

October 8, 2015

Mr. Marvin S. Fertel
President and Chief Executive Officer
Nuclear Energy Institute
1201 F Street, NW, Suite 1100
Washington, DC 20004

Dear Mr. Fertel:

I am writing to you in response to your September 4, 2015, letter relating to the U.S. Nuclear Regulatory Commission's (NRC's) contingency plan in the event of a lapse of appropriations. You encouraged the NRC to consider ways that the agency can minimize future disruptions in carrying out regulatory activities, including a review of the positions that are excepted from a potential furlough.

After evaluating our experience during the last lapse of appropriations, the NRC recently issued its revised Management Directive and Handbook (MD) 4.5, *Contingency Plan for Periods of Lapsed Appropriations* (<http://pbadupws.nrc.gov/docs/ML1523/ML15236A364.pdf>). While there were no major changes to MD 4.5, the revisions provide additional guidance on the scope of resident inspection functions excepted from furlough, add a new excepted function for region-based inspections, and incorporate components of the Concept of Operations used in the fiscal year 2014 NRC shutdown.

As you know, the NRC may not obligate funds in excess of, or in advance of, appropriations, even though most of NRC's costs ultimately will be recovered through the imposition of user fees. An agency may nonetheless continue its operations during a funding lapse for emergencies involving the safety of human life or the protection of property. The Office of Management and Budget, consistent with Department of Justice legal advice,¹ articulates the "emergencies" exception as requiring:

- (a) a reasonable and articulable connection between the obligation . . . and the safety of life or the protection of property, and
- (b) some reasonable likelihood that either the safety of life or the protection of property would be compromised in some significant degree by failure to carry out the function in question – and that the threat to life or property can be reasonably said to be near at hand and demanding of immediate response.²

¹ Opinion of the Office of Legal Counsel, Department of Justice, *Government Operations in the Event of a Lapse in Appropriations* (Aug. 16, 1995).

² See, e.g., OMB Memorandum M-13-22, *Planning for Agency Operations During a Lapse in Appropriations*, Sept. 17, 2013.

The NRC applies this standard in light of our responsibility to protect public health and safety. In the course of recently updating MD 4.5, the NRC carefully considered its plan to ensure that all activities that protect human life or property from imminent danger will continue to be performed in the event of a funding lapse, and we remain satisfied that the NRC's interpretation and application of the law is appropriate.

The updated MD 4.5 continues to list general functions rather than specific actions. You recommended that the NRC clarify that power generation and grid reliability concerns warrant an excepted function for processing of emergency and exigent licensing actions. The NRC's limited regulatory responsibilities for power generation and grid reliability do not rise to the level of an excepted function except for the protection of human life or property from imminent danger. If an emergent issue arises warranting immediate action pertaining to power generation and grid reliability where the excepted staff on duty do not have the expertise to address the situation, the NRC will call back staff with the relevant expertise as excepted personnel on an as-needed basis.³ We also note that licensees have authority under Title 10 of the *Code of Federal Regulations* Section 50.54(x) to independently take reasonable action that departs from a license condition or technical specification without NRC approval in circumstances involving an imminent threat to public health and safety.

You expressed concern that the level of reduction of staff at the NRC exceeded the reduction of other agencies and cite the Department of Homeland Security (DHS) as an example. Any disparity is in large part due to the inherent nature of the mission of that Department, which includes preventing terrorism, border and port security, and transportation security, among other activities which would clearly satisfy the "emergencies" exception. We are not aware that the DHS applied the law and Executive Branch guidance differently.

The DHS also has several activities that are funded through fee revenues, and which can continue during a shutdown using those available funds. The NRC's funding sources are much more limited in this regard, but any NRC activities that are so funded can similarly continue during a lapse of appropriations. For example, the processing of fingerprints for criminal background checks for licensee employees is funded from a reimbursable account and will therefore continue during a shutdown with funds available in that account. The recently updated MD 4.5 specifically cites this as an example of an activity funded by authorized reimbursements from non-Federal sources and which may therefore continue during periods of lapsed appropriations. For the remaining activities, the NRC must rely on funding from appropriations.

You also recommend that the agency establish in advance "the bases for continuing commercial contract work during a funding gap." The NRC's contingency plan includes this practice. As part of its planning for a possible lapse of appropriations, the NRC reviews each active commercial contract to determine whether performance under the contract may continue during a shutdown. Contract work necessary to support excepted functions will continue. Contract work that is not necessary to support excepted functions and for which performance remains practicable even after the furlough of non-excepted employees may continue to the extent that funds obligated on the contract remain available, or until work has reached a point at which technical direction from NRC staff is required. Under the NRC's contingency plan, all

³ Directive Handbook 4.5, para. II.B.1.

contractors are notified of their status, and provided instructions on how to proceed 5 days before funds are exhausted.

The Commission recognizes a lapse of appropriations creates challenges for both the industry and the NRC. The NRC will utilize its limited resources following a lapse of appropriations to ensure adequate protection of the public health and safety and the common defense and security.

Sincerely,

/RA/

Stephen G. Burns