

Decision

Matter of: Office of Management and Budget and U.S. Department of Homeland Security—Pause of Border Barrier Construction and Obligations

File: B-333110

Date: June 15, 2021

DIGEST

Congress has appropriated funds to the Department of Homeland Security (DHS) specifically for constructing fencing or barrier system at the southern border of the United States, commonly referred to as the border wall. On January 20, 2021, the President issued a Proclamation directing a pause in the construction of the border wall and a pause in obligation of funds for the wall.

DHS has almost fully obligated funds appropriated in previous fiscal years for border fence or barrier construction projects, and suspended work on some projects. DHS has not yet obligated funds appropriated in fiscal year 2021.

We conclude that delays in the obligation and expenditure of DHS's appropriations are programmatic delays, not impoundments. DHS and the Office of Management and Budget (OMB) have shown that the use of funds is delayed in order to perform environmental reviews and consult with various stakeholders, as required by law, and determine project funding needs in light of changes that warrant using funds differently than initially planned. As explained below, because the delay here is precipitated by legal requirements, the delay is distinguishable from the withholding of Ukraine security assistance funds.

In order to facilitate Congress's oversight of executive spending and its Constitutional power of the purse, the congressional oversight and appropriations committees should consider requiring OMB and DHS to submit a timeline detailing the planned uses and timeframes for obligating DHS's fiscal year 2021 appropriation. A detailed timeline could serve as a tool for rigorous oversight to ensure the President does not substitute his own policies and priorities in place of those established through the legislative process.

DECISION

On January 20, 2021, President Biden issued a Proclamation¹ terminating a previous declaration of national emergency concerning the southern border of the United States issued by President Trump.² Among other things, the Proclamation directs officials to “pause work on each construction project on the southern border wall, to the extent permitted by law . . . [and to] pause immediately the obligation of funds related to construction of the southern border wall, to the extent permitted by law.”³ Pursuant to our role under the Congressional Budget and Impoundment Control Act of 1974 (ICA), we are issuing this decision on whether a violation of the ICA occurred.⁴

As explained below, we conclude that neither the Proclamation nor its implementation violate the ICA. Funds appropriated to the Department of Homeland Security (DHS) in previous fiscal years are almost fully obligated on border barrier construction projects. Construction has been suspended for some projects in order to rescope the projects to mitigate environmental damage and minimize the impact on border communities, consistent with statutory requirements under environmental and other laws. Delays in spending these funds in order to satisfy applicable statutory requirements are programmatic delays, not impoundments.

Funds appropriated in fiscal year 2021 have not yet been obligated. Prior to obligating these funds for new construction projects, DHS must comply with environmental, procurement, and other statutory prerequisites because the Secretary of Homeland Security has decided not to exercise discretionary statutory waiver authority. In addition, before DHS obligates these funds, it must determine project needs, as initial plans for these funds presupposed the continued waiver of statutory prerequisites and continued participation of the Department of Defense (DOD) in barrier construction. Delays associated with meeting statutory prerequisites and determining funding needs in light of changed circumstances constitute programmatic delays, not impoundments.

The delays here are factually and legally distinguishable from the delay considered in our decision regarding the impermissible withholding of funds for Ukraine security

¹ Proclamation No. 10142, *Termination of Emergency With Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction*, 86 Fed. Reg. 7225 (Jan. 20, 2021) (Proclamation).

² Proclamation No. 9844, *Declaring a National Emergency Concerning the Southern Border of the United States*, 84 Fed. Reg. 4949 (Feb. 15, 2019).

³ 86 Fed. Reg. 7225.

⁴ Pub. L. No. 93-344, title X, § 1015, 88 Stat. 297, 336 (July 12, 1974); 2 U.S.C. § 686.

assistance.⁵ OMB did not justify the withholding of Ukraine security assistance funding by presenting evidence of any statutory prerequisites that needed to be satisfied before funds could be obligated. Here, delays in the obligation and expenditure of DHS's border barrier appropriations stem from the time required to meet applicable statutory requirements and develop plans for the use of the funds that consider current circumstances.

In accordance with our regular practice, we contacted OMB and DHS to seek factual information and their legal views on this matter.⁶ OMB and DHS each responded with relevant information and their legal views.⁷ We also received supplemental information from Members of Congress seeking our views.⁸

⁵ B-331564, Jan. 16, 2020.

⁶ GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html; Letter from General Counsel, GAO, to General Counsel, OMB (Apr. 7, 2021); Letter from General Counsel, GAO, to Principal Deputy General Counsel and Acting General Counsel, DHS (Apr. 7, 2021).

⁷ Letter from General Counsel, OMB, to General Counsel, GAO (May 6, 2021) (OMB Response); Letter from Assistant General Counsel for Appropriations and Fiscal Law, DHS, to Managing Associate General Counsel for Appropriations Law, GAO (May 10, 2021) (DHS Response). OMB's Response included the apportionment schedules for the relevant DHS appropriations. OMB also responded to follow-up questions via e-mail. E-mail from Deputy General Counsel, OMB, to Senior Attorney, GAO, *Subject: RE: GAO letter regarding Proclamation on Border Wall Funds and Impoundment Control Act* (May 20, 2021) (OMB Response Follow-Up E-mail). DHS's Response included an Appendix with obligations and expenditure data for the relevant DHS appropriations. DHS also responded to some follow-up questions via e-mail. E-mail from Assistant General Counsel for Appropriations and Fiscal Law, DHS, to Assistant General Counsel for Appropriations Law, GAO, *Subject: RE: GAO letter regarding Proclamation on Border Wall Funds and Impoundment Control Act* (May 20, 2021) (DHS Response Follow-Up E-mail).

⁸ On March 17, 2021, we received a letter from Members of the United States Senate to the Comptroller General regarding this matter. The signatories to that letter are listed at the end of this decision. We received two additional letters from Members of the House of Representatives and the United States Senate requesting to join the original letter seeking our views. The signatories for each additional letter are also listed at the end of this decision. We received an additional letter from Senators Shelley Moore Capito and Richard Shelby to supplement the record on May 12, 2021. We also received and responded to a letter from Members of Congress regarding the status of this decision on May 25, 2021. B-333110, June 2, 2021.

We note that this is our second decision related to funding for and construction of border barriers.⁹ In our earlier decision we examined whether it was permissible for DOD to transfer and use its fiscal year 2019 appropriations to construct border fencing. There we concluded that DOD’s transfer of funds for border fence construction was consistent with DOD’s statutory transfer authority and that use of these amounts for border fence construction was permissible.

BACKGROUND

DHS Border Barrier Authorities and Activities

DHS has statutory authority to control and guard the borders of the United States.¹⁰ Within DHS, responsibility for border security is carried out by the United States Customs and Border Protection (CBP).¹¹ Under CBP’s Border Wall System Program, it plans for and executes deployment of barriers and other assets intended to prevent the illegal entry of people, drugs, and other contraband along the southern border.¹²

⁹ B-330862, Sept. 5, 2019.

¹⁰ 8 U.S.C. § 1103(a)(5). Specifically, DHS is required to take “actions as may be necessary to install additional physical barriers . . . in the vicinity of the United States border . . . [and] construct reinforced fencing along not less than 700 miles of the southwest border . . . and provide for the installation of additional physical barriers, roads, lighting, cameras, and sensors to gain operational control of the southwest border.” Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, title I, § 102, 110 Stat. 3009, 3009-546, 3009-554 (Sept. 30, 1996) (IIRIRA), *as amended by* DHS Appropriations Act, 2008, Pub. L. No. 110-161, div. E, title V, § 564, 121 Stat. 1844, 2042, 2090–2091 (Dec. 26, 2007).

Notwithstanding this mandate, the law further provides that DHS is not required to install fencing, physical barriers, or other resources in a particular location, if the Secretary of Homeland Security determines that the use or placement of such resources is not the most appropriate means to achieve and maintain control of the border at that location. *Id.*

¹¹ 6 U.S.C. § 211.

¹² GAO, *Southwest Border Security: CBP Is Evaluating Designs and Locations for Border Barriers but Is Proceeding Without Key Information*, GAO-18-614 (Washington, D.C.: Aug. 6, 2018); GAO, *DHS Annual Assessment: Most Acquisition Programs Are Meeting Goals but Data Provided to Congress Lacks Context Needed For Effective Oversight*, GAO-21-175 (Washington, D.C.: Jan. 19, 2021). For purposes of this decision, we adopt the term “southern border” as used in Proclamation No. 10142, in reference to the United States-Mexico land border, which is generally referred to in statute as the “southwest border.” See, e.g., DHS

The Secretary of Homeland Security has statutory authority to waive all legal requirements where determined necessary to ensure expeditious construction of barriers along the border.¹³ The previous Secretary of Homeland Security waived a variety of environmental and natural resource laws, such as the National Environmental Policy Act of 1969 (NEPA),¹⁴ to ensure expeditious construction of barriers at the border.¹⁵ Note, this authority is discretionary, and the Secretary is not required to waive these requirements. In addition, the Secretary of Homeland Security is required by law to consult with the Secretary of the Interior, Secretary of Agriculture, states, local governments, Indian tribes, and property owners to “minimize the impact on the environment, culture, commerce, and quality of life” at sites where barriers are to be constructed.¹⁶

Each year, CBP receives a lump sum appropriation, available for multiple fiscal years, for its construction activities in its Procurement, Construction, and Improvements (PC&I) account. For example, for fiscal year 2019, CBP received about \$2.5 billion in its PC&I account.¹⁷

For fiscal years 2018, 2019, 2020, and 2021, the respective appropriation act designates a certain amount of funding from the PC&I lump sum that is specifically available for fencing or barrier system. For example, for fiscal year 2019, of the \$2.5 billion appropriated to CBP, \$1.375 billion is available for border fencing.¹⁸ Each year, the appropriations acts vary in the extent to which they include requirements

Appropriations Act, 2020, Pub. L. No. 116-93, div. D, title II, § 209(a)(1), 133 Stat. 2317, 2502, 2511 (Dec. 20, 2019).

¹³ IIRIRA, *as amended by* REAL ID Act of 2005, Pub. L. No. 109-13, div. B, title I, § 102, 119 Stat. 231, 302, 306 (May 11, 2005).

¹⁴ Pub. L. No. 91-190, 83 Stat. 852 (1970). NEPA requires federal agencies to consider and disclose the environmental impacts of a proposed major federal action. 42 U.S.C. § 4332(C). Generally, NEPA requires agencies to prepare an environmental impact statement for a major federal action significantly affecting the quality of the human environment. *Id.* To determine if an environmental impact statement is necessary, an agency may also perform an environmental assessment, a document that briefly considers whether a more detailed environmental impact statement is required. 40 C.F.R. §§ 1501.3, 1501.5.

¹⁵ DHS Response, footnote 13.

¹⁶ IIRIRA, *as amended by* Pub. L. No. 110-161, § 564.

¹⁷ DHS Appropriations Act, 2019, Pub. L. No. 116-6, div. A, title II, 133 Stat. 13, 15, 18 (Feb. 19, 2019).

¹⁸ Pub. L. No. 116-6, § 230(a)(1); DHS Response, at 3.

regarding the design of fencing or barriers and/or the specific geographic areas along the southern border where fencing or barriers may be constructed.¹⁹ Appropriations for border fencing or barriers are available for obligation for five fiscal years.²⁰ This means that these amounts can be used for needs that arise any time during the five-year period of availability, consistent with the purposes of the appropriation.²¹

¹⁹ For fiscal year 2018, \$251 million was made available for secondary fencing, all of which provides for cross-barrier visual situational awareness, in the San Diego Sector; \$445 million was made available for primary pedestrian levee fencing in the Rio Grande Valley Sector; \$196 million was made available for primary pedestrian fencing in the Rio Grande Valley Sector; and \$445 million was made available for replacement of primary pedestrian fencing along the southwest border. All but the \$251 million was available only for operationally effective designs deployed as of the date of the Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat. 135, which was enacted May 5, 2017 (Consolidated Appropriations Act, 2017). DHS Appropriations Act, 2018, Pub. L. No. 115-141, div. F, title II, § 230, 132 Stat. 348, 605, 616-617 (Mar. 23, 2018); DHS Response, at 2–3. For fiscal year 2019, \$1.375 billion was made available for primary pedestrian fencing, including levee fencing, in the Rio Grande Valley Sector, and this amount was available only for operationally effective designs deployed as of the date of the Consolidated Appropriations Act, 2017. Pub. L. No. 116-6, § 230; DHS Response, at 3. For fiscal year 2020, \$1.375 billion was made available for barrier system along the southwest border, and this amount was available only for operationally effective designs deployed as of the date of the Consolidated Appropriations Act, 2017, or operationally effective adaptations of such designs. Pub. L. No. 116-93, § 209; DHS Response, at 3. For fiscal year 2021, the appropriation act provided that an amount equal to the amount made available in section 209 of Public Law 116-93 (the DHS Appropriations Act, 2019) is available for the same purposes as the amount provided under such section in such act. DHS Appropriations Act, 2021, Pub. L. No. 116-260, div. F, title II, § 210, 134 Stat. 1182, 1448, 1456-1457 (Dec. 27, 2020); DHS Response, at 3. Thus, for 2021, \$1.375 billion is available for barrier system along the southwest border. DHS Response, Appendix, at 9–10. Before obligating amounts provided for 2021, or amounts provided previously that remained available for obligation, DHS was required to submit an expenditure plan to the congressional appropriations committees. Pub. L. No. 116-260, § 208; DHS Response, at 3. The appropriations acts for each year prohibit construction of fencing or barriers in certain wildlife refuges and parks. Pub. L. No. 115- 141, § 230(c); Pub. L. No. 116-6, § 231; Pub. L. No. 116-93, § 210; Pub. L. No. 116-260, § 211.

²⁰ DHS Response, Appendix, at 1.

²¹ 31 U.S.C. § 1502. When the five-year period of availability ends, the funds expire. Expired funds are not available to incur new obligations, but are available for five fiscal years for disbursement of obligations incurred during the period of availability, and for adjustments to obligations incurred during the period of availability. GAO, A

DHS obligates funds appropriated for fencing or barriers by entering into contracts for border barrier construction activities, or by placing orders for border barrier projects under interagency agreements with other federal agencies, such as the U.S. Army Corps of Engineers (USACE).²² DHS incurs an obligation when it enters into contracts, and when it places orders under the interagency agreements.²³ DHS has obligated fiscal year 2018, 2019, and 2020 fencing or barrier appropriations by entering into contracts and placing orders under interagency agreements for border barrier construction, and the majority of this funding was obligated by August 2020.²⁴ DHS has not yet obligated its fiscal year 2021 barrier system appropriation.²⁵

To support border barrier construction, DHS also requested and received assistance from DOD.²⁶ DOD transferred and used its appropriations to construct border fencing in support of DHS.²⁷ In addition, following the declaration of national

Glossary of Terms Used in the Federal Budget Process, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 23.

²² The interagency agreements here were entered into pursuant to the Economy Act, 31 U.S.C. § 1535, and authorities under 40 U.S.C. §§ 321, 501, 502. DHS Response, Appendix (table showing data on border barrier contracts, interagency agreements, obligations, and expenditures).

²³ An obligation is a “definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received.” *Glossary*, at 70. An agency incurs an obligation, for example, when it enters into a contract or takes an action requiring the government to make payments from one government account to another. *Id.*; see also 31 U.S.C. § 1535(d) (for interagency agreements under the authority of the Economy Act, the placement of an order under the agreement obligates the appropriation of the ordering agency); 31 U.S.C. § 1501(a)(1) (an agency shall record an obligation when supported by documentary evidence of a binding agreement between the agency and another agency); DHS Response, at 8. An expenditure is the actual spending of money, such as making a payment. *Glossary*, at 48.

²⁴ DHS Response, at 3, Appendix, at 2.

²⁵ DHS Response, Appendix, at 2–3.

²⁶ DOD has authority under 10 U.S.C. § 284(b)(7) to provide support for the counterdrug activities of other departments to include the “[c]onstruction of . . . fences . . . to block drug smuggling corridors across international boundaries of the United States.” See also GAO, *Southwest Border Security: Actions Are Needed to Address the Cost and Readiness Implications of Continued DOD Support to U.S. Customs and Border Protection*, GAO-21-356 (Washington, D.C.: Feb. 2021).

²⁷ In B-330862, Sept. 5, 2019, we concluded that DOD’s transfer of fiscal year 2019 amounts into its Drug Interdiction account for border fence construction was consistent with DOD’s transfer authority and that use of these amounts for the

emergency concerning the southern border,²⁸ the Secretary of Defense exercised statutory authority made available by the declaration of emergency to use unobligated military construction appropriations to undertake border barrier projects necessary to support the armed forces.²⁹ Also, DHS used amounts in the Treasury Forfeiture Fund for border barrier construction.³⁰

Proclamation Pausing Border Barrier Construction and Obligations

On January 20, 2021, President Biden issued a Proclamation terminating the previous declaration of national emergency concerning the southern border issued by President Trump.³¹ The Proclamation also directs officials to “pause work on each construction project on the southern border wall, to the extent permitted by law . . . [and to] pause immediately the obligation of funds related to construction of the southern border wall, to the extent permitted by law.”³² The Proclamation also requires the Secretary of Homeland Security, in coordination with other relevant agencies, to develop a plan within 60 days of the Proclamation that both redirects funds used for border barriers and provides for the continued use of funding expressly appropriated for border barriers consistent with that appropriated purpose.³³ In addition, the President’s Budget for Fiscal Year 2022 proposes the cancellation of all prior year border barrier construction funding that remains unobligated at the time of enactment of the Appropriations Act for Fiscal Year 2022.³⁴

purpose of border fence construction was permissible under various statutory provisions. The Court of Appeals for the Ninth Circuit held that the transfer of amounts was not authorized by DOD’s transfer authority. *California v. Trump*, 963 F.3d 926, 949 (9th Cir.), *cert. granted*, 141 S. Ct. 618 (2020).

²⁸ 84 Fed. Reg. 4949.

²⁹ 10 U.S.C. § 2808; GAO, *Southwest Border: Information on Federal Agencies’ Process for Acquiring Private Land for Barriers*, GAO-21-114 (Washington, D.C.: Nov. 2020).

³⁰ See 86 Fed. Reg. 7225; 31 U.S.C. § 9705(g)(4)(B).

³¹ 86 Fed. Reg. 7225.

³² *Id.*

³³ 86 Fed. Reg. 7226.

³⁴ *Appendix, Budget of the United States Government for Fiscal Year 2022*, at 517, available at https://www.whitehouse.gov/wp-content/uploads/2021/05/appendix_fy22.pdf (last visited June 1, 2021) (FY22 Budget Request).

DHS and USACE issued suspension of work orders on existing barrier construction contracts.³⁵ In addition, DOD announced it was cancelling all border barrier construction projects funded with appropriations originally intended for military missions and functions.³⁶

DISCUSSION

At issue here is whether the Proclamation and actions taken by OMB and DHS to implement the Proclamation violate the ICA. We first address DHS's fiscal year 2018, 2019, and 2020 appropriations, and then, separately, its fiscal year 2021 appropriation. We also address how the factual and legal circumstances here are distinguishable from our decision on Ukraine security assistance funding.³⁷ Lastly, we address President Biden's proposed cancellation of unobligated border barrier funding.

Analysis of Funding Appropriated In Previous Fiscal Years for Border Fencing and Barriers

DHS has almost fully obligated the approximately \$4 billion appropriated across fiscal years 2018, 2019, and 2020, for barrier construction projects.³⁸ DHS and

³⁵ DHS Response, at 5; DHS Response Follow-Up E-mail.

³⁶ DOD, *DOD Release Regarding Cancellation of Border Barrier Project Cancellation* (Apr. 30, 2021), available at <https://www.defense.gov/Newsroom/Releases/Release/Article/2591993/dod-release-regarding-cancellation-of-border-barrier-project-cancellation/> (last visited June 2, 2021). OMB and DOD announced that military construction appropriations previously planned for border barrier construction projects that remain unobligated (about \$2 billion) will be used instead for other DOD military construction projects, such as a ships maintenance facility in Virginia and a mission training complex in Germany. White House, Fact Sheet: *Department of Defense and Department of Homeland Security Plans for Border Wall Funds* (June 11, 2021), available at [FACT SHEET: Department of Defense and Department of Homeland Security Plans for Border Wall Funds | The White House](#) (last visited June 14, 2021); Department of Defense, Deputy Secretary of Defense Memorandum for Director, Office of Management and Budget, *Department of Defense Plan for the Redirection of Border Wall Funds* (June 10, 2021).

³⁷ B-331564, Jan. 16, 2020.

³⁸ Specifically, as of March 31, 2021, DHS obligated approximately 95 percent, 98 percent, and 96 percent of its fencing or barrier appropriations for fiscal years 2018, 2019, and 2020, respectively. See DHS Response, Appendix, at 4–5. Much of the amount appropriated for fiscal year 2018 was obligated during 2018, 2019, and 2020, on an interagency agreement with USACE for construction projects. DHS Response, at 3, Appendix (table showing data on border barrier contracts,

USACE issued suspension of work orders for some construction projects.³⁹ However, expenditures (payments) are continuing because construction work continues on some projects to “avert immediate physical dangers,” and work continues under other contracts in order to monitor the work areas where construction has been suspended.⁴⁰ In addition, DHS and USACE continue to make progress payments to contractors for work that occurred prior to issuance of the suspension of work orders.⁴¹

DHS explains that construction work is suspended so that it can take steps necessary to comply with statutory requirements under environmental laws and for stakeholder consultation.⁴² Specifically, for existing projects funded with fiscal year 2018, 2019, or 2020 appropriations, DHS will engage in the standard environmental planning and compliance process, including compliance with NEPA.⁴³ This process will include remediating or mitigating environmental damage caused by construction, to the extent possible.⁴⁴ The Secretary of Homeland Security is considering rescinding or revising previously issued waivers of environmental and other laws, but DHS will engage in the standard compliance process, regardless of whether a previously issued waiver is in place.⁴⁵

In addition, DHS suspended construction work to engage in more substantive consultation with stakeholders, such as property owners and border community

interagency agreements, obligations, and expenditures). A majority of amounts appropriated for fiscal year 2019 was obligated in May 2019 on an interagency agreement with USACE for construction projects. *Id.* A majority of amounts appropriated for fiscal year 2020 was obligated in May, June, and August of 2020, on an interagency agreement with USACE for construction projects, or on construction contracts awarded by DHS. *Id.* GAO is separately conducting a performance audit examining characteristics, including funding, of USACE’s contracts for border barrier construction, among other things. USACE’s obligations for border barriers is not the subject of this decision.

³⁹ See DHS Response, at 10; DHS Response Follow-Up E-mail; Federal Acquisition Regulation (FAR) § 52.242-14 (standard clause for inclusion in construction contracts stating that the government may suspend all or any part of the work called for under a contract for the period of time that the government determines appropriate, “for the convenience of the Government”).

⁴⁰ DHS Response, at 10, 12; DHS Response Follow-Up E-mail.

⁴¹ DHS Response, at 10.

⁴² See DHS Response, at 12.

⁴³ DHS Response, at 12.

⁴⁴ *Id.*

⁴⁵ *Id.*

residents, as required under the Secretary’s statutory consultation provision.⁴⁶ DHS states that consultation will be robust, and will inform both environmental planning and execution of barrier construction projects.⁴⁷ As a result of the need to comply with stakeholder consultation requirements, NEPA, and other environmental and natural resource laws, DHS states that it will rescope existing construction projects accordingly.⁴⁸

Any delays in expenditures here result from ensuring that requirements under environmental and stakeholder consultation laws are satisfied for border barrier projects. We have previously concluded that delays associated with the review of whether statutory prerequisites were satisfied are programmatic delays outside the reach of the ICA, not impoundments.⁴⁹ Following our previous decisions, delays of this nature are programmatic delays.

The fact that small amounts of unobligated sums remain in DHS’s appropriation accounts here does not indicate an impoundment.⁵⁰ These appropriations are

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See DHS Response, at 12–13.

⁴⁹ B-290659, July 24, 2002 (delay in obligation of appropriations for the United Nations Population Fund (UNFPA) to review whether UNFPA satisfied certain statutory prerequisites to receiving the funding was programmatic because the agency was reviewing whether the required legal conditions for use of the funds had been met). See also B-291241, Oct. 8, 2002 (delay in apportioning funds was programmatic because OMB was reviewing whether a statutory limit on the transfer of funds applied to the appropriation at issue). We have also previously concluded that delays stemming from changes to project design or scope are programmatic delays. B-221412, Feb. 12, 1986 (delays in the obligation of Veterans Administration appropriations were programmatic because they resulted from changes to project design or scope and there was no evidence of an intent to refrain from obligating the funds).

⁵⁰ B-200685, Dec. 23, 1980, at 2 (“[T]he mere failure to obligate the full amount of an appropriation before it expires does not necessarily mean that there has been an impoundment. There must be sufficient evidence of an intention to refrain from obligating or expending available budget authority, based on the facts and circumstances of each case.”). As previously described, DHS has obligated a majority of its fiscal year 2018, 2019, and 2020 appropriations for construction projects. In previous decisions where we found obligation rates were comparable across the years, and there was no evidence of an intent to withhold funds from obligation, we concluded that there was not an impoundment. Dec. 23, 2020 (The National Weather Service obligated funds “at a robust yet measured pace that [gave]

available for multiple fiscal years before they expire, and DHS can obligate additional amounts consistent with current project requirements. Additionally, DHS stated that it will maintain some unobligated balances in the accounts, pursuant to departmental funds control practices, in order to cover unanticipated liabilities that may arise in the future.⁵¹ We have recognized that sound administrative funds control practices may reasonably result in small amounts of expired, unobligated balances.⁵²

Furthermore, the apportionment schedules for each DHS appropriation reflect that amounts are apportioned and available for obligation.⁵³ OMB and DHS stated that no instructions to withhold these appropriations have been given.⁵⁴

DHS asserts that it is not impounding funds because it is not withholding funds from obligation or expenditure, and we agree.⁵⁵ Prior year funding for border fencing or barriers remains obligated for construction projects, and continues to be spent. Any delayed expenditures stem from DHS taking necessary steps to comply with statutory environmental and stakeholder consultation requirements for these construction projects and do not constitute an impoundment. Therefore, there is no violation of the ICA with regard to DHS's appropriations for fiscal years 2018, 2019, and 2020.

Analysis of Funding Appropriated In Fiscal Year 2021 for Border Barriers

For fiscal year 2021, DHS received \$1.375 billion in appropriations for the construction of barrier system along the southern border, and has not yet obligated

no indication that the agency withheld amounts from obligation.”); B-320091, July 23, 2010; B-331298.

⁵¹ See DHS Response, Appendix, at 2.

⁵² B-331298, Dec. 23, 2020.

⁵³ OMB Response, Attachment.

⁵⁴ OMB Response, Attachment; DHS Response, at 5–6, Appendix, at 7.

⁵⁵ DHS Response, at 10.

these funds.⁵⁶ DHS explains that this funding will be obligated for new construction projects once statutory prerequisites have been satisfied.⁵⁷

Specifically, the previous Secretary of Homeland Security exercised statutory authority to waive laws such as NEPA to expedite construction of barriers along the border.⁵⁸ The current Secretary of Homeland Security will not exercise authority to waive any laws with respect to barrier construction.⁵⁹ Therefore, prior to obligating 2021 barrier funds on contracts for new projects, DHS must first comply with applicable laws. For example, DHS must undertake environmental reviews and analysis, including compliance with NEPA and the Endangered Species Act, and consult with stakeholders.⁶⁰ Once those processes are complete, or nearly complete, DHS can finalize designs and begin the contracting process which, under the Competition in Contracting Act of 1984 (CICA),⁶¹ requires full and open competition.⁶² Indeed, DHS has no legal basis to proceed with contract awards without meeting these legal prerequisites.

⁵⁶ Pub. L. No. 116-260, § 210; DHS Response, Appendix, at 3. Unlike most of the amounts appropriated in previous fiscal years, the 2021 appropriation is not restricted in terms of the location where barriers may be constructed. Also, DHS explains that there are no statutory design restrictions with respect to fiscal year 2021 barrier funding, since the appropriation does not reference or incorporate the design restriction from the DHS Appropriations Act, 2020. DHS Response, Appendix, at 9–10.

⁵⁷ DHS Response, at 14.

⁵⁸ Pursuant to a law enacted in 2005, the Secretary of Homeland Security “shall have the authority to waive all legal requirements such Secretary, in such Secretary’s sole discretion, determines necessary to ensure expeditious construction of . . . barriers . . . [which] shall be effective upon being published in the Federal Register.” IIRIRA, *as amended by* Pub. L. No. 109-13, § 102. Under a statute in effect prior to enactment of the 2005 law, the Secretary of Homeland Security was authorized to waive the Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 883 (Dec. 28, 1973), and NEPA, as necessary to ensure expeditious construction of barriers. Pub. L. No. 104-208, § 102(c).

⁵⁹ OMB Response, at 5–6; DHS Response, at 11, Appendix, at 4. The authority that Congress has provided to the Secretary of Homeland Security to waive legal requirements for barrier construction provides the Secretary with a choice of whether to waive any laws and, if so, which laws to waive. The statute could, of course, be amended by Congress to change the discretion afforded to the Secretary.

⁶⁰ OMB Response, at 5–6; DHS Response, at 11, 14, Appendix, at 4.

⁶¹ Pub. L. No. 98-369, div. B, title VII, 98 Stat. 494, 1175 (July 18, 1984).

⁶² DHS Response, at 14, Appendix, at 4.

A delay in the obligation of DHS's 2021 border barrier funding caused by steps DHS is taking to ensure compliance with environmental, stakeholder consultation, and procurement statutes is a programmatic delay, not an impoundment under the ICA.⁶³ By law, these requirements must be satisfied before DHS can obligate the funds, and OMB and DHS have shown that they intend to spend the funds for new construction projects once applicable legal processes and procedures have taken place.⁶⁴ Accordingly, the circumstances reflect a programmatic delay, not an impoundment.

DHS states that some of its 2021 border barrier funding will be obligated for existing barrier construction projects, once DHS has determined existing projects' needs.⁶⁵ Specifically, DHS is reviewing existing projects, and will use some of its 2021 funding for projects previously constructed by DOD, for the costs associated with bringing DHS's existing projects into compliance with statutory requirements under environmental laws, and for stakeholder consultation.⁶⁶ DHS asserts it has substantial discretion in determining the projects that will be funded with the 2021 appropriation.⁶⁷

A delay in obligation of funds while DHS determines project needs in light of changed circumstances is a programmatic delay, not an impoundment. We have previously concluded that delays associated with certain project changes are programmatic delays.⁶⁸ Here, there have been changes to existing projects, subsequent to enactment of the 2021 appropriation. In particular, DOD cancelled its barrier projects, and DHS decided that its approach to existing, previously funded projects will include standard environmental planning and compliance and robust stakeholder consultation.

On January 13, 2021, DHS submitted a statutorily required expenditure plan to the congressional appropriations committees regarding CBP's PC&I lump-sum appropriation.⁶⁹ With regard to the fiscal year 2021 appropriation for barrier system, the plan stated that the funds would be used for construction of 56 miles of border

⁶³ Under our previous decisions, delays associated with the review of whether statutory prerequisites were satisfied, or whether a statutory transfer limit applied, are programmatic delays. B-291241, Oct. 8, 2002; B-290659, July 24, 2002.

⁶⁴ DHS Response, at 14.

⁶⁵ OMB Response, at 9; DHS Response, at 13, Appendix, at 6.

⁶⁶ OMB Response, at 8; DHS Response, at 12.

⁶⁷ DHS Response, at 13.

⁶⁸ B-221412, Feb. 12, 1986.

⁶⁹ DHS Response, Appendix, at 3.

barrier system in top-priority locations.⁷⁰ Specifically, DHS planned to use its 2021 barrier appropriation for construction in California, and to award a contract by January 19, 2021, which would have required waiving NEPA and other laws to proceed on this timeline.⁷¹ DHS's plans presupposed continued DOD participation in existing barrier construction and waiver of environmental and natural resources laws.

We additionally note that the apportionment schedule for DHS's fiscal year 2021 border barrier appropriation reflects that amounts are available and that OMB has not created a reserve with respect to this funding.⁷² Also, OMB stated that it has not directed the withholding of this appropriation.⁷³ And DHS likewise stated that OMB has not instructed DHS to withhold funding from obligation or expenditure, pursuant to the Proclamation or otherwise.⁷⁴ Lastly, DHS stated it has not, and is not, withholding this funding in a manner prohibited by the ICA.⁷⁵

OMB and DHS assert that any delay in obligating fiscal year 2021 funding is programmatic, not an impoundment.⁷⁶ As explained, based on the information before us, we conclude that there is not an impoundment of DHS's fiscal year 2021 barrier appropriation and no violation of the ICA with respect to these funds. OMB and DHS have met their burden to justify why the funds have not been obligated: meeting the conditions of applicable laws, absent their waiver, must precede obligation of funds for new projects, and determination of existing projects' funding needs in light of changed circumstances must precede obligation of funds for current projects. We see nothing to indicate that either OMB or DHS is attempting to override congressional intent that these funds be used for constructing barriers at the southern border.

⁷⁰ DHS Response, footnote 17.

⁷¹ DHS Response, at 4.

⁷² OMB Response, at 10, Attachment, at 12; DHS Response, Appendix, at 7. The apportionment for the 2021 funds reflects a restriction in the DHS Appropriations Act, 2021, that CBP's lump-sum appropriation for PC&I is not available for obligation until DHS submits an expenditure plan to the congressional appropriations committees. Pub. L. No. 116-260, § 208 (statutory requirement to submit an expenditure plan); OMB Response, Attachment (fiscal year 2021 apportionment). DHS submitted the expenditure plan on January 13, 2021. DHS Response, at 3.

⁷³ OMB Response, Attachment, at 12.

⁷⁴ DHS Response, Appendix, at 7.

⁷⁵ *Id.*

⁷⁶ OMB Response Follow-Up E-mail; DHS Response, at 13–14.

However, we are sensitive to the fact that this appropriation was provided several months ago, and none of the funds have yet been obligated. Neither OMB nor DHS provided us with a detailed timeframe in which this appropriation will be obligated for new and/or existing barrier construction.⁷⁷ Therefore, in order to facilitate Congress's oversight of executive spending and its Constitutional power of the purse, the congressional oversight and appropriations committees should consider requiring OMB and DHS to submit a timeline detailing the planned uses and timeframes for obligating this appropriation.

Distinguishing the Withholding of Ukraine Security Assistance

Any delay in obligation or expenditure of border barrier funding is factually and legally distinguishable from OMB's impermissible withholding of funds appropriated to DOD for security assistance to Ukraine in B-331564, Jan. 16, 2020. In our decision regarding Ukraine security assistance funding, the uses of the funding had been planned for by DOD, and DOD even certified to Congress that statutory prerequisites had been satisfied. When OMB made the funds unavailable for obligation, it did not identify any circumstances to justify taking a different approach from the one planned for and certified by DOD. OMB asserted that the delay was associated with a need "to determine the best use of such funds," but OMB did not provide any support for why DOD's plan for the funds did not reflect the best use of the funds.⁷⁸ Nor did OMB identify any other legal requirements that needed to be met before the Ukraine security assistance funding could be spent. Instead, in its response to us, OMB described the withholding as necessary to ensure that the funds were not spent "in a manner that could conflict with the President's foreign policy."⁷⁹

Here, laws such as NEPA, CICA, and the stakeholder consultation statute constrain the obligation of DHS's barrier appropriations. While previous Secretaries of Homeland Security waived these laws under discretionary statutory authority, the current Secretary will not issue waivers, and the terms of legal prerequisites must be satisfied,⁸⁰ also resulting possibly in rescoping existing projects to mitigate environmental damage,⁸¹ for example.

⁷⁷ DHS noted that activities such as environmental reviews and requests for proposals may affect the timeline for contract execution, and that for large, complex, construction projects, full NEPA review and full and open competition for contract award can take several months to several years. DHS Response, at 14, footnote 57.

⁷⁸ B-331564, Jan. 16, 2020, at 6 (citation omitted).

⁷⁹ *Id.*

⁸⁰ OMB Response, at 9.

⁸¹ DHS Response, at 12.

Proposed Cancellation of Border Barrier Funding in Budget Request

We note that President Biden's FY22 Budget Request proposed cancellation of border barrier funding that remains unobligated.⁸² Cancellation of this funding can only be accomplished through a duly enacted law.⁸³ Withholding unobligated funding based on the FY22 Budget Request would violate the ICA.⁸⁴ Here, OMB stated that the Administration will continue obligating and expending DHS's border barrier funding "unless and until" Congress acts on the requested cancellation.⁸⁵ A proposed cancellation through the budget request, without being coupled with an impermissible withholding or delay, does not violate the ICA. As explained, we conclude that DHS's barrier appropriations are apportioned as available, and there is no indication of an impermissible delay in the obligation of funds.

CONCLUSION

President Biden announced a policy choice through the Proclamation that funding not be diverted for border barrier construction, and through the Budget Request that proposes cancellation of unobligated border barrier funding. However, making a policy choice through the Proclamation and Budget Request, without more, does not constitute an impoundment in violation of the ICA. Here, funds appropriated to DHS in previous fiscal years remain almost fully obligated for barrier construction projects. DHS and USACE suspended work after the current Secretary of Homeland Security exercised statutorily provided discretion to require that existing projects now comply with environmental and stakeholder consultation laws. Though DHS has not yet obligated its fiscal year 2021 appropriation, it must first comply with statutory prerequisites and finalize determinations for barrier project funding requirements in light of current circumstances. Delays in the obligation and expenditure of funds

⁸² FY22 Budget Request, at 517. OMB describes a cancellation proposal as "a proposal by the President to reduce budgetary resources that are not subject to the requirements of Title X of the Congressional Budget and Impoundment Control Act." OMB Circular No. A-11, *Preparation Submission, and Execution of the Budget*, pt. 3, § 112.2 (Arp. 2021), available at <https://www.whitehouse.gov/wp-content/uploads/2018/06/a11.pdf> (last visited June 2, 2021). The Circular further states that amounts proposed for cancellation in the President's Budget Request are not to be withheld from obligation. *Id.*

⁸³ The Constitution sets forth the procedures of bicameralism and presentment, which are the only mechanism for enacting federal law. B-330330, Dec. 10, 2018.

⁸⁴ For example, we concluded that the withholding of appropriations for the Advanced Research Projects Agency-Energy based on the President's Budget Request, which proposed cancellation of the funds, violated the ICA. B-329092, Dec. 12, 2017.

⁸⁵ OMB Response, at 9.

here, associated with meeting statutory requirements and finalizing plans for the uses of funding, are programmatic delays, not impoundments.

To facilitate Congress's oversight of executive spending on border barrier construction, Congress should consider requiring OMB and DHS to submit a timeline detailing the planned uses and timeframes for obligation and expenditure of DHS's barrier appropriations. Having detailed information about the timeframes for spending these funds will help assure Congress that executive action is aligned with the policies and priorities it established in the legislative process.

A handwritten signature in cursive script, reading "Thomas H. Armstrong". The signature is written in black ink and is positioned above the typed name.

Thomas H. Armstrong
General Counsel

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