UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 10 2019

OFFICE OF CONGRESSIONAL
AND INTERGOVERNMENTAL RELATIONS

The Honorable Gary C. Peters
Ranking Member
Committee on Homeland Security and Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Peters:

On behalf of the U.S. Environmental Protection Agency, I am writing in response to your letter dated February 28, 2019, regarding costs incurred by the Agency due to lapses in appropriations.

During a lapse in appropriations, the EPA maintains personnel available to undertake certain "excepted" activities where the Agency is authorized by law to incur financial obligations in advance of appropriations. For example, the EPA maintains personnel to provide emergency guidance to states and regulated entities to protect against significant risk to human health, conduct emergency response activities, address imminent risks to human life from contaminated sites or media, and provide assistance as necessary for other situations posing a threat to human life and certain property. The EPA also maintains personnel available to undertake certain "exempted" activities where funds are available.

More specifically, OMB Circular A-11, section 124.2 defines five categories of employees that must be accounted for in the *U.S. EPA Contingency Plan in the Event of a Government Shutdown* (Contingency Plan):

- Their compensation is financed by a resource other than annual appropriation;
- They are necessary to perform activities expressly authorized by law;
- They are necessary to perform activities necessarily implied by law;
- They are necessary to the discharge of the President's constitutional duties and powers;
- They are necessary to protect life and property.

Enclosed, we have included a list of excepted and exempted employees for the recent December 2018 lapse in appropriations. All excepted employees were instructed to only work the number of hours that were needed to complete their excepted duties. The number of excepted employees also fluctuated depending on the needs of the Agency. While the majority of the EPA's excepted

employees were excepted as necessary to protect life and property, the Agency had personnel numbers under three other categories:

- The Agency's Presidentially appointed/Senate confirmed individuals are necessary to perform activities expressly authorized by law.
- In the January 14 Contingency Plan, twelve individuals were deemed necessary to perform activities necessarily implied by law. These employees, from the Office of the Chief Financial Officer, were added to process payments for services rendered for excepted activities where there is an imminent threat to the safety of human life and property and funds were available.
- Individuals working on the Administrator's hearing preparation were identified as necessary to the discharge of the President's Constitutional duties and powers. This number increased between the December 31 and January 14 Contingency Plans according to the work needed to directly support the hearing preparation activities.

As you are aware, even though the recent lapse in appropriations began December 21, 2018, the EPA was able to use carryover funding to fully operate the Agency through December 28, 2018. Regarding excepted activities after this date, excepted personnel from the EPA Office of General Counsel (OGC) reviewed requests to except other personnel and provided advice on whether there was a legal basis to except the individual. If the request raised a novel or complex issue, the OGC consulted with their counterparts at the U.S. Office of Management and Budget (OMB) and/or the U.S. Department of Justice (DOJ). To make these determinations, OGC attorneys relied on DOJ Office of Legal Counsel opinions and OMB guidance on permissible activities during a lapse in appropriations. Further information on the EPA's procedures and activities that occurred during the recent lapse in appropriations can be found in the EPA's Contingency Plan, which we have enclosed.[1]

After the 2013 lapse in appropriations, EPA management considered ways to better prepare for future lapses in appropriations and identified the use of carryover funds as a potential means to minimize the impact on Agency operations. In 2018, the Agency used carryover funding to maintain core operations for the entirety of the January 2018 lapse in appropriations and the first week of the December 2018 lapse.

During any lapse in appropriations, as consistent with law, the EPA federal workers not working on "excepted" or "exempted" activities were furloughed. For the October 2013 lapse in appropriations, the amount paid to federal workers was approximately $86 million for the time of the furlough. The Agency did not incur any additional costs during the January 2018 lapse in appropriations, due to available reserve funds that prevented the closure of the Agency. For the December 2018 lapse in appropriations, approximately $165 million was paid to federal workers for the time of the furlough.

Regarding the overall cost to the Agency due to the lapses in appropriations, many of the Agency losses are unquantifiable; however, the Agency incurred losses in productivity and interest owed on a small number of payments. While lost productivity is impossible to quantify, we can

[1] See *U.S. EPA Contingency Plan in the Event of a Government Shutdown*, U.S. EPA, https://www.epa.gov/2018lapse/us-epa-contingency-plan-event-government-shutdown.

estimate the impact to the Agency. The October 2013 lapse in appropriations occurred at the very beginning of the fiscal year, and therefore did not have as large an impact on budget operations as it may have if it had occurred during another part of the fiscal year. The January 2018 lapse in appropriations occurred over a weekend and only lasted four days. The Agency was able to remain open using available funding from the prior year. Therefore, the January 2018 lapse in appropriations had no impact on budget operations. However, a known instance of productivity loss during the December 2018 lapse in appropriations was the manual processing of all financial obligations incurred during the lapse. Once appropriations were restored, these manual transactions had to be reconciled and then entered in to the financial system. This backlog needed to be cleared before the systems could be made available to all user for new financial transactions.

While the Agency does not have revenue data on the October 2013 and December 2018 lapses in appropriations, in the recent December 2018 lapse, fees and collections continued to come in during the lapse period but were not recorded until after furloughed EPA staff returned to work. Additionally, the Agency did not receive donations. The total interest costs due to the October 2013 lapse in appropriations totaled nearly $7,000. Interest due on late payments was not applicable for the January 2018 lapse in appropriations. Interest cost due to the December 2018 lapse in appropriations was nearly $90,000 due to the extended length of the lapse.

While total costs affiliated with preparation and implementation activity are impossible to quantify, Agency time and resources were spent preparing for the lapses in appropriations. EPA staff participated in meetings, both internal and governmentwide, to prepare for the lapses in appropriations. Time devoted to these activities was diverted from other priority work. In addition, all EPA staff were provided up to four hours to perform lapse preparation activities after the EPA's carryover funding ended on December 28, 2018. The Agency is confident that the time and resources spent preparing for the lapse in appropriations led to the successful implementation of EPA's Contingency Plan.

For every lapse in appropriations, EPA leadership calls were needed to ensure coordination across the Agency. Staff work was required to determine excepted and exempted activities to include contract work and to shut down non-excepted systems. Questions and answers were established or updated to ensure EPA employees had a clear understanding of what was happening and what was expected during the lapse in appropriations. Additionally, the EPA partners with an external shared service provider to process employee payroll. As a result, the Agency also had to coordinate with the Agency's payroll service provider on lapse of appropriations planning guidance and procedures.

During the October 2013 lapse in appropriations, federal and contractor employees time totaling at least $25 thousand was necessary to shut down financial interfaces and systems, to manage access to the Agency's Financial System, and to ensure the Agency's Time & Attendance System could accommodate excepted employees. During the December 2018 lapse in appropriations, federal and contractor employees time totaling at least $75 thousand was necessary to shut down financial interfaces and systems, to manage access to the Agency's Financial System, and to ensure the Agency's Time & Attendance System could accommodate excepted employees. While impossible to quantify, during the October 2013 lapse in

appropriations, at least $150 thousand was spent on federal and contracting employees time to monitor systems and perform some work on the Agency's Time and Attendance System.

Additionally, during the December 2018 lapse in appropriations, federal and Contracting employees time totaling at least $460 thousand were required to monitor systems, develop code for payroll file submission based on the furlough requirements, and process approved financial transactions during the recent lapse in appropriations.

The EPA is unable to provide data regarding the impacts of a lapse of appropriations on contractor personnel, such as layoffs or lost pay, because they are not Agency employees. The Agency does not collect these details in the EPA Acquisition System. That information would need to be obtained from the impacted contractors.

While exact costs are unavailable, the EPA spends time reopening and restarting normal operation of Agency activities after a lapse in appropriations. This also includes training and other typical Agency activities that are foregone to focus on addressing priority work that was backlogged during a lapse in appropriations.

Further, as part of the EPA's Contingency Plan, a central component to resuming orderly operations prioritizes coordination with the General Services Administration (GSA) and lessors to ensure that all EPA buildings' systems are fully operating prior to employees' return. During the recent lapse in appropriations, the EPA did not witness any degredation to Agency facilities or core building systems.

For acquisitions and contracts, the EPA estimates that it took approximately 4,251 staff-hours to resume contract activities due to the recent lapse in appropriations. This total is comprised of the following activities: issuing and rescinding contractor stop work notices; placing bridge contracts; extending contracts and solicitations; and resuming other program activities such as surveying the acquisition landscape to scope activities necessary to restart the acquisition function and anticipating post-lapse in appropriations activities triggered by the lapse in appropriations such as contractor requests for equitable adjustment.

The EPA estimates that seven contract optional periods were not exercised due to the recent lapse in appropriations, resulting in a loss of $1.9 million dollars of contractor support. Additionally, 299 task orders lapsed and 49 solicitations and contracts required amendments to extend response times and periods of performance. The EPA estimates that it took 149 staff-hours to execute contract modifications and solicitation extensions due to delays incurred by the recent lapse in appropriations. Five bridge contracts that took approximately 47 staff-hours to place had to be executed after the recent lapse ended to ensure continued service for contract vehicles which lapsed during the period. In addition to the above, the EPA had to extend procurement action lead times by 38 days for all transactions in-process prior to the recent lapse in appropriations, which significantly impacted procurement schedules across the Agency.

Additionally, to the Agency's knowledge, during the recent lapse in appropriations at least 300 employees canceled or deferred travel. The Agency does not have data pertaining to the October 2013 and January 2018 lapses in appropriations.

In consultation with the DOJ, the EPA sought to extend court filing deadlines and court-ordered deadlines to take regulatory actions. In instances where an extension was not granted, the Agency worked with the DOJ to draft required filings. In a small number of instances, the Agency continued work on pending regulatory actions to meet court-ordered deadlines.

Thirteen EPA federal advisory committee meetings were canceled and/or rescheduled due to the recent lapse of appropriations:

- Mobile Sources Technical Review Subcommittee (MSTRS) of the Clean Air Act Advisory Council (CAAAC) cancelled its January 10, 2019, meeting and rescheduled it for April 2, 2019;
- National Environmental Education Advisory Committee (NEEAC) canceled its January 23-24, 2019 meeting and is in the process of rescheduling it for April 2019;
- National Environmental Justice Advisory Committee (NEJAC) is in the process of rescheduling a meeting tentatively scheduled for the end of February to April or May 2019;
- Environmental Financial Advisory Board (EFAB) canceled its February 20-21, 2019 meeting and rescheduled it for April 17-18, 2019;
- Board of Scientific Counselors (BOSC) Air and Energy Subcommittee canceled its January 9, 2019 meeting and rescheduled it for March 22, 2019;
- Board of Scientific Counselors (BOSC) Chemical Safety for Sustainability Subcommittee canceled its January 14-16, 2019 meeting and rescheduled it for April 10-12, 2019;
- Board of Scientific Counselors (BOSC) Homeland Security Subcommittee canceled its February 8, 2019 meeting and rescheduled it for March 19, 2019;
- Board of Scientific Counselors (BOSC) Sustainability and Healthy Communities Subcommittee canceled its February 21-22, 2019 meeting and rescheduled it for April 2-3, 2019;
- Board of Scientific Counselors (BOSC) Safe and Sustainable Waters Subcommittee canceled its February 26-27, 2019 meeting and rescheduled it for April 23-24, 2019.
- Board of Scientific Counselors (BOSC) Executive Committee canceled its April 9-11, 2019 meeting and rescheduled it for June 27-28, 2019;
- Hazardous Waste Electronic Manifest System (e-Manifest) Advisory Board canceled plans for a tentative March 19-21, 2019 meeting and is in the process of rescheduling for mid-June 2019;
- Local Government Advisory Committee (LGAC) canceled its January 10-11, 2019 meeting and rescheduled it for June 27-28, 2019; and
- Local Government Advisory Committee (LGAC) Small Community Advisory Subcommittee canceled its January 11, 2019 meeting and rescheduled it for June 28, 2019.

Within the Office of Research and Development (ORD), the EPA maintains personnel available to undertake excepted activities during lapses in appropriations, including the maintenance of equipment and testing facilities and ensuring any ongoing, time-sensitive projects were

monitored and allowed to run their course. Specifically, during the recent lapse in appropriations these maintenance and monitoring activities included:

- The protection of servers to prevent damage that could occur in case of an unscheduled service interruption;
- Backing up data at each ORD site;
- Coordinating and processing the purchase and funding of goods and services to protect EPA equipment and facilities;
- Meeting regulatory requirements (e.g., hazardous waste permit and NRC license requirements);
- Maintaining bacterial cultures, fish cultures, and biological experiments;
- Monitoring and managing bioreactor lysimeter and mine drainage sulfate reduction columns;
- Maintenance of cryopreserved cell lines, on-going selection of engineered cell lines, and isolation of primary cells from fresh tissue procurement; and
- Maintaining the atmospheric chemistry chamber.

Ensuring that EPA facilities were maintained preserved valuable EPA property and facilitated the ability for researchers to pick up where they left off prior to the lapse in appropriations. While there were some deadlines missed due to the recent lapse in appropriations, ORD does not anticipate significant impacts and is working with the other program offices to develop new timelines for its projects. In those cases where a deadline is still pending, project teams have been asked to find ways to make up lost time and meet the original deadline.

During the recent lapse in appropriations, the EPA was unable to continue work on chemical assessments under the Integrated Risk Information System (IRIS). Currently, IRIS is focused on eleven priority assessments (https://www.epa.gov/iris/iris-program-outlook). EPA program offices identified hexavalent chromium, inorganic arsenic, mercury salts, methylmercury, polychlorinated biphenyls (PCBs), five per- and polyfluroalkyl substances (PFAS), and vanadium as priority assessments. The inorganic arsenic assessment was the only impacted timeline requiring the rescheduling of a milestone. In this case, a National Academies of Science (NAS) review of the inorganic arsenic systematic review protocol was delayed from March until July 2019. As work continues on each of these IRIS assessments, new timelines are being developed in coordination with the other EPA program offices. Because of the long-term nature of this work, in most cases, the Agency anticipates recouping any time lost due to the recent lapse in appropriations.

The EPA does not anticipate significant impacts on the schedule for National Ambient Air Quality Standards (NAAQS) reviews, although the court-ordered deadline for finalizing sulfur dioxide NAAQS was adjusted. That final rule was signed by Administrator Wheeler on February 26, 2019. As outlined in the May 2018 memorandum, *Back-to-Basics Process for Reviewing National Ambient Air Quality Standards*, the EPA intends to finalize any necessary revisions to the particulate matter or ozone NAAQS by late 2020. More information on the process and status of these reviews may be available on the EPA website (https://www.epa.gov/criteria-air-pollutants/back-basics-process-reviewing-national-ambient-air-quality-standards) or the Clean

Air Scientific Advisory Committee website (https://yosemite.epa.gov/sab/sabpeople.nsf/webcommittees/CASAC).

Because day-to-day responsibilities of many Clean Water Act (CWA) permitting activities are performed either by other federal agencies, such as the U.S. Army Corps of Engineers, or by states and tribes with delegated regulatory and permitting authority, the impacts from lapses in appropriations are minimal.

The CWA section 402 program (also known as the National Pollution Discharge Elimination System, or NPDES program) is administered by 47 out of 50 states. The overwhelming majority of all section 402 individual and general permit actions are issued by an authorized state. Therefore, normal permitting activity continued during the recent lapse in appropriations in most areas of the country. Additionally, the Army Corps is responsible for the day-to-day implementation of the CWA section 404 permit program; therefore, since the Army Corps was fully appropriated and operational, all routine permitting activity continued throughout the country during the EPA's recent lapse in appropriations. The EPA has discretionary authority to review section 402 permits issued by authorized states and section 404 permits issued by the Army Corps; however, during normal operations, the EPA only reviews a subset of all permit actions. On January 28, 2019, the EPA resumed reviewing state-issued section 402 permits and issuing and reissuing permits for states and tribes where the EPA is the permitting authority. The EPA has also resumed its discretionary review of section 404 permits, and the Army Corps districts are providing flexibility for the EPA review of permit actions due to the recent lapse in appropriations.

During the recent lapse in appropriations the Government Publishing Office could not accept or publish most regulatory actions; therefore, the "Waters of the United States" proposed rule was not published in the *Federal Register*. However, on December 11, 2018, the date the proposed rule was signed, pre-publication versions of the proposed rule, the resource and programmatic assessment, and the economic analysis were all made available to the public on the EPA's website. Given that the comment period for a proposed rule will not begin until that proposal is published in the *Federal Register*, the delay in publication has provided the public with additional time to review and develop comments on the publicly available proposed rulemaking and supporting documents. Now that the proposed rule has been published in the *Federal Register* on February 14, 2019, the docket is open, and the 60-day comment period has begun.

Under the CWA, the EPA issues both competitive and non-competitive grant awards to a variety of entities. Some grants to states and tribes are awarded individually, and some are bundled into Performance Partnership Grants with other grant programs under other environmental laws. Many of the non-competitive grants awarded to states and tribes, such as nonpoint source grants, under CWA section 319, that help fund state nonpoint source programs and projects, and water pollution control grants, under CWA section 106, that help fund delegated state and tribal CWA programs, are awarded on an annual basis, usually in the summer. The geographic program grants, such as the Chesapeake Bay and the National Estuary Program, are also awarded annually, usually in the summer or fall. Therefore, the recent lapse in appropriations did not significantly impact work performed under these programs and did not significantly impact the award schedule for these grants. As for competitive awards, including awards under CWA

section 104 authority, the award schedules vary widely. The EPA is not aware of any significant delays in awarding competitive grants during the recent lapse in appropriations.

In order to properly manage Superfund site response activities during the recent lapse of appropriations, the EPA assigned Superfund sites and projects by priority. Approximately 50 sites were identified as Tier 1 sites, after a determination was made that they could pose an imminent threat to the safety of human life or to the protection of property without continued response work by the EPA. Responses at Tier 1 sites continued during the recent lapse of appropriations. Projects at other sites continued without direct EPA involvement and were generally conducted by potentially responsible parties (PRPs), other federal agencies, or EPA contractors operating under direction and funding predating the recent lapse of appropriations. Work was stopped at sites that required funding or direction from the EPA and did not pose an imminent threat to the safety of human life or to the protection of property, or due to winter weather.

EPA's HQ Emergency Operations Center maintained daily operations, including secure room functions during regular business hours during the recent lapse in appropriations. In addition, all 10 EPA Regions maintained phone duty coverage, which included the assessment by EPA's On-Scene Coordinators of 1,478 notifications of incidents from the National Response Center. EPA response activities for the California wildfires and Super Typhoon Yutu continued under FEMA mission assignment. EPA On-Scene Coordinators were also deployed to the sites of 10 major releases, which included certain train derailments, and were available for the Super Bowl security in support of the Department of Homeland Security.

In FY19, EPA's Brownfields program anticipates awarding $68 million in Brownfields Assessment, Cleanup, and Multipurpose grants and allocating approximately $48 million for state and tribal response programs. Brownfields grantees who were awarded grant funds prior to the FY19 grant cycle continued to have access to awarded funds and were able to use those funds to conduct site assessments and cleanups per the terms of their grants during the recent lapse in appropriations.

With respect to civil enforcement inspections, the EPA did not conduct any routine, planned civil enforcement inspections between December 29, 2018, and January 25, 2019. Few EPA inspections would have been scheduled for January because winter weather can impact travel for our inspectors, outdoor facility operations, or the functioning of our monitoring equipment. The recent lapse in appropriations affected planning for future inspections. Accordingly, the recent lapse in appropriations may have an effect on the overall number of inspections in FY2019.

Criminal investigations continued during the recent lapse in appropriations, including laboratory support for those investigations. Emergency response personnel continued to respond as appropriate to accidental releases. With respect to civil enforcement actions, during the recent lapse in appropriations the EPA continued actions that were subject to judicial deadlines and actions for which the DOJ requested our assistance. However, the EPA did not initiate new actions, including new referrals, unless necessary to address an imminent threat. Thus, the recent lapse in appropriations may reduce the number of new cases opened in FY2019.

The EPA recognizes the importance of the Committee's need to obtain information necessary to perform its legitimate oversight functions and is committed to continuing to work with your staff on how best to accommodate the Committee's interests. If you have further questions, you may contact me, or your staff may contact Travis Voyles in my office at Voyles.Travis@epa.gov or (202) 564-6399.

Sincerely,

Troy M. Lyons
Associate Administrator

Enclosures

cc: The Honorable Ron Johnson, Chairman