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Redirecting Army Corps of Engineers Civil Works Resources During National Emergencies

In January 2019, news outlets reported that the Trump Administration was investigating redirecting U.S. Army Corps of Engineers (USACE) civil works funds to construct physical barriers along the U.S.-Mexico border. USACE is an agency in the Department of Defense (DOD) that performs both military and civil works activities. Section 923 of the Water Resources Development Act of 1986 (WRDA 1986; 33 U.S.C. §2293) provides the Secretary of the Army authority to redirect civil works resources in the event of a declared war or national emergency that requires or may require use of the Armed Forces.

In 1985 and 1986, during deliberations on the proposed authority to allow the Secretary of the Army to redirect civil works resources, the authority was discussed as a means to more easily draw upon civil works resources to meet mobilization construction requirements in times of war and national emergencies (e.g., building barracks for mobilized reserve units). The authority appears not to have been used since its enactment. In January 2019, USACE indicated it had no information on any past uses of the authority, and was unable to provide current implementation guidance documents for the authority.

Among the issues for Congress that might be raised if 33 U.S.C. §2293 were used to fund construction of a border wall or fence as part of immigration enforcement efforts is the effect that a redirection of funds might have on USACE's water resource projects. USACE civil works responsibilities consist primarily of three types of water resource projects: improvements for supporting commercial navigation, measures to reduce flood damage, and restoration of aquatic ecosystems.

This CRS product provides a primer on the authority to redirect civil works resources, USACE civil works funding, and the legislative history of 33 U.S.C. §2293. It also discusses ways other than 33 U.S.C. §2293 that USACE has been or could be involved in wall or fence construction along the U.S.-Mexico border. For a broader discussion of issues for Congress related to using various authorities and DOD funding for border wall construction, see CRS Legal Sidebar LSB10242, *Can the Department of Defense Build the Border Wall?*

Authority to Redirect Resources

In 1986, Congress provided the Secretary authority to terminate or defer certain civil works projects and redirect these resources. Specifically, 33 U.S.C. §2293(a) states:

In the event of a declaration of war or a declaration by the President of a national emergency in

accordance with the National Emergencies Act [50 U.S.C. 1601 et seq.] that requires or may require use of the Armed Forces, the Secretary, without regard to any other provision of law, may (1) terminate or defer the construction, operation, maintenance, or repair of any Department of the Army civil works project that he deems not essential to the national defense, and (2) apply the resources of the Department of the Army's civil works program, including funds, personnel, and equipment, to construct or assist in the construction, operation, maintenance, and repair of authorized civil works, military construction, and civil defense projects that are essential to the national defense.

If 33 U.S.C. §2293 were to be used, the Administration's interpretation of the legal authority provided in 33 U.S.C. §2293 and policy decisions regarding the use of the authority are among the factors that might shape which USACE budget accounts and which civil works projects would be affected. As previously noted, there is no publicly available implementation guidance regarding the process for the Secretary of the Army to use this authority. Beyond requiring that the Secretary deem the terminated or deferred civil works project as not essential to national defense, the language in 33 U.S.C. §2293 does not specify which USACE civil works budget accounts may be tapped or which types of projects may be terminated or deferred. Current, publicly available FY2019 information on USACE financial resources is limited (e.g., no information on current obligated and unobligated amounts in USACE civil works accounts or at the project level). According to the *FY2018 United States Army Corps of Engineers—Civil Works Annual Financial Report*, the agency had \$37.7 billion in civil works funding (including emergency supplemental funds) available for expenditure across all USACE civil works accounts in FY2018.

Congressional Notification

Pursuant to 33 U.S.C. §2293(b), the Secretary of the Army is required to immediately notify the "appropriate committees of Congress" of any action taken pursuant to the authority. The Secretary also is required to cease using 33 U.S.C. §2293 authorities within 180 days of the end of the state of war or termination of the national emergency (pursuant to 50 U.S.C. §1622).

Civil Works Funding

USACE uses most of its civil works appropriations to work on specific studies and projects authorized by Congress. Congress typically funds USACE civil works activities through multiple accounts in annual Energy and Water

Development appropriations acts (e.g., \$7 billion for USACE civil works accounts in the Energy and Water, Legislative Branch, and Military Construction and Veterans Affairs Appropriations Act, 2019 [P.L. 115-244]). In late 2018, USACE published an FY2019 work plan for its civil works activities. The work plan identified specific USACE projects to receive the funds that Congress provided in P.L. 115-244. Similar to recent annual Energy and Water Development Appropriations acts, P.L. 115-244 restricts the agency's reprogramming and use of funds (e.g., Sections 101, 102, and 103 of Title I of Division A, Title I of P.L. 115-244).

Since FY2005, Congress has expanded the use of emergency supplemental appropriations legislation to fund USACE to perform not only flood response, but also long-term flood recovery projects (e.g., constructing new flood control projects) in the wake of various flood disasters. These funds are provided directly to USACE civil works accounts. These are not Federal Emergency Management Agency funds or funding connected to the Disaster Relief Fund. (For more on disaster relief funding, see CRS Report R41981, *Congressional Primer on Responding to Major Disasters and Emergencies*.)

In February 2018, in the Bipartisan Budget Act of 2018 (BBA 2018; P.L. 115-123), Congress appropriated more than \$17 billion in emergency supplemental appropriations to USACE civil works accounts. Congress specifically appropriated \$15 billion in BBA 2018 funds for the USACE Construction account for use on construction of flood and storm damage reduction projects. The use of BBA 2018 study and construction funds was limited to flood and storm damage reduction projects in states and territories affected by three hurricanes in 2017 (Harvey, Irma, and Maria), and to states and territories affected by more than one flood-related major disaster declared pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. §§5121 et seq.) in calendar years 2014, 2015, 2016, or 2017. The Stafford Act declarations are a BBA 2018-established requirement for states and territories to qualify for some of the BBA 2018 funds; the BBA 2018 funds for USACE civil works are not derived from Stafford Act-related authorities or funds.

BBA 2018 also established other conditions that apply specifically to the BBA 2018 funds for USACE, such as waiving the nonfederal cost-sharing requirements for USACE construction projects in Puerto Rico. From July 2018 through September 2018, USACE released a series of tables identifying the projects on which the agency anticipated using the BBA 2018 funds. The table for the \$15 billion in USACE construction funds showed flood and storm damage reduction projects representing \$13.9 billion (e.g., \$4.9 billion for projects in Texas, \$2.5 billion for projects in Puerto Rico, \$2.4 billion for projects in California). For more on USACE civil works budget accounts and appropriations, including BBA 2018 funds and related projects, see CRS Report R45326, *Army Corps of Engineers Annual and Supplemental Appropriations: Issues for Congress*.

Although Congress in P.L. 115-244 and BBA 2018 conditioned the use of appropriated civil works funds (e.g., geographic eligibility criteria for the use of BBA 2018 funds), President Trump may choose to declare a national emergency along the southern border and have the Secretary of the Army exercise the authority in 33 U.S.C. §2293 to redirect funds and resources away from civil works projects deemed not essential to the national defense. As previously noted, for a discussion of legal questions raised by such an approach, see CRS Legal Sidebar LSB10242, *Can the Department of Defense Build the Border Wall?*

Legislative History of 33 U.S.C. §2293

The authority to redirect civil works resources during a declared war or national emergency was submitted by the Reagan Administration in February 1985 as part of its proposal for a water resources development bill. The Senate authorizing committee's reported WRDA 1986 legislation (S. 1567, 99th Congress) identified a declared war as the circumstances in which the authority to redirect civil works funds would become available. An amendment on the Senate floor expanded the provision to include a declared national emergency. Other aspects of the legislative history of 33 U.S.C. §2293 from the mid-1980s that may shape perspectives on the authority include statements describing the anticipated scope and use of the authority.

USACE and Border Wall Construction

Other departments and agencies often call upon USACE's engineering and contracting expertise. For example, USACE has the lead under the National Response Framework for public works and engineering. In these circumstances, the requesting department or agency uses its own funds to pay for the work performed by USACE.

USACE has been involved in past border security construction efforts, largely through work performed for the Department of Homeland Security. USACE performs this work on a reimbursable basis; that is, there is no indication that USACE civil works project funds have been used directly for past border wall or fencing construction.

Another potential avenue for USACE involvement in border wall construction is through the military construction authorities in the event of a national emergency (e.g., 10 U.S.C. §2808). For more on the military construction authorities, see CRS Insight IN11017, *Military Construction Funding in the Event of a National Emergency*. Commitment of USACE staff, expertise, and resources to border wall construction may raise questions about USACE readiness and capabilities to perform its military, civil works, and disaster response roles. USACE readiness is an example of potential tradeoffs that the 116th Congress and the Trump Administration face as part of deliberation on approaches to manage immigration enforcement and other activities at the U.S.-Mexico border.

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