

CRS Report for Congress

Received through the CRS Web

“Corps of Engineers Reform” in WRDA 2005

Nicole T. Carter
Analyst in Environmental Policy
Resources, Science, and Industry Division

Summary

Enactment of Water Resources Development Acts (WRDAs) in recent Congresses has been complicated by proposed changes to U.S. Army Corps of Engineers (Corps) policies and practices. S. 728, WRDA 2005, contains provisions to alter the formulation, review, and implementation of Corps water resources projects. These provisions are fueling disagreement about the appropriate direction for change and are shaping the WRDA debate in the 109th Congress. One view is that Corps projects could be improved by increasing environmental considerations in project planning, implementing external review, and enacting more stringent requirements for fish and wildlife mitigation. Another view supports refinements to Corps planning, review, and mitigation that are aimed at limiting the length and increasing the predictability of the project development process, while not increasing costs. The changes to Corps practices proposed in S. 728 draw upon multiple views; most changes proposed in WRDA bills in the 108th Congress and other legislation draw more heavily upon the former view. This report will be updated as legislative events warrant.

Controversial proposals to change Corps policies and practices have complicated or stalled the passage of some Water Resources Development Acts (WRDAs) in recent Congresses. WRDA is the typical legislative vehicle for Congress to authorize water resources activities and policy changes for the civil works program of the U.S. Army Corps of Engineers. Under its civil works program, the Army Corps of Engineers plans, constructs, and operates water resources facilities primarily for flood damage reduction, navigation, and environmental purposes. (For more information on the agency, see CRS Report RS20866, *The Civil Works Program of the Army Corps of Engineers: A Primer*, by Nicole T. Carter and Betsy A. Cody.) WRDA often receives biennial congressional consideration, but no WRDA has been enacted since 2000.

S. 728, WRDA 2005, started the legislative consideration of WRDA in the 109th Congress. The primary issues that appear to be shaping consideration in the 109th Congress are the same as in the 108th Congress: authorized spending (e.g., the amount of authorizations in the bill and the bill’s potential budgetary impact), changes to Corps policies and practices, and authorization of a few controversial projects. The S. 728 provisions that would change Corps planning, review, and fish and wildlife mitigation are

the subject of some debate. This CRS report discusses these three provisions and compares them to similarly titled provisions in prior WRDA bills. For more information on the other issues shaping the WRDA 2005 debate, see CRS Issue Brief IB10133, *Water Resources Development Act (WRDA): Army Corps of Engineers Authorization Issues in the 109th Congress*, coordinated by Nicole T. Carter.

Background

Support for changing the Corps' practices gained momentum in 2000 in the wake of a series of critical articles in the *Washington Post*, whistleblower allegations, and ensuing investigations. Many of the supporters of these changes, primarily environmental groups, sought to modify Corps project planning (e.g., by changing the benefit-cost analysis and consideration of environmental impacts and benefits) to require additional review of Corps projects (e.g., through external review of Corps feasibility reports), and to strengthen environmental protection (e.g., through modifications to fish and wildlife mitigation requirements). These kinds of changes often were referred to as "Corps reform." Although Corps reforms were discussed in the 106th, 107th, and 108th Congresses, no significant changes were enacted. (For background information on Corps reform issues, see CRS Report RL30928, *Army Corps of Engineers: Civil Works Reform Issues in the 107th Congress*, by Nicole T. Carter.) Some Members of Congress, along with navigation and other interests, were satisfied with existing practices.

Although the 106th Congress did not enact Corps changes, it asked the National Academy of Sciences to review Corps planning in §216 of WRDA 2000. In April 2004, the Academy's National Research Council (NRC) published four reports from this review. Each report recommended changes in Corps practices and the larger water resources management context. The Corps argues that it has transformed itself by changes it has implemented since 2000, and other changes that are nearing completion; these include refinements in planning, internal review (with the possibility of external review), and wetlands mitigation.¹

WRDA legislation considered, but not enacted, during the 108th Congress. On September 24, 2003, the House passed H.R. 2557 (H.Rept. 108-265) — WRDA 2003. During the House Transportation and Infrastructure Committee's markup of the bill, selected Corps reform provisions were added. The Senate Environment and Public Works Committee reported S. 2773 (S.Rept. 108-314) — WRDA 2004 — on August 25, 2004, and it was placed on the Senate's legislative calendar. S. 2773 contained some Corps reform provisions, as well as provisions authorizing a few high-profile projects that were not included in H.R. 2557. Reportedly, the consideration of S. 2773 was shaped largely by discussions over the authorization of these projects and the contents of the Corps reform provisions. No further action was taken on the either bill.

Many environmental advocates for change viewed the planning, independent review, and fish and wildlife mitigation provisions in H.R. 2557 as a first step in changing the Corps; however, they generally stated support for stronger measures and additional measures. Environmental groups criticized provisions in S. 2773 on the same issues for

¹ The Corps summarized its efforts at [http://www.usace.army.mil/inet/functions/cw/hot_topics/18apr_changes.htm], visited April 21, 2005.

failing to significantly improve the Corps' project planning and implementation. Supporters of the agency's practices argued there was no need for such changes because the Corps' project development and review process was sufficiently thorough. They viewed the provisions in S. 2773 as burdensome, potentially delaying Corps projects.

Evolution of the Corps Reform Debate

The debate over changing the Corps has evolved. As shown by S. 753, the Corps of Engineers Modernization and Improvement Act of 2005, some continue to support the types of Corps reform measures that largely grew out of the exposure the Corps received in 2000. Others argue that any changes should move in a different direction than the original measures pursued after the 2000 events. These stakeholders, like many nonfederal sponsors of Corps projects, want to increase the predictability of the Corps planning process by making changes such as standardizing planning procedures, models, and data; limiting the length of studies; and requiring tracking of the agency's construction backlog. In other words, there are at least two views of how to change the Corps that derive from fundamentally divergent perspectives of what, if anything, is wrong with the Corps' practices.

Corps Reform in WRDA 2005

Provisions to change the Corps in S. 728, WRDA 2005, reflect various views; although some elements of S. 728 are similar to provisions negotiated during WRDA considerations in the 108th Congress, many elements of S. 728 are either new or significantly modified. Judgements of the merits of the S. 728 provisions vary widely, depending on perspectives on the Corps project development process and on the direction of any change.

The S. 728 provisions that would change Corps procedures on planning (§2006), independent review (§2007), and fish and wildlife mitigation (§2008) are the subject of some debate. These three provisions, however, are not the only provisions in S. 728 changing Corps practices and policies. Other provisions also could be analyzed in the context of Corps reform (e.g., §2005, requiring a Corps fiscal transparency report, and §2015, requiring cost-sharing for monitoring of ecosystem restoration projects) and may be seen by some observers as implementing changes similar to the NRC recommendations. The analysis herein focuses on §§2006, 2007, and 2008 due to their role in WRDA 2005's consideration.

Planning. Corps planning is based largely on the *Principles and Guidelines for Water and Related Resources Implementation Studies* (P&G), prepared by the Water Resources Council in 1983 to guide federal water resources development.² Using the P&G as a framework, the Corps publishes its own planning guidance. The agency last revised its planning guidance in April 2000, and amended it in June 2004. Environmental groups criticize the Corps for insufficient attention and rigor to its analysis of the environmental damages of its flood control and navigation projects; some of these groups want the Corps to update its guidance to incorporate contemporary analytical techniques

² The WRC was established pursuant to the 1965 Water Resources Planning Act (42 U.S.C. §1962-b2); it is currently dormant due to a lack of funding.

and changes in public values and federal agency programs. For example, Corps analyses currently include economic development benefits from wetlands losses; some want these benefits to be excluded. Many nonfederal project sponsors support other changes to Corps planning, such as greater attention to local and regional benefits of Corps projects, and increased predictability through a planning process limited in time and in the scope of required studies. They cite examples of decade-long Corps feasibility studies costing tens of millions of dollars as the justification for some of these changes.

Section 2006 of S. 728 contains elements from planning sections of the two WRDA bills of the 108th Congress, but also includes new provisions. Section 2006 of S. 728, like S. 2773 (108th Congress), would require the Corps to periodically update its planning guidelines and regulations. Section 2006 has benefit-cost analysis requirements that include some but not all of the requirements in S. 2773. For example, S. 728 would require a Corps feasibility study to be based on a benefit-cost analysis that identifies risk and uncertainty; national, regional, and economic benefits and costs; costs and benefits of protection or degradation of natural systems; and social, cultural, and historical properties costs and benefits. In contrast to S. 2773, §2006 of S. 728 does not exclude from analyses the benefits and costs associated with the increase in direct federal payments or subsidies and the benefits attributable to wetlands drainage, reduction, or loss. S. 728 also does not require the Corps to apply to water resources projects an economic discount rate used by other federal agencies, as S. 2773 would have required.³

Section 2006 would require that the federal objective of a Corps study be (1) to maximize net national economic benefit, consistent with protecting the environment, for flood damage reduction and navigation projects, and (2) to maximize net national ecosystem benefits, consistent with economic development, for ecosystem restoration projects. These planning objectives are similar to provisions in H.R. 2557.

There are numerous provisions in §2006 that were in neither WRDA bill of the 108th Congress. For example, §2006 largely limits Corps feasibility studies to two years, requires a risk analysis for cost estimates, and requires review and development of multiple elements of the water planning process (such as development of approved methods and models to apply to water resources planning). Section 2006 also requires that the Chief's report be submitted, upon completion, to the Senate Environment and Public Works Committee and the House Transportation and Infrastructure Committee. Currently, upon the completion of a Chief's report, informational copies are sent to the committees, and the formal submission occurs after policy compliance reviews by both the Assistant Secretary of the Army (Civil Works) and the Office of Management and Budget (OMB). There are numerous other policy-related changes in §2006 that were not in either WRDA bill of the 108th Congress.

Independent Review. Prior to policy compliance review by the Assistant Secretary and OMB, Corps feasibility reports and supporting studies are reviewed internally by staff from Corps districts, divisions, and agency headquarters. The federal actions identified in a feasibility report are subject to public comment as part of

³ For background information on Corps discount rates, see CRS Report RL31976, *Benefit-Cost Analysis and the Discount Rate for the Corps of Engineers' Water Resource Projects: Theory and Practice*, by Kyna Powers.

compliance with the National Environmental Policy Act of 1969 (NEPA, P.L. 91-190, 42 U.S.C. §4321). Some Corps feasibility studies and reports also have undergone external review, often at the direction of Congress. The Corps has indicated that it is nearing completion of peer review guidance to be applied at Corps districts to the scientific information supporting selected feasibility reports. Some environmental groups contend that an external review of Corps planning is necessary. They claim that it could counter deficiencies in the internal review and an institutional-cultural bias of the agency for large construction projects. Others argue that the Corps' existing review process and the additional steps being taken by the agency are sufficient, and that external review would add little more to projects than costs and delays.

Section 2007 of S. 728 would establish review requirements that appear substantially different from the independent review provisions in the WRDA bills of the 108th Congress. Key differences include what would be reviewed and by whom. Section 2007 would establish a policy that "major engineering, scientific, and technical work products related to Corps of Engineers decisions and recommendations" be peer reviewed. Unlike the review requirements proposed in the 108th Congress that tied review to project studies or reports, §2007 reviews would apply to work products, which may or may not be related to specific Corps projects. This would allow for methods, models, procedures, and data used in many Corps studies to undergo general reviews, rather than being reviewed on a project-by-project basis. Section 2007 does not state which "major" work products would be the subject of review; instead, it requires the Corps to publish and implement peer review guidelines within a year of enactment. Section 2007 would prohibit the review of specific recommendations and of the application of policy to recommendations.

Section 2007 would not require that the review be external to the Corps; however, it provides for the possibility of external review. Section 2007 does not provide guidance on how the external review decision would be made; it appears that the Corps guidelines required to be developed under §2007 would address this matter.

Rather than delegating to the Corps the responsibility for establishing the guidelines for review, the review provisions in H.R. 2557 and S. 2773 of the 108th Congress directed the review process by identifying what would be reviewed and by whom. Both bills tied review to project studies or reports, although they would have had different universes of projects subject to review. The reviews would have been conducted independently from the Corps; for instance, S. 2773 prohibited the participation of Corps employees; and H.R. 2557 required that the review be conducted by a National Academy of Sciences panel, or a panel by another independent, eligible organization. These bills also did not appear to explicitly prohibit the review of specific recommendations or the application of policy to recommendations, as §2007 of S. 728 would.

Fish and Wildlife Mitigation. WRDA 2000 called for a study by the General Accounting Office (GAO, now the Government Accountability Office) on the effectiveness of concurrent mitigation for fish and wildlife impacts of Corps projects. In the May 2002 GAO report, titled *US Army Corps of Engineers: Scientific Panel's Assessment of Fish and Wildlife Mitigation Guidance* (GAO-02-574), most of the panelists rated the overall quality of the Corps' mitigation program as moderate or good while also identifying some areas of concern. For example, panelists noted that mitigation design was emphasized to the detriment of mitigation monitoring and evaluation, and that wetlands were emphasized over other land forms. They also pointed

out that Corps guidance did not require corrective actions to be made where mitigation features failed. The June 2004 amendment to the Corps' planning guidance addressed some aspects of mitigation, such as requiring Corps mitigation plans to include provisions for mitigation monitoring. The Corps currently is not required to complete a specific amount of mitigation before beginning project construction; according to the Corps, completing a specific amount might not be feasible in some cases (e.g., if excavated project material is used for mitigation activities). Environmental advocates contend that the Corps has not been held to the same mitigation standards as other developers, particularly for wetlands. They propose full mitigation for environmental impacts of projects by replacing habitat destroyed acre-for-acre and linking appropriations for mitigation and construction. Opponents of such changes argue that the existing planning process and regulations provide sufficient environmental protection, and that further requirements would only cause delay and increase costs.

The §2008 fish and wildlife mitigation provision in S. 728 is largely similar to a fish and wildlife mitigation provision in H.R. 2557. Both provisions add requirements for the content of mitigation plans for Corps projects, and would require completion of mitigation for a project or separable project element of a project, within a year of project or element completion. The provisions differ in that §2008 includes a provision on the use of mitigation banks if other mitigation is not practicable. Another distinction is that §2008 does not include a requirement that project mitigation plans include mitigation success criteria based on "replacement of lost functions and values of the habitat, including hydrologic and vegetative characteristics."

In contrast, §2008 of S. 728 differs significantly from the more extensive fish and wildlife mitigation requirements in S. 2773. For example, S. 2773 appeared to require stricter fish and wildlife mitigation implementation requirements for Corps projects, such as completion of 100% of off-site mitigation prior to 50% of project construction. S. 2773 also included a controversial standard for mitigation, often referred to as "acre-for-acre" mitigation: "the Secretary shall, at a minimum, require and restore the same number of acres of habitat that fully replace the hydrologic and ecological functions and characteristics of each acre of habit adversely affected by the project." Section 2008 of S. 728 does not include similar provisions.