EXPEDITING ECONOMIC GROWTH: HOW STREAMLINING FEDERAL PERMITTING CAN CUT RED TAPE FOR SMALL BUSINESSES

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WEDNESDAY, SEPTEMBER 6, 2017

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The Committee met, pursuant to call, at 11:00 a.m., in Room 2360, Rayburn House Office Building, Hon. Steve Chabot [chairman of the Committee] presiding.

Present: Representatives Chabot, Luetkemeyer, Brat, Radewagen, Kelly, Blum, Comer, González-Colón, Bacon, Fitzpatrick, Marshall, Norman, Velázquez, Evans, Murphy, Adams, and Schneider.

Chairman CHABOT. The Committee will come to order.

First of all, on behalf of the Small Business Committee, I wanted to extend our heartfelt prayers and support to the communities ravaged by Hurricane Harvey. Unfortunately, the storm took dozens of lives. It also took people’s businesses and possessions and homes. This Committee is committed to helping these Americans reclaim and rebuild their lives as quickly as possible. As part of this effort, the Committee has been working, and will continue to work, with Administrator Linda McMahon and the Small Business Administration to ensure that it is able to efficiently and effectively respond. SBA’s Disaster Loan Program, which provides direct loans to business owners and homeowners is a key component of the recovery efforts in these communities. This Committee will continue to be engaged on this issue for the coming weeks and months to make sure that we are doing everything possible that we can to help our fellow Americans in their time of need.

And I would also like to extend our heartfelt concern to both the ranking member as well as Ms. González-Colón for Hurricane Irma, which is ready, in the very near future, I believe, to hit Puerto Rico as well. And I know they have a lot of family and friends and loved ones there. So it has been a rough period of time for our country, and particularly the communities that I just mentioned. So we wish you the best to all your loved ones. And the things that I mentioned about are this Committee’s commitment to helping out the folks down in Texas and Louisiana also extend to our fellow citizens in Puerto Rico as well. So we will work with the staff of the ranking member and Ms. González-Colón if they have suggestions or things that we can do to help there.
We are also here today to examine how the Federal permitting process hurts small businesses, which obviously this Committee is very involved with since it is the Small Business Committee. As this Committee well knows, complying with regulations is one of the biggest challenges facing small businesses today. The time and cost to comply with the growing number of regulations stymies economic growth and stifles innovation.

The Federal permitting process is a component of this vast regulatory state. Usually before a business can begin to open its doors, launch a project, or begin an initiative, it must obtain a number of permits before moving forward. But the current permitting process is a maze that businesses big and small must navigate. And as with regulations generally, the Federal permitting process disproportionately affects small businesses. To obtain all the proper permits, small businesses must often deal with several agencies and departments with overlapping regulatory jurisdictions and endure lengthy delays waiting for permitting decisions, and cope with increasing costs to comply with these Federal permitting requirements.

Our witnesses today will provide real examples of what it is like to attempt to comply with our complex Federal permitting process: having to constantly check boxes to move forward with a project; having to fill out difficult permitting applications only to wait for months, sometimes years, for agencies to make decisions; having to do the nearly impossible to meet all the permitting requirements while keeping their doors open.

The current administration has taken positive steps to address the Federal permitting process, including two executive orders and a presidential memorandum. These actions acknowledge the burden the Federal permitting process imposes on the economy. That is a good start, but we must continue to look for ways to simplify and streamline the permitting process, especially to ease the regulatory burden on small businesses, our economy’s lifeblood.

That is why I introduced H.R. 33, the Small Business Regulatory Flexibility Improvements Act of 2017, at the beginning of this year. This bill ensures that Federal agencies actually examine the impact of new regulations on small businesses and consider ways to reduce unnecessary costs and burdens. The Small Business Regulatory Flexibility Improvements Act was included in a larger bill, H.R. 5, the Regulatory Accountability Act of 2017, which passed the House with a bipartisan vote back in January. The Senate has introduced a similar bill, S. 584, and we are waiting for them to take this important legislation up hopefully soon. If passed, the Small Business Regulatory Flexibility Improvements Act will be another step towards easing the regulatory burden on small businesses.

I want to thank the witnesses here today. We appreciate you taking the time out to travel to Washington, D.C. to testify about your experiences, and we look forward to your testimony.

And I would now like to recognize the ranking member, Ms. Velázquez, for her opening statement.

Ms. VELAZQUEZ. Thank you, Mr. Chairman. And I just want to echo your moving words. If there is a time when the federal government must play a role it is when natural disasters strike. And
I pray for those victims in Texas, and Oregon with the fires, and now the Caribbean. And we do not know if Hurricane Irma will—well, the estimate, it is putting that storm, that hurricane, in a path to hit the South in the United States.

This Committee has worked diligently throughout the years to revamp the disaster relief program and to provide the tools to the Small Business Administration to be able to assist those homeowners, businesses, and victims of any natural disaster. But I really am very grateful for your words and we pray that nothing happens; that there is no loss of lives. This is very personal for me and it should be very personal for everyone. Sometimes we forget that the people of Puerto Rico are American citizens and they show up to fight and defend our country. So thank you so much.

Mr. Chairman, like raising revenue and funding various programs, regulation is a fundamental tool the Government uses to implement public policy. The costs and benefits associated with federal regulations has been a subject of great controversy with the costs estimated in the hundreds of billions of dollars and the benefits even higher. An inherent part of the regulatory process is permitting, in which a business must obtain approval from the federal government for a project. While federal permits are critical to ensuring public safety, they can also represent a costly and complicated hurdle for small businesses. Unchecked, regulations can over time become out of date, requiring companies to devote significant resources to compliance.

This can be especially problematic for small companies that lack in-house lawyers and economies of scale enjoyed by larger competitors.

It is reasons like this that prompted Congress to enact the Paperwork Reduction Act and the Regulatory Flexibility Act which help ease and minimize small firms’ compliance costs. Despite the drawbacks, we should remember that permitting requirements also advance important public goals, helping ensure worker safety and protecting our air and water from pollution. I think we can all agree that certain processes should require a permitting process. For example, it seems like basic common sense that a permit for the disposal of nuclear waste is appropriate.

Similarly, a careful review will find that some permits actually help small businesses and are critical to protecting local economies. For example, in accordance with the Clean Water Act, large boats are required to obtain a permit before operating in U.S. waters. This limits pollutants and toxic chemical compounds released into our waterways. This not only protects the public health, but also ensures product life remains plentiful and healthy for human consumption, keeping intact local job-creating fishing industries.

Examples like this underscore why a “one size fits all” method for slashing regulation is inappropriate. Agencies should examine their use of permits on a case-by-case basis. In doing so, they can streamline and remove outdated regulations without compromising public health and safety or jeopardizing local environmental resources. One such method of analyzing the regulatory landscape was included in the FASA Act, which created a Federal Permitting Improvement Steering Council to streamline and expedite permitting requirements for infrastructure projects. Ensuring the FASA
Act is fully implemented and the council fully functional could go a long way towards reducing permitting burdens. Unfortunately, President Trump has yet to nominate an executive director of the council.

Improving compliance assistance can also go a long way toward leveling the playing field for small businesses. That is why it is so important that agencies are adequately staffed. Slashing budgets and imposing hiring freezes means agencies have fewer resources to help small companies navigate and comply with these processes. New technology can also play a role in reducing regulatory burden.

It is my hope that today’s discussion will shed light on how we can further reduce compliance costs for small companies without raising risks to the public health and the environment.

With that, I once again thank the witnesses for being here and offering their insight, and I yield back the balance of my time. Thank you, Mr. Chairman.

Chairman CHABOT. Thank you very much. The gentlelady yields back.

And if Committee members have opening statements prepared, I would ask that they be submitted for the record.

I would like to take just a moment to explain our timing lights for the witnesses. Pretty simple. We operate under the 5-minute rule. You each get 5 minutes to testify and then we will have 5 minutes to ask questions. There is a lighting system to assist you. The green light will be on for 4 minutes, the yellow light will be on for 1 minute letting you know to wrap up, and the red light will come on and we hope that you are either finished or will wrap up shortly thereafter.

And I would now like to introduce our very distinguished panel this morning.

Our first witness will be Mr. Philip Howard, who is the founder of Common Good, a nonpartisan coalition focusing on simplifying the government. He has written many books and articles on legal and government reform, and he was appointed to President Trump’s Strategic and Policy Forum in April of this year. He is also Senior Counsel at Covington and Burling in New York. Mr. Howard is testifying on behalf of Common Good, and we welcome you here today.

Our second witness is Mr. Louis Griesemer. Mr. Griesemer is the President and CEO of Springfield Underground located in Springfield, Missouri.

I am pronouncing the name right, aren’t I? Okay, thank you.

Springfield Underground supplies construction aggregates and provides underground storage for warehousing, laboratories, food storage, record storage, and data centers. Mr. Griesemer is testifying on behalf of National Stone, Sand, and Gravel Association, and we welcome you here today as well.

Our third witness will be Mr. Mark Hayden, who is the General Manager of Missoula Electric Cooperative in Missoula, Montana. The Missoula Electric Cooperative provides electric distribution services to nearly 15,000 locations in Western Montana and Eastern Idaho with many miles of its distribution lines crossing over Federal lands. And we welcome you here today as well.
And I would now like to recognize the ranking member to introduce our fourth witness.

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

It is my pleasure to introduce Ms. Margot Dorfman. Ms. Dorfman is the founder and CEO of the U.S. Women’s Chamber of Commerce. The chamber represents 500,000 members, three-quarters of whom are small business owners and federal contractors. Through her leadership, the organization has championed opportunities to increase women-business careers and leadership advancement. Additionally, Ms. Dorfman has an extensive background in business, including over 10 years in executive positions with General Mills and other Fortune 500 firms. Welcome. Thank you.

Chairman CHABOT. Thank you very much. And I would just let our witnesses know and also remind members that we are going to have votes probably starting around 10 minutes till noon approximately, but we are not absolutely sure. So we could finish up, but may have to come back.

Mr. Howard, you are recognized for 5 minutes.

STATEMENTS OF PHILIP K. HOWARD, SENIOR COUNSEL, COVINGTON & BURLING LLP; LOUIS A. GRIESEMER, PRESIDENT, SPRINGFIELD UNDERGROUND, INC.; MARK HAYDEN, GENERAL MANAGER, MISSOULA ELECTRIC COOPERATIVE; MARGOT DORFMAN, CEO, U.S. WOMEN’S CHAMBER OF COMMERCE

STATEMENT OF PHILIP K. HOWARD

Mr. HOWARD. Thank you. Good morning, Mr. Chairman, members. Thank you very much for this opportunity to appear here.

The focus of today’s hearing, streamlining permitting for small businesses, is of vital importance to this country for a number of reasons. Small business is the heart of the American economy, represents half the GDP. It is also the wetlands that spawns the other half. Not many years ago, Amazon and Google were small businesses. All the businesses that make this country grow started as small businesses.

Small business is also the soul of the American economy. What makes America so different than other countries is the ability of anyone to go out and be entrepreneurial and follow their star and make their own way by starting a business.

Regulation is critical, good regulation, as the ranking member and the chairman both indicated. So the solution here in my judgment is not deregulation; it is making regulation practical for small business.

What has happened without anybody really intending it is over the last 50 years, the permitting and regulatory structure for small business has slowly started suffocating the goose that lays the golden egg that everyone describes here. At this point, according to the World Bank, the United States ranks 51st in the world in ease of starting a business. As the chairman indicated, it is much more expensive for a small business to comply with regulation than it is for big business, on average about 36 percent more per worker.

Regulation is also extraordinarily unfair because the inability to comply, even to understand, but to comply with regulation means
that small businesses that try hard to comply are at a competitive
disadvantage to small businesses that realize that they can often
just get away with ignoring regulation all together. So you have
this vast disparity that is the opposite of what the rule of law is
supposed to promote.

I think there are three flaws in our general approach to regu-
lating small business. First, it is too dense for real people to un-
derstand, much less to comply with: literally hundreds of millions
of words of law, about 150 million words of binding Federal law and
regulation, probably over a billion of State and local regulation. It
gets denser every year because rarely the legislature or regulators
take away the rules. It is like the roach motel. The regulations
check in and they never check out.

The reason it is so dense is not because that is necessary to pro-
tect a safe workplace or clean water; it is because we try to tell
people exactly how to comply. We do not tell them what the goals
are and give them principles and provide oversight mechanisms.
Worker safety, for example, we literally have thousands of rules
telling people helpful things like stairwell shall be lit by artificial
or natural light. How else can they be lit? They require material
safety data sheets for sawdust and sand and common dishwashing
liquid, and give tickets if you do not have them in the appropriate
place. These things have almost nothing to do with what makes the
workplace safe.

The third problem with regulating small business is the govern-
ment does not even try to coordinate among the different agencies
regulating small business. Federal Government agencies do not co-
ordinate among themselves and much less coordinate with the
State and local governments. So what happens is if you are trying
to start a business in New York, for example, start a restaurant,
Mayor Bloomberg found required permits from 11 different agen-
cies. In D.C., you want an extra apartment, you want to rent it
out? Five permits. I have done studies of infrastructure permitting,
and one project with almost no environmental impact, to raise the
roadway of the Bayonne Bridge, 47 permits from 19 different agen-
cies. It is impossible for a small business to navigate that lab-
yninth.

The solution is not deregulation, but to create a practical method.
Small businesses should also keep water clean. They should also
have safe workplaces. What that requires I think is not just stem-
ing the flow, which I agree with the chairman needs to be done,
but we need a new approach. We need a new approach in general,
replacing micro regulation with broader goals. And to get there I
think that the first step would be to appoint an independent com-
mission to do a study on the cumulative burdens, State and local
as well as Federal, and recommend pilot projects where you have
simplified regulation, where you have simplified enforcement using
outside bodies like CPAs, except make them certified regulatory
agents, to create a safe harbor and help people to comply because
you cannot expect some small businessman to figure out exactly
what all these rules require. So we should somehow institutionalize
a mechanism, the goal of which is make it practical for small busi-
ness to comply with legitimate public goals. And it would initiate
such energy in our society if people could be confident that they
could actually go and understand the law and go out and follow their star and do what has made the American economy great for all these years. Thank you.

Chairman CHABOT. Thank you, Mr. Howard. Thank you.

Mr. Griesemer, you are recognized for 5 minutes.

STATEMENT OF LOUIS A. GRIESEMER

Mr. GRIESEMER. Chairman Chabot, Ranking Member Velázquez, and members of the Committee, thank you for inviting me to testify at this hearing on behalf of National Stone, Sand, and Gravel Association, NSSGA.

NSSGA represents the 10,000 construction and aggregate operations across the United States, located in every State and nearly every congressional district. More than 70 percent of NSSGA members are small businesses like mine. It is an industry that directly employs over 100,000 people and indirectly supports an additional 487,000 jobs throughout the economy. Overall, NSSGA member companies represent more than 90 percent of the crushed stone and 70 percent of the sand and gravel produced and consumed annually in the United States.

NSSGA's primary concern is a fully funded, robust highway trust fund. While nothing can take the place of these critical Federal funds, regulatory overreach can cause costly project delays so regulatory reform is of great importance to us.

As a business, we extract natural material for processing into crushed, sized, and washed stone. Crushed stone, sand, and gravel typically make up over 80 percent of ready-mix concrete and over 90 percent of hot-mixed asphalt. Aggregates are used in nearly all construction and public works projects, including buildings, highways, bridges, and airports, as well as treating drinking water and cleaning air emissions from power plants. Some of the regulations we must follow to operate make sense, and others do not, particularly for small businesses.

My family's business was started in 1946 by my father and uncle, who discovered limestone while digging a farm pond and recognized the need for road material in nearby Springfield, Missouri. Springfield Underground now employs 43 people, and in addition to supplying construction aggregates, we also utilize our former underground operations as cold storage for corporations such as Kraft-Heinz and Cargill. Like me, some of our employees are the second or third generation of their families to work at Springfield Underground. I have worked in the industry since 1977.

I want to be clear that I am not against regulation, nor is NSSGA. In fact, as the co-chair of the Mine Safety Health Administration NSSGA Alliance, I have led cooperative discussions with MSHA to develop and disseminate education and training materials intended to boost workplace safety and health for over 10 years. We have found that we can accomplish more by working together rather than having just a command-and-control relationship.

However, in too many cases, agencies unnecessarily slow down projects, and Springfield Underground has experienced this firsthand. In one instance, we had approved plans from our city for an expansion of our tractor trailer parking lot. When a State road con-
tractor needed a place to dispose of crushed pavement, we contracted with them to take the material as fill for this parking lot. We applied for a land disturbance permit that was held up first by U.S. Fish and Wildlife Service, but then by the State. Both required a study to determine if we were in a bat breeding area for an endangered species bat. The potential breeding area amounted to a dozen trees and some brush. The permit was delayed by 4 weeks until it was determined that our land was not in the bat breeding zone. Rather than creating a ripple effect by delaying the project, another contractor had to take some of the material.

Another example, our air permit requires that we apply water to unpaved areas to control dust. The humidity in Missouri means that putting that much water down creates some sticky mess that clings to truck tires. This site is also close enough to an airport so the Federal Aviation Administration does not want us to impound water that might attract migratory birds that impact planes taking off and landing. One agency limits our availability of water, while another agency demands overuse of it.

These are only a few examples of problems that small businesses like mine can face. We need Congress to step in and help us by pursuing meaningful regulatory reform that assists small businesses who only want to follow the rules and support our employees and our community. To lessen the regulatory burden, the Small Business Regulatory Flexibility Act should apply to proposed Fish and Wildlife Service rules and the Mine, Safety, and Health Administration rules, and Federal agencies should have to meet deadlines for permit approvals and to determine if a regulation applies to a site.

I appreciate this opportunity to address how streamlining Federal permitting could help small businesses like mine. Thank you, Mr. Chairman. I will be happy to respond to any questions.

Chairman CHABOT. Thank you very much.

Mr. Hayden, you are recognized for 5 minutes.

STATEMENT OF MARK HAYDEN

Mr. HAYDEN. Good morning, Chairman Chabot, Ranking Member Velázquez, and members of the Committee. My name is Mark Hayden and I am the general manager of Missoula Electric Cooperative, MEC, in Missoula, Montana.

MEC, through its 41 dedicated employees, serves the electric distribution needs of approximately 15,000 meters in Western Montana and Eastern Idaho. Our 2,000 miles of distribution line deliver energy to some of the most wild and scenic locations in the country, nearly 3,000 miles of which cross Federal land. We are proud members of the National Rural Electric Cooperative Association, the Montana Electric Cooperatives’ Association, and the Northwest Public Power Association.

For me, the timing of this hearing could not be more appropriate. Western Montana is on fire. Lives have been lost, property destroyed, hundreds evacuated. And while the fires burning today were all lightning sparked, they are a stark reminder to me of the unnecessary risk that long delays in Federal approval of permit applications and inadequate fuel reduction programs can bring to my co-op, our infrastructure, and our members.
At MEC, we are constantly working to improve system reliability and reduce the risk of power line-caused wildfires. And vegetation management on Federal lands is a critical component of our program. Our dealings in this regard have generally been very positive, but this is not the situation in all rights-of-way managed by the Forest Service. Other cooperative representatives have testified before Congress of inconsistent land management policies, long delays in approvals and review times, and unnecessary liability resulting from these delays.

In short, Federal reforms are needed to cut red tape and make it easier for electric co-ops to manage vegetation on federally managed rights-of-way. For that reason, we commend the House for recently passing H.R. 1873, the Electricity Reliability and Forest Protection Act, that received strong bipartisan support. This legislation would give electric utilities more consistent procedures and streamline processes in order to better manage utility rights-of-way.

Unfortunately, H.R. 1873 will do little to address my concerns regarding the delays in the application for major operation and maintenance activities, especially when the National Environmental Policy Act, NEPA, process is required to amend these special use permits.

For example, MEC made the decision to request burial of approximately 6.1 miles of overhead line on Forest Service land to improve reliability and reduce the risk of fire, and an application was submitted in December of 2013. Initial estimates suggested a 6-month review process; however, 18 months later, we were still awaiting approval. It was then that I was invited to provide testimony before the House Natural Resources Committee Subcommittee on Water, Power, and Oceans regarding these application delays. In preparation for that testimony, I placed one final call to the local Forest Service district ranger to express my concerns. The ranger told me that if I wanted to see things change I should take up my issue with Congress, at which point I told him I intended to do so the following week.

Two days later, on the Saturday afternoon prior to the hearing, MEC received unofficial notice via email that we were authorized to begin construction. This project qualified for categorical exclusion, meaning neither an environmental assessment or environmental impact statement was required. I can only imagine the number of months or years project approval would have taken had those more in-depth investigations applied.

Proper vegetation and fuels management on Federal land not only affect our utility operations, but also those of our customers. An executive at a family-owned lumber mill on our lines tells me he views the cumbersome and time-consuming process to fulfill NEPA requirements as the single most important barrier to implementing timely stewardship and restoration treatments on our national forests. Regulatory barriers to proper vegetation and fuels management threaten not only the operation of our utility and the livelihoods of our members, but also of those businesses we serve.

Mr. Chairman, members of the Committee, for us the status quo is not an option. We need streamlined, expedited procedures that allow for timely implementation of projects to improve system reli-
ability, reduce the risk of power line-caused wildfire, and protect the long-term health of our forests. Our small businesses and the overall economies of the communities we serve depend on it. The best way to accomplish that is to provide consistency, flexibility, and accountability in the Federal permitting and permit amendment processes, and we believe this can be accomplished without abrogating the intent of Federal regulations.

I appreciate this Committee’s work in examining how small businesses, such as Missoula Electric Cooperative, can benefit from regulatory reform and for holding this hearing today. Thank you for the honor of testifying before the Committee, and I will be pleased to answer any questions.

Chairman CHABOT. Thank you. Thank you very much.

Ms. Dorfman, you are recognized for 5 minutes.

STATEMENT OF MARGOT DORFMAN

Ms. DORFMAN. Chairman Chabot, Ranking Member Velázquez, members of the House Small Business Committee, I thank you for the opportunity to speak today.

Federal regulations are created to implement our laws typically for the purpose of protecting public health and safety, and increasing or approximating competition where markets are inadequate. Sometimes the reverse is true as large businesses seek to use our laws and regulations for the purpose of gaining market advantage while putting public health and safety and smaller business competition at risk. Hurricane Harvey has demonstrated the importance of human safety and how closely linked our safety is to appropriate, well-enforced regulations, and we have seen the importance of financial regulations and oversight as our economy nearly fell apart due to the lack of government oversight and accountability of our financial institutions. We have seen the value of the Consumer Financial Protection Bureau to small businesses seeking access to capital and watching out for predatory and discriminatory lending practices, and history has also shown us that the rising concentration and anti-competitive behavior of some large corporations has led to the decline in the amount of new businesses entering the market.

The U.S. Women’s Chamber of Commerce recognizes and supports positive and responsible streamlining of Federal permits as a way to expedite economic growth. However, our view is twofold. One, the primary driver of problematic permitting and regulatory processes is the poor manner in which the government enacts and manages regulatory creation and implementation including permitting. The annihilation of regulations which protect public health and safety and increase competition would only serve to put our lives and economy at risk.

Two, for Congress to fuel greater small business inactivity, you need to listen to small business owners who will tell you to expedite economic growth through small business success, you must improve the function of government, remove economic uncertainty, drive down health insurance and healthcare costs, drive up consumer spending, and simplify our tax system. We agree that permitting and other regulatory hurdles could be greatly improved and streamlined. It should be much easier for small businesses to know
what regulations impact their businesses and what permits are necessary. Completing required filings and permits should be made easier, cheaper, and be concluded more quickly. The National Environmental Policy Act, the FASA Act, and Title 41 created the Federal Permitting Improvement Steering Council, but the Council does not focus on the needs of small business. The Small Business Administration is not a member of this council and the FAS 41 2016 Annual Report to Congress does not mention any consideration of small business and their activities or concerns. This is one opportunity of many governmentwide to make small business inclusion part of the fabric of government.

If we are to focus on regulations, permitting, streamlining, and assisting small businesses to compete, grow, and help fuel our economy, the U.S. Women’s Chamber of Commerce recommends the following.

One, give small business a seat at the table governmentwide. Fund the Small Business Administration and empower and compel SBA to serve as a real champion for small businesses, rather than an agency that has been systematically underfunded for years, and then hold SBA leadership accountable for producing results.

Two, add small business assistance and fast-tracking of permits so as to lighten the financial burden and improve small business certainty and planning. Especially focus on fast-tracking the construction or expansion of manufacturing facilities.

Three, reduce the fees or remove the fees for small business permitting on projects.

Four, foster small business-large business partnerships, which include the large business partner securing required permits and managing regulatory requirements.

Five, President Trump’s recent budget proposal would defund manufacturing extension partnership, which provides tremendous assistance to small manufacturers. Instead, funding should be increased and include strong assistance in permitting and other regulatory requirements.

Six, champion a governmentwide initiative to require all regulations be presented in plain English. All permitting processes be modernized, streamlined, and transparently tracked for timelines. All regulations be reviewed periodically so as to ensure rules remain relevant and are carefully targeted to avoid unintended consequences.

And seven, stop agency staff overreach as laws passed by Congress are either not implemented or altered through weak, regulatory implementation so as to render them useless.

Additionally, the U.S. Women’s Chamber of Commerce strongly encourages the House Small Business Committee to focus on what really counts for small businesses, a well-run government, removing economic uncertainty, driving down health insurance and healthcare costs, driving up consumer spending, and simplifying our tax system. Thank you.
average amount of time it takes for an infrastructure project nowadays to obtain Federal permits and what are the costs associated with delays in permitting?

Mr. HOWARD. Well, it depends on the nature of the project. Large projects take years, between often 5 to 10 years, which has the effect of more than doubling the cost to taxpayers of the infrastructure. Lengthy environmental review ironically turns out to be usually very harmful to the environment because it prolongs bottlenecks of, you know, polluting bottlenecks and antiquated power lines that waste electricity, you know, for example.

And just some of the stories we just heard are an indication of a regulatory system that is not what Congress intended when it passed NEPA. The NEPA guidance said environmental reviews should—even for the most complex project should not be more than 300 pages long. You could not find one that is that short. Raising the Bayonne Bridge, 20,000 pages for a project with almost no environmental impact. So very, very painfully expensive.

And by the way, there are a lot of small businesses who are subcontractors on the big projects. So they are delayed 5 years, too, you know, the aggregate supplier and such.

Chairman CHABOT. I have got limited time so let me move on.

Mr. Griesemer, how do permitting and compliance costs affect your company's ability to bid on new projects?

Mr. GRIESEMER. Well, compliance becomes a part of—almost all of our senior managers have some sort of compliance component to what they do. It is across the board, whether it is human resources, whether it is environmental, whether it is safety, it impacts everybody's job. And we are a small company that is devoted to compliance. That is our culture. We want to comply with all the regulations. The difficulty is these overlapping regulations, and sometimes not even knowing that a regulation is going to—there are new ones popping up all the time. The example I gave on the road project on the endangered bat was not a problem the last time we had a land disturbance permit, but the ripple effect is—this was a project that was trying to be accelerated. All the other agencies, governmental, regulatory agencies were getting out of the way and trying to make this happen as quickly as possible and you have got one agency that is just not on board with that.

Chairman CHABOT. Okay. Thank you.

Mr. Hayden, how does uncertainty in permitting and regulatory costs affect the prices that your customers would have to pay for electricity, for example?

Mr. HAYDEN. Well, of course, you know, one cost that I cannot measure is this added risk, so I would start with that. You know, we are very concerned about the added risk of fire, wildfire caused by power lines down. And I mentioned that many times because that is foremost.

But if we talk about material costs, scheduling of our people, it is hard to invest in a piece of equipment or materials for a job if we have an uncertainty whether the project is either going to get approved or be delayed for multiple years. So that is a direct cost to our members. Staff time spent working on these is incredible. It takes an inordinate amount of hours for our staff to deal with the back and forth that goes on when permitting. And then it is service
reliability. If we cannot keep the lights on, that is a direct cost to our members. It is a direct cost to our company.

Chairman CHABOT. Thank you very much.

And finally, Ms. Dorfman, I am always amazed at the number of warnings I get when I buy something. You open it up, warned not to eat something, like I am going to have this desire that I have got to eat this thing, and probably it was some, you know, I assume a child probably ate something they were not supposed to and so a lawyer sued somebody and this is what we all have to put up with. Now, the child probably could not read the warning about not eating something on this, but nonetheless, I am just wondering, do you think we ever go to absurd lengths on these types of things, you know, protecting us from ourselves? Do we ever go overboard or do you think all these regulations are worthwhile?

Ms. DORFMAN. As I mentioned, I do believe that we have to have some common sense to this. But the regulations have been put in place for public safety and, in some instances, to ensure that there is competitiveness. So I think it is not a chop everything off and you have to go in with a fine-toothed comb and really identify, or the tweezers, to make sure that what you are removing is common sense. And I do not think there is like a blanket statement for that.

Chairman CHABOT. So we should be reasonable, use common sense in these things in general?

Ms. DORFMAN. Yes.

Chairman CHABOT. Thank you very much. I appreciate it. My time is expired. The ranking member is recognized for 5 minutes.

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

So I know that we always say that regulations could hinder economic growth and it could impose a burden, an economic burden to small businesses compared to larger companies, and, therefore, putting them at a disadvantage. But the fact of the matter is that we here in Congress, we pass legislation, and as a result of the legislation that we pass and enact into law, regulations are called for by certain agencies to promulgate.

So my question is why do you think it takes 10 years for an agency to promulgate regulation? Mr. Howard?

Mr. HOWARD. Part of the problem is how we regulate. We changed the way we regulated after the 1960s to avoid bad judgment by officials. So we got this idea. There were never 1,000-page rulebooks, you know, with the 1950s to 1960s. The Interstate Highway Act was passed. We built 40,000 roads in little over a decade. It would not take that long if we did not try to create manuals that contemplate every single eventuality. The 950-page Volcker Rule could be summarized in one paragraph, no unreasonable proprietary trading by banks. So it takes years for people to argue over the 1,000 pages.

Ms. VELAZQUEZ. We’ve held hearings here (more than one) on the IRS, and we had a panel of small businesses, but we did not have the IRS participating in that hearing. And for the most part, everyone that was sitting at that table said the important role that the IRS plays and that it’s important for them to have access to a live person, but they cannot. Well, the disinvestment that has taken place in terms of certain agencies that we vilify, such as
EPA, OSHA, IRS, will have a direct impact on slowing down the process for these agencies to do their job. So they are understaffed. They do not have the kind of manpower they need in order to expedite the processes.

So it is a very difficult balance. We need to strike a balance. Right? We need to apply common sense and to help—to get these agencies to do what is right, but then, on the other hand, we expect for them to do their job without the type of resources that are needed. Budget cuts have consequences and sometimes the people that are intended to be helped, we are not helping them.

Mr. HOWARD. Can I just say one thing?

Ms. VELAZQUEZ. Yes.

Mr. HOWARD. We also took away their authority. The chairman of CEQ, the Council of Environmental Quality, does not have the authority to say, oh, you are just burying the power line and this is going to be better for fires? That is a categorical exclusion. Go for it. Instead, he had to wait 18 months while it sort of circulated through lots of employees. So creating clear lines of authority to make decisions solves many of the problems that have been described today.

Ms. VELAZQUEZ. So when agencies publish a proposed rule, the Reg Flex Act requires agencies to describe and estimate the number of small entities to which the proposed rule applies. Agencies often underestimate the number of small businesses impacted by proposed regulation or simply say that data is unavailable. Is it your experience, and this question is for anyone on the panel, is it your experience that the burden is on small businesses to demonstrate that they will be affected? And what is the best way to change this so that small businesses do not have to sue federal agencies in order for their voice to be heard? Mr. Hayden?

Mr. HAYDEN. You know, I do not know that the burden has been placed on us to defend that, but I would look to the Regulatory Flexibility Act to say, hey, these indirect costs, they need to be measured in addition to the direct costs. Small business needs a voice in the process of developing regulation, you know, through that whole regulatory process. They need to show math. They need to show their math on how we are not affected. I guess that is what I would add to that is that I think that would really move the ball in terms of our having a voice in how those regulations are developed.

Chairman CHABOT. The gentlelady's time is expired.

The gentleman from Missouri, Mr. Luetkemeyer, who is the vice chairman of this Committee, is recognized for 5 minutes.

Mr. LUETKEMEYER. Thank you, Mr. Chairman. And welcome to my compatriot from Missouri here, Mr. Griesemer. Thank you for your attendance today.

Let me start with you. I appreciate your story with regards to the—I think it is the Indiana long-eared black bat, I believe, is that what it is?

Mr. GRIESEMER. There is also an Ozarks long-eared bat.

Mr. LUETKEMEYER. Oh, okay. I know we have got a lot of them. I had a situation in my district where we were doing the same thing, had a community that had a project like this and we
came to realize that there has never even been a sighting in our State of this bat, yet that may be hibernating in these trees, and as a result it caused problems.

Could you elaborate just a little bit, talk about your experience and then the cost to comply and the cost of the delay that it cost you?

Mr. GRIESEMER. Sure. On that particular example, it seemed to us a simple matter because there are apparently some maps that exist within U.S. Fish and Wildlife that show that we are not in a breeding zone. The issue was that they breed in the trees. We are an underground mining operation. I kind of consider that we are actually creating bat habitat, but that is not the issue in front of us. But it would have been a fairly simple matter it seems to me to just look at the map and say, no, you are not in the breeding zone it is pretty clear.

What the expectation is, because of funding and staffing and so forth, is that the expectation is it takes 4 weeks for the review. And this was a U.S. 65 project; that is the main artery between Springfield and Branson, Missouri. That is a tourist destination, and this is our six-lane artery that was being shut down. So it was really an accelerated project.

The Highway Department had incentives in place to make sure this project was done in time, and as a subcontractor, echoing what Mr. Howard said, we were just a cog in the wheel, but potentially a vital cog that could have delayed this project significantly.

Mr. LUETKEMEYER. How many people do you have in your business that are dedicated just to working on compliance issues?

Mr. GRIESEMER. As I said in my testimony, every one of our officers has some compliance component in their job description. Probably our engineering and environmental, we are a small company so they have multiple duties. Our engineering and compliance person that does most of our regulatory and environmental permits and safety permits, half of his time, probably 30 to 40 percent of the human resources time, is devoted to that. A good percentage of my time as CEO is devoted. We estimate a couple hundred thousand dollars' worth of labor costs, management costs per year just for our company, approximately 5 percent of our expenses a year are directly related to regulatory.

Mr. LUETKEMEYER. Thank you.

Mr. Hayden, you were talking with regards to the hoops you were having to jump through with regard to doing work on Federal land, is that right?

Mr. HAYDEN. That is correct.

Mr. LUETKEMEYER. Do you have to do—do you have to jump through more hoops on Federal land than you do if you put a utility line over private land?

Mr. HAYDEN. We do. Yes.

Mr. LUETKEMEYER. Really?

Mr. HAYDEN. In terms of the NEPA permitting process would require. We can bury, you know, generally bury line on private land much more easily than Federal.

Mr. LUETKEMEYER. So you can do the same thing you are doing on private land, yet on Federal land they make you jump through a whole bunch of extra hoops and costs?
Mr. HAYDEN. Costs. Cost recovery agreements. Yes.

Mr. LUETKEMEYER. How many people do you have in your company dedicated just to compliance, or percentage of people?

Mr. HAYDEN. Oh, percentage would be, you know, I have an Engineering Department, who, we are a small company so I would say that, you know, 15 to 20 percent of our engineering managers' time would be devoted to that. But we outsource a lot of that. When it comes to doing our long-range planning, we outsource most of that environmental analysis work.

Mr. LUETKEMEYER. Okay, thank you.

Also, Mr. Hayden, I know you mentioned the Small Business Regulatory Flexibility Improvements Act. It is the chairman's bill that we have passed here in the House. It is sitting in the Senate. And much to my consternation, it passed out of the Senate the other day, but it did on a party line vote and one of the senators, which is from Missouri, voted against it, which is ridiculous because all we are trying to do is help the small businesses.

Would you elaborate a little bit on the effect of that bill on your business, how it would improve your ability to do business?

Mr. HAYDEN. Well, I think it is a broad effect on any regulation, not just our business, having that input, having a panel sit down. If you think about a classic example would be the Waters of the United States bill that has now been pulled back, but there was no input from small business on the effect that that was going to have an electric utility, like Missoula Electric Cooperative. Electric co-ops cover about, you know, 75 percent of the Nation I think is the amount of landmass we cover. Think of the impact of that and we did not even have a seat at the table.

Mr. LUETKEMEYER. I appreciate that comment. And my time is out here, but I want to make one comment here very quickly, because you made the comment in your testimony with regards to having a voice in the determination of the regulation. It is vitally important, I think, and you just made the point again, to be able to have small businesses at the table, people who are going to be directly affected by these regulations, to at least have an input or say in how these regulations are developed. So thank you so much for your story and your time today.

Chairman CHABOT. The gentleman's time has expired.

The gentleman from Pennsylvania, Mr. Evans, who is the ranking member of the Subcommittee on Economic Growth, Tax, and Capital Access, is recognized for 5 minutes.

Mr. EVANS. Thank you, Mr. Chairman.

Mr. Howard, I am going to probe a little bit on the part when you talk about a new approach. And you say, you talk about a new regulatory framework is needed, and the sense I get from you in saying that is people do not want the other extreme of total deregulation. That is kind of what you are saying. Now, I know we are dealing strictly with Federal jurisdiction here, but many businesses are worried about duplicate regulation, both at the Federal level and the State and the local levels. Can you discuss the extent to which firms face such duplicate permits?

Mr. HOWARD. Well, I can give a few examples. The example that I studied and issued reports on the last couple of years has been infrastructure. And infrastructure projects typically go
through multiple layers of review. The new power line to connect
wind farms in Wyoming to the Pacific Northwest, for example, had
to get permits from each county in Idaho over which the line was
constructed, which delayed the project and added to the cost of it
and potentially, although it rarely works out this way, could have
been a veto.

One of the reasons the United States has almost no private in-
vestment in infrastructure compared to Europe is because of what
Mr. Griesemer was saying, which is the uncertainty of when the
permit is going to be given. So nobody wants to invest private
money if they do not know if they are getting an answer in a year
or two. So that is one example that I happen to have studied with
infrastructure, but almost every area of endeavor that is regulated
has permits required on multiple levels of government.

Mr. EVANS. And you sort of think, what I heard you say, and
I do not want to put words in your mouth, you said something
about having another commission. I heard you say you have an-
other commission.

Mr. HOWARD. Yeah, I am sorry. I did say that. Yes.

Mr. EVANS. You did say, I mean, I thought I heard you say send
another commission, so I am thinking in my head, educate me on
what you think by setting up another commission would accom-
plish the objective. I am just——

Mr. HOWARD. Well, personally, I think that small business
should have a seat at the table.

Mr. EVANS. Right.

Mr. HOWARD. But I do not think it is possible to reconcile the
regulatory objectives with a large oil and gas company, with the
regulatory objectives of a company with 20 or 50 employees. I think
those require different regulatory regimes, not a “one size fits all.”

Mr. EVANS. Mm-hmm.

Mr. HOWARD. And so I believe there should be pilot projects to
test dramatically simplified approaches to meeting environmental
goals and worker safety goals and other goals. I am not for getting
rid of those goals, but applying those in a different way to small
business because I do not think we can ever reconcile the need to
regulate Shell Oil or BP in one way and regulate a small business
in the same way. I just do not think those two things are compat-
ible.

Mr. EVANS. Okay.

Ms. Dorfman, a poll conducted by the American Sustainable
Business Council found that the lack of demand was the biggest
problem facing small businesses. Given this outcome, should we be
focusing our attention on ensuring small businesses have cus-
tomers reforming the Tax Code? And which provisions?

Chairman CHABOT. If you could turn the mic on there. Thank
you.

Ms. DORFMAN. Sorry. We find that the tax regulations are
overly complex and they are weighted to the wealthy, but also to
big business. And so we are not getting the same benefits as you
were mentioning. You know, you cannot compare BP to a 50-person
company, the same thing. We are not receiving the same benefits
so there are challenges there.
And then additionally, where the money comes from is really looking at the consumer spending. And so we need the money into the pockets of the consumer to drive the consumer spending to grow small businesses.

Mr. EVANS. Real quick. Do you have any suggestions and thoughts around that since tax reform is a discussion we are generally talking about?

Ms. DORFMAN. We need to, when looking at that, ensure that the consumer, which is generally the nonwealthy, the non-1 percent, has better tax benefits where they have more money coming in to them that they can go ahead and use that money as the extra money to spend on consumables.

Mr. EVANS. Thank you, Mr. Chairman. I yield back the balance of my time.

Chairman CHABOT. Thank you. The gentleman yields back. The gentlelady from American Samoa, Ms. Radewagen, who is the chairman of the Subcommittee on Health and Technology, you are recognized for 5 minutes.

Mrs. RADEWAGEN. Talofa. Good morning.

Thank you, Mr. Chairman and Ranking Member Velázquez, for holding this hearing. I also want to thank all of today's witnesses for appearing today. It is an important hearing. We have been working on this exact issue in the Natural Resources Committee on which I am also a member.

It is important that we also examine how burdensome regulations harm America's small businesses. It is easy for multinational corporations to hire an army of lawyers to handle regulations. It is here where we need to advocate for small businesses.

Mr. Howard, my question is for you. Regulatory overlap between agencies can cause confusion for businesses and complicates the permitting process. How do you think agencies should decide which agency is the lead agency with overriding authority when multiple agencies disagree?

Mr. HOWARD. The Balkanization of authority within the Federal Government and among the different levels of government makes trying to get permits, and indeed, trying to comply with regulation, a form of chaos. It is anarchy. There are no clear lines of authority to resolve disagreements among different agencies. The laws are so dense that the President of the United States does not have the authority right now to resolve these disagreements.

In every area of regulation there should be an overarching authority through the executive branch to resolve disagreements. The FAST Act set up a 16-agency steering council to resolve disagreements. I asked when they were doing it how long it would take to schedule the meeting and what happened if people did not agree. There is no clear line of authority up to the president to resolve that disagreement.

Common Good has proposed three pages of amendments to the FAST Act, which among other things would give the chairman of the Council of Environmental Quality the authority to decide all issues about scope and adequacy of environmental review and would give the president, or whoever he designates, the authority to resolve those disagreements. Without that authority, what you
get is bickering between Fish and Wildlife and the Corps of Enginee
Mrs. RADEWAGEN. Can you explain how a one-stop shop Fed-
Mr. HOWARD. The one-stop shop has applied very well in other
countries. Germany, for example, designates one agency, whether
it is a State or a Federal agency there depending on the project to
give the permit. They still have to comply with law, but they have
ultimate authority to make the decision. Germany, which is
thought to be a greener country than the United States, issues per-
mits and complex projects within 1 to 2 years.
A one-stop shop is simply allocating authority to an agency or to
the White House and with whatever checks and balances Congress
chooses to put in it, oversight by someone else, and everyone still
has to comply with law, so there are judges and courts in the back-
ground. But today, the authority is even. Every agency is equal to
every other agency. They are each complying with their own regu-
lations. They each have their own goals. And that is why it takes
months and years to get really obvious approvals often.
Mrs. RADEWAGEN. Thank you, Mr. Chairman. I yield back.
Chairman CHABOT. Thank you. The gentlelady yields back.
The gentlelady from North Carolina, Ms. Adams, who is the
ranking member of the Subcommittee on Investigations, Oversight,
and Regulations, you are recognized for 5 minutes.
Ms. ADAMS. Thank you, Mr. Chairman. And thank you to our
Ranking Member Velázquez as well. And thank you all for your
testimony. This question is to the entire panel.
The National Federation of Independent Business does a regular
survey of small businesses, but I find it particularly interesting
that their server results show that complaints about regulations
are relatively consistent through economic booms and conservative
presidents that prioritized deregulation. For instance, the shared
concern about regulation under President Obama was about 13.9
percent. It is not substantially higher than under George W. Bush,
which was 9.9 percent and 11.0 percent; or Ronald Reagan's second
term, which was about 12.8. And one would think that regulatory
concerns would have significantly decreased under Reagan and
Bush since neither of those were known for being fans of big gov-
ernment.
So my question to all of you is why are regulatory concerns con-
sistently cited?
Ms. DORFMAN. I believe that there are challenges with regu-
latory concerns. However, the issue is that because they are not
being addressed, getting through the permitting or those sorts of
things because there is not funding for the Federal agencies to
make sure things are expedited, that those are what would create
it. As you said, it was kind of inconsequential from one party to
the other, but what I think the overarching is, is that there is al-
ways a lack of speed and expedited service.
Ms. ADAMS. Okay.
Mr. Hayden?
Mr. HAYDEN. Congresswoman, I guess an example I would give
is just a frontline practical example. Ranking Member Velázquez
mentioned common sense. And in our example, we were trying to move a power line outside of the forest and bring it out to road right-of-way. In that first example I gave in my testimony, the area under analysis had already had a telecommunications line buried in that. So rather than doing this full-blown analysis, would it not make sense to be able to go to a file and look at the analysis that had been done previously?

We have since submitted a second application and that application seeks to bury a power line in a highway road right-of-way. That ground has been disturbed by bulldozers when the road was built, and it just does not make sense that this thorough analysis has been done.

And I will give one final example. We got a bill for $8,000 to do that first analysis in the example I gave. That indicated that 10 people had spent an average of 2.3 days on the project. So 18 months, 2.3 days, even if that was sequential, it should have been much shorter.

Mr. HOWARD. Under each of the Republican presidents you mentioned, and I was involved in advising all of the last four presidents, including starting with Clinton and Gore in reinventing government, the basic approach was to prune the jungle. Let’s go in and get rid of stupid rules. But what they did not do is create the authority mechanisms that allowed Mr. Hayden to call somebody up and say this ground has already been disturbed. It makes no sense whatsoever to wait a long time. Can I please have permission to bury this line? No one in the government thinks they have that authority.

Ms. ADAMS. Okay.

Mr. HOWARD. And so until you actually shift from a command and control, what do the rules require, to give somebody the job of actually asking what is common sense here and being transparent about it, you know, saying here is why we made the decision, American voters will increasingly be frustrated at Big Brother. They are not frustrated because we are protecting clean water or protecting the forest; they are frustrated because they cannot get an answer and it is taking them months to do something that ought to take a day.

Ms. ADAMS. Okay. Mr. Griesemer, would you like to comment?

Mr. GRIESEMER. Yeah, I would just echo that I have not, regardless of which administration we have been under, there has not really been a reduction that I am aware of of any other volume of regulations. The Code of Federal Regulations is just a massive thing, regardless of whether you are talking environmental, safety and health or what area. It seems to be almost immune from any kind of political influence as far as deregulation. They do cut some things and try to streamline, but we are not seeing the effect at the small business level.

Ms. ADAMS. All right. Thank you. Thank you very much. I yield back.

Chairman CHABOT. Thank you. The gentlelady yields back.

Mr. Blum, before we get to you, the chair would like to make a suggestion. We have four more questioners and we are expecting votes at any minute. We are actually over now. Rather than have
to come back or cutting off—there it is right now—I was going to suggest that we go to about 3 minutes each if that would be okay.

Mr. Blum, you are recognized for 5 minutes. Thank you.

Mr. BLUM. Thank you, Chairman. Thank you to the panelists for being here today.

Mr. Howard, you said you were involved in the Clinton-Gore Re-invent Government effort, is that correct?

Mr. HOWARD. Yes, sir.

Mr. BLUM. Is this the government you all invented?

Mr. HOWARD. No, it actually got invented before. They just did not quite succeed in reinventing it.

Mr. BLUM. The Competitive Enterprise Institute estimates the cost to U.S. businesses for regulations is approach $2,000 billion a year, $2 trillion a year, and most of that is not legislated. Most of that is developed by unelected, career bureaucrats without a vote being held in the United States Congress. Those bureaucrats report to not one voter. This is why I support adamantly the REINS Act which has passed the House of Representatives, but is still, like a lot of legislation, in the U.S. Senate.

I would like to hear anyone from the panel, particularly Mr. Howard, on how do we solve this dilemma? I mean, these are unelected bureaucrats forcing trillions of dollars of cost onto United States businesses. What do we need to do as a Congress? I think the REINS Act is a great step in the right direction. I would love to hear your thoughts.

Mr. HOWARD. First, you are correct. I agree completely that Congress should have ultimate responsibility for regulations that are just delegated lawmaking. So Congress should take responsibility for the success of regulations, as well as for statutes.

Now, just to push back a little, I do not remember the last time Congress had hearings to go through the statutes that were passed that authorized a lot of these regulations to say should we clean up those statutes? So the REINS Act, it seems to me if you are going to take responsibility, it should be for the statutes as well as for the regulations.

The President used to have authority over public employees. The Civil Service System—I have written extensively, I will talk to you about it offline—needs to be overhauled both to encourage better workers and to make people accountable when they do not have common sense, when they use bad judgment, when they are mean-spirited, and that would go a long way toward making the unaccountable regulators, if you will, at least somewhat accountable.

Mr. BLUM. Thank you. I will yield back my time, Mr. Chairman.

Chairman CHABOT. Thank you very much. The gentleman yields back.

The gentleman from South Carolina, Mr. Norman, is recognized for 3 minutes.

Mr. NORMAN. Thank you, Mr. Chairman. I will be brief because we have to go vote.

But let me just say I have been on both sides. I am a developer. I have been held hostage by the one-eyed bat, by the Hilltop Wood Splitter. I have been in the political arena. Let me just suggest, when we tried to get these businesses to name the specifics of the rules that are costing them money that are redundant, they were
scared to do it because their philosophy was it is going to get worse. I do not want it to take longer. So I would suggest to get involved more because you are talking, and I have seen from the political arena, you are talking either a lot of people, business people cannot get involved because you do not have the time, but you need to get your people, Mr. Griesemer, your NSSGA, to really get involved and get with us because I can tell you, the people coming to my office wanting more regulations on a State level and a national level far exceed the businesses that come to say stop it.

But we do not know what we do not know. And see, you are talking to a lot of people who are not in the business arena. I am. So get active. Let people who are business minded. And if you do not—I have heard over and over, I do not have time. I do not have time. Well, it is costing you a lot of money as I have heard and it is redundant.

So I put the burden back on you all to get active. To get from a local level on up to my level, get active. And a lot of times the chamber is not going to get involved because they are a lot of bureaucrats who are not interested in rocking the boat. It is time to rock the boat, and we have a president now who is willing to do that. I yield back.

Chairman CHABOT. Thank you very much. The gentleman yields back.

And the gentlelady from Puerto Rico—and I would, before recognizing her, I would just note that the chair early on expressed the Committee's sympathy and concern both for the ranking member and yourself for your constituents and family members who may be adversely impacted as we speak by Hurricane Irma. And the gentlelady is recognized for 3 minutes.

Ms. GONZALEZ-COLON. I want to thank you, Chairman Chabot, for your willingness to cooperate with the situation, and the ranking member, for their concerns about the Hurricane Irma. It is the worst hurricane ever that is hitting the Caribbean, the U.S. Virgin Islands, and Puerto Rico. We are talking about 185 miles per hour. So never before have we had this kind of impact.

And this issue that we are discussing today and the votes that are taking place at the same time are issues that are very important for the island in terms of how to improve our economy.

Because of the time I will make just two questions. One of them is that the President on January 24th released a memorandum titled “Streaming, Permitting, and Reducing Regulatory Burdens for Domestic Manufacturing.” In this memorandum the executive departments and agencies are directed to expedite reviews and approvals for construction and manufacturing facilities while also reducing regulatory burdens affecting domestic manufacturing. In that memo there is no specific reference to the territories or even Puerto Rico. Do you understand that the territories and Puerto Rico should be included in the definition of that kind of regulation? That is an open question for the panel.

You need to say yes.

Mr. GRIESEMER. Yes.

Mr. HOWARD. Yes.

Mr. HAYDEN. Yes.

Ms. GONZALEZ-COLON. Thank you for voluntarily saying that.
The second question will be regarding Mr. Howard. As you know, the National Environmental Policy Act requires that all major projects with Federal nexus to submit a comprehensive review of the potential environmental impacts. Currently, the Government Accountability Office reported that the administration did not know how much time it spent on environmental reviews, but they estimate that time in 4.6 years took place in terms of the span of completing the average environmental impact statement. In your opinion, how could that number be more efficiently worked if we got a one-stop Federal permitting system expediting the process?

Mr. HOWARD. Without question, the missing link in shortening and focusing environmental review is that there is no official, no environmental official, who has the authority to make the judgment, what is important in this project. Recently, there was a tunnel to be built under the Hudson River, really important tunnel that needs to get built immediately because the two existing tubes were damaged by Super Storm Sandy and they can collapse at any moment and when they do, there is gridlock for the entire metro area of New York. They were being held up by environmental review for a tunnel. It did not matter how they built the tunnel. It would be better for the environment. But no one had the authority to say get moving. You need to have that authority somewhere.

Ms. GONZALEZ-COLON. Thank you, Mr. Chairman. I yield back.

Chairman CHABOT. Thank you very much. And the gentlelady yields back.

We want to thank the panel very much. I am going to withhold my closing statement, which was profound and well written, et cetera, and thank you.

You all have shed a lot of light on what we need to do to have a much better permitting process and how it adversely, especially, affects small businesses.

I would ask unanimous consent that members have 5 legislative days to submit statements and supporting materials for the record.

Without objection, so ordered.

And if there is no further business to come before the Committee, we are adjourned. Thank you very much. Got to go vote.

[Whereupon, at 12:16 p.m., the Committee was adjourned.]
Chairman Chabot, Ranking Member Velázquez, and Members of the Committee:

Thank you for inviting me to testify before the Committee today about streamlining federal permitting to reduce the regulatory burden on small businesses. Small businesses play an indispensable role in American culture and commerce but are burdened by the dense regulations that have built up over the past five decades. They do not have the time and resources to understand, much less comply with, the many requirements.
Getting a permit to start a business, or to build anything, requires going to multiple agencies, often at federal, state, and local levels. These agencies rarely coordinate their requirements. Often their demands are duplicative, and sometimes conflict with one another. Nor do they honor the practical implications of the regulations—not the costs, time constraints, or diversion of energy.

The regulatory burden on small business extends far beyond requirements to apply for specific permits: Regulatory compliance itself is a form of mandatory permitting because a small-business owner cannot do business without it.

As I will discuss, Congress should advance its interest in promoting small business by examining the permitting and regulatory burdens imposed by state and local law as well as federal law. A new regulatory framework is needed to meet public regulatory goals in a way that is practical for people running small businesses. Small businesses need a separate, simpler regulatory system, focused on meeting regulatory goals, not rote compliance with detailed specifications and prescriptions. Government should make permits and licenses accessible to real people with a “one-stop shop.” I propose principles to frame a regulatory overhaul and specific initiatives to set that overhaul in motion.

**Small Business is the Driver of American Prosperity**

Small businesses are critical, first, because they are the largest part of the U.S. economy. Companies that have fewer than 500 employees are collectively responsible for almost half of the total GDP and more than half of all sales in the United States.

Small businesses are also the incubator of big businesses—a kind of wetlands which spawns innovation. According to the Kauffman Foundation, the net increase in jobs since 1980 is entirely attributable to newly-started businesses.

Small businesses also provide an open door by which Americans can achieve self-determination and ownership, which is important far beyond its economic consequences. America is the land of opportunity in large part because of its receptivity to individual initiative.

But the pace of growth has slowed: 11 percent fewer businesses opened their doors in 2013 than in 1980. The disjointed regulatory framework is a powerful disincentive to entrepreneurship. According to 2017 World Bank rankings, the U.S. ranks 51st in the world in ease of starting a business. By many accounts, regulatory compliance costs are overwhelming for small businesses. The U.S. Small Business Administration found that companies with fewer than 20 employees faced regulatory costs per employee that were 36 percent greater than the cost for larger firms.

Studies suggest that most of these costs are attributable to federal regulations: 58 percent of small-business owners responded in a 2017 survey that federal requirements are the most burdensome for their business. Nearly half of small businesses report spending more than $10,000 annually on federal companies, with 11 percent spending more than $40,000 in total per year.
The amount spent on compliance does not include the diversion of time of small-business owners and managers towards numerous compliance-related tasks. The paperwork can take one or two hours per week, but the opportunity costs include the constant distraction of worrying about what might be required. 42 percent of small-business owners say that they have delayed or halted business investments due to the uncertainty about existing requirements, while 39 percent did so because of the uncertainty related to a new, pending regulation. *Inc. Magazine* reports that 545 federal regulations affecting small business were issued in 2015 alone.

**America's Flawed Approach to Regulation**

The onerous burden of regulation is typically met with calls for de-regulation. When push comes to shove, however, most Americans want government oversight over clean water, safe workplaces, and caring nursing homes.

The core flaw of American regulation, in my view, is that it leaves no room for practicality: Bureaucratic detail suffocates everyone, including the regulator. There's no room for balancing different considerations, or, indeed, even for a discussion on what's sensible. Public goals are irrelevant; what matters is compliance with thousands of rules—an impossible task even for large businesses.

Getting permits is the threshold requirement for doing business or constructing infrastructure or buildings. Over the past 50 years, myriad licenses have been required—most for good reasons, such as compliance with fire codes or environmental goals, and some for anti-competitive reasons, such as onerous requirements to get a license to be a hairdresser. In some states, a barber or cosmetologist needs ten times as much training as an emergency medical technician.

Government rarely coordinates all these permitting requirements. The budding entrepreneur is expected to run a gauntlet of different agencies without so much as a roadmap of where to go. Mayor Michael Bloomberg found that opening a restaurant in New York City required permits from as many as 11 agencies. A prospective lessor in Washington, DC must file five forms with three different agencies to obtain permits to rent out a condominium. Sometimes the requirements are duplicative: Getting certified as a home care worker in New Jersey, for example, requires the same background checks and fingerprinting by two different agencies, adding unnecessary costs and delay before being able to work.

Disjointed permitting and regulation impose painful and unnecessary costs on all Americans. The inability to rebuild America's decrepit infrastructure is a case in point. The accretion of well-meaning review and permitting requirements from all levels of government results in delays of upwards of a decade on major projects. In my 2015 report, “Two Years, Not Ten Years,” I found that a six-year delay more than doubles the cost of projects. I also discovered that lengthy environmental review is often harmful to the environment, because it prolongs fixing traffic bottlenecks and inefficient power grids. These delays hurt small construction companies by de-
trending valuable projects and hurt small business generally by imposing unnecessary blackouts, traffic jams, shipping costs, and other effects of outmoded infrastructure.

The delays in infrastructure permitting are generally not the result of “over-regulation”—greener countries such as Germany give permits in one or two years. The delays are caused by the balkanization of approvals among multiple agencies at all levels of government. A project to raise the roadway of the Bayonne Bridge, for example, required 47 permits from 19 different agencies. The project had virtually no environmental impact, because it used existing bridge foundations, but still required an environmental assessment of 20,000 pages, including appendices. This is not good government; it is regulation devouring the public good instead of enhancing it.

Over the past 50 years, American regulation has grown into a dense jungle of uncoordinated requirements. It fails not because the goals of, say, environmental review or worker safety, are invalid, but because it tries to meet those goals with thousands of detailed dictates emanating from scores of different regulatory agencies. It suffers the mindlessness of central planning—not allowing people to adapt to practical problems on the ground. But, worse, there is not one central planner, but dozens who often make inconsistent demands. Worse still, all those central planners are dead; they wrote the laws and regulations decades ago, and small business must comply even if the rules make no sense anymore.

Studies suggest, for example, that worker safety rules often have had little impact on worker safety. This doesn’t mean the federal government should not oversee worker safety. It means it should replace the micro-management model with a goal-oriented oversight that focuses on results. It truly doesn’t matter if “material safety data sheets” for common workplace products—say, soap and cleaning products—are kept in plain view. How do we expect someone running a small business to keep straight that and thousands of other requirements?

A fundamental flaw in America’s regulatory structure is that no one is in charge. There’s no one with the responsibility to ask, “What’s the right thing to do here?” No one in government has the job of balancing the demands of different agencies. No one has the job of giving a small business a permit. Instead, American regulation is a dense legal jungle, impenetrable to all except large companies with legal staffs of hundreds of lawyers.

Making Regulation Practical for Small Business

What’s needed is a broad overhaul—replacing command-and-control dictates with radically simpler regulatory goals, with clear lines of authority so that citizens do not get whipsawed by conflicting or duplicative requirements.

For small business, the threshold question is the practical ability of a real person to deal with myriad public goals. Government must respect the limited time and resources of Americans who have the spirit and resourcefulness to start businesses that keep America going. It must make clear its goals and allow small business own-
ers to use their common sense in achieving them. The result will be greater compliance with crucial societal norms.

To succeed, regulation must also be understandable. Clear and concise principles and expectations must replace dense instruction manuals. If the language is too complex and voluminous, it undercuts compliance rather than ensuring it. There will always be disagreements, but instead of fights over the parsing of words in Section 526(v)(2), let them argue over the best way to accomplish public goals.

A simpler system requires giving officials the authority to make decisions. This is our choice: either a jungle of thousand-page rulebooks, or a simplified framework where officials make choices to give permits and make regulatory decisions. These choices can be readily second-guessed by other officials, and ultimately by courts, but there’s no other alternative. The only cure to dense bureaucracy is human responsibility.

Accepting the role of human responsibility requires overcoming myths that drive bad decisions from both sides of the aisle. The liberal myth about the current regulatory system is that detailed rules make sleazy operators do what’s right. But the current system is so dense that enforcement is haphazard, and encourages bad operators to ignore the rules altogether.

The conservative myth is that detailed rules deter officials from exercising arbitrary power. But when laws are unknowable, and demand impractical perfection, regulators wield arbitrary power: a business with exceptional worker safety may be penalized for paperwork violations. Lawyers step in where regulators have left off, bringing lawsuits for minor infractions of detailed specifications that do little to advance desired public goals. A small business was sued for ADA noncompliance after installing a soap dispenser an eighth of an inch above the prescribed height for use by someone in a wheelchair.

**Replacing the Regulatory Jungle**

Every president since Jimmy Carter has tried to prune the regulatory jungle. But pruning a jungle is a fool’s errand. It is too dense. The internal logic of trying to tell people exactly how to comply means that the red tape will immediately grow back.

Small businesses almost universally call for a new paradigm for government regulation. In a 2012 survey conducted for Common Good by Clarus Research Group, 86 percent of small-business leaders said that regulations would be more effective in protecting public health and safety if they gave “clear, certain goals” and “more freedom to use common sense in making daily decisions.”

There is also widespread public support for this approach. A national survey of voters conducted in May 2017 also by Clarus Research Group found that 62 percent of voters favor making “laws that give civil servants basic goals and principles on how to do their jobs along with the flexibility to work out the details on their own.” 56 percent of Republicans, 63 percent of independents, and 67 percent of Democrats agree.
It is time that Congress heeded their call. Here are three initiatives that would move forward a new simplified regulatory regime, which honors the human scale and capacity of small business:

1. **Pilot projects for simpler goal-oriented regulations.** Congress should appoint an independent commission to design pilot projects to test simpler goal-oriented regulations for small businesses. Thee pilots could, for example, consolidate into one department all federal, state, and local compliance related to employees: Fair Labor Standards Act, workers' compensation, unemployment insurance, etc. This oversight agency could readily be a state agency, and Congress could condition federal funding on such efforts at the state level. The commission could also identify duplicative and obsolete laws that need to be repealed, such as licensing requirements that mainly serve as barriers to entry for new businesses.

2. **Establish one-stop shops for permitting.** Government should do the work of coordinating different agency demands, not require aspiring entrepreneurs to trudge from agency to agency. Congress could create a pilot project for a coordinating department, perhaps within the U.S. Small Business Administration, which would act as the point of contact for small businesses needing a federal permit. Because different agencies often disagree, Congress could also create clear lines of authority up to the White House, to make sure applicants get a decision on a timely basis.¹

3. **Privatize enforcement.** No level of government has sufficient resources to check on the over 29 million small businesses. Similarly, few small businesses have the capacity to understand certain complex areas of regulation, such as environmental regulation. A solution here might be to create a safe harbor for businesses that receive a regulatory compliance letter. Just as most businesses have financial auditors who bless their books, they could have a “certified regulatory expert” to monitor their compliance and issue compliance letters. These regulatory experts could work with the business to make sure that they are in substantial compliance.

The spirit of America arises from the sense of personal ownership of life’s choices. It is this ownership that empowers people to innovate, to take risks, and to pick themselves up when they fail. Today, it is hard for anyone to accomplish anything without a huge legal staff. The American can-do spirit is bogged down by the accumulation and complexity of regulatory requirements.

The solution is not to abandon important regulatory goals, but to dredge out the regulatory muck and replace it with buoys that make sure people stay within accepted channels. A new simplified system of regulation will not only reduce the monetary costs imposed on small businesses, but open the door, now blocked by countless rules, to the deep store of creativity that resides in current and prospective small-business leaders.

¹ In New York City, the NYC Business Acceleration Team helps fledgling food and beverage businesses navigate the city’s regulatory system. A similar program was created in Los Angeles that cut the time that restaurants spent on the permitting process in half.
Thank you for this opportunity to appear before you.
STATEMENT OF
LOUIS GRIESEM, SPRINGFIELD UNDERGROUND
ON BEHALF OF
THE NATIONAL STONE, SAND, & GRAVEL ASSOCIATION
BEFORE THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON SMALL BUSINESS
HEARING ON
EXPEDITING ECONOMIC GROWTH: HOW STREAMLINING FEDERAL PERMITTING CAN CUT RED TAPE FOR SMALL BUSINESSES
WASHINGTON, D.C.
SEPTEMBER 6, 2017
Chairman Chabot, Ranking Member Velázquez, and members of the committee, thank you for inviting me to testify at this hearing on behalf of the National Stone, Sand & Gravel Association, (NSSGA), on how streamlining federal permitting can cut red tape for small businesses and expedite economic growth.

The National Stone, Sand & Gravel Association and Industry

NSSGA is the world’s largest trade association by product volume representing the mining industry. There are 10,000 construction aggregates businesses across the United States. These are located in every state and nearly every congressional district. More than 70% of NSSGA members are small businesses. It is an industry that directly employs over 100,000 people, and each of those 100,000 jobs indirectly supports an additional 4.87 jobs throughout the economy. Overall, NSSGA member companies represent more than 90% of the crushed stone and 70% of the sand and gravel produced and consumed annually in the United States. NSSGA’s primary concern is a full-funded, robust highway trust fund. While nothing can take the place of these critical federal funds, regulatory over-reach can cause costly project delays, so regulatory reform is of great importance.

The United States annually consumes approximately 2.8 billion tons of aggregates annually. Crushed stone, sand and gravel typically make up over 80% of ready mixed concrete and over 90% of hot mixed asphalt. On a four-lane road, for example, one lane alone requires an average of 38,000 tons of construction aggregates for every mile. Aggregates are used in nearly all residential, commercial, and industrial building construction and in most public works projects, including roads, highways, bridges, dams, and airports. A new school or hospital typically requires 15,000 tons of aggregates in its construction. Aggregates are used for many environmental purposes including: treating drinking water and in sewage treatment plants, for erosion control and in cleaning air emissions from power plants. While Americans take for granted this essential natural material, it is imperative for construction.

Unlike other businesses, we cannot simply choose where we operate. We are limited to where natural forces have deposited the materials we mine. Not every aggregates deposit meets the stringent standards set by the Federal Highway Administration (FHWA) and state Departments of Transportation (DOTs) for use in federal or state projects. So, our operations are limited to areas that are near cities and roads where they are needed. Generally, once aggregates are transported outside a 25-mile limit, the cost of the material can increase 30 to 100% in addition to creating environmental and transportation concerns. Because our product is so heavy, over 90% of aggregates are used within 50 miles of their original location, making our industries’ businesses uniquely tied to their community.

The aggregates business can be described as making small rocks out of larger ones. We extract material for processing into crushed, sized, and washed stone. For safety and efficiency purposes, our op-
erations tend to utilize large parcels of land that must be located where quality rock naturally occurs. Our operations are heavily regulated before, during and after extraction. Our primary waste is finer crushed rock or dust from processing. For this we must perform a number of “one size fits all” controls required under air and water permits. Our facilities are routinely monitored to ensure we are operating in a safe and environmentally responsible manner. Some of the requirements make sense and others do not, particularly for small businesses.

It gets even more complicated when we need to expand our operations, open a new or temporary operation, or merely do minor construction work at a site to upgrade our facilities to provide needed material for crucial infrastructure projects. A host of federal requirements come into play, among them the Clean Water Act, the Endangered Species Act, and the Historic Preservation Act. These statutes often require businesses to prove that we should not fall under their jurisdiction. A “regulated until proven otherwise” approach is very costly and difficult for any business, particularly a small company like mine, without the resources for dedicated compliance staff that larger corporations employ. This is not an efficient use of resources for either the company or the agencies, and punishes the businesses who are trying to comply and care deeply about safety and the environment. It also shifts limited federal enforcement dollars away from actually protecting the environment.

**Springfield Underground**

I am a past chairman of NSSGA and have worked in the industry since 1977. I appear today to stress the negative impact that excessive regulation has on small businesses like mine. My family’s business was started in 196 by my father and uncle, who discovered limestone while digging a farm pond and recognized the need for road material in nearby Springfield, Missouri. Springfield Underground now employs 43 people, and in addition to supplying construction aggregates, we also use our former underground operations as cold storage for major corporations such as Kraft, Heinz, and Cargill. Like me, some of our employees are the second or third generation of their families to work at Springfield Underground.

I want to be clear that I am not against regulation, nor is NSSGA; in fact, as the co-chair of the Mine Safety Health Administration-NSSGA Alliance, I have led cooperative discussions with MSHA to develop and disseminate education and training materials intended to boost workplace safety and health for ten years. The MSHA-NSSGA Alliance is the first alliance MSHA ever entered into and is also its most active alliance. It has been very productive in terms of training programs for increased safety and efficient use of government and business resources. Last year, the industry finished with an injury incidence rate of just 1.95 injuries per 200,000 hours worked; the 16th year in a row in which our sector achieved a lower rate than in the prior year. We have found that we can accomplish more by working with agencies, rather than having just a “command and control” relationship. Unfortunately, not all my experiences with federal agencies have been as
positive. In too many cases, agencies unnecessarily slow down projects.

The Small Business Administration estimates that regulations cost 36% more for small businesses per employee than for larger companies. At Springfield Underground, we simply do not have the resources that larger corporations use to comply with confusing and overlapping regulations. We support efforts to reform the regulatory environment, recognizing that any reform is likely to benefit small businesses greatly because we suffer the most under the current structure.

**Infrastructure Depends on Aggregates, but Federal Requirements Hamper Us**

Through its economic, social and environmental contributions, aggregates production helps to create sustainable communities and is essential to the quality of life Americans enjoy. Aggregates are a high-volume, low-cost product. Because so much of our material is used in public projects, any cost increases are ultimately borne by the taxpayer. When aggregates producers are finished using the stone, sand or gravel in an area, they pay to return the land to other productive uses, such as water reservoirs, residential developments, farm land, parks, nature preserves, or in our case, underground storage.

On the federal level, we fall under regulations by the Department of Labor, Environmental Protection Agency, Fish and Wildlife Service and the Army Corps of Engineers. The Department of Homeland Security and the United States Treasury Department also regulate us because we engage in blasting. At the state level, we obtain approvals from state agencies for air and water quality permits and mining and blasting permits. At the local level, multiple layers of land use approval are required before we can open a new facility or even expand an existing one. But I don’t want to complain about reasonable regulations that have defined benefits and are enforced fairly. The members of our industry comply every day with safety and environmental regulations that we support wholeheartedly as an industry. There are, however, regulations that provide no demonstrable public benefit, that delay or kill projects, and that cost many good jobs in construction and related fields. As government is the largest consumer of construction aggregates, the cost of excess regulation falls on the American taxpayer.

In particular, the application of the Endangered Species Act (ESA) and what constitutes a Waters of the United States have been expanded far beyond what Congress intended, and more often than not these act as an impediment to any development. For example, Section 7 ESA consultation by the Fish and Wildlife Service (FWS) is open-ended and lacking procedural guardrails that can be relied upon to define the scope, sequence and timing of agency review and action. Even when all the required information is provided, the FWS can take months or years to reach a decision. Permits in the U.S. take far longer to obtain than other developed countries, and the ESA is a major culprit. The ESA process has be-
come a true impediment to any sort of development through a lack of timely response by FWS employees, who can delay projects significantly.

As previously mentioned, these problems are exacerbated with small businesses, because we do not have the same resources as large corporations to handle these issues. Small businesses have to run this overwhelming gauntlet of regulation, and it can cost jobs with very little (if any) benefit.

**Examples of Federal Requirements that Harm Business**

Small businesses like mine that have projects stalled over the ESA sometimes don’t even involve the presence of endangered species, and can create a domino effect that hurts other businesses and citizens alike. In our case, we had approved plans from our city for an expansion of our tractor-trailer parking lot. When a state road contractor needed a place to dispose of crushed pavement from repaving MO Highway 65 in Springfield, we contracted with them to take the material as fill for this parking lot. This material had to be removed from the road so that repaving of an important artery in Springfield could occur. Highway 65 not only is the major commuter highway to Christian County (fastest growing county in Missouri), it is the tourist route to Branson from Interstate 44. The Missouri DOT put incentives in place for rapid completion. We applied for a land disturbance permit that was delayed, first by FWS, but then even longer by the Missouri Department of Conservation, who both required a study to determine if we were in a breeding area for the endangered bat. The habitat that we would potentially destroy amounted to a dozen trees and some brush. The permit was delayed by four weeks. It seems reasonable that this small area could have been excluded in a shorter period of time, while balancing the need for retaining habitat.

That’s an eternity for a state highway project like this. Finally, after all this, the Missouri Department of Conservation determined that we are not in a bat breeding zone. This may not seem like a long delay, but consider that lanes were closed and a major long-term road improvement could have been unnecessarily delayed, creating a ripple effect that impacts nearly all other businesses and citizens in the area due to commuting delays.

Sometimes NSSGA members agree to unreasonable conditions rather than accept long delays. One small business agreed to $125,000 of mitigation at another site in order to proceed with a project rather than have the project be delayed indefinitely by having a permit application be put into pending status by FWS. That was a significant financial burden for a small family-owned business, but had to happen so that commitments to highway departments and other customers could be met. This is a case of a business agreeing to an agency’s incorrect assessment in order to proceed.

Another NSSGA member has faced a delay of eight years waiting for the issuance of a Biological Opinion by FWS. This project involved an open engagement process involving meetings between federal agencies and local wildlife groups. The permitting process
and mitigation requirements for species compensation reduced the project size from 1,100 acres to now less than 400 acres. This process led to a finalized group consensus years ago, but the assigned FWS biologist has repeatedly delayed finalization of the biological opinion. This is a project that has met relevant criteria, and has cost the significant investment in money, time and other resources by the member company, but has not been allowed to proceed.

In another example, a member worked diligently to protect the habitat and the listed species on a site, but has faced a delay of over a year waiting for an incidental take permit for a facility expansion. These delays harm not only the companies producing building materials and the infrastructure projects that rely on them, but also delay important conservation efforts.

NSSGA supports the administration’s withdrawal of the 2015 Waters of the United States Rule, which would have radically expanded jurisdiction under the CWA to include areas suspected of only tenuous connections to navigable waters. While the agencies’ decision to return to the “pre-rule” status quo once the 2015 rule is rescinded is not an ideal long-term solution, the action at least restores the guidance that aggregate operators are familiar with while the agencies work to develop a rule that provides clarity and certainty. While the 2015 rule would have cost aggregates operations millions of additional dollars in mitigation to expand or open new facilities, the current system is cumbersome and lengthy. Like ESA consultation, determining applicability under the CWA can create confusion and delays which are particularly burdensome for small businesses.

The water on our site contains only natural dust, but under the CWA is called “process” water and requires a CWA/National Pollutant Discharge Elimination System (NPDES) permit for discharge, which sets strict limits on what can be in the water. We work to recycle this water and use it for dust suppression as part of our air permit required by the Clean Air Act. These permits are handled by the state, but the state permits are approved by the EPA. One of our sites was audited by EPA and warned that there were no signs designating the outflow points on our property, even though this is not a requirement of the state permit. This is just the sort of federal “check the box” requirement that does not improve the environment, but rather creates needless work and cost for small business.

Our air permit requires that we apply 100 gallons of water per day for every 1000 square feet of unpaved area unless it is freezing or unless 1/4” of rainfall has occurred. In the spring and in the fall in Missouri it is cool and humid enough that the ground doesn’t dry out and create dust, yet we still have to comply with this requirement. Putting that much water down creates a sticky mess that clings to truck tires. We then have to provide wash stations so the trucks don’t track that out onto the public roads. This site is also close enough to the Springfield-Branson National Airport that the Federal Aviation Administration doesn’t want us to impound water that will attract migratory birds that could affect planes taking off and landing. Of course, that leaves us without
sufficient water supply for our water trucks in the summer time when it is most needed. This is just one example of where multiple, conflicting requirements cause problems that cost additional money to solve, again, without helping improve the environment.

While we have had success working with the Mine Safety Health Administration, numerous programs and requirements could be improved, particularly those that impact small businesses. The industry has a great safety record and we want to make sure every regulation has a demonstrable effect in improving safety or the environment.

To summarize, businesses like mine are put into impossible situations, such as trying to prove a negative, while federal agencies can stop projects nearly at will under the guise of authority under CWA or ESA.

**Suggestions for Improvement**

Congress and the administration have come up with some great ideas for cutting red tape, and I would urge you to move forward with some of these. In particular, NSSGA supports:

1) Look at the impacts to small businesses beforehand: The Small Business Regulatory Flexibility Act should be expanded to include the Fish and Wildlife Service and the Mine Safety and Health Administration’s rules so that impacts to small businesses must be evaluated for major rules in the same way that rules for EPA and OSHA are evaluated. SBREFA should be strengthened by not allowing agencies to improperly claim their rules do not meet the threshold, in addition to other reforms.

2) Improve the permitting process, deadlines and transparency: Currently small businesses often feel they are guilty until they prove themselves innocent and agencies are not accountable to respond to them in a timely fashion, or multiple agencies have overlapping requirements. The environment and worker safety an still be protected or even improved by making the process more transparent, timely and less adversarial.

3) Agencies should be held accountable: Just as businesses are accountable, so should agencies. Congress should ensure that they are fulfilling their core functions under the appropriate acts, while not promulgating unnecessary burdens and delays on industry.

4) Reform efforts should be continuous: Periodic review of rules should be required as well as updating outdated statutes to better respond to changing conditions.

We support reasonable regulation, based on science, that preserves our natural resources, protects our environment and ensures the safety of our employees and neighbors. We are opposed, however, to overreaching regulation that hurts our businesses and by extension, infrastructure. I appreciate this opportunity to speak on how streamlining federal permitting could help small businesses like mine, that are the lifeblood of our nation’s economy. Thank
you, Mr. Chairman, and I will be happy to respond to any ques-
tions.
Good morning Chairman Chabot, Ranking Member Velázquez, and members of the Committee, my name is Mark Hayden, and I am the General Manager of Missoula Electric Cooperative (MEC) in Missoula, Montana.

Thank you for the opportunity to testify today, and allowing me to share my thoughts on how streamlining federal permitting can cut red tape for small businesses. Missoula Electric Cooperative is a proud member of the National Rural Electric Cooperative Association, the Montana Electric Cooperatives’ Association, and the Northwest Public Power Association. By way of background, MEC is a consumer-owned electric utility serving the electric distribution needs of approximately 15,000 meters in Western Montana and Eastern Idaho. Our workforce includes 41 skilled and dedicated employees committed to serving the energy needs of our member-owners. The nearly 2,000 miles of distribution line that we maintain deliver energy to some of the most wild and scenic locations in the country—286 miles of which cross federal land.

For me, the timing of this hearing could not be more appropriate. The wildfires burning in Western Montana are having a devastating effect on our state and local economies. Currently five active fires have burned nearly 250,000 acres in, or adjacent to, MEC’s service territory, and personnel totaling nearly 2,500 are protecting lives and property on many fronts. Lives have been lost, homes have been lost, and hundreds of resident evacuations due to the threat of fire, including my own family. In the small community of Seeley Lake, smoke concentrations have hovered in the hazardous range for weeks, and a lake normally bustling with summer recreationists has been closed to allow aircraft access to the precious fire-fighting water resource. In short, a community whose economy relies heavily on summer tourists has been dealt a devastating blow. I fully recognize that the fires burning in Montana today were all lighting sparked, but also realize the increased risk that long delays in federal approval of permit applications, inadequate fuels reduction programs, and other factors bring to our co-op and to our infrastructure.

Electric cooperatives face a myriad of permitting and regulatory requirements in order to conduct our business. For some it may be
permitting a new gas plant, and for others relicensing an existing small hydropower installation. At MEC, our permitting challenges have centered around our Special Use Permits and the National Environmental Policy Act (NEPA) review process used to amend these agreements. We work diligently to maintain positive relations with those who hold the permits authorizing our power lines on federal land, primarily the U.S. Forest Service and to a lesser degree the Bureau of Land Management. However, long delays in application processing hinder our ability to adequately plan, and add significant project cost.

We are constantly working to improve system reliability and reduce the risk of power-line-caused wildfire, and vegetation management is a critical component of our program, especially on federal land. A great example of this occurs regularly in the clearing of danger trees outside of our rights-of-way during our co-op's Routine Operations and Maintenance activities. Representatives from MEC and local Forest Service officials communicate periodically and expectations are understood. As a result, managers and crews can adequately plan for the time and financial resources necessary to complete a project. But this positive situation is not found on all rights-of-way managed by the Forest Service. Other cooperative representatives have testified before Congress of inconsistent federal land management policies, long delays in approval and review times, and unnecessary liability resulting from these delays.

In short, federal reforms are needed to cut red tape and make it easier for electric cooperatives to manage vegetation to limit downed power lines, prevent catastrophic fires, and respond to emergencies.

For that reason, we commend the House for recently passing H.R. 1873, the “Electricity Reliability and Forest Protection Act” that received strong bipartisan support. This legislation would give electric utilities more consistent procedures and a streamlined process in order to better manage utility rights-of-way.

Unfortunately, in other cases, significant delays occur, especially during major Operation and Maintenance activities, where compliance with NEPA is a concern. Such approvals are a requirement of our Special Use Permit, and necessary to assuring electricity service is not jeopardized as a result of work needed on rights-of-way.

For my co-op in Montana, our service area, like so many parts of the West, has been adversely affected by the Mountain Pine Beetle infestation and the dead and dying trees left in its wake. One of the areas hardest hit is in the Swan Valley north of Seeley Lake, Montana. Obviously, one of the most effective ways to improve service reliability and mitigate fire risk is to bury an overhead power line. As you can imagine, each instance of tree/power line contact can pose significant risk of wildfire ignition under the right environmental conditions. However, converting overhead distribution lines to underground is an expensive proposition, especially for a small cooperative like MEC, so this cannot be standard practice.

After considerable internal discussions regarding our situation in the Swan Valley, the decision was made in December 2013 to re-
request permission to bury approximately 6.1 miles of overhead three-phase line on Forest Service land. An application was submitted to the Forest Service district office having jurisdiction over the proposed project, and, just one month after submittal, we were notified that approval of our request was expected by June of 2014.

In May of 2015 I was invited to provide testimony before the House Subcommittee on Water, Power and Oceans regarding the delay in approval of this project application. In preparation for my testimony, I placed one final call to the local Forest Service District Ranger to express my frustration just prior to the subcommittee hearing. This local official indicated that if I wanted to see things change I should take up my issue with Congress, at which point I told him that I intended to the following week! Two days later on Saturday, May 16th, the weekend prior to the hearing, MEC received unofficial notice via email that all associated field work had been completed on our project, confirmed that our co-op had paid the Forest Service for all associated costs, and that we were authorized to begin construction.

In all, MEC waited nearly 18 months for approval on the Swan Valley project. Our cost recovery bill from the Forest Service indicates that 10 different individuals spent an average of 2.3 days each on our project. Most troubling to me is that the project qualified for categorical exclusion, meaning neither an environmental assessment or environmental impact statement was required. I can only imagine the number of months or years project approval would have taken had those more in-depth investigations applied.

This situation I have described exemplifies the harm to small businesses of unnecessary delays. To be effective in business requires adequate planning, especially for large construction projects, and the current process for federal permit approvals makes that impossible. Firm timelines must be incorporated into the approval process, and early, consistent consultation with coordinating agencies should be mandated. The uncertainly surrounding the approval process when working with the Forest Service adds unacceptable risk to every project. For example, materials ordered too early not only add to the carrying cost during the delay, but also the risk of outright cancellation if the permit is not approved. Materials ordered too late risk long lead times in which an entire construction season can be lost to the changing seasons. When service liability and fire prevention are a concern, inconsistency and delays risk unnecessary power interruption and increased potential for powerline sparked fires. All this leads to higher costs, which, ultimately, are borne by the owners of our cooperative utility—our members.

Proper vegetation and fuels management on federal land not only affects our utilities operations, but also those of our customers. Many of our customers, including large commercial accounts, are directly impacted by the Forest Services’ actions in our region. For example, our largest customer is one of the few remaining family-owned lumber mills operating in Montana, and in working closely with them, I get to hear firsthand about some of the challenges faced by this small business. An executive at the company tells me
he views the cumbersome and time-consuming process to fulfill NEPA requirements as the single most important barrier to implementing timely stewardship and restoration treatments on our National Forests. The process commonly has evolved into PhD dissertation of 400-800 pages for every decision to be approved by a line officer within the Forest Service. According to him, this process averages 3-5 years if there are no delays or interruptions from budget delays or fire suppression costs, which consume manpower and resources.

Montana’s Governor has identified nearly 5 million acres of hazardous fuel conditions across the state in need of immediate fuel reduction treatments to reduce excess forest fuels. Over 590,000 acres across various ownerships in Montana have burned so far this year. Regulatory barriers to proper vegetation and fuels management threaten not only the operations of our utility and the livelihoods of our members, but also of those businesses we serve.

Not all the challenges we face stem from NEPA. Earlier this year, our small utility submitted a second request for burial of a power line located in a different Forest Service district from the one I mentioned previously. This straightforward project proposes to bury approximately 4 miles of overhead line, much of which is located in heavily wooded forest today. The new location would be in highway right-of-way along U.S. Highway 12. Regarding that request, I just received communication asking if we had considered delaying our project until next spring, even though it has been communicated that NEPA is not an issue. Problems cited by the Forest Service include delays in consultation with coordinating agencies, and resources stretched thin because of fire. We fully understand the reality of these factors, but believe that cross-agency consultation, review, and approval for a very straightforward and routine application should not take a year to achieve.

Mr. Chairman, members of the committee, for us the status quo is not an option. We need streamlined, expedited procedures that allow for timely implementation of projects to protect the long-term health of our forests, our small businesses, and the overall economies of the communities we serve. The best way to accomplish this is to provide consistency, flexibility, and accountability into the federal permitting and permit amendment processes, especially when system reliability and fire prevention are driving factors. We believe this can be done without abrogating the intent of federal regulations. I appreciate this Committee’s work in examining how small businesses, such as Missoula Electric Cooperative, can benefit from regulatory reform and for holding this hearing today.

Thank you again for the honor of testifying before this Committee and I will be pleased to answer any questions.
Testimony of
Margot Dorfman, CEO

Before the
House Small Business Committee
“Expediting Economic Growth:
How Streamlining Federal Permitting
Can Cut Red Tape for Small Businesses”

Wednesday, September 6, 2017
Chairman Chabot Ranking Member Velázquez, Members of the House Small Business Committee, thank you for the opportunity to speak today as the Committee looks at expediting economic growth through effective, streamlined federal permitting.

Federal regulations are created to implement our laws, typically for the purpose of protecting public health and safety, and increasing or approximating competition where markets are inadequate. Sometimes the reverse is true. Sometimes large business or financial influencers seek to use our laws or the resulting regulations for the purpose of gaining market advantage while putting public health and safety and smaller business competition at risk.

We have seen how important human safety is and how closely linked our safety is to appropriate, well-enforced regulations. Hurricane Harvey — with rain flooding toxic waste sites, chemical plant explosions, buildings, bridges and dams at risk — should serve as a clear reminder of the role of government in the creation and management of regulations protecting human life.

We have seen the importance of financial regulations and oversight as our very economy nearly fell apart due to the lack of government oversight and accountability of our financial institutions. We have seen the value of the Consumer Financial Protection Bureau to small businesses seeking access to capital and watching out for predatory and discriminatory lending practices. History has also shown us that the rising concentration and anti-competitive behavior of some large corporations has led to a decline in the amount of new businesses entering the market.

Back to Basics

The U.S. Women’s Chamber of Commerce 500,000 members, three-quarters of whom are business owners — mostly small business, recognizes and supports the positive impacts of prudent and responsible streamlining of federal permits as a way to expedite economic growth. However, our view is twofold:

(1) The primary driver of problematic permitting and regulatory processes is the poor manner in which the government enacts and manages regulatory creation and implementation — including permitting. The annihilation of regulations which protect public health and safety and increase competition would only serve to put our lives and economy at risk.

(2) If Congress is genuinely seeking to fuel greater small business activity, you should listen to small business owners who will tell you to expedite economic growth through small business success,

your focus should be on improving the functioning of government, removing economic uncertainty, driving down health insurance and health care costs, driving up consumer spending and simplifying our tax system.4

Government Competency and Accountability

We agree that permitting and other regulatory hurdles could be greatly improved and streamlined; it should be much easier for small businesses to know what regulations impact their business plans and what permits are necessary. Completing required filings and permits should be made easier, cheaper and should be concluded more quickly.

The memo for this hearing emphasizes the National Environmental Policy Act, the FAST Act and Title 41 (FAST-41) which created the Federal Permitting Improvement Steering Council. But, this Council doesn’t seem to focus on the needs of small business whatsoever. The Small Business Administration is in not a member of this Council and the FAST-41 FY 2016 Annual Report to Congress does not even mention any consideration of small business in their activities or concerns.5 There are so many opportunities governmentwide to really make small business inclusion part of the fabric of government – and yet, we are continually left out. We don’t get representation at key decision-making moments; only big business is consistently invited to sit at the tables of influence in American government.

If we are to focus on regulations, permitting, streamlining and assisting small businesses to compete, grow and help fuel our economy, the U.S. Women’s Chamber of Commerce recommends the following:

1. Give small business a seat at the table governmentwide. Fund the Small Business Administration and empower and compel SBA to serve as a real champion for small businesses rather than an agency that has been systematically underfunded for years. Hold SBA leadership accountable to produce results.
2. Add small business assistance and fast-tracking of permits so as to lighten the financial burden and improve small business certainty and planning. Especially focus on fast-tracking the construction or expansion of manufacturing facilities.
3. Reduce the fees (or remove fees) for small business permitting on projects.
4. Foster small business / large business partnerships which include the large business partner securing required permits and managing regulatory requirements.

5. President Trump’s recent budget proposal would defund the Manufacturing Extension Partnership\(^6\) which provides tremendous assistance for small manufacturers. Instead, funding should be increased and include strong assistance in permitting and other regulatory requirements.

6. Champion a government-wide initiative to require: all regulations be presented in plain English; all permitting processes be modernized, streamlined and transparently tracked for timeliness; regulations be reviewed for current relevancy so as to ensure rules remain relevant and are carefully targeted to avoid unintended consequences.

7. Stop agency staff overreach as laws passed by Congress are either not implemented or altered through weak regulatory implementation so as to render them useless or inappropriate.

The U.S. Women’s Chamber of Commerce strongly encourages the House Small Business Committee to focus on what counts for small business – a well-run government, removing economic uncertainty, driving down health insurance and health care costs, driving up consumer spending and simplifying our tax system.

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Statement for the Record

by

The Associated General Contractors of America
to the
U.S. House of Representatives’
Committee on Small Business
For a hearing on

September 6, 2017

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

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

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

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

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

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

1 While AGC members rarely build single family homes, they are regularly engaged in the construction of all other improvements to real property, whether public or private. These improvements include the construction of commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing development.
efforts to return reason to this regulatory scheme so small business contractors can efficiently build the infrastructure this nation sorely needs and deserves.

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

B. The Clean Water Act Section 404 Permit Process

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

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

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

A) Prepare & Submit Application
- Performed by Owner/Developer or General Contractor (e.g., Design Build)
- Jurisdictional Determination
  - Access all parcels, field delineations, Approved JD from USACE District, determine mitigation needs/cost
- Application Add/Corrections
  - If legally-mandated timeline, the clock starts ticking when USACE deems application complete
- Public/Agency Input Process
  - Includes written comments and public meeting, USACE transmits comments to applicant, Applicant responds
- Related Reviews/Permits
  - 404 permit requires an ESA consult (USFWS or NMFS) and a Section 401 certification (states) and more...
- EPA Veto 404(c) or 404(g) Elevation
  - Procedures for EPA veto of permit or elevation of disputes over permit application & policy matters
B) Application Review
- Permitting Agency Performs Cursory Review to Ensure Application is Complete
  - Then the Agency Conducts a Full Review
  - Litigation
    - Applicants and/or community/activists groups can file lawsuits against the agency
C) Decision
- Denied
- Approved
- USACE conditions based on USEPA 404(c)(1) Guidelines, NEPA may impose additional permit conditions

7 Frequent "Chokepoints"
2. 'Chokepoint' Details in CWA Section 404 Individual Permit Process

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

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

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

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

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

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

Public notice requirements allow project opponents another opportunity beyond NEPA to challenge and stop projects, for which (generally) no contractor relief is provided. Oftentimes, even individuals who are not directly affected by the project become involved. This is presenting an opportunity to voice tangentially related concerns, or pursue political goals or no-growth agendas, thereby forcing the
permitting agencies to spend time and resources processing these concerns that ultimately do not have bearing on their permit decision.

(4) Related Reviews/Permits

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

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

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

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

* The level of state responsibility, and autonomy of the state review, vary greatly, from cursory review or waiver of review (with USACE carrying most of the responsibility), to in-office review of draft USACE permits, to a full blown independent technical review by the state, assuming a significant component of program responsibility.
- Bald and Golden Eagle Protection Act

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

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

(6) Litigation

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

(7) Permit Conditions

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

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

3. Recommended Reforms Specific to the 404 Program

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

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

Courts have upheld USEPA’s authority under the CWA to change, if not revoke, Section 404 “dredge-and-fill” discharge permits that have already been approved and issued by USACE if it determines that the discharge will have an “unacceptable adverse effect” on identified environmental resources. This creates uncertainties for Section 404 permittees, their lenders, and others in business with them, which
drives up financing and construction costs. USEPA has adopted regulations setting forth the process for implementing Section 404(c).

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

Permitting Authorities Are Thwarting Advanced Mitigation, Mitigation Banking, and Future Mitigation Investments

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

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

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

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

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5 See 40 C.F.R. § 231.1 et seq.
from an environmental stewardship perspective. Revise the “2008 Mitigation Rule” at 33 C.F.R. § 332.3(b)(2) and USACE’s Regulatory Guidance Letter (RGL) 16-01 on the procedures for determining what geographic areas on a project are WOTUS.

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

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

RHA Section 148 provides that the Secretary of the Army may grant permission for the alteration or use of works built by the United States when such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work. As a result, USACE requires that applicable construction projects are reviewed to determine if any of the proposed activities may affect a federal easement, right of way, property, levee, etc. Construction projects possibly subject to this process may include but are not limited to highways crossing Corps’ property, bridges built over USACE flood control projects, and simply modification of existing Corps’ projects—e.g., levees—by state and local entities.

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

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

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


8 33 U.S.C. § 408.

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

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

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

- According to the statute, the Corps’ permission is required with respect to activities that may affect various “works” that are “built by the United States ... for the preservation and improvement of any of its navigable waters or to prevent floods.” The Circular states that it applies in the case of any “alteration or occupation or use of the project” (EC 1165-2-216, ¶ 6.6 a) (emphasis added). The language could be and seemingly has been interpreted to suggest 408 applies to any proposal that would alter or occupy any portion of a Corps project, which in turn suggests anything within the project’s property boundaries. However, that is not what Section 408 says, nor is it what Congress intended in enacting Section 14 of the Rivers and Harbors Act. A broad reference to a Corps “project” without additional clarification can lead to a District office to require the 408 process for any proposal that involves any real estate within a Corps project. A common example would be a highway or pipeline that crosses Corps’ property. To be clear, the Corps has a right to review and approve that proposal as property owner and potentially as a regulator under Clean Water Act Section 404 or other authorities. However, if the project does not touch or affect the “works” regulated under Section 408, then the Corps should not overlay additional 408 requirements beyond whatever other procedure may be required.

Specifically concerning local flood control protections, like levees, AGC agrees with the Section 408 Coalition and the Mississippi Valley Flood Control Association: Congress through legislation and/or the Corps via regulation or guidance should clarify that the jurisdiction of RHA Section 408 does not extend...
to alterations or improvements made or allowed by the local sponsor (non-Federal interests) to the 
flood control projects for which they are responsible for operation and maintenance.

C. Water Issues Generally

1. Definition of “Waters of the United States”

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

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

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

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

2. Benchmark Limits in NPDES Permits

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

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

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

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

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

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

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

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

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

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21 The burdens associated with the CGP reissuance are covered under this existing ICR (OMB Control No. 2040-0004, EPA ICR No. 0229-20) and the updated one that is currently at OMB for review (OMB Control No: 2040-0004, EPA ICR No. 0229-21).
AGC believes it is inappropriate to lump 46 state-issued CGPs, and the EPA-issued CGP into one “generic” approval. OMB needs to more specifically analyze the information collected under every one of these permits (e.g., Multi-Sector General Permit, Vessels General Permit, previous CGPs) and not just assume the newly issued iterations will have similar reporting burdens. Under current practice, EPA incorporated new recordkeeping requirements in its newly issued 2017 CGP without accurately accounting for increased burdens on industry.12

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

In alignment with the directives of E.O. 13777, AGC recommends that EPA review and consider possible modification to its 2017 CGP, including revisiting the cost analysis for the new expanded liability and restrictive stabilization provisions, as well as the new requirement for the site operator to tell the public (via the notice of permit coverage already posted at the site, as per prior permit requirements) how to contact EPA to obtain a copy of the site-specific stormwater pollution prevention plan and how to report a visible discharge of pollution from the site.13 AGC also recommends that EPA commit to an improved CGP cost analysis henceforth and that all of EPA’s future requests for information collections under the NPDES permit program be conducted on a permit-by-permit basis, to reflect new burdens placed on industry within each new construction permitting cycle.

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

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

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

13 See footnote 11.
5. **Post Construction Stormwater Rule**

Information Collection Request (six separate survey instruments) – Fall 2010
https://www.epa.gov/npdes/proposed-national-rulemaking-strengthen-stormwater-program-documents

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

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

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

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

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

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²⁴ Currently, EPA does not have authority or regulations to control stormwater discharges from developed sites that are not “associated with industrial activity.” 40 C.F.R. § 122.26(b)(14). Developed sites and impervious surfaces are not listed in CWA § 402(p)(12) or in EPA’s Phase I or Phase II regulations implementing the stormwater permitting program. CWA § 402(p)(5) and (6) set forth processes that allow EPA to designate new sources or categories of sources for NPDES permitting.

Notably, in Virginia Department of Transportation v. U.S. Environmental Protection Agency26 (hereafter referred to as Accotink, the name of the creek at issue) the federal district court held that the CWA did not confer authority to regulate stormwater flow into a waterbody because stormwater is not a “pollutant,” under that term’s statutory definition.27

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

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

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

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

EPA recently finalized its Small MS4 Remand Rule that changes the federal regulations governing how small cities apply for and obtain NPDES permit coverage to discharge stormwater via their sewer systems into WOTUS. This action stems from a U.S. Court of Appeals for the Ninth Circuit holding (2003) that EPA’s prior “Phase II” general permit program29 for small MS4s (municipal separate storm sewer systems) violated the Clean Water Act. The amendments require extensive public input and agency review of cities’ stormwater management plans - including ordinances for runoff from active construction sites and post-construction developed sites.

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

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27 Id. at 5.
28 Post-construction stormwater management measures generally require heavy maintenance of both the water and the shoreline, including upkeep of vegetation strengthening the banks. Determining who has the burden of maintenance is state- and municipality-specific and sometimes unclear. Potential claims from a failed pond or other “green-infrastructure” may be far-reaching, extending to the owner for improper maintenance or to a design professional or general contractor who builds the treatment system. The construction and real estate development industries are separate and distinct from each other; contractors cannot warrant the post-construction performance of stormwater controls that others design, operate and maintain. AGC members remain concerned about potential scenarios that would saddle the contractor with the long-term, legal liability for the performance of permanent stormwater controls after the construction firm leaves the project.
29 EPA published its “Phase II” rule on Dec. 8, 1999, expanding the construction and MS4 permit programs. 64 Fed. Reg. 68,722. All of EPA’s stormwater final rules are online at https://www.epa.gov/npdes/stormwater-rules-and-requirements.
controlling the discharge of pollutants from the MS4 system to the MEP. EPA’s Small MS4 Remand Rule allows cities to manage their stormwater pollution on a location-by-location basis — and without being tied to mandatory numeric permit requirements.

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

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

Guidance — Issued Nov. 1, 2016
https://www.epa.gov/npdes/municipal-sources-resources

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

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

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

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

34 C.F.R. § 122.34(b)(4).
EPA's federal stormwater regulations also require permits for stormwater discharges from construction sites that disturb one acre or more of land (and construction sites less than one acre are covered if part of a larger plan of development) and that discharge to an MS4 or to WOTUS.\(^1\)

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

As stated above, construction sites that discharge into an MS4 are required to obtain an NPDES stormwater permit as if they were discharging directly into a WOTUS. In addition, many local governments, as MS4 permittees, have a role to play in the regulation of construction activities. As such, construction sites discharging into a regulated MS4 also may have to meet additional requirements or obligations established by the local MS4. Currently, compliance with local requirements does not mean compliance with federal NPDES requirements or vice versa, unless the authorized state agency or EPA has specifically designated the local program a "qualifying local program."\(^2\)

10. Integrated Municipal Stormwater and Wastewater Planning

Guidance – Issued June 5, 2012

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

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


\(^{1}\) 40 C.F.R. § 122.26(b)(15).
\(^{2}\) 40 C.F.R. § 122.44(i).
EPA is advising states that they can include regulation of flow in state NPDES permits. At least one federal court told EPA it can’t do this in the context of EPA’s total maximum daily load (TMDL) program. In this guidance, EPA is telling states how to regulate impervious surface – thereby dictating land use decisions.

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

D. Oil Spills Prevention and Preparedness

I. Spill Prevention Control and Counter-Measure (SPCC) Rule Amendments

2009 SPCC Amendments

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

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

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

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

E. Air and Climate Issues

I. NAAQS - Ozone

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

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

2. Treatment of Data Influenced by Exceptional Events

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

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

3. Off-road Emissions Inventories

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

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

4. GHG Tailoring Rule

EPA’s GHG Tailoring Rule is intended to make it easier for states to exclude transported background ozone from future designations.

EPA may want to consider further action. AGC notes that business groups in the western states are concerned that the revised rule still does not provide a clear path to exclude transported background ozone from future designations. This issue is of importance to AGC contactor members in the intermountain states.
This proposed rule clarifies when facilities will need to set controls for GHG emissions in order to obtain necessary air permits prior to construction or major upgrades and even to be operated.

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

F. TSCA Subchapter IV (Lead Exposure Reduction)

1. LRRP Program Expansion to Public & Commercial Buildings

75 Fed. Reg. 24,848 (May 6, 2010)
Advanced Notice of Proposed Rulemaking

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

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

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

G. CERCLA – Brownfields Act

The Brownfields Act limits traditional CERCLA (Comprehensive Environmental Response, Compensation and Liability Act) liability by providing protections/relief to prospective purchasers and innocent landowners. It does not, however, address the issue of liability for innocent contractors who redevelop the property on a contractual basis and possess no ownership interest. Response action contractors or
RACs performing site cleanups are subject to the same kind of open-ended liability as the companies that originally deposited the hazardous waste at a site. Regular contractors (non-RACs) also face uncertainty and high risks when working at a site where unknown/unforeseen hazardous waste is uncovered. Grading contractors who move contaminated soil around a construction site are often held to be “operators” of the facility and “transporters” of hazardous waste.

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

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

H. Compliance and Enforcement

1. Citizen Suit Provisions in 20 Environmental Statutes

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

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

- Limit citizen suit penalties to violations of objective, numeric limitations rather than subjective, narrative standards;
- Extend “notice period” beyond the current 60 days (giving regulatory agencies more time to review notice of intent letters and initiate formal actions);
- Clarify definition of “diligent prosecution” of alleged violations, thereby allowing federal/state authorities to exercise their primacy in enforcement and preventing unnecessary citizen suit intervention. 22

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

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

3. Inspect and Correct: Cooperative Approach to Enforcement Policy

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

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

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


4. Compliance Assistance & Partnerships

In early 2009, EPA terminated long-standing partnership programs with industry (e.g., the Sector Strategies Partnership with the commercial construction industry aimed at reducing regulatory burdens while improving compliance) and defunded compliance assistance online centers (e.g., the Construction Industry Compliance Assistance Center). In the years that followed, the number and cost of federal regulations increased substantially—with EPA leading in the numbers.
AGC recommends that EPA bring back its agency-industry partnership and recognition programs (e.g., Sector Strategies, Performance Track, C&D Recycling Partnership). AGC also recommends that EPA fully fund compliance assistance programs. A recent Environmental Council of States report finds that approximately half of all regional compliance assistance centers are underfunded or about to close.

5. Next Generation Compliance/Enforcement Strategy

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

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

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

1. AGC’s Flowchart of Environmental Approvals and Permits Applicable to Construction
AGC’s Statement to the U.S. House of Representatives Committee on Small Business for a hearing on “Evaluating the Paperwork Reduction Act: Are Burdens Being Reduced?” (March 29, 2017)

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

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

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

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

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

35 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/ces/psdb/73m=18&utm_medium=email&utm_source=emaildelivery.
II. The Paperwork Reduction Act

The Paperwork Reduction Act\(^{37}\) 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.\(^{38}\) 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."\(^{39}\)

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

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

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

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\(^{36}\) 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.


\(^{38}\) 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.

\(^{39}\) The regulations implementing the PRA, which closely track the statutory requirements, can be found at 5 C.F.R. § 1320, Controlling Paperwork Burdens on the Public; Regulatory Changes Reflecting Recodification of the Paperwork Reduction Act (60 Fed. Reg. 44984, Aug. 29, 1995).
2. Documentation and recordkeeping requirements (e.g., EPA’s requirements that construction site operators develop compliance management plans for stormwater and oil spill prevention and control); and

3. Third-party or public disclosures (e.g., EPA’s requirements to contact the National Response Center in the event of an oil or chemical spill on a construction site). 40

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. 41 “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. 42

IV. Does the PRA Reduce Burden?

Under the PRA, “burden” is defined expansively to mean the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. 43 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,” 44 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.”

40 44 U.S.C. § 3502(3)(A) and 5 C.F.R. § 1222.3(c)(1) (“a ‘collection of information’ may be in any form or format”); 5 C.F.R. § 1230.3(c) (“collection of information” includes any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information).
41 5 C.F.R. § 1230.3(c)(i)- (ii).
42 5 C.F.R. § 1230.3(m).
43 5 C.F.R. § 1230.3(b)(1).
In June 2016, the House Subcommittee on Energy and Power held a hearing 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. 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, as of March 21, 2017, show:

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<thead>
<tr>
<th>ENVIRONMENTAL PROTECTION AGENCY TOTALS:</th>
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<tbody>
<tr>
<td>ACTIVE OMB CONTROL NO.</td>
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<tr>
<td>TOTAL ANNUAL RESPONSES</td>
</tr>
<tr>
<td>TOTAL ANNUAL HOURS</td>
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<tr>
<td>TOTAL ANNUAL COST</td>
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These data point to the conclusion that—despite efforts of OMB/OIRA, agency Chief Information Officers and agency program officials—EPA has been unable to meet one of PRA’s main goals, which is a net reduction in the total burden placed on the public by government information collection.

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

V. Executive Summary: AGC’s Recommended Reforms

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

A. Eliminate Duplicative Federal Recordkeeping Requirements

- REFORM 1: Construction site operators are required to develop plans for preventing, containing, and cleaning up oil spills under the National Pollutant Discharge Elimination System and Spill Prevention Control and Countermeasures Plan (SPCC) regulations. If a construction site operator has a Stormwater Pollution Prevention Plan that addresses oil storage and spill control, containment and cleanup measures, then EPA should allow the jobsite SWPPP to also satisfy the agency’s SPCC requirements. Otherwise this is double regulation – and each plan carries significant costs for the...
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
The burdens associated with the Regulatory Agencies: Paperwork Reduction Act- Generic permit coverage of the EPA ICR 0004, frivolous lawsuits. public requests/reports, which may prove overwhelming for small businesses. Executive adopted in the uninformed public to serve as the government's watchdogs, may lead to unsubstantiated citizen part of the proposal or the economic analysis (draft or burden (time/cost) to paperwork burden for both industry and the agency to respond to the expected increase of pages {likewise, 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. 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). EPA claims that OMB is approving a variety of reporting requirements generally expected in the permits covered; however, the consolidated ICR does not restrict permits to specific information requests. It is inappropriate to lump 46 state-issued CGPs, and the EPA-issued CGP into one “generic” approval. OMB needs to more specifically analyze the information collected under every one of these permits (e.g., Multi-Sector General Permit, Vessels General Permit, previous CGPs) and not just assume the newly issued iterations will have similar reporting burdens. Under current practice, EPA incorporated new recordkeeping requirements in its newly issued 2017 CGP without accurately accounting for increased burdens on industry. 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

45 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).
46 For example, the 2017 CGP added a new requirement for the site operator to tell the public (via the notice of permit coverage already posted at the site, as per prior permit requirements) how to contact EPA to obtain a copy of the site-specific SWPPP and how to report a visible discharge of pollution from the site. This provision was not part of the proposal or the economic analysis (draft or final). EPA has failed to account for the “life cycle” paperwork burden for both industry and the agency to respond to the expected increase in public requests/reports, which may prove overwhelming for small businesses. SWPPPs are “living” documents that can be 100’s of pages long with complicated drawings. Distribution of outdated compliance data, and allowing an uninformed public to serve as the government’s watchdogs, may lead to unsubstantiated citizen complaints or frivolous lawsuits. (Likewise, EPA’s draft economic analysis completely discounted, or underestimated, the total burden (time/cost) to collect new project information from the applicant, to electronically report SWPPPs for public examination, and to increase site inspections/documentation – but these proposed changes were not adopted in the final version of the permit.)
significant rules unless the most adverse effects on small entities have been eliminated, reduced or justified.

VI. AGC's Specific Comments

A. Areas of SWPPP/SPCC Overlap

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

The Clean Water Act and EPA's associated regulations 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 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.

51 40 C.F.R. §§ 122.26(b)(14)(i) and 122.26(b)(15).
52 Under the NPDES program, EPA can authorize states to implement the federal requirements and issue stormwater permits.
53 See Final NPDES Electronic Reporting Rule, 80 Fed. Reg. 64,076, 64,079 ("large and transient number of permittees that are reporting each year for new locations - approximately 200,000 new construction sites each year").
54 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). 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; (3) 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/upgrade 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 stabilized. See U.S. Environmental Protection Agency, Developing Your Stormwater Pollution Prevention Plan: A Guide for Construction Sites, EPA-833-R-06-004, 30 (May 2007).
The principal component of the stormwater program for any construction site is the SWPPP. It implements the bulk of the applicable CGP requirements by describing: the site and of each major phase of the planned activity; the pollution prevention practices and activities that will be implemented on the site; the roles and responsibilities of contractors and subcontractors; and the inspection, maintenance and corrective action procedures, schedules and logs. It is also the place where the contractor must document changes and modifications to the construction plans and associated stormwater pollution prevention activities. EPA’s CGP requires contractors to keep copies of the SWPPP, inspection records, copies of all reports required by the permit, and records of all data used to complete the NOI to be covered by the permit for a period of at least three years from the date that permit coverage expires or is terminated.

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

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

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.56

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.57

Spill Plans

The construction site SPCC plan is a complete overlap with the above-identified components of the jobsite SWPPP. The SPCC rule58 applies in all 50 states and is administered and enforced by federal EPA

56 EPA’s CGP requires operators to minimize 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(e)(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.”
58 40 C.F.R. § 112.
in every state. It covers a jobsite if (1) the above ground oil storage containers (in tanks of 55 gallons or greater, including asphalt cement tanks) have a total capacity of more than 1,320 gallons and (2) a spill could reach navigable waters of the United States or adjoining shorelines. It is important to note that EPA revised the definition of “navigable waters” of the United States, as the term applies to the SPCC rule, to comply with a court decision.69

The SPCCC 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.68 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.64 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, 2017.62

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

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


69 Notably, December 2008 amendments to the SPCC rules 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.

64 See supra note 17.

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

EPA standards define "lead-based paint" as: any paint or surface coatings that contain lead equal to or in excess of 1.0 milligram per square centimeter (mg/cm\(^2\)) or 0.5 percent by weight. By contrast, OSHA Lead Standard for the Construction Industry\(^{64}\) 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).\(^{65}\)

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

- 1926.62(d) - Initial Employee Exposure Determinations and Interim Protections\(^{66}\)
- 1926.62(h) - Housekeeping
- 1926.62(i)(5) - Handwashing Facilities
- 1926.62(j)(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\(^{67}\) of accumulations of lead dust.\(^{68}\) Generally, builders also

\(^{63}\) 40 C.F.R. § 745, Subpart E.
\(^{64}\) 29 C.F.R. § 1926.62.
\(^{65}\) 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.
\(^{66}\) 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.
\(^{67}\) 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 online at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22707.
\(^{68}\) 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=23637. 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 "as 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.

The requirements at 29 C.F.R. § 1926.62(h) call for the following:

- All surfaces to be maintained as free as practicable of accumulated lead;
- Floors and other surfaces shall wherever possible be cleaned by vacuuming or other methods that minimize the likelihood of lead becoming airborne;
have a written Lead Compliance Plan for each project where they encounter lead; this is an OSHA requirement for work where exposure to lead may exceed 50 micrograms per cubic meter of air averaged over an eight-hour period.

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

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

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

With the publication of an Advance Notice of Proposed Rulemaking in March 2010, EPA announced that it is looking into expanding the application of its current Lead RRP rule to potentially all commercial buildings and pre-1978 public buildings. 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 violation. Notably, EPA’s Semiannual Regulatory Agenda, Fall 2016, has changed the small entity impact designation for this rulemaking to “undetermined” and there is no reference to any Small Business Regulatory Enforcement Fairness Act (SBREFA) panel—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.

Shoveling, dry or wet sweeping, and brushing may be used only where vacuuming or other equally effective methods have been tried and found not to be effective;

Where vacuuming methods are selected, the vacuums shall be equipped with HEPA filters and used and emptied in a manner which minimizes the reentry of lead into the workplace; and

Compressed air shall not be used to remove lead from any surface unless the compressed air is used in connection with a ventilation system designed to capture the airborne dust created by the compressed air. This listing appears in the “Report of the Small Business Advocacy Review Panel on The Lead-based Paint; Certification and Training; Renovation and Remodeling Requirements” [March 3, 2000]. However, the Panel found that the OSHA standards “are targeted at the protection of the worker and do not overlap with the requirements being considered for EPA’s Renovation and Remodeling proposed rule which seeks to protect occupants.” See p. 15 – online at https://www.epa.gov/rrp/files/rrp-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.


70 See supra note 22.

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.\textsuperscript{72} 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 (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.\textsuperscript{73} 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.\textsuperscript{74} 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 .2 percent—highlighted “authorize 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 ...”\textsuperscript{75} A review of the FY 2016 enforcement actions related to the Lead RRP rule shows that for most of

\textsuperscript{72} 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 422 respondents complete a questionnaire. The Agency has established a public docket for this ICR under Docket ID No. EPA-HQ-OPTT-2013-071S, which is available for online viewing at www.regulations.gov.

\textsuperscript{73} See 44 U.S.C. § 3501.


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.78

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

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

D. Electronic Reporting Requirements

As stated above, the PRA applies to the collection of information “regardless of form or format.”79 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.79

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.79

79 See supra note 6 and accompanying text.
80 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 £-government Act created a new office in OMB to oversee information technology issues).
81 Prior OMB guidance may have made agencies too lax in considering how their online dissemination of information impacts the regulated community. In 2010, then OMB Administrator Cass R. Sunstein issued a memo to agencies that relaxes agency obligations to seek White House approval for certain web-based technologies. Cass R. Sunstein, “Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory
As a case in point, let us look at EPA’s NPDES Electronic Reporting (e-Reporting) Rule, which requires regulated entities to file certain forms via an electronic reporting system (nationwide implementation by Dec. 2020) rather than using paper forms.80 Per the rule, all reissued federal- and state-issued CGPs will require contractors to electronically file their NOI, NOT (notice of termination form) as well as any waiver request forms. The new rule requires states to share these data with EPA, along with government-administered inspection and enforcement results. Generally, for the regulated community, they need to (1) identify the recipient for each submission – for example, Georgia, Nebraska, Oregon and Rhode Island recently announced that all NPDES data will go to USEPA as the initial recipient, not the state; (2) use “approved” e-reporting program/tool; (3) register and obtain a user account; (4) obtain a valid electronic signature. As AGC pointed out in its comments on the proposed version of NPDES e-Reporting Rule, EPA’s PRA estimates on the time/cost associated with doing all of this was (and still is, per the final rule) way low.81

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.82 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

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).

81 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/PRAView. 82 https://www.epa.gov/npdes/stormwater-discharges-construction-activities.
sensitive information. While electronic collection of information generally reduces burden, it also raises potential issues with information security and business pursuit and procurement.

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

VII. CONCLUSION

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

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AGC’s Flowchart of Environmental Approvals for Infrastructure Projects

- AGC of America created this poster-sized flowchart to diagram and describe the environmental review and permitting process for a federally-funded or federally-permitted infrastructure project in the United States.¹
- So you want to BUILD? Good luck with that...

**Overview**

- Before breaking ground, most large infrastructure projects must receive many environmental approvals pursuant to many environmental laws administered by many different regulatory agencies and program offices.
- These projects generally do not qualify for efficient general permitting procedures and must obtain extremely costly and time-consuming individual permits, on a project-by-project basis.
- From top to bottom, AGC’s flowchart walks you through the environmental aspects that need to be considered at each stage of a project:
  - **BEGIN PLANNING** [Grey Boxes - Top]: identify property, perform preliminary engineering and environmental site assessments and studies.
  - **NEPA PHASE** [Red Sign - Top]: identify the project’s purpose and need, study environmental impacts and alternatives, conduct public/agency outreach, publish a final environmental impact statement (EIS), including mitigation plans.² NEPA is an “umbrella” statute because other environmental laws, policies, executive orders, and guidance are considered as part of the review process [Red Arrows - Top].
  - **ENVIRONMENTAL PERMITTING** [Gold Bar - Middle]: meet the specialized pre-construction requirements that apply to the project, each directed at a specific environmental medium or concern (i.e., air [Yellow Path], water [Blue Path], wildlife habitat [Green Path], cultural and aesthetic resources [Pink Path], waste and other aspects [Light Grey Path]). Dozens of federal statutes, and innumerable implementing regulations — that are ancillary to NEPA — apply to construction activities.
  - **DURING CONSTRUCTION**: meet environmental commitments, permit terms and conditions, and other environmental requirements — e.g., maintain management plans, inspect, monitor, report, take corrective action, fulfill mitigation measures, manage waste streams, etc.
  - **OPERATIONS AND MAINTENANCE** [Grey Footer]: occupy and operate or transfer property; perform required environmental follow-up — be aware of long-term legal risk and liability associated with the disposal and clean-up of hazardous substances.

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¹AGC of America

²NEPA is an “umbrella” statute because other environmental laws, policies, executive orders, and guidance are considered as part of the review process.
Congress needs to address the staggering statutory and regulatory inefficiency that currently exists. The average time to complete one EIS, under the NEPA process, is five years and costs $6.6 million (Nat’l Assoc. of Environmental Professionals review, 2015). An individual Clean Water Act (CWA) Section 404 permit applicant spends 788 days and $271,596 to obtain coverage, on average (Rapanos v. United States, 2006). What is more, a six-year delay in starting construction on public projects costs the nation more than $3.7 trillion in lost employment/economic gain, inefficiency, and needless pollution (Common Good report, 2015).

The current practice of performing sequential and often duplicative environmental reviews, following the NEPA record of decision, is presenting massive schedule, budget and legal hurdles to project delivery. Project proponents are being forced to repeat: analyses and studies; mitigation and management planning; as well as interrelated “authorizations” (i.e., certifications, consultations, consistency determinations, etc.) – all before they can submit their permit applications and receive the necessary approvals to proceed with construction.

Legal challenges to environmental documentation and permitting procedures are root causes for delays on infrastructure projects.

AGC Recommended Reforms

Both Congress and the White House have turned to AGC for common-sense recommendations on streamlining the federal environmental review and permitting processes. In part, AGC has recommended the following:

1. The NEPA review and the regulatory permitting processes must be coordinated, and advanced concurrently, and not sequentially. There must be timelines and deadlines for completing the environmental approvals needed for infrastructure work.

Specifically, AGC supports a nationwide merger of the NEPA and CWA 404 permitting processes, with the U.S. Army Corps of Engineers (Corps) issuing a 404 permit at the end of the NEPA review, based on the information generated by NEPA process. Data show these processes take the longest, are the costliest, and are subject to the most disagreements (see above).

2. To reduce duplication, the monitoring, mitigation and other environmental planning work performed during the NEPA review must satisfy federal environmental permitting requirements, unless there is a material change in the project.

3. A reasonable and measured approach to citizen suit reform to prevent misuse of environmental laws.

Additional details:
- Not all these permits and related “authorizations” (i.e., certifications, consultations, consistency determinations, etc.) are required to start work on every project. The scope of the environmental review process will depend on the location/nature of the project.
- AGC’s flowchart displays federal requirements only; it does not include the additional state and local requirements that “go beyond” the national baseline to address region-specific needs and concerns.
- U.S. EPA has authorized states to administer some of the fed. programs depicted on this chart (e.g., stormwater permits).
- If the federal action may or may not cause a significant impact the “lead agency” can first prepare a shorter Environmental Assessment (EA) to determine whether an EIS is required. If the EA indicates that no significant impact is likely, the agency can release a finding of no significant impact (FONS) and proceed. A limited number of federal actions may avoid the EA and EIS requirements under NEPA if they meet the criteria for a categorical exclusion (CATEX).
- In its May 2017 testimony before Congress, AGC presented reforms included in its comprehensive paper: “Reforms for Improving Federal Environmental Review and Permitting,” April 30, 2017 Discussion Draft. AGC also testified before Congress in March 2017 on how to reduce environmental permitting paperwork. AGC has met and shared its reforms with the U.S. Environmental Protection Agency (EPA) and the Army Corps, among others. In addition, the association submitted detailed proposals at the request of the U.S. Department of Commerce, which was covered in the Washington Post. And, the House Natural Resources Committee sought and received AGC’s advice on reforming the Endangered Species Act.

BACKGROUNDER: AGC’S FEDERAL ENVIRONMENTAL REVIEW AND PERMITTING FLOWCHART — JUNE 14, 2017