



## Decision

**Matter of:** Department of Commerce—Application of the Impoundment Control Act to Appropriations Enacted in Fiscal Years 2018 and 2019

**File:** B-331298

**Date:** December 23, 2020

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### DIGEST

In recent years, Congress has expressed concern with the number of vacant positions at the National Weather Service in the Department of Commerce, and in 2019, Members of Congress asked us whether the delay in filling vacant positions constituted an impoundment. We are unaware of any instruction from any official to withhold amounts from obligation. The Department of Commerce provided us with the rate of obligation for the appropriations that fund the National Weather Service's personnel costs. These data show that the Weather Service obligated amounts allotted to it at a robust yet measured pace that gives no indication that the agency withheld amounts from obligation. Based on this information, we conclude that the National Weather Service's execution of the relevant appropriations did not violate the Impoundment Control Act of 1974.

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### DECISION

This responds to a congressional request for our decision on whether the National Weather Service's (Weather Service) delay in filling vacant positions constituted an impoundment.<sup>1</sup> Letter from Representatives Jamie Raskin, Donald S. Beyer, Conor Lamb, and Daniel W. Lipinski to Comptroller General (Aug. 1, 2019) (Request Letter). As explained below, the Weather Service did not impound amounts appropriated in fiscal years 2018 or 2019 from accounts that fund personnel costs.

In accordance with our regular practice, we contacted the Department of Commerce (Commerce), where the Weather Service resides, for factual information and its legal

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<sup>1</sup> An impoundment is any action or inaction by an officer or employee of the federal government that precludes obligation or expenditure of budget authority. GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 61.

views on the matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at [www.gao.gov/products/GAO-06-1064SP](http://www.gao.gov/products/GAO-06-1064SP); Letter from Assistant General Counsel for Appropriations Law, GAO, to Acting General Counsel, Commerce (Feb. 26, 2020). Commerce responded with relevant data and information and its legal views. Letter from Chief, General Law Division, Commerce, to Assistant General Counsel for Appropriations Law, GAO (Apr. 15, 2020) (Response Letter).

## BACKGROUND

In a 2017 GAO audit report, we found that 11 percent of positions in Weather Service operational units were unfilled by the end of fiscal year 2016. GAO, *National Weather Service: Actions Have Been Taken to Fill Increasing Vacancies, but Opportunities Exist to Improve and Evaluate Hiring*, GAO-17-364 (Washington, D.C.: May 2017). Since then, Congress has expressed concern with the number of vacant Weather Service positions.<sup>2</sup> For example, a 2018 House of Representatives report stated that “the Committee consistently hears of staffing and management challenges within [the Weather Service]” and recommended an amount of “not less than \$625,000,000 for salaries and benefits of [Weather Service] employees.” H.R. Rep. No. 115-704, at 22 (May 24, 2018). The Request Letter we received also expressed concerns about the consistency of the Weather Service’s reports to congressional committees on the number of its vacant positions. Request Letter, at 1–3.

The Weather Service is a line office of the National Oceanic and Atmospheric Administration (NOAA) within Commerce. NOAA, *Organization*, available at <https://www.noaa.gov/about/organization> (last visited Dec. 10, 2020). As a general matter, Congress does not make line-item appropriations specifically for the Weather Service. For example, in both the Department of Commerce Appropriations Act, 2018<sup>3</sup> and the Department of Commerce Appropriations Act, 2019,<sup>4</sup> Congress made appropriations for NOAA. In turn, NOAA determined amounts to allot to the Weather Service for its operations. Neither of these acts contained line-item appropriations requiring amounts to be used for filling Weather Service vacancies. See generally Pub. L. No. 116-6, 133 Stat. 91–101; Pub. L. No. 115-141, 132 Stat. 400–409.

Costs for Weather Service personnel are mainly borne by NOAA’s Operations, Research, and Facilities (Operations) appropriation. Response Letter at 4, n.2; see, e.g., NOAA, *Budget Estimates Fiscal Year 2019*, at ORF-6. With respect to funding that could be used for Weather Service positions for fiscal years 2018 and 2019, the

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<sup>2</sup> S. Rep. No. 115-275, at 45 (June 14, 2018); H.R. Rep. No. 115-704, at 22 (May 24, 2018); H.R. Comm. on Appropriations, 115<sup>th</sup> Cong., *Consolidated Appropriations Act, 2018*, 180–181 (Comm. Print 2018); S. Rep. No. 115-139, at 43 (July 27, 2017).

<sup>3</sup> Pub. L. No. 115-141, div. B, title I, 132 Stat. 400–409 (Mar. 23, 2018).

<sup>4</sup> Pub. L. No. 116-6, div. C, title I, 133 Stat. 91–101 (Feb. 15, 2019).

Operations appropriation has a 2-year period of availability and is “[f]or necessary expenses of activities authorized by law for [NOAA].” Pub. L. No. 116-6, 133 Stat. at 97; Pub. L. No. 115-141, 132 Stat. at 405.

NOAA’s Procurement, Acquisition and Construction (Procurement) appropriation also funds a smaller number of Weather Service positions. See, e.g., NOAA, *Budget Estimates Fiscal Year 2019*, at PAC-2. The Procurement appropriation is “[f]or procurement, acquisition and construction of capital assets . . . of [NOAA],” and amounts that could be used for Weather Service positions in fiscal years 2018 and 2019 have a 3-year period of availability. Pub. L. No. 116-6, 133 Stat. at 97–98; Pub. L. No. 115-141, 132 Stat. at 406.

## DISCUSSION

The question presented is whether the Weather Service impounded funds from its allotted portion of the fiscal year 2018 and 2019 Operations and Procurement appropriations. Congress has vested the President with strictly circumscribed authority to impound, or withhold, budget authority only in limited circumstances as expressly provided in the Impoundment Control Act of 1974. See 2 U.S.C. §§ 681–688; B-331564, Jan. 16, 2020. The President’s transmission of a special message to Congress is a necessary prerequisite of an authorized withholding. 2 U.S.C. §§ 683–684; B-331564. Here, the President did not submit a special message to Congress, so there is no authority for the Weather Service to impound funds. Therefore, we must determine whether the Weather Service withheld amounts from obligation, as any such withholding would constitute an improper impoundment.

An improper impoundment may result where an official within or outside of the agency (for instance, in the Office of Management and Budget (OMB)) directs the withholding of budget authority. See, e.g., B-331564, Jan. 16, 2020 (OMB withheld funds by issuing instructions through apportionment schedules); B-307122, Mar. 2, 2006 (agencies withheld amounts in anticipation of the President’s proposed rescissions). Commerce told us that “no direction has been given to withhold budget authority from obligation.” Response Letter, at 2. Commerce provided us with the OMB-approved apportionment actions, and they contained no instructions withholding amounts from obligation. Commerce also told us that “NOAA and [the Weather Service] took all necessary internal administrative actions to make all budget authority under” the fiscal year 2018 and 2019 Operations and Procurement appropriations available for obligation in accordance with OMB-approved apportionments. *Id.* Thus, in this case, we are unaware of any instruction from any official to withhold amounts from obligation.

Another indication of whether an impoundment occurred is the rate at which the agency obligates its appropriations. For example, we found that the National Aeronautics and Space Administration’s high obligation rate bore no indication of an impoundment. B-320091, July 23, 2010. Here, we examined documentation submitted to us by Commerce, including the obligation rates of the Operations and

Procurement appropriations enacted in fiscal years 2018 and 2019. See Pub. L. No. 116-6, 133 Stat. at 97–98; Pub. L. No. 115-141, 132 Stat. at 405–406. Because these amounts are appropriated to NOAA rather than to the Weather Service, we examined the rate at which the Weather Service obligated the amounts that NOAA allotted to it.

Commerce reported that the Weather Service had obligated a significant amount of its fiscal years 2018 and 2019 Operations and Procurement appropriations. Response Letter, at 4 and Attachment (Weather Service execution data); *id.* at n.2. The table below shows the Weather Service’s obligation rate for its allotted portion of NOAA’s Operations and Procurement appropriations, as reported to us by Commerce.

**National Weather Service obligation rate for its allotted portion of NOAA’s Operations, Research and Facilities (Operations) and Procurement, Acquisition, and Construction (Procurement) appropriations, enacted in fiscal years 2018 and 2019**

	Total percent obligated	
	Amounts enacted in Public Law 115-141	Amounts enacted in Public Law 116-6
Operations appropriation	99.99% <sup>a</sup>	98.62% <sup>b</sup>
Procurement appropriation	90.65% <sup>c</sup>	85.90% <sup>d</sup>

Source: Letter from Chief, General Law Division, Department of Commerce (Commerce), to Assistant General Counsel for Appropriations Law, GAO (Apr. 15, 2020) and Attachment (Weather Service execution data).

Note: For amounts that would be used to fund Weather Service positions, each Operations appropriation had a 2-year period of availability and each Procurement appropriation had a 3-year period of availability. Pub. L. No. 116-6, 133 Stat. at 97–98; Pub. L. No. 115-141, 132 Stat. at 405–406.

<sup>a</sup> The percent obligated covers the entire period of availability of the Operations appropriation enacted in Public Law 115-141.

<sup>b</sup> At the time of Commerce’s reporting, the Operations appropriation enacted in Public Law 116-6 still had 7 months remaining in its period of availability.

<sup>c</sup> At the time of Commerce’s reporting, the Procurement appropriation enacted in Public Law 115-141 still had 7 months remaining in its period of availability.

<sup>d</sup> At the time of Commerce’s reporting, the Procurement appropriation enacted in Public Law 116-6 still had 1 year and 7 months remaining in its period of availability.

These data show that the Weather Service obligated amounts allotted to it at a robust yet measured pace that gives no indication that the agency withheld amounts from obligation. Even if unobligated balances remained in the Operations and Procurement appropriation accounts by the end of their periods of availability,

relatively small unobligated sums alone do not indicate an impoundment. Under sound administrative funds control practices, agencies may obligate cautiously in order to cover unanticipated liabilities. Viewed another way, agencies obligating 100 percent of their available funds leave little to no room for obligations to be adjusted upward, and if unforeseen costs arise, those agencies run the risk of exceeding amounts available and violating the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(A). See GAO, *Budget Issues: Key Questions to Consider When Evaluating Balances in Federal Accounts*, GAO-13-798 (Sept. 30, 2013) (describing various reasons expired, unobligated amounts may reasonably occur).

The legal standard for an impoundment rests on whether the agency withheld budget authority. A delay in filling vacancies, absent a withholding of funds, does not constitute an impoundment. The data Commerce provided does not give us reason to believe that the Weather Service is withholding budget authority, and given that we have no evidence of a direction to withhold funds, we conclude that the Weather Service did not impound Operations or Procurement amounts.

This decision considers only if the Weather Service executed amounts allotted to it in a manner consistent with the Impoundment Control Act of 1974. However, we also asked Commerce and the Weather Service to provide some context for how the Weather Service was responding to congressional concerns regarding its vacancies. Telephone Conversation with Chief, General Law Division, Commerce; Chief Financial Officer, Weather Service; Assistant General Counsel for Appropriations Law, GAO; Senior Attorney, GAO; and Staff Attorney, GAO (Dec. 3, 2020) (December Conversation). The Weather Service's Chief Financial Officer told us that, in response to a House recommendation to spend at least \$625 million for salaries and benefits of Weather Service employees, the Weather Service obligated more than \$625 million for salaries and benefits in fiscal year 2019 and again in fiscal year 2020. *Id.*; Email from Chief Financial Officer, National Weather Service, to Senior Attorney, GAO, *Re: GAO/Commerce phone call: NWS use of funds to address vacancies* (Dec. 9, 2020); H.R. Rep. No. 115-704, at 22. The official also stated that in the past two years there have been no reprogramming actions that have adversely affected the funding levels for employees' salaries and benefits. December Conversation. According to the official, the Weather Service has been fully executing each of its programs, projects, and activities. December Conversation.

The Weather Service Chief Financial Officer identified some of the factors contributing to vacancies, such as the rate of attrition; the administrative limitations on NOAA's capacity to hire and onboard personnel; the difference between funding levels and the pace of federal pay raises; and the difference between funding levels and operational requirements. *Id.* The official explained that the Weather Service has engaged in a multi-year effort to reduce the number of vacancies. *Id.* Part of this effort included improving NOAA's communication with Congress and clarifying the way NOAA reports full-time equivalent data in its spend plan; modifying NOAA's hiring process and prioritizing critical vacancies; implementing a career progression

program; and conducting studies to identify ways to achieve workplace efficiencies.  
*Id.*

## CONCLUSION

We conclude that the Weather Service's execution of its fiscal year 2018 and 2019 Operations and Procurement appropriations did not violate the Impoundment Control Act of 1974. We are unaware of any instruction from any official to withhold amounts from obligation. Data Commerce provided to us show that the Weather Service obligated amounts allotted to it at a robust yet measured pace that gives no indication that the agency withheld amounts from obligation.

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

Thomas H. Armstrong  
General Counsel