No. 19-16102, 19-16300, 19-16299, 19-16336

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA CLUB, et al.,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,
Defendants-Appellants.

STATE OF CALIFORNIA, et al.,
Plaintiffs-Appellees-Cross-Appellants,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,
Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of California

FURTHER EXCERPTS OF RECORD

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FURTHER EXCERPTS OF RECORD
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***Sierra Club v. Trump*, No. 4:19-cv-00892 (N.D. Cal.)**

EXHIBIT 10

Unclassified

REPROGRAMMING ACTION – PRIOR APPROVAL

Subject: Counternarcotics for U.S. Southern Command	**DoD Serial Number:** FY 07-41 PA
Appropriation Title: Military Personnel, Army, 07/07; and Drug Interdiction and Counter-Drug Activities, Defense, 07/07	**Includes Transfer?** Yes

Component Serial Number:	*(Amounts in Thousands of Dollars)*							
	Program Base Reflecting Congressional Action		Program Previously Approved by Sec Def		Reprogramming Action		Revised Program	
Line Item	Quantity	Amount	Quantity	Amount	Quantity	Amount	Quantity	Amount
a	b	c	d	e	f	g	h	i

This reprogramming action is submitted for prior approval because it uses general transfer authority pursuant to section 8005 of Public Law 109-289, the Department of Defense Appropriations Act, 2007; and section 1001 of Public Law 109-364, the John Warner National Defense Authorization Act for Fiscal Year (FY) 2007. This action transfers $1.3 million from the Military Personnel, Army, 07/07, appropriation to Drug Interdiction and Counter-Drug Activities, Defense, 07/07, appropriation. This action reprograms funds in support of higher priority items, based on unforeseen military requirements, than those for which funds were originally appropriated; and is determined to be necessary in the national interest. They meet all administrative and legal requirements, and none of the items has been denied previously by the Congress.

FY 2007 REPROGRAMMING INCREASE: **+1,300**

Drug Interdiction and Counter-Drug Activities, Defense, 07/07 **+1,300**

P.L. 109-289, Title VI 973,874 973,874 **+1,300** 975,174

Explanation: Funding will be used to support U.S. Southern Command's counternarcotics efforts in Central America through the construction of an infrastructure project (Blue Fields/Corn Island facility) in Nicaragua. This project will increase the interdiction capability of the Western Caribbean against the "go-fast" boat threat that is transporting cocaine to the United States.

FY 2007 REPROGRAMMING DECREASE: **-1,300**

Military Personnel, Army, 07/07 **-1,300**

Budget Activity 4: Subsistence of Enlisted Personnel

3,810,702 3,601,556 **-1,300** 3,600,256

Explanation: The Defense Logistics Agency recently implemented a business process change that provided the Army with discrete visibility over theater premium transportation charges for the Subsistence-in-Kind account. Previously, these charges were embedded in subsistence bills charged to the Military Personnel appropriation. The charges now post to the Operation and Maintenance appropriation. As a result, the Military Personnel appropriation subsistence account has an asset.

Approved (Signature and Date) SEP 7 2007

Congress of the United States
House of Representatives
Committee on Appropriations
Washington, DC 20515–6015

RECEIVED
SEP 25 2007

September 24, 2007

The Honorable Tina W. Jonas
Under Secretary of Defense, Comptroller
Department of Defense
Washington, DC 20301

Dear Madam Secretary:

The Committee has received and reviewed your request to reprogram $1,300,000 within Military Personnel, Army, 07/07; and Drug Interdiction and Counter-Drug Activities, Defense, 07/07 (FY 07-41 PA).

The Committee interposes no objection to the proposed reprogramming.

Sincerely,

John P. Murtha
Chairman
Defense Subcommittee

United States Senate
COMMITTEE ON APPROPRIATIONS
WASHINGTON, DC 20510-6025
http://appropriations.senate.gov

RECEIVED
SEP 25 2007

September 20, 2007

The Honorable Tina W. Jonas
Under Secretary of Defense (Comptroller)
The Pentagon
Washington DC 20301

Dear Ms. Jonas:

The Committee has reviewed your fiscal year 2007 reprogramming action FY 07-41 PA, dated September 7, 2007, and supports the transfer of funds requested.

Sincerely,

TED STEVENS
Ranking Member
Committee on Appropriations
Subcommittee on Defense

DANIEL K. INOUYE
Chairman
Committee on Appropriations
Subcommittee on Defense

HOUSE COMMITTEE ON ARMED SERVICES

U.S. House of Representatives

Washington, DC 20515–6035

ONE HUNDRED TENTH CONGRESS

September 19, 2007

RECEIVED
SEP 24 2007

The Honorable Tina W. Jonas
Under Secretary of Defense, Comptroller
3E822 Defense, Pentagon
Washington, D.C. 20301

Dear Secretary Jonas:

The House Committee on Armed Services has completed its review of the proposed reprogramming FY07-41 PA, dated September 7, 2007. This reprogramming would transfer $1.3 million from the Military Personnel, Army, 07/07 appropriation to the Drug Interdiction and Counter-Drug Activities, Defense, 07/07 appropriation.

The committee interposes no objections to the proposed reprogramming.

Sincerely,

IKE SKELTON
Chairman

DUNCAN HUNTER
Ranking Member

IS/DH:amh

United States Senate
COMMITTEE ON ARMED SERVICES
WASHINGTON, DC 20510-6050

September 20, 2007

The Honorable Tina Jonas
Under Secretary of Defense (Comptroller)
3E822 Pentagon
Washington, D.C. 20301-1100

Dear Secretary Jonas:

The Committee on Armed Services has reviewed reprogramming requests FY07-37 PA, FY07-39 PA, FY07-40 PA, FY07-41 PA, and FY07-42 PA and has no objection to your proceeding with these transfers.

Sincerely,

Carl Levin
Chairman

EXHIBIT 11

Unclassified **REPROGRAMMING ACTION –PRIOR APPROVAL** Page 1 of 1

Subject: National Guard Border Security Shortfalls	DoD Serial Number: FY 06-31 PA
Appropriation Title: Operation and Maintenance, Defense-Wide, 06/07; Operation and Maintenance, Air Force, 06/06; and Operation and Maintenance, Navy Reserve, 06/06	Includes Transfer? Yes

Component Serial Number:	*(Amounts in Thousands of Dollars)*							
	Program Base Reflecting Congressional Action		Program Previously Approved by Sec Def		Reprogramming Action		Revised Program	
Line Item	Quantity	Amount	Quantity	Amount	Quantity	Amount	Quantity	Amount
a	b	c	d	e	f	g	h	i

This reprogramming action is submitted for approval because it uses $415.0 million of general transfer authority pursuant to section 8005 of Public Law 109-148, the Department of Defense (DoD) Appropriations, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006; and section 1001 of Public Law 109-163, the National Defense Authorization Act for Fiscal Year (FY) 2006. This reprogramming action provides funding in support of higher priority items, based on unforeseen military requirements, than those for which originally appropriated; and are determined to be necessary in the national interest. It meets all administrative and legal requirements, and none of the items have previously been denied by the Congress. Specifically, this reprogramming action transfers $415.0 million from the Operation and Maintenance, Air Force, 06/06, ($200.0 million) and the Operation and Maintenance, Navy Reserve, 06/06, ($215.0 million) appropriations to the Operation and Maintenance, Defense-Wide, 06/07, appropriation to support the National Guard in its border security mission.

FY 2006 REPROGRAMMING INCREASE:			**+415,000**	
Operation and Maintenance, Defense-Wide, 06/07			**+415,000**	
Border Security	708,000	392,700	**+415,000**	807,700

Explanation: Funds are required to support critical Operation Jump Start efforts for the National Guard during FY 2007.

FY 2006 REPROGRAMMING DECREASES:			**-415,000**	
Operation and Maintenance, Air Force, 06/06			**-200,000**	
Budget Activity 1: Operating Forces	17,672,772	17,786,655	**-200,000**	17,586,655
Operation and Maintenance, Navy Reserve, 06/06			**-215,000**	
Budget Activity 1: Operating Forces	1,702,889	1,691,467	**-215,000**	1,476,467

Explanation: Funds appropriated in Division B, Title I, Chapter 2 of Public Law 109-148 are excess.

Approved (Signature and Date) SEP 22 2006

DD 1415-3 ***UNCLASSIFIED***

United States Senate

COMMITTEE ON ARMED SERVICES
WASHINGTON, DC 20510–6050

September 28, 2006

The Honorable Tina W. Jonas
Under Secretary of Defense (Comptroller)
3E822 Pentagon
Washington, D.C. 20301-1100

Dear Secretary Jonas:

The Committee on Armed Services has reviewed reprogramming request FY 06-31 PA. The Committee is disappointed that the revised plan for Operation Jump Start that was briefed to the committee staff to justify this reprogramming has changed from the plan briefed to the Congress when the supplemental request for this operation was submitted just four months ago. The plan was submitted to Congress with the assurance that at least two-thirds of the National Guard manpower for Operation Jump Start would be provided by personnel as part of their Annual Training (AT). The Committee is also disappointed that no attempt was made to brief Congress on these changes until the Department decided, at the last moment, to capture expiring funds to cover this substantial cost increase, leaving the committees very little time to obtain information on these proposed changes before acting. With respect to the funding source, while the statutory language can be read to provide the required authority to transfer these funds, we believe that such transfers go beyond the original congressional intent of providing separate funding for specific emergency purposes and should not become a standard practice.

The Committee does not object to these transfers, subject to the following condition. When the supplemental was submitted to the Congress in May, we were assured that no additional funding would be needed for fiscal year 2007. Before this $415 million in additional funding for fiscal year 2007 is obligated, the committee directs the Department to provide the congressional defense committees with a fiscal year 2007 plan for this operation that specifies the new projected breakout of AT and Active Duty Special Work manyears for fiscal year 2007, and the projected cost of this revised plan.

With kind regards, I am

Sincerely,

John Warner
Chairman

United States Senate
COMMITTEE ON APPROPRIATIONS
WASHINGTON, DC 20510–6025
http://appropriations.senate.gov

September 26, 2006

The Honorable Tina W. Jonas
Under Secretary of Defense (Comptroller)
The Pentagon
Washington DC 20301

Dear Ms. Jonas:

The Committee has reviewed your fiscal year 2006 reprogramming action FY 06-31 PA, dated September 22, 2006, and will interpose no objection.

With best wishes,

Cordially,

DANIEL K. INOUYE
Ranking Member
Committee on Appropriations
Subcommittee on Defense

TED STEVENS
Chairman
Committee on Appropriations
Subcommittee on Defense

COMMITTEE ON ARMED SERVICES

U.S. House of Representatives

Washington, DC 20515–6035

ONE HUNDRED NINTH CONGRESS

September 28, 2006

Honorable Tina W. Jonas
Under Secretary of Defense, Comptroller
3E822 Defense, Pentagon
Washington, D.C. 20301

Dear Secretary Jonas:

The House Committee on Armed Services has completed its review of the proposed reprogramming FY06-31 PA, dated September 22, 2006. The request seeks approval to transfer $200.0 million from Air Force Operation and Maintenance Accounts and $215.0 million from Navy Reserve Operation and Maintenance Accounts to Defense-Wide Operation and Maintenance Accounts. This transfer will support Operation Jump Start efforts for the National Guard during fiscal year 2007.

The committee interposes no objections to the proposed reprogramming, however, this approval is based on the understanding that no additional funding will be required for Operation Jump Start during fiscal year 2007. In addition, the committee understands that the reprogrammed funds are excess to both the Air Force Operation and Maintenance Account and the Navy Reserve Operation and Maintenance Account and that all requirements related to Hurricane Katrina relief are met.

In conclusion, the committee is greatly disturbed by the late notice provided for this reprogramming action but will grant approval of the request due to its strong support for Operation Jump Start. Furthermore, the committee is displeased by the Department's gross underestimation of costs related to the mission, based on faulty assumptions regarding the availability of Army National Guard Military Personnel funds. These assumptions were at best overly optimistic, reflecting poor planning and communication between the National Guard Bureau and the states' adjutant generals. In the future, the committee expects earlier notice and greater detail in connection with these reprogramming requests.

Sincerely,

Duncan Hunter
Chairman

Ike Skelton
Ranking Member

Congress of the United States
House of Representatives
Committee on Appropriations
Washington, DC 20515–6015

September 25, 2006

Received
Sep 26, 2006

The Honorable Tina W. Jonas
Under Secretary of Defense, Comptroller
Department of Defense
Washington, DC 20301

Dear Madam Secretary:

The Committee has received and reviewed your request to reprogram $415,000,000 within Operation and Maintenance, Defense-Wide, 06/07; Operation and Maintenance, Air Force, 06/06; and Operation and Maintenance, Navy Reserve, 06/06 (FY 06-31 PA).

The Committee interposes no objection to the proposed reprogramming.

Sincerely,

C. W. Bill Young
Chairman
Defense Subcommittee

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Attorneys for Plaintiffs (Additional counsel listed on following page)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO-OAKLAND DIVISION

SIERRA CLUB and SOUTHERN BORDER COMMUNITIES COALITION,

Plaintiffs,

v.

DONALD J. TRUMP, President of the United States, in his official capacity; PATRICK M. SHANAHAN, Acting Secretary of Defense, in his official capacity; KEVIN K MCALEENAN, Acting Secretary of Homeland Security, in his official capacity; and STEVEN MNUCHIN, Secretary of the Treasury, in his official capacity,

Defendants.

Case No.: 4:19-cv-00892-HSG

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date:
Time:
Judge: Honorable Haywood S. Gilliam
Dept: Oakland
Date Filed: June 12, 2019
Trial Date: Not set

42 U.S.C. § 4332. To comply with that mandate, NEPA's implementing regulations require an agency to complete at least an initial Environmental Assessment to determine whether a proposed action will have such impacts. 40 C.F.R. 1501.4(b)-(c). DoD does not dispute that its actions have significant effects on the environment, nor that it has failed to prepare an Assessment. Instead, Defendants rely upon determinations issued by the Secretary of Homeland Security purporting to waive various statutory requirements, including NEPA, pursuant to Section 102(c) of IIRIRA.

Section 102(c) allows DHS to waive compliance with laws to the extent "necessary to ensure expeditious construction of the barriers and roads *under this section*"—that is, under Section 102 of IIRIRA. IIRIRA § 102(c) (emphasis added). As such, DHS's purported waiver can only eliminate the Department of Defense's NEPA obligations if the "expeditious construction" is "under" IIRIRA authority. Defendants insist, however, that their projects are *not* being undertaken under DHS's IIRIRA authority; in an attempt to evade the restrictions of the CAA, they have characterized the actions as occurring "under" Section 284. Defendants cannot have it both ways. If Defendants are diverting funds toward border barrier construction that is derivative of DHS's authorities, they have violated statutory and constitutional law. *See supra* I and II. In the alternative—that is, if the Department of Defense's construction pursuant to Section 284 is not derivative of DHS's Section 102(c) authority, Defendants have failed to satisfy their obligations under NEPA.[3]

IV. Ultra vires review is proper and, in the alternative, APA review is available.

A "court may grant injunctive relief against executive officers to enjoin both ultra vires acts—that is, acts exceeding the officers' purported statutory authority—and unconstitutional acts." PI Order 28. *See also Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949) ("[W]here [an] officer's powers are limited by statute, his actions beyond those limitations . . . are ultra vires his authority and therefore may be made the object of specific relief."). Plaintiffs' "cause of action, which exists outside of the APA, allows courts to review ultra vires actions by the President that go beyond the scope of the President's statutory authority." *Hawaii v. Trump*, 878 F.3d 662, 682 (9th Cir. 2017), *rev'd on other grounds*, 138 S. Ct. 2392 (2018).

[3] Plaintiffs acknowledge that the Court did not find they were likely to succeed on this NEPA argument, but respectfully present it for the Court's consideration on the merits.

"[W]here a plaintiff seeks equitable relief against a defendant for exceeding its statutory authority, the zone-of-interests test is inapposite." PI Order 30; *see also Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987) ("Appellants need not, however, show that their interests fall within the zones of interests of the constitutional and statutory powers invoked by the President in order to establish their standing to challenge the interdiction program as ultra vires."). Even if Plaintiffs were required to satisfy a further zone-of-interest test with respect to Defendants' claimed Section 8005 authority, the test would pose no obstacle to the Court's review. "The test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (quotations omitted). The inquiry is causal: zone-of-interests requires only that an injury "somehow be tied to" a violation of the underlying statutory or constitutional purpose. *Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 654 F.3d 919, 932 (9th Cir. 2011).

Here, Plaintiffs' interest in avoiding circumvention of Congress's decision to deny funds is entirely aligned with Section 8005's purpose. Plaintiffs were involved with Congress's funding decisions with respect to the border wall, and repeatedly advocated with lawmakers to limit the scope and location of any construction. *See* Houle Decl. ¶ 7; Gaubeca Decl. ¶ 5. They now seek to enforce the denial of funds that Congress enacted in the CAA. *See Clarke v. Sec. Indus. Ass'n.*, 479 U.S. 388, 401 (1987) (zone-of-interests analysis "not limited to considering the statute under which respondents sued" but must consider "overall context" and "overall purposes" of congressional action). "[I]t is sufficient that the Organizations' asserted interests are consistent with and more than marginally related to the purposes of the [statute]." *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1244 (9th Cir. 2018). Plaintiffs' "stake in opposing" the use of Section 8005 to circumvent Congress's protection of the lands Plaintiffs treasure is "intense and obvious," and easily passes the "zone-of-interests test[, which] weeds out litigants who lack a sufficient interest in the controversy." *Patchak v. Salazar*, 632 F.3d 702, 707 (D.C. Cir. 2011), *aff'd sub nom. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209.

Finally, even if the Court ultimately views these claims as challenges arising under Section

8005, rather than nonstatutory ultra vires claims, it may treat them as APA claims. *See, e.g.*, *Alto v. Black*, 738 F.3d 1111, 1117 (9th Cir. 2013) (electing to consider under APA claims not "explicitly denominated as an APA claim" as they were "fairly characterized as claims for judicial review of agency action under the APA"); *Clouser v. Espy*, 42 F.3d 1522, 1533 (9th Cir. 1994) ("We shall therefore treat plaintiffs' arguments as being asserted under the APA, although plaintiffs sometimes have not framed them this way in their pleadings."). The transfers are final agency decisions because "the initial agency decisionmaker arrived at a definitive position and put the decision into effect," *Oregon Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 984-85 (9th Cir. 2006) (quotation omitted), leading directly to the challenged harms to Plaintiffs, PI Order 24-25.

V. The Court should order injunctive and declaratory relief.

A. The Court should enter a permanent injunction.

Less than one month ago, this Court issued a preliminary injunction finding that "Plaintiffs are likely to show that Defendants' actions exceeded their statutory authority, and that irreparable harm will result from those actions." PI Order 55. The material facts remain unchanged since then, and the standard for a permanent injunction is "essentially the same," except that a plaintiff must show actual success on the merits instead of a likelihood of success. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008). More specifically, a party seeking a permanent injunction must show that "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1088 (9th Cir. 2015) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). Plaintiffs have satisfied these requirements.

1. Plaintiffs will suffer irreparable harm absent a permanent injunction.

The undisputed facts demonstrate that, without an order permanently enjoining construction in the areas designated as El Paso Sector 1, Yuma Sector 1, El Centro, and Tucson Sector 1, 2, and 3, Plaintiffs' members will suffer irreparable harm to their recreational and aesthetic interests. Defendants' proposed construction "will lead to a substantial change in the environment" that