



## Decision

**Matter of:** National Archives and Records Administration—Publication of Federal Register during the Fiscal Year 2019 Lapse in Appropriations

**File:** B-331091

**Date:** July 16, 2020

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## DIGEST

During the fiscal year 2019 lapse in appropriations, the National Archives and Records Administration (NARA) incurred obligations to publish documents in the *Federal Register*, including for regulatory actions by the National Oceanic and Atmospheric Administration, the Department of Labor, and the Centers for Disease Control and Prevention. We conclude here that NARA violated the Antideficiency Act, because NARA did not have specific statutory authority to incur obligations in the absence of available appropriations against which to record such obligations, and no exception to the Antideficiency Act applied. NARA must report the violation as required by 31 U.S.C. § 1351. With this decision, we will consider future obligations of this nature in similar circumstances to be a knowing and willful violation of the Act.

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## DECISION

GAO was asked to issue a decision on whether the National Archives and Records Administration's (NARA) publication practices during its lapse in appropriations from December 22, 2018, through January 25, 2019, complied with the Antideficiency Act.<sup>1</sup> In this decision, we considered NARA's activities in connection with the publication of three temporary rules for the National Oceanic and Atmospheric

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<sup>1</sup> See Letter from Senator Thomas R. Carper, Ranking Member, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, United States Senate, and Senator Gary C. Peters, Ranking Member, Committee on Homeland Security and Governmental Affairs, United States Senate, to Comptroller General (May 23, 2019); Letter from Representative Robert Scott, Chairman, House Committee on Education and Labor, and Representative Andy Levin, Vice Chairman, House Committee on Education and Labor, to Comptroller General (May 23, 2019) (Request Letters).

Administration (NOAA), a final rule for the Department of Labor (DOL), and a notice for the Centers for Disease Control and Prevention (CDC).

As discussed below, we conclude that NARA violated the Antideficiency Act when it incurred obligations to publish these documents, because NARA lacked available budget authority and no exception to the Antideficiency Act that would otherwise authorize its obligations applied. See 31 U.S.C. §§ 1341(a), 1342. NARA's Office of the *Federal Register* (OFR) relied on certifications by NOAA that publication of NOAA's temporary rules was necessary for the protection of property. We disagree that these rules involved the protection of property. NARA also relied on certifications by DOL and CDC that delaying publication of their documents would significantly damage the execution of funded functions at those agencies. We disagree with DOL and CDC's determinations that significant damage would have occurred.

In accordance with our regular practice, we contacted NARA for its legal views and factual information on this matter. Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, NARA (June 25, 2019); GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at [www.gao.gov/products/GAO-06-1064SP](http://www.gao.gov/products/GAO-06-1064SP). NARA provided pertinent facts and its legal analysis. Letter from General Counsel, NARA, to Assistant General Counsel for Appropriations Law, GAO (July 19, 2019) (Agency Response).

## BACKGROUND

NARA is charged with the "prompt and uniform printing and distribution" of documents required to be published in the *Federal Register*, and receives annual appropriations for carrying out this activity. 44 U.S.C. § 1502. See also, Pub. L. No. 116-6, div. D, title V, 133 Stat. 13, 173–174 (Feb. 15, 2019). NARA typically obligates its annual Operating Expenses (OE) appropriation for OFR publication activities. Agency Response, at 5. See, e.g. Pub. L. No. 116-6, 133 Stat. at 173–174 (appropriating amounts "[f]or necessary expenses in connection with the administration of [NARA] and archived Federal records and related activities . . . and maintenance of the electronic records archives"). NARA acknowledges that OFR did not have an OE appropriation between December 22, 2018, and January 25, 2019, when the agency incurred obligations to publish documents for NOAA, DOL, and CDC. Agency Response, at 5.

On December 10, 2018, OFR published a notice regarding its publication procedures in the event of a lapse in appropriations. 83 Fed. Reg. 63540 (Dec. 10, 2018). The notice provided that OFR would "publish documents directly related to the performance of governmental functions necessary to address imminent threats to the safety of human life or protection of property." *Id.* The notice required agencies submitting documents to include a transmittal letter "certify[ing] that their

documents relate[d] to emergency activities authorized under the [Antideficiency Act.]” *Id.*

On January 14, 2019, OFR published a *Federal Register* Bulletin, which stated that the December 10 notice applied to unfunded agencies,<sup>2</sup> and that OFR would publish documents from agencies not experiencing an appropriations lapse if accompanied by a letter “certifying that delaying publication until the end of the appropriations lapse would prevent or significantly damage the execution of funded functions at the agency.” Oliver A. Potts, *What happens to the Federal Register during a government shutdown?*, Fed. Reg. Bull., Jan. 14, 2019, available at [www.archives.gov/federal-register/write/newsletter/2019-january](http://www.archives.gov/federal-register/write/newsletter/2019-january) (last visited Apr. 28, 2020) (*Bulletin*). Agencies were instructed to explain in their letter how the delay in publication would impact funded functions. *Id.* In the *Bulletin*, OFR also provided instructions for agency certifications regarding emergency activities. *Id.* In particular, the submitting agency’s transmittal letter had to certify that the document “directly impacts the safety of human life or the protection of property” and that “delaying publication of [the] document would compromise, in significant degree, the safety of human life or the protection of property.” OFR required agencies to specify the connection between the document and the claimed impact on the safety of human life or protection of property and to describe how a delay in publication would create an adverse impact. *Id.*

OFR relied on “the explanation, legal analysis, and justification” provided in agency certifications to determine that documents were necessary for the protection of property or human life or would prevent or significantly damage the execution of funded functions at an agency. Agency Response, at 5–6. Where an agency did not provide such explanation or simply asserted that it had satisfied the conditions, OFR declined to publish the agency’s document. Agency Response, at 6.

During the lapse in appropriations, OFR published 21 issues of the *Federal Register*, consisting of a total of 709 documents, including notices, proposed rules, and rules.<sup>3</sup> We asked NARA for examples of agency letters and explanations that resulted in publication of the related document and examples of agency submissions that OFR declined to publish because OFR determined publication would not satisfy an exception to the Antideficiency Act. Additionally, we inquired about a specific DOL

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<sup>2</sup> NARA published documents directly related to the protection of life and property throughout the entire lapse period regardless of the funded status of the issuing agency. Agency Response, at 1.

<sup>3</sup> See *Federal Register*, available at [https://www.federalregister.gov/documents/search?conditions%5Bpublication\\_date%5D%5Bgte%5D=12%2F22%2F2018&conditions%5Bpublication\\_date%5D%5Blte%5D=01%2F25%2F2019](https://www.federalregister.gov/documents/search?conditions%5Bpublication_date%5D%5Bgte%5D=12%2F22%2F2018&conditions%5Bpublication_date%5D%5Blte%5D=01%2F25%2F2019) (last visited Apr. 27, 2020) (Document search of date range of lapse in appropriations).

final rule that was questioned in one of our Request Letters and requested the corresponding transmittal letter that led to its publication. We reviewed the transmittal letters NARA provided in response to our request and, in this decision, focus on the propriety of NARA's activities with regard to the documents that NARA incurred obligations to publish, within the sample provided. These documents are discussed in further detail below. This decision does not evaluate whether each of the 709 documents OFR published during the appropriations lapse was properly published pursuant to an exception to the Antideficiency Act.<sup>4</sup>

As a general matter, NARA should endeavor to undertake its own evaluation of whether an Antideficiency Act exception applies to its own use of its appropriations, and should not defer to the assessment of another agency. We note that NARA said OFR relied on the explanation, legal analysis, and justification provided by the relevant agencies because "OFR staff do not have the authority, knowledge, or resources to evaluate the specific governmental functions cited as exceptions to the Antideficiency Act." Agency Response, at 5. NARA also stated that OFR did "review and assess the sufficiency" of each certification. *Id.* As NARA retains responsibility for its decisions with regard to its own appropriation, OFR's review and assessment should be more than a cursory examination. Here, as explained below, the submissions prepared by the relevant agencies lacked sufficient legal analysis to justify an exception under the Antideficiency Act.

#### NOAA temporary rules

NOAA, which also experienced a lapse in appropriations during the period in question, submitted a number of temporary rules to OFR, relying on the Antideficiency Act exception for the protection of property, three of which NARA provided as examples.<sup>5</sup> See Agency Response, at 7. Specifically, NOAA requested that OFR publish two temporary rules on the basis that the rules were necessary to prevent overfishing of particular species of fish. Agency Response, Attachments, at 3b-5, 3b-6. NOAA asserted that a delay in publication would risk such overfishing

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<sup>4</sup> Among the examples provided in response to our Development Letter, NARA included a January 23, 2019 transmittal letter from the Department of Veterans Affairs requesting that OFR publish a notice concerning the confidentiality of certain medical records. Agency Response, Attachments, at 3b-1. Because NARA explained that the document was not published until after the appropriations lapse ended, and it is not evident from NARA's response that OFR conducted work to publish the notice during the lapse in appropriations, we do not evaluate this submission in our decision, despite NARA's inclusion of the example. See Agency Response, at 6. Similarly, we do not consider documents that NARA declined to publish.

<sup>5</sup> We do not opine here on whether NOAA violated the Antideficiency Act through its activities related to the publication of the subject documents during its lapse in appropriations.

and could result in long-term harm to the fishery resources. *Id.* NOAA also requested that OFR publish a temporary rule to correct the allowable amount of another species of fish that could be caught in a particular region. *Id.*, at 3b-4. NOAA asserted that a delay in publication of the rule would cause conservation concerns with regard to the endangered Stellar sea lion. *Id.*

#### DOL final rule

On January 25, 2019, OFR published a final rule on tracking workplace injuries and illnesses for DOL, Occupational Safety and Health Administration (OSHA), on the basis that a delay in publication would significantly damage OSHA's execution of funded functions. Agency Response, at 8. DOL did not experience a lapse in appropriations during the period in question. Pub. L. No. 115-245, div. B, title I, 132 Stat. 3048 (Sept. 28, 2018). The final rule repealed an existing regulatory requirement that certain employers electronically provide injury and illness information each year. Agency Response, Attachments, at 4b-1. Under the previous regulation, employers were to submit their 2018 information by March 2, 2019. *Id.* DOL asserted it was necessary to publish the final rule to repeal the requirement by January 30, 2019, so that it would take effect before the March 2 deadline, otherwise OSHA would have to waste resources collecting and processing the data. *Id.* DOL also asserted that the data collection requirement raised employee privacy concerns. *Id.*

#### CDC notice

OFR also processed and scheduled for publication a CDC document on the National Hospital Care Survey where CDC asserted that the document supported funded functions of several agencies, such as the statutorily required collection of statistics that are necessary to evaluate morbidity trends and plan programs and policies, among other things. Agency Response, at 6–7, Attachments, at 3b-3. CDC did not experience a lapse in appropriations during the period in question. Pub. L. No. 115-245, div. B, title II, 132 Stat. at 3068. CDC stated that its “collection activities [would] expire on [January 31, 2019]” and that publication was necessary for collection activities to continue. Agency Response, Attachments, at 3b-3.

#### DISCUSSION

The Antideficiency Act prohibits obligations or expenditures in advance or in excess of available appropriations. 31 U.S.C. § 1341(a). The Antideficiency Act also prohibits the acceptance of voluntary services, except in the case of an emergency involving the safety of human life or the protection of property, not to include “ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.” 31 U.S.C. § 1342. As the Antideficiency Act is Congress's most significant means to enforce its constitutional power of the purse, we interpret exceptions narrowly and in a manner that protects congressional prerogatives, and have consistently declined to

read into general statutory language an implied exception to the Act. B-331132, Dec. 19, 2019; B-331093, Oct. 22, 2019; B-303961, Dec. 6, 2004.

At issue here is whether OFR's publication activities during the lapse in appropriations were consistent with the Antideficiency Act, 31 U.S.C. §§ 1341(a), 1342. Specifically, we consider two categories of activity: (1) OFR's publication of three NOAA temporary rules on the asserted basis that the regulatory actions were necessary for the protection of property; and (2) OFR's activities to publish the DOL and CDC documents on the asserted basis that a delay would significantly harm funded functions at those agencies. Since NARA did not have an OE appropriation for OFR when the agency incurred obligations to publish documents for NOAA, DOL, and CDC, we consider whether OFR's publication activities were authorized under an exception to the Antideficiency Act.

#### Publication of NOAA documents

Each of NOAA's temporary rule submissions considered here modified the amount of certain fish that could permissibly be caught in particular regions in order to protect fishery resources and an endangered species. NOAA relied on the exception under the Antideficiency Act for the protection of property. NOAA's submission focused on the potential harm to wildlife, in this case particular species of fish and a marine mammal, should the regulations not be published during the lapse in appropriations. While NOAA did not specifically address how such wildlife constitutes "property" within the meaning of the Antideficiency Act's emergency exception, we must begin our analysis with that question.

To constitute property under the Antideficiency Act, the property must be either government-owned property or property for which the government has a responsibility. 9 Comp. Dec. 182, 185 (1902) ("[T]he property in contemplation is property in which the Government has an immediate interest or in connection with which it has some duty to perform."). For example, tax payments owed to the federal government, government buildings, and a Navy airplane, have all been considered government property in prior decisions. See B-331093, Oct. 22, 2019 (finding the Internal Revenue Service had an "interest in collecting balances due and a responsibility over remittances submitted"); 53 Comp. Gen. 71 (B-177900, Aug. 2, 1973) (expenses incident to protection of an unlawfully occupied federal building); 10 Comp. Gen. 248 (A-34142, Dec 2, 1930) (towing of Navy airplane); 3 Comp. Gen. 979 (1924) (firefighting assistance to protect government building). When a postal clerk collected and delivered scattered mail to a neighboring town, the decision recognized that the government did not own the mail, however, it had a responsibility to deliver it, and the mail was considered to be property for purposes of the Act. 9 Comp. Dec. at 185. Importantly, while this early decision contemplated the scope of ownership covered by the statutory provision, it did not suggest a construction that expands the ordinary meaning of the term "property" itself. See *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013).

In its regulatory actions, NOAA cited the Magnuson-Stevens Fishery Conservation and Management Act (MSA) as its underlying authority. 84 Fed. Reg. 117 (Jan. 14, 2019) (50 C.F.R. pt. 679); 84 Fed. Reg. 49 (Jan. 7, 2019) (50 C.F.R. pt. 679); 84 Fed. Reg. 33 (Jan. 4, 2019) (50 C.F.R. pt. 679). Accordingly, we first look to MSA to inform our review of the government’s interest and responsibility with respect to fish and fishery resources.<sup>6</sup>

Under MSA, the U.S. government has certain rights and responsibilities with respect to fish and fishery resources. The U.S. government exercises “sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone” and “exclusive fishery management authority” over certain species throughout their migratory range. 16 U.S.C. § 1811. In enacting MSA, Congress stated that these fish “constitute valuable and renewable natural resources” and that a “national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, to facilitate long-term protection of essential fish habitats, and to realize the full potential of the Nation’s fishery resources.” 16 U.S.C. § 1801(a)(1), (6). Congress also stated that, among the purposes of the Act, was “to establish Regional Fishery Management Councils to exercise sound judgment in the stewardship of fishery resources.” 16 U.S.C. § 1801(b)(5). NOAA, National Marine Fisheries Service (NMFS), is responsible for managing fisheries within the exclusive economic zone. NOAA, *Understanding Fisheries Management in the United States* (June 25, 2017), available at <https://www.fisheries.noaa.gov/insight/understanding-fisheries-management-united-states> (last visited Apr. 27, 2020).

It is evident that NOAA, along with the Regional Fishery Management Councils established under MSA, exert more than a modicum of control when it comes to the regulation of fishing activities. MSA sets forth national standards for fishery conservation and management and requires Regional Fishery Management Councils to create fishery management plans for each fishery in their region. 16 U.S.C. §§ 1851, 1852. Among other things, the fishery management plan must set forth annual catch limits for its fisheries and must regulate overfishing. 16 U.S.C. §§ 1852(h)(6), 1853. Such plan may also require vessels to obtain permits or pay fees, and may establish prohibitions on fishing in certain areas or other limitations “necessary and appropriate for the conservation and management of the fishery.” 16 U.S.C. § 1853(b).

NOAA, NMFS also carries out responsibilities under the Endangered Species Act (ESA) and the Marine Mammals Protection Act (MMPA). See 16 U.S.C. §§ 1382, 1533. Such duties include designating critical habitats, monitoring the status of

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<sup>6</sup> Under MSA, “fish” is defined as “finfish, mollusks, crustaceans, and all other forms of marine animal and plant life other than marine mammals and birds[,]” while “fishery resources” refers to “any fishery, any stock of fish, any species of fish, and any habitat of fish.” 16 U.S.C. §§ 1802(12), (13).

endangered species, and protecting certain aquatic mammals. See 16 U.S.C. §§ 1362(12)(i), 1533. In addition, Regional Fishery Management Councils must take ESA and MMPA into consideration when developing fishery management plans. See NOAA, *Understanding Fisheries Management in the United States* (June 25, 2017), available at <https://www.fisheries.noaa.gov/insight/understanding-fisheries-management-united-states> (last visited Apr. 27, 2020).

NOAA's management and conservation responsibilities with respect to both fish and endangered species are certainly significant. Nonetheless, the relevant statutes do not support the characterization of these resources as property—that is something owned or possessed by a particular entity. See Merriam-Webster Dictionary Online, *Defining property*, available at [www.merriam-webster.com/dictionary/property](http://www.merriam-webster.com/dictionary/property) (last visited Apr. 27, 2020).

It is true that in the postal case it was the government's responsibility with respect to the mail that formed the basis for the determination that the postal worker's efforts constituted protection of property under the act. 9 Comp. Dec. at 185 ("It having been the duty of the Government to transport and deliver at its destination the mail in its custody, services rendered in saving it from destruction were undoubtedly rendered for the Government."). But importantly, at issue in that decision was not whether the mail was, at its core, property. Rather, the postal case considered whether the statutory exception was intended to apply exclusively to government-owned property, or did it extend to property over which the government had a responsibility, like the mail. Significantly, both categories contemplated still satisfy the basic condition of being property. Conversely, although NOAA's regulatory authority over fish and the protection of Stellar sea lions may check the box for government responsibility, these are wildlife, inherently distinguishable from something like mail, which, unlike wildlife, is owned by someone, that is, the recipient of the mail.

The government's interest in protecting these wildlife is also distinct from the sort of interest we've recognized that the government has in tax remittances. See B-331093, Oct. 22, 2019 (deeming tax remittances to constitute property under the Antideficiency Act). Where an individual has not satisfied their federal tax liability, such payment is money owed to the government, with regard to which the government has an ownership interest and a responsibility to collect. See *id.* Whereas here, the government's role is to manage, to protect, and to conserve natural resources for the benefit of the American people. See, e.g., 16 U.S.C. §§ 1801(b)(1), (b)(5); NOAA, *Understanding Fisheries Management in the United States* (June 25, 2017), available at <https://www.fisheries.noaa.gov/insight/understanding-fisheries-management-united-states> (last visited Apr. 27, 2020). The interest that is incumbent with regulatory responsibility over important natural resources does not thereby equate to the sort of direct interest necessary to render something property under the Antideficiency Act. Because the wildlife in question do not constitute property under the Antideficiency

Act, the issue of potential harm by overfishing raised by NOAA is not the dispositive issue in the analysis.

NARA asserts that its authority to incur obligations to publish NOAA's temporary rules in the absence of an available appropriation was necessarily implied from NOAA's own authority to incur obligations to prepare and submit the rules. See Agency Response, at 2–4. NARA points to an August 1995 Department of Justice (DOJ), Office of Legal Counsel (OLC) legal opinion which recognizes a “necessary implication” exception to the Antideficiency Act, opining that “a limited number of government functions funded through annual appropriations must otherwise continue despite a lapse in their appropriations because the lawful continuation of other activities necessarily implies that these functions will continue as well.” DOJ, OLC Memorandum for the Director Office of Management and Budget, *Government Operations in the Event of a Lapse in Appropriations* (Aug. 16, 1995) (August 1995 OLC Memo); Agency Response, at 4.

Importantly, as we explain below, the OLC opinion has limited application, and it does not apply here. Nevertheless, the necessary implications basis NARA claims as authority for its obligations differs from the authority NOAA relied upon in its certifications. NOAA certified in its transmission letters to OFR that it was relying on the emergency exception to the Antideficiency Act as its authority. Given that, in each circumstance, NARA incurred obligations to provide legal notice to affected persons based on the emergency rationale asserted by NOAA, OFR's publication would, in relying upon the same rationale, also invoke the emergency exception, rather than the necessary implication justification NARA asserts as its authority. See Agency Response, at 4. Further, as NOAA was also experiencing a lapse in appropriations and, therefore, NARA was not acting in support of a funded function, this situation is also factually distinguishable from those activities contemplated in the August 1995 OLC Memo as necessarily implied. See August 1995 OLC Memo, at 4. Because we find that the “property” at issue here was not property at all, the emergency exception to the Antideficiency Act did not authorize NARA's obligations, in the absence of available appropriations, to publish NOAA's temporary rules.

#### Publication of DOL and CDC documents

On January 14, 2019, OFR began accepting and publishing documents from agencies with funded programs, including a DOL final rule and a CDC notice, where OFR determined the submitting agency demonstrated that delaying publication would significantly damage the execution of funded functions at the agency. Agency Response, at 2. As NARA did not have available appropriations during this time, we consider whether it was permissible under the Antideficiency Act for NARA to incur obligations to publish the DOL and CDC documents.

As a general matter, we look for specific congressional intent in the relevant statute evidencing that an activity is to continue when appropriations are not available to satisfy the obligations. B-331132, Dec. 19, 2019. Because the Antideficiency Act is

critical to Congress’s constitutional power of the purse, we narrowly construe statutes in determining whether they provide such an exception. *Id.* An agency’s general authority to perform an activity does not itself constitute an exception to the Antideficiency Act. *Id.*; B-331093, Oct. 22, 2019.

Here NARA relies on a December 1995 OLC opinion as support for its authority to publish the DOL and CDC documents. In particular, NARA looks to the proposition that an unfunded agency’s activities may continue during a lapse in appropriations, to the extent they are “necessary to the effective execution of functions by an agency that has current fiscal year appropriations, such that a suspension of [the unfunded agency]’s functions during the period of anticipated funding lapse would prevent or significantly damage the execution of those funded functions.” 19 Op. Off. Legal Counsel 337, 338 (1995).<sup>7</sup>

With regard to the DOL final rule, DOL asserted in its certification to OFR that it was necessary to publish the rule to repeal a requirement that employers electronically submit information on employee illnesses and injuries by January 30, 2019, so that the rule would take effect before the March 2, 2019, submission deadline. Otherwise, OSHA would have to waste resources collecting and processing the unwanted data, and the submission of the data itself raised privacy concerns. Agency Response, Attachments, at 4b-1. We previously considered whether the Office of Information and Regulatory Affairs (OIRA) properly incurred obligations during the appropriations lapse to review the same rule at issue here.<sup>8</sup> B-331132, Dec. 19, 2019. Importantly, we found that the argument that DOL would have been significantly harmed had OIRA suspended its review of the final rule during the appropriations lapse lacked support. B-331132, Dec. 19, 2019 (noting that DOL had not previously enforced the information submission deadline under the repealed rule). Given our previous conclusion that a delay in OIRA’s review of the final rule would not have caused significant harm, we are, on the same basis, not persuaded that a subsequent delay in publication of the final rule by OFR would have caused significant harm.

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<sup>7</sup> NARA also refers to an August 1995 OLC opinion that relies on a 1981 opinion for the proposition that “a limited number of government functions funded through annual appropriations must otherwise continue despite a lapse in their appropriations because the lawful continuation of other activities necessarily implies that these functions will continue as well.” August 1995 OLC Memo, at 4, *citing* 5 Op. Off. Legal Counsel 1, 5 (1981); Agency Response, at 2. As we discussed in B-331093, Oct. 22, 2019, the 1981 opinion applied this exception to the administration of social security payments, and we declined to more widely extend its rationale. B-331093, Oct. 22, 2019. See also B-331132, Dec. 19, 2019.

<sup>8</sup> OIRA reviews significant final rules from agencies before they are published in the *Federal Register*. Exec. Order No. 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51735 (Oct. 4, 1993).

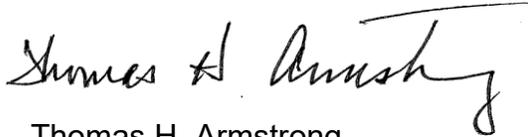
With regard to the CDC notice, CDC conveyed in its certification to OFR that data collection activities for the National Hospital Care Survey were scheduled to expire on January 31, 2019, and, in order for the collection activities to continue, the notice needed to be published for Office of Management and Budget approval by January 29, 2019. CDC included details on the significance of the data to funded functions, such as the planning of programs to improve the delivery of health care, and the use of the data by other public and private entities. However, aside from declaring that information collection activities were scheduled to end, CDC did not describe any significant harm that would befall these funded functions as a result. For example, from the information provided, there is no indication that the survey could not resume at a later date, or that critical information would be lost or unavailable. Nor did CDC provide any other articulation of the impact a delay in publication of the notice would have on a future information collection. Specifically, if OFR had delayed efforts to publish the notice causing the collection activities to expire, there is no indication that CDC could not pursue reinstatement of the information collection activity under the Paperwork Reduction Act, or that doing so would cause significant harm.

For the reasons discussed, we conclude that NARA's obligations to publish and to prepare for publication, DOL's final rule on tracking workplace illnesses and injuries and CDC's notice regarding the National Hospital Care Survey, respectively, did not fall within an exception to the Antideficiency Act. NARA consulted OLC prior to OFR engaging in publication activities to support funded agency functions and OLC authorized such activity, citing to its December 1995 opinion. Agency Response, at 2; Agency Response, Attachments, at 5-4; E-mail from Special Counsel, OLC, to Director of Legal Affairs and Policy, OFR, and Director, OFR, *Subject: RE: Federal Register publication during the funding lapse* (Jan. 11, 2019). Notwithstanding, it is specific congressional intent in the relevant statute evidencing that an activity is to continue in the absence of available appropriations that is paramount. Matters such as these are matters of statutory construction, not agency policy. NARA did not have specific statutory authority to incur obligations in advance of appropriations, nor had Congress otherwise mandated that OFR's publication activities continue in the absence of an appropriation. NARA's responsibility to publish the *Federal Register*, which is an ongoing, regular function of government, does not itself serve as such authority. Nor did DOL or CDC demonstrate that the impact of a delay in publication of their respective documents warranted exception to the Act.

## CONCLUSION

NARA violated the Antideficiency Act when it incurred obligations to publish the NOAA, DOL, and CDC documents discussed in this decision, as NARA lacked available budget authority at the time it incurred the obligations, and no exception to the Antideficiency Act applied. NARA should report its violation in accordance with the Act, 31 U.S.C. § 1351. With this decision, we will consider any future obligations of this nature in similar circumstances to be a knowing and willful violation of the Antideficiency Act. See 31 U.S.C. § 1350.

Congress subsequently enacted a continuing resolution on January 25, 2019, which was available through February 15, 2019, and a full-year appropriation on February 15, 2019. Pub. L. No. 116-6, 133 Stat. at 173–174; Pub. L. No. 116-5, 133 Stat. 10 (Jan. 25, 2019). Although NARA had no available budget authority at the time it incurred the obligations at issue, the proper corrective action in this case is for NARA to record the obligations against the OE appropriation that Congress ultimately provided for OFR’s fiscal year 2019 expenses.

A handwritten signature in black ink, appearing to read "Thomas H. Armstrong". The signature is written in a cursive style with a prominent horizontal line above the name.

Thomas H. Armstrong  
General Counsel