



B-329092

December 12, 2017

Congressional Committees

Subject: *Impoundment of the Advanced Research Projects Agency-Energy Appropriation Resulting from Legislative Proposals in the President's Budget Request for Fiscal Year 2018*

This letter is to inform you of an impoundment in the Advanced Research Projects Agency-Energy (ARPA-E) appropriation in fiscal year (FY) 2017. As explained in more detail below, ARPA-E withheld from obligation \$91 million of budget authority in violation of the Impoundment Control Act. See Pub. L. No. 93-344, title X, §§ 1001-1017, 88 Stat. 297, 332 (July 12, 1974), *classified at* 2 U.S.C. §§ 681-688. Since we have confirmed that the funds have been made available for obligation, we are not transmitting a report under the Impoundment Control Act because the impoundment is no longer taking place.

On May 23, President Trump submitted his budget request for FY 2018 to Congress. The budget request proposes the elimination of ARPA-E, an agency within the Department of Energy. The budget request asks that Congress cancel \$46.367 million of ARPA-E's unobligated balances and require that another \$45 million of ARPA-E's unobligated balances be used for "program direction,"¹ which will be used "to ensure full closure of ARPA-E by mid-2019."² In September, we received an inquiry about the status of these amounts.³ We contacted ARPA-E

¹ *Appendix, Budget of the United States Government for Fiscal Year 2018* (May 23, 2017), at 380-81, available at www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/doe.pdf (last visited Dec. 11, 2017).

² *2018 Major Savings and Reforms, Budget of the United States Government for Fiscal Year 2018* (May 23, 2017), at 33, available at www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/msar.pdf (last visited Dec. 11, 2017).

³ GAO is also currently conducting an audit engagement related to the Department of Energy's review of ARPA-E's funding opportunity announcements.

officials who told us that, per the Department of Energy's instructions, ARPA-E was withholding the obligation of more than \$91 million of budget authority in anticipation of congressional enactment of the legislative proposals in the budget request. We conclude that this withholding violated the Impoundment Control Act. The Department of Energy recently acknowledged that while ARPA-E's appropriation was fully apportioned and allotted in FY 2017, "limited oral conversations regarding whether to withhold any budget authority in the ARPA-E appropriation during FY 2017 pursuant to the FY 2018 President's Budget did occur." Letter from Acting General Counsel, Department of Energy, to Managing Associate General Counsel, GAO (Nov. 29, 2017).

All funds impounded in response to the President's budget request have been released. The Department of Energy provided us with an FY 2018 apportionment schedule and allotment record, showing that all of ARPA-E's unobligated balances, carried forward from previous fiscal years, are currently available for obligation. ARPA-E officials also orally confirmed that such budget authority is now available.

Background on the Impoundment Control Act

The Impoundment Control Act operates on the premise that when Congress appropriates money to the executive branch, the President is required to obligate the funds. See 2 U.S.C. §§ 681–688; B-203057, Sept. 15, 1981.⁴ In other words, an agency must make funds available for obligation unless otherwise authorized to withhold. The act authorizes the President to impound, or withhold the obligation of funds, in certain circumstances.⁵ The Impoundment Control Act separates

⁴ See also U.S. Const. art. II, § 3, cl. 5 (the President "shall take care that the laws be faithfully executed"); *Train v. City of New York*, 420 U.S. 35 (1975) (President Nixon improperly directed the Administrator of the Environmental Protection Agency to allot to the states only about half of funds appropriated for water pollution assistance).

⁵ The law includes this disclaimer: "Nothing contained in this Act, or in any amendments made by this Act, shall be construed as . . . superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder." 2 U.S.C. § 681(4). The Comptroller General and the federal courts have interpreted this disclaimer to mean that the President may not use the Impoundment Control Act to withhold funds for formula grants. GAO, *President's Eighth Special Message for Fiscal Year 1982*, OGC-82-9 (Washington, D.C.: Mar. 10, 1982) ("[T]he executive branch may not violate specific statutory requirements while it seeks to have Congress change those requirements"); GAO, *President's Eleventh Special Message for FY 1981*, OGC-81-14 (Washington, D.C.: July 30, 1981 (agency may not withhold mandatory grants to states pending congressional consideration of rescission proposal); *Maine v. Goldschmidt*, 494 F.Supp. 93 (D. Me. 1980) (lawsuit in response to President Carter's proposal to defer the obligation of grants to states under the Federal-Aid Highway Act).

impoundments into two exclusive categories—deferrals and rescissions. If the President wishes to temporarily postpone the obligation of budget authority, he may propose a deferral. 2 U.S.C. § 684. Deferrals are permissible only to provide for contingencies, to achieve savings made possible by or through changes in requirements or greater efficiency of operations, or as specifically provided by law. *Id.* § 684(b). Any amount of budget authority deferred must be prudently obligated before the end of the period of availability. *Id.*; 54 Comp. Gen. 453 (1974).⁶

If the President wants Congress to permanently cancel the availability of budget authority, he may propose a rescission. 2 U.S.C. § 683. A rescission may be proposed for any reason, including policy reasons. Any amount of budget authority proposed to be rescinded must be made available for obligation unless Congress, within 45 legislative days, completes action on a bill rescinding all or part of the amount proposed for rescission. *Id.* § 684(b).

The President notifies Congress of his proposed deferral or rescission by transmitting a “special message.” The special message must describe, among other things, the amount of budget authority proposed for deferral or rescission, the relevant account and “specific project or governmental functions involved,” the reasons why the budget authority should be deferred or rescinded, the “estimated fiscal, economic, and budgetary effect” of the proposed deferral or rescission, and any other “relevant facts, circumstances, and considerations.” *Id.* §§ 683 (rescissions), 684 (deferrals).

The Comptroller General has a number of statutory responsibilities under the Impoundment Control Act. The Comptroller General is required to review each special message and report findings to Congress as soon as practicable. *Id.* § 685(b). The Comptroller General also ensures that the impoundment is not misclassified, such as a rescission proposal reported as a deferral. *Id.* § 686(b). In addition, if the Comptroller General becomes aware of an unreported impoundment, the Comptroller General must “make a report on such reserve or deferral and any available information concerning it to both Houses of Congress.” *Id.* § 686(a).

⁶ Not all delays constitute a reportable impoundment under the Impoundment Control Act. Legitimate programmatic delays may occur when the agency is taking reasonable and necessary steps to implement a program, even though funds temporarily go unobligated. GAO, *Impoundment Control: Deferral of DOD Budget Authority Not Reported*, GAO/OGC-91-8 (Washington, D.C.: May 7, 1991), at 3–4; GAO, *Impoundment Control: President’s Third Special Impoundment Message for FY 1990*, GAO/OGC-90-4, (Washington, D.C.: Mar. 6, 1990), at 9–10 (design modification); B-115398.51, Sept. 28, 1976 (low number of loan applications). Similarly, the Impoundment Control Act does not apply to delays or lapsing of budget authority resulting from ineffective program administration, unless there is “concrete evidence of an intent to withhold budget authority.” B-229326, Aug. 29, 1989.

Since the enactment of the Impoundment Control Act, our practice has been to review withholdings brought to our attention by concerned Members or congressional committees, intended recipients, or auditors. See, e.g., B-320091, July 23, 2010; GAO, *Comments on Unreported Impoundment of DOD Budget Authority*, GAO/OGC-92-11 (Washington, D.C.: June 3, 1992). In those situations, we review the agency's actions to determine if it has complied with the Impoundment Control Act and ultimately confirm that funds are made available for obligation.

Application to ARPA-E

ARPA-E historically receives an annual lump-sum, no-year appropriation for its programs. For instance, in FY 2017, ARPA-E received "\$306,000,000, to remain available until expended" for "Department of Energy expenses necessary in carrying out the activities authorized by section 5012 of the America COMPETES Act (Public Law 110-69)." Pub. L. No. 115-31, div. D, title III, 131 Stat. 135, 312 (May 5, 2017). ARPA-E's lump-sum appropriation also historically includes a line-item for "program direction," an amount which is available for two fiscal years. See, e.g., *id.* ("Provided, That of such amount, \$29,250,000 shall be available until September 30, 2018, for program direction").⁷

In mid-September, we received an inquiry about the status of \$91 million of ARPA-E's unobligated balances—\$46.367 million of which was proposed for cancellation and \$45 million of which was proposed to be used for "full closure of ARPA-E by mid-2019" in the President's budget request.⁸ We contacted ARPA-E officials, who told us that the Department of Energy had directed ARPA-E to withhold the obligation of all \$91 million in anticipation of congressional enactment of such proposals. On September 28, we communicated our concerns to the Department of Energy's Office of General Counsel. On October 4, we sent a letter to the Acting General Counsel to seek additional facts and legal views from the Department of Energy. On November 29, after conducting a review and consulting with the Office of Management and Budget (OMB), the Acting General Counsel responded:

"Our review found that all funds for that appropriation in FY 2017 were fully apportioned to DOE and fully allotted within DOE. Our review

⁷ The Department of Energy explains that "[p]rogram direction funds are utilized for salaries and benefits of federal staff; travel; support services contracts to provide technical advice and project management assistance; and other related expenses, including the DOE Working Capital Fund." Department of Energy, *FY 2017 Congressional Budget Request*, vol. 4, at 415 (Feb. 2016), available at www.energy.gov/sites/prod/files/2016/02/f29/FY2017BudgetVolume%204.pdf (last visited Dec. 11, 2017).

⁸ See notes 1 and 2, *supra*.

revealed that limited oral conversations regarding whether to withhold any budget authority in the ARPA-E appropriation during FY 2017 pursuant to the FY 2018 President's Budget did occur. Upon learning this, our office immediately apprised the relevant parties of the legal requirements of the Impoundment Control Act and the [OMB's] guidance on the same, contained in [C]ircular A-11, § 112.2. Those offices then took appropriate steps to be in compliance and have confirmed that all funds for this appropriation have been allotted in the current fiscal year, and that they are available for obligation.”

Until the Department of Energy's Office of the General Counsel intervened, ARPA-E improperly withheld the obligation of budget authority in connection with the President's proposed elimination of ARPA-E and a so-called “cancellation proposal” in the President's budget request. OMB describes a cancellation proposal as “a proposal by the President to reduce budgetary resources that are not subject to the requirements of Title X of the Congressional Budget and Impoundment Control Act.” OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, pt. 3, § 112.2 (July 2017), available at www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/a11_current_year/a11_2017.pdf (last visited Dec. 11, 2017). We have previously concluded that amounts withheld as a consequence of a “cancellation proposal” constitute impoundments that agencies may make only after the President transmits a special message to Congress under the Impoundment Control Act. B-308011, Aug. 4, 2006 (agency withheld \$2 million from a no-year account for several months pending congressional action on a proposed cancellation in the President's budget request); B-307122, B-307122.2, Mar. 2, 2006 (agencies withheld over \$470 million in budget authority, affecting 12 programs, for approximately two months pending congressional consideration of the President's proposed cancellations to offset Hurricane Katrina relief). OMB has reached a similar conclusion concerning the import of a cancellation proposal, instructing agencies that “[a]mounts proposed for cancellation are not to be withheld from obligation.” OMB Circular No. A-11, pt. 3, § 112.2.

We note that the Impoundment Control Act applies to ARPA-E's funds despite the fact that they were made available without fiscal year limitation. The law applies by its express terms to all budget authority. 2 U.S.C. §§ 683 (rescission), 684 (deferral). See also GAO, *Deferral of SPR Budget Authority Not Reported to Congress*, GAO/OGC-83-11 (Washington, D.C.: May 5, 1983) (reporting a deferral of \$800 million of no-year budget authority in the Strategic Petroleum Reserve account); B-200685, Dec. 23, 1980 (stating that any executive action or inaction is subject to the Impoundment Control Act “even if the budget authority involves no-year funds” and noting that “of the 132 deferrals and rescissions reported by the President during [FY] 1980, over half involved no-year funds”). Violations of the Impoundment Control Act hinge on whether the agency clearly intended to withhold

the obligation of budget authority. B-229326, Aug. 29, 1989.⁹ ARPA-E stated that it deliberately withheld the obligation of \$91 million in FY 2017, per the Department of Energy's instructions.

CONCLUSION

Agencies may only withhold budget authority from obligation if the President has transmitted a special message to Congress. 2 U.S.C. §§ 683 (rescission), 684 (deferral). ARPA-E withheld the obligation of \$91 million without the President transmitting a special message to Congress. Accordingly, ARPA-E violated the Impoundment Control Act.

Since the purpose here is to ensure funds are made available for obligation and we have confirmed that the agency has done so, we are not transmitting a report to Congress under the Impoundment Control Act. In the past, we have declined to transmit a report to Congress under similar circumstances. See B-307122, B-307122.2. The Department of Energy's recent apportionment schedule and allotment record show that all of ARPA-E's unobligated balances from previous fiscal years are currently available for obligation. ARPA-E officials also orally confirmed that the budget authority is now available.

If you have any questions, please contact Julia C. Matta, Managing Associate General Counsel, at (202) 512-4023.

Sincerely,



Thomas H. Armstrong
General Counsel

⁹ See note 6, *supra*.

List of Congressional Committees

The Honorable Lisa Murkowski
Chairman
The Honorable Maria Cantwell
Ranking Member
Committee on Energy and Natural Resources
United States Senate

The Honorable Lamar Alexander
Chairman
The Honorable Dianne Feinstein
Ranking Member
Subcommittee on Energy and Water Development
Committee on Appropriations
United States Senate

The Honorable Lamar Smith
Chairman
The Honorable Eddie Bernice Johnson
Ranking Member
Committee on Science, Space, and Technology
House of Representatives

The Honorable Mike Simpson
Chairman
The Honorable Marcy Kaptur
Ranking Member
Subcommittee on Energy and Water Development, and Related Agencies
Committee on Appropriations
House of Representatives