

Statement of

Leah Pilconis
Environmental Law & Policy Advisor

With

The Associated General Contractors of America

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

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

Quality People. Quality Projects.



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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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.¹ Responding to federal reporting requests and documentation requirements consumes large amounts of time, resources, and funds. Any effort to reduce these burdens will benefit both the construction firms that face them and, in turn, the U.S. economy.²

¹ 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/subs/?eml=gd&utm_medium=email&utm_source=govdelivery.

² 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.

I. The Paperwork Reduction Act

The Paperwork Reduction Act³ 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.⁴ 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."⁵

II. 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);
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).⁶

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.⁷

³ The Paperwork Reduction Act of 1995: <http://www.reginfo.gov/public/reginfo/pr.pdf>. PRA is codified at 44 U.S.C §§ 3501-3520.

⁴ 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.

⁵ 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).

⁶ 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").

⁷ 5 C.F.R. § 1320.3(c)(4)(i)-(ii).

“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.⁸

III. 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.⁹ 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,”¹⁰ 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.”

In June 2016, the House Subcommittee on Energy and Power held a hearing¹¹ 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*.¹² 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,¹³ 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

⁸ 5 C.F.R. § 1320.3(m).

⁹ 5 C.F.R. § 1320.3(b)(1).

¹⁰ <http://www.gao.gov/assets/230/228881.pdf>.

¹¹ <http://docs.house.gov/meetings/IF/IF03/20160706/105153/HHRG-114-IF03-20160706-SD002.pdf>.

¹² *Id.*

¹³ Information available online at www.regulations.gov.

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.

IV. 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 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.¹⁴ 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).¹⁵ 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

¹⁴ 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.

¹⁵ 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).

requirements in its newly issued 2017 CGP without accurately accounting for increased burdens on industry.¹⁶ 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 significant rules unless the most adverse effects on small entities have been eliminated, reduced or justified.

V. 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 regulations¹⁷ 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."¹⁸ There are more than 200,000 construction starts every year that fall into the NPDES regulated universe.¹⁹ 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.²⁰

¹⁶ 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.)

¹⁷ 40 C.F.R. §§ 123.25(a)(9), 122.26(a), 122.26(b)(14)(x) and 122.26(b)(15).

¹⁸ Under the NPDES program, EPA 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. 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 Pollutant 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

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.²¹

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.²²

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).

²¹ 40 C.F.R. § 110, 40 C.F.R. § 117, or 40 C.F.R. § 302.

²² 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."

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

Spill Plans

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 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.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. 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.²⁷ 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, the ICR for SPCC Plans is going to expire on March 31, 2017.²⁸

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.

²³ 82 Fed. Reg. 3633 (Jan. 12, 2017).

²⁴ 40 C.F.R. § 112.

²⁵ 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>.

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, 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.

²⁷ See *supra* note 17.

²⁸ https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201604-2050-005.

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

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 rules²⁹ 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/cm²) or 0.5 percent by weight. By contrast, OSHA Lead Standard for the Construction Industry³⁰ 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).³¹

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 Protections³²
- 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”³³ of accumulations of lead dust.³⁴ Generally, builders also have a written Lead Compliance

²⁹ 40 C.F.R. § 745, Subpart E.

³⁰ 29 C.F.R. § 1926.62.

³¹ 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.

³² 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.

³³ 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. 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.

³⁴ 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;
- 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;

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.³⁵ 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.³⁶ 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) panel³⁷ – 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.

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.³⁸

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- 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.

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

³⁶ See *supra* note 23.

³⁷ <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201610&RIN=2070-AJ56>.

³⁸ 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.

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.³⁹ 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.⁴⁰ 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 ..."⁴¹ A review of the FY 2016 enforcement actions related to the Lead RRP rule shows that for most of 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.⁴²

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

³⁹ See 44 U.S.C. § 3501.

⁴⁰ 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).

⁴¹ 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>.

⁴² <https://www.epa.gov/enforcement/fy2016-enforcement-actions-lead-renovation-repair-and-painting-rule-rrp>.

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.”⁴³ 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.⁴⁴

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.⁴⁵

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.⁴⁶ 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

⁴³ See *supra* note 6 and accompanying text.

⁴⁴ 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).

⁴⁵ 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).

⁴⁶ <https://www.federalregister.gov/documents/2015/10/22/2015-24954/national-pollutant-discharge-elimination-system-npdes-electronic-reporting-rule>.

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.⁴⁷

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.⁴⁸ 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 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,⁴⁹ 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.

VI. 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.

⁴⁷ AGC's extensive comments on this rulemaking are online at 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>.

⁴⁸ <https://www.epa.gov/npdes/stormwater-discharges-construction-activities>.

⁴⁹ *Id.*