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September 4, 2015

The Honorable Stephen G. Burns  
Chairman  
U.S. Nuclear Regulatory Commission  
11555 Rockville Pike  
Rockville, MD 20852

Dear Chairman Burns:

Given the unfortunate reality that the federal government occasionally experiences lapses in appropriations, and the very significant effect that can have on the public and entities that rely on the activities of government agencies, I appreciate the action taken by the NRC to address specific outage-related access authorization issues during the last government shutdown. However, I remain concerned that during the most recent shutdown, the agency furloughed more than 90 percent of its employees.<sup>1</sup> That decision not only substantially curtailed the agency's ability to carry out its responsibility to license nuclear facilities, but also exceeded the level of reductions implemented by many other agencies, including the Department of Homeland Security (DHS), which also has responsibility for public safety. Fundamental fairness supports the NRC taking a fresh look at this issue because licensees continue to pay annual fees during a government shutdown even though they receive no services.

In response to the concerns we raised in 2013, then-Chairman Macfarlane indicated that NRC was reviewing its shutdown contingency plan "to determine if any clarifications or changes need to be made to the list of excepted agency functions, and considering lessons learned from the recent government shutdown."<sup>2</sup> As it does not appear that the NRC has completed a formal update of its shutdown contingency plan, I would encourage you to expeditiously direct staff to identify ways in which the agency can minimize future disruptions to carrying out important regulatory functions and, in turn, reduce the disruption experienced by licensees.

The NRC's Contingency Plan for Periods of Lapsed Appropriations, Directive and Handbook 4.5 ("Management Directive 4.5") explains that the NRC may, consistent with the Anti-Deficiency Act, continue to "provide for national security" and "conduct essential activities" during a lapse in appropriations.<sup>3</sup> This includes, among other things, "activities essential to ensure continued public

<sup>1</sup> E&E News, *Nuclear group blasts agency's shutdown actions, urges reforms* (Oct. 31, 2013) ("After carryover funds ran dry earlier this month, NRC furloughed 90 percent of its staff ... for the first time in history.").

<sup>2</sup> Letter from Allison M. Macfarlane (NRC) to Marvin S. Fertel (NEI), at 2 (Dec. 19, 2013).

<sup>3</sup> NRC Directive Handbook 4.5, Contingency Plan for Periods of Lapsed Appropriations, at 2-3 (approved Jan. 3, 2012).

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health and safety” and “activities that ensure production of power and maintenance of power distribution.”

A review of the NRC’s list of excepted functions in Section II.B of DH 4.5 shows the breadth of issues and responsibilities that are *expressly authorized* to continue during a funding gap. Excepted functions *include* a broad list of NRC responsibilities: event notification, emergency response, site operations, resident inspectors, enforcement, allegations/investigations, facility and nuclear reactor security and safeguards, commissioners, policy direction, legal advice, state liaison, international liaison, public affairs, congressional liaison, inspector general, financial management, administrative and information technology support, and human resources. Given the breadth of this list, we believe the agency should look afresh at its shutdown contingency plan to ensure staff normally performing “activities essential to ensure continued public health and safety” and “activities that ensure production of power and maintenance of power distribution” are not furloughed.<sup>4</sup>

That the NRC determined more than 90% of its employees—3,600 of 3,900—were not required to perform those functions listed in Section II.B would seem to demonstrate an unnecessarily narrow view of its authority to continue operations during a funding gap. These extensive furloughs resulted in a stoppage of reactor licensing activities, emergency preparedness exercises, rulemakings, and other NRC activities. The NRC was somewhat of an outlier in this regard. For example, and as noted above, DHS furloughed less than 15% of its workforce.<sup>5</sup>

We appreciate the value provided by the NRC guidelines, which suggest that at least 10 working days of unobligated carryover funds should be available to forestall furloughs during a funding gap.<sup>6</sup> There also may be ways for the agency to continue activities of strategic importance for even more extended periods if it were to earlier curtail other lower priority activities.

In addition, as you know, approximately 90% of the NRC’s appropriations are offset by user fees, which licensees continue to pay during a funding gap. As a matter of fairness, those paying government fees should be able to receive the services for which they are paying. Our research identified a significant difference in this regard between the NRC’s approach and that of DHS as that department continued to allow normal operations during the October 2013 funding gap for a range of activities funded through DHS fees and multi-year appropriations (*e.g.*, programs under the Federal Emergency Management

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<sup>4</sup> I also urge you to update Management Directive 4.5 to reflect lessons learned from the most recent government shutdown. NEI’s October 3, 2013, letter to Chairman Macfarlane expressed concerns about potential interruptions in the NRC’s processing of fingerprints, an activity needed for access authorization. The NRC responded promptly and appropriately to NEI’s request for continuation of that function, but this has not been reflected in an update to Management Directive 4.5.

<sup>5</sup> Congressional Research Service, FY2014 Appropriations Lapse and the Department of Homeland Security: Impact and Legislation, at 2 (Oct. 24, 2013).

<sup>6</sup> NRC Directive Handbook 4.5, Contingency Plan for Periods of Lapsed Appropriations, at 8 (approved Jan. 3, 2012) (“Actions are required before, during, and immediately following an exhaustion of all available NRC funds... The timeframes are predicated on the assumption that unobligated carryover funding is available to forestall furloughs for at least 10 working days after a lapse in funds.”).

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Agency, the National Protection and Programs Directorate, and U.S. Citizenship and Immigration Services).<sup>7</sup>

In sum, we encourage the NRC to consider ways to take steps now to guard against unnecessary interruption of agency operation and services in the event of a government-wide shutdown. Specifically, we suggest the agency consider addressing the following issues:

- ensuring its interpretation and implementation of the Anti-Deficiency Act is not unnecessarily conservative and more limited than required;
- ensuring it will maximize the use of carry-over funds and fee-based revenue to ensure continued operations during a lapse in appropriations;
- identifying lessons learned from DHS and other agencies to help the NRC to determine how it can forestall furloughs and continue normal operations;
- establishing in advance the bases for continuing commercial contract work during a funding gap;
- clarifying that power generation and grid reliability concerns can justify the processing of emergency and exigent licensing actions,<sup>8</sup> and
- engaging the relevant congressional committees to address statutory impediments to the NRC taking appropriate regulatory action and providing necessary services during a funding gap.

Thank you for your attention to this important matter.

Sincerely,



Marvin S. Fertel

c: The Honorable Kristine L. Svinicki, Commissioner  
The Honorable William C. Ostendorff, Commissioner  
The Honorable Jeffery M. Baran, Commissioner  
Mark A. Satorius, Executive Director for Operations  
Margaret Doane, General Counsel  
Maureen Wylie, Chief Financial Officer

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<sup>7</sup> Congressional Research Service, FY2014 Appropriations Lapse and the Department of Homeland Security: Impact and Legislation, at 2 (Oct. 24, 2013).

<sup>8</sup> Following the October 2013 shutdown, NEI previously expressed a concern that the NRC excluded "power generation" from the list of criteria for determining whether an emergency licensing action should be processed. *See* Letter from Marvin Fertel (NEI) to Chairman Allison Macfarlane (Oct. 29, 2013) (explaining how disruptions to the grid can have "significant and potentially dangerous impacts").

## CHAIRMAN Resource

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**From:** FERTEL, Marvin <msf@nei.org>  
**Sent:** Friday, September 04, 2015 3:25 PM  
**To:** CHAIRMAN Resource  
**Cc:** Blake, Kathleen; CMRSVINICKI Resource; CMROSTENDORFF Resource; CMRBARAN Resource; Satorius, Mark; Doane, Margaret; Wylie, Maureen  
**Subject:** [External\_Sender] NEI Letter for NRC Chairman Burns on Government Shutdowns and Lapsed Appropriations  
**Attachments:** 09\_04\_2015 NEI Letter to NRC Chairman Burns on Government Shutdowns\_Lapsed Appropriations.pdf

Please see attached. Thank you.

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