



THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

SEP 15 2016

The Honorable Eugene Dodaro  
Comptroller General  
Government Accountability Office  
Washington, D.C. 20548

Dear Mr. Dodaro:

I am replying to alleged violations of the Antideficiency Act, as required by section 145.8 of the Office of Management and Budget (OMB) Circular A-11 (2015).

In an opinion dated December 14, 2015, the Government Accountability Office concluded that the U.S. Environmental Protection Agency violated 31 U.S.C. § 1341 by using certain social media platforms to educate the public regarding the agency's Clean Water Rule. GAO alleged that the EPA's use of the social media platform "Thunderclap" constituted "covert propaganda" in violation of a statutory prohibition on using appropriated funds for publicity or propaganda purposes. GAO also alleged that inclusion of two links to external websites in an EPA blog post violated a statutory prohibition on using appropriated funds for indirect or "grassroots" lobbying.

The alleged Antideficiency Act violation turns on a disputed question of law. The EPA's Office of General Counsel has thoroughly examined the matter and determined that the agency's efforts to educate the American public regarding the EPA's mission to protect clean water did not violate the Antideficiency Act. In a letter to GAO dated August 7, 2015, the EPA General Counsel, Avi Garbow, articulated the legal basis for the EPA's determination. The GAO opinion includes no case that the EPA had not already considered except a line of inapposite First Amendment cases. Instead, GAO adopts new analytical approaches that are inconsistent with its prior opinions.

The violation of 31 U.S.C. § 1341 is alleged to have occurred on September 29, 2014, and April 7, 2015, in the Environmental Programs and Management account, Treasury Account Symbol 06816/170108.

#### Thunderclap

GAO alleged that the EPA's use of the social media platform Thunderclap constituted "covert propaganda" in violation of a statutory prohibition on using appropriated funds for publicity or propaganda purposes. The Comptroller General "decisions have defined covert propaganda as material such as editorials or other articles prepared by an agency or its contractors at the behest of the agency and circulated as the ostensible position of parties outside the agency." B-301022 at 4, Mar 10, 2004. Notably, here GAO did not find "covert propaganda" in the EPA's communications with 980 people who signed up for the Thunderclap website to post a message on their social media accounts at an appointed time ("Thunderclap supporters"). GAO acknowledges that the EPA's Thunderclap campaign webpage was "visibly attributed to the EPA as it displayed the agency's profile photo and, under the title, 'by U.S. Environmental Protection Agency.'" Yet GAO finds that EPA violated the Antideficiency Act because the message that the Thunderclap supporters ultimately chose to post on their own social media accounts was not attributed to the EPA.

Anyone who signed up for the Thunderclap campaign had the option of using the Thunderclap campaign message (“EPA message”) or customizing the message. The only part of the message that could not be edited was the link to the EPA’s website. This means that any one of the 980 people who signed up for the EPA’s Thunderclap campaign – or even all of them – could have changed the message that was posted to their social media accounts to say *anything*. Specifically, in order to become a Thunderclap supporter, that person had to (1) see a tweet asking that they join the campaign; (2) navigate to the Thunderclap page, read the description of the campaign and choose to participate; (3) read a pop-up page with a draft social media message that they were explicitly encouraged to edit and customize; and (4) affirmatively navigate to the social media site of their choice and authorize the posting of the message. Therefore, the Thunderclap supporters were not mere “conduits of EPA’s message,” as GAO alleges, but rather recipients of information that they could choose to reject, customize or formally adopt.

GAO asserts that its decision regarding the EPA’s use of Thunderclap is distinguishable from its past cases, but the only difference is that GAO uses two entirely different analytical frameworks that cannot be reconciled. The EPA’s use of Thunderclap is directly analogous to another case in which GAO found that the Department of Defense did not violate the publicity or propaganda prohibition. B-316443 at 11, July 21, 2009. In that case, DOD created an outreach program for retired military officers who served as media analysts to which DOD provided talking points and other information. GAO found that because there was no evidence that DOD attempted to conceal its role in influencing the media analysts’ views, and there was no evidence that DOD contracted with or otherwise paid the analysts for their positive commentary, DOD did not violate the publicity or propaganda prohibition. Applying the framework from the DOD decision to the EPA’s situation, there should be no difference in results. As GAO explicitly found here, there is no evidence that the EPA attempted to conceal its role in the creation of the Thunderclap and there is no evidence or allegation that the EPA contracted with or paid the Thunderclap supporters to post a message on their social media accounts.

Furthermore, the publicity or propaganda prohibition provides that “[n]o part of any appropriation” shall be used for publicity or propaganda, and indeed no part of any appropriation was used for the alleged violation here. GAO explicitly found that the Thunderclap page the EPA created “was visibly attributed to EPA, as it displayed the agency’s profile, photo and under the title, ‘by U.S. Environmental Protection Agency.’” Like DOD’s multi-million dollar outreach campaign to retired military officers who served as media analysts, which GAO found permissible, the EPA’s expenditure of nominal amounts reaching out to the 980 Thunderclap supporters was permissible. And because the EPA had no control over the message that the Thunderclap supporters might ultimately post on their own time and at their own expense – or indeed whether a message would be posted at all had less than a minimum number of 500 participants signed up – there is no point in time at which the EPA used appropriated funds impermissibly.

### Hyperlinks

GAO alleged that inclusion of two links to external websites in an EPA blog post violated a statutory prohibition on using appropriated funds for indirect or “grassroots” lobbying. The EPA blog post included hyperlinks to (1) an article on the Natural Resources Defense Council (NRDC)’s website about how brewers need a reliable supply of clean water for their products and (2) a July 2010 article on Surfrider’s website about why surfers get sicker than beachgoers. GAO concluded that the EPA’s use of these hyperlinks constituted an express appeal to the public to contact Congress in opposition to pending legislation that would prevent implementation of the Clean Water Rule because the external webpages also included “action” buttons that linked to other pages on the external websites where readers were urged to contact Congress in connection with the Clean Water Rule legislation.

GAO has previously always required a clear appeal *by an agency* to find a violation. B-325248, Sept. 9, 2014 (“The prohibition is violated where there is evidence of a clear appeal by an agency to the public to contact Members of Congress in support of, or in opposition to, pending legislation.”). Here, the EPA’s blog post did not contain any appeal to the public to contact Congress. In order to get to such an appeal, a member of the public would need to follow the hyperlink to another entity’s webpage and then view the banner information on the side to find buttons to click on to navigate to pages about Congress.

GAO concedes that not “every hyperlink must constitute an endorsement of the linked webpage” and in doing so establishes an unworkable “I know it when I see it” approach rather than relying on its time-tested analysis of whether (1) there is pending legislation and (2) a clear appeal *by an agency* to the public to contact members of Congress in support, or in opposition to that legislation. Under this new context-based approach, GAO’s analysis fundamentally turns on the EPA’s decision to link to environmental groups’ websites during a controversial rulemaking. This is inconsistent with GAO’s long history of narrowly interpreting the grassroots lobbying prohibition to avoid constitutional concerns.

In an attempt to legitimize this new, context-based approach, GAO cites to four First Amendment free speech cases. But the question of whether a governmental entity was engaging in “government speech” or creating a public forum for purposes of First Amendment jurisprudence is not relevant to the critical question of whether *the EPA* made a “clear appeal” to the public to contact Congress in connection with any pending legislation when it included hyperlinks to articles on Surfrider and NRDC’s websites.

With respect to the NRDC website in particular, as GAO acknowledges, the page that the EPA linked to did not mention Congress or legislation at all, but described the NRDC’s partnership with breweries, discussed the importance of the regulations, and called for enforcement of the Clean Water Act. The action button on that page merely stated “Add your voice and help make great beer.” Thus, in order to view a “clear appeal,” the reader would have needed to first click the link on the EPA blog and then click another link on the NRDC webpage. This is too attenuated to constitute a “clear appeal” by an agency under GAO’s prior opinions. To find that agencies cannot link to legitimate articles that educate the public because there may be a link on that page which, if a reader chose to activate it, would take them to another page (that the agency had not directly linked to) containing an appeal to contact Congress is not workable.

Furthermore, with respect to the Surfrider website, neither the EPA (nor GAO) can find any evidence that there was any reference to taking action or contacting Congress on Surfrider’s website at the time of the EPA’s obligation of funds – i.e., when EPA posted its blog with the hyperlink. To find, as GAO does, that an agency is responsible for the future content of a webpage it links to “rather than just the message as it may have existed at a single point in time” is unworkable as a practical matter and unreasonable as a matter of law. The content on webpages changes daily. Further, the relevant obligation of funds in this case occurs when a federal employee takes action to link to the external website. If content is added to another entity’s website in the future, then it is unclear at what point in time GAO believes appropriated funds would be obligated for the purposes of grassroots lobbying in violation of the Antideficiency Act.

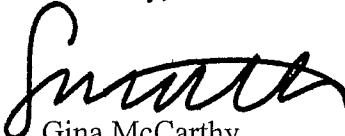
Under GAO’s analysis, individual government employees could be held personally responsible and administratively disciplined for linking to pages that do not contain appeals by other entities to contact Congress at the time they take their action. Even if an agency employee were to spend every moment at work monitoring the hyperlinked entity’s website, an appeal to contact Congress could be added after the employee went home at night that would immediately cause them to be in violation of the

Antideficiency Act. In other words, an agency could obligate appropriated funds to link to a website perfectly legitimately, and, at some point in the future, that *prior* legitimate obligation of funds could suddenly become an Antideficiency Act violation without any further action or obligation of funds by the agency.

In sum, the internet is a hive of interconnected and constantly changing information. To find that federal agencies are responsible not only for the page they link to but also for (1) subsequent links from that external site to other pages and (2) any changes made to that page after they link to it is not supported by GAO's prior case law or any other case law on the Antideficiency Act. Because no violation has occurred, no disciplinary action has been taken and no further steps are required on the part of the EPA.

Identical reports are being submitted to the President, the President of the Senate and the Speaker of the House of Representatives in accordance with the process set forth in OMB Circular A-11.

Sincerely,



Gina McCarthy