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DOCKET ID No. EPA-HQ-OA-2017-0190

Associated General Contractors of America's Comments Regarding the U.S. Environmental Protection Agency's Evaluation of Existing Regulations (82 Fed. Reg. 17,793; April 13, 2017) in Accordance with Executive Order 13777 ("Enforcing the Regulatory Reform Agenda")

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Date: May 15, 2017

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A. Introduction

The Associated General Contractors of America (AGC) submits the following comments to the U.S. Environmental Protection Agency (EPA) in response to its "evaluation of existing regulations" announced in the April 13, 2017, *Federal Register* (82 Fed. Reg. 17,793). EPA's comment request relates to its effort to comply with President Trump's Executive Order (EO) 13777, "Enforcing the Regulatory Reform Agenda." EO 13777 requires federal agencies to evaluate existing regulations and ''make recommendations to the agency head regarding their repeal, replacement, or modification.''

AGC represents more than 26,000 members—the largest commercial construction trade association—through a network of over 90 chapters in 50 states, the District of Columbia and Puerto Rico. Our commercial construction 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]

EPA, states and localities 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. *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. The greatest challenge the Trump administration will face is prioritizing its efforts to return reason to the regulatory scheme.

In the sections that follow, AGC identifies EPA 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 EPA's convenience and to provide its perspective on improvements to EPA's programs that influence and impact the environmental review and permitting processes for construction work.[2]

[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.

[2] At this juncture, AGC recognizes that EPA is identifying regulatory reform options, any one of which may become subject to notice-and-comment rulemaking to modify, or even eliminate, the target regulation. Hence, it would be premature for AGC to provide detailed recommendations on any of the issues identified in this document.

B. Water Issues

1. Definition of "Waters of the United States"

80 Fed. Reg. 37,054 (June 29, 2015)
https://www.epa.gov/sites/production/files/2015-06/documents/epa-hq-ow-2011-0880-20862.pdf

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

President Trump issued on Feb. 28 Executive Order (EO) 13778 that calls for a new "review" of the WOTUS rule in a manner consistent with the late Justice Antonin Scalia's opinion in a 2007 Supreme Court case addressing the WOTUS definition.[3]

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. Section 404 Dredge-and-Fill Permit Veto Authority

CWA Section 404(a) provides that the U.S. Army Corps of Engineers (Corps), "may issue permits ... at specified disposal sites" for the dredging or filling of navigable waters. Section 404(c) grants EPA the power to veto or place restrictions on the areas designated as disposal sites, if the proposed discharge would have an "unacceptable adverse effect" on municipal water supplies, shellfish beds and fishing areas, wildlife, or recreational areas.[4] The Corps is the permitting agency, but again, EPA has certain veto authority.

EPA's current authority to veto a duly issued CWA Section 404 permit casts uncertainty on development. As a matter of law and policy, AGC believes that EPA's authority does not – and should not – extend beyond the point at which the Corps issues a Section 404 permit. Once the Corps issues a permit, the contractor needs to have confidence that it can lawfully proceed without concern that EPA will unexpectedly halt a project.

[3] *Rapanos v. United States*, 547 U.S. 715 (2006).
[4] 40 C.F.R. § 231.2(e).

EPA's asserted authority to nullify existing permits or to obstruct incoming applications has serious implications for all construction projects requiring a Section 404 permit. Under this regulatory regime, any entity that acts as the owner, contractor, lender, investor, insured or surety for any project requiring a Section 404 permit will face a continued legal and financial risk even after a permit has been issued. This risk may even extend to subcontractors and construction craft workers.

EPA is denying the regulated community certainty that is a central goal of the CWA. It is denying investors in both public and private infrastructure of the certainty they need to invest in critical job-creating sectors of the economy. It is delaying and deterring the necessary effort to repair, replace and upgrade public infrastructure. It is inhibiting project financing. These harmful effects will be felt throughout the economy.

AGC has urged Congress to amend CWA Section 404(c) to withdraw EPA's authority to unilaterally modify or revoke a permit that has been duly issued by the Corps. To this end, and notwithstanding congressional action, AGC recommends that EPA revise its "unacceptable adverse effect" regulations, in response to the concerns outlined above.[5]

3. 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.**

4. 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.**

[5] EPA has adopted regulations setting forth the process for implementing Section 404(c). *See* 40 §§ Part 231.1 *et seq*.

5. 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[6] (RFA) and the Paperwork Reduction Act[7] (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.[8] 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.[9]

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.[10] (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.

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.[11]

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[6] 5 U.S.C. § 601–612.
[7] 44 U.S.C. § 3501–3520.
[8] 69 Fed. Reg. at 21,334 (April 11, 2016).
[9] "Cost Impact Analysis for the 2017 Proposed Construction General Permit (CGP)," U.S. EPA, 2016. Online at https://www.regulations.gov/docket?D=EPA-HQ-OW-2015-0828. 5 U.S.C. § 603(b)(3).
[10] 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).
[11] 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

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.[12] 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.

6. 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

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.)

[12] See footnote 11.

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.[13]

7. 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.[14] 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.)

Notably, in *Virginia Department of Transportation v. U.S. Environmental Protection Agency*[15] (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.[16]

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.

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

[14] https://www3.epa.gov/region1/npdes/stormwater/updated-info-sms4gp.html.

[15] No. 12-775, 2013 WL 53741 (E.D. Va. Jan. 3, 2013).

[16] *Id.* at 5.

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.). [17]

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

81 Fed. Reg. 89,320 (Dec. 9, 2016)
https://www.gpo.gov/fdsys/pkg/FR-2016-12-09/pdf/2016-28426.pdf

EPA recently finalized its Small MS4 Remand Rule that changes the federal regulations governing how small cities apply for and obtain NPDES permit coverage to discharge stormwater via their sewer systems into WOTUS. This action stems from a U.S. Court of Appeals for the Ninth Circuit holding (2003) that EPA's prior "Phase II" general permit program[18] 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 controlling the discharge of pollutants *from* the MS4 system to the MEP.[19] 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.

[17] 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.

[18] 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-notices.

[19] 33 U.S.C. § 1342(p)(3)(B)(iii).

9. 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.

10. 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."[20] 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.

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.[21]

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).

[20] 40 C.F.R. § 122.34(b)(4).
[21] 40 C.F.R. § 122.26(b)(15).

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."[22]

11. Integrated Municipal Stormwater and Wastewater Planning

Guidance – Issued June 5, 2012
https://www.epa.gov/sites/production/files/2015-10/documents/integrated_planning_framework.pdf

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.

12. EPA-USGS Technical Report: Protecting Aquatic Life from Effects of Hydrologic Alteration

EPA Report 822–P–15–002; USGS Scientific Investigations Report 2015–5160 – Issued February 2016
https://www.epa.gov/wqc/draft-epausgs-technical-report-protecting-aquatic-life-effects-hydrologic-alteration-documents

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.

[22] 40 C.F.R. § 122.44(s).

C. Oil Spills Prevention and Preparedness

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

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

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

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

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

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

D. Air and Climate Issues

1. NAAQS - Ozone

80 Fed. Reg. 65,292 (Oct. 26, 2015)
https://www.gpo.gov/fdsys/pkg/FR-2015-10-26/pdf/2015-26594.pdf

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

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

2. *Treatment of Data Influenced by Exceptional Events*

81 Fed. Reg. 68,216 (Oct. 3, 2016)
https://www.epa.gov/sites/production/files/2016-09/documents/exceptional_events_rule_revisions_2060-as02_final.pdf

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*

NONROAD Model (Nonroad Engines, Equipment, and Vehicles)
Update initiated early 2016
https://www.epa.gov/oil-spills-prevention-and-preparedness-regulations/2009-spcc-amendments

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

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

4. *GHG Tailoring Rule*

81 Fed. Reg. 68,110 (Oct. 3, 2016)
https://www.regulations.gov/document?D=EPA-HQ-OAR-2015-0355-0001

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

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

E. TSCA Subchapter IV (Lead Exposure Reduction)

1. LRRP Program Expansion to Public & Commercial Buildings

75 Fed. Reg. 24,848 (May 6, 2010)
Advanced Notice of Proposed Rulemaking
https://www.gpo.gov/fdsys/pkg/FR-2010-05-06/pdf/2010-10097.pdf

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

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

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

F. 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.

G. 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.** [23]

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**

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

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 it 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.

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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.

H. ATTACHMENTS

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

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

Note: These attachments were uploaded as separate files to DOCKET No. EPA-HQ-OA-2017-0190.