March 31, 2017

Secretary Wilbur L. Ross, Jr.
U.S. Department of Commerce
1401 Constitution Ave. NW
Washington, D.C. 20230

RE: Impact of Federal Regulations on Domestic Manufacturing [DOC-2017-0001]

Dear Secretary Ross,

AGC represents more than 26,000 members—the largest commercial construction trade association—through a network of over 90 chapters in 50 states, the District of Columbia and Puerto Rico. Our commercial construction companies build many forms of manufacturing facilities—from factories and warehouses to energy and industrial facilities. As such, they know the challenges facing construction of these facilities first-hand and helped formulate—through AGC—reforms to these processes.

Per the instructions in your March 9, 2017, request for information—issued in accordance with the presidential memorandum—AGC puts forth several major environmental review and permitting hurdles that significantly delay and add cost to the construction of manufacturing facilities. AGC has in hand suggested reforms—both legislative and regulatory in nature—that could help streamline the National Environmental Policy Act review and Clean Water Act Section 404 permit process. The association would be happy to share those reforms directly with the Department, as they are not contained herein.

AGC outlines some of the most problematic environmental review/permitting issues as follows:

I. The National Environmental Policy Act (NEPA)
   A. The Use of NEPA
   B. The Interplay between NEPA and other Federal Requirements
   C. Federal Review and Permitting in Action
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II. The Clean Water Act’s (CWA) Section 404 Permitting Process
   A. ‘Chokepoint’ Details in CWA Section 404 Individual Permit Process
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III. The CWA’s National Pollutant Discharge Elimination System Regulations and Oil Pollution Control Act’s Spill Prevention Control and Countermeasure Regulations
   A. Stormwater Pollution Prevention Plan/Spill Prevention Control & Countermeasure Plan Overlap
      1. Stormwater Pollution Prevention Plan
      2. Spill Prevention Control & Countermeasure Plan
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IV. Concerns Regarding Mandatory Online Reporting of Construction Site-Specific Compliance Management Information and Enforcement Findings

V. Concerns Associated with Stationary Source Greenhouse Gas (GHG) Emissions Reporting and Permitting
I. The National Environmental Policy Act (NEPA)

A. The Use of NEPA

NEPA is a procedural “planning” statute with two primary aims. First, it obligates federal agencies to consider every significant aspect of the environmental impact of an action before proceeding with it. Second, it ensures that the agency responsible for the action will inform the public what the action is, and that it has considered environmental concerns in its decision-making process. In this capacity, NEPA has become one of the primary mechanisms through which the public can participate in the federal decision-making process.

There are three triggers for NEPA’s procedural requirements:

- One or more project components will occur on federal lands, such as national forest or Bureau of Land Management (BLM) lands;
- The project or its components will be funded in part or whole by federal funds; or
- The project will require a federal permit or license.

The third trigger is of particular relevance to manufacturing where the federal action—issuance of a permit or license—would likely result in NEPA review. This is especially true when a nonfederal project such as an industrial facility and/or manufacturing plant requires a federal CWA Section 404 permit. The complexity of the required NEPA review would depend on the scope of analysis the US Army Corps of Engineers (USACE) undertakes, for example whether it limits the scope to just the area of the project necessitating a permit or if it “federalizes” the larger development. The scope of a project in these circumstances can be a very contentious point and a web of case law exists that argues the finer points. AGC discusses the Section 404 permitting process in later sections of this document.

Federal actions to which NEPA applies involve the participation of a “lead agency” and “cooperating agencies.” The lead agency is the federal agency that takes responsibility for preparing the NEPA documentation. A cooperating agency is any federal agency, other than a lead agency, that has jurisdiction by law or special expertise regarding any environmental impact involved in a proposal. A tribal, state, or local agency may also be a cooperating agency. There are a host of environmental statutes that may apply to a given federal action and, as such, numerous federal agencies may be required to participate in the NEPA process.

NEPA covers the full range of potential impacts, including but not limited to water quality impacts, wetlands impacts, air quality impacts, endangered species impacts, and historic resources impacts. NEPA establishes procedural and planning practices for federal agencies but it does not replace (or conflict with) other substantive environmental laws (e.g., Clean Air Act, Clean Water Act, Endangered Species Act) and the additional permitting and process procedures required therein.

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1 40 C.F.R. § 1508.16.
2 40 C.F.R. § 1508.5.
3 Note that some states (e.g., North Carolina, Massachusetts and Washington) have requirements that are like the requirements established for federal agencies by NEPA. Therefore, if your construction project is entirely or partly financed, assisted, conducted, regulated, or approved by a state agency in one of these states, you should consult with state agency officials to ensure that these requirements have been met.
If the environmental consequences of a proposed federal action may be significant, the federal agency prepares an Environmental Impact Statement (EIS). An EIS is a detailed evaluation of the proposed action and alternatives. As soon as possible after determining that an EIS is needed, the agency is required to determine the scope of the project (including any environmental laws, regulations, or executive orders, in addition to NEPA, that will apply to the project). Once the agency determines the scope of the action, EIS preparation can begin. The action’s “purpose and need statement” is the foundation on which subsequent sections of the EIS are built.

Environmental impact statements and supporting technical studies often run a thousand pages or more. The public, other federal/state cooperating agencies, and outside parties provide input into the preparation of an EIS and then comment on the draft EIS when it is completed. After a final EIS is prepared, a federal agency will prepare a public record of its decision (ROD) that addresses how the agency incorporated the findings of the EIS, including consideration of alternatives, into the decision-making process.

B. The Interplay between NEPA and other Federal Requirements

NEPA forms the framework to coordinate compliance with other environment-related statutes and regulations, many of which impose permit requirements. On the positive, the NEPA process serves to provide decision-makers with a more comprehensive view of the major environmental issues and potential conflicts among the environmental components of proposed projects. However, NEPA does not give the lead agency (or for that matter, the Council on Environmental Quality (CEQ)) regulatory authority and oversight of the agencies charged with implementing the regulations and permitting programs that are required to adequately ensure the federal activity is conducted to avoid and minimize potential impacts. In current practice, project proponents are generally proceeding with piecemeal permit applications after NEPA to advance the project to construction.

Construction projects involving manufacturing or industrial facilities may require compliance with literally dozens of federal, state, tribal, and local laws.

Federal environmental legal requirements potentially applicable to federal actions include; but may not be limited to:

- Archaeological and Historical Preservation Act
- Clean Air Act
- Clean Water Act (CWA)
- Coastal Zone Management Act
- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)
- Emergency Planning and Community Right to Know Act
- Endangered Species Act (ESA)
- Executive Order 12898 (Environmental Justice)
- Farmland Protection Policy Act

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4 No hard-and-fast regulatory definition of “purpose and need” exists. However, as it has been interpreted, the statement cannot be so narrow that it effectively defines competing “reasonable alternatives” out of consideration. The “purpose” of an action may be a discussion of the goals and objective of an action. The “need” may be a discussion of existing conditions that call for some improvement.

5 The draft EIS should be prepared in accordance with the scope of the project and, to the fullest extent possible, meet requirements of § 102(2)(C) of NEPA. The CEQ regulations specify requirements for inviting and responding to comments on the draft EIS. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1503.

6 The final EIS should respond to any participating agency comments and address any inadequacies in the draft EIS.
Fish and Wildlife Coordination Act
• Historic Sites and Buildings Act
• Marine Mammal Protection Act
• Migratory Bird Treaty
• National Historic Preservation Act
• Pollution Prevention Act
• Resource Conservation and Recovery Act
• Safe Drinking Water Act
• Section 4(f) of USDOT Act (49 USC 303)
• Title VI of the Civil Rights Act
• Wild and Scenic Rivers Act
• Wilderness Act

These federal statutes are administered by a variety of different federal agencies that could all potentially become “cooperating agencies” in any given NEPA evaluation; including but not limited to:

• Advisory Council on Historic Preservation
• Army Corps of Engineers (USACE)
• Bureau of Land Management
• Environmental Protection Agency (USEPA)
• Fish and Wildlife Service (USFWS)
• Forest Service
• National Marine Fisheries Service (NMFS)
• National Park Service
• Natural Resources Conservation Service of U.S. Department of Agriculture
• Tribal Consultation

Indeed, the NEPA process requires the lead agency to coordinate extensive reviews, documentation and analysis with other federal agencies including the ones listed above, as well as various state regulatory and review agencies. One of the challenges for project sponsors is to align all the different agency approvals that are needed for a project.

In addition to the NEPA process, the project sponsor/operator will need to complete separate environmental federal permit processes or analyses, as the final version of the project may warrant. Indeed, CEQ’s NEPA regulations require a draft EIS to “list all Federal permits, licenses, and other entitlements which must be obtained in implementing the proposal.”

The CEQ has formally sought to streamline the NEPA process, and in 2011 it issued a Memorandum for Heads of Federal Departments and Agencies that touted the benefits of “integrating environmental reviews, coordinating multi-agency or multi-governmental reviews and approvals ...” CEQ regulations encourage agencies to integrate these multiple reviews into a single, comprehensive EIS that is prepared concurrently and integrated with the requirements of other federal environmental laws. Several agencies

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7 40 C.F.R. § 1502.25(b) (2014).
9 40 C.F.R. § 1502.25(a) (2014). In the agency’s much-cited “Frequently Asked Questions,” the CEQ clarified that project proponents who will need permits under other environmental laws are to “integrate the NEPA process into other planning at the earliest possible time to [e]nsure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.”
have issued guidance\(^\text{10}\) on how to accomplish such streamlining with regard to substantive (and not merely procedural) environmental laws. But multi-year approval processes remain the norm and delay perpetuates the bottlenecks and inefficiencies that impede competitiveness and cause pollution.

C. Federal Review and Permitting in Action

There are a multitude of statutes, implementing regulations, agency policies, and court decisions that affect what permits are required on construction projects, what agencies look for during a permitting process, and what activities or discharges they can authorize. Duplicative environmental reviews and permits are often required on the same project by federal, state, and local governments. A builder of infrastructure, including industrial facilities, must seek approval not from “the government,” but from a dozen or more different arms of the government.

The process of issuing a federal environmental permit almost always involves a complex web of related permissions, approvals and certifications that are all interdependent. For example, if the USACE determines that a project requires federal authorization under a CWA Section 404 permit before it can proceed, the project sponsor/operator can expect a lengthy and costly process during which a host of separate agencies will enter the fray: the USFWS (and/or the NMFS) will likely be engaged through consultation on endangered species or essential fish habitats; the state environmental agency will be involved pursuant to the Section 401 water quality certification process; other state historic preservation offices may be involved depending on their role in their respective state and the nature of the project; and the pertinent tribal government is involved if any tribal leads or interests are impacted by the project.

Looking just at the federal environmental permitting scheme, in addition to the potential need for Section 404 permit coverage, a manufacturing or stationary-source plant would likely also need the following permits from the USEPA:

- National Pollution Discharge Elimination System (NPDES) permit under the Clean Water Act
- Title V Clean Air Act operating permit for a “major source” of pollutants (certifying compliance with the applicable requirements of their permits at least annually)
- New Source Review and Prevention of Significant Deterioration Clean Air Act permit prior to construction to ensure that the anticipated “release of pollutants [does not] exceed federal standards for the region”
- Additional CWA and CAA permits as well as Safe Drinking Water Act, RCRA and EPCRA requirements may also apply depending on the types of materials the manufacturing facility uses and the waste streams it generates.

D. Federal Review and Permitting Costs

The cost to prepare an EIS is often borne by project sponsors, in this case, the manufacturers.

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\(^\text{10}\) EPA’s National Hardrock Mining Framework, U.S. Envtl. Prot. Agency app. C-2 and C-3 (Sept. 1997) (‘‘NEPA offers the opportunity to identify permit conditions, including those needed to avoid or minimize impacts or to mitigate for unavoidable impacts.’’).
• Per a National Association of Environmental Professionals (NAEP) review of the 194 EISs published in 2015, the average time to complete an EIS was five years and only 16 percent were prepared in two years or less.\textsuperscript{11}
• A U.S. Government Accountability Office (GAO) report stated that the average completion time for an EIS in 2012 was 4.6 years.\textsuperscript{12}
• Between 2003 and 2012, the U.S. Department of Energy paid consultants an average fee of $6.6 million, and as much as $85 million, to prepare EISs.\textsuperscript{13}

II. The Clean Water Act & the Section 404 Permitting 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 the CWA Section 404. Since the 2006 U.S. Supreme Court \textit{Rapanos} decision, the USACE (and EPA) have been asserting jurisdiction over any wet areas that have a “significant nexus” to downstream navigable waters.\textsuperscript{14} 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 in completing the process.\textsuperscript{15} (And if the process is beginning with an EIS, it may take three to six years (or longer) until the environmental reviews are complete.) Following are details of the various chokepoints the project proponent may encounter during the permit issuance process.

A. ‘Chokepoint’ Details in CWA Section 404 Individual Permit Process

1. Jurisdictional Determination

It is increasingly common for USACE to require 100 percent ground surveying and full delineation – along with field verification by a District Engineer – before the Corps will issue an Approved Jurisdictional Determination (JD). USACE staff will not accept NEPA analysis findings. More and more, USACE will not approve 404 permits 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 property 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 Section 404 permits rarely, if ever, are processed within the time limits set forth in the standard procedures. Agencies can work around strict timelines, including

\textsuperscript{11} NAEP annually reports information on EIS time frames by analyzing information published by agencies in the Federal Register, with the Notice of Intent to complete an EIS as the “start” date, and the Notice of Availability for the final EIS as the “end” date. However, AGC members’ experiences show that it’s common for large and controversial projects to take even longer than these numbers reflect.
\textsuperscript{13} \textit{Id.} See also 2014 GAO report noting that “there is no government wide mechanism [for agencies to track] the cost [or time] of completing NEPA analyses … However, the Department of Energy (DOE) tracks limited cost data associated with NEPA analyses.”
\textsuperscript{15} \textit{Id.}
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 USFWS, NMFS, and state historic preservation offices. 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 30 or 45 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 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 historic preservation office. 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.

CWA 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.

- May need Section 408 authorization (permission from the USACE under 33 USC 408 because project will alter or temporarily or permanently occupy or use a Corps-authorized civil works project).
- USACE consults with the USFWS and/or NMFS – Endangered Species Act (ESA) Section 7 consult – if project might affect endangered species. Under 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
- Bald and Golden Eagle Protection Act

5. **EPA Veto 404(c) or 404(q) Elevation**
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 to critics. 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 fill; USEPA’s Section 404(b)(1) guidelines thus constitute the substantive environmental criteria for evaluating Section 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.

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.

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16 The level of state responsibility, and autonomy of the state review, vary greatly, from cursory review or waiver of review (with the Corps carrying most of the responsibility), to in-office review of draft Corps permits, to a full blown independent technical review by the state, assuming a significant component of program responsibility.
III. Unnecessary Duplication under the CWA’s National Pollutant Discharge Elimination System (NPDES) Regulations and Oil Pollution Control Act’s Spill Prevention Control and Countermeasure (SPCC) Regulations

A. Stormwater Pollution Prevention Plan/Spill Prevention Control and Countermeasure Plan Overlap

Construction site operators are required to develop comprehensive, site-specific compliance management plans under the CWA’s 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 CWA and USEPA’s associated regulations 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.” There are more than 200,000 construction starts every year that fall into the NPDES regulated universe. To secure coverage under USEPA’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 USEPA or the state permitting agency in control where the project will take place.

17 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 USEPA 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). USEPA 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, USEPA’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.)

18 Under the NPDES program, USEPA can authorize states to implement the federal requirements and issue stormwater permits.

19 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”).

20 The stormwater management requirements and accompanying reporting and recordkeeping procedures are quite complex. USEPA’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 USEPA 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
1. **Stormwater Pollution Prevention Plan**

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. USEPA’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.21

USEPA’s permit instructs operators to store all diesel fuel, oil, hydraulic fluids, other petroleum products in watertight 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 USEPA’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.22 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.23

2. **Spill Prevention Control and Countermeasure Plan**

The construction site SPCC plan is a complete overlap with the above-identified components of the jobsite SWPPP. The SPCC rule24 applies in all 50 states and is administered and enforced by federal EPA 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 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).

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22 USEPA’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). USEPA’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.”
24 40 C.F.R. § 112.
could reach navigable waters of the United States or adjoining shorelines. It is important to note that USEPA revised the definition of “navigable waters” of the United States, as the term applies to the SPCC rule, to comply with a court decision.25

The SPCC 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.26 Basic requirements call for appropriate secondary containment and/or diversionary structures, security measures, inspections and recordkeeping and employee training. USEPA’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. Once you have an SPCC plan in place, the site operate 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, the ICR for SPCC Plans expires on March 31, 2017.27

B. Eliminate Duplicative Federal Recordkeeping Requirements

In sum, construction site operators are required to develop plans for preventing, containing, and cleaning up oil spills under the NPDES and SCPP regulations. If a construction site operator has a SWPPP that addresses oil storage and spill control, containment and cleanup measures, then USEPA 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.

IV. Concerns Regarding Mandatory Online Reporting of Construction Site-Specific Compliance Management Information and Enforcement Findings

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 of USEPA’s 2015 nationwide rule that shifts its entire NPDES permit program to electronic format.28 USEPA 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


26 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, USEPA 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.


28 See Final NPDES Electronic Reporting Rule, 80 Fed. Reg. 64,076,
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. Congress should reconsider how the electronic management of information is factored into the burden estimates of any new federal regulation before it further promotes using web-based technologies for information collection.

For all its rulemakings, USEPA intends to make compliance and enforcement data electronically available to the public via USEPA’s Enforcement and Compliance History Online or ECHO database. The Agency’s admitted goal is “to promote transparency and accountability by providing communities and citizens with easily accessible information on facility and government performance.” AGC has expressed great concern, via written comments and face-to-face meetings, concerning the public posting of construction site-specific inspection and enforcement data via USEPA’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 construction industry is particularly sensitive to the need for adequate protection of confidential and sensitive information. Indeed, the electronic collection of information raises potential issues with information security and business pursuit and procurement.

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. The White House Office of Management and Budget 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.

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29 Id.

30 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 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).
V. Concerns Associated with Stationary Source Greenhouse Gas (GHG) Emissions Reporting and Permitting

In 2016, the USEPA undertook revisions\(^\text{31}\) to the PSD and Title V permitting regulations specific to greenhouse gas (GHG) and sought to establish a Significant Emissions Rate (SER) for GHG emissions under the PSD program. USEPA proposed to establish an SER for GHG emissions, under which the emissions are considered *de minimis* and do not require controls for sources that already require a permit for conventional pollutants. USEPA has not yet finalized the proposed revisions. (The revisions came in response to court decisions\(^\text{32}\) that found emissions of GHGs alone do not trigger the facility permitting programs and associated controls; however, if a facility already qualifies for those CAA permitting programs to reduce emissions of conventional pollutants, then EPA also can require controls for GHG emissions.)

Individual construction firms are not likely to be regulated directly by the permitting programs for GHGs at the threshold that USEPA proposed, 75,000 tons per year (tpy) carbon dioxide equivalent (CO\(_2\)e). For example, general contractors also typically do not report emissions under USEPA’s Greenhouse Gas Reporting Rule, wherein facilities that emit 25,000 metric tons or more per year of GHGs are required to submit annual reports to USEPA.\(^\text{33}\) However, AGC members undertake construction and major renovation activities of stationary sources that stand to be regulated under the proposal. The construction industry is sensitive to the concerns of investors who make the business decisions to build (or not build) new structures or to expand and make improvements on existing facilities. Additionally, construction costs are closely tied to materials costs, which would be adversely impacted by increases in business expenses resulting from any GHG control measures necessary to receive pre-construction or operation permits. AGC seeks to ensure that new requirements are neither cost-prohibitive nor place additional and unnecessary burdens on the very businesses necessary for the construction industry to continue to improve our nation’s infrastructure and quality of life.

AGC maintains that the Clean Air Act (CAA) is not a suitable vehicle to regulate GHG emissions; however, insofar as USEPA may be obligated to address GHGs through the Act, AGC urges USEPA to set a *de minimis* threshold high enough to protect businesses that would be unduly harmed by a low threshold and provide regulatory certainty to those businesses ultimately impacted.

Thank you for the consideration of AGC’s comments. AGC has an extensive knowledge of the many other environmental review and permitting requirements that can impede the construction of manufacturing facilities. In addition, AGC has a number of recommendations for streamlining reform not contained herein for public consumption at this point. However, the association would welcome further discussion on its reforms upon the Department’s request.

Sincerely,

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\(^{31}\) *See Federal Register* on Oct. 3, 2016.

\(^{32}\) *See* June 23, 2014, U.S. Supreme Court decision in *Utility Air Regulatory Group (UARG) v. EPA* and the April 10, 2015, Amended Judgment by the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) in *Coalition for Responsible Regulation v. EPA*.