction barring Defendants from
 reprogramming military construction spending pursuant to 10 U.S.C. § 2808 for nine of the eleven proposed border
 barrier projects. *California v. Trump*, 407 F. Supp. 3d 869 (N.D. Cal. December 11, 2019). However, Judge Gilliam
 stayed the permanent injunction in light of the Supreme Court’s decision in *Sierra Club*. An appeal of Judge
 Gilliam’s December 11, 2019 decision is currently pending before the Ninth Circuit.

Meanwhile, two months earlier, on October 11, 2019, Judge Briones in the Western District of Texas
 issued a decision in which he determined that the Trump Administration’s proposed plan for funding the eleven
 border barrier projects through § 2808 violated the 2019 Consolidated Appropriations Act, generally, and § 739 of
 the Act, specifically. *El Paso County v. Trump*, 2019 WL 5092396 (W.D. Tex. Oct. 11, 2019). On December 10,
 2019, Judge Briones issued a nationwide permanent injunction barring the Trump Administration from using § 2808
 funds beyond the funds allocated in the 2019 Consolidated Appropriations Act for the border barrier projects. *El
 Paso County v. Trump*, 407 F. Supp. 3d 655 (W.D. Tex. Dec. 10, 2019). On January 8, 2020, a panel of the Fifth
 Circuit granted the Trump Administration’s request to stay the injunction pending resolution of the appeal and
 denied the plaintiffs’ request to expedite the appeal. *El Paso County v. Trump*, No. 19-51144 (5th Cir. Jan. 8, 2020).

1 genuinely in dispute and the questions before the Court are purely legal, the Court can resolve
2 Administrative Procedures Act challenges on summary judgment. *King County v. Azar*, 320 F.
3 Supp. 3d 1167, 1171 (W.D. Wash. 2018), *appeal dismissed*, 2018 WL 5310765 (9th Cir. 2010).
4 Similarly, questions of statutory and Constitutional interpretation are questions of law, which
5 may properly be resolved at summary judgment. *See Union Stations Associates, LLC v. Puget*
6 *Sound Energy, Inc.*, 238 F. Supp. 2d 1226, 1229 (W.D. Wash. 2002).

7 8 IV. DISCUSSION

9 A. Washington Has Article III Standing to Bring Its Claims

10 As stated above, Washington claims that Defendants' diversion of \$88.96 million from
11 the Bangor Project to the border barrier projects pursuant to 10 U.S.C. § 2808 violates the APA,
12 as well as the Appropriation and Presentment Clauses of the Constitution. However, before
13 turning to the merits of Washington's claims, the Court must first address Defendants' threshold
14 assertion that Washington lacks Article III standing to pursue its claims.

15 A plaintiff seeking relief in federal court bears the burden of establishing "the irreducible
16 constitutional minimum" of Article III standing. *Spokeo, Inc. v. Rovins*, ___ U.S. ___, 136 S.Ct.
17 1540, 1547 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Article III of
18 the Constitution limits federal courts' jurisdiction to "cases" and "controversies" and "[o]ne
19 element of the case-or-controversy requirement" is that a plaintiff must establish that it has
20 "standing to sue." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (quoting *Raines v.*
21 *Byrd*, 521 U.S. 811, 818 (1997)). "The law of Article III standing, which was built on separation-
22 of-powers principles, serves to prevent the judicial process from being used to usurp the powers
23
24
25

1 of the political branches.” *Clapper*, 568 U.S. at 408 (quoting *Summers v. Earth Island Institute*,
2 555 U.S. 488, 492-493 (2009)).

3 To establish Article III standing, “a plaintiff must show (1) it has suffered an ‘injury in
4 fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or
5 hypothetical; (2) the injury is fairly traceable to the challenged action of the defendants; and (3)
6 it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable
7 decision.” *Friends of the Earth, Inc. v. Laidlaw, Env’tl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000).

8 At summary judgment, a plaintiff “must ‘set forth’ by affidavit or other evidence ‘specific facts’”
9 to establish standing. *Lujan*, 504 U.S. at 561 (quoting Fed. R. Civ. P. 56(e)). When evaluating a
10 plaintiff’s standing, courts must “take as true” the factual evidence that plaintiff submits. *Id.*

11 Here, Washington alleges that it will suffer two distinct injuries if Defendants divert the
12 funds that Congress appropriated for the Bangor Project: (1) the loss of tax revenues Washington
13 would have received as a result of the Bangor Project, and (2) the loss of the Bangor Project
14 itself, including the possible harms arising from that loss. Defendants do not challenge the
15 causation and redressability aspects of Article III standing. Instead, they contend that
16 Washington lacks standing because its alleged harms—the loss of tax revenues and the Project
17 itself—do not constitute cognizable injuries-in-fact. According to Defendants, the alleged loss of
18 tax revenue is not a cognizable injury-in-fact because Washington has failed to establish a direct
19 link between the tax at issue and the administrative action being challenged, as is required by
20 *Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992). Instead, Defendants argue, Washington claims
21 only that its “general fund revenues” will decline. Defendants further argue that the loss of the
22 Bangor Project itself does not constitute a cognizable injury-in-fact because Washington is not a
23
24
25

1 direct recipient of the money that Congress appropriated for the Project, rather the money will go
2 to third-party contractors, vendors, other individuals in the supply chain.

3 This Court rejects Defendants' contentions and concludes that Washington has Article III
4 standing to pursue its claims. First, the projected tax revenue loss is sufficient to establish
5 standing for Article III purposes. Washington is not arguing a merely theoretical reduction in
6 general revenue. It has established that the construction activity at the Bangor Project itself
7 would be subject to both sales and use tax, and that such taxes are "the single largest source of
8 State tax revenue." Declaration of Kathy L. Oline in Support of Motion for Summary Judgment
9 ("Oline Dec."), Dkt. No. 18 at ¶ 8. In addition, the Project would engender business and
10 occupation tax. *Id.* at ¶ 10. Washington projects that its total tax loss from the loss of the Bangor
11 Project will be approximately \$2.6 million, with an additional loss of approximately \$880,000 in
12 local taxes. *Id.* at ¶¶ 19, 22. Thus, Washington has shown that it will suffer the loss of significant
13 tax revenue as a direct result of Defendants diverting funding from the Bangor Project, and such
14 loss is sufficient to establish Article III standing.
15

16 This conclusion is in accord with the Ninth Circuit's recent decision in *City of Oakland v.*
17 *Lynch*, 798 F.3d 1159 (9th Cir. 2015). In *City of Oakland*, the city sued to enjoin the federal
18 government from seeking civil forfeiture of a local medical marijuana dispensary that was acting
19 in accordance with local and state laws, but in violation of the federal Controlled Substances Act.
20 798 F.3d at 1162. Oakland projected that it would lose significant sales tax revenues if the
21 dispensary was closed; the government argued that the expected loss of tax revenue was too
22 speculative to establish injury for Article III standing purposes. The Ninth Circuit rejected the
23 government's argument, concluding instead that Oakland's anticipated loss of tax revenue
24 conferred Article III standing. *Id.* at 1164 (noting that if the dispensary closed "it will no longer
25

1 provide Oakland with tax revenue, either directly through income taxes or indirectly through
2 customer sales taxes. And [Ninth Circuit] precedent makes clear that the deprivation of revenue
3 constitutes injury under Article III); *see also*, *City of Sausalito v. O’Neill*, 386 F.3d 1186 (9th
4 Cir. 2004) (holding that an expected loss of tax revenue constituted a sufficient injury for
5 purposes of Article III standing).

6 Nor does *Wyoming v. Oklahoma*, cited by Defendants, dictate a different conclusion.
7 *Wyoming* concerned a law enacted by Oklahoma that required Oklahoma utility companies to
8 use a certain percentage of coal that was mined in Oklahoma. 502 U.S. at 443-44. Prior to the
9 law’s enactment, nearly 100% of coal used by Oklahoma utility companies was mined in
10 Wyoming. Wyoming charged a severance tax on the coal sold to the Oklahoma companies. *Id.* at
11 445. After the law went into effect, Oklahoma utilities began purchasing Oklahoma coal, thereby
12 reducing the amount of severance tax Wyoming collected. *Id.* at 447. Wyoming sued, alleging
13 that Oklahoma’s law violated the Commerce Clause. The Supreme Court concluded that
14 Wyoming stated an injury for Article III standing purposes because “Wyoming’s loss of
15 severance tax revenues ‘fairly can be traced’ to the Act.” *Id.* (quoting Report of Special Master
16 11). Similarly, Washington has demonstrated that it will suffer significant state and local tax
17 revenues if the Bangor Project is not restored. The link between the revenue loss and the
18 administrative action could hardly be more direct: the construction activities related to the
19 Bangor Project will be subject to sales or use tax, and the loss of the Project would mean the loss
20 of those taxes. Indeed, Washington’s projected gross sales receipt tax for the project was
21 included in the Navy’s proposal to Congress. Thus, this Court concludes that Washington’s
22 expected loss of tax revenue is sufficient to confer standing. *See also El Paso County v. Trump*,
23 2019 WL 5092396, *7 (W.D. Tex. Oct. 11, 2019) (El Paso County’s potential loss in \$4 million
24
25

1 in tourism tax revenue due to “the perception that [El Paso] is chaotic and dangerous and that
2 tourists’ access to historical and scenic destinations will be impeded by construction” constitutes
3 an injury-in-fact for Article III purposes).

4 Moreover, the loss of the Bangor Project is an independently sufficient injury for
5 purposes of Article III. One must look no further than to the Defendants’ own representations to
6 see the importance of the Bangor Project to Washington. As stated above, Bangor Base is the
7 homeport for the U.S. Pacific Fleet of Trident Ballistic Missile submarines. In justifying the need
8 for the Banger Project to Congress, the Navy claimed that the Project is necessary to address
9 “deficiencies” at Bangor Base. Pub. L. No. 115-232, § 2201 (2018). Specifically, the Navy
10 testified that the “[m]ission requirements” for the U.S. Pacific Fleet “have outpaced the ability”
11 of Bangor Base “to provide adequate facilities to support the secure transit of the ballistic
12 submarines between Bangor Base and surface/dive points in the Strait of Juan de Fuca.”
13 Declaration of Andrew Hughes (“Hughes Dec.”), Dkt. No. 17, Ex. A at 7 (stating that without
14 the Bangor Project “[f]ull operational capability of the [Transit Protection System] mission
15 cannot be executed.”). It is difficult for this Court to imagine much, if anything, that could be
16 more important to the State of Washington than that the nuclear-powered submarines carrying
17 nuclear warheads are secure when traveling through its waters. The potentially disastrous results
18 of unsecure nuclear weapons within the State’s boundaries are so obvious that they do not need
19 to be elaborated on here. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607
20 (1982) (states may sue to assert their “quasi-sovereign interest in the health and well-being—
21 both physical and economic—of [their] residents in general”). The Court concludes that the loss
22 of the Bangor Project is itself a sufficient injury to confer Article III standing. *See El Paso*
23 *County*, 2019 WL 5092396, *8 (W.D. Tex. October 11, 2019) (loss of construction project at
24
25

1 Fort Bliss represents a missed opportunity to “obtain a benefit,” which suffices to show injury in
2 fact for standing purposes).

3 **B. Washington’s Claims Under the Administrative Procedures Act**

4 Having found that the State has standing to bring this action, the Court next turns to the
5 merits of Washington’s APA claims. Under the APA, a court “shall ... hold unlawful and set
6 aside agency action” that is “arbitrary [and] capricious,” “not in accordance with the law” or that
7 is “in excess of statutory ... authority ... or limitations, or short of statutory right.” 5 U.S.C. §
8 706(2)(A), (C). As stated above, Washington asserts that Defendants’ diversion of \$88.96
9 million from the Bangor Project to fund border wall construction, purportedly pursuant to 10
10 U.S.C. § 2808, violates the APA for three distinct reasons: (1) it is “not in accordance with law”
11 because Defendants’ actions are barred by the CAA, (2) it is “in excess of statutory ... authority,
12 or limitations, or short of statutory right” because § 2808 does not, as Defendants claim,
13 authorize their actions, and (3) the administrative record demonstrates that Defendants acted
14 “arbitrar[ily] and capricious[ly]” by defunding the Bangor Project. Dkt. No. 15, Count V.
15 Washington argues that because Defendants’ actions violate the APA, it is “entitled to a
16 declaration that any action taken pursuant to the Proclamation is invalid, and an injunction
17 prohibiting Defendants from implementing the Proclamation or otherwise reprogramming funds
18 under [10 U.S.C.] § 2808.” *Id.* at ¶ 208. The Court will address the State’s arguments in turn.¹⁷
19
20
21
22
23
24
25

¹⁷ Because the Court holds that Defendants’ actions run afoul of the APA on other grounds, the Court need not and does not reach Washington’s argument that the “Defendants’ cancellation of hundreds of military construction projects” is arbitrary and capricious.” Dkt. No. 44 at 20.

1 **1. Defendants’ Actions Are “Not in Accordance With Law” Because They**
2 **Violate the Consolidated Appropriations Act**

3 The State argues that Defendants’ attempt to reprogram funds pursuant to § 2808 is a
4 violation of the APA, because it is “not in accordance with” the Consolidated Appropriations Act
5 of 2019 (“the CAA”). Pub. L. No. 116-6, div. A, 133 Stat. 13 (2019). Passed in the wake of the
6 partial government shutdown over the President’s demand for border wall funding, the CAA
7 constrains the Trump Administration’s use of appropriations for border wall construction in
8 several ways. First, Congress rejected the President’s demand for \$5.7 billion to build 175 miles
9 of a border wall and instead appropriated only \$1.37 billion to build 55 miles of pedestrian
10 fencing in Texas’s Rio Grande Valley. CAA § 230. Second, Congress differentiated this fencing
11 from the border wall, limiting the designs to ones already deployed, which did not use solid
12 material like concrete. *Id.* at § 230(b). And third, Congress included § 739 in the CAA. Section
13 739 prohibits the Administration from “increas[ing] ... funding for a[ny] program, project, or
14 activity as proposed in the President’s budget request for a fiscal year until such proposed change
15 is subsequently enacted in an appropriations Act, or unless such change is made pursuant to the
16 programming or transfer provision of this or any other appropriations Act.” CAA § 739. In other
17 words, § 739 explicitly prohibits the Trump Administration from circumventing Congress, and
18 instead requires that any increased funding for the border wall come through an appropriations
19 act.
20
21

22 Washington argues that Defendants’ attempt to use § 2808 to divert an additional \$3.6
23 billion in military construction spending to the eleven border barrier projects is in direct
24 contravention to the foregoing limitations Congress placed in the CAA. Defendants counter that
25 Washington reads the limitations in § 739 too expansively and that if Congress “wished to
restrict all other border barrier construction—including construction authorized by § 2808—it

1 could have plainly so stated, as it did elsewhere with respect to other funds in the CAA. The
2 President made clear prior to the CAA's passage his intention to use alternate statutory sources
3 to fund barrier construction, but Congress nonetheless included no rider forbidding it." Dkt. No.
4 43 at 30 (internal citations omitted). Defendants also argue that § 739 only limits any attempt to
5 increase the funding appropriated by Congress to the Department of Homeland Security through
6 the CAA. Because any funds utilized for border barrier construction pursuant to § 2808 will be
7 used as part of the Department of Defense military construction activities, the funds will not add
8 "additional money to a 'program, project, or activity' within one of [the Department of
9 Homeland Security] accounts." *Id.* at 31-32.

11 The Court holds that Defendants' attempt to procure additional funds for the border
12 barrier projects outside the appropriations framework violates § 739 of the CAA. As stated
13 above, § 739 specifically requires that any funds "made available in ...any other appropriation
14 act" that is "used to increase" funding for a "program, project or activity as proposed in the
15 President's budget request for a fiscal year" must be "enacted" or "made pursuant" to "an
16 appropriation Act." CAA § 739. It is beyond dispute that the border wall is a "program, project,
17 or activity" that was proposed in President Trump's budget request for the fiscal year 2019. *See*
18 Letter from Russell T. Vought, Acting Dir. of the Office of Mgmt. & Budget, to Richard Shelby,
19 Chairman of the Senate Comm. on Appropriations (Jan. 6, 2019) (requesting \$5.7 billion for
20 construction of a steel barrier along 234 miles of the southern border). It is also beyond dispute
21 that the military construction funds Defendants seek to reprogram to the border wall pursuant to
22 § 2808 were made available through appropriations by Congress to the Military Construction
23 Appropriations Act. Pub. L. No. 97-106, 95 Stat. 1503. Indeed, the Trump Administration has
24
25

1 conceded that the funds were appropriated by Congress.¹⁸ Therefore, according to the explicit
2 terms of § 739, any attempt to apply those funds to the border wall, must be “enacted” or “made
3 pursuant” to an “appropriations act.” Under federal law, an “appropriations Act” is an Act whose
4 title begins: “An Act making appropriations.” 2 U.S.C. § 622(5); 1 U.S.C. § 105. Section 2808
5 does not begin with this language; rather, it is a provision of the Military Construction
6 Codification Act, Pub. L. No. 97-124, 96 Stat. 153 (1982), which neither says anything about
7 appropriations in its title, nor makes any appropriations in its body. *El Paso County*, 2019 WL
8 5092396 at *15. Thus, Defendants’ attempt to divert funding to the eleven border barrier projects
9 through § 2808 is in direct conflict with § 739 of the CAA, and must be set aside under the APA.
10 5 U.S.C.A. § 706(2)(A) (courts should “hold unlawful and set aside agency action . . . found to
11 be . . . not in accordance with law”).

12
13 In reaching this conclusion, the Court rejects Defendants’ argument that the State lacks a
14 cause of action to enforce the CAA because the State’s alleged injuries fall outside the “zone of
15 interests” protected by that statute. The “zone-of-interests” requirement is a standing-like
16 limitation on claims that can be brought under the APA. *See Lexmark Int’l, Inc. v. Static Control*
17 *Components, Inc.*, 572 U.S. 118, 129 (2014). Under this doctrine, “a person suing under the APA
18 must satisfy not only Article III’s standing requirements, but an additional test: [t]he interest he
19 asserts must be ‘arguably within the zone of interests to be protected or regulated by the statute’
20 that he says was violated.” *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*,
21 567 U.S. 209, 224 (2012) (quoting *Association of Data Processing Service Organizations, Inc. v.*
22 *Camp*, 397 U.S. 150, 153 (1970)). However, the requirement “is not meant to be especially
23 demanding,” *Clarke v. Securities Industries Assn.*, 479 U.S. 388, 399 (1987), and the zone-of-
24
25

¹⁸ Fact Sheet, <http://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory>.

1 interest requirement “forecloses suit only when a plaintiff’s ‘interests are so marginally related to
2 or inconsistent with the purpose implicit in the statute that it cannot be reasonably assumed that’
3 Congress authorized that plaintiff to sue.” *Lexmark*, 572 U.S. at 130 (quoting *Patchak*, 567 U.S.
4 at 225). According to Defendants, the limitations in the CAA are meant to “regulate the
5 relationship between Congress and the Executive Branch regarding federal spending and in no
6 way protect the revenue streams of local governments to tax contractors and residents who
7 receive federal funds.” Dkt. No. 43 at 15. Defendants argue that “[n]othing in the CAA suggests
8 that Congress intended to allow lawsuits by state governments who seek to protect their future
9 tax revenue allegedly affected by the use of funds from a completely separate appropriations
10 statute.” *Id.*

12 This Court is not persuaded by Defendants’ argument. As stated above, during the three
13 weeks immediately following the government shutdown, and while a bipartisan committee was
14 tasked with negotiating a funding bill—*i.e.*, what ultimately became the CAA—President
15 Trump’s Administration repeatedly declared that the southern border wall “is going to be built,
16 with or without Congress.”¹⁹ Indeed, President Trump stated that he was specifically considering
17 declaring a national emergency at the southern border so that he could, in his view, unlock
18 military construction funds pursuant to § 2808.²⁰ Congress’s inclusion of § 739 in the CAA was
19 clearly a direct response to the President’s statement. Congress intended to appropriate only
20
21

22
23 ¹⁹ Andrew O’Reilly, *Mulvaney Says Border Wall Will Get Built, “With or Without” Funding from Congress*, Fox
News (Feb. 10, 2019), <https://perma.cc/NGM3-2FML>

24 ²⁰ *Remarks by President Trump During Roundtable Discussion with State, Local, and Community Leaders on*
Border Security and Safe Communities (Jan. 12, 2019) [https://www.whitehouse.gov/briefings-statements/remarks-](https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-congressional-leadership-border-security/)
25 [president-trump-meeting-congressional-leadership-border-security/](https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-senate-minority-leader-chuck-schumer-house-speaker-designate-nancy-pelosi/); see also, *Remarks by President Trump in*
Meeting with Senate Minority Leader Chuck Schumer and House Speaker-Designate Nancy Pelosi, The White
House (Dec. 11, 2018, 11:40 A.M.), [https://www.whitehouse.gov/briefings-statements/remarks-president-trump-](https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-senate-minority-leader-chuck-schumer-house-speaker-designate-nancy-pelosi/)
[meeting-senate-minority-leader-chuck-schumer-house-speaker-designate-nancy-pelosi/](https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-senate-minority-leader-chuck-schumer-house-speaker-designate-nancy-pelosi/)

1 \$1.37 billion to border barrier construction and it included § 739 in the CAA to prevent the
2 President from circumventing its funding limitation by obtaining funding outside the
3 appropriations process. In other words, § 739 is a reassertion of Congress’s spending authority,
4 authority that is exclusively Congress’s under the Constitution. U.S. Const., art. I, § 9, cl. 7;
5 *Nevada v. Dep’t of Energy*, 400 F.3d 9, 13 (D.C. Cir. 2005) (noting that the Appropriations
6 Clause vests in Congress the exclusive power over the federal purse).

7
8 Here, in accordance with its constitutional spending authority, Congress saw fit to
9 appropriate \$88.96 million to the Bangor Project. It further saw fit to limit funding for border
10 barrier construction to \$1.37 billion all in accordance with its exclusive spending power.
11 Washington alleges that Defendants seek to circumvent Congress’s spending authority by
12 procuring funds outside the appropriation framework, an action that Washington alleges is
13 specifically prohibited by § 739 of the CAA. Washington further alleges that such action will
14 injure it both in terms of lost tax revenue and loss of the Bangor Project. Such alleged injuries
15 fall squarely within the zone of interests CAA was meant to protect. Thus, Washington satisfies
16 the zone-of-interests requirement. *See Cook v. Billington*, 737 F.3d 767, 771 (D.C. Cir. 2013)
17 (Kavanaugh, J.) (“A plaintiff with Article III standing satisfies the [zone-of-interests]
18 requirement unless his interests are so marginally related to or inconsistent with the purposes
19 implicit in the statute that it cannot be reasonably assumed that Congress intended to permit the
20 suit.”) (quotation omitted).

22 **2. 10 U.S.C. § 2808 Does Not Authorize Defendants to Reprogram the Funds**

23 The State argues that Defendants’ actions violate the APA for the additional reason that
24 those actions are “in excess of statutory ... authority, or limitations, or short of statutory right.” 5
25 U.S.C. § 706(2)(C). Defendants rely on 10 U.S.C. § 2808 for authority to reprogram the funds.

1 However, § 2808 authorizes Defendants to “undertake military construction projects, not
2 otherwise authorized by law,” only under certain prescribed conditions. Specifically, the statute
3 requires the following: (1) that a national emergency “that requires use of the armed forces” has
4 been declared by the President in accordance with the National Emergencies Act, (2) that the
5 funds be used for “military construction projects,” and (3) that the military construction projects
6 are “necessary to support such use of the armed forces.” *Id.*²¹

7
8 The State argues that Defendants’ diversion of military construction funds is neither for
9 “military construction,” nor “necessary to support [the] use of the armed forces,” both criteria
10 that are explicitly required by § 2808. According to the State, the diversion is not, therefore,
11 authorized under the statute, as Defendants claim. For the reasons discussed below, the Court
12 finds that Defendants’ actions fail to meet the requirements of § 2808, and concludes that § 2808
13 does not authorize Defendants’ proposed use of the funds. Furthermore, Defendants’ actions,
14 being unauthorized, violate the APA. *See* 5 U.S.C. § 706(2)(C).

15
16 **a. The Border Wall Does Not Meet the Definition of “Military Construction”
Under § 2808**

17 The parties agree that the eleven proposed border barrier projects constitute
18 “construction”; the dispute is whether the projects constitute “*military* construction” as the term
19 is used in § 2808. In order to qualify as “military construction,” the statute requires that the
20 construction be “carried out with respect to a military installation.” 10 U.S.C. § 2801(a). A
21 “military installation” is defined as “a base, camp, post, station, yard center, or other activity
22

23
24 ²¹ U.S. Section 2808’s military construction authority has been invoked only twice since it was enacted in 1982, and
25 only once for a military construction project located in the United States. That project involved securing facilities
holding weapons of mass destruction shortly after the September 11, 2001 attacks. *See Sierra Club v. Trump*, 379 F.
Supp. 3d 883, 902 (N.D. Cal. May 24, 2019); *California v. Trump*, 407 F.Supp.3d 869, 877 (N.D. Cal. 2019). The
other authorization was for emergency construction funding “to deal with the threat to the national security and
foreign policy of the United States caused by the invasion of Kuwait by Iraq.” *Sierra Club*, at 902. (quoting Exec.
Order No. 12,734, 55 Fed. Reg. 48,099 (Nov. 14, 1990)).

1 under the jurisdiction of the Secretary of a military department[.]” § 2801(c)(4). In other words,
2 to be authorized under § 2808, the construction to which funds are diverted must be “carried out
3 with respect to” a “base, camp, post. . . or other activity under the jurisdiction of the Secretary of
4 a military department.” *Id.*

5 Defendants do not argue that border barrier projects are “being carried out with respect
6 to” a “base, camp, post, station, [or] yard center.” *See Sierra Club*, 379 F. Supp. 3d at 920
7 (“Defendants make no attempt to characterize the U.S.-Mexico border or a border barrier as a
8 ‘base, camp, post, station, yard [or] center.’ *Nor could they.*”) (emphasis added). Instead,
9 Defendants argue that the eleven border barrier projects “fall squarely within the definition of
10 ‘military installation’” for two reasons. Dkt. No. 47 at 10. First, Defendants claim that the eleven
11 projects constitute “military installations” under § 2801(c)(4) because each project “fall[s] within
12 the broad scope” of the purported catch-all category, “any other activity.” *Id.* Second,
13 Defendants point out that two of the projects are located on the Barry M. Goldwater Range, a
14 preexisting military installation in Arizona, and that the other nine will be on land that has
15 recently been administratively assigned to Fort Bliss, a military installation near El Paso, Texas.
16 Therefore, as Defendants’ second argument goes, all eleven projects are “under the jurisdiction”
17 of a military “base” and thus satisfy the definition of “military installation” under § 2801(c)(4).
18 The Court concludes that neither argument is availing.

21 **(i) Defendants’ Proposed Definition of “Any Other Activity” Is Unduly Broad**

22 As to the first argument, while the Court recognizes that the two barrier projects located
23 on the Goldwater Range meet the statute’s definition of “military installation,” the Court finds
24 that the remaining nine projects do not satisfy that requirement. In reaching this decision, the
25 Court rejects Defendants’ unduly expansive reading of “other activity” in § 2801(c)(4)’s

1 definition of “military installation.” Under “the familiar interpretive canon *noscitur a sociis*, ‘a
2 word is known by the company it keeps.’” *McDonnell v. United States*, ___ U.S. ___, 136 S. Ct.
3 2355, 2368 (2016) (quoting *Jarecki v. G.G. Searle & Co.*, 367 U.S. 303, 307 (1961)); *see also*,
4 *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (“[W]here general words follow
5 specific words in a statutory enumeration, the general words are construed to embrace only
6 objects similar in nature to those objects enumerated by the preceding specific words.”
7 (quotation omitted)). The canon is “wisely applied where a word [in a statute] is capable of many
8 meanings in order to avoid” giving “unintended breadth to the Acts of Congress.” *Ibid*.

9
10 Applying this principle to the phrase “other activity” as it is used in § 2801(c)(4), the
11 Court concludes that the terms “base, camp, post, station, yard [or] center” that precede “other
12 activity” in the definition of “military installation” provide a contextual limitation to the meaning
13 of “other activity” as it is used in the statute. That limitation is that the “other activity” must be
14 similar in nature or scope to “a base, camp, post, station, yard, [or] center.” Indeed, “[h]ad
15 Congress intended for ‘other activity’ in Section 2801(c)(4) to be so broad as to transform
16 literally any activity conducted by the Secretary of a military department into a ‘military
17 installation,’ there would have been no reason to include a list of specific, discrete military
18 locations.” *Sierra Club*, 379 F. Supp. 3d at 921(citing *Yates v. United States*, — U.S. —, 135
19 S.Ct. 1074, 1087 (2015) (“Had Congress intended ‘tangible object’ in § 1519 to be interpreted so
20 generically as to capture physical objects as dissimilar as documents and fish, Congress would
21
22
23
24
25

1 have had no reason to refer specifically to ‘record’ or ‘document.’ The Government's unbounded
2 reading of ‘tangible object’ would render those words misleading surplusage.”)).

3 **(ii) The Projects Are Not “Carried Out With Respect to a Military Installation”**
4 **Merely Because They Are on Land that Has Been or Will Be**
5 **Administratively Assigned to Fort Bliss**

6 The Court also rejects Defendants’ second argument: that so long as the projects are on
7 land that is “under the jurisdiction of the Secretary of a military department,” the projects fall
8 within the definition of “military installation.” Here, two of the projects will be located on the
9 Goldwater Range. As to the remaining nine projects, of the proposed projects that are located on
10 federal land, the Trump Administration intends to transfer that land to the Department of
11 Defense. For the proposed projects that are not on federal land, the Trump Administration
12 intends to have the Department of Defense acquire or condemn the private land. Once the land
13 for all nine proposed projects is in the possession of the Department of Defense, it will then
14 administratively assign the land to Fort Bliss. *See* AR at 3. Therefore, Defendants argue, each of
15 the projects will be on land “under the jurisdiction” of the Department of Defense.
16

17 As stated earlier, this Court agrees that the two projects located at the Goldwater Range
18 fall within the definition of “military installation” because they are located on an existing
19 military facility under the jurisdiction of the Department of Defense. As to the remaining nine
20 projects, however, the Court cannot accept Defendants’ claim that Congress intended land to fall
21 within the definition of “military installation” whenever the Department of Defense expresses an
22 intent to obtain land or administratively assigns land to a military facility. Under Defendants’
23 proposed interpretation of “military installation,” there would theoretically be no limit to what
24 could be considered a military installation. This Court declines to conclude that Congress
25 intended to grant the Department of Defense “boundless authority to reallocate military

1 construction funds to build anything [it] want[s], anywhere [it] want[s], provided that [it] first
2 obtain[s] jurisdiction over the land where the construction will occur.” *California v. Trump*, 407
3 F. Supp. 3d at 893.

4 In reaching this conclusion, the Court finds relevant the circumstances in which
5 Defendants’ actions arise. As outlined more fully above, Congress repeatedly and deliberately
6 declined to appropriate the full funds the President requested for a border wall along the southern
7 border of the United States. The President, in response, repeatedly threatened to declare a
8 national emergency at the southern border so that, in his view, he could invoke § 2808 to obtain
9 the funding Congress refused to provide him. Thus, under Defendants’ expansive definition of
10 “military installation,” § 2808 would allow the Executive Branch to redirect billions of dollars
11 from projects to which Congress appropriated funds to projects that Congress specifically
12 *declined* to fund. Such an interpretation defies not only the text of the statute, but logic itself. As
13 Justice Field wrote more than a century ago, a court cannot shut its “eyes to matters of public
14 notoriety and general cognizance. When we take our seats on the bench we are not struck with
15 blindness, and forbidden to know as judges what we see as men.” *Ho Ah Kow v. Nunan*, 12 F.
16 Cas. 252, 255 (C.C.D. Cal. 1879).
17
18

19 Nor is the Court persuaded by Defendants’ reliance on the Supreme Court’s decision in
20 *United States v. Apel*, 571 U.S. 359 (2014). In *Apel*, the Supreme Court was asked to determine
21 whether the term “military installation” as it is used in a trespass statute, means property that the
22 military has exclusive use, possession, or control over. *Apel* involved a case in which an anti-war
23 protestor was arrested for trespassing in a designated protest area on Vandenberg Air Force Base.
24 The designated area was located on an easement for right-of-way that the Base had granted to the
25 County of Santa Barbara. The protestor challenged his arrest, arguing that the designated area

1 was not part of a “military installation” within the meaning of the trespass statute because the Air
2 Force did not exercise exclusive control over it. The Supreme Court rejected the protestor’s
3 argument, holding that the term “military installation” as it is used in the trespass statute does not
4 require that the military retain exclusive control over the property at all times. In doing so, the
5 Court noted that “‘military duty’ and ‘military protection’ are synonymous with the exercise of
6 *military jurisdiction*,” and that the term “‘military installation’ is used [that way] elsewhere in
7 the federal law.” *Id.* at 368 (emphasis in original). While the Supreme Court cited to the
8 language of 10 U.S.C. § 2801(c)(4) as an example of the term “military installation” in another
9 statute, the Court did not engage in any analysis whatsoever of the statute and it is disingenuous
10 for Defendants to suggest otherwise. Simply put, the Court declines to accept Defendants’
11 invitation to stretch an illustrative comment by the Supreme Court to binding precedent in this
12 case.
13

14 In sum, as Judge Gilliam stated in *California v. Trump*, “Section 2808 was [not] intended
15 to be used to resolve policy disputes with Congress or to provide the Executive Branch with
16 unchecked power to transform the responsibilities assigned by law to a civilian agency into
17 military ones by reclassifying large swaths of the southern border as ‘military installations.’ Such
18 an interpretation defies both the text and spirit of the statute.” 407 F.Supp.3d at 896.
19

20 Accordingly, the Court concludes that with the exception of the two Goldwater Range projects,
21 the proposed border barrier projects do not meet the definition of “military construction” set
22 forth in the statute.
23

24 **b. The Border Wall Is Not “Necessary to Support Such Use of Armed Forces”
Under § 2808**

25 The Court also concludes that Defendants’ redirection of funds is not authorized under §
2808 for a second, independently sufficient reason. Even if Defendants had established that all

1 eleven of the proposed barrier projects constitute “military construction” within the meaning of
2 §2808, Defendants would still have to demonstrate that the projects “are necessary to support
3 such use of the armed forces” along the southern border. Defendants rely on a lengthy
4 administrative record that they claim establishes that the projects are necessary to provide such
5 support. However, even crediting the facts and giving due deference to the military
6 determinations in the administrative record, this Court finds that Defendants have failed to meet
7 their burden.

8
9 On April 4, 2018, the President directed the Secretary of Defense to support the
10 Department of Homeland Security “in securing the southern border and taking other necessary
11 actions” due to “[t]he crisis at our southern border.” *California v. Trump*, 407 F. Supp. 3d at 869.
12 Accordingly, as of August 13, 2019, approximately 5,500 Department of Defense personnel have
13 been sent to the southern border. *Id.* The Department of Defense personnel are primarily serving
14 in “support roles that relieve [Department of Homeland Security] personnel of non-law
15 enforcement duties,” such as “logistics, planning, and intelligence analysis,” as well as providing
16 “monitoring and detection support” through the use of “mobile surveillance camera units” or
17 “aerial reconnaissance.” *Id.* Defendants argue that the proposed border barrier projects “would
18 improve the effectiveness and efficiency of [these 5,500 Department of Defense] personnel by
19 allowing them to shift away from providing such support to frequent, low risk border incursions
20 and instead concentrate on monitoring, tracking, and responding to a smaller, more focused set
21 of higher risk activities at the border.” Dkt. No. 43 at 27 (citing AR 57) *see also* Preliminary
22 Assessment from the Chairman of the Joint Chiefs of Staff, AR 119-24 (concluding that
23 constructing the physical barriers in areas where Department of Defense personnel are deployed
24 would allow those forces to be re-prioritized to other missions in support of the Department of
25

1 Homeland Security). Defendants further assert that the proposed barrier projects will “serv[e] as
2 a force multiplier for the [Department of Homeland Security]” and thereby “reduce reliance by
3 [the Department of Homeland Security] on [the Department of Defense] for force protection,
4 surveillance support, engineering support, and air support[.]” *Id.* at 27-28. Defendants also claim
5 that the proposed barrier projects “would give a distinct and enduring advantage to the Border
6 Patrol as a force multiplier, and would provide agents with capabilities to respond more quickly
7 to illicit activities.” *Id.* (citing AR 56-57). Lastly, Defendants point out that the Secretary of
8 Defense selected the eleven proposed projects because he concluded that those projects in
9 particular “will deter illegal entry, increase the vanishing time of those illegally crossing the
10 border, and channel migrants to ports of entry.” *Id.* at 29 (citing AR 9).

12 The foregoing portions of the Administrative Record highlighted by Defendants clearly
13 demonstrate that the purpose of the eleven border barrier projects is to help secure the southern
14 border which, of course, is the responsibility of domestic law enforcement—specifically the
15 Department of Homeland Security and Customs and Border Patrol—not the Department of
16 Defense. *See* 6 U.S.C § 202 (empowering the Department of Homeland Security “to [s]ecur[e]
17 the borders, territorial waters ports, terminals, waterways, and air, land, and sea transportation
18 systems of the United States”); 8 U.S.C. §§ 1103(a)(5) (charging the Secretary of Homeland
19 Security with “the power and duty to control and guard the boundaries and borders of the United
20 States”); *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000) (“Securing the border ... [is], of
21 course, law enforcement activit[y].”); *Snapshot: A Summary of CBP Facts and Figures*; U.S.
22 Customs & Border Protection (Dec. 2018), <http://perma.cc/H3JS-PH9C> (Customs and Border
23
24
25

1 Patrol is the “largest federal law enforcement agency in the United States” and its mission is to
2 “safeguard America’s borders”).

3 This distinction between the jurisdiction of domestic law enforcement and the
4 Department of Defense is both historic, and critical to this case. Indeed, the military is expressly
5 prohibited from making “direct active use of Federal troops” to execute domestic law
6 enforcement under the Posse Comitatus Act, 18 U.S.C. § 1385. *See also Laird v. Tatum*, 408
7 U.S. 1, 15 (1972) (Chief Justice Burger noting that there is “a traditional and strong resistance of
8 Americans to any military intrusion into civilian affairs” that “has deep roots in our history and
9 found early expression, for example, in the Third Amendment’s explicit prohibition against
10 quartering soldiers in private homes without consent and in the constitutional provisions for
11 civilian control of the military”); *United States v. Dreyer*, 804 F.3d 1266, 1272 (9th Cir. 2015)
12 (noting that the Posse Comitatus Act “prohibits Army and Air Force military personnel from
13 participating in civilian law enforcement activities”).
14

15 Defendants argue that the border barrier projects will “support” the armed forces at the
16 border by reducing the amount of assistance they provide to the Department of Homeland
17 Security. The problem with Defendants’ argument is that the administrative record makes clear
18 that the proposed projects are intended to support and benefit the Department of Homeland
19 Security, a civilian agency, not the armed forces. That such border barrier projects may be
20 beneficial to the Department of Defense in that the projects will relieve some of its personnel
21 from assisting the Department of Homeland Security in meeting its mission does not establish
22 that the projects are *necessary* to support the use of the armed forces at the southern border,
23 which, of course, is the requirement set by Congress in § 2808. Indeed, when asked what the
24 Department of Defense personnel are doing at the border that could not be performed by the
25

1 Department of Homeland Security, Admiral Michael Gilday, operations director for the Joint
2 Staff, responded: “[n]one of the capabilities that we are providing [at the southern border] are
3 combat capabilities. It’s not a war zone along the border.”²² Simply put, the southern border is
4 not a militarized zone; it is the responsibility of the Department of Homeland Security to ensure
5 that the border is secure—a law enforcement function explicitly outside the purview of the
6 Department of Defense. *See California v. Trump*, 407 F. Supp. 3d at 897-98 (“[T]he Court
7 cannot blind itself to the plain reality presented in this case: the border projects Defendants now
8 assert are ‘necessary to support the use of the armed forces’ are the very same projects
9 Defendants sought—and failed—to build under DHS’s civilian authority, because Congress
10 would not appropriate the requested funds. Even where review is ‘deferential,’ courts are not
11 required to exhibit a naivete from which ordinary citizens are free.” (internal quotation omitted)).
12 Accordingly, the Court finds that the border barrier projects are not necessary to support the
13 armed forces within the meaning of § 2808.
14

15 **c. The Court Rejects Defendants’ Threshold Defenses to Plaintiff’s Challenge**
16 **to Defendants’ Reliance on § 2808**

17 The Court reaches the merits of Plaintiff’s *ultra vires* challenge to Defendants’ actions, as
18 discussed above, because it rejects the two threshold defenses that Defendants have raised: (1)
19 that Plaintiff’s claims do not meet the “zone-of-interests” required of APA claimants; and (2)
20 that Plaintiff’s claims are not justiciable. Both defenses fail, for the reasons that follow.
21

22 ***The “zone-of-interests” requirement***

23 Defendants argue that Washington cannot pursue a claim under the APA because the
24 State’s alleged injuries fall outside the “zone of interests” protected by § 2808, a defense
25

²² Heather Timmons, *The US Border Situation Isn’t a National Emergency, Pentagon Officials Tell Congress*, Quartz (Jan. 29, 2019).

1 Defendants also raised with respect to Plaintiff's claim that Defendants' actions violate the CAA.
2 *See supra*, § IV.B.1. As discussed more fully above, a plaintiff pursuing a challenge under the
3 APA must show its interests fall within the "zone of interests" that the statute at issue was
4 designed to protect. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 567 U.S. at 224.

5 The Court concludes that the zone-of-interests test does not apply to Plaintiff's challenge
6 to Defendants' reliance on § 2808. As the Ninth Circuit recently noted in a case directly on point,
7 it seems unlikely "that there could be a zone of interests requirement for a claim alleging that
8 official action was taken in the absence of all authority." *Sierra Club v. Trump*, 929 F.3d 670,
9 700 (9th Cir. 2019); *see also Sierra Club v. Trump*, 379 F. Supp. 3d at 943; *El Paso County v.*
10 *Trump*, 2019 WL 5092396, at *12, n.1 (both cases holding that the zone-of-interests requirement
11 does not apply to *ultra vires* challenges against federal agency action).
12

13 ***Justiciability***

14 Defendants' second threshold defense of their reliance on § 2808 is that the use of
15 military construction funds pursuant to § 2808 necessarily involves a nonjusticiable political
16 question that is beyond the purview of this Court. Specifically, Defendants charge that President
17 Trump's determination that a national emergency that requires the use of the armed forces at the
18 southern border is not subject to judicial review by this Court. Defendants' argument is threefold.
19 First, Defendants claim that the President's action is not reviewable under the APA. Second, the
20 Defendants argue that the President's national emergency declaration is a nonjusticiable political
21 question. Lastly, Defendants contend that Washington cannot challenge a statutorily authorized
22 discretionary judgment of the President.
23
24

25 As an initial matter, it is important to note that—with respect to its challenge to
Defendants' reliance on § 2808—Washington is not challenging the lawfulness of the President's

1 Proclamation itself. During oral argument, the State made clear that its challenge to § 2808 does
2 not require this Court to set aside the Proclamation, nor question the President’s deployment of
3 the armed forces to the southern border. Rather, Washington is challenging whether the
4 Secretary of Defense’s action—*i.e.*, the decision to divert military construction funds from the
5 Bangor Project to the eleven border barrier projects—is authorized by § 2808. Thus, this Court
6 need not (and does not) consider the lawfulness of President Trump’s Proclamation in order to
7 determine whether the Secretary of Defense’s action is in compliance with § 2808.
8

9 Put in this light, the Court finds that Defendants’ justiciability argument does not hold
10 water. Washington is not challenging the President’s emergency declaration. It is challenging the
11 actions of the Secretary of Defense in reprogramming the funds; and such agency actions are
12 indisputably reviewable under the APA. *O.A. v. Trump*, 404 F. Supp. 3d 109, 148 (D.D.C.
13 August 2, 2019) (that an agency action relies on “a presidential proclamation or other
14 presidential order” does not insulate the action “from APA review”). Likewise, Washington is
15 not challenging the President’s determination that an emergency exists at the southern border
16 that requires the use of armed forces. It is questioning whether the eleven border barrier projects
17 meet the definition of “military construction” set forth in § 2801. Such statutory interpretation is
18 well within the domain of this Court.²³ *See Sierra Club*, 929 F.3d at 687 (quoting *Zivotofsky ex*

21 ²³ Defendants also argue that the Secretary of Defense’s determination that the border barrier projects “are necessary
22 to support such use of the armed forces” is “a military judgment committed to the Secretary” by law and, as such,
23 beyond this Court’s review. Dkt. No. 43 at 26. According to Defendants, there “is no meaningful standard by which
24 the Court can review the Secretary of Defense’s decision that the border barrier projects ‘are necessary to support
25 such use of the armed forces’” and, therefore, the decision is “committed to agency discretion by law.” *Id.* (quoting
5 U.S.C. § 701(a)(2), 10 U.S.C. § 2808). Moreover, Defendants argue, even if the Secretary’s decision was
reviewable, it would be entitled “to substantial deference from this Court.” *Id.* A decision is committed to agency
discretion by law, and thus not subject to judicial review, when a court would have “no meaningful standard against
which to judge the agency’s exercise of discretion.” *Perez v. Wolf*, 943 F.3d 853, 860 (9th Cir. 2019). However, that
is not the case here. Rather, § 2808 provides “meaningful standards” for reviewing Defendants’ actions by imposing
clear limits on the Secretary’s authority to reprogram the funds. Thus, § 2808 establishes clear statutory standards
that constrain the Secretary’s use of the statute and applying those statutory standards to the Secretary’s actions “is a
familiar judicial exercise.” *Sierra Club v. Trump*, 929 F.3d at 687 (quoting *Zivotofsky ex rel. Zivotofsky v. Clinton*,

1 *rel. Zivotofsky v. Clinton*, 566 U.S. 189, 197 (2012) (determining whether Defendants’
2 “reprogramming of funds is consistent” with a statute “is a familiar judicial exercise”).

3 **C. Washington’s Constitutional Claims**

4 In addition to challenging Defendants’ actions under the APA, Washington also argues
5 that Defendants’ actions violate the Constitution, specifically the Presentment Clause (Article I,
6 Section 7, Clauses 2 and 3), the Appropriations Clause (Article I, Section 9, Clause 7), the Take
7 Care Clause (Article II, Section 3), and the nondelegation doctrine (rooted in Article I, Section
8 1). *See* Dkt. No. 15, Counts I-IV.

9
10 The Court is cognizant of the “well-established principle” that a court should not reach a
11 “constitutional question if there is some other ground upon which to dispose of the case.” *Nw.*
12 *Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009). Given that this Court has
13 already determined that Defendants’ funding plan violates the APA and, therefore, can dispose
14 of the case on that basis, the Court exercises restraint and declines to reach the constitutional
15 claims raised by Washington. *See Harmon v. Brucker*, 355 U.S. 579, 581 (1958) (“In keeping
16 with our duty to avoid deciding constitutional issues presented unless essential to propose
17 disposition of a case, we look first to petitioner’s non-constitutional claim that respondent
18 [Secretary of the Army] acted in excess of powers granted him by Congress.”).

19 **D. Injunctive Relief**

20
21 Having found that Defendants’ redirection of military construction funds under § 2808
22 violates the APA, the Court next considers the State’s request for injunctive relief. Washington
23 seeks an injunction that permanently enjoins Defendants from “diverting funds appropriated by
24

25
566 U.S. 189, 196 (2012)). Accordingly, the Secretary of Defense’s invocation of § 2808 is subject to review by this Court.

1 Congress for military construction projects towards construction of a border wall.” Dkt. No. 15
2 at ¶ 210. In other words, Washington requests that this Court issue an injunction that prohibits
3 Defendants from diverting *any* funds through § 2808 to the border barrier construction projects,
4 not just the \$88.96 million appropriated for the Bangor Project.²⁴

5 “According to well-established principles of equity, a plaintiff seeking a permanent
6 injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must
7 demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such
8 as monetary damages, are inadequate to compensate for that injury; (3) that, considering the
9 balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and
10 (4) that the public interest would not be disserved by a permanent injunction.” *eBay Inc. v.*
11 *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Where, as here, the government is the
12 defendant, the last two factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). “An injunction
13 is a matter of equitable discretion; it does not follow from success on the merits as a matter of
14 course.” *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 32-33 (2008) (citing *Weinberger v.*
15 *Romero-Barcelo*, 456 U.S. 305, 313 (1982) (“[A] federal judge sitting as chancellor is not
16 mechanically obligated to grant an injunction for every violation of law”). Further, an injunction
17 “should be no more burdensome to the defendant than necessary to provide complete relief” to
18 the plaintiff. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

21 Defendants do not challenge whether Washington has adequate available remedies at law.
22 Instead, Defendants focus on the remaining two elements for injunctive relief, arguing that such
23

24 _____
25 ²⁴ In the amended complaint, Washington also requests a declaration that the President’s national emergency Proclamation is invalid, that Defendants’ attempt to divert pursuant to § 2808 previously appropriated military construction funds is invalid, and that the McCain NDAA that committed \$88.96 million to the Bangor Project remains valid law. Dkt. No. 15 at ¶ 209. However, the parties do not address the merits of this request in the cross-motions for summary judgment, so the Court will decline to do so as well.

1 relief is not warranted because the State has failed to establish irreparable injury and because the
2 government's compelling interests in constructing the border barrier projects outweigh
3 Washington's interests. In arguing that the State has not established an irreparable injury,
4 Defendants simply reiterate their claim that "the indirect effects of anticipated lost tax revenues"
5 are insufficient for purposes of Article III standing, and therefore, "insufficient to establish an
6 irreparable injury" for purposes of injunctive relief. Dkt. No. 43. For the same reasons that the
7 Court concluded that Plaintiff has standing, *see supra* § IV.A., it concludes that loss of the
8 Bangor Project and loss of the tax revenue associated with it is an irreparable injury warranting
9 an injunction.
10

11 Next, Defendants argue that the balance of equities and public interest weigh in their
12 favor because they have a compelling interest in the safety and integrity of our borders, and in
13 ensuring that the armed forces "are properly supported and have the necessary resources" in their
14 mission to support "[the Department of Homeland Security] at the southern border." Dkt. No. 43
15 at 38. It can hardly be denied that the public has a strong interest both in the integrity of this
16 country's borders and in ensuring that the armed forces are well-supported while deploying the
17 missions. *See Landon v. Plasencia*, 459 U.S. 21, 34 (1982). However, doing so cannot be done at
18 the expense of our laws. *See East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779 (9th Cir.
19 2018) (citing *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers) (noting
20 that the public has an interest in ensuring that "statutes enacted by [their] representatives" are not
21 imperiled by executive fiat). This Court has already determined that Defendants' attempt to
22 divert previously appropriated military construction funds to the border barrier projects pursuant
23 to § 2808 violates the APA. The Court concludes that the public's interest in ensuring that the
24
25

1 government abides by its laws outweighs the government's proffered interest in this case. Thus,
2 Washington is entitled to a permanent injunction.

3 Next the Court addresses the scope of the injunction. As stated above, Washington
4 requests that this Court enjoin Defendants from diverting any funds under § 2808 to the border
5 barrier projects, not just the \$88.96 million appropriated by Congress to the Bangor Project. The
6 State argues that this Court "is not required to chop up the Secretary of Defense's single decision
7 [to divert funds under § 2808] into 127 sub-decisions to accommodate Defendants' desire to
8 carry on an illegal diversion of funding that cannot be undone." Dkt. No. 44 at 29.

9 The Court declines the State's request to enjoin the Defendants' redirection of all \$3.6
10 billion in military construction funds, for two reasons. First, this Court is required to narrowly
11 tailor the relief requested to fully address Washington's alleged injuries, but no more. *See*
12 *Califano*, 442 U.S. at 702 (injunctive relief "should be no more burdensome to the defendant
13 than necessary to provide complete relief" to the plaintiff). Enjoining Defendants from using the
14 \$88.96 million designated for the Bangor Project will fully remedy Washington's asserted harm
15 and return the State to the same position it was in prior to Defendants' actions. No broader
16 injunction is necessary to provide Washington with complete relief.

17 Second, the Court believes that an injunction narrowly tailored to the State-specific
18 injuries alleged in this case need not be stayed pending appeal. As noted above, two sister courts
19 have already enjoined the Defendants' actions as to the entire \$3.6 billion in redirected funds.
20 *See supra*, n. 16. Those injunctions have been stayed by various courts pending appeal. *See*
21 *Trump v. Sierra Club*, 140 S. Ct. 1 (2019); *El Paso Cnty. v. Trump*, No. 19-51144 (5th Cir. Jan.
22 8, 2020); *California v. Trump*, 407 F. Supp. 3d at 909. The Court concludes that an injunction
23 relating to only the \$88.96 million appropriated to the Bangor Project is not necessarily
24
25

1 controlled by or subject to the stays entered by the Supreme Court, the Fifth Circuit, or the
2 Northern District of California. *Id.* That is because those cases involve different plaintiffs and
3 materially different alleged injuries. The Supreme Court reversed the Ninth Circuit and granted
4 Defendants’ application for a stay, noting that “[a]mong the reasons is that the Government has
5 made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review
6 of the Acting Secretary’s compliance with Section 8005.” *Trump v. Sierra Club*, 140 S. Ct. at 1.
7 Similarly, in granting the defendants’ application for a stay of the injunction in *El Paso County*,
8 the Fifth Circuit noted “the substantial likelihood that Appellees lack Article III standing.” *El*
9 *Paso Cnty. v. Trump*, No. 19-51144. These rationales do not apply to the instant case, which
10 involves distinct causes of action, a different plaintiff, different alleged injuries, and a different
11 basis for standing. Having distinguished the strength of the State’s standing from those cases in
12 which stays have been entered, the Court therefore also finds it appropriate to narrowly tailor the
13 State’s remedy.
14

15 V. CONCLUSION

16 For the foregoing reasons, the Court HEREBY GRANTS in part and DENIES in part
17 Washington’s motion for summary judgment. Dkt. No. 16. The Court DENIES Defendants’
18 cross motion for summary judgment. Dkt. No. 43. The Court HEREBY ORDERS as follows:

19 (1) Defendants’ decision to reprogram \$88.96 million in military construction funds
20 previously appropriated by Congress for the Bangor Project pursuant to 10 U.S.C. § 2808 is not
21 authorized by the statute and violates the CAA. Therefore, the decision is VACATED and set
22 aside in accordance with Administrative Procedures Act (5 U.S.C. § 706(c)) and
23

24 (2) Defendants Mark Esper, in his official capacity as Secretary of Defense and Chad F.
25 Wolf, in his capacity as Acting Secretary of Homeland Security, and all persons acting under

1 their direction, are PERMANENTLY ENJOINED from redirecting the \$88.96 million in military
2 construction funds appropriated to the Bangor Project to fund any of the eleven proposed border
3 barrier construction projects as outlined above.

4 Dated this 27th day of February, 2020.

5
6 

7 Barbara Jacobs Rothstein
8 U.S. District Court Judge
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25