

Government Shutdown – Implications for Government Environmental Programs and Activities

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As described below, most government activities will stop during the federal government shutdown.^[1] To give a sense of scale, an Agency like EPA has furloughed all but about 5% of its staff of 16,000 during the shutdown, and that number will decline over time if the shutdown continues. As discussed below, various activities, such as decisions on many types of permits, licenses, and registrations, as well as government (and government contractor) engagement relative to non-emergency Superfund sites, are likely to be suspended until after the shutdown.

Shutdown rules allow certain “essential” activities to continue irrespective of whether there are resources presently available to fund the activity.^[2] The most commonly referenced essential activities are those that address “emergencies involving the safety of human life or the protection of property.” 31 U.S.C. § 1342 (2012). The reference to “safety” in this passage has been narrowly construed, and the reference to “property” has generally been construed as limited to *government* property – “federal lands, buildings, equipment, research property, and other property owned by the United States.”^[3]

In addition to these public safety and property-protection activities, Agencies also have the discretion to treat additional activities as exempt when there are carry-over resources available from prior appropriations to fund them or when there are trust fund resources available (e.g., Superfund and the Leaking Underground Storage Tank trust fund); however, this discretionary authority is sparingly used because of the difficulty in drawing lines between competing priorities, the perceived value of treating Agency personnel in equitable fashion, and the need to avoid the appearance of significant operations during a period in which the government is supposed to be shut down. With indications that the government may not reopen quickly,^[4] here is generally what you can expect from several key Agencies and Departments as the shutdown continues.

1. **EPA’s Shutdown Activities**

- **EPA Will Maintain Emergency Preparedness Capacity and Will Continue Work on Imminent Hazard Sites^[5]:** EPA will deploy staff to address imminent threats to human health under the Superfund and leaking underground storage tank programs.^[6] EPA may also service some non-emergency ongoing Superfund projects that are not dependent on federal

funding.^[7]

- **EPA Will Generally Not Award New Contracts and Grants and Will Suspend Payment on Most Contracts and Grants:** EPA will not award most contracts or Fiscal Year 2014 grants unless necessary to support the essential activities described above.^[8] Contractors with existing contracts pertaining to non-essential work will likely be directed to stop work.^[9] EPA will not pay most contractors while the government is shutdown.^[10] Grant recipients may generally continue work during the shutdown, unless EPA involvement or approval is required in order for work under the grant to proceed.^[11]
- **EPA Rulemaking Activities and Administrative Appeals Will Generally Stop:** Work on most federal rulemaking may be deferred until the shutdown ends.^[12] For example, EPA has already postponed publishing a Federal Register Notice extending the comment period for a NPDES Electronic Reporting Rule^[13] and is poised to cancel a stakeholder conference for radon emission standard rulemaking.^[14] The Environmental Appeals Board is closed and will not process filings or consider extension motions until the government reopens.^[15]
- **Most Other EPA Regulatory Activities Will Be Delayed:** The shutdown will affect most other EPA notice, permitting, and registration activities. EPA has indicated, for example, that it is extending review periods for TSCA section 5 Premanufacture Notices, Significant New Use Notices, Microbial Commercial Activity Notices, and exemption notices submitted before October 1, 2013.^[16] As a general rule, air and water permits and FIFRA registrations will be similarly delayed.

2. **DOI's Shutdown Activities**

- **DOI May Process Offshore Drilling Permits, But Not Other Permits:** DOI will continue permitting offshore drilling and may review offshore drilling permit modifications.^[17] However, DOI will stop onshore and offshore renewable energy activities.^[18] DOI will not process or review most onshore oil, gas, coal, and mineral permits or leases.^[19] DOI's Bureau of Land Management will stop work on all resource management plans.^[20] Additionally, DOI will not permit or consult concerning the Endangered Species Act, Gold and Bald Eagle Protection Act, or Lacey Act.^[21]
- **DOI May Continue Other Operations:** DOI's Bureau of Safety and Environmental Enforcement will continue preparing ongoing NEPA compliance documents,^[22] but DOI's Bureau of Oceans Energy Management will stop NEPA work.^[23] DOI will maintain emergency response programs and programs with carry-over appropriations.^[24] DOI may also continue inspecting offshore drilling operations and onshore oil, gas, coal, and mineral leases.^[25]

3. **Federal Court and DOJ Shutdown Activities**

- **Federal Courts Are Open – For Now:** The federal court system has indicated that it has sufficient carry-over resources to remain open after October 1 for approximately 10 days.^[26] If the government remains shutdown as of October 15, the court system will issue new

guidance that will likely prioritize cases meeting the essentiality test for continued work during a shutdown, while also ensuring basic functionality in the offices of the clerks of court.^[27] Federal court filing deadlines are still in effect.^[28]

- **DOJ is Requesting Stays in Most MatterS, But Litigation May Continue:** DOJ will continue to service litigation throughout the shutdown,^[29] but is taking affirmative action to scale down its activities. For the most part, the shutdown will not interrupt criminal litigation.^[30] With respect to civil litigation, DOJ is requesting stays in active cases.^[31] If a stay request is denied, DOJ will service the litigation.^[32] EPA, DOI, and other agencies are expected to support DOJ litigation as necessary.^[33] However, most Agency staff needed for litigation support have been furloughed, subject to being recalled for purposes of meeting litigation needs.
- **DOJ Will Seek Extensions With Respect to Deadlines Secured by Consent Decree:** During the shutdown, Agencies will generally not deploy staff to work on rulemakings or other actions compelled by consent decrees in deadline cases; rather, DOJ will file motions to extend timelines commensurate with the shutdown. Likewise, Agencies will not service settlement agreement obligations until after the shutdown.

4. Other Federal Agency Shutdown Activities

- **Other Agencies are Curtailing Activities, But Some Will Continue:** FDA's continuing activities include emergency consumer protection services, high risk recalls, public health issues, and import entry review.^[34] DOT is still enforcing hazardous material safety requirements, inspecting pipelines, and responding to hazardous material accidents.^[35] FERC will maintain minimal oversight of energy markets and the bulk power system.^[36]

5. State and Local Government Implications

- **The Shutdown May Also Affect State and Local Government Activities:** Grants and loans to state and local governments will be deferred until after the shutdown. This could impair environmental program activity for states relying on federal programmatic grants.^[37] For local governments, state revolving fund money for wastewater or drinking water plant construction and upgrades will be unavailable until after the shutdown.^[38]

^[1] Office of Mgmt. & Budget, M-13-22, *Planning for Agency Operations during a Potential Lapse in Appropriations* 3 (2013), http://www.whitehouse.gov/omb/memoranda_default.

^[2] *Id.*

^[3] EPA, *EPA Contingency Plan for Shutdown* 5 (2013), <http://www.epa.gov/lapse/resources/epa-contingency-plan-2013.pdf>.

^[4] Karen Tumulty, Lori Montgomery & Debbi Wilgoren, *Washington Braces for Prolonged Budget Battle as Obama Cancels Part of Asia Trip*, Wash. Post, Oct. 2,

2013, <http://www.washingtonpost.com/politics/obama-cancels-part-of-asia-trip-washington-braces-for-prolonged-budget->

[battle/2013/10/02/e035be98-2b4b-11e3-8ade-a1f23cda135e_story.html](http://www.fishbase.org/2013/10/02/e035be98-2b4b-11e3-8ade-a1f23cda135e_story.html).

[5] EPA, *EPA Contingency Plan 2*.

[6] *Id.* at 6.

[7] *Id.* at 8.

[8] *Id.* at 10.

[9] *Id.*; *Government Shutdown Has Broad Effect Curtailing Activities at EPA*, InsideEPA (Daily News), Oct. 1, 2013.

[10] EPA, *EPA Contingency Plan 10* (2013), <http://www.epa.gov/lapse/resources/epa-contingency-plan-2013.pdf>.

[11] *Id.*; *Frequently Asked Questions & Answers – Potential Government Shutdown 16* (2013), <http://www.epa.gov/lapse/>.

[12] Stephen Lee, *OIRA Work Would Come to a Standstill During Shutdown, Shelanski Tells Panel*, BNA (190 DEN A-15), Sept. 30, 2013.

[13] *Proposed NPDES Electronic Reporting Rule*, EPA, <http://www2.epa.gov/compliance/proposed-npdes-electronic-reporting-rule> (last visited Oct. 2, 2013).

[14] *Radiation Protection: Subpart W Rulemaking Activity*, EPA, <http://www.epa.gov/radiation/neshaps/subpartw/rulemaking-activity.html> (last visited Oct. 2, 2013).

[15] *EPA Environmental Appeals Board*, EPA, http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/ (last visited Oct. 2, 2013).

[16] *EPA Office of Pollution Prevention and Toxics*, <http://www.epa.gov/opptintr/index.html> (last visited Oct 2, 2013).

[17] U.S. Dep't of Interior, *Bureau of Safety and Environmental Enforcement (BSEE) Contingency Plan Fact Sheet* (2013), <http://www.doi.gov/shutdown/index.cfm>.

[18] U.S. Dep't of Interior, *Bureau of Ocean Energy Management Contingency Plan Fact Sheet* (2013), <http://www.doi.gov/shutdown/index.cfm>; U.S. Dep't of Interior, *Bureau of Land Management Contingency Plan Fact Sheet* (2013), <http://www.doi.gov/shutdown/index.cfm>.

[19] U.S. Dep't of Interior, *Bureau of Land Management Contingency Plan Fact Sheet* (2013), <http://www.doi.gov/shutdown/index.cfm>.

[20] *Id.*

[21] *Id.*; U.S. Dep't of Interior, *Fish and Wildlife Service Contingency Plan Fact Sheet* (2013), <http://www.doi.gov/shutdown/index.cfm>.

[22] U.S. Dep't of Interior, *Bureau of Safety and Environmental Enforcement (BSEE) Contingency Plan Fact Sheet* (2013), <http://www.doi.gov/shutdown/index.cfm>.

[23] U.S. Dep't of Interior, *Bureau of Ocean Energy Management Contingency Plan Fact Sheet* (2013), <http://www.doi.gov/shutdown/index.cfm>.

[24] U.S. Dep't of Interior, *Department of the Interior Contingency Plan for Operations in the Absence of FY 2014 Appropriations 2* (2013), <http://www.doi.gov/shutdown/index.cfm>.

[25] Dep't of Interior, *Bureau of Land Management Contingency Plan Fact Sheet* (2013), <http://www.doi.gov/shutdown/index.cfm>; U.S. Dep't of Interior, *Bureau of Safety and Environmental Enforcement (BSEE) Contingency Plan Fact Sheet* (2013), <http://www.doi.gov/shutdown/index.cfm>.

[26] United States Courts, *Judiciary to Remain Open If Government Shuts Down*, <http://news.uscourts.gov/judiciary-remain-open-if-government-shuts-down> (last visited Oct. 2, 2013).

[27] *Id.*

[28] *Id.*

[29] U.S. Dep't of Justice, *U.S. Department of Justice FY 2014 Contingency Plan 2-3* (2013), <http://www.justice.gov/jmd/publications/doj-contingency-plan.pdf>.

[30] *Id.* at 3

[31] *Id.*; *Government Shutdown Has Broad Effect Curtailing Activities At EPA*, InsideEPA (Daily News), Oct. 1, 2013.

[32] *Id.*

[33] U.S. Dep't of Interior, *Solicitor's Office Contingency Plan 1-2* (2013), <http://www.doi.gov/shutdown/index.cfm>; EPA, *EPA Contingency Plan 7* (2013), <http://www.epa.gov/lapse/resources/epa-contingency-plan-2013.pdf>.

[34] U.S. Dep't of Health and Human Servs., *Contingency Staffing Plan for Operations in the Absence of Enacted Annual Appropriations 2* (2013), http://www.hhs.gov/budget/fy2014/fy2014contingency_staffing_plan-rev2.pdf.

[35] U.S. Dep't of Transp., *Operations During a Lapse in Annual Appropriations: Plans by Operating Administration 17* (2013), <http://www.dot.gov/sites/dot.dev/files/docs/DOT%202014%20Plan%20for%20Approp%20Lapse.pdf>.

[36] U.S. Federal Energy Regulatory Commission, *Plan for Operating in the Event of a Lapse in Appropriations 2-3* (2013), <http://www.ferc.gov/about/strat-docs/contingency-plan.pdf>.

[37] *Government Shutdown Has Broad Effect Curtailing Activities At EPA*, InsideEPA (Daily News), Oct. 1, 2013.

[38] *Id.*

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