UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

AUG - 7 2015

Julie C. Matta
Assistant General Counsel
U.S. Government Accountability Office
441 G St, NW
Washington, DC 20548

Dear Ms. Matta:

Thank you for the opportunity to provide the legal views of the Environmental Protection Agency (EPA or Agency) with respect to the Agency's use of social media in connection with the Clean Water Rule.

Based on the analysis prepared by my staff and enclosed for your consideration, I have not identified any violations of the restrictions on grass-roots lobbying and publicity or propaganda contained in the appropriation acts. Rather, what I see is an appropriately far-reaching effort to educate the American public about an important part of EPA's mission: protecting clean water; and further, to raise awareness about a significant EPA action: our final Clean Water Rule, which interprets the very scope of the Clean Water Act, one of our key federal authorities. It has been and continues to be important that the American people, who rely on clean water for their health and welfare every day, understand the EPA's work to ensure its protection.

The EPA places a high priority on providing the public timely, accurate and accessible information about the environment and about our rulemaking activities; social media is an increasingly important tool in this public outreach and education effort. The Agency is continually learning, and continually refining its approaches, both to make sure communications are effective, and to ensure that those communications continue to be in compliance with applicable law. The attorneys in my office work closely with the Agency's communications professionals to provide legal guidance.

I would be pleased to provide further information or analysis should you find it helpful in developing your response to the Committee, and I would appreciate the opportunity to respond to any concerns you identify. Please feel free to contact Elise Packard, Associate General Counsel for Civil Rights and Finance at (202) 564-7729.

Sincerely,

Avi S. Garbow
General Counsel

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

TO: Avi S. Garbow, General Counsel
FROM: Elise B. Packard, Associate General Counsel for Civil Rights and Finance
DATE: August 6, 2015
SUBJECT: Analysis in response to an inquiry from the Government Accountability Office regarding EPA use of Social Media and the Clean Water Rule

In support of your response to the Government Accountability Office (GAO) regarding EPA's use of social media, we have worked with the communications professionals in the Office of Public Affairs (OPA) and Office of Water (OW) to compile the relevant facts and materials and to develop the following legal analysis.

In sum, EPA's social media campaign did not violate the restrictions on grass-roots lobbying and publicity and propaganda contained in appropriation acts. EPA's use of social media platforms to educate the public about its Clean Water Rule was an integral part of its mission and duty to provide information to the public about environmental issues and encourage participation in the rulemaking process. While social media is a constantly changing landscape, and thus bright-line legal rules are not available for all questions, we are confident that the campaign comported with all the requirements of these restrictions, as interpreted over several decades in Comptroller General Decisions. It is also worth noting that in the course of developing this analysis we have again confirmed that both OPA and OW are familiar with and receptive to our legal guidance on these matters.

Below we have broken down our responses by the specific questions posed by GAO in the letter to you from Julia C. Matta, Assistant General Counsel for Appropriations Law, dated July 10, 2015.

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1. *Please describe in detail EPA's use of social media platforms, such as blogs, Facebook, Twitter, Thunderclap, and YouTube, in connection with the agency's efforts to define "Waters of the United States" under the Clean Water Act, both preceding and following the public comment period for EPA's proposed rule. Please include the date(s), or date range(s) for any social media campaign, for example, the #ditchthemyth and #cleanwaterules campaigns.*

Response:

As a general matter, EPA uses social media platforms, such as Facebook and Twitter, as educational and awareness tools. These digital platforms are an essential part of communication and outreach today because Americans increasingly turn to social media sources to find and share information. The EPA primarily uses these social media platforms to provide information and to explain why an agency action is relevant to stakeholders. Frequently, a social media post or tweet will direct a reader to the Agency's website where more information is available. Specifically, EPA utilized social media platforms for these purposes for the Clean Water Rule (also known as the "Waters of the United States" rulemaking) from February 2014 through July 2015. These platforms were used to provide information about streams and wetlands, explain the issues around the Clean Water Rule, show why agency action is relevant to stakeholders, provide opportunities for public engagement, and let the public know about the public comment period for the rule. These activities are in line with EPA's typical approaches in communicating about its rulemaking activities. With respect to the Clean Water Rule in particular, there was an unusual amount of negative attention from certain external interest groups, and these groups distributed inaccurate information regarding the rule over social media platforms. Thus, in addition to typical educational materials, the Agency also specifically distributed accurate information to correct the record on points where external groups had distributed misleading material.

While more details are provided in response to question two, the four phases of social media outreach regarding the Clean Water Rule can be described as follows:

- In February 2014, EPA began a general education campaign by posting information on social media about the importance of streams and wetlands to human health, the environment, and the economy. This was done to provide context for the upcoming release of the proposed rule.
- In March 2014, EPA utilized social media to announce the release of the proposed rule and to let the public know about the opportunity to comment on the proposal.
- In July 2014, EPA utilized social media to respond to misinformation being spread about the proposed rule, by identifying misunderstandings and providing accurate facts to stakeholders. This was done under #DitchTheMyth.
- In April 2015, EPA began using #CleanWaterRules to share information about why the agency was taking action to protect streams and wetlands.

2. *For each social media platform, please provide any documentation related to such use, including but not limited to: internal materials used to develop the social media campaigns, outreach materials created by EPA or its employees to describe social media campaigns to the public, social media posts derived from or connected to such campaigns, and any other relevant material.*

Response:

Responsive documents have been gathered and provided using a SharePoint site.

Each of EPA's social media accounts has a designated manager who is responsible for all content posted to that account. To locate the social media posts on EPA-managed accounts that were responsive to this inquiry, each of these managers was asked to look through their account's feed or download all their posts via the social media platform's analytics tool and find all the posts that were intended to promote the Clean Water Rule. These have all been uploaded to the SharePoint site. The document names reflect the date and the relevant social media platform.

In order to locate internal planning materials, the Office of Water was asked to search for documents related to planning social media outreach on the Clean Water Rule. Sixteen such documents were located and uploaded to the Sharepoint Site; these are in a separate folder titled "internal" and also identified by file names including the word "internal." These are materials that were used in development of the social media campaigns and are deliberative materials that have not previously been released.

3. *Identify the total cost of EPA's use of social media platforms in connection with the agency's efforts to define "Waters of the United States," both preceding and following the public comment period for EPA's proposed rule. Such costs should include but not be limited to any contract obligations as well as amounts obligated for the salaries paid to EPA employees for the time during which they performed work in support of EPA's use of such social media platforms.*

Response:

Generally there is not a direct cost associated with the use of a social media platform. Thunderclap, for example, is a free tool available on the public internet. The Agency does pay staff in the Office of Public Affairs and the Office of Water for the time they spend developing an EPA message and posting it to an EPA account. However, the Communications Director in the Office of Water does not track his time by platform or rule, and the employees in the Office of Public Affairs (OPA) do not track their time by client or project. One tweet or Facebook post might require a very small portion of an individual employee's day. In addition to employee time, the Agency occasionally spends appropriated funds to procure or create video or multimedia content. For the purpose of raising awareness around the proposed Clean Water Rule, OPA spent $64, 610.00 on video and graphic assets.

4. *Section 718 of the Financial Services and General Government Appropriations Act, 2014, provides that "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." [1] *GAO has interpreted this language as prohibiting publicity that is (1) self-aggrandizing – meaning intended to emphasize the importance of the agency or activity in question; (2) purely partisan – designed to aid a political party or candidate; or (3) that constitutes covert propaganda-- meaning the material or Communication was prepared by or on behalf of any agency and circulated as the ostensible position of parties outside the agency.*

a. *Please provide EPA's legal views on whether any of the agency's uses of social media platforms, including but not limited to EPA's Thunderclap campaign, #ditchthemyth campaign, and #cleanwaterrules campaign, violated section 718 or similar provisions contained in appropriations acts of other fiscal years?*

Response 4.a:

EPA did not violate Section 718 of the Financial Services and General Government Appropriations Act of 2014 (or similar provisions contained in appropriations acts of any other year) with its uses of social media platforms. The legislative history of the restriction on publicity or propaganda suggests that it "should not impair the government's duty to keep its citizens 'fully and accurately informed.'" B-302504 at 6 (Mar. 10, 2004) citing 97 Cong. Rec. 6734 (1951). In previous cases, the Comptroller General has "sought to provide guidance in a way to balance agency informational activities with the importance of transparency in government." B-319834 at 4. [P]olicy making officials may use government resources to explain and defend those policies." Id. at 5.

In a long line of cases, the Comptroller General has repeatedly recognized that agencies have a "right or duty to inform the public regarding its activities and programs." ," B-302504 at 6-7. That right or duty "includes the right to disseminate information in defense of an administration's point of view." B-302504 at 7. As the Comptroller General has explained, "[o]ur decisions reflect societal values in favor of a robust exchange of information between the government and the public it serves." B-302504 at 7.

Given those legitimate interests and the lack of any definitions in the statute or legislative history, the Comptroller General has interpreted the publicity or propaganda restriction to prohibit the use of appropriated funds only for publicity that is self-aggrandizing, purely partisan, or covert propaganda. The Comptroller General has defined "self-aggrandizement or puffery" as "publicity of a nature tending to emphasize the importance of the agency or activity in question." Id. at 7. Purely political or partisan activities are those that are "completely devoid of any connection with official functions" or "completely political in nature." Id. at 8, quoting B-147578. Covert propaganda, according to the Comptroller General, are materials that are "misleading as to their origin" or as described by GAO in question 4 of the incoming letter –

[1] Pub. L. No. 113-76, div E, title VII, § 718, 128 Stat. 5, 234 (Jan. 17, 2014). This same provision appears in section 718 of the Financial Services and General Government Appropriations Act, 2015. Pub. L. No.113-235, div. E, title VII, §718 28 Stat 2130, 2383 (Dec. 16, 2014).

"material or communication . . . prepared by or on behalf of an agency and circulated as the ostensible position of parties outside the agency."

EPA's authorities to disseminate information

In its analysis of whether there has been a violation of the restriction on publicity or propaganda, the Comptroller General has "historically afforded agencies wide discretion in their informational activities" and "will defer to an agency's justification" unless it is "so palpably erroneous as to be unreasonable." Id. at 7, quoting B-178528. Since its founding, the EPA's mission has been focused on the protection of human health and the environment. EPA recognizes the necessity for full participation by all citizens in environmental policymaking, problem solving, environmental education and sustainable practices. Environmental protection and clean water is important to everyone, and, therefore, it was essential that EPA aim to educate and inform the broadest range of citizens, not just those stakeholders who read the Federal Register.

In evaluating an agency's justification of its activities, the Comptroller General will consider the agency's statutory authority to disseminate information. B-302504 at 7.[2] Here, EPA has specific statutory authority to educate the public, and to do so using the internet and other information technologies. First, the Environmental Education Act directs EPA to engage in a broad range of informational activities and to use methods to achieve the "widest possible dissemination" of information. It provides:

> (a) The Administrator shall establish an Office of Environmental Education within the Environmental Protection Agency.
> (b) The Office of Environmental Education shall--
> (1) develop and support programs and related efforts, in consultation and coordination with other Federal agencies, to improve understanding of the natural and built environment, and the relationships between humans and their environment, including the global aspects of environmental problems;
> (2) support development and the widest possible dissemination of model curricula, educational materials, and training programs for elementary and secondary students and other interested groups, including senior Americans;
> (3) develop and disseminate, in cooperation with other Federal agencies, not-for-profit educational and environmental organizations, State agencies, and noncommercial educational broadcasting entities, environmental education publications and audio/visual and other media materials; 20 U.S.C. § 5501(b).

Second, the E-Government Act of 2002 recognizes the importance of promoting the "use of the Internet and other information technologies to provide increased opportunities for citizen

[2] Additionally, The Comptroller General has recognized that "agencies also have a general responsibility, even in the absence of specific [statutory] direction, to inform the public of the agency's policies." B-319834 at 5.

participation in Government."[3] Section 206 of that law, entitled "REGULATORY AGENCIES," lays out two purposes: to "(1) improve performance in the development and issuance of agency regulations by using information technology to increase access, accountability, and transparency; and (2) enhance public participation in Government by electronic means, consistent with requirements under...the Administrative Procedures Act."[4]

Consistent with EPA's longstanding mission, public participation policy, and these statutory directives, EPA conducted a media campaign to raise awareness of the proposed rule, educate the public about the subject matter of the rulemaking, and dispel inaccurate information about the rule that was widely broadcast through the media by non-federal entities. Through every communication tool available to the agency, including social media, EPA encouraged stakeholders of all perspectives to learn about the rule and to comment in the official docket of our proposed rule. Public comment is an essential part of the agency's rulemaking process; is legally required for many of our actions; and is always extraordinarily valuable because of the range of perspectives and information it brings to the agency's attention.

Beyond the need for public input on EPA's proposed rule, EPA sought to inform the public of this rulemaking even after the comment period closed. The Clean Water Rule defines the phrase "waters of the United States" and thereby the jurisdictional reach of the Clean Water Act: some waters are included by regulation, others are excluded, and a third category of waters are subject to a case-by case analysis. As such, the rule has the potential to affect waterbodies throughout the United States and activities that require a Clean Water Act permit. At the same time, there was a significant amount of confusion about the rule as well as erroneous information about the rule being broadcast through traditional and social media by non-federal entities. Not only was it EPA's right, but it was also EPA's duty to use every communication tool available to the agency, including social media, to dispel the confusion and correct the misinformation by educating as wide a range of stakeholders as possible about the Clean Water Rule and direct them to EPA's website for more detailed information about the rule.

EPA's use of social media did not constitute self-aggrandizement

EPA's social media communications do not consist of messages that are self-aggrandizing. The Comptroller General describes this type of prohibited communication as an "attempt to persuade the public of the importance of [the agency] and/or one of its officials." B-302992 at 8, Sept. 10, 2004. Neither the overall purpose of EPA's social media campaign nor any of the individual communications messages were self-aggrandizing, their message was not about EPA as an entity or any of its officials. EPA's strong message was that clean water and the Clean Water Rule are important and have an impact on everyone.

EPA's social media campaign did not constitute partisan activity

The Comptroller General has "found communications to be purely partisan in nature if they have no connection to an agency's official duties and were completely political in nature." B-319834 at 6, Sept. 9, 2010. More precisely, the Comptroller General has stated that "[t]o be

[3] Pub. L. No. 347-107, 116 Stat. 2901.
[4] Pub. L. No. 347-107, 116 Stat. 2915.

characterized as purely partisan in nature, the [communication materials] must be found to have been 'designed to aid a political party or candidates." B-302992 at 8, Sept. 10, 2004, citing B-147578, Nov. 8, 1962. An "[e]ffort designed solely to aid a political party or candidate is a purely partisan communication, as is a communication that seeks to gather information regarding the public's view of a political party or disseminate information solely to promote a favorable view of a particular political party." B-319834 at 6. On the other hand, the Comptroller General has repeatedly recognized that "[a]gencies . . . have the right to explain and defend their policies and respond to arguments against those policies." B-319834 at 6, citing B302504, at 8. The "publicity or propaganda prohibition does not bar materials that may have some political content or express support for a particular view." B-302504 at 12 (Mar. 10, 2004).

Agencies can provide needed information to the public without being partisan, while still defending an Administration's position. "[M]aterials that support a particular view or justify the agency's policies" are not prohibited. B-319834 at 10, Sept. 9, 2010. As the Comptroller General explained:

> it is important for the public to understand the philosophical underpinnings of the policies advanced by elected officials and their staff in order for the public to evaluate and form opinions on those policies. In that regard, the public may find it important to know of the Administration's views–whether the public agrees with them or not.

B-319834 at 10. The Comptroller General has consistently determined that agencies may strongly advocate a particular viewpoint without becoming partisan. Slogans used in the flyer, print and TV ads about the changes to the Medicare law "may appear to some as an attempt to persuade the public to the Administration's point of view" but did not constitute a violation. Significantly, in that case, the Comptroller General noted that the "content" was not "totally free of political tone." B-302504 at 11. However, the publicity and propaganda restriction "does not bar materials that may have some political content or express support for a particular view." B-302504 at 12.

There is no question that EPA was attempting to inform the public about and support the proposed rule in its social media campaign, but that is a legitimate role of an executive agency, not a partisan activity. It was also attempting to educate the public about the facts of the rule, in light of a highly negative campaign by some outside parties. The Comptroller General has previously found that communication materials were not purely partisan under the law even though they were "designed . . . to rebut negative media attention surrounding the [Agency's] policies" and were "not comprehensive and do not explain all the positive and negative effects of the . . . policy." B-302992 at 9 and 10. Even though "the materials did not provide a balanced picture of the positive and negative aspects of the . . . policies," the Comptroller General concluded that "the Forest Service was authorized to disseminate such materials under its information dissemination authority and in defense of its own policies." B-302992 at 12.

The subject of EPA's social media campaign was the Clean Water Rule. The communication materials did not even mention a political party or candidate. As described in greater detail above, the purpose of the social media campaign was to build awareness of the rule and to

educate the public about the rule and the importance of clean water. In some instances the materials provided detailed information about the rule, while in other instances the communication materials were shorter, but included the web site for the Clean Water Rule. Both types of information furthered EPA's goals: detailed information was useful in educating the public about the contents of the rule and abbreviated information let people know about the existence of the rule and how they could find further information about the rule on EPA's website. Given that EPA's clear purpose in the social media campaign was to inform and educate the public about an important rulemaking, coupled with the absence of any mention of a political candidate or political party, there is no basis for finding that EPA's communication materials were purely partisan.

EPA's social media campaign did not constitute covert propaganda

The Comptroller General's "decisions have defined covert propaganda as material such as editorials or other articles prepared by an agency or its contractors at the behest of the agency and circulated as the ostensible position of parties outside the agency." B-301022 at 4, Mar. 10, 2004. "A critical element of covert propaganda is the concealment of the agency's role in sponsoring such material." B-301022 at 4. An example of "covert propaganda" is the video news release (VNR) prepared by a governmental agency and distributed to television stations with the intent that it will "be broadcast, without alteration, as television news" and without disclosing that the agency wrote and produced it. B-304272 (Feb. 17, 2005). Other similar examples of "covert propaganda" involved the use of appropriated funds for communications prepared by contractors without requiring them to disclose the government's role to their audience. B-305368, Sept. 30, 2005 and B-306349, Sept. 30, 2005.

In the absence of a clear intent to conceal the federal agency's role in the communication materials, the Comptroller General has declined to find "covert propaganda" even where the government's role is not explicitly identified. For example, the Comptroller General determined that a Department of Defense (DOD) outreach program did not violate the publicity or propaganda restriction because there was "no evidence that DOD attempted to conceal from the public its outreach to RMOs [Retired Military Officers] or its role in providing RMOs with information, materials, access to department officials, travel, and luncheons" and there was "no evidence that DOD contracted with or paid RMOs for positive commentary or analysis." B-316443 at 2. Similarly, in looking at an Office of National Drug Control Policy (ONDCP) "Open Letter to America's Prosecutors" and two related attachments, the Comptroller General did not find covert propaganda, even though ONDCP was not identified as an author on one of the attachments. There was no covert propaganda in that case because there was no evidence of an attempt at concealment. B-301022, Mar. 10, 2004.

In its Clean Water Rule social media campaign, EPA did not in any way disguise its authorship of the content or mislead the recipients as to EPA's role in its creation of the information conveyed by the social media platforms. To the contrary, EPA clearly identified itself as the author of the content it distributed on various social platforms, including Facebook, Twitter, YouTube, and Pinterest. First, all social media messages appear with the agency's name and logo. This is a central function of the social media platforms. In addition to appearing in the feed of a follower, they are posted on the main pages for EPA's social media accounts. Clean

Water Rule messages contained links to the rule web page or to other relevant agency web pages. Graphics included a border that contained EPA's logo and the Clean Water Rule website address. There was nothing covert about EPA's social media campaign.

Moreover, the Comptroller General has found no covert propaganda when the objectionable material was created by individuals acting on their own initiative -- even when they also have a contractual relationship with the federal government. For example, when a syndicated columnist wrote several articles favorable to a government initiative while under contract with a federal agency in connection with the initiative there was no "covert propaganda" because the columnist's contract did not specify the preparation of articles under her name. B-304716, Sept. 30, 2005. In another case, when a technical consultant with a government contract chose to write opinion pieces but the federal agency contract did not call for those services, there was no violation of the publicity or propaganda restriction. B-320482, Oct. 19, 2010.

Similarly, the Comptroller General found no violation of the publicity and propaganda restriction when a private citizen used White House Press materials. B-304829, June 6, 2005. As explained in that case, "the publicity or propaganda prohibition is a restriction on the government's use of appropriated funds in disseminating information and does not prescribe legal limitations upon the subsequent use of that information." B-304829 at 2. Because the subsequent use of the information does not involve the use of appropriated funds, it is beyond the reach of the publicity or propaganda restriction.

Social media is designed to facilitate the rapid dissemination of information by social media users. EPA used social media for that purpose: to reach both the initial recipients and subsequent recipients –i.e., anyone with whom the initial recipients shared EPA's message. Followers of social media accounts are self-selected, meaning the agency was not targeting "supporters" with posts, but rather everyone who chose to follow EPA accounts as a source of information. EPA created content for distribution that clearly identified EPA as the author and that identifying information was designed to follow the initial message as it was distributed further by initial recipients. For example, when EPA posts a message on Twitter someone can choose to share or "retweet" the message. When someone shares an EPA post, it clearly says "John Doe retweeted" on top of the message and then shows the original message with EPA's name.

In some cases, the initial recipients could alter the content – and make it their own – but EPA neither intended nor encouraged users to distribute EPA's message without alteration and attribute it to anyone other than EPA. Most important, EPA had no contractual relationship with the initial recipients of its social media messages and therefore no control over whether they forwarded EPA's messages to subsequent recipients and if they did so, whether the messages were modified to remove EPA's identifying information. Finally, no appropriated funds were involved when the initial recipients' shared EPA's message. Therefore, EPA's social media campaign did not violate the prohibition on publicity and propaganda.

b. *Thunderclap posted the following message to the social media accounts of 980 people: "Clean water is important to me. I support EPA's efforts to protect it for my health, my family, and my community," and included a link*

to EPA's Web page on the proposed clean water rule. It is estimated that about 1.8 million people were reached by Thunderclap. Please provide your legal views on whether EPA's role in sponsoring this message was made clear to the target audience.

Response 4.b:

As described in the section on covert propaganda above, nothing about EPA's social media campaign was covert or hidden. The Thunderclap was clearly identified as an EPA social media effort. The web page for the Thunderclap featured EPA's logo, prominently identified EPA as the organizer of the Thunderclap, and linked to the Clean Water Rule website. When someone elected to share the Thunderclap message with others it included references to EPA and linked to the Clean Water Rule website.

If the "target audience" of the Thunderclap consisted of the 980 recipients of the Thunderclap, there is no factual basis for finding that it was covert propaganda. EPA made no effort to conceal its role in organizing the Thunderclap. Instead, EPA's role is clearly discernable by the fact that EPA's name appeared as the organizer on the Thunderclap website, in the messages EPA sent encouraging people to sign up for Thunderclap, and in the message that Thunderclap posted to social media accounts of the 980 recipients.

Even assuming that the target audience included the estimated 1.8 million who received messages from the 980 Thunderclap participants, it would not violate the publicity or propaganda restriction. In B-316443, the Comptroller General evaluated a Department of Defense outreach program intended to influence the views of retired military officers that were media analysts – referred to by DOD as "message force multipliers" because of their ability to communicate the DOD's views to the public in their role as media analysts. The Comptroller General found no violation even though DOD did not ensure that the subsequent recipients of the media analysts' opinions would be able to discern DOD's role in cultivating their opinions. The determinative factor in that case was the lack of (1) any evidence that DOD attempted to actively conceal its role or (2) any evidence that DOD contracted with or paid the retired military officers for positive commentary or analysis. B-316443, July 21, 2009.

EPA made no attempt to conceal its role in creating the Thunderclap and EPA did not have a contract with any of the Thunderclap recipients. Furthermore, the Thunderclap was designed to retain EPA's identifying information so it would be easy for the subsequent recipients of the Thunderclap to discern EPA's role in creating it. But even if one of the 980 recipients of the Thunderclap altered the message to obscure EPA's role, it would not be "covert propaganda" under the Comptroller General's case law because, like the DOD case discussed above, there is no evidence of an attempt at concealment, and, like the White House Press case described in (a), the prohibition does not proscribe an individual's subsequent use of EPA's materials.

c. *As part of EPA's #ditchthemyth campaign, EPA provided "truths" about the proposed rule. Beside each of these truth statements was a link to "Tweet*

the Truth." It is our understanding that clicking this link created a prewritten statement for supporters to post on Twitter.

i. Did clicking this link produce prewritten statements, created by EPA, for posting? Please explain.

Response:

The Ditch the Myth campaign was intended to educate people about the Clean Water Rule and dispel misinformation. The campaign included six graphics to clarify different aspects of the rule. These graphics were shared via EPA's social media accounts (Facebook, Twitter, Instagram, Pinterest, etc.) and posted to EPA's website. The website where the graphics were posted also included factual statements or "truths" about the clean water rule that people could tweet on their own Twitter accounts. Here are a few examples of those statements:

> TRUTH: Normal farming and ranching activities don't need permits under the Clean Water Act, including moving cattle. Tweet the truth
>
> TRUTH: The proposed rule specifically excludes groundwater. Tweet the truth
>
> TRUTH: No. All historical exclusions and exemptions for agriculture are preserved. Tweet the truth

If someone clicked on the "Tweet the truth" hyperlink, a Twitter window would pop up with a statement that included EPA Water as the byline, showing it was information from the agency. The individual could then: 1) retweet the statement, 2) edit or change the statement as they liked and tweet it, or 3) select cancel and close the window.

ii. Please provide examples of the "Tweet the Truth" statements used in this campaign.

Response:

See answer to 4.c.i. above and relevant documents in response to question 2.

iii. Please provide your legal views on whether EPA's role in sponsoring the statements created by clicking the "Tweet the Truth" link was made clear to the target audience–the viewers of such posts?

Response:

All of the graphics and text used in the "Ditch the Myth" campaign, clearly identified EPA as the author, regardless of whether EPA sent it via Twitter, Facebook, or another social medium. For example, EPA's logo is at the top left hand corner of the "Know the Facts" graphics and

EPA's website "epa.gov/ditch the myth" is included on the graphic itself. Thus, it was clear to the target audience – e.g. those who received EPA's messages and tweets – that EPA was the source of the material. Moreover, even assuming that the target audience encompasses anyone receiving a tweet that was re-tweeted by the initial recipient of EPA's tweet, clicking on the link to "Tweet the Truth" generated a statement that included "EPA Water" as the byline. As described in the section on covert propaganda and in Section 4.c.i. above, a "critical element of covert propaganda is the concealment of the agency's role in sponsoring such material." B-301022 at 4. Moreover, as the Comptroller General explained in another case, "the publicity or propaganda prohibition is a restriction on the government's use of appropriated funds in disseminating information and does not prescribe legal limitations upon the subsequent use of that information." B-304829 at 2.

5. *Section 715 of the Financial Services and General Government Appropriations Act, 2015, provides that "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.*[5] *GAO has construed this language as prohibiting indirect or grassroots lobbying – a clear appeal to the public to contact Members of Congress in support or Opposition to pending legislation.*

    a. *Please provide EPA's legal views on whether any of the agency's uses of social media platforms violated section 715 or similar provisions contained in the appropriations acts of other fiscal years?*

Response:

The Comptroller General has interpreted this provision to prohibit a narrow range of communications: those that include a "clear or explicit appeal" to the public to contact Congress in support of, or in opposition to, pending legislation. B-304715, April 27, 2005. Absent an explicit appeal t to the public to contact Congress in support of, or in opposition to, any pending legislation, there can be no violation of section 715. In 2005, several members of Congress asked the Comptroller General to adopt a different standard for determining a violation – one that assesses the agency's intent and whether the message is likely to influence the public to contact Congress. In rejecting that "unworkable" approach, the Comptroller General explained that the requirement for a clear or explicit appeal is "founded upon the language and the legislative history of the grassroots lobbying provisions, and it is consistent with a proper respect for the right and responsibility of federal agencies to communicate with the public, as well as Congress, regarding agency policies and activities." B-304715 at 4. Based on the materials provided in response to this request, EPA's social media campaign did not include any appeals—explicit or otherwise—to contact Congress in connection with legislation—pending or

[5] Pub. L. No. 113-235, S 715. This same provision appears in section 715 of the Financial Services and General Government Appropriations Act, 2014. Pub. L. No. 113-76. S 715.

otherwise—on any subject. Therefore, EPA's use of social media platforms did not violate section 715 or similar provisions in other fiscal years.

b. *Please provide EPA's legal views on whether any of the agency's uses of social media platforms violated section 401 of the Department of the Interior, Environment and Related Agencies Appropriations Act, 2015, which states that "No part of any appropriation contained in this 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," or provisions similar to section 401 contained in the appropriations acts of other fiscal years?*[6]

Response:

The Comptroller General has interpreted this provision to prohibit activities prohibited by section 715 (explicit appeals) as well as "particularly egregious examples of lobbying . . . even though the material stops short of actually soliciting the reader to contact his congressperson in support of or opposition to pending legislation." B-281637 at 3 (May 14, 1999). More specifically, the Comptroller General has described Section 401 as prohibiting "appeals to the public that implicitly tend to promote support for or opposition to legislative measures." Id. at 4. As explained in the response to 5.a., EPA did not use social media to request anyone to contact Congress in support of, or in opposition to any pending legislation or legislative proposal of any kind. Nor did EPA's social media campaign constitute an implicit appeal to ask the public to contact Congress in support of, or in opposition to a legislative proposal. This is true whether one evaluates EPA's social media messages individually or the social media campaign as whole.

In evaluating whether there is indirect lobbying as a result of an implicit appeal to members of the public to contact Congress, the Comptroller General considers the following factors – (1) timing; (2) setting; (3) audience; (4) content; (5) reasonably anticipated effect; and (6) intent. B-281637 at 5. It is important to note, however, the Comptroller General's philosophy in interpreting the grass-roots lobbying restrictions:

> We have no reason to think that Congress meant to preclude government officials from saying anything that might possibly cause the public to think about or take positions on the issues of the day and, as a result, contact their elected representatives. To the contrary, we see the free and open exchange of ideas and views as central to our political system and, accordingly, remain reluctant to construe these laws in such a way that would unnecessarily or excessively constrain agency communications with the public or Congress.

B-304715 at 4.

[6] Pub. L. No. 113-235, § 401. This same provision appears in section 402 of the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2014. Pub. L. No. 113-75 S 715.

The entire focus of EPA's social media campaign was an EPA rulemaking, not Congressional legislation. EPA used social media to build awareness of the rulemaking, educate the public about the rule, and engage the public in EPA's rulemaking process. Consistent with those intentions, the subject of EPA's blogs and messages was EPA's rulemaking, not legislation. The absence of any intent to influence legislation is further evidenced by the content of EPA's messages, which lacked reference to a legislative proposal.

Given that the content of the message did not mention legislation, coupled with the intended and actual focus on the messages, it would not have been reasonable to anticipate that EPA's social media campaign would have the effect of mobilizing the recipients of its message to lobby Congress. Considering the length limitations in some social media formats, as well as the volume of messages people receive from all sources on a daily basis, it is highly unlikely that a short message about the Clean Water Rule would cause a recipient to research whether there was any associated legislative proposals pending before Congress and then lobby Congress in support of, or opposition to the proposal. Under these circumstances, there can be no violation of section 401.

c. *On April 7, 2015, EPA's Communications Director created an EPA blog post containing some hyperlinks to Web pages of other entitles. These external Web pages contained link buttons, which led visitors to Action pages. These action pages urged visitors to contact Congress to defend EPA's Clean Water Act proposal and oppose congressional action that would undermine the rule. Please provide your legal views on whether EPA's hyperlinks to these Web pages constitute a clear appeal to the public to contact Members of Congress regarding pending legislation?*

Response to 5.c:

EPA's hyperlinks to the NRDC and Surfrider Web pages do not constitute a clear appeal to the public to contact Members of Congress regarding pending legislation. As described in response to 5.a. the Comptroller General has interpreted this provision to prohibit a narrow range of communications -- those that include a "clear or explicit appeal" to the public to contact Congress in support of, or in opposition to, pending legislation. B-304715, (April 27, 2005).

The facts here are not analogous to the facts at issue in an unpublished Comptroller General opinion. B-285298, May 22, 2000, available at 2000 WL 675585 (Comp. Gen.). There, the Comptroller General found a violation of a provision similar to section 715 when a federal official forwarded an e-mail prepared by a member of the public that explicitly urged members of the public to contact Congress in support of pending legislation. At the time the email was forwarded, there was no question as to the contents of the forwarded email: it included an explicit appeal to contact Congress in support of pending legislation.

In contrast, the EPA actions at issue here are the inclusion of hyperlinks to other organizations' websites. EPA's link to the Surfrider Web page was for the purpose of directing readers to an article that delineates the reasons why surfers get sick more than beachgoers. The article is dated July 2010—long before EPA's proposed Clean Water Rule was even drafted. The article

was mentioned in the April 7, 2015 blog post to explain why clean water is important to surfers. Similarly, the link to NRDC's web page was to an article describing an alliance of brewers formed to support clean water. The link served to demonstrate the point made in the blog: "brewers depend on a reliable supply of clean water to craft their products." Significantly, neither the Surfrider nor NRDC articles themselves include an explicit or implicit appeal to the public to contact Congress in connection with pending legislation. By including links to the articles, EPA intended only to direct readers to those articles, not to all other content that might be anywhere on a given Web page, such as information a reader would receive if they clicked on the "take action" links.

Web pages are dynamic; they can change daily or hourly. If the pages linked contained action links at the time of the April 7, 2015 blog, it is unclear whether the blog author was aware of these links at the time of his post. If the links to take action did not yet exist, it is highly unlikely that the blog poster could have predicted they would. Further, to hold agencies responsible for every link that a reader could get to from an article that the agency linked to would be unreasonable. Even now, EPA cannot determine whether the "take action" link was included on Surfrider's website on April 7, 2015. Over the past several weeks, the content on Surfrider's webpage accompanying the 2010 article has changed often. While the hyperlink EPA used to direct readers to the article about surfers getting sick retrieves the article EPA intended to distribute, on any given day the surrounding content that accompanies the article may be different. This is typical of Web pages. Short of refraining from using hyperlinks to external websites, there would be no way for a federal agency to avoid violating the indirect lobbying prohibitions if accompanying content on the external site at any moment in time is attributed to the agency. 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.

d. Please describe any legislation concerning EPA's proposed rule that was pending at the time of EPA's April 7, 2015, blog post. Or at the time of any of EPA's social media outreach concerning the proposed rule.

Response to 5.d:

EPA's law librarian conducted a search on Congress.gov using the following search terms: Waters of the United States (or US); Clean Water Rule; Jurisdiction + Clean Water Act; Definition + waters. These search results are provided on the SharePoint site in a document entitled "Legislative Search Results.Congress.gov".

While the search results appear to be over-inclusive, and possibly under-inclusive, they show that on July 11, 2014, a bill was introduced in the House that would prohibit the implementation of the Clean Water Rule (HR 5078). This bill died with the conclusion of the 113th Congress, but on January 28, 2015, a similar bill was introduced (HR 594).

Conclusion

As described in greater detail above, EPA's social media communications were not self-aggrandizing, purely partisan, or covert propaganda. Nor did EPA engage in indirect lobbying by making either an explicit or implicit appeal to the public to contact Congress in support of, or in opposition to pending legislation or a legislative proposal. Rather, EPA's use of social media to educate the public about the Clean Water Rule was consistent with EPA's longstanding mission, public participation policy, and statutory directives – all of which facilitate the "free and open exchange of ideas and views" that the Comptroller General has described as "central to our political system." B-304715 at 4. Accordingly, EPA's use of social media in connection with the Clean Water Rule did not violate the appropriation act restrictions on grass-roots lobbying and publicity or propaganda.