

Statement for the Record

by

The Associated General Contractors of America

to the

U.S. House of Representatives'

**Committee on Small Business**

For a hearing on

**“Expediting Economic Growth: How Streamlining Federal  
Permitting Can Cut Red Tape for Small Businesses”**

September 6, 2017



The Associated General Contractors of America (AGC) is the largest and oldest national construction trade association in the United States. AGC represents more than 26,000 firms, including America's leading general contractors and specialty-contracting firms. Many of the nation's service providers and suppliers are associated with AGC through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, levees, locks, dams, water conservation projects, defense facilities, multi-family housing projects, and more.

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## A. Introduction

AGC is the largest commercial construction trade association, representing more than 26,000 members—over 80 percent of which are small businesses with 20 or fewer employees— through a network of over 90 chapters in 50 states, the District of Columbia and Puerto Rico. Our commercial construction firms are engaged in building, heavy, civil, industrial, utility and other construction for both public and private property owners and developers. Collectively, AGC member firms build much if not most of the nation’s public and private infrastructure.<sup>1</sup>

As such, our members know first-hand how to build infrastructure in a safe, effective and efficient manner. Similarly, they know the many challenges to doing just that. The federal environmental review and permitting process is such a challenge, repeatedly echoed by AGC members across the country; it’s a process that is circuitous, costly and time-intensive for many infrastructure projects.

AGC and its members appreciate recent legislative accomplishments in regards to streamlining the environmental permitting and review process. However, there remain opportunities to build upon those accomplishments as well as reduce duplication in and improve the efficiency of this process. Improving environmental approval processes alone while maintaining the integrity of those processes to mitigate environmental impacts could generate project cost savings. In addition, such improvements could allow the public to receive and benefit from infrastructure projects in a timelier fashion.

Federal, state and local governments heavily regulate construction site stormwater runoff, dredge and fill activities in U.S. waters and wetlands, oil and chemical storage and spills, air emissions, lead and asbestos handling/abatement, and solid/hazardous waste storage and disposal. Construction practices may also be subject to rules on hazardous substances (Superfund liability), historic properties, coastal zones, vegetation and habitat protection, indoor air quality, energy and equipment use, as well as requirements resulting from the National Environmental Policy Act (NEPA) processes. In addition to these (and other) strict and abundant requirements, public and private project owners often ask contractors to employ “green” construction practices such as materials recycling and reuse, and voluntary diesel retrofit of their off-road construction equipment. Small business construction contractors are not well equipped to navigate the complex and tangled web of environmental permitting, review and compliance mandates that accompany infrastructure projects. See AGC’s Flowchart of Environmental Approvals and Permits Applicable to Construction – Attachment 1.

With tens of thousands of new federal regulations, interpretive guidance and agency policy issued over the last eight years, there is a target rich environment for unwinding unnecessary, ineffective, unworkable and unduly costly (low benefit) regulations that impact small business construction contractors. The greatest challenge the Trump administration and Congress will face is prioritizing

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<sup>1</sup> While AGC members rarely build single family homes, they are regularly engaged in the construction of all other improvements to real property, whether public or private. These improvements include the construction of commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing development.

efforts to return reason to this regulatory scheme so small business contractors can efficiently build the infrastructure this nation sorely needs and deserves.

In the sections that follow, AGC identifies federal environmental actions, programmatic interpretations and tools that should be revisited or – in some cases – reformed or eliminated. (AGC’s recommendations are not listed in order of importance.) AGC is available to meet and discuss any of the issues identified below at the U.S. House of Representatives Committee on Small Business’s convenience and to provide its perspective on improvements to federal environmental review and permitting programs that influence and impact construction work.

## **B. The Clean Water Act Section 404 Permit Process**

Projects that cross wetlands, streams and other features deemed “Waters of the United States” (WOTUS) generally require USACE permits and must mitigate their impacts under CWA Section 404. Since the 2006 U.S. Supreme Court *Rapanos* decision, the USACE (and USEPA) have been asserting jurisdiction over any wet areas that have a “significant nexus” to downstream navigable waters.<sup>2</sup> This test has been met with very little nexus or significance between the actual wetland at issue and navigable waters.

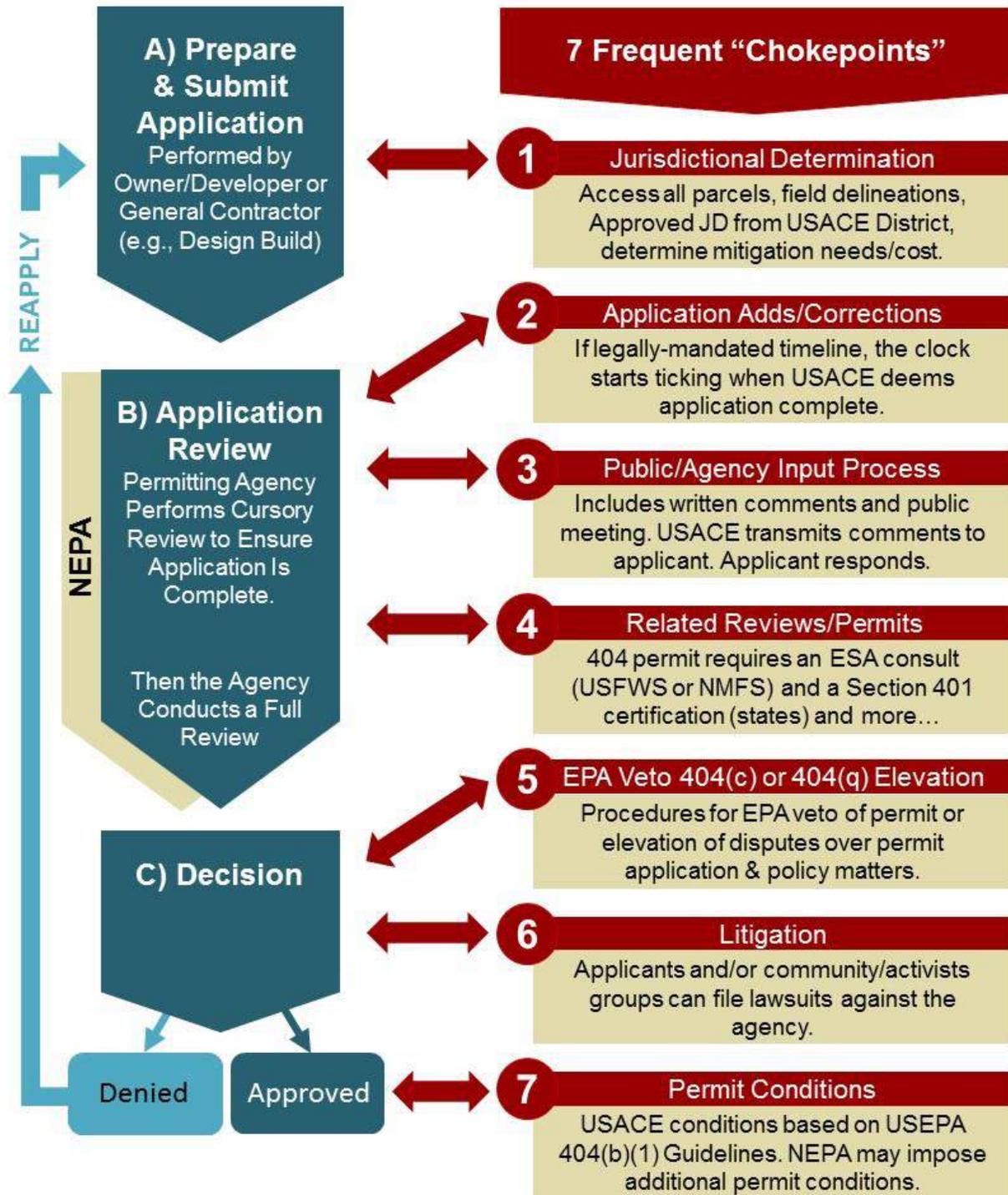
The average applicant for an individual permit spends 788 days and \$271,596 to complete the process.<sup>3</sup> (And if the process is beginning with an EIS, it may take three to six years (or longer) until the environmental reviews are complete. See Section II.D above.) Following are details of the various chokepoints the project proponent may encounter during the permit issuance process.

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<sup>2</sup> *Rapanos v. United States*, 547 U.S. 715 (2006).

<sup>3</sup> *Id.*

1. At-A-Glance Look at the CWA Section 404 Permit Process



## 2. *'Chokepoint' Details in CWA Section 404 Individual Permit Process*

Following is a description of the various chokepoints the project proponent may encounter during the permit issuance process.

### *(1) Jurisdictional Determination*

For public design-build (or P3) construction projects – where the government is placing responsibility on the general contractor for environmental permitting – it is increasingly common for USACE to require 100 percent ground surveying and full delineation – along with field verification by a USACE District Engineer – before USACE will issue an Approved JD (jurisdictional determination). USACE staff will not accept NEPA analysis findings. More and more, USACE will not approve 404 permit without the Approved JD and final comprehensive mitigation plan. The USACE's insistence on better delineation data is holding up the permit issuance process because the general contractor does not have access to the entire project area to perform field studies until well into the construction process (for example, approval of right-of-way acquisitions). As a result, it is impossible to manage cost/risk due to the unknowns regarding project schedule and mitigation responsibilities.

### *(2) Application Adds/Corrections*

Applications for major projects requiring 404 permits rarely, if ever, are processed within the time limits set forth in the standard procedures. Agencies can work around strict timelines, including being able to start and stop the clock. If the agency's decision is that an application is incomplete or denied without prejudice, the applicant will need to resubmit it, which starts a new countdown. Added together, these many sequential clocks can create a long process.

USACE's increasingly high standards for field data/delineations before it will issue a decision on an application is bringing the permitting process on some large highway projects to a standstill (see #1). Limited access on design-build projects where the contractor is required to purchase the right of way severely limits a contractor's ability to conduct field delineations in a timely manner – causing excessive delay to the project.

Deadlines also can serve as a negative reinforcement, arguing that some agency staff sit on an application until their allotted time is almost up before looking at it regardless of how minor or simple the task.

### *(3) Public/Agency Input Process*

Notice must also be sent to all parties who have specifically requested copies of public notices and to the appropriate officials at USEPA, the FWS, the NMFS, and state historic preservation officers. When Section 404 (or CWA 401 – see below) applications are submitted, the agencies accept public comments regarding the applications for at least thirty days. If, during the initial comment period, someone requests a public hearing regarding the applications, the agencies must issue another public notice scheduling a public hearing at least thirty or forty-five days into the future.

Public notice requirements allow project opponents another opportunity beyond NEPA to challenge and stop projects, for which (generally) no contractor relief is provided. Oftentimes, even individuals who are not directly affected by the project become involved. This is presenting an opportunity to voice tangentially related concerns, or pursue political goals or no-growth agendas, thereby forcing the

permitting agencies to spend time and resources processing these concerns that ultimately do not have bearing on their permit decision.

#### *(4) Related Reviews/Permits*

When a Section 404 permit application is submitted to the USACE, the agency typically routes the application to numerous other agencies for review and comment. Section 404 permit applications are routed to USEPA, the USFWS, the state environmental agency, and the state office of historic preservation. The commenting agencies have vast and varied concerns that must be addressed by the applicant. Each requires a slightly different type of alternatives analysis, and demands a somewhat distinct conditions, limitations and mitigation approach.

If the concerns of the commenting agencies are not adequately addressed, one or more of the commenting agencies may recommend against issuance of the requested permit.

Section 404 is a single permit, but it encompasses several other authorizations in a timeline of review:

- Need CWA 401 certification from state before a federal agency can issue a permit or license for an activity that may result in a discharge to WOTUS; state must certify that activity will not violate the water quality standards, or other applicable authorities, of the state (or waive Section 401 certification). [This process, in effect, allows for state control of dredge and fill activities. A state's review of the proposed construction activity will typically address feasible alternatives to the activity, initial and secondary impacts of the proposed activity, mitigation, compliance with water quality standards, stormwater/wastewater impacts, flood management, protection of rare resources, and other factors that would affect water quality.<sup>4</sup>]
- May need Section 408 authorization (permission from USACE under 33 U.S.C. 408 because project will alter or temporarily or permanently occupy or use a USACE-authorized civil works project).
- USACE consults with the USFWS and/or NMFS (Consultation / Biological Opinion) – Endangered Species Act (ESA) Section 7 consult – if project might affect endangered species. Under the ESA, any project with federal involvement or subject to federal oversight may not adversely affect federally listed species and habitat – otherwise mitigation strategies to minimize the impacts are required. With more than 1,400 species on the list and vast portions of the landscape designated as critical habitat, and many more species and areas of land awaiting listing and designation decisions, USFWS and NMFS are taking an ever-increasing role in the regulation of infrastructure projects.
- National Historic Preservation Act must account for potential impacts to historical and cultural resources (SHPO Consultation / Antiquities Permits)
- Fishery Conservation and Management Act (Essential Fish Habitat Consultations)
- Depending on location, Coastal Zone Management Act (CZMA Consistency Determination) and Wild Scenic Rivers Act
- Migratory Bird Treaty Act

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<sup>4</sup> The level of state responsibility, and autonomy of the state review, vary greatly, from cursory review or waiver of review (with USACE carrying most of the responsibility), to in-office review of draft USACE permits, to a full blown independent technical review by the state, assuming a significant component of program responsibility.

- Bald and Golden Eagle Protection Act

*(5) USEPA Veto 404(c) or 404(q) Elevation*

The U.S. Environmental Protection Agency (USEPA) has the authority to prohibit, deny, or restrict the use of any defined area as a disposal site under section 404(c), may elevate specific cases for further evaluation under Section 404(q), and enforces Section 404 provisions.

*(6) Litigation*

Agencies are risk-averse, and sometimes choose not to pursue streamlined options out of concern that such “short-cuts” will increase litigation risk. Agencies/projects that face scrutiny from stakeholder groups want to minimize risk by gathering information, at the least to demonstrate due diligence. However, the burden of providing this political protection means asking information that applicants may not be able to obtain, or may be unwilling to share (in the case of proprietary information).

*(7) Permit Conditions*

Section 404(b) authorizes USEPA to set the environmental standards that must be met by each permit, for the disposal of dredged or fill material; USEPA’s Section 404(b)(1) guidelines set out at 40 C.F.R. § 230 establish the environmental criteria for evaluating 404 permit applications. Under the guidelines, permittees must complete an alternatives analysis describing how all the practicable alternatives to the proposed project were studied, weighed, and presumably rejected for the preferred project. The agencies regularly request more data, analyses of more sites, and/or other additional information regarding the proposed project and other (presumably) available business opportunities that the applicant could pursue in lieu of the project for which a permit has been requested. The Section 404(b)(1) guidelines also establish a “mitigation sequence” used by USACE: avoid, minimize and compensate impacts.

USEPA’s guidelines often are applied in a rigid one-size-fits-all manner, failing to distinguish between different types of uses or between projects with net habitat gains—despite some damage to existing low-quality habitat—from projects that were simply destructive of habitat.

3. *Recommended Reforms Specific to the 404 Program*

As illustrated by the preceding “chokepoints” analysis, the *general* reforms discussed in Section III of this document would serve to improve the efficiency of the 404 program. In particular, a mandatory merger of the NEPA and Section 404 permit processes would greatly expedite project decision-making and avoid duplication and procedural inefficiencies (see Section III.B). In addition, AGC recommends the following reforms that are *specific* to the 404 program.

*(1) USEPA’s Authority to Veto a Duly Issued Permit Casts Uncertainty on Development*

**Courts have upheld USEPA’s authority under the CWA to change, if not revoke, Section 404 “dredge-and-fill” discharge permits that have already been approved and issued by USACE** if it determines that the discharge will have an “unacceptable adverse effect” on identified environmental resources. This creates uncertainties for Section 404 permittees, their lenders, and others in business with them, which

drives up financing and construction costs. USEPA has adopted regulations setting forth the process for implementing Section 404(c).<sup>5</sup>

**REFORM:** Amend CWA Section 404(c) and - as needed - direct USEPA to revise its "unacceptable adverse effect" regulations.

*(2) Permitting Authorities Are Thwarting Advanced Mitigation, Mitigation Banking, and Future Mitigation Investments*

**Permitting Authorities Are Thwarting Advanced Mitigation, Mitigation Banking, and Future Mitigation Investments.** Complex procurement strategies, construction schedule risks, habitat alteration, and competition for potential mitigation sites can encumber the already difficult task of mitigating for "like" value and function and reinforce the need for project proponents to examine mitigation strategies as early as possible. There is a shortage of wetland mitigation banking credits in some parts of the country and many USACE Districts are unwilling to accept in-lieu fee arrangements. President Trump's Executive Order 13778 directing the USEPA and USACE to modify or rescind the 2015 Waters of the United States (WOTUS) is likely to stall the establishment of any new mitigation banks because it's likely that the federal government will eventually relinquish control over work in remote streams and isolated waters/wetlands.

What is more, federal permitting agencies generally will not accept preliminary jurisdictional determinations resulting from the NEPA process and will hold up project approvals until they have data collection (field surveys/delineation) from the entire project site. The project may be well underway before the design-build contractor has access to 100% of the parcels (e.g., right-of-way acquisition goes well into the project). As such, in the pursuit phase of the project, mitigation costs are unquantifiable because the quantity of WOTUS impacts and the quality of the waters impacted is unresolved. This unknown, combined with the lack of wetland bank capacity, requires contractors to speculate on mitigation costs – which can reach in the hundreds of thousands of dollars per project.

These uncertainties inhibit efforts to optimize construction phasing, schedules and to minimize cost and delay. What is more, design-build contracts that transfer the obtaining of Section 404 permits to the contractor generally provide no contractor cost or schedule relief for permitting delays or mitigation costs at the outset of a procurement. This forces contractors to add cost contingencies resulting in higher construction costs to the owner and/or responsible contractors dropping out of the procurement due to untenable risk.

**REFORM:** The use of remote sensing, geographic information systems (GIS) mapping software, and decision support systems for evaluating conservation strategies have made it possible to evaluate areas where WOTUS impacts must be avoided and identify areas for mitigation investments very early in the environmental planning process. Federal permitting agencies should accept NEPA planning-level decisions to support advance mitigation strategies that are both more economical and more effective

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<sup>5</sup> See 40 C.F.R. § 231.1 *et seq.*

from an environmental stewardship perspective. Revise the “2008 Mitigation Rule”<sup>6</sup> at 33 C.F.R. § 332.3(b)(2) and (3) and USACE’s Regulatory Guidance Letter (RGL) 16-01 on the procedures for determining what geographic areas on a project are WOTUS.

To address the lack of mitigation banking capacity in many regions of the country, USACE should develop a national in-lieu fee mitigation option whereby sponsors of large projects may contribute funding, at mitigation market rates, to a national account when bank credits are unavailable at the time the USACE/USEPA is in position to issue the permit. The funding from the national account would be apportioned among the seven USACE Districts base on where impacts were taken and applied toward habitat preservation and promoting banking opportunities.

*(3) Delay on the RHA Section 408 Side Puts Off the CWA Section 404 Review Process and Further Delays Construction*

**Construction projects are being delayed because of Section 408 burdens.<sup>7</sup> USACE will *not even begin* to process many CWA Section 404 Nationwide and individual permits until the 408 permission is granted. This means that delay on the River and Harbors Act (RHA) Section 408 side puts off the CWA Section 404 review process and further delays construction. And, many of the reviews required under RHA Section 408 may be reviewed, yet again, under the CWA Section 404 process.**

RHA Section 14<sup>8</sup> provides that the Secretary of the Army may grant permission for the alteration or use of works built by the United States when such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work. As a result, USACE requires that applicable construction projects are reviewed to determine if any of the proposed activities may affect a federal easement, right of way, property, levee, etc. Construction projects possibly subject to this process may include but are not limited to highways crossing Corps’ property, bridges built over USACE flood control projects, and simply modification of existing Corps’ projects—e.g., levees—by state and local entities.

USACE has recently undertaken action to more rigorously ensure compliance with Section 408, setting forth nine steps to obtain the 408 permission.<sup>9</sup> Those steps include pre-coordination, written request, required documentation (including environmental compliance, if applicable), district-led Agency Technical Review (ATR), Summary of Findings, division review, HQUSACE review, notification, and post-permission oversight.

Not all steps are applicable to every RHA Section 408 request, such as Division or Headquarters offices review. That stated, the Corps requires the RHA Section 408 requester to provide all information that

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<sup>6</sup> In 2008, USACE and USEPA published compensatory mitigation rules (2008 Mitigation Rule). See *73 Fed. Reg.* 19,594 (Apr. 10, 2008). While USACE makes the final determination regarding the mitigation conditions included in the permit, USEPA retains the authority to veto the permit if it concludes that the mitigation is not adequate.

<sup>7</sup> See [http://www.nola.com/environment/index.ssf/2017/05/corps\\_attempting\\_to\\_speed\\_coas.html](http://www.nola.com/environment/index.ssf/2017/05/corps_attempting_to_speed_coas.html); [http://www.journalscene.com/news/waiting-on-the-final-leg-of-berlin-g-myers-parkway/article\\_72b28f28-1309-11e7-a986-1f5ecfa794a9.html](http://www.journalscene.com/news/waiting-on-the-final-leg-of-berlin-g-myers-parkway/article_72b28f28-1309-11e7-a986-1f5ecfa794a9.html).

<sup>8</sup> 33 U.S.C. § 408.

<sup>9</sup> USACE Policy - Engineering Circular 1165-2-216.

the district identifies as necessary to satisfy all applicable federal laws, executive orders, regulations, policies, and ordinances. In addition, the Corps needs to review the relevant project area under the requirements of NEPA and other environmental statutes (e.g., the Endangered Species Act) where applicable. USACE must also consider factors that may be relevant to the public interest depend upon the type of USACE project being altered and may include, but are not limited to, such things as conservation, economic development, historic properties, cultural resources, environmental impacts, water supply, water quality, flood hazards, floodplains, residual risk, induced damages, navigation, shore erosion or accretion, and recreation. And, the evaluation must consider information received from the interested parties, including tribes, agencies, and the public. **AGC is concerned that with such rigor has come redundant, administratively burdensome and inefficient 408 permission processes, especially in the broader context of federal environmental review and permitting.**

**REFORMS:** AGC recommends that USACE undertake the issuance of a new regulation or guidance allowing for the concurrent processing of the RHA Section 408 permission and CWA 404 permit.

As recommended by the National Waterways Conference, AGC agrees that the Corps should clarify the application of Section 408 to “works,” and not undeveloped land or other features of a project, even if owned by the Corps and within the project’s boundaries.

- According to the statute, the Corps’ permission is required with respect to activities that may affect various “works” that are “built by the United States . . . for the preservation and improvement of any of its navigable waters or to prevent floods.” The Circular states that it applies in the case of any “alteration or occupation or use of the *project*” (EC 1165-2-216, ¶ 6.a) (emphasis added).<sup>10</sup> The language could be and seemingly has been interpreted to suggest 408 applies to any proposal that would alter or occupy any portion of a Corps project, which in turn suggests anything within the project’s property boundaries.<sup>11</sup> However, that is not what Section 408 says, nor is it what Congress intended in enacting Section 14 of the Rivers and Harbors Act.<sup>12</sup>
- A broad reference to a Corps “project” without additional clarification can lead to a District office to require the 408 process for any proposal that involves any real estate within a Corps project.<sup>13</sup> A common example would be a highway or pipeline that crosses Corps’ property.<sup>14</sup> To be clear, the Corps has a right to review and approve that proposal as property owner and potentially as a regulator under Clean Water Act Section 404 or other authorities.<sup>15</sup> However, if the project does not touch or affect the “works” regulated under Section 408, then the Corps should not overlay additional 408 requirements beyond whatever other procedure may be required.

Specifically concerning local flood control protections, like levees, AGC agrees with the Section 408 Coalition and the Mississippi Valley Flood Control Association: Congress through legislation and/or the Corps via regulation or guidance should clarify that the jurisdiction of RHA Section 408 does not extend

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<sup>10</sup> <https://waterways.org/wordpress2/wp-content/uploads/2014/10/NWC-Comments-WRRDA-Webinar-III.pdf>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

to alterations or improvements made or allowed by the local sponsor (non-Federal interests) to the flood control projects for which they are responsible for operation and maintenance.

## C. Water Issues Generally

### 1. Definition of “Waters of the United States”

80 Fed. Reg. 37,054 (June 29, 2015)

<https://www.epa.gov/sites/production/files/2015-06/documents/epa-hq-ow-2011-0880-20862.pdf>

In 2015, EPA and the U.S. Army Corps of Engineers (Corps) jointly issued a final rule that redefines the term “Waters of the United States” (WOTUS) across all Clean Water Act (CWA) programs -- dictating what waters features are covered by the Act's terms, permissions and permit provisions. The new, 2015 definition increases the number of sites that would automatically require Section 404 permits (i.e., no significant nexus determination needed) and decreases the number of sites that can qualify for "nationwide" general permits, for example. A nationwide stay remains in effect. The U.S. Supreme Court is currently considering the case on a procedural issue. As a result, the pending legal challenges will not proceed until 2018, at the earliest. Litigation is expected to continue for the foreseeable future.

President Trump issued on Feb. 28 Executive Order (EO) 13778 that calls for a new “review” of the WOTUS rule in a manner consistent with the late Justice Antonin Scalia’s opinion in a 2007 Supreme Court case addressing the WOTUS definition.<sup>16</sup>

AGC believes EO 13778 sets the nation on a path toward pro-growth, pro-jobs, and pro-environment policies that will benefit all Americans. We look forward to working with EPA and the Corps to provide much needed clarity regarding the scope of federal jurisdiction under the Clean Water Act. **AGC supports action to withdraw and re-propose the WOTUS rule, as appropriate and consistent with law, reflecting the principles of federalism and recognizing the significant role of the states in protecting our nation’s waters.**

### 2. Benchmark Limits in NPDES Permits

EPA has relied upon the concept of “benchmark monitoring” since it promulgated its first National Pollutant Discharge Elimination System (NPDES) Multi-Sector General Permit (MSGP) in 1995 for stormwater discharges associated with industrial activities; however, the justifications for such monitoring have changed over time. AGC participates in the Federal Stormwater Association (Washington, DC coalition) and supports FSWA’s Dec. 23, 2013, comments on EPA’s most recent MSGP (incorporated by reference herein – see Docket ID No. EPA–HQ– OW–2012–0803) that outline the evolution and concerns with EPA’s “benchmark monitoring” program.

As FSWA’s analyses demonstrates, **AGC finds that benchmark values are unreasonably low – well below typical background levels for these pollutants – which means that regulated parties are wasting resources and are subject to significant liability addressing background and not the real impacts from their industrial operations.**

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<sup>16</sup> *Rapanos v. United States*, 547 U.S. 715 (2006).

### 3. Stormwater General Permits for Small “Sites”

There are small “industrial” sites that cannot qualify for “no exposure” but that do not present significant risk or require the full force of EPA’s MSGP or other permits. The same is true for small construction sites, such as “single lot” projects by homebuilders or minor construction on an otherwise regulated industrial site. **EPA should revise its stormwater permitting programs to provide simpler, streamlined permits for small “sites” that are low risk.**

### 4. Stormwater General Permits for Construction: Economic Analysis

40 C.F.R. Part 122.26(b) - RIN 2040-ZA27

For more than a decade, each time EPA embarks on the process of reissuing its federal Construction General Permit (CGP), AGC has pointed out the proposed CGP’s inconsistencies with the [Regulatory Flexibility Act](#)<sup>17</sup> (RFA) and the [Paperwork Reduction Act](#)<sup>18</sup> (PRA), as well as EPA’s overall failure to accurately reflect the increased costs and burdens (associated with its proposed CGP) in any related Economic Analysis.

For example, the RFA requires EPA to prepare and make available for public comment an initial regulatory flexibility analysis (IRFA) or certify the proposal will not have a significant impact on a substantial number of small entities. EPA’s 2017 CGP did not follow adequate steps for certification under the RFA.<sup>19</sup> The draft Economic Analysis posted to the public docket with the release of the proposed 2017 CGP failed to quantify the number small entities impacted by the rulemaking, as required under the RFA.<sup>20</sup>

AGC is also concerned that EPA seeks approval from the Office of Management and Budget (OMB) for its “information collections” under the entire NPDES permitting program (for both EPA-issued permits and state-issued permits) via a consolidated NPDES information collection request (ICR) to expedite compliance with the PRA regulations.<sup>21</sup> (The consolidated NPDES ICR is intended to cover: all requests for information to be sent to EPA/states such as forms; documentation and recordkeeping requirements; and third-party or public disclosures.) EPA claims that OMB is approving a variety of reporting requirements *generally expected* in the permits covered; however, the consolidated ICR fails to recognize that compliance forms and reporting requirements vary depending on the NPDES permit.

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<sup>17</sup> 5 U.S.C. § 601–612.

<sup>18</sup> 44 U.S.C. § 3501–3520.

<sup>19</sup> 69 Fed. Reg. at 21,334 (April 11, 2016).

<sup>20</sup> “Cost Impact Analysis for the 2017 Proposed Construction General Permit (CGP),” U.S. EPA, 2016. Online at <https://www.regulations.gov/docket?D=EPA-HQ-OW-2015-0828>. 5 U.S.C. § 603(b)(3).

<sup>21</sup> The burdens associated with the CGP reissuance are covered under this existing ICR (OMB Control No. 2040-0004, EPA ICR No. 0229.20) and the updated one that is currently at OMB for review (OMB Control No: 2040-0004, EPA ICR No. 0229.21).

AGC believes it is inappropriate to lump 46 state-issued CGPs, and the EPA-issued CGP into one “generic” approval. OMB needs to more specifically analyze the information collected under every one of these permits (e.g., Multi-Sector General Permit, Vessels General Permit, previous CGPs) and not just assume the newly issued iterations will have similar reporting burdens. Under current practice, EPA incorporated new recordkeeping requirements in its newly issued 2017 CGP without accurately accounting for increased burdens on industry.<sup>22</sup>

Historically, EPA always has found the economic impact on entities that will be covered under the CGP, including small businesses, to be minimal. With very few exceptions, EPA’s economic analysis estimates no cost impact for most proposed (and contemplated) revisions to its CGP, beyond costs that are already accounted for in the CGP that is currently in use.

**In alignment with the directives of E.O. 13777, AGC recommends that EPA review and consider possible modification to its 2017 CGP, including revisiting the cost analysis for the new expanded liability and restrictive stabilization provisions, as well as the new requirement for the site operator to tell the public (via the notice of permit coverage already posted at the site, as per prior permit requirements) how to contact EPA to obtain a copy of the site-specific stormwater pollution prevention plan and how to report a visible discharge of pollution from the site.<sup>23</sup> AGC also recommends that EPA commit to an improved CGP cost analysis henceforth and that all of EPA’s future requests for information collections under the NPDES permit program be conducted on a permit-by-permit basis, to reflect new burdens placed on industry within each new construction permitting cycle.**

AGC also has recommended that Congress consider making explicit provisions for public outreach to small entities whenever it appears that they will be adversely affected by an expensive regulation. It would also reduce paperwork burdens to require agencies to respond, in writing, to serious objections from the U.S. Small Business Administration’s Office of Advocacy. For example, the Office of Information and Regulatory Affairs would not approve significant rules unless the most adverse effects on small entities have been eliminated, reduced or justified.

See AGC Statement to the U.S. House of Representatives Committee on Small Business for a hearing on “Evaluating the Paperwork Reduction Act: Are Burdens Being Reduced?” – Attachment 2.

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<sup>22</sup> For example, the 2017 CGP added a new requirement for the site operator to tell the public (via the notice of permit coverage already posted at the site, as per prior permit requirements) how to contact EPA to obtain a copy of the site-specific stormwater pollution prevention plan (SWPPP) and how to report a visible discharge of pollution from the site. This provision was not part of the proposal or the economic analysis (draft or final). EPA has failed to account for the “life cycle” paperwork burden for both industry and the agency to respond to the expected increase in public requests/reports, which may prove overwhelming for small businesses. SWPPPs are “living” documents that can be 100’s of pages long with complicated drawings. Distribution of outdated compliance data, and allowing an uninformed public to serve as the government’s watchdogs, may lead to unsubstantiated citizen complaints or frivolous lawsuits. (Likewise, EPA’s draft economic analysis completely discounted, or underestimated, the total burden (time/cost) to collect new project information from the applicant, to electronically report SWPPPs for public examination, and to increase site inspections/documentation – but these proposed changes were not adopted in the final version of the permit.)

<sup>23</sup> See footnote 11.

## 5. *Post Construction Stormwater Rule*

Information Collection Request (six separate survey instruments) – Fall 2010

<https://www.epa.gov/npdes/proposed-national-rulemaking-strengthen-stormwater-program-documents>

EPA considered regulating stormwater runoff from completed/developed construction sites, in response to a Chesapeake Bay Foundation lawsuit. EPA struggled with the significant cost of this rulemaking, predicted to be one of the mostly costly rules ever considered. Such new federal requirements would increase the cost of construction and present liability issues concerning the contractor's legal/contractual obligations to the site and the owner after the contractor leaves the site. To expand its authority to cover such sites, Section 402(p)(5) requires EPA to conduct a study and submit it to Congress. EPA deferred action on a national rulemaking to reduce permanent, or “post-construction” stormwater discharges from new and redevelopment in late 2013.

**AGC recommends that the post construction stormwater rulemaking be shelved indefinitely. State and local authorities are in a better position to identify the best practices.** The fact remains that developed land, generally, does not meet the definition of point source discharge to WOTUS and it has not been designated for any regulatory program by EPA, through the process set forth by Congress.<sup>24</sup>

## 6. *Stormwater Flow is Not a Pollutant*

As stated above, EPA abandoned a rulemaking in 2013 that contemplated a significant expansion of the federal stormwater program, including nationwide performance standards to retain/infiltrate stormwater discharges (onsite) at newly developed and redeveloped sites. EPA went so far as to initiate a rulemaking process required by CWA Section 402(p)(5)-(6), including conducting a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel process and drafting a Report to Congress.

The troubling news is that EPA continues to carry out the objectives of its deferred rulemaking via its existing permit process for municipal separate storm sewer systems (MS4s), which is legally questionable. EPA has included stormwater flow mandates in a variety of permits, including the MA MS4 and NH MS4 permits, recently issued by EPA Region 1; those permits are currently being litigated.<sup>25</sup> AGC is also concerned by EPA guidance (see item 9 below) that places emphasis on inserting numeric, flow-based limits in state-issued MS4 permits. These represent clear examples of EPA's effort to bypass rulemaking and unilaterally assert authority it does not possess under the CWA. (Note: EPA's Small MS4 Remand Rule reserves the ability of cities to choose from a wide range of options to tackle urban water pollution; see item 8 below.)

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<sup>24</sup> Currently, EPA does not have authority or regulations to control stormwater discharges from developed sites that are not “associated with industrial activity.” 40 C.F.R. § 122.26(b)(14). Developed sites and impervious surfaces are not listed in CWA § 402(p)(2) or in EPA's Phase I or Phase II regulations implementing the stormwater permitting program. CWA § 402(p)(5) and (6) set forth processes that allow EPA to designate new sources or categories of sources for NPDES permitting.

<sup>25</sup> <https://www3.epa.gov/region1/npdes/stormwater/updated-info-sms4gp.html>.

Notably, in *Virginia Department of Transportation v. U.S. Environmental Protection Agency*<sup>26</sup> (hereafter referred to as *Accotink*, the name of the creek at issue) the federal district court held that the CWA did not confer authority to regulate stormwater flow into a waterbody because stormwater is not a “pollutant,” under that term’s statutory definition.<sup>27</sup>

**EPA should revisit and revise any federal MS4 permits that strictly limit stormwater flow or impervious surface area at developed sites -- as well as unmanageable mandates to retain runoff onsite to mimic pre-development conditions. AGC is strongly opposed to such “backdoor” approaches to regulating post-construction runoff because they fail to adhere to the necessary rulemaking procedures, protections and analyses.**

One-size-fits-all post-construction controls can substantially increase the cost of construction, especially in areas with poor soils, steep slopes, or other complicating conditions. Moreover, contractors can face numerous obstacles to compliance (lack of available space, poor soils, underlying utilities, etc.).<sup>28</sup>

#### 7. *Stormwater General Permits for Small Cities (MS4s): MEP Standard*

81 Fed. Reg. 89,320 (Dec. 9, 2016)

<https://www.gpo.gov/fdsys/pkg/FR-2016-12-09/pdf/2016-28426.pdf>

EPA recently finalized its Small MS4 Remand Rule that changes the federal regulations governing how small cities apply for and obtain NPDES permit coverage to discharge stormwater via their sewer systems into WOTUS. This action stems from a U.S. Court of Appeals for the Ninth Circuit holding (2003) that EPA’s prior “Phase II” general permit program<sup>29</sup> for small MS4s (municipal separate storm sewer systems) violated the Clean Water Act. The amendments require extensive public input and agency review of cities’ stormwater management plans - including ordinances for runoff from active construction sites and post-construction developed sites.

Operators of regulated small MS4s are required to develop a local stormwater program to reduce the discharge of pollutants to the “maximum extent practicable” (MEP). In its 1987 CWA Amendments, Congress never defined MEP; however, Congress limited EPA’s NPDES permitting authority over MS4s to

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<sup>26</sup> No. 12-775, 2013 WL 53741 (E.D. Va. Jan. 3, 2013).

<sup>27</sup> *Id.* at 5.

<sup>28</sup> Post-construction stormwater management measures generally require heavy maintenance of both the water and the shoreline, including upkeep of vegetation strengthening the banks. Determining who has the burden of maintenance is state- and municipality-specific and sometimes unclear. Potential claims from a failed pond or other “green infrastructure” may be far-reaching, extending to the owner for improper maintenance or to a design professional or general contractor who builds the treatment system. The construction and real estate development industries are separate and distinct from each other; contractors cannot warrant the post-construction performance of stormwater controls that others design, operate and maintain. AGC members remain concerned about potential scenarios that would saddle the contractor with the long-term, legal liability for the performance of permanent stormwater controls after the construction firm leaves the project.

<sup>29</sup> EPA published its “Phase II” rule on Dec. 8, 1999, expanding the construction and MS4 permit programs. 64 Fed. Reg. 68,722. All of EPA’s stormwater final rules are online at <https://www.epa.gov/npdes/stormwater-rules-and-notice>.

controlling the discharge of pollutants *from* the MS4 system to the MEP.<sup>30</sup> EPA's Small MS4 Remand Rule allows cities to manage their stormwater pollution on a location-by-location basis — and without being tied to mandatory numeric permit requirements.

**EPA must maintain flexibility for its definition of MEP in MS4 permits. AGC members are concerned that EPA continues to narrow and limit the flexibility municipalities need to implement the MS4 permit program, which also impacts those communities and businesses that utilize and rely upon those drainage systems. The section provides more specific examples of AGC's concerns; see items 7 and 9.**

8. *MS4 Permits: Compendium of Clear, Specific & Measurable Permitting Examples -- Part 1 & Part 2*

Guidance – Issued Nov. 1, 2016

<https://www.epa.gov/npdes/municipal-sources-resources>

The *Compendium of Clear Specific and Measurable Permitting Examples* accompanied release of EPA's Small MS4 Remand Rule in 2016 (see item 8 above). This guidance functions as a list of “approved” permit terms and conditions for local MS4 post-construction programs. The approved language consists almost entirely of numeric limits.

**AGC strongly encourages EPA to revisit the above-referenced guidance because it will continue to push states to adopt higher cost, more complex programs where no such federal mandate exists and without properly considering cost and feasibility in the field.** Indeed, states and municipalities have flexibility under EPA's regulations to base their “post-construction” program decisions on pollution reduction activities that will achieve the best results at the local level. Flow-based or treatment-based standards can be difficult to implement, depending on local soil types, climate, or existing development typologies; the cost and feasibility of compliance may vary widely.

9. *Stormwater General Permits for Small Cities (MS4s): Minimum Control Measures*

EPA's stormwater regulations require most MS4 operators to apply for permits and to develop, implement and enforce a program to control pollutants in stormwater discharges associated with construction activity. Specifically, EPA regulations for small MS4s require the operators of systems serving populations under 100,000 (and systems at large hospitals, universities and military bases) to develop, implement and enforce “construction site runoff control programs” for sites that disturb one acre or more of land, or less than one acre if within a common plan of development – commonly called “Minimum Measure #4.”<sup>31</sup> In general, most local governments often have their own requirements for construction sites (*e.g.*, local permits for grading, sediment and erosion, utilities). In some cases, local jurisdictions require their own separate permits before a project can begin. Local authorities sometimes want to review the jobsites' SWPPP, even if it has been approved by the state permitting authority.

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<sup>30</sup> 33 U.S.C. § 1342(p)(3)(B)(iii).

<sup>31</sup> 40 C.F.R. § 122.34(b)(4).

EPA's federal stormwater regulations also require permits for stormwater discharges *from* construction sites that disturb one acre or more of land (and construction sites less than one acre are covered if part of a larger plan of development) and that discharge to an MS4 or to WOTUS.<sup>32</sup>

**AGC recommends that EPA modify its stormwater permit regulations to avoid duplicative or conflicting erosion and sediment control requirements between the local program requirements and the NPDES construction general permit requirements. EPA should modify its small MS4 rules and remove the duplicative “Minimum Measure #4” (Construction Site Runoff Control Program) at 40 C.F.R. § 122.34(b)(4).**

As stated above, construction sites that discharge into an MS4 are required to obtain an NPDES stormwater permit as if they were discharging directly into a WOTUS. In addition, many local governments, as MS4 permittees, have a role to play in the regulation of construction activities. As such, construction sites discharging into a regulated MS4 also may have to meet additional requirements or obligations established by the local MS4. Currently, compliance with local requirements does not mean compliance with federal NPDES requirements or vice versa, unless the authorized state agency or EPA has specifically designated the local program a “qualifying local program.”<sup>33</sup>

#### 10. *Integrated Municipal Stormwater and Wastewater Planning*

Guidance – Issued June 5, 2012

[https://www.epa.gov/sites/production/files/2015-10/documents/integrated\\_planning\\_framework.pdf](https://www.epa.gov/sites/production/files/2015-10/documents/integrated_planning_framework.pdf)

This guidance is meant to help local governments meet multiple CWA water quality objectives and prioritize capital investments. However, EPA has not provided enough flexibility in implementing the policy. Municipalities are facing increasing NPDES permitting program requirements -- the funding gaps are leading to increased infrastructure needs.

**AGC maintains that EPA should provide some relief to allow communities to adopt an integrated planning approach to CWA obligations: the intent is to use the flexibilities in both permits and enforcement to work with communities towards common goals.** EPA could allow for extended compliance schedules, special permit conditions, and mechanisms for tracking and accounting units of pollution to better understand which permit programs are producing tangible progress on the ground.

#### 11. *EPA-USGS Technical Report: Protecting Aquatic Life from Effects of Hydrologic Alteration*

EPA Report 822-P-15-002; USGS Scientific Investigations Report 2015-5160 – Issued February 2016

<https://www.epa.gov/wqc/draft-epausgs-technical-report-protecting-aquatic-life-effects-hydrologic-alteration-documents>

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<sup>32</sup> 40 C.F.R. § 122.26(b)(15).

<sup>33</sup> 40 C.F.R. § 122.44(s).

EPA is advising states that they can include regulation of flow in state NPDES permits. At least one federal court told EPA it can't do this in the context of EPA's total maximum daily load (TMDL) program. In this guidance, EPA is telling states how to regulate impervious surface – thereby dictating land use decisions.

**AGC recommends that the EPA withdraw this guidance and peel back federal control to give power back to the states. The Clean Water Act was not intended to regulate water quantity - but rather water quality.**

## **D. Oil Spills Prevention and Preparedness**

### *1. Spill Prevention Control and Counter-Measure (SPCC) Rule Amendments*

2009 SPCC Amendments

<https://www.epa.gov/oil-spills-prevention-and-preparedness-regulations/2009-spcc-amendments>

EPA eased the compliance burden and costs on contractors covered by the federal Spill Prevention Control and Countermeasures Plan (SPCC) rule; reforms allow “low-risk” construction sites to develop “self-certified” SPCC Plans (in lieu of PE-certification) and use EPA's SPCC Plan template to comply with the SPCC rule, saving approximately \$3,000 per project. But there are still major inefficiencies inherent to the program.

**Construction site operators are required to develop plans for preventing, containing, and cleaning up oil spills under the NPDES and SPCC regulations. If a construction site operator has a SWPPP that addresses oil storage and spill control, containment and cleanup measures, then EPA should allow the jobsite SWPPP to also satisfy the agency's SPCC requirements. Otherwise this is double regulation – and each plan carries significant costs for the contractor to develop.** The list of overlapping requirements includes documentation, management certification, site maps and diagrams, inspection and maintenance, recordkeeping, training, designated employees, notification procedures and response obligations. The U.S. Coast Guard also is involved in spill plans if the project is on/over water.

**In addition, EPA should exempt asphalt cement from the definition of “oil.”**

See AGC Statement to the U.S. House of Representatives Committee on Small Business for a hearing on “Evaluating the Paperwork Reduction Act: Are Burdens Being Reduced?” – Attachment 2.

## **E. Air and Climate Issues**

### *1. NAAQS - Ozone*

80 Fed. Reg. 65,292 (Oct. 26, 2015)

<https://www.gpo.gov/fdsys/pkg/FR-2015-10-26/pdf/2015-26594.pdf>

Under this rule, construction companies will feel the effects of tighter ozone limits, mainly via restrictions on equipment emissions in areas with poor air quality (direct impact), as well as additional controls on industrial facilities and planning requirements for transportation-related sources (indirect impact). Notably, nonattainment counties that are out of compliance with the Clean Air Act ozone standards could have federal highway funds withheld.

**AGC recommends legislation and/or regulatory reform measures to: adjust the schedule for implementation of the 2015 ozone standard; long-term NAAQS reform to move the 5-year review cycle to 10 year; expand “Exceptional Events” to cover ozone inversions (see below); provide more “tools” for states to implement compliant state implementation plans.**

## 2. *Treatment of Data Influenced by Exceptional Events*

81 Fed. Reg. 68,216 (Oct. 3, 2016)

[https://www.epa.gov/sites/production/files/2016-09/documents/exceptional\\_events\\_rule\\_revisions\\_2060-as02\\_final.pdf](https://www.epa.gov/sites/production/files/2016-09/documents/exceptional_events_rule_revisions_2060-as02_final.pdf)

According to EPA, this final rule and associated guidance is intended to make it easier for states to exclude tainted data from EPA’s future assessments of compliance or non-compliance with its NAAQS. This is critical for states looking for all viable options to help attain EPA’s tighter ozone NAAQS issued in October 2015.

**EPA may want to consider further action. AGC notes that business groups in the western states are concerned that the revised rule still does not provide a clear path to exclude transported background ozone from future designations. This issue is of importance to AGC contractor members in the intermountain states.**

## 3. *Off-road Emissions Inventories*

NONROAD Model (Nonroad Engines, Equipment, and Vehicles)

Update initiated early 2016

<https://www.epa.gov/oil-spills-prevention-and-preparedness-regulations/2009-spcc-amendments>

EPA’s NONROAD2008 model is primarily used to estimate air pollution inventories (construction equipment) by state and local air quality planners; serves as a basis for emission reduction regulations.

**AGC strongly maintains that EPA must validate its nonroad emissions inventory model. AGC learned in early 2016 that EPA had hired Eastern Research Group, Inc. to oversee a NONROAD overhaul.**

## 4. *GHG Tailoring Rule*

81 Fed. Reg. 68,110 (Oct. 3, 2016)

<https://www.regulations.gov/document?D=EPA-HQ-OAR-2015-0355-0001>

This proposed rule clarifies when facilities will need to set controls for GHG emissions in order to obtain necessary air permits prior to construction or major upgrades and even to be operated.

**AGC recommends that EPA keep threshold levels at 75K or higher.**

## **F. TSCA Subchapter IV (Lead Exposure Reduction)**

### *1. LRRP Program Expansion to Public & Commercial Buildings*

75 Fed. Reg. 24,848 (May 6, 2010)

Advanced Notice of Proposed Rulemaking

<https://www.gpo.gov/fdsys/pkg/FR-2010-05-06/pdf/2010-10097.pdf>

EPA continues to attempt to expand its Lead Renovation, Repair and Painting (LRRP) program to cover all work that disturbs lead-based paint in commercial and public buildings. For years, EPA has been trying to determine whether such work creates a lead-based paint hazard. AGC testified at an EPA public hearing on June 26, 2013, that the existing OSHA standards for lead adequately protects workers and the surrounding public. EPA was under deadline to make a decision on whether or not to issue a proposal by propose work practice and other requirements by March 31, 2017, pursuant to a legal settlement with environmental groups. EPA has yet to announce next steps.

On every construction job where any detectable trace of “lead coatings” are present, the U.S. Occupational Safety and Health Administration’s (OSHA) Lead Standard for the construction industry requires monitoring, training, a written compliance plan, recordkeeping and establishment of a housekeeping program sufficient to maintain all surfaces as “free as practicable” of accumulations of lead dust. Yet EPA has a LRRP program with training, certification and extensive recordkeeping requirements that it is looking to expand significantly. **EPA should recognize that the OSHA rules protect the spread of lead-paint dust during all construction and terminate its efforts to expand current regulations to cover RRP work in public and commercial buildings.** To date, EPA has produced no data to show the RRP activities in the existing building stock would cause a lead-based paint “hazard.” In addition to EPA and OSHA, the U.S. Department of Housing and Urban Development also has a lead-based paint program.

See AGC Statement to the U.S. House of Representatives Committee on Small Business for a hearing on “Evaluating the Paperwork Reduction Act: Are Burdens Being Reduced?” – Attachment 2.

## **G. CERCLA – Brownfields Act**

The Brownfields Act limits traditional CERCLA (Comprehensive Environmental Response, Compensation and Liability Act) liability by providing protections/relief to prospective purchasers and innocent landowners. It does not, however, address the issue of liability for innocent contractors who redevelop the property on a contractual basis and possess no ownership interest. Response action contractors or

RACs performing site cleanups are subject to the same kind of open-ended liability as the companies that originally deposited the hazardous waste at a site. Regular contractors (non-RACs) also face uncertainty and high risks when working at a site where unknown/unforeseen hazardous waste is uncovered. Grading contractors who move contaminated soil around a construction site are often held to be “operators” of the facility and “transporters” of hazardous waste.

**AGC supports changes to the Brownfields Act that would provide federal enforcement and liability protections to construction contractors who redevelop contaminated properties.**

***AGC also encourages EPA to extend these same protections to construction contractors who remediate petroleum-contaminate sites; those sites are covered by the federal Resource Conservation and Recovery Act (RCRA). EPA estimates that approximately half of the nation’s brownfields sites are contaminated with petroleum.***

## **H. Compliance and Enforcement**

### *1. Citizen Suit Provisions in 20 Environmental Statutes*

The citizen suit provisions in 20 environmental statutes are being used to challenge all types of projects, land restrictions and permit requirements relating to the projects. These lawsuits can take years to resolve and the delay not only impacts the ability to secure the necessary environmental approvals and the financing of the project, but – in far too many cases – impedes projects that are vital to the renovation and improvement of our nation’s municipal water supplies, wastewater treatment facilities, highway and transit systems, bridges and dams.

**AGC urges EPA to consider a reasonable and measured approach to citizen suit reform designed to prevent misuse of environmental laws. Federal environmental rules and regulations that apply to construction site owners and operators are complex and cumbersome. AGC recommends that EPA rules be enforced only by trained staff of government agencies – or –**

- **Limit citizen suit penalties to violations of objective, numeric limitations rather than subjective, narrative standards;**
- **Extend “notice period” beyond the current 60 days (giving regulatory agencies more time to review notice of intent letters and initiate formal actions);**
- **Clarify definition of “diligent prosecution” of alleged violations, thereby allowing federal/state authorities to exercise their primacy in enforcement and preventing unnecessary citizen suit intervention.<sup>34</sup>**

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<sup>34</sup> All environmental statutes which authorize citizen suits bar such suits if the federal or state government is “diligently prosecuting” an action against the same violator. *But see Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, Case No. 1:14-cv-753 (M.D.N.C. Oct. 20, 2015) (a government enforcement action must not only be brought, but also managed, in good faith, to be a compliance bar to a CWA citizen suit).

## 2. CWA Enforcement

AGC members report a disconnect between the program office drafting permits and the OECA inspectors enforcing the program, with different interpretations of permit terms and conditions. **Therefore, AGC encourages EPA to consider moving the enforcement aspect of the stormwater program back into the Office of Water to better ensure consistency and fairness in EPA's enforcement obligations**

## 3. *Inspect and Correct: Cooperative Approach to Enforcement Policy*

Reports and data show that many environmental fines being levied against construction firms are for relatively minor paperwork infractions – not environmental contamination. Policies must be put forth to recalibrate environmental enforcement initiatives to focus more agency resources on compliance education and industry collaborative efforts.

EPA created a web-based “eDisclosure” portal to receive and automatically process self-disclosed civil violations of environmental law. These revisions have created disincentives for industry use. AGC members report that the “disclosure” program is too complex for small businesses and calls into question the confidentiality of information released to EPA. The prior administration also phased out many other agency policies and programs that were designed to help well-intentioned industry achieve compliance and avoid harsh penalties and negative image/reputation (see item 4 directly below).

**AGC recommends that the agency develop reforms to help companies discover and promptly correct environmental problems. Ideas include: reintroduce a process/protocol for making a Voluntary Disclosure under EPA's Small Business Compliance Policy; expand the use of EPA's Expedited Settlement Offer Policy under NPDES stormwater permit program (and other programs where enforcement is prevalent); and provide relief to contractors who “inspect and correct” compliance problems. In addition, AGC strongly encourages EPA to create a new process/protocol for responding to paperwork violations where there is no penalty or punitive damages and to provide relief to small business contractors who inspect and promptly correct compliance problems.**

See AGC Statement to the U.S. House of Representatives Committee on Small Business for a hearing on “Evaluating the Paperwork Reduction Act: Are Burdens Being Reduced?” – Attachment 2.

## 4. *Compliance Assistance & Partnerships*

In early 2009, EPA terminated long-standing partnership programs with industry (e.g., the Sector Strategies Partnership with the commercial construction industry aimed at reducing regulatory burdens while improving compliance) and defunded compliance assistance online centers (e.g., the Construction Industry Compliance Assistance Center). In the years that followed, the number and cost of federal regulations increased substantially – with EPA leading in the numbers.

**AGC recommends that EPA bring back its agency-industry partnership and recognition programs (e.g., Sector Strategies, Performance Track, C&D Recycling Partnership). AGC also recommends that EPA fully fund compliance assistance programs. A recent Environmental Council of States report finds that approximately half of all regional compliance assistance centers are underfunded or about to close.**

5. *Next Generation Compliance/Enforcement Strategy*

EPA's Next Generation Compliance Policy encourages greater focus, across all agency program, on the electronic collection and posting of compliance data, as well as public accountability through increased transparency of this data. EPA's broad shift toward the electronic submission of compliance and enforcement information – and the online public access to that data – does not consider industry concerns related to privacy, data quality, security, ownership, competition, etc. The cost to monitor company "feeds" for errors and consult with the government to ensure the information provided includes proper context were not factors in the paperwork cost/burden analysis for EPA's 2015 NPDES Electronic Reporting Rule, for example. EPA also may lack the financial resources and staff to maintain the robust databases it has set out to create.

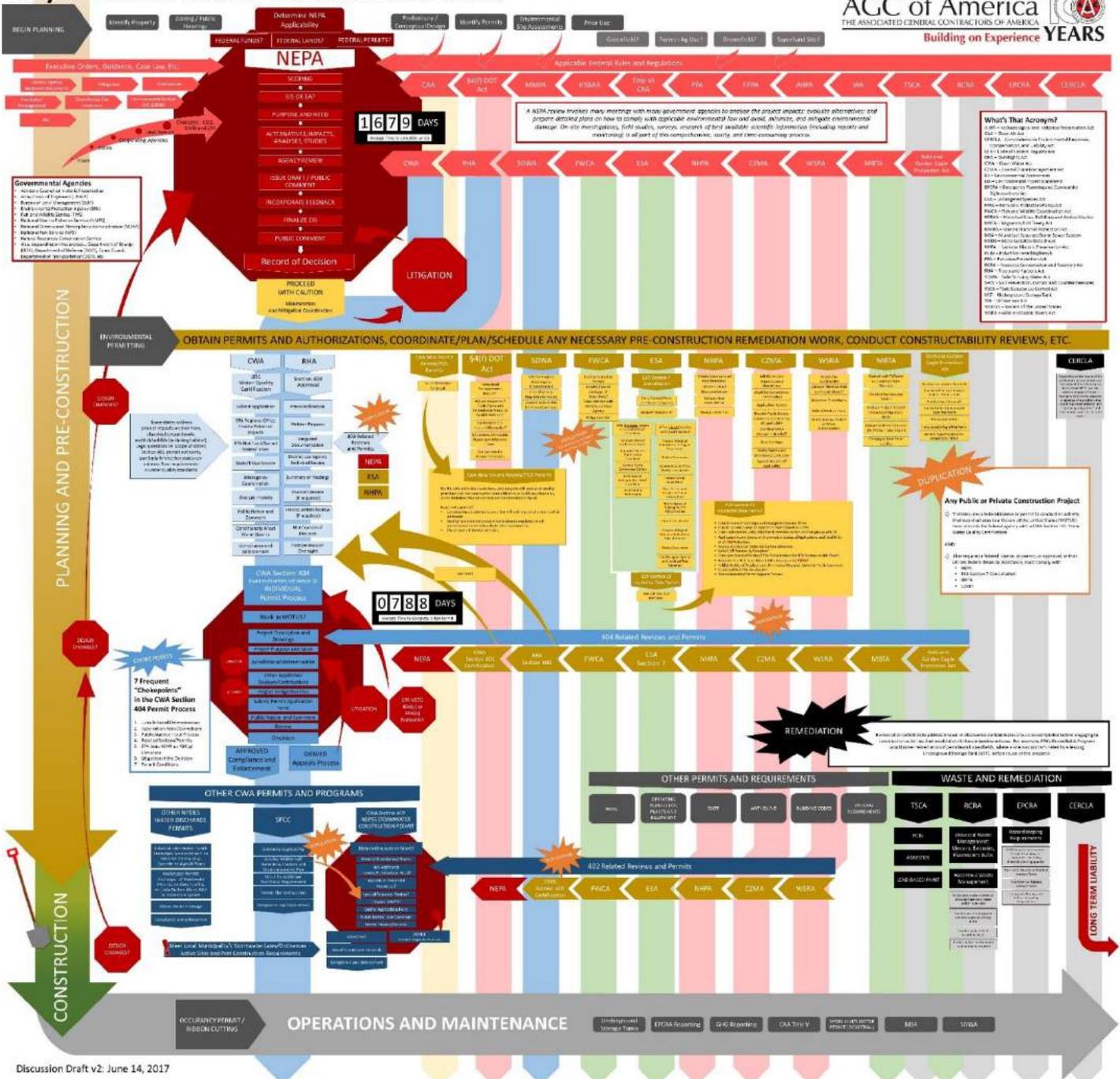
**AGC remains concerned that sharing complicated environmental reports with the public at large could delay projects and waste enforcement resources by chasing false leads and increase frivolous citizen suits over confusing data, errors, or misinterpretations of that data. AGC recommends that EPA re-evaluate the future of using web-based technologies for information collection and, particularly, public dissemination.**

See AGC Statement to the U.S. House of Representatives Committee on Small Business for a hearing on "Evaluating the Paperwork Reduction Act: Are Burdens Being Reduced?" – Attachment 2.

# I. ATTACHMENTS

## 1. AGC's Flowchart of Environmental Approvals and Permits Applicable to Construction

So you want to BUILD? Good luck with that...



Discussion Draft v2: June 14, 2017

2. *AGC's Statement to the U.S. House of Representatives Committee on Small Business for a hearing on "Evaluating the Paperwork Reduction Act: Are Burdens Being Reduced?" (March 29, 2017)*

**Statement of Leah F. Pilconis  
The Associated General Contractors of America  
Committee on Small Business  
United States House of Representatives  
March 29, 2017**

Chairman Chabot, Ranking Member Velazquez and members of the committee, thank you for inviting the Associated General Contractors of America (AGC) to testify on the construction industry's experience in meeting the federal government's requests for "information" and whether the Paperwork Reduction Act (PRA or Act) is accomplishing its goals of minimizing the resulting burden on the public and maximizing the practical utility of the information collected.

My name is Leah Pilconis, and I am AGC's Environmental Law and Policy Advisor. The association represents more than 26,000 construction contractors, suppliers and service providers across the nation, through a nationwide network of 92 chapters in all 50 states, DC, and Puerto Rico. AGC contractors are involved in all aspects of nonresidential construction and are building the nation's public and private buildings, highways, bridges, water and wastewater facilities and more.

One of my core functions for AGC is to monitor, summarize, and regularly comment on federal legislation and regulations that may implicate either the scope or nature of the construction industry's obligations to the environment. On behalf of AGC, I maintain liaison with EPA and other federal agencies that interpret and enforce federal environmental laws. In a pro-active effort to help AGC members meet federal environmental requirements, I also develop and disseminate practical "compliance tools" for construction contractors, and help to organize and hold environmental seminars, forums, and other programs for such contractors. I have served as a construction industry representative on government advisory panels tasked with evaluating the small-business impact of federal rules on the management of stormwater runoff during active construction and post development; the scope of federal control over construction work in water and wetlands; and the control of lead-paint dust during renovation, repair and painting activities.

AGC supports the objectives of the PRA and the White House Office of Management and Budget's (OMB) implementation of the Act. The PRA is an important tool to ensure that the federal government avoids the unnecessary collection of information and streamlines the information collection process. The federal government's information collections take an enormous toll on the construction industry, which includes predominantly small businesses.<sup>35</sup> Responding to federal reporting requests and documentation requirements consumes large amounts of time, resources, and funds. Any effort to

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<sup>35</sup> Currently there are 660,000 construction firms in the United States (residential and nonresidential), of which 91 percent are small businesses employing fewer than 20 workers. See the most recent year of available data online at [http://www.census.gov/econ/susb/?eml=gd&utm\\_medium=email&utm\\_source=govdelivery](http://www.census.gov/econ/susb/?eml=gd&utm_medium=email&utm_source=govdelivery).

reduce these burdens will benefit both the construction firms that face them and, in turn, the U.S. economy.<sup>36</sup>

## II. The Paperwork Reduction Act

The Paperwork Reduction Act<sup>37</sup> provides the statutory framework for the Federal government’s collection, use, and dissemination of information. The goals of the PRA include: (1) minimizing paperwork and reporting burdens on the American public; and (2) ensuring the maximum possible utility from the information that is collected.<sup>38</sup> OMB plays an important role as the lead agency charged with overseeing implementation of the PRA. The Act authorizes the Office of Information and Regulatory Affairs (OIRA) within OMB to “oversee the use of information resources to improve the efficiency and effectiveness of governmental operations to serve agency missions, including burden reduction and service delivery to the public.”<sup>39</sup>

## III. U.S. EPA: An Information-Based Agency

The U.S. Environmental Protection Agency (EPA) can be characterized as an “information-based” agency: the agency constantly requires the collection or generation of data in developing and implementing its programs. Information collections are defined broadly by both statute and implementing regulations. Regardless of form or format, whether an application form, a reporting or recordkeeping requirement, rules or regulations – and whether the request is oral, electronic or any other technique or technological method used to monitor compliance, OMB’s PRA regulation (as well as the PRA) broadly define the “collection of information” to include the following (as further described in this statement):

1. Requests for information to be sent to agencies, such as forms (e.g., EPA’s Notice of Intent for coverage under EPA’s Construction General Permit), written reports (e.g., EPA’s National Pollutant Discharge Elimination System (NPDES) Discharge Monitoring Reports), and surveys (e.g., EPA’s Public and Commercial Building Contractor Survey Questionnaire regarding renovation, repair, and painting work);

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<sup>36</sup> The construction industry plays important role in the U.S. economy. It operates in every state; employs more than 6.5 million workers (2015); nonresidential spending in the U.S. in 2015 totaled \$672 billion (\$390 billion private, \$282 billion public); construction contributed 4.0% to national GDP (2015). Source: Ken Simonson, Chief Economist, AGC of America, from Prof. Stephen Fuller, George Mason University, CFMA Annual Financial Survey and U.S. Government Sources.

<sup>37</sup> The Paperwork Reduction Act of 1995: <http://www.reginfo.gov/public/reginfo/pr.pdf>. PRA is codified at 44 U.S.C §§ 3501-3520.

<sup>38</sup> Other purposes of the Act include coordinating government information resources, improving the “quality and use of Federal information to strengthen decision-making, accountability, and openness in Government and society,” minimizing costs to government of gathering, maintaining and using information, and ensuring that information is handled in ways consistent with federal laws related to privacy, security and access.

<sup>39</sup> The regulations implementing the PRA, which closely track the statutory requirements, can be found at 5 C.F.R. § 1320, Controlling Paperwork Burdens on the Public; Regulatory Changes Reflecting Recodification of the Paperwork Reduction Act (60 Fed. Reg. 44984, Aug. 29, 1995).

2. Documentation and recordkeeping requirements (e.g., EPA’s requirements that construction site operators develop compliance management plans for stormwater and oil spill prevention and control); and
3. Third-party or public disclosures (e.g., EPA’s requirements to contact the National Response Center in the event of an oil or chemical spill on a construction site).<sup>40</sup>

Specifically, the PRA applies to collections of information imposed on, “ten or more persons” (e.g., individuals or businesses) within any 12-month period. Any recordkeeping, reporting, or disclosure requirement contained in a rule of general applicability is deemed to involve ten or more persons, thereby triggering PRA applicability.<sup>41</sup> “Recordkeeping requirement” means a requirement imposed by or for an agency on persons to maintain or retain records; or to notify, disclose or report to third parties, the government or the public of the existence of such records.<sup>42</sup>

#### IV. Does the PRA Reduce Burden?

Under the PRA, “burden” is defined expansively to mean the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.<sup>43</sup> In AGC’s experience, program agencies chronically underestimate the burden their information collections impose on regulated industries.

One would expect that reducing the EPA’s paperwork burden is among the leading accomplishments of the Act. However, it appears that the PRA has not reduced the hours Americans spend providing information to that agency.

A March 2000 Government Accountability Office (GAO) report, “EPA Paperwork: Burden Estimate Increasing Despite Burden Reduction Claims,”<sup>44</sup> took aim at claims of burden reduction. It found EPA’s claims to have reduced paperwork burden by 24 million burden hours and saved businesses and communities hundreds of millions of dollars between fiscal years 1995 and 1998 were “misleading,” and in fact were the result of agency re-estimates, changes in the economy or respondents’ technology, or the planned maturation of program requirements.”

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<sup>40</sup> 44 U.S.C. § 3502(3)(A) and 5 C.F.R. § 1320.3(c)(1) (“a ‘collection of information’ may be in any form or format”); 5 C.F.R. § 1320.3(c) (“‘collection of information’ includes any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information”).

<sup>41</sup> 5 C.F.R. § 1320.3(c)(4)(i)-(ii).

<sup>42</sup> 5 C.F.R. § 1320.3(m).

<sup>43</sup> 5 C.F.R. § 1320.3(b)(1).

<sup>44</sup> <http://www.gao.gov/assets/230/228881.pdf>.

In June 2016, the House Subcommittee on Energy and Power held a hearing<sup>45</sup> to review EPA’s regulatory activity under the Obama Administration. Since President Obama took office in 2009, EPA had published more than 3,900 rules, averaging almost 500 annually, and amounting to over 33,000 new pages in the *Federal Register*.<sup>46</sup> The hearing highlighted growing concerns from states and affected entities about the mounting complexity, costs, and legality of EPA rules. The compliance costs associated with EPA regulations under President Obama number in the hundreds of billions and grew by more than \$50 billion in annual costs during the time he was in office.

Turning to present day, the current EPA totals for active information collections,<sup>47</sup> as of March 21, 2017, show:

**ENVIRONMENTAL PROTECTION AGENCY TOTALS:**

ACTIVE OMB CONTROL NOS.	TOTAL ANNUAL RESPONSES	TOTAL ANNUAL HOURS	TOTAL ANNUAL COST
416	405,108,876	186,188,315	\$2,611,290,696

These data point to the conclusion that—despite efforts of OMB/OIRA, agency Chief Information Officers and agency program officials—EPA has been unable to meet one of PRA’s main goals, which is a net reduction in the total burden placed on the public by government information collection.

There is room for improvement in implementation of the Act and in effectively reducing the paperwork burden on small businesses. Through some combination of legislative action, regulatory reform and updated guidance, OMB should be working with the agencies to reduce duplication and burden, generate more accurate “life cycle” burden estimates, better protect confidential and sensitive information, and solicit better public input into the process that reflects actual small business experiences, as further explained below.

**V. Executive Summary: AGC’s Recommended Reforms**

Giving special consideration to requirements that are particularly burdensome to small businesses, AGC has recommended to EPA meaningful reforms that would produce significant savings and significant reductions in current paperwork burdens. Several of AGC’s top strategies for reducing regulatory burdens are highlighted in brief below and further discussed in Section V of this statement.

**A. Eliminate Duplicative Federal Recordkeeping Requirements**

- **REFORM 1:** Construction site operators are required to develop plans for preventing, containing, and cleaning up oil spills under the National Pollutant Discharge Elimination System and Spill Prevention Control and Countermeasures Plan (SPCC) regulations. If a construction site operator has a Stormwater Pollution Prevention Plan that addresses oil storage and spill control, containment and cleanup measures, then EPA should allow the jobsite SWPPP to also satisfy the agency’s SPCC requirements. Otherwise this is double regulation – and each plan carries significant costs for the

<sup>45</sup> <http://docs.house.gov/meetings/IF/IF03/20160706/105153/HHRG-114-IF03-20160706-SD002.pdf>.

<sup>46</sup> *Id.*

<sup>47</sup> Information available online at [www.regulations.gov](http://www.regulations.gov).

contractor to develop. The list of overlapping requirements includes documentation, management certification, site maps and diagrams, inspection and maintenance, recordkeeping, training, designated employees, notification procedures and response obligations. The U.S. Coast Guard also is involved in spill plans if the project is on/over water.

- **REFORM 2:** On every construction job where any detectable trace of “lead coatings” are present, the U.S. Occupational Safety and Health Administration’s (OSHA) Lead Standard for the construction industry requires monitoring, training, a written compliance plan, recordkeeping and establishment of a housekeeping program sufficient to maintain all surfaces as “free as practicable” of accumulations of lead dust. Yet EPA has a separate lead-safe Renovation, Repair and Painting (RRP) Program with training, certification and extensive recordkeeping requirements that it is looking to expand significantly. EPA should recognize that the OSHA rules protect the spread of lead-paint dust during all construction and terminate its efforts to expand current regulations to cover RRP work in public and commercial buildings. To date, EPA has produced no data to show the RRP activities in the existing building stock would cause a lead-based paint “hazard.” In addition to EPA and OSHA, the U.S. Department of Housing and Urban Development also has a lead-based paint program.

## **B. Exempt Small Businesses from Environmental Penalties for Paperwork Violations**

- **REFORM 3:** In early 2009, EPA terminated long-standing partnership programs with industry (e.g., the Sector Strategies Partnership with the commercial construction industry aimed at reducing regulatory burdens while improving compliance) and defunded compliance assistance online centers (e.g., the Construction Industry Compliance Assistance Center). In the years that followed, the number and cost of federal regulations increased substantially – with EPA leading in the numbers. Reports and data show that many environmental fines being levied against construction firms are for relatively minor paperwork infractions – not environmental contamination. Policies must be put forth to recalibrate environmental enforcement initiatives to focus more agency resources on compliance education and industry collaborative efforts. Congress should enact a “right to cure” process for paperwork violations with no threat of penalty; provide relief to small-business contractors who “inspect and correct” compliance problems; reinstate a process for making a voluntary disclosure under EPA’s Small Business Compliance Policy; and expand the use of EPA’s Expedited Settlement Offer Policy under the stormwater, oil spill and lead-paint programs where enforcement is prevalent.

## **C. Reconsider How Electronic Management of Information Should Be Factored into Burden Estimates**

- **REFORM 4:** The government’s broad shift toward the electronic submission of compliance and enforcement information – and the online public access to that data – does not consider industry concerns related to privacy, data quality, security, ownership, competition, etc. The cost to monitor company “feeds” for errors and consult with the government to ensure the information provided includes proper context were not factors in the paperwork cost/burden analysis for EPA’s 2015 NPDES Electronic Reporting Rule. EPA also may lack the financial resources and staff to maintain the robust databases it has set out to create. Sharing complicated environmental reports with the

public at large could delay projects and waste enforcement resources by chasing false leads and increase frivolous citizen suits over confusing data, errors, or misinterpretations of that data. There needs to be a renewed focus on information management within the context of the PRA and, specifically, the future of using web-based technologies for information collection.

#### **D. Prohibit Use of Generic Approvals of Information Collection Request under the NPDES Permit Program**

- **REFORM 5:** OMB’s PRA regulations allow agencies to use “generic” and “fast-track” processes to seek approval on an expedited basis for individual collections of the “already-approved general type.” In 2010, OMB issued a memo reminding agencies that they may seek “generic clearances” from OIRA to expedite the PRA approval process for information collections that are voluntary, uncontroversial, or easy to produce.<sup>48</sup> In this vein, EPA does a consolidated NPDES information collection request (ICR) that authorizes information collected under the entire NPDES permitting program (for both EPA-issued permits and state-issued permits).<sup>49</sup> EPA claims that OMB is approving a variety of reporting requirements *generally expected* in the permits covered; however, the consolidated ICR does not restrict permits to specific information requests. It is inappropriate to lump 46 state-issued CGPs, and the EPA-issued CGP into one “generic” approval. OMB needs to more specifically analyze the information collected under every one of these permits (e.g., Multi-Sector General Permit, Vessels General Permit, previous CGPs) and not just assume the newly issued iterations will have similar reporting burdens. Under current practice, EPA incorporated new recordkeeping requirements in its newly issued 2017 CGP without accurately accounting for increased burdens on industry.<sup>50</sup> OMB should more closely monitor agency estimates of burden and measure their accuracy against actual experience. Congress should also consider making explicit provisions for public outreach to small entities whenever it appears that they will be adversely affected by an expensive regulation. It would also reduce paperwork burdens to require agencies to respond, in writing, to serious objections from the U.S. Small Business Administration’s Office of Advocacy. For example, the Office of Information and Regulatory Affairs would not approve

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<sup>48</sup> Cass R. Sunstein, “Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies: Paperwork Reduction Act – Generic Clearances,” Office of Management and Budget, Executive Office of the President, May 28, 2010.

<sup>49</sup> The burdens associated with the CGP reissuance are covered under this existing ICR (OMB Control No. 2040-0004, EPA ICR No. 0229.20) and the updated one that is currently at OMB for review (OMB Control No: 2040-0004, EPA ICR No. 0229.21).

<sup>50</sup> For example, the 2017 CGP added a new requirement for the site operator to tell the public (via the notice of permit coverage already posted at the site, as per prior permit requirements) how to contact EPA to obtain a copy of the site-specific SWPPP and how to report a visible discharge of pollution from the site. This provision was not part of the proposal or the economic analysis (draft or final). EPA has failed to account for the “life cycle” paperwork burden for both industry and the agency to respond to the expected increase in public requests/reports, which may prove overwhelming for small businesses. SWPPPs are “living” documents that can be 100’s of pages long with complicated drawings. Distribution of outdated compliance data, and allowing an uninformed public to serve as the government’s watchdogs, may lead to unsubstantiated citizen complaints or frivolous lawsuits. (Likewise, EPA’s draft economic analysis completely discounted, or underestimated, the total burden (time/cost) to collect new project information from the applicant, to electronically report SWPPPs for public examination, and to increase site inspections/documentation – but these proposed changes were not adopted in the final version of the permit.)

significant rules unless the most adverse effects on small entities have been eliminated, reduced or justified.

## VI. AGC's Specific Comments

### A. Areas of SWPPP/SPCC Overlap

Construction site operators are required to develop comprehensive, site-specific compliance management plans under the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES) stormwater regulations and the federal Oil Pollution Control Act's Spill Prevention Control and Countermeasure (SPCC) regulations. AGC finds these dual recordkeeping requirements to be excessively burdensome and unnecessary.

The Clean Water Act and EPA's associated regulations<sup>51</sup> require nearly all construction site "operators" nationwide engaged in activities that disturb one acre or more of land, including smaller sites in a larger common plan of development or sale, to obtain coverage under an NPDES permit to allow their stormwater to discharge to "Waters of the United States."<sup>52</sup> There are more than 200,000 construction starts every year that fall into the NPDES regulated universe.<sup>53</sup> To secure coverage under EPA's or a state's Construction General Permit (CGP), the construction site operator(s) must first prepare a written Stormwater Pollution Prevention Plan (SWPPP) and then file a Notice of Intent (NOI) with EPA or the state permitting agency in control where the project will take place.<sup>54</sup>

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<sup>51</sup> 40 C.F.R. §§ 123.25(a)(9), 122.26(a), 122.26(b)(14)(x) and 122.26(b)(15).

<sup>52</sup> Under the NPDES program, EPA can authorize states to implement the federal requirements and issue stormwater permits.

<sup>53</sup> See Final NPDES Electronic Reporting Rule, 80 Fed. Reg. 64,076, 64079 ("large and transient number of permittees that are reporting each year for new locations - approximately 200,000 new construction sites each year").

<sup>54</sup> The stormwater management requirements and accompanying reporting and recordkeeping procedures are quite complex. EPA's CGP, which serves as a model for the nation, and accompanying fact sheet total just under 200 pages. U.S. Environmental Protection Agency's National Pollution Discharge Elimination System General Permit regulating Stormwater Discharges from Construction Activities (the "2017 CGP"); 82 Fed. Reg. 6534 (Jan. 19, 2017) – <https://www.epa.gov/npdes/stormwater-discharges-construction-activities>. The permit imposes many documentation and recordkeeping requirements on the construction site operator, including: (1) permit application form (Notice of Intent or NOI); (2) notice informing the public of permit coverage and on how to contact EPA to obtain the jobsite SWPPP or report a discharge (2) comprehensive site-specific SWPPP (including documentation of compliance with erosion and sediment control requirements and pollution prevention measures) that must be updated to comply with the permit; (4) site inspection reports every seven to 14 days – including the date, place and time of BMP inspections and the name of inspector(s); (5) the date, time, exact location and a characterization of significant observations, including spills and leaks; (6) records of any non-stormwater discharges; (7) corrective action reports of BMP maintenance/upgrades taken at the site; (8) any documentation and correspondence related to endangered species and historic preservation requirements; (9) weather conditions (e.g., temperature, precipitation); (10) dates when major land disturbing activities (e.g. clearing, grading, and excavating) occur in the area; (11) dates when construction activities are temporarily or permanently ceased in an area; (12) dates when the area is temporarily or permanently stabilize. See U.S. Environmental Protection Agency, *Developing Your Stormwater Pollution Prevention Plan: A Guide for Construction Sites*, EPA-833-R-06-004, 30 (May 2007).

The principal component of the stormwater program for any construction site is the SWPPP. It implements the bulk of the applicable CGP requirements by describing: the site and of each major phase of the planned activity; the pollution prevention practices and activities that will be implemented on the site; the roles and responsibilities of contractors and subcontractors; and the inspection, maintenance and corrective action procedures, schedules and logs. It is also the place where the contractor must document changes and modifications to the construction plans and associated stormwater pollution prevention activities. EPA's CGP requires contractors to keep copies of the SWPPP, inspection records, copies of all reports required by the permit, and records of all data used to complete the NOI to be covered by the permit for a period of at least three years from the date that permit coverage expires or is terminated.

The CGP requires the site operator to include in the project's SWPPP a spill prevention and control plan that includes measures to:

- Stop the source of the spill;
- Contain the spill;
- Clean up the spill, leaks and other releases;
- Dispose of materials contaminated by the spill;
- Identify and train personnel responsible for spill prevention and control; and
- Notify appropriate facility personnel, emergency response agencies, and regulatory agencies of a leak, spill, or other release in excess of a reportable quantity.<sup>55</sup>

EPA's permit instructs operators to store all diesel fuel, oil, hydraulic fluids, other petroleum products in water-tight containers that are kept under storm-resistant cover or surrounded by secondary containment structures (e.g., spill berms, decks, spill containment pallets).

This requirement is not unique to EPA's permit (it does serve as a national model). The CGP's spill prevention and response procedures implement provisions of the federal Effluent Limitations Guidelines and Standards (ELG) for the Construction and Development (C&D) industries that set a "floor" for the minimum stormwater management provisions that must be included in all CGPs nationwide.<sup>56</sup>

Failing to develop a SWPPP, keep it up-to-date, or keep it on-site, are permit violations that can result in CWA penalties of up to \$52,414 per day per violation.<sup>57</sup>

### ***Spill Plans***

The construction site SPCC plan is a complete overlap with the above-identified components of the jobsite SWPPP. The SPCC rule<sup>58</sup> applies in all 50 states and is administered and enforced by federal EPA

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<sup>55</sup> 40 C.F.R. § 110, 40 C.F.R. § 117, or 40 C.F.R. § 302.

<sup>56</sup> EPA's CGP requires operators to minimize the discharge of pollution in stormwater and to prevent the discharge of pollutants from spilled or leaked materials from construction activities, in accordance with the C&D ELG requirements at 40 C.F.R. § 450.21(d). EPA's CGP also implements the 40 C.F.R. § 450.21(d)(3) requirement to "minimize the discharge of pollutants from chemical spills and leaks and implement spill and leak prevention and response procedures" and the 40 C.F.R. § 450.21(e)(3) requirement prohibiting the discharge of "fuels, oil, or other pollutants used in vehicle and equipment operation and maintenance."

<sup>57</sup> 82 Fed. Reg. 3633 (Jan. 12, 2017).

<sup>58</sup> 40 C.F.R. § 112.

in every state. It covers a jobsite if (1) the above ground oil storage containers (in tanks of 55 gallons or greater, including asphalt cement tanks) have a total *capacity* of more than 1,320 gallons and (2) a spill could reach navigable waters of the United States or adjoining shorelines. It is important to note that EPA revised the definition of “navigable waters” of the United States, as the term applies to the SPCC rule, to comply with a court decision.<sup>59</sup>

The SPCCC rule requires all regulated jobsites to have a comprehensive SPCC plan detailing how the owner/contractor will store oil and both control and clean up any spills that may occur on the jobsite.<sup>60</sup> Basic requirements call for appropriate secondary containment and/or diversionary structures, security measures, inspections and recordkeeping and employee training. EPA’s SPCC rules also require site operators to notify appropriate facility personnel, emergency response agencies, and regulatory agencies of a leak, spill, or other release in excess of a reportable quantity.<sup>61</sup> Once you have an SPCC plan in place, the site operator must conduct site inspections, personnel training and periodically review and renewal of the plan.

Failure to develop an SPCC plan or comply with the related program requirements can result in CWA penalties of up to \$45,268 per day per violation.

Double regulation is especially burdensome for construction site operators because jobsites are temporary and ever changing. Unlike a fixed or permanent oil storage facility, a construction contractor must prepare multiple SPCC plans every year as jobsites are modified, projects completed and new projects are started. Per [www.reginfo.gov](http://www.reginfo.gov), the ICR for SPCC Plans is going to expire on March 31, 2017.<sup>62</sup>

AGC members report that it can cost from \$2,000.00 to \$5,000.00 to hire a Professional Engineer to prepare an environmental compliance plan, depending on your geographical area and the complexity required. This does not account for the additional costs incurred to perform and document inspections and update and renew plans. It is clearly feasible for a single plan to provide the detail necessary to satisfy the SWPPP and SPCC programs.

## **B. Lead Paint Activities; Training & Certification for Renovation and Remodeling Work**

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<sup>59</sup> Oil Pollution Prevention; Spill Prevention, Control, and Countermeasure Rule; Revisions to the Regulatory Definition of “Navigable Waters,” 73 Fed. Reg. 7,1941 (Nov. 26, 2008) - <https://www.epa.gov/oil-spills-prevention-and-preparedness-regulations/oil-spill-prevention-and-preparedness-regulation>.

<sup>60</sup> Notably, December 2008 amendments to the SPCC rule provided regulatory relief for “low-risk sites” that store smaller quantities of oil, including the ability to develop “self-certified” SPCC plans (in lieu of one certified by a professional engineer) and use EPA’s SPCC plan [template](#) to comply with the SPCC rule. In addition, EPA exempted hot-mix asphalt (HMA) and HMA containers from SPCC rule applicability, thereby excluding silos of HMA from the total oil storage capacity for any job site. Per AGC’s recommendations, this exemption is warranted because an HMA discharge would not “flow” to reach navigable waters or adjoining shorelines.

<sup>61</sup> See *supra* note 17.

<sup>62</sup> [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201604-2050-005](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201604-2050-005).

The EPA, the U.S. Department of Housing and Urban Development (HUD) and the U.S. Occupational Safety and Health Administration (OSHA) all have rules governing the disturbance of lead paint during renovation, repair and painting (RRP) work. EPA and HUD regulations may overlap where lead paint (as defined by each agency) is presumed to be present during construction work in “target housing” or a “child occupied facility.” But whenever EPA’s Lead RRP rules<sup>63</sup> apply, there always will be overlap with OSHA’s Lead Standard for the Construction Industry.

EPA standards define “lead-based paint” as: any paint or surface coatings that contain lead equal to or in excess of 1.0 milligram per square centimeter (mg/cm<sup>2</sup>) or 0.5 percent by weight. By contrast, OSHA Lead Standard for the Construction Industry<sup>64</sup> applies to *all* construction work where an employee may be occupationally exposed to *any detectable amount* of lead (this is not dependent on the size of a job or the concentration of lead). Furthermore, OSHA standards are not limited to lead-based paint as defined by HUD or EPA, or lead-containing paint as defined by or the Consumer Product Safety Commission (CPSC).<sup>65</sup>

Per OSHA’s standards, for work where there is any exposure to lead (of any measurable concentration - even below EPA thresholds for “lead based paint”), a company must adhere to the following regulatory provisions:

- 1926.62(d) – Initial Employee Exposure Determinations and Interim Protections<sup>66</sup>
- 1926.62(h) - Housekeeping
- 1926.62(i)(5) - Handwashing Facilities
- 1926.62(l)(1)(i) - Hazcom Program

The OSHA “housekeeping” provisions require employers to capture any lead dust that remains in the workplace during and after renovation activities are performed, calling for a program sufficient to maintain all surfaces as free as practicable<sup>67</sup> of accumulations of lead dust.<sup>68</sup> Generally, builders also

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<sup>63</sup> 40 C.F.R. § 745, Subpart E.

<sup>64</sup> 29 C.F.R. § 1926.62.

<sup>65</sup> OSHA’s Lead Standard for the Construction Industry consider paint to be “lead containing coatings” if there is any detectable amount of lead in the sample.

<sup>66</sup> The contractor disturbing the lead must conduct an assessment, protect their employees during the assessment, and determine actual employee exposure to respirable dust during renovation and demolition activities. See OSHA Letter of Interpretation

[https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=22701](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22701).

<sup>67</sup> OSHA clarified what it means by “as free as practicable” in a Letter of Interpretation online at [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=25617](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25617). It states: “The intent of this provision is to ensure that employers regularly clean and conduct housekeeping activities to prevent avoidable lead exposure, such as those potentially caused by re-entrained lead dust.” OSHA provides further instruction on complying with the “free as practicable” standard in a Compliance Directive online at [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=DIRECTIVES&p\\_id=1570](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=1570).

<sup>68</sup> AGC would like to specifically focus on OSHA’s “housekeeping” provisions that place requirements – as well as restrictions – on construction workplace and cleanup practices wherever there is any detectable amount of lead. The requirements at 29 C.F.R. § 1926.62(h) call for the following:

- All surfaces to be maintained as free as practicable of accumulated lead;
- Floors and other surfaces shall wherever possible be cleaned by vacuuming or other methods that minimize the likelihood of lead becoming airborne;

have a written Lead Compliance Plan for each project where they encounter lead; this is an OSHA requirement for work where exposure to lead may exceed 50 micrograms per cubic meter of air averaged over an eight-hour period.

Commercial builders report that they use all feasible engineering and work practice controls to reduce and maintain employee exposure to levels that are below the OSHA permissible exposure limit. For certain activities for which workers may be exposed to health threats, OSHA requires extensive pre- and post-exposure blood testing and monitoring, comprehensive lead awareness training and a medical surveillance program. Significant recordkeeping is required and the employer must maintain all documentation for at least 30 years.

Turning to EPA’s Lead RRP rule; it applies to all firms and individuals performing paid renovation, repair and painting projects that disturb lead-based paint in housing and child-occupied facilities (such as schools and day-care centers) built before 1978. It requires training, firm and individual renovator certification, lead-safe work practices, and various recordkeeping including:

- Reports certifying that lead-based paint is not present.
- Records relating to the distribution of the lead pamphlet.
- Documentation of compliance with the requirements of the LRRP program.

With the publication of an Advance Notice of Proposed Rulemaking in March 2010, EPA announced that it is looking into expanding the application of its current Lead RRP rule to potentially all commercial buildings and pre-1978 public buildings.<sup>69</sup> That would mean a lot more projects and, presumably, a lot more construction firms would need to comply with the requirements or risk fines of up to \$ 38,114 per day per violation.<sup>70</sup> Notably, EPA's Semiannual Regulatory Agenda, Fall 2016, has changed the small entity impact designation for this rulemaking to “undetermined” and there is no reference to any Small Business Regulatory Enforcement Fairness Act (SBREFA) panel<sup>71</sup> – despite the fact that a Lead RRP Pre-Panel Outreach Meeting on Dec. 9, 2014, and half a dozen individuals, including myself, were invited to serve as “potential” Small Entity Representatives (SERs) and asked to provide preliminary written comments.

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- Shoveling, dry or wet sweeping, and brushing may be used only where vacuuming or other equally effective methods have been tried and found not to be effective;
  - Where vacuuming methods are selected, the vacuums shall be equipped with HEPA filters and used and emptied in a manner which minimizes the reentry of lead into the workplace; *and*
  - Compressed air shall not be used to remove lead from any surface unless the compressed air is used in connection with a ventilation system designed to capture the airborne dust created by the compressed air.

This listing appears in the “Report of the Small Business Advocacy Review Panel on The Lead-based Paint; Certification and Training; Renovation and Remodeling Requirements” (March 3, 2000). However, the Panel found that the OSHA standards “are targeted at the protection of the worker and do not overlap with the requirements being considered for EPA’s Renovation and Remodeling proposed rule which seeks to protect occupants.” See p. 15 – online at <https://www.epa.gov/reg-flex/sbar-panel-lead-based-paint-activities-training-and-certification-renovation-and-remodeling>. AGC disagrees and has asked EPA to revisit this matter now that the RRP rule is final and fully implemented.

<sup>69</sup> 75 Fed. Reg. 24848 - <http://edocket.access.gpo.gov/2010/pdf/2010-10097.pdf>.

<sup>70</sup> See *supra* note 23.

<sup>71</sup> <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201610&RIN=2070-AJ56>.

Most recently, EPA launched a national survey of contractors, property managers/lessors, and building occupants to assess whether RRP activities in public and commercial buildings create lead-based paint hazards.<sup>72</sup> The survey is amounting to a nearly one-million-dollar fishing expedition. AGC recognizes that EPA’s LRRP is focused on protecting the surrounding public from lead-paint hazards and the agency is actively looking at how far dust will travel during construction. Yet, the fact remains, if OSHA regulations are deemed sufficient to protect the employees who are actually performing the work, EPA has a tough case to prove that any persons NOT associated with the project would be (or could be) detrimentally exposed to lead dust.

The PRA and OMB regulations intend for the creation or collection of information to be carried out within the context of efficient and economical management.<sup>73</sup> Congress should direct EPA to cease action on its survey and issue a “no hazard” determination to conclude further rulemaking action under the Lead RRP rule. Similarly, in accordance with EPA’s ongoing review of its current Lead RRP rule (on the books) under Section 610 of the Regulatory Flexibility Act – to assess the impact on small entities and consider, among other things, whether the rule overlaps or duplicates with other federal rules – AGC offered these same comments and urges Congress to oversee EPA’s course of action.

### **C. Right to Cure Paperwork Violations**

Reports and data show that a great deal of costly fines being levied against construction firms for alleged environmental violations are paperwork related. For example, EPA stormwater regulators and long-time enforcement personnel have repeatedly identified “inadequate documentation or training” as the leading problems found during a stormwater permit compliance inspection. Failure to prepare, properly fill out, or update a site’s permit application (NOI) or SWPPP and keep it on site, and failure to document inspections as well as corrective actions performed on the jobsite are permit violations.<sup>74</sup> A closer look at only California state data on stormwater violations (from 1992-February 2016) found that 84 percent of the violations were strictly paperwork/administrative in nature. Of the 42,485 records from that period, only 885—less than .02 percent—highlighted “unauthorize discharge” in the enforcement description category.

Similarly, EPA’s public announcements of its most recent enforcement actions under the Lead RRP program focus on paperwork violations: “Of the total settlements reported during fiscal year 2016, 116 cited alleged RRP rule violations involving repair, renovation or painting projects where lead-based paint is disturbed. Approximately 63 percent of this year’s cases alleged failure to obtain EPA certification ...”<sup>75</sup> A review of the FY 2016 enforcement actions related to the Lead RRP rule shows that for most of

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<sup>72</sup> EPA estimates that the roughly 8,485 survey respondents will incur a total burden of 564 hours for both the screening questions and the full survey. The total cost to respondents of this one-time collection is estimated to be \$34,103. The cost to the agency is estimated to be approximately \$710,000. EPA expects to have only 402 respondents complete a questionnaire. The Agency has established a public docket for this ICR under Docket ID No. EPA-HQ-OPPT-2013-0715, which is available for online viewing at [www.regulations.gov](http://www.regulations.gov).

<sup>73</sup> See 44 U.S.C. § 3501.

<sup>74</sup> See U.S. Environmental Protection Agency, Developing Your Stormwater Pollution Prevention Plan: A Guide for Construction Sites, EPA-833-R-06-004, 30 (May 2007).

<sup>75</sup> EPA Nov. 3, 2016, Press Release: EPA Enforcement Actions Help Protect Vulnerable Communities from Lead-Based Paint Health Hazards, <https://www.epa.gov/newsreleases/epa-enforcement-actions-help-protect-vulnerable-communities-lead-based-paint-health>.

the 116 violations, EPA routinely cited failure to obtain EPA certification for the firm, failure to assign a certified renovator to the team, and failure to provide EPA's Lead Hazard Information Pamphlet or maintain records.<sup>76</sup>

In face-to-face conversation and educational outreach sessions with EPA's lead SPCC compliance regulator, it has come as no surprise that he also has pointed to paperwork violations as the leading indicators of noncompliance: specifically, no SPCC plan, no PE certification, and no records to show compliance.

Federal environmental statutes carry extremely harsh penalties (as referenced elsewhere in this statement) as well as possible jail time for failure to comply with regulatory or permit requirements. In early 2017, EPA (and other regulatory agencies) increased civil penalties for new enforcement cases, per 2015 amendments to the Federal Civil Penalty Inflation Adjustment Act of 1990, codified at 28 U.S.C. § 2461, which requires agencies to annually raise their statutory civil penalties and make adjustments to account for inflation. Policies must be put forth to recalibrate environmental enforcement initiatives to focus more agency resources on compliance education and industry collaborative efforts. A fine should not be imposed for any paperwork violation if the violation is promptly corrected by the small business owner following notification of the violation.

#### **D. Electronic Reporting Requirements**

As stated above, the PRA applies to the collection of information "regardless of form or format."<sup>77</sup> It follows that the PRA applies to the collection of information through web-based interactive technologies. One might argue that PRA calls for a name change, as more-and-more, the government is shifting to require the regulated community to report information electronically, instead of via paper format. The Act may need to be updated to account for advance in technologies and new strategies for considering the burdens associated with the life-cycle of electronic records.<sup>78</sup>

Before information is collected electronically from the public, regulatory agencies need to more thoroughly assess how the information will be used by agencies, whether it will be disseminated by them (and if so what privacy concerns apply), how long it will be stored, and how and when it will be disposed. OMB should be evaluating significant information collections based in part on how the information will be used, disseminated, stored, and disposed of and making approval of information collections contingent upon detailed answers to these questions from the agencies. This would involve OMB updating Circular A- 130 on "Management of Federal Information Resources" and the agencies reissuing their Strategic IRM plans.<sup>79</sup>

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<sup>76</sup> <https://www.epa.gov/enforcement/fy2016-enforcement-actions-lead-renovation-repair-and-painting-rule-rrp>.

<sup>77</sup> See *supra* note 6 and accompanying text.

<sup>78</sup> Some policy experts argue that the large number of statutes on information management has led to a fracturing of responsibilities for these issues (Clinger Cohen Act – established Chief Information Officers; the Government Paperwork Elimination Act made agencies move information collections online and allowed recordkeeping to be online; the E-government Act created a new office in OMB to oversee information technology issues).

<sup>79</sup> Prior OMB guidance may have made agencies too lax in considering how their online dissemination of information impacts the regulated community. In 2010, then OMB Administrator Cass R. Sunstein issued a memo to agencies that relaxes agency obligations to seek White House approval for certain web-based technologies. Cass R. Sunstein, "Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory

As a case in point, let us look at EPA’s NPDES Electronic Reporting (e-Reporting) Rule, which requires regulated entities to file certain forms via an electronic reporting system (nationwide implementation by Dec. 2020) rather than using paper forms.<sup>80</sup> Per the rule, all reissued federal- and state-issued CGPs will require contractors to electronically file their NOI, NOT (notice of termination form) as well as any waiver request forms. The new rule requires states to share these data with EPA, along with government-administered inspection and enforcement results. Generally, for the regulated community, they need to (1) identify the recipient for each submission – for example, Georgia, Nebraska, Oregon and Rhode Island recently announced that all NPDES data will go to USEPA as the initial recipient, not the state; (2) use “approved” e-reporting program/tool; (3) register and obtain a user account; (4) obtain a valid electronic signature. As AGC pointed out in its comments on the proposed version of NPDES e-Reporting Rule, EPA’s PRA estimates on the time/cost associated with doing all of this was (and still is, per the final rule) way low.<sup>81</sup>

Although not codified in federal regulation, the preamble to the final rule states: “[s]eparate from this rulemaking, EPA intends to make this more complete set of data available electronically to the public, to promote transparency and accountability by providing communities and citizens with easily accessible information on facility and government performance.” Indeed, as EPA shifts its NPDES program from paper to electronic reporting, a lot more construction site-specific data will be readily shared with – and searchable by – the public via EPA’s Enforcement and Compliance History Online or ECHO database.

EPA incorporated the NPDES e-Reporting requirements into its 2017 CGP and now requires construction site operators to use its new NeT-CGP online tool to file.<sup>82</sup> AGC has concerns about the public posting of CGP NOIs and more construction inspection and enforcement data via EPA’s ECHO website.

With the advent of online posting of company’s compliance data, businesses must exercise more caution in providing electronic information to the government, then perhaps when providing it in paper format. Because commercial contractors build critical infrastructure, and increasingly must operate in competitive markets, some of the information the companies provide is highly sensitive – from a security perspective, a commercial one, or both. For example, details about the location, design, and operation of facilities and their importance to the utility networks can provide a roadmap to individuals or groups that might want to interfere with or compromise operation of those facilities. Similarly, information about facility finances, staffing, fuel use, and efficiency can disadvantage the facility in competing with other facilities in competitive markets and in securing economical fuel supply. For this reason, the industry is particularly sensitive to the need for adequate protection of confidential and

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Agencies: Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act,” Office of Management and Budget, Executive Office of the President, April 7, 2010 (stating that voluntary social media and other web-based forums – for example, blogs, wikis, or message boards – will not be considered information collections under the PRA).

<sup>80</sup> <https://www.federalregister.gov/documents/2015/10/22/2015-24954/national-pollutant-discharge-elimination-system-npdes-electronic-reporting-rule>.

<sup>81</sup> AGC’s extensive comments on this rulemaking are online at [www.regulations.gov](http://www.regulations.gov) - Docket ID: EPA-HQ-OECA-2009-0274. The ICR document prepared by EPA for this rulemaking has this agency tracking number 2468.01 - <https://www.reginfo.gov/public/do/PRASearch>.

<sup>82</sup> <https://www.epa.gov/npdes/stormwater-discharges-construction-activities>.

sensitive information. While electronic collection of information generally reduces burden, it also raises potential issues with information security and business pursuit and procurement.

AGC submitted two rounds of comments,<sup>83</sup> held face-to-face meetings with EPA staff, organized a member webinar, and will continue to take extensive steps to ensure that the agency understands the construction industry's concerns regarding the misinterpretation or misuse of such information. Databases are easy to setup but expensive to maintain.

## VII. CONCLUSION

AGC shares this committee's goals of reducing current paperwork burdens on small businesses, increasing the practical utility of information collected by the Federal Government, ensuring accurate burden estimates, and preventing unintended adverse consequences. Thank you again for this opportunity to testify on behalf of AGC.

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<sup>83</sup> *Id.*