



Public Employees for Environmental Responsibility

962 Wayne Avenue, Suite 610 • Silver Spring, MD 20910

Phone: (202) 265-PEER • Fax: (202) 265-4192

Email: info@peer.org • Web: <http://www.peer.org>

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January 22, 2019

Gene L. Dodaro, Comptroller General of the United States
U.S. Government Accountability Office
441 G St., NW
Washington, DC 20548

Re: URGENT AUDIT AND INVESTIGATION REQUEST – Department of Interior

Dear Mr. Dodaro,

I am writing on behalf of Public Employees for Environmental Responsibility (PEER), a non-profit group that works nation-wide with government scientists, land managers, law enforcement agents, field specialists and other leading environmental professionals, including many within the Department of Interior (DOI).

This is to request your immediate investigation of Acting Interior Secretary David Bernhardt for potential legal violations of the Antideficiency Act (AA)¹. We also request an audit to determine the source of funding Interior is tapping to finance a wide variety of nonemergency work described below.

As you know, DOI's appropriations from Congress lapsed on December 22, 2018. The agency has furloughed most of its employees and suspended most of its services.

As detailed by GAO's AA webpage, the AA prohibits all Federal managers from:²

- *making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law. 31 U.S.C. § 1341(a)(1)(A).*
- *involving the government in any obligation to pay money before funds have been appropriated for that purpose, unless otherwise allowed by law. 31 U.S.C. § 1341(a)(1)(B).*

¹ 31 U.S.C. § 1341 et seq.

² Excerpted from GAO's *Antideficiency Act Resources*, at: www.gao.gov/legal/appropriations-law-decisions/resources.

- *accepting voluntary services for the United States, or employing personal services not authorized by law, except in cases of emergency involving the safety of human life or the protection of property. 31 U.S.C. § 1342.*

Moreover, under decisions of the Office of Legal Counsel, agency managers are required to take reasonable steps to prevent the need to incur unappropriated obligations.³ In other words, if the manager can foresee that his or her actions will cause the agency to incur potential unappropriated obligations, they have a duty under the AA to avoid that outcome.

Yet, Acting Secretary Bernhardt appears to be ignoring the AA's strictures by compelling DOI staff in certain duty stations to do work during the shutdown for which "safety of human life or the protection of property" is not the motivation.

However, there appear to be several potential ongoing AA violations in DOI that we ask you to investigate. We do not claim to know the full scope of Interior staff still working across the nation, but we highlight four examples here:

First is the DOI post-shutdown decision to compel furloughed non-essential staff in at least 38 of the U.S. Fish and Wildlife Service (USFWS) National Wildlife Refuges to start working again to facilitate private hunting.⁴ In an email of January 8, 2019, Margaret Everson, principal deputy director of the USFWS, cited "opportunities, including hunting" that were being lost in the shutdown, as the justification.

The source used to pay the salaries of these re-called employees is claimed to be "carry over" funds, however, the details and legal justification for that under the AA remains unclear. The situation demands independent investigation, particularly as initially the USFWS had determined to furlough those same workers due to the lack of available appropriated funds.

Second, also within the USFWS, numerous furloughed, non-essential staff of several Regional Offices were recently ordered back to work to prepare National Environmental Policy Act (NEPA) environmental assessments and Categorical Exclusions on a "rush" basis for more than sixty national wildlife refuges across the country. This NEPA work would affect the opening of several hundred thousand acres of National Wildlife Refuge System lands to private hunting and fishing.

Again, staff are directed to use new cost codes. Allegedly some are to be paid from a pool of unappropriated monies from sportfishing and hunting funds, but it appears highly doubtful that such funds can be legally used for such NEPA compliance work to implement this radical new policy decision.

³ U.S. Dep't of Justice, Office of Legal Counsel, United States Marshals Service Obligation to Take Steps to Avoid Anticipated Appropriations Deficiency, 23 *Op. O.L.C.* 105 (1999), at: www.justice.gov/file/19531/download.

⁴ PBS News Hour, Jan. 9, 2019, "Government restaffs wildlife refuges during shutdown to allow hunters access," at www.pbs.org/newshour/nation/government-restaffs-wildlife-refuges-during-shutdown-to-allow-hunters-access .

The GAO should investigate whether these fishing and hunting funds are dedicated by their authorizing laws to narrower uses. An AA violation may be transpiring as well as potentially violations of the laws that created the sources the USFWS is tapping.

Third PEER is receiving reports that U.S. Bureau of Land Management (BLM) employees are being ordered to return to staff offices to process permit applications for oil and gas drilling on public lands. We have received these reports from multiple sources but we do not know the source of fund that DOI is tapping for this nonemergency work.

Fourth is the recent change within the Bureau of Ocean Energy Management (BOEM), as described in this press report of January 15, 2019:⁵

The Trump administration brought employees back to work last Thursday to advance the controversial outer continental shelf five-year leasing plan — just two days after the Interior Department said the work was shelved during the government shutdown.

Last week, Interior updated its contingency plans so 40 employees at the Bureau of Ocean Energy Management could be available "on an on-call basis to perform the exempt functions of preparing National Outer Continental Shelf (OCS) Program decision documents."

The work includes conducting environmental review and finalizing seismic testing permits for energy exploration off the Atlantic coast.

"In order to comply with the Administration's America First energy strategy to develop a new [outer continental shelf] Oil and Gas leasing program, work must continue toward issuing the Proposed Program per the Outer Continental Shelf Leasing Act requirements," reads the updated shutdown plan, dated Jan. 8.

"Failure to hold these sales would have a negative impact to the Treasury and negatively impact investment in the U.S. Offshore Gulf of Mexico," the plan says.

The aims stated in the revised BOEM Contingency Plan of complying with the Administration's long-term energy strategy and contributing to future investment in offshore oil development appear to violate the AA-mandated duty to not take actions that may incur future unappropriated obligations, as could result here where BOEM staff were recalled specifically to enable future oil and gas extraction. Future compliance, monitoring, enforcement, contracting, and other DOI activities surely would be incurred as a result in violation of the AA.

The above-described staff re-calls by DOI appear to represent decisions by Mr. Bernhardt to cater to the desires of certain special interests in violation of the letter and intent of the AA.

⁵ E&E News article: Interior updates shutdown plan to push 5-year leasing policy, at: www.eenews.net/eenewspm/2019/01/15/stories/1060114899; see also Jan. 16 E&E News article: Dems blast Interior over leasing work during shutdown, at: www.eenews.net/greenwire/2019/01/16/stories/1060116249.

While these employees have been directed to return to work, by contrast, most of their fellow staff, whose work may be just as vital or more so, are furloughed and not allowed to work, and while still other “excepted” staff must keep working with no pay.

It should be noted that virtually all of DOI’s normally Presidentially-appointed, Senate-approved, headquarters management positions now are occupied by quasi-“acting” officers, operating under “Temporary Redelelegations of Authority” signed by former Secretary Zinke. By the terms of their non-confirmed appointments (which are legally questionable), those officers cannot carry out any “functions or duties required by statute or regulation to be performed only by the Senate-confirmed official occupying the position”.⁶ Only the Secretary can perform those duties and functions. Thus, Acting Secretary Bernhardt now in most cases is the only DOI official with recognized legal responsibility to carry out Congressional mandates such as managing the USFWS Wildlife Refuges under his control and making the ultimate NEPA compliance determinations that agency staff are now preparing in the Regional Offices with questionable funding. As such, Mr. Bernhardt is the one official who could be held responsible for the USFWS’s ongoing potential AA violations.

The seriousness of this request is underscored by the fact that Acting Secretary Bernhardt could potentially be subject to criminal prosecution or removal from office for violating the AA.⁷

Further, no end of the government shutdown is in sight, the Federal Courts are due to close soon, and DOI is refusing to accept Freedom of Information Act request filings, thereby frustrating independent citizen investigation. Making the situation worse, the DOI Office of Inspector General (IG) also is shuttered.⁸ It is highly questionable to allow numerous non-essential programmatic DOI tasks to go forward while the IG is not on duty to monitor and receive staff reports on potential legal violations or to do investigations so as to “prevent and detect fraud and abuse in, such programs,” as Congress mandated under the Inspector General Act of 1978.⁹

Basically, no Federal entities or mechanisms other than a GAO investigation are now left to enforce the AA. Now more than ever GAO is needed to promptly investigate the facts and law and act on behalf of the national interest and DOI’s employees. You are requested to respond on an expedited basis. In the meanwhile, please contact me if you would like further information.

Sincerely,



⁶ Former Secretary Zinke Order No. 3345, Temporary Redelelegation of Authority for Certain Vacant Non-Career Senate-Confirmed Positions. Sec. 4.

⁷ 31 U.S.C. § 1350

⁸ See <https://www.doi.ig.gov/> under, DOI & OIG TWEETS.

⁹ P.L. 95-452; 5 U.S.C. App.

Jeff Ruch
Executive Director

CC: Office of Antideficiency Act Reports, GAO
Julie Matta, Managing Associate General Counsel, GAO
Acting Secretary of the Interior David Bernhard