



B-326944

December 14, 2015

The Honorable James M. Inhofe
Chairman
Committee on Environment and Public Works
United States Senate

Subject: *Environmental Protection Agency—Application of Publicity or Propaganda and Anti-Lobbying Provisions*

Dear Mr. Chairman:

This responds to your request for our opinion concerning whether the Environmental Protection Agency's (EPA) use of certain social media platforms in association with its "Waters of the United States" (WOTUS) rulemaking in fiscal years (FY) 2014 and 2015 violated publicity or propaganda and anti-lobbying provisions contained in appropriations acts. Letter from Chairman, Committee on Environment and Public Works, United States Senate, to Comptroller General (June 16, 2015).

Section 718 of the Financial Services and General Government Appropriations Act, 2014, prohibited the use of EPA's appropriations for unauthorized publicity or propaganda purposes.¹ Section 715 of the act prohibited the use of EPA's appropriations for indirect or grassroots lobbying in support of or opposition to pending legislation.² These same restrictions applied to EPA's FY 2015 appropriations.³ Section 401 of the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2015, similarly prohibited the use of EPA's appropriations for grassroots lobbying.⁴

¹ Pub. L. No. 113-76, div. E, title VII, § 718, 128 Stat. 5, 234 (Jan. 17, 2014).

² *Id.*, § 715.

³ Pub. L. No. 113-235, div. E, title VII, §§ 715, 718, 128 Stat. 2130, 2382-83 (Dec. 16, 2014).

⁴ *Id.*, § 401.

In accordance with our regular practice, we contacted EPA to seek factual information and its legal views on this matter. Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, EPA (July 10, 2015); *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. In response, EPA provided its legal analysis and electronic access to factual documentation. Email from Interim Secretary, EPA, to Managing Associate General Counsel, et al., GAO, *Subject: EPA Response to GAO regarding social media* (Aug. 7, 2015) (providing access to SharePoint site); EPA, Associate General Counsel Memorandum for General Counsel, *Analysis in response to an inquiry from the Government Accountability Office regarding EPA use of Social Media and the Clean Water Rule* (Aug. 6, 2015) (EPA Response).

As explained below, we conclude that EPA violated the described provisions through its use of social media in association with its rulemaking efforts to define “Waters of the United States” under the Clean Water Act (CWA) during FYs 2014 and 2015. Because EPA obligated and expended appropriated funds in violation of statutory prohibitions, we also conclude that EPA violated the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(A), as the agency’s appropriations were not available for these prohibited purposes.

EPA did not quantify an exact cost associated with the use of any particular social media platform. The agency noted that staff is paid for time spent developing and posting a message but time is not tracked by platform or project. EPA Response, at 3. EPA explained to us that it spent \$64,610 on video and graphic assets to raise awareness surrounding the proposed rule, but it does not appear to us that the aspects of EPA’s campaign with which we have concerns would involve these video and graphic assets. *Id.* The agency should determine the cost associated with the prohibited conduct and include the amount in its report of its Antideficiency Act violation.

BACKGROUND

In March 2014, EPA and the Army Corps of Engineers released a proposed rule defining the scope of waters protected under the CWA to “provid[e] clarity” and to minimize the number of case-specific determinations made by regulators, which, according to the agencies, had increased following two Supreme Court decisions.⁵ 79 Fed. Reg. 22188 (Apr. 21, 2014).⁶ The public comment period was initially set to

⁵ *Rapanos v. United States*, 546 U.S. 932 (2006); *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159 (2001).

⁶ See EPA, *News Releases – Water, EPA and Army Corps of Engineers Clarify Protection for Nation’s Streams and Wetlands* (Mar. 25, 2014), available at

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expire on July 21, 2014, but was ultimately extended until November 14, 2014.⁷ According to EPA, the agency used social media platforms in connection with the WOTUS rulemaking from February 2014 through July 2015. EPA Response, at 2. To understand how EPA used social media platforms, it is necessary to understand how the various platforms facilitate communications among their users. Social media platforms, like Facebook, Twitter, and Tumblr, enable users to create and share content, like messages and photos. This content becomes archived on each user's individual page or "timeline." When users log into a social media platform, they see a "newsfeed" or "dashboard," which is a real-time aggregate of the recent content of other users that they follow on the network. While we describe social media platforms at a basic level, we note that there are variations and distinct capabilities associated with different forums.

EPA explained to us that through social media, it sought to clarify the issues concerning the WOTUS proposed rule, to provide information about streams and wetlands, to demonstrate the rule's relevance, to provide opportunities for public engagement, and to correct what it viewed as misinformation concerning the rule. *Id.*, at 2. For ease of discussion in this opinion, we describe EPA's social media campaign using four categories: Thunderclap, the #DitchtheMyth Campaign, the #CleanWaterRules Campaign, and EPA's Links to External Websites.

1. EPA's Use of Thunderclap

Thunderclap is a "crowdspeaking platform" that allows a single message to be shared across multiple Facebook, Twitter, and Tumblr accounts at the same time. Thunderclap, *FAQ*, available at www.thunderclap.it/faq (last visited Dec. 7, 2015). The website allows what the site calls "campaign organizers" to create a Thunderclap page. The Thunderclap page is used to describe the organizer's social media campaign, including a message of no more than 117 characters to be shared by those who sign up to support the campaign. Thunderclap, *Getting Started*, available at www.thunderclap.it/guide (last visited Dec. 7, 2015). Each organizer selects what the site calls a "supporter goal" (for example, 500 supporters). If the campaign reaches the supporter goal, Thunderclap will automatically post the message on the social media accounts of the campaign's supporters on the same date and at the same time. The date and time are chosen by the campaign

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<http://yosemite.epa.gov/opa/admpress.nsf/3881d73f4d4aaa0b85257359003f5348/ae90dedd9595a02485257ca600557e30> (last visited Dec. 7, 2014).

⁷ 79 Fed. Reg. 22188; 79 Fed. Reg. 35712 (June 24, 2014) (extending public comment period to October 20, 2014); 79 Fed. Reg. 61590 (Oct. 14, 2014) (extending public comment period to November 14, 2014).

organizer. Thunderclap will post the message as drafted by the organizer, although an individual supporter has the option of customizing the message when signing up for a campaign.

During the public comment period for the WOTUS proposed rule, EPA created a Thunderclap campaign page titled, “I Choose Clean Water.” The page was visibly attributed to EPA, as it displayed the agency’s profile photo and, under the title, “by U.S. Environmental Protection Agency.” The Story section of the page describing the campaign read as follows:

“Clean water is important – for drinking, swimming, and fishing. We need it for our communities, farms, and businesses. But right now 60 percent of the streams and millions of acres of wetlands across the country aren’t clearly protected from pollution and destruction. In fact, one in three Americans—117 million of us—get our drinking water from streams that are vulnerable. To have clean water downstream in the rivers and lakes in our neighborhoods we need healthy headwaters upstream. EPA and the U.S. Army Corps of Engineers has [sic] proposed to strengthen protection for the clean water that is vital to all Americans.”⁸

If EPA met its goal of 500 supporters, Thunderclap would post the following message to supporter accounts: “Clean water is important to me. I support EPA’s efforts to protect it for my health, my family, and my community. <http://thndr.it/1sLh51M>.” At the time of the campaign, the hyperlink⁹ connected to EPA’s webpage on the proposed rule.¹⁰

⁸ EPA, *I Choose Clean Water*, Thunderclap, available at www.thunderclap.it/projects/16052-i-choose-clean-water (last visited Dec. 7, 2015) (EPA Thunderclap).

⁹ A hyperlink is text or a photo in a document or webpage that when clicked, connects to another webpage, section, or document.

¹⁰ This opinion focuses on the Thunderclap message created by EPA, despite the possibility that supporters could have altered or otherwise customized the message when joining the campaign. Further, depending on the forum authorized by the campaign supporter (Facebook, Tumblr, and/or Twitter), the posted message may have been accompanied by a photo of a child drinking water or other text. As we cannot be certain of every variation of the Thunderclap message that was posted, or how or why one message may have appeared differently than others, our discussion concerns EPA’s message as included on its campaign page, “Clean water is important to me. I support EPA’s efforts to protect it for my health, my family, and
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EPA actively promoted its Thunderclap campaign by encouraging people to sign up and to spread the word so that others might sign up as well. See, e.g., Communications Director for Water, *Do You Choose Clean Water?*, The EPA Blog (Sept. 9, 2014), available at <http://blog.epa.gov/blog/2014/09/do-you-choose-clean-water/> (last visited Dec. 7, 2015). The EPA blog post announcing the campaign stated, after explaining that the greater protection proposed was necessary to ensure clean water, “We hope you’ll support our clean water proposal. To help you do that, and get your friends to also voice their support, we’re using a new tool called Thunderclap; it’s like a virtual flash-mob.” *Id.* Leading up to the post date for the Thunderclap message, EPA’s Twitter and Facebook accounts advertised the campaign with posts like, “Help us send a strong message about supporting clean water,” “Tell your friends that you choose clean water: let Thunderclap send a message,” and “Help us spread the word about the importance of clean water. We need 500 people to sign up to share the message.”

EPA met and exceeded its supporter goal, causing Thunderclap to post the agency’s message on 980 social media accounts on September 29, 2014, at 2 p.m. Based on the followers and friends of these supporters, Thunderclap estimates that EPA’s message potentially reached about 1.8 million people.

2. EPA’s #DitchtheMyth Campaign

In another social media effort, EPA attempted to dispel what it views as inaccuracies on the rule being circulated by external interest groups. For this purpose, EPA created a hashtag (#): #DitchtheMyth.¹¹ The #DitchtheMyth campaign included graphics regarding aspects of the rule, along with statements that people could tweet using their own Twitter accounts. The Ditch the Myth website showed as a “Myth,” for example, that “[g]roundwater is regulated by the Clean Water Act.” Below the “Myth,” EPA included what it called a “Truth”—in this example: “The proposed

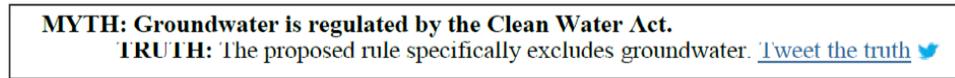
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my community,” with the link to EPA’s webpage on its proposed rule. EPA Thunderclap.

¹¹ Including the hashtag symbol before a word, without spaces, allows users to click on the hashtagged phrase and see other posts that have used the same hashtag. Users can also perform searches for a hashtag to locate relevant posts. Hashtags that become very popular can become “Trending Topics,” which may highlight or elevate the hashtag’s visibility on users’ newsfeeds. Twitter, *Using hashtags on Twitter*, available at <http://support.twitter.com/articles/49309#> (last visited Dec. 7, 2015).

rule specifically excludes groundwater”—followed by a hyperlink of the phrase “Tweet the truth.”¹² See below:

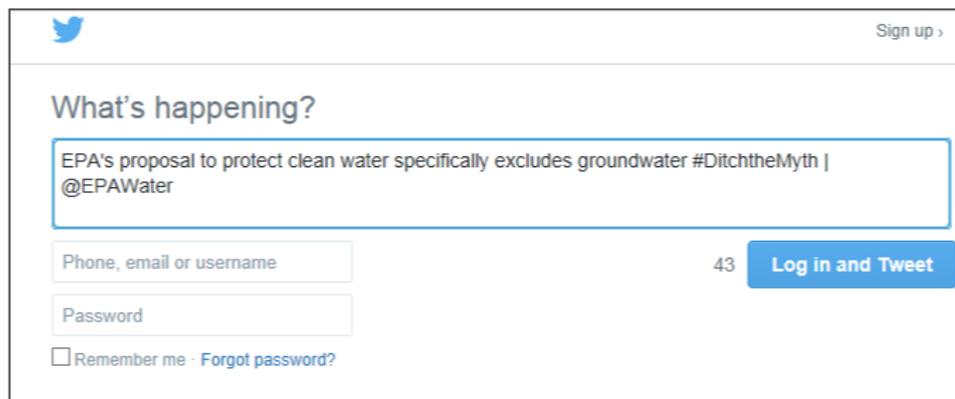
Figure 1: Image from EPA’s Ditch the Myth Webpage



Source: EPA. | GAO B-326944

Clicking the hyperlinked phrase “Tweet the truth” generated a Twitter window with the “Truth” statement followed by “#DitchtheMyth | @EPAWater[:]”

Figure 2: Screenshot of GAO-Generated Tweet



Source: Twitter. | GAO B-326944

Twitter users could share the statement as displayed or alter the message. Each of the graphics (a feature separate from the tweets) included EPA’s Ditch the Myth website as well as the agency’s logo, and EPA describes the inclusion of its Twitter handle, @EPAWater, at the end of the prewritten tweets, as a byline.

3. EPA’s #CleanWaterRules Campaign

On April 7, 2015, EPA’s Communications Director for its Office of Water created an EPA blog post called “Tell Us Why #CleanWaterRules.”¹³ The post initiated the

¹² EPA’s Ditch the Myth website no longer exists. We accessed the #DitchtheMyth content through documents provided to us by EPA.

¹³ Leland E. Beck, *Monday Morning Regulatory Review – 4/13/15*, Federal Regulations Advisor (Apr. 12, 2015), available at

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agency's #CleanWaterRules social media campaign. The Communications Director states that "[w]e can't protect our rivers, lakes, and coastal waters if we don't protect our streams and wetlands," and notes that the best thing people can do for clean water is to "spread the word about how much it matters." He suggested that people do this by posting a photo holding a #CleanWaterRules sign to Facebook, Twitter, or Instagram, with the #CleanWaterRules hashtag and a reason why clean water rules. EPA's social media accounts used this hashtag in numerous messages describing the importance of clean water and the protections in the rule.

4. EPA's Links to External Websites

The EPA blog post described above also included hyperlinks to a Natural Resources Defense Council (NRDC) webpage and to a Surfrider Foundation blog post.¹⁴ In the EPA blog post, EPA's Communications Director for Water describes why "clean water rules," two reasons being because he is a surfer and because he is a beer drinker.

He notes that as a surfer, he "[doesn't] want to get sick from pollution." The phrase "sick from pollution" hyperlinks to a Surfrider Foundation blog post, "Five reasons why surfers are more likely to get sick from polluted ocean water than beach

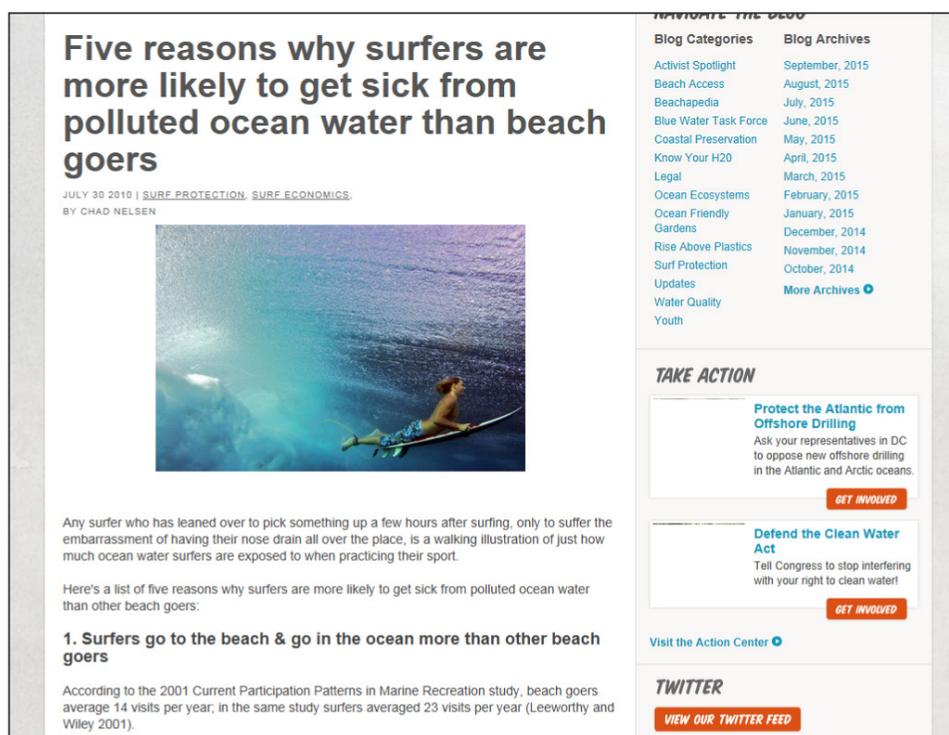
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www.fedregsadvisor.com/2015/04/12/ (last visited Dec. 7, 2015) (Fed. Reg. Advisor); Communications Director for Water, *Tell Us Why #CleanWaterRules*, EPA Blog (Apr. 7, 2015), available at <http://blog.epa.gov/blog//2015/04/tell-us-why-cleanwaterrules/> (last visited Dec. 7, 2015) (EPA Blog Post).

¹⁴ NRDC describes itself an environmental action group operating under section 501(c)(3) of the tax code. NRDC, *About NRDC: NRDC Action Fund*, available at www.nrdc.org/about/actionfund.asp (last visited Dec. 7, 2015) (NRDC Action Fund). The organization asserts that it "mobilize[s] the public in direct action campaigns that have produced millions of petitions to . . . government agencies." NRDC, *About NRDC: Finances*, available at www.nrdc.org/about/finances.asp (last visited Dec. 7, 2015). The NRDC website also states that "[t]he NRDC Action Fund works to support pro-environment legislation and defeat anti-environment legislation through paid advertising and phonebanking and by mobilizing grassroots pressure." NRDC Action Fund. The Surfrider Foundation also operates under section 501(c)(3) of the tax code. It describes itself as a grassroots environmental organization whose mission is to "protect[] oceans, waves and beaches through a powerful activist network." Surfrider Foundation, *Surfrider Foundation FAQ*, available at www.surfrider.org/images/uploads/publications/FAQ_2015.pdf (last visited Dec. 7, 2015).

goers.”¹⁵ In a column adjacent to the Surfrider blog post is a “Take Action” section containing a link button (“Get Involved”) with the description, “Defend the Clean Water Act. Tell Congress to stop interfering with your right to clean water!” We include below the Surfrider Foundation blog post hyperlinked in the EPA blog.¹⁶

Figure 3: Screenshot of Surfrider Foundation Blog Post



Source: Surfrider Foundation. | GAO B-326944

The “Get Involved” button leads to an action page. When we visited the page on June 5, 2015, the action page stated:

“Federal lawmakers in DC are trying to prevent the Environmental Protection Agency from restoring Clean Water Act (CWA) protection for nearly 20 million acres of wetlands, two million miles of streams,

¹⁵ Chad Nelsen, Surfrider Foundation, *Five reasons why surfers are more likely to get sick from polluted ocean water than beach goers* (July 30, 2010), available at www.surfrider.org/coastal-blog/entry/five-reasons-why-surfers-are-more-likely-to-get-sick-from-polluted-ocean-wa (last visited Dec. 7, 2015) (Surfrider Blog Post).

¹⁶ This screenshot was taken on September 15, 2015. We note that the Surfrider Foundation has since redesigned its website. The “Take Action” column, along with the other information in side bar, no longer appears alongside the blog posts.

and the drinking water for 117 million Americans. Members of both the U.S. Senate and the House of Representatives have proposed attaching 'dirty water' riders to spending bills to block the EPA's efforts.

"These small streams and wetlands need our protection as they impact the quality and health of downstream waters, and ultimately our coasts and the ocean. Clean water at the beach starts with healthy waters upstream.

"Tell Congress to stand strong for clean water and oppose any amendments that undermine the Clean Water Act in appropriations legislation."

We visited the Surfrider blog post again on September 15, 2015. The text of the action page linked through the "Get Involved" button had changed to state the following, along with an associated form letter for submission:

"Congress is considering legislation to prevent the Environmental Protection Agency from implementing the recent Clean Water Rule, despite the fact that 80% of Americans support this science-based decision.

"The Clean Water Rule is necessary to protect nearly 20 million acres of wetlands and two million miles of streams that provide drinking water for 117 million Americans and support healthy water downstream at the beach.

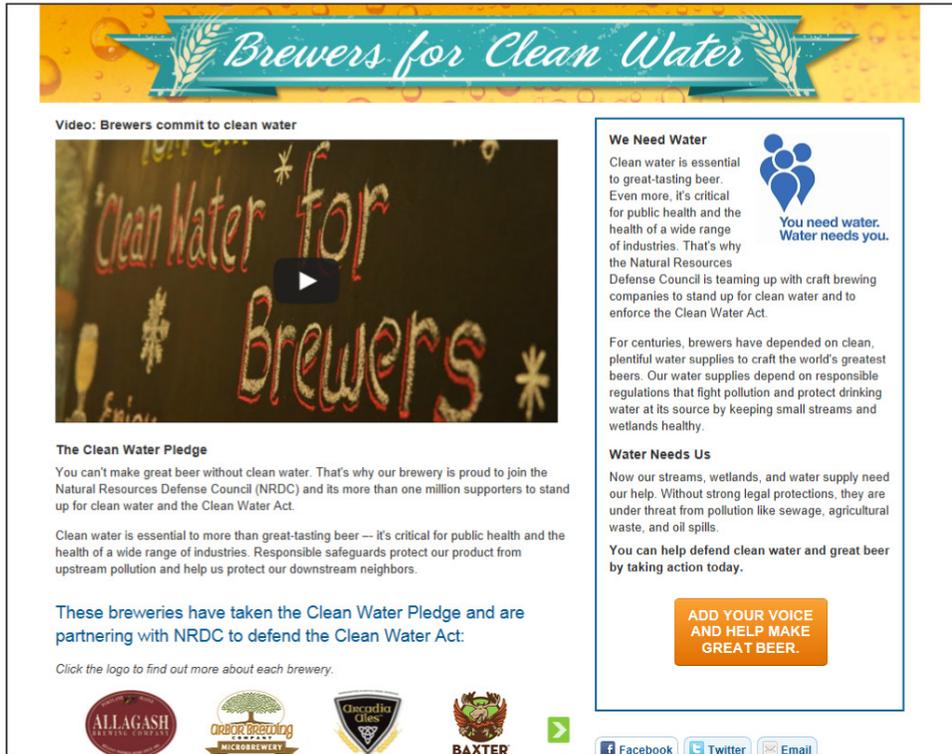
"Tell Congress to listen to the American public instead of industry polluters and oppose any legislation or spending bills that would undermine the Clean Water Rule."

In June and July 2014, provisions that would prohibit the use of appropriated funds in connection with the proposed rule were introduced in the Army Corps of Engineers' and EPA's FY 2015 appropriations bills, but were not ultimately enacted. H.R. 4923, 113th Cong., § 106 (2014); H.R. 5171, 113th Cong., § 429 (2014). In June 2015, a similar provision was proposed for inclusion in EPA's FY 2016 appropriations bill. See H.R. 2822, 114th Cong., § 422 (2015).

Regarding beer, the EPA blogger explains that "brewers depend on a reliable supply of clean water," and that "there is an alliance of brewers speaking out for clean water." The phrase "alliance of brewers" hyperlinks to an NRDC page, "Brewers for Clean Water." NRDC, *Brewers for Clean Water*, available at www.nrdc.org/water/brewers-for-clean-water/ (last visited Dec. 7, 2015) (Brewers Alliance Page). In a box embedded alongside the text of the Brewers for Clean Water page, describing NRDC's partnership with breweries to defend the CWA, is

an orange link button (“Add Your Voice and Help Make Great Beer”) leading to an action page. We include below the NRDC webpage hyperlinked in the EPA blog.¹⁷

Figure 4: Screenshot of NRDC Webpage



Source: NRDC. | GAO B-326944

The action page states the following:

“We shouldn’t have to worry if the water sources we rely on for drinking, fishing, and swimming are polluted. But a legal loophole has undermined the Clean Water Act safeguards that are supposed to prevent big polluters from dumping dangerous pollutants into our waters.

“The Environmental Protection Agency and the Army Corps of Engineers are ready to make important changes to close this loophole, but polluters and their allies in Congress could try to block them from moving forward. You can step up to help stop the polluter attack on these needed clean water safeguards.

¹⁷ This screenshot was taken on September 15, 2015.

“Protect clean water. Urge your senators to defend Clean Water Act safeguards for critical streams and wetlands.”

Below the text is a form for readers to send to their senators, urging support for the “Clean Water Protection Rule.”

At the time of EPA’s April 7, 2015 blog post, the Waters of the United States Regulatory Overreach Protection Act of 2015 was pending in the House. H.R. 594, 114th Cong. (2015). If enacted, the provision would prevent implementation of the WOTUS proposed rule. The Regulatory Integrity Protection Act of 2015, which would require withdrawal of the rule, was introduced in the House on April 13, 2015. H.R. 1732, 114th Cong. (2015). Several other proposed measures that would similarly impact the rule were pending at or near the time of EPA’s blog post.

As of December 2015, the EPA blog post continues to hyperlink to the Surfrider Foundation blog post and the NRDC Brewers for Clean Water webpage.

DISCUSSION

At issue here is whether EPA violated publicity or propaganda and anti-lobbying provisions concerning the use of its FY 2014 and FY 2015 appropriations. In this opinion, we first address the publicity or propaganda prohibition, including its application to EPA’s Thunderclap, #DitchtheMyth, and #CleanWaterRules social media campaigns. Then we address the grassroots lobbying prohibition, as applied to the hyperlinks in EPA’s “Tell us why #CleanWaterRules” blog post, which connected to NRDC and Surfrider Foundation webpages containing appeals to readers to contact Congress.

As discussed below, we conclude that EPA’s use of Thunderclap constituted covert propaganda, in violation of the publicity or propaganda prohibition. The agency’s #DitchtheMyth and #CleanWaterRules social media campaigns, however, did not implicate the publicity or propaganda prohibition. We also conclude that EPA hyperlinks to the NRDC and Surfrider Foundation webpages provided in the EPA blog post constitute grassroots lobbying, in violation of the grassroots lobbying prohibition.

A. Publicity or Propaganda

Section 718 of the Financial Services and General Government Appropriations Act, 2014, provides: “No part of any appropriation contained in this or any other Act shall be used directly or indirectly, including by private contractor, for publicity or propaganda purposes within the United States not heretofore authorized by Congress.” Pub. L. No. 113-76, div. E, § 718. This same provision appears in section 718 of the Financial Services and General Government Appropriations Act, 2015. Pub. L. No. 113-235, div. E, § 718.

EPA's activities raise issues concerning two forms of restricted communications: covert propaganda and self-aggrandizement. Covert propaganda refers to communications that fail to disclose the agency's role as the source of information. B-320482, Oct. 19, 2010. Communications tending to emphasize the importance of the agency, its officials, or the activity in question constitute self-aggrandizement. *Id.* See *also* 31 Comp. Gen. 311 (1952). As explained below, we conclude that EPA's use of Thunderclap constitutes covert propaganda, in violation of the publicity or propaganda prohibition. The #DitchtheMyth social media campaign, however, did not amount to covert propaganda. We also conclude that the #CleanWaterRules social media campaign was not self-aggrandizement.

1. EPA's Use of Thunderclap and the #DitchtheMyth Campaign

Here, because EPA created a Thunderclap message that did not identify EPA as the author to those who would read it when Thunderclap shared the message across social media accounts, we consider whether EPA's use of Thunderclap constituted covert propaganda. The critical element of covert propaganda is the agency's concealment from the target audience of its role in creating the material. B-305368, Sept. 30, 2005 ("A critical element of this violation is the concealment of, or failure to disclose, the agency's role in sponsoring the material"); B-302710, May 19, 2004 ("[F]indings of propaganda are predicated upon the fact that the target audience could not ascertain the information source").

It is not enough that an agency disclose its role to the conduit of such material if it has not taken measures to identify its role to the intended recipient. For example, when the Centers for Medicare and Medicaid Services (CMS) provided prepackaged news videos to news stations to be reproduced without alteration, and did not, within the story or script, identify the agency as the source, we determined that CMS engaged in covert propaganda. B-302710. The labeling of the materials which identified CMS as the source to the news organizations did not identify CMS's role to the viewers. *Id.* Rather, the agency designed the videos to appear to the television viewing audience as though developed by the news stations. *Id.* Similarly, we concluded that suggested editorials prepared by the Small Business Administration (SBA) and distributed to newspapers constituted covert propaganda. B-223098, Oct. 10, 1986. The newspapers printing the editorials would know of SBA's role; however, as the text of the pieces did not identify SBA as the source, the readers would not. *Id.*

A Thunderclap campaign, by its nature, requires supporters for Thunderclap to post the campaign's message. Accordingly, reaching and acquiring these supporters is an inherent objective. For these supporters, EPA's role in the campaign and construction of the message to be shared was evident: EPA advertised the campaign, and the webpage on which supporters joined the campaign was visibly attributed to the agency. Like CMS's prepackaged news videos and its relationship

with television stations, these supporters, while certainly one target audience of the campaign, were not the target audience of the Thunderclap message itself; they were conduits of EPA's message. The message¹⁸ was not written for the supporters who joined the campaign—it was written for their networks of friends and followers who would see the message in their newsfeeds and dashboards when Thunderclap posted on their accounts. This notion is supported by EPA's many social media messages encouraging people to "tell [their] friends," "spread the word" and "help [EPA] send a strong message."

Similar to CMS's prepackaged news videos and SBA's suggested editorials, EPA designed its Thunderclap message so that it could be shared without alteration. While EPA's role was transparent to supporters who joined the campaign, this does not constitute disclosure to the 1.8 million people potentially reached by the Thunderclap. To those people, it appeared that their friend independently shared a message of his or her support for EPA and clean water.

We recognize that by allowing Thunderclap to post EPA's message to their social media accounts, supporters may have adopted the message. But the purpose of the publicity or propaganda prohibition is to ensure that the government identifies itself as the source of its communications. A supporter's adoption or acceptance of EPA's message does not alter the fact that EPA used supporters as conduits of an EPA message campaign intended to reach a much broader audience than just these conduits, and EPA failed to disclose to that broader audience that the message was prepared and disseminated by EPA. EPA constructed a message to be shared by others that refers to EPA in the third person and advocates support of the agency's efforts. In stating "clean water is important to *me*" and "*I* support *EPA's* efforts," EPA deliberately disassociates itself as the writer, when the message was in fact written, and its posting solicited, by EPA. *Compare* B-305368 (concluding that contract for positive commentary on the No Child Left Behind Act constituted covert propaganda, despite the commentator's personal belief in the Act), *with* B-320482 (deciding that contractor's opinion pieces and public statements on healthcare policy did not violate the prohibition, because the agency was not involved in procuring his opinion, nor were the actions taken as part of his contract).

EPA argues that it made no attempt to conceal or otherwise mislead recipients as to its role in creating the information conveyed on social media. EPA Response, at 8. Concerning Thunderclap specifically, the agency notes the campaign was clearly identified as an EPA social media effort. *Id.*, at 10. The agency stipulates that the message retained EPA's identifying information, included reference to EPA, and also linked to the website for the proposed rule, which made it easy for subsequent recipients of the message to discern EPA's involvement. *Id.*

¹⁸ "Clean water is important to me. I support EPA's efforts to protect it for my health, my family, and my community," with a link to EPA's website on the proposed rule.

As we previously noted, EPA made its role evident to those in its social media networks who viewed its posts regarding the campaign and to those who joined the campaign allowing Thunderclap to post on their accounts. But EPA did not identify its role to its ultimate audience. The reference to EPA within the Thunderclap message (“I support EPA’s efforts”) and the link to the website for the proposed rule did not identify EPA as the creator of the message, or even the Thunderclap campaign, to the 1.8 million viewers. A Thunderclap post is not the equivalent of “retweeting” or sharing another’s Facebook post, in which cases the new message would reflect its previous or original author. Generally, retweets and shared Facebook posts make clear from whom the post was derived. Thunderclap posts do not retain identifying information in the same manner as these other forms of sharing. From the post, one could possibly discern that the message was associated with Thunderclap, but even that possibility does not constitute a visible indication to readers that EPA was the source of the statement.

As it relates to the potential 1.8 million viewers of the agency’s Thunderclap campaign, EPA argues its message could not be considered covert, because EPA did not contract with the Thunderclap recipients nor conceal its role. As support, the agency cites to our decision concluding that the Department of Defense’s (DOD) outreach to Retired Military Officers (RMO) serving as media-analysts did not violate the prohibition. See B-316443, July 21, 2009. EPA’s Thunderclap, however, is distinguishable from DOD’s outreach to RMOs. DOD sought to influence public opinion of its war policies by providing the RMOs with talking points and information and by organizing meetings and travel. As the opinion emphasized, the agency did not engage RMOs to have them deliver a DOD message to the public. *Id.* Here, however, EPA identified a particular message that it wanted to convey and sought supporters to authorize Thunderclap to deliver that message using their social media accounts. In this way, EPA’s use of appropriations is legally indistinguishable from our decisions in which agencies constructed a message intended for a third party to distribute. See, e.g., B-302710; B-223098.

EPA also notes that use of its messages beyond the agency’s initial action is outside the scope of the publicity or propaganda prohibition as such use did not involve appropriated funds. EPA Response, at 9–10 (citing B-304829, June 6, 2005). To the contrary, the publicity or propaganda prohibition is concerned with the perception of the 1.8 million viewers. As with our CMS decision where the concern was that a prepackaged news video could be included in a news segment and the viewing audience would not be able to discern the source, here we focus on the message constructed by EPA with appropriated funds, and whether that message identified EPA’s role to its target audience. It did not. Similar to the suggested editorials submitted by SBA for newspapers to print for the target audience, the Thunderclap was specifically designed for transmission through an intermediary making that transmission precisely the communication at issue. See B-223098. See *also*

B-302710. Thus, we find EPA's use of Thunderclap violated the publicity or propaganda prohibition.

For purposes of the publicity or propaganda prohibition, we distinguish EPA's #DitchtheMyth campaign from Thunderclap. Despite the fact that the #DitchtheMyth campaign, like Thunderclap, was designed to permit people to post EPA's message from their own accounts, the facts are different. The graphics used in the #DitchtheMyth campaign contained the EPA logo, and the prewritten tweets contained the "#DitchtheMyth | @EPAWater" ascription at the end. We agree with EPA that including the @EPAWater Twitter handle at the end of the tweets identified EPA to the intended audience as the source of the information. Consequently, we conclude that EPA did not violate the prohibition in using appropriations to fund its #DitchtheMyth campaign.

2. EPA's #CleanWaterRules Campaign

The #CleanWaterRules campaign was designed to spread positive commentary on clean water and the WOTUS rule. EPA used the hashtag itself in numerous social media messages providing information and emphasizing the importance of the agency's new rule. EPA's #CleanWaterRules campaign raises a question about self-aggrandizement because certain posts described what EPA declared as benefits or positive changes that would come about, and attributed such benefits to the agency's new rule. Examples of such posts include:

- "Our new rule protects clean water and in turn protects everything that depends on it – including your neighborhood grocery store. #CleanWaterRules"
- "Our communities and our economy depend on clean water. That's why we're finalizing our Clean Water Rule. #CleanWaterRules"
- "Millions of acres of America's wetlands lacked clear protections – until our new #CleanWaterRules"
- "Some big news this morning: Our Clean Water Rule was just finalized. This rule will better protect upstream waters, ensuring cleaner water downstream. That's great news for people's health, the environment and our economy. . . . #CleanWaterRules"

Self-aggrandizement is defined as publicity of a nature tending to emphasize the importance of the agency or activity in question, noting that one of the prohibition's primary targets is communication with an obvious purpose of puffery. B-302504, Mar. 10, 2004. Balancing the restriction with an agency's right to disseminate information regarding its views and policies, we have traditionally afforded agencies wide discretion in their informational activities. *Id.*

We do not view EPA's use of the #CleanWaterRules hashtag as self-aggrandizing. The campaign and associated social media posts certainly emphasized the

significance of the agency's rule and the perceived benefits that would result from its implementation, but engendering praise for the agency was not the goal. We note that this situation concerns an agency's rulemaking and not an agency's backing of particular legislation—when EPA refers to “our rule,” the attribution is a factual statement rather than evidence of an attempt to laud or credit EPA for the stated benefits. See B-302504 (HHS cover letter touting the benefits of a new Medicare law with statements including “[a]s a result of a new law, Medicare is making some of the most significant improvements to the program since its inception” and an accompanying letter advising beneficiaries that “[t]his new law preserves and strengthens the current Medicare program” did not constitute self-aggrandizement, as HHS did not attribute the enactment of new benefits to HHS). See also B-319075, Apr. 23, 2010 (HHS's creation of the *HealthReform.gov* website and the *State Your Support* webpage dedicated to advocating the Administration's position on health-care reform during the pendency of the Patient Protection and Affordable Care Act did not constitute self-aggrandizement, as they were not designed to persuade the public of HHS's importance).

3. EPA's Informational Authorities

EPA points to authority in the National Environmental Education Act of 1990 (NEEA), 20 U.S.C. §§ 5501–5510, and section 206 of the E-Government Act of 2002, Public Law 107-347, as providing statutory authority to use the internet and other information technologies to educate the public and achieve the “widest possible dissemination of information,” and to create opportunities for public participation in Government. EPA Response, at 5–6 (internal quotation marks omitted).

The NEEA established an Office of Education within EPA, charged with disseminating educational and media material, and developing and supporting efforts to improve understanding of the natural environment, among other duties. 20 U.S.C. § 5501(a), (b). Section 206 of the E-Government Act contemplates enhanced public participation enabled by agency maintenance of a federal government website containing information consistent with the requirements of the Administrative Procedures Act and electronic docketing for its rulemakings. Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2916 (Dec. 17, 2002). Clearly, these statutes evidence Congress' interest in EPA informing the public regarding its policies and views. These statutes, necessarily, should be construed in harmony with the publicity or propaganda prohibition, which Congress has imposed on EPA's use of its appropriation. In this regard, neither of these provisions provides EPA with specific authority to overcome the publicity or propaganda restriction on the use of appropriated funds. See B-302504.

B. Grassroots Lobbying

Section 715 of the Financial Services and General Government Appropriations Act, 2015, provides:

“No part of any funds appropriated in this or any other Act shall be used by an agency of the executive branch other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, and for the preparation, distribution or use of any kit, pamphlet, booklet, publication, radio, television, or film presentation designed to support or defeat legislation pending before the Congress, except in presentation to the Congress itself.”

Pub. L. No. 113-235, div. E, § 715.¹⁹ The anti-lobbying provision prohibits indirect or “grassroots” lobbying in support of, or in opposition to, pending legislation. B-325248, Sept. 9, 2014. The provision 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. *Id.*; B-322882, Nov. 8, 2012. It is not required that the appeal specify a particular piece of legislation. B-192746-O.M., Mar. 7, 1979. Our interpretation of section 715 is derived from the statutory language as well as the legislative history of grassroots lobbying prohibitions and is consistent with a proper respect for an agency’s right to communicate with the public and Congress about its policies and activities. B-325248. See *also* B-304715, Apr. 27, 2005; B-270875, July 5, 1996; B-192658, Sept. 1, 1978. To violate the grassroots lobbying prohibition, there must be pending legislation and a clear appeal by an agency to the public to contact Members of Congress.

At issue here is whether EPA’s hyperlinks to external webpages containing link buttons to contact Members of Congress in support of the proposed rule constitute a clear appeal by EPA to the public to contact Members of Congress in support of or in opposition to pending legislation. Both of the external webpages contained link buttons to contact Congress in support of the proposed rule while several bills were pending that would prevent implementation of the rule. In this context, we view the appeals as urging contact in opposition to pending legislation. EPA associated itself with the linked content when it chose to hyperlink to those webpages within its official blog post. As explained below, we conclude that by hyperlinking to these

¹⁹ Additionally, section 401 of the Department of Interior, Environment, and Related Agencies Appropriations Act, 2015, states that “[n]o part of any appropriation contained in the Act shall be available for any activity that in any way tends to promote public support or opposition to any legislative proposal on which Congressional action is not complete other than to communicate to Members of Congress as described in 18 U.S.C. [§] 1913.” Pub. L. No. 113-235, div. F, § 401.

webpages, EPA appealed to the public to contact Congress in opposition to pending legislation in violation of the grassroots lobbying prohibition.

1. The External Webpages Contained Clear Appeals to the Public to Contact Members of Congress in Opposition to Pending Legislation

In the “Tell Us Why #CleanWaterRules” blog post, EPA’s Communications Director for its Office of Water explained how water affects two groups: surfers and beer brewers. EPA’s Communications Director explained that surfers are at risk for becoming sick from pollution, and that brewers rely on clean water. The EPA blogger included hyperlinks to the Surfrider Foundation blog post and the NRDC webpage supporting his statements.

a. Pending Legislation

Although specific legislation is not mentioned in either the EPA blog post or the hyperlinked webpages, since the March 2014 release of the proposed WOTUS rule for comment and continuing to the present, multiple bills have been introduced to prevent implementation of the rule. Such measures include:

- Protecting Water and Property Rights Act of 2014, S. 2496, 113th Cong. (2014) (introduced June 19, 2014)
- Waters of the United States Regulatory Overreach Protection Act of 2014, H.R. 5078, 113th Cong. (2014) (introduced July 11, 2014)
- Waters of the United States Regulatory Overreach Protection Act of 2015, H.R. 594, 114th Cong. (2015) (introduced January 28, 2015)
- American Energy Renaissance Act of 2015, S. 791, 114th Cong. (2015) (introduced March 18, 2015)
- American Energy Renaissance Act of 2015, H.R. 1487, 114th Cong. (2015) (introduced March 19, 2015)
- Regulatory Integrity Protection Act of 2015, H.R. 1732, 114th Cong. (2015) (introduced April 13, 2015)
- Defense of Environment and Property Act of 2015, S. 980, 114th Cong. (2015) (introduced April 16, 2015)
- Federal Water Quality Protection Act, S. 1140, 114th Cong. (2015) (introduced April 30, 2015)
- Defending Rivers for Overreaching Policies Act of 2015, S. 1178, 114th Cong. (2015) (introduced April 30, 2015)
- Don’t Ignore the Will of the American People Act, H.R. 2599, 114th Cong. (2015) (introduced June 1, 2015)
- Federal Regulatory Certainty for Water Act, H.R. 2705, 114th Cong. (2015) (introduced June 9, 2015)
- Department of Interior, Environment, and Related Agencies Appropriations Act, 2016, H.R. 2822, § 429, 114th Cong. (2015) (introduced June 18, 2015)

Of interest to us is legislation pending from April 7, 2015, the date of EPA's blog post, to the present. For example, the Waters of the United States Regulatory Overreach Protection Act of 2015, H.R. 594, was introduced in the House on January 28, 2015. If enacted, the provision would prevent implementation of the proposed rule. The Regulatory Integrity Protection Act of 2015, H.R. 1732, was one of several measures introduced in April 2015 that would require withdrawal of the proposed rule. On June 18, 2015, section 422, was proposed for inclusion in the Department of Interior, Environment, and Related Agencies Appropriations Act, 2016.²⁰ The provision would prohibit the use of EPA's appropriation in connection with the WOTUS rule.

A Member of Congress contacted through the NRDC and Surfrider Foundation action forms could fairly perceive the contact as encouragement to vote against pending legislation that would prevent implementation of the rule—which, during the time of the EPA blog post, would include these and other measures. During a Maritime Administration advertising campaign encouraging the public to contact Congress in support of a strong merchant marine, legislation was pending that would directly impact the strength of the merchant marine. B-192746-O.M. We concluded that one could reasonably infer that the ad campaign was directed toward supporting the legislation. *Id.* A congressman receiving mail from constituents supporting a strong merchant marine could reasonably consider such comments as favoring the pending legislation. *Id.* Cf. B-322882, Nov. 8, 2012 (U.S. Consumer Product Safety Commission email encouraging individual to contact Congress regarding an interpretive rule did not violate prohibition as the appeal did not mention pending legislation, *and* there was no relevant legislation concerning the rule pending at the time).

b. Clear Appeal

In addition to providing support for EPA's assertion that brewers rely on clean water, the NRDC Brewers for Clean Water page espoused a strong message of support for Clean Water Act safeguards, along with a clear suggestion that the public get involved to encourage strong legal protections. As seen in Figure 4, the orange link button leading to the action page ("Add your voice and help make great beer") is prominently displayed, as is the lead-in solicitation, which states in part:

"Our water supplies depend on responsible regulations that fight pollution and protect drinking water at its source by keeping small streams and wetlands healthy.

"Water Needs Us

²⁰ H.R. 2822, § 422, 114th Cong. (2015).

“Now our streams, wetlands, and water supply need our help. Without strong legal protections, they are under threat from pollution like sewage, agricultural waste and oil spills.

“You can help defend clean water and great beer by taking action today.”

The action element is thus visually and substantively incorporated in the NRDC Brewers for Clean Water page that is directly hyperlinked in the EPA blog, and clicking the link button leads to the webpage allowing readers to transmit a message to their senators. Specifically, after noting that “polluters and their allies in Congress could try to block” the rule from moving forward, the prompt explicitly urges readers to contact their senators to ask them to support agency efforts to finalize the proposed rule. See *Brewers Alliance Page* (click link button). The NRDC page makes a clear appeal to the public to contact Members of Congress.

Similarly, the Surfrider Foundation webpage contains a clear appeal to the public to contact Members of Congress. As seen in Figure 3, the prompt associated with the “Get Involved” link button stated on its face, “Defend the Clean Water Act, Tell Congress to stop interfering with your right to clean water!” Clicking the button led to an action page including a form to contact Congress to encourage opposition of legislation or amendments in appropriations bills that would undermine the CWA or WOTUS rule.

We distinguish our conclusion here from our opinion concluding that HHS did not engage in grassroots lobbying when it created a *State Your Support* webpage, allowing users to electronically sign a form letter to the President supporting the Administration’s position on health care reform while the Patient Protection and Affordable Care Act was pending. B-319075. Messages to the President do not implicate the grassroots lobbying prohibition. The letter included an affirmation of “commitment to work with Congress to enact legislation this year which provides affordable, high quality coverage for all Americans.” *Id.* However, the letter actually contained no direct appeal to contact Congress, and we did not find a violation. B-319075. See also B-304715, Apr. 27, 2005.

Unlike the *State Your Support* webpage, both the NRDC and Surfrider Foundation webpages made clear appeals to the public to contact Congress in support of the proposed rule. Specifically, the webpages contained clear appeals to the public to contact Members of Congress in support of EPA’s efforts to finalize the WOTUS rule and in opposition to measures that would undermine the rule, while several bills that would explicitly prevent implementation of the rule were pending. The appeals urge the public to contact Congress in opposition to pending legislation. See B-192746. We next analyze whether EPA’s association with the webpages through its hyperlinks constitutes grassroots lobbying.

2. EPA Associated with the Appeals by Hyperlinking to the Webpages

Hyperlinks facilitate the transmission of information and ideas across the internet. The ease and innovation of the internet, however, do not obviate established restrictions on the use of appropriations. By its nature, including a hyperlink invites readers to visit the website to which the hyperlink connects. In fact, EPA conceded that it intended to direct readers to the linked articles, which supported statements made in its blog post. EPA Response, at 15. We cannot view the articles in a vacuum. We must assess their visible content and overall message as part of the message conveyed by EPA in connecting to the linked webpages. While EPA's literal message (as stated in the sentences containing the hyperlinks) concerned the impact of clean water on surfers and brewers, and the hyperlinked webpages both contained information affirming EPA's statements, the context here is important.

EPA published its "Tell Us Why #CleanWaterRules" blog post on April 7, 2015, after submitting the final rule to OMB on the previous day.²¹ Fed. Reg. Advisor. At a critical time in the rulemaking process, the blog post announced EPA's #CleanWaterRules campaign. By asking the public to post photos proclaiming reasons that clean water rules using a hashtag, EPA created an opportunity to elevate support for its rule. EPA Blog Post. With knowledge of significant, continued congressional opposition to the rule²² (including measures pending at or near the time of the blog post's publication), the agency used this forum to link to a campaign page belonging to NRDC, an environmental action group, describing an alliance of brewers and their advocacy for strong legal protections for streams and wetlands under the Clean Water Act. This webpage connected to a form letter specifically seeking congressional support for the finalization of EPA's clean water rule. EPA also used its blog post to link to an article in a blog belonging to a grassroots environmental organization that utilizes a "powerful activist network" to protect oceans, waves and beaches (Surfrider Foundation)—a blog which displayed a visible "Take Action" column for lobbying alongside the article.

²¹ Pursuant to an Executive Order, OMB, through its Office of Information and Regulatory Affairs (OIRA), provides oversight of agency regulatory actions. For significant regulatory actions, OIRA may return a final rule to the agency for additional consideration or delay the publication or issuance of the rule to the public. Exec. Order No. 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 190 (Oct. 4, 1993).

²² Following introduction of the proposed rule, 231 members of the House submitted a letter requesting that EPA withdraw the proposal, citing "serious concerns." Members sent another letter of concern to EPA regarding the WOTUS rule in October 2014.

Our consideration in applying the grassroots lobbying restriction is not confined to the message conveyed on the date EPA published its blog post. We recognize that websites are dynamic. While the content of some remains static, the content of others may change frequently. And a webpage, as it exists in one moment, may be viewed and may convey a message beyond that moment—a message that, as conditions change, may evolve from what was previously communicated. EPA published its blog post on April 7, 2015, but a reader could visit the blog and link to the NRDC and Surfrider Foundation webpages beyond that date, if EPA continued to facilitate access. A clear appeal to contact Congress regarding pending legislation, whether it occurred on April 7, 2015, or in the months that followed, implicates the grassroots lobbying prohibition. For example, several bills were introduced after EPA published its blog post. As previously noted, a senator contacted through the NRDC or Surfrider Foundation action pages could reasonably perceive an appeal to support EPA’s efforts to finalize the rule as suggesting opposition to those bills.

NRDC launched its Brewers for Clean Water initiative on April 9, 2013, almost two years prior to the EPA blog post, and one year before the release of the proposed rule. NRDC, *Great Beer Needs Clean Water: NRDC Partners with Craft Brewers to Protect the Clean Water Act*, Apr. 9, 2013, available at www.nrdc.org/media/2013/130409.asp (last visited Dec. 7, 2015); Founders Brewing Co, *In Support of Brewers for Clean Water*, Apr. 9, 2013, available at <http://foundersbrewing.com/latest-news/2013/in-support-of-brewers-for-clean-water/> (last visited Dec. 7, 2015) (“The Natural Resources Defense Council (NRDC) announced their Brewers for Clean Water initiative today.”). But the grassroots lobbying prohibition is concerned with the message EPA conveyed apart from what NRDC may have contemplated in 2013. While we cannot know every change to the NRDC page made between the time of its launch and EPA’s hyperlink, we do know that EPA affirmatively included the NRDC hyperlink in its communication, the language in the hyperlinked webpage encourages support of regulations fitting the description of the WOTUS rule, and the webpage displays an orange link button, leading to a webpage that notes congressional opposition and seeks support for EPA’s efforts to finalize the “proposed Clean Water Protection Rule.”

Similarly, the Surfrider Foundation blog post was created on July 30, 2010, years before the EPA blog post. Surfrider Blog Post. The link button is part of the “Take Action” section of the webpage, which serves as a sidebar of the blog, and does not connect specifically to any particular article.²³ The text of the action prompts have

²³ At the time we began drafting this opinion, the “Take Action” section appeared on other pages of the Surfrider Foundation blog and alongside various blog posts. The section was a highly visible aspect of the webpage to which EPA’s blog hyperlinked. The Surfrider Foundation blog site has since been redesigned and no longer features a “Take Action” section alongside the blog post.

changed during the time we have developed this opinion. Indeed, as EPA has argued, we cannot be certain an action prompt regarding EPA's proposed rule even existed at the time of the agency's blog post. EPA Response, at 15. Still, the Surfrider Foundation page has at various points contained action prompts encouraging readers to contact Congress in opposition to appropriations riders and legislation that would undermine the CWA or WOTUS rule, at a time when such measures were pending. EPA is responsible for the message it continues to endorse, rather than just the message as it may have existed at a single point in time.

The fact that the linked content was not EPA's does not excuse the agency from responsibility for its own message. Here, EPA conveyed a message through the expressive act of facilitating access to the NRDC and Surfrider Foundation webpages, especially during an atmosphere of ongoing public debate over the rule. This concept that including a hyperlink forms an expressive act and conveys a message that is informed by the linked content finds support in a line of court cases under the government speech doctrine. The Supreme Court and several federal circuit courts have, in other contexts, recognized that the government's decision to include third-party speech within its own communication channels is an expressive act in and of itself that conveys a message. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 473, 476 (2009) (emphasizing city's control over selection of monuments as evidence of its control over its message); *Sutcliffe v. Epping School Dist.*, 584 F.3d 314, 331-33 (1st Cir. 2009) (choice of external websites to hyperlink using town website conveyed a message independent of the message within the third-party speech).²⁴

For example a school district used its website to urge opposition of a bill pending in the state legislature, including by linking to the "interactive" websites of two organizations opposing the bill. *Page v. Lexington County School Dist. One*, 531 F.3d 275, 278 (4th Cir. 2008). In rejecting the argument that the school district could not control its message because it could not control the content of the linked websites, the Fourth Circuit reasoned that the school district had provided information that other websites supporting its position existed and had facilitated viewing those sites, rather than incorporating all possible content displayed on the linked websites. *Id.* at 284. Significantly, the court noted that the selection of hyperlinks by the school district and its ability to remove them at any time evidenced control over the message and demonstrated that the hyperlinked websites were chosen, insofar as they could, to "buttress" the position the school district sought to convey. *Id.* at 284–85. In the present case, while EPA also did not directly

²⁴ Here we do not apply the case law for purposes of discerning constitutional violations, but use it as a reference to inform our analysis of EPA's message, as conveyed by its decision to hyperlink to the NRDC and Surfrider Foundation webpages.

incorporate the contents of the NRDC and Surfrider Foundation webpages, similar to *Page*, the decision to hyperlink to third-party websites using its official blog reflects an effort to facilitate the viewing of websites that were representative of EPA's own message or position.

Both webpages contained clear appeals to the public to contact Congress at a time when legislation to prevent implementation of the WOTUS rule was pending. When EPA hyperlinked to the NRDC and Surfrider Foundation webpages using an official communication channel belonging to EPA and visually encouraged its readers to visit these external websites, EPA associated itself with the messages conveyed by these self-described action groups.²⁵ It is this association combined with the clear appeals actually contained in the webpages that form the prohibited conduct.

EPA's choice of hyperlinks formed its own expressive act for which the agency is responsible. EPA sought to direct readers to the NRDC and Surfrider Foundation articles in support of statements made in its blog post. It cannot then disclaim association with the overall message the reader reaches when clicking those hyperlinks. While EPA cannot control external websites, it can certainly control its own. We conclude that EPA violated the anti-lobbying provisions contained in appropriations acts for FY 2015 when it obligated and expended funds in connection with establishing the hyperlinks to the webpages of environmental action groups.

3. EPA's Position

EPA argues that its campaign did not include any appeals to contact Congress regarding pending legislation. See EPA Response, at 12–13. But this argument necessarily turns on acceptance of the agency's view that it has no responsibility for linked content—an argument that we reject. See *id.*, at 14–15.

Acknowledging that websites are dynamic and content can change daily or hourly, EPA poses that it would be “a sweeping and unwarranted interpretation of the law to hold agencies' responsible for knowing every change made to someone else's webpage over time.” *Id.*, at 15. But EPA overlooks the important element of control,

²⁵ In *Summum* the Supreme Court noted that “[i]t certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. . . . [P]ersons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf.” 555 U.S. at 471. *Cf. Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2251 (2015) (where Texas exercised final approval authority over specialty license plates bearing Texas's name and displaying a message created by a third party, Texas “explicitly associate[d] itself with the speech on its plates”).

which the Supreme Court recognized. See *Summum*, 555 U.S. at 473. We do not suggest that an agency is responsible for knowing every change an external organization makes to its website—but that an agency is responsible for its own message, which is the message it controls. See *Page*, 531 F.3d at 282, 285. See also *Sutcliffe*, 584 F.3d at 330–31.

It was EPA’s decision to link to external websites belonging to environmental action groups to support statements made in its blog. In doing so, EPA associated itself with the content reached by clicking those hyperlinks. We are not speaking about “every link that a reader could get to from [the linked article],” as EPA suggests that we are, for those are not the facts before us. See EPA Response, at 15. Here we assess a website whose action prompt was integrated into the overall message and content of the hyperlinked webpage, with a large orange button leading to the direct appeal to contact senators; and a website whose action prompt was a visible element of the hyperlinked webpage itself, containing the appeal to contact Congress on its face.

EPA told us that it included the hyperlinks to explain why clean water is important to surfers and to demonstrate that brewers need clean water. *Id.*, at 14–15. The agency also noted, and we agree, that it is unclear when certain elements of the linked webpages emerged. *Id.*, at 15. But in discerning the message that EPA conveyed it is necessary to consider the visible content and overall message to which EPA’s hyperlinks facilitated access.²⁶ Here, a reader of The EPA Blog viewing the hyperlinked articles could reasonably interpret the linked content as messaging endorsed by EPA.²⁷ We do not suggest that every hyperlink must constitute an endorsement of the linked webpage. But these facts—the continued

²⁶ In *Summum*, the Supreme Court emphasized that the government’s display of a monument is perceived by the public to convey a government message. 555 U.S. at 470-72. Similarly, in *Walker* the Court noted that license plates are closely identified with government speech in the public mind. 135 S. Ct. at 2248–49 (“Indeed, a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message.”). In both instances, the Court reasoned that the public could reasonably interpret the third-party speech in question as conveying a message of the government. See *id.*; *Summum*, 555 U.S. at 471.

²⁷ EPA’s social media policy indicates that the agency has acknowledged this much, as the policy suggests inclusion of an exit message when connecting to third party content. EPA, *Using Social Media to Communicate with the Public* (July 7, 2005), available at www2.epa.gov/sites/production/files/2013-11/documents/comm_public.pdf (last visited Dec. 7, 2015). Such procedures were not applied in this situation.

debate surrounding the rulemaking, the inclusion of the hyperlinks to websites of environmental action groups within a blog post announcing a campaign designed to recruit public voices to indirectly support finalization of the rule, and the pendency of legislation that would directly prevent the rule from moving forward—preclude a good faith characterization of these hyperlinks as mere citations.

CONCLUSION

The use of appropriated funds associated with implementing EPA's Thunderclap campaign and establishing hyperlinks to the NRDC and Surfrider Foundation webpages violated prohibitions against publicity or propaganda and grassroots lobbying contained in appropriations acts for FYs 2014 and 2015. Because EPA obligated and expended appropriated funds in violation of specific prohibitions, we also conclude that EPA violated the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(A), as the agency's appropriations were not available for these prohibited purposes. Accordingly, EPA should report the violation to the President and Congress, with a copy to the Comptroller General, as required by the Antideficiency Act.²⁸ The agency should determine the cost associated with the prohibited conduct and include the amount in its report of its Antideficiency Act violation.

If you have any questions, please contact Edda Emmanuelli Perez, Managing Associate General Counsel, at (202) 512-2853, or Julia C. Matta, Assistant General Counsel, at (202) 512-4023.

Sincerely,



Susan A. Poling
General Counsel

²⁸ 31 U.S.C. § 1351. The Office of Management and Budget has published requirements for executive agencies for reporting violations. OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, §§ 145, 145.8, available at www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc (last visited Dec. 7, 2015).