

# United States Senate

WASHINGTON, DC 20510

January 21, 2016

The Honorable Loretta Lynch  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue  
Washington, D.C. 20530

Dear Attorney General Lynch:

We write to request that the Department of Justice investigate whether officials at the Environmental Protection Agency knowingly and willfully violated and are continuing to knowingly and willfully violate 31 U.S.C. 1341(a) in its “covert propaganda” and grass roots lobbying campaign to promote the agency’s rules defining “Waters of the United States (WOTUS).”

As you know, Section 1341 of the Antideficiency Act prohibits employees of the U.S. government from spending any money not authorized by Congress. While few people may have heard of the Antideficiency Act, it plays an important role in protecting our constitutional system of checks and balances.

The Constitution is clear: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” This means the Executive Branch is prohibited from spending even a dollar unless Congress first gives it permission. The requirement springs from the bedrock principle that legislative and executive powers must be kept separate and not concentrated in a single federal entity. Americans understand that the separation of powers is essential to guarantee basic freedoms.

The Antideficiency Act is a tool, enshrined in law, designed to defend this basic principle. In effect, it says that any government employee who spends money not authorized by Congress has violated the principle of separation of powers. As the Department of Justice itself has long recognized, a knowing and willful violation of the Antideficiency Act is subject to a \$5,000 fine and spend up to two years in prison.<sup>1</sup>

We all know how seriously federal agencies consider possible violations of the Antideficiency Act. For example, during a lapse in appropriations the National Park Service barricades national memorials. Federal workers are likewise barred from sending so much as an email to a colleague during a shutdown for fear of a violation.

---

<sup>1</sup> See August 31, 2004, Memorandum Opinion from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, for the Acting General Counsel, Department of Housing and Urban Development.

Last month, the Government Accountability Office found that the EPA violated the Antideficiency Act by promoting its WOTUS rules in ways expressly prohibited by Congress. GAO wrote:

“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.**”

Under the Antideficiency Act, EPA must conduct an internal investigation and identify the persons responsible. However, EPA is dismissive of GAO’s legal decision.<sup>2</sup> In fact, even though GAO issued its legal decision on December 14, EPA has not removed from its website the messages that GAO found to be covert propaganda and grass roots lobbying.<sup>3</sup>

Raising additional concerns, in a recent court filing in litigation challenging the WOTUS rule, Department of Justice attorneys filed a brief on behalf of EPA that mischaracterized the GAO decision as an opinion letter rather than the formal legal decision that an Antideficiency Act violation had occurred.<sup>4</sup> Under the Antideficiency Act, the EPA Administrator must submit a report to Congress detailing the violation and amount of money that was spent illegally.

Given EPA’s continuing violations, and the cavalier attitude displayed by EPA public affairs staff and Department of Justice line attorneys, we request the Department of Justice immediately investigate whether a criminal violation of the Antideficiency Act has taken place. Only a thorough and independent investigation can determine whether a crime has occurred.

We appreciate your consideration of this request and look forward to your response.

Sincerely,



Ben Sasse  
U.S. Senator

James Inhofe  
Chairman  
U.S. Senate Committee on  
Environment and Public Works

<sup>2</sup> See <https://blog.epa.gov/blog/2015/12/we-wont-back-down-from-our-mission/> (last visited 1/20/2015).

<sup>3</sup> See <https://blog.epa.gov/blog/2014/09/do-you-choose-clean-water/> (last visited 1/20/2016) and <https://blog.epa.gov/blog/tag/cleanwaterrules/> (last visited 1/20/2016).

<sup>4</sup> See Federal Defendants’ Surreply in Opposition to Plaintiffs’ Motion to Complete the Administrative Record, State of North Dakota, et al., vs. USEPA, Case No. 3:15-cv-00059-RRE-ARS (D. N.D.).