Statement of

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to the

U.S. House of Representatives

Committee on Transportation and Infrastructure
Subcommittee on Water Resources and Environment

For a hearing on

"America's Water Resources Infrastructure: Approaches to Enhanced Project Delivery"

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AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.

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

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Chairman Graves, Ranking Member Napolitano and members of the subcommittee, thank you for providing the Associated General Contractors of America (AGC) with the opportunity to offer its recommendations on ways to speed up completion of America's major water infrastructure. My name is Leah Pilconis, and I am AGC's Senior Counsel on Environmental Law and Policy. 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 the U.S. Army Corps of Engineers (USACE or Corps) and other federal agencies that interpret and enforce federal environmental laws.

As a representative of the commercial construction industry, I strive to help the federal government understand the construction process. I work closely with the in-house environmental managers of many of the nation's leading construction firms and often facilitate dialogue between interested construction company professionals and the government staff writing new permits and rules. A central goal is to better align environmental programs (mandatory and voluntary) with the construction industry's needs. Companies want to be in full compliance with environmental requirements, but the permitting process is cumbersome and uncertain. This uncertainty is driving up costs to construction firms and taxpayers in two main ways: (1) it is priced into bids; and (2) it is causing construction delays, even after the contract is awarded. AGC's goal is to build infrastructure in a way that is most efficient and done in an environmentally responsible manner and makes the best use of the taxpayer's dollars.

AGC's membership consists of more than 26,000 construction contractors, suppliers and service providers across the nation. AGC operates through a nationwide network of more than 90 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, locks, dams, levees and other infrastructure that protects our nation from floods and keeps our waterways open to navigation.

For years, AGC has worked with this subcommittee to ensure the safe and efficient delivery of high-quality facilities and infrastructure for our nation. AGC appreciates and thanks the subcommittee for its continued efforts to help develop our nation's water resources and improve water infrastructure. By taking steps to enact a Water Resources Development Act (WRDA) in the 115th Congress and keeping this critical legislation to a regular two-year reauthorization schedule, this subcommittee is demonstrating its commitment to foster economic growth and stimulate employment.[1]

AGC also commends the subcommittee for the major legislative reforms it enacted in 2014 and 2016[2] to streamline how the federal government approves and completes infrastructure projects, as detailed in

[1] "Overall, Corps projects help to generate $109.83 billion in net annual economic benefits and generate $34.16 billion in revenue to the U.S. Treasury." S. Rept. 114-283 - WRDA 2016.

[2] For example, project acceleration provisions in WRDA 2014 amended the project streamlining requirements in Section 2045 of WRDA 2007 (P.L. 110-114, codified at 33 U.S.C. § 2348; S. 601 and H.R. 3080). Specifically, these streamlining

footnote #2. AGC hopes that its testimony will help the committee build on that progress and develop and pass the next WRDA in 2018.[3]

As my statement will discuss, the scope and breadth of environmental requirements that apply to Corps projects often represent a significant component of the project development and approval process. There is a backlog of more than 1,000 authorized water resources construction projects that will cost more than $90 billion to complete. In my testimony today, I will highlight AGC's list of 10 main opportunities for Congress to minimize delays during project planning and permitting to ensure faster delivery of critical water infrastructure projects. These opportunities include:

1. Establishing and implementing a "One Federal Decision" process for all environmental reviews and authorizations for critical infrastructure projects;
2. Merging the National Environmental Policy Act (NEPA) and Clean Water Act (CWA) Section 404 permitting processes, at the national level;
3. Reducing duplication by using the NEPA documents to satisfy permit requirements (stop re-doing studies and consults);
4. Limiting the scope of re-evaluations – there must be clear standards for determining when a previously approved environmental document needs to be redone;
5. Establishing and enforcing a two-year deadline for completing the environmental approval process for critical infrastructure projects;
6. Ensuring that the regulatory and environmental considerations under the CWA Section 404 permitting process do not create unachievable requirements;
7. Establishing more certainty upfront regarding the requirements for and availability of suitable compensatory mitigation;
8. Requiring the Corps to concurrently process the River and Harbors Act (RHA) Section 408 permission and CWA 404 permit on all infrastructure projects, as applicable;
9. Granting the Corps greater authority to run the 404 permit program; and
10. Reforming citizen suit provisions to prevent the misuse of environmental laws.

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procedures apply to projects that require an EIS: coordination plan and deadlines, dispute resolution procedures, financial penalty provisions, statute of limitations on claims, and categorical exclusions from NEPA in emergencies. The Water Infrastructure Improvements for the Nation (WIIN) Act of 2016 builds on the streamlining provisions in WRDA 2014; it amended Section 14 of the Rivers and Harbors Act (RHA) of 1899 (33 U.S.C. § 408) to provide for concurrent NEPA review along with RHA Section 408 applications. Also, when the Corps is tasked with conducting a RHA Section 408 approval *and* an approval under CWA Section 404 or RHA Section 10, for example, the Corps must carry out those review concurrently, to the maximum extent practicable, and reuse documents that address the same types of impacts in the same geographic area, at the Secretary's discretion. (P.L. 114-322 – Title I, codified at 33 U.S.C. §§ 408, 408(a); the short title of WRDA 2016, S. 2848 / HR 5303).

[3] The consequences of not enacting biennial WRDA legislation prior to 2014, and investing in the renewal of aging infrastructure, has greatly contributed to the degradation of our water resources program. The American Society of Civil Engineers gives our nation's infrastructure a D+. American Society of Civil Engineers, *2017 Report Card for America's Infrastructure* – online at https://www.infrastructurereportcard.org/wp-content/uploads/2017/10/Full-2017-Report-Card-FINAL.pdf (last visited Jan. 10, 2018).

Complexity of Environmental Issues

Dedicated and predicable funding is critical for any federal project. But even fully-funding a federal project does not mean the project can commence.[4] Construction companies cannot legally break ground on the project until all the necessary environmental approvals are granted, which can take up to a decade or more. Work can be brought to a complete stop mid-cycle if a federal regulatory agency forces a re-evaluation of the project's environmental impacts or a citizen lawsuit is filed; sometimes the latter occurs just to further delay the project.

The layering of pre-construction requirements over the decades[5] without adequate consideration of how they work in unison, has led to many projects facing years of delay before actual construction beings. Unfortunately, for large infrastructure projects (including those that are vital to navigation, flood control, aquatic ecosystem restoration and hydroelectric power), the typical environmental approval scenario plays out as follows: extremely lengthy National Environmental Policy Act (NEPA) review process (4.6 years, on average, to complete an Environmental Impact Statement (EIS)[6] and the average cost can be in the tens of millions[7]), followed by protracted federal environmental permitting process (e.g., 2.16 years and $271,596, on average, to *obtain* an individual Clean Water Act (CWA) Section 404 permit[8]) – and the list of "required" approvals goes on from there (see AGC environmental flowchart at page 16). Even after federal agencies grant environmental approvals, projects remain subject to shut down from citizen suits.

AGC has created a flowchart to diagram the dozens of federal environmental approvals needed before a construction contractor can break ground on most large infrastructure projects – see page 16 below. As AGC's chart visually illustrates, the current practice of performing sequential and often duplicative environmental reviews, after the NEPA process, is presenting massive schedule, budget and legal hurdles to project delivery. Project proponents are being forced to repeat: analyses and studies; mitigation and planning; as well as interrelated "authorizations" (i.e., certifications, consultations, consistency determinations, etc.) before commencing with construction.

WRDA-authorized water resource projects are caught on a NEPA[9] treadmill. NEPA requires federal decisionmakers to consider environmental impacts before resources are committed to a project and to

[4] Projects funded by the American Recovery and Reinvestment Act (stimulus package) were effectively exempt from NEPA (via "categorical exclusions") to speed up project investment *and still* there were no "shovel ready" projects. In addition to the NEPA review process, there are dozens of separate environmental statutes that may apply to any one construction project – spanning many federal government agencies that each required their own permits, permissions, licenses and approvals, as explained in this statement.

[5] Specific statutory protection of the environment began more than a century ago, in 1899, when the United States passed the first federal environmental law, the Rivers and Harbors Act.

[6] U.S. Gov't Accountability Office (GAO), GAO-14-370, National Environmental Policy Act: Little Information Exists on NEPA Analyses, at 14 (2014) (stated that the average completion time for an EIS in 2012 was 4.6 years).

[7] U.S. Gov't Accountability Office (GAO), GAO-14-370, *National Environmental Policy Act: Little Information Exists on NEPA Analyses*, at 14 (2014) – click here.

[8] *Rapanos v. United States*, 547 U.S. 715 (2006).

[9] The NEPA review process applies to an activity or action that: is proposed on federal lands; requires passage across federal lands; will be funded in part or in whole by federal money; or requires a federal permit, license, or other approval. For public-private-partnership (P3) projects, an agency decision to commit federal land or federal funds for development typically constitutes a major federal action sufficient to trigger NEPA. The Act requires the lead agency (e.g., the Corps) to: 1) consider the environmental, social, and economic impacts of their decisions; 2) evaluate all reasonable alternatives; 3) mitigate impacts to the extent practical; and 4) solicit comments from other agencies, stakeholders, and the public. 42 U.S.C. § 4321–4347.

provide the public an opportunity to comment on and shape the interagency review process. Corps' actions such as: the construction of major civil works projects; proposed changes in projects which increase size substantially or add additional purposes; and proposed major changes in the operation and/or maintenance of completed projects are subject to a NEPA review and "normally require an EIS".[10] (The Corps will normally be the lead agency for NEPA reviews on Corps' civil works projects and will generally avoid joint lead agency arrangements.[11]) In addition, the Corps' water resource projects also require federal environmental permits and permissions from its own Regulatory Division[12] before construction can commence. In evaluating those permit applications – under the CWA Section 404[13] or Section 10 of the Rivers and Harbors Act (RHA),[14] for example – the Corps must, once again, undergo a separate NEPA evaluation (subject to the Corps' own NEPA implementation procedures for the regulatory permit program) because the issuance of a federal permit is a "federal action" that triggers the NEPA statute.[15] A decision on a permit application will require the preparation of an EIS if the environmental effects of the permit issuance are deemed to be significant. The District Engineer will prepare a statement of findings (SOF) or, where an EIS has been prepared, a Record of Decision (ROD), on all permit decisions.[16]

What is more, inefficient, bureaucratic processes are forcing the re-evaluation of previously approved NEPA documents and permit decisions on the account of very minor adjustments to the project. For example, environmental planning documents have a limited "shelf-life" and they may need to be re-evaluated if a project is stalled (due to lack of funding, legal challenges, etc.).[17] In addition, even a relatively minor modification to the project design, footprint, or construction "means and methods" may require a NEPA re-evaluation, thus reopening the NEPA approval for another round of challenges by opponents, as further explained below.

Notably, the threat of endless litigation is forcing agencies to try to make their NEPA and Section 404 permit analyses litigation-proof. This invariably leads to excessive paperwork, duplicate consultation procedures and related inter-agency reviews, and inefficient project planning and construction phasing. As

[10] NEPA requires the preparation of an EIS for all major *federal actions* significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). *See also* 33 C.F.R. § 230.6 (Corps actions normally requiring an EIS).

[11] Lead agency status for regulatory actions will be determined based on 40 C.F.R. § 1501.5(c). *See also* 33 C.F.R. § 230.16 (Lead and cooperating agencies).

[12] The Corps' regulatory program review process includes the following authorities: Sections 9/10 of the Rivers and Harbors Act of 1899 (RHA), Section 404 the Federal Water Pollution Control Act, as amended in 1972 (commonly known as the Clean Water Act (CWA)), and Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972. Under these authorities, Corps authorization is needed for construction work performed in, over, or under a navigable water of the U.S.; for discharge of dredged or fill material into waters of the U.S., including jurisdictional wetlands; and for transportation of dredged material to the ocean for disposal. In nearly all situations, authority rests with District Commanders for permit decisions.

[13] 33 U.S.C. § 1344.

[14] 33 U.S.C. § 403.

[15] The Corps follows CEQ's NEPA regulations and further promulgated its own NEPA procedures for the Corps' programs, including the CWA Section 404 permit program. 33 C.F.R. Appendix B to Part 325 - NEPA Implementation Procedures for the Regulatory [Permit] Program. *See also* 33 CFR Part 230 – Procedures for Implementing NEPA. The CEQ's regulations require each agency to adopt implementation procedures to "supplement" its NEPA provisions. 40 C.F.R. § 1507.3(a) (2014).

[16] 33 C.F.R. § 325.2(a)(6) - Processing of applications. *See also* 40 C.F.R. § 1505.2 - Record of decision in cases requiring environmental impact statements.

[17] An EIS is prepared in two stages, a draft and final EIS. If considerable time passes after issuance of a final EIS (as may occur if significant time lapses between the time Congress authorizes project construction and appropriates funding for that construction), a supplemental EIS may be required. Typically, natural resource data (e.g., wetland delineations, invasive species surveys) is considered valid for only a few years depending on the responsible agency.

explained above, the cumbersome and uncertain process is driving up costs to construction firms and taxpayers.

AGC's Top 10 Opportunities for Reform

Enclosed with this statement please find AGC's Oct. 18, 2017, 32-page set of recent recommendations to the Corps on ways to improve its environmental review and permitting process for infrastructure projects.[18] In addition, AGC offers directly below its list of the 10 opportunities for Congress to minimize delays during project planning and permitting to ensure faster delivery of civil works projects.

1. **ONE FEDERAL DECISION: Congress should require federal agencies to follow a "One Federal Decision" process for all environmental reviews and authorizations for major infrastructure projects so there is just one NEPA review for a project that ends with a single Record of Decision (ROD) issued by the lead agency.**[19]
    - Separate NEPA reviews for a given project consume significantly more agency resources than a joint NEPA document (see #2 below) because of repeated interagency consults (endangered species, historic properties, coastal zone impacts, state water quality standard certification), repeated public comment/hearing responsibilities and increased opportunity for conflict, for example. Agencies need to stop redoing NEPA at various steps of the project development and permitting process – see the previous section for discussion the Corps NEPA analysis in permitting actions.
2. **MERGE THE PROCESSES: Congress should require a nationwide merger of the NEPA and CWA 404 permitting processes,[20] with the Corps issuing a 404 permit at the end of the NEPA review (or by a defined deadline thereafter – see #5 below), based on the information generated by the NEPA process.** Data show these processes take the longest, are the costliest, and are subject to the most disagreements. Even though WRDA 2014 states that agencies "shall carry out the[ir] obligations ... under other applicable laws concurrently and in conjunction with the required [NEPA] environmental review process" – it is not happening, because the law provides an exception if "doing so would prevent the ... agency from conducting needed analysis or otherwise carrying out those obligations."[21]
    - **Congress should revisit the Corps' NEPA regulations regarding the "scope of review" of the Corps' NEPA analyses.[22] Congress also should also revisit when a project alternative is**

[18] *See* http://newsmanager.commpartners.com/agcfed/downloads/USACE%20Reg%20Reform%20-%20AGC.pdf.
[19] President Trump's Executive Order (EO) 13807: "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects" (Aug. 15, 2017) calls for "One Federal Decision," unless separate NEPA documents are requested by the project sponsor or a single environmental review is not the best method for the project. The President has tasked the Council for Environmental Quality (CEQ) and the Office of Management and Budget with implementing the "One Federal Decision;" the regulatory process will take years and is subject to litigation. Congress should codify this "One Federal Decision" requirement.
[20] The "2015 (update) Red Book -- Synchronizing Environmental Reviews for Transportation and Other Infrastructure Projects" describes a process that satisfies the NEPA requirements and synchronizes environmental permitting for all agencies involved.
[21] 33 C.F.R. § 2348(e)(8).
[22] 33 C.F.R. § 325, App'x B(7)(b). The Corps' "scope of review" under NEPA has been problematic in two ways: (1) individual districts have required NEPA reviews to address aspects of the project that are far beyond the scope of the activity authorized by the Corps permit; (2) environmental groups have frequently targeted the districts' NEPA decisions in

"practicable"[23] and when a practicable alternative has basis for elimination[24] – and consider repealing the "least environmentally damaging practicable alternative" or LEDPA standard[25] in the CWA § 404(b)(1) Guidelines (guidelines)[26] to allow more flexibility in project decision-making (e.g., the selection of the "preferred alternative" and the Corps' public interest review[27]) and to facilitate a successful NEPA/404 merger process.[28]

Indeed, the LEDPA analysis is too restrictive. While the NEPA alternatives analysis may form the basis of the CWA 404(b)(1) alternatives analysis, the two analyses are different. Under NEPA, the agency is required to identify its environmentally "preferred" alternative, a process which does not involve a practicability analysis. 40 C.F.R. § 1502.14(e). Because NEPA is a procedural statute only, the agency is not required to "choose" the environmentally preferred alternative. Under EPA's 404(b)(1) guidelines, however, if a less environmentally damaging practicable alternative to the proposed discharge is identified, the Corps cannot issue a CWA Section 404 permit for the proposed discharge. 40 C.F.R. § 230.10(a).

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litigation, targeting a lack of precision or clarity as to the scope of NEPA analysis (and basis for that analysis) employed by the Corps in the environmental assessment/statement of findings.

[23] An alternative is "practicable" if it is "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." *Id.* at § 230.10(a)(2). The regulations establish a presumption, for non-water-dependent projects, that practicable alternatives are available to avoid aquatic resources.

[24] In prior correspondence with the White House Council on Environmental Quality, AGC has suggested the followings "reasons" for when alternatives should be eliminated from analyses:

- Eliminate an alternative when constructability, including a significant increase in cost for specific construction methods, is beyond the budget for the proposed action.
- Eliminate an alternative when the length or size of that alternative results in significantly greater impacts than a proposed action or other alternatives.
- Eliminate an alternative when it significantly changes the location of a proposed action.
- Eliminate an alternative that is labeled as "not preferred" by an agency or commenter, and no further comments are provided by the agency or commenter regarding why the alternative would result in fewer impacts than the proposed action.
- Eliminate an alternative when the configuration of the alternative to incorporate into the main system would result in greater impacts (e.g., additional infrastructure required to support the configuration).

[25] Per EPA's "guidelines," the Corps may not issue a CWA Section 404 permit "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a). Thus, in evaluating whether to issue a Section 404 permit, the Corps must determine that there is not a "less environmentally damaging practicable alternative" to the discharge proposed by the permit.

[26] As directed by the Clean Water Act, the U.S. Environmental Protection Agency (EPA) issued "guidelines" through the notice-and-comment rulemaking process, *see* 45 *Fed. Reg.* 85336 (Dec. 24, 1980), for the placement of dredged and fill materials – *see* 33 U.S.C. § 1341(b); 40 C.F.R. § 230 – that set the environmental standards for the Corps' issuance of 404 permits. While the Guidelines are binding regulations, some flexibility in their application is contemplated and permitted. *See* 40 C.F.R. § 230.6(a). Congress could direct EPA and the Corps to update the 404(b)(1) guidelines as directed.

[27] 33 C.F.R. § 320.4(a) (the Corps' public interest review regulations require an evaluation of: "[T]he probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." *Id.* Waterways programs foster economic development, facilitate trade and commerce, aid international competitiveness, stimulate employment, provide water recreation opportunities, enhance agricultural and industrial productivity, and augment our national defense.

[28] The substantive standards for Section 404 permits are found in EPA's Section 404(b)(1) guidelines, the Corps' public interest review regulations, and policy memoranda of the two agencies. Permits may be conditioned or denied based on these governing standards. Compliance with NEPA may also result in imposition of additional permit conditions.

- **Congress should require the lead agency on a federal NEPA review to rely on state and local environmental planning products when establishing the proposed project's "Purpose and Need" and "Range of Alternatives."** Major infrastructure projects are commonly located within metropolitan areas under the jurisdiction of state, local and regional planning entities that undertake lengthy processes to determine infrastructure priorities within their jurisdictions. It does not make sense to reopen all the work that has already been done.

3. **<u>REDUCE DUPLICATION</u>: 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 scope of the project.**[29]

   - Many CWA Section 404 (individual) permit delays stem from delays in other federal environmental permissions, authorizations, certifications, etc., required before a District Engineer will sign off on the permit application.[30] Key examples include delays and repetition with assessments/analyses under the Endangered Species Act (ESA) Section 7 consults, the National Historic Preservation Act (NHPA) authorizations Section 106 authorizations, [31] and the Coastal Zone Management Act (CZMA) consistence determinations, for example, which are a part of the NEPA process. This procedural problem can take many forms: the Corps is not fully participating in the NEPA process; the Corps is requiring a do-over because of minor modifications to project footprint or construction means and methods; the Corps is imposing different requirements to satisfy the same environmental requirements that were looked at during NEPA planning (likely stemming from each agency's unique determination of key benchmark issues such as "purpose and need" of the project or the "alternatives" selection process). **For water infrastructure projects, Congress should require the Corps to always be a cooperating agency in the NEPA process (when it is not serving as the lead agency) and, in that regard, assume the responsibility for ensuring that the above-referenced consultation**

[29] The Council on Environmental Quality's (CEQ) regulations implementing the procedural aspects of NEPA are found at 40 C.F.R. Sections 1500–1508. The NEPA document is circulated to agencies, organizations and members of the public known to have an interest in the study. Draft and final environmental assessments (EA) and draft and final EISs and supplements are made available to the public as provided in 40 C.F.R. §§ 1502.19 and 1506.6. The final report, final EA or final EIS and the proposed Report of the Chief of Engineers (Chief's Report) is circulated to interested parties for public review and filed with the EPA pursuant to regulations of the President's Council on Environmental Quality for implementing NEPA and 40 C.F.R. §§ 1500-1508. Reviews and consultation requirements, analyses, and status of coordination required by other environmental laws, executive orders and memoranda are summarized in the draft NEPA document.

[30] While the Corps makes the Section 404 permit decision, other federal and state agencies have substantial roles in the permit application process. The result is a process that requires extensive interagency coordination. The Corps must comply with environmental review requirements under various federal laws before issuing a CWA Section 404 permits. These laws include NEPA, ESA at 16 U.S.C. §§ 1531, *et seq.*, NHPA at 16 U.S.C. §§ 470, *et seq.*, CZMA at 16 U.S.C. §§ 1451, *et seq.*, and many others. Each law has different requirements, and the Corps must ensure that all applicable requirements are satisfied before a permit is issued. The Corps' regulations include procedures for NEPA compliance (*see supra* footnote 15) and for Section 106 compliance (33 C.F.R. § 325 App. C). As reflected in those regulations, the Corps has an independent obligation to comply with those laws.

[31] Another suite of laws relates to historic and cultural protection and preservation. These laws have often elevated tribal nations' concerns. More generally, attention to how the project affects an area's cultural heritage (local communities) must be considered. These factors should be part of the EIS analysis (e.g., to identify sites of historic significance, the presence of Native American graves).

requirements are completed during the NEPA review and such consults are sufficient for the 404 federal permit authorizations.

4. **LIMIT THE SCOPE OF RE-EVALUATIONS: Congress should direct federal agencies to develop clear standards for determining what project changes warrant a re-evaluation of previously approved environmental documentation (i.e., what constitutes a material change).** Currently, projects are being delayed because minor changes or adjustments to the project design or location – or even just changes to construction means and methods (e.g., change in how diverting water flow) – will trigger another round of lengthy coordination at the federal and state level, and several more public review periods that restart the statute of limitations and give opponents more time to sue (sometimes just to stop the project). Projects also are held up when environmental field surveys (wildlife, wetlands) become "stale" and agencies require new, updated information.

5. **ESTABLISH FIRM DEADLINES: Congress should enact specific deadlines for completing the environmental permitting process as well as NEPA review deadlines, consistent with President Trump's recent order.** Executive Order 13807[32] aims to reduce environmental review and permitting time, to the extent permitted by law, to "not more than an average of approximately 2 years" following the publication of the notice of intent to prepare an EIS and all federal authorizations are complete within 90 days after the ROD. Similarly, FERC has set expeditious schedules for all federal agencies, and state agencies acting under federal delegated authority, to reach a final decision on requests for federal authorizations necessary for natural gas infrastructure projects (a 90-day deadline for other federal decisions upon the issuance of FERC's final EIS, unless a specific schedule is otherwise formally noticed by FERC).[33] **In addition, Congress should consider:**

    - Requiring the Corps to implement the financial penalty provisions enacted in WRDA 2014 that created a unique system of reprogramming a federal agency's funding if that agency missed its deadline for rendering a decision on a permit, license, or other approval;[34]
    - A broader application of the Title 41 of the Fixing America's Surface Transportation Act (FAST-41)[35] provisions that require agencies to post the schedules for federal environmental reviews on an online "Dashboard" and to update the Dashboard to reflect progress toward each schedule milestone;
    - Limiting text or page length of environmental analyses for activities that are repeated in the same fashion in like environments;
    - Establishing a standard practice wherein environmental reviews adopt material from previously completed environmental reviews from the same geographic area;[36]

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[32] *See* footnote 9.

[33] 18 C.F.R. § 157.22. FERC issued a Final Rule (Order 687) and regulations establishing the process by which it would exercise its responsibilities under Section 313 of EPAct - https://www.ferc.gov/whats-new/comm-meet/101906/C-2.pdf.

[34] 33 USC § 2348(5)(B) (sets the deadline as the later of 180 days after an application for the approval is complete; 180 days after the Corps completes the NEPA process).

[35] 42 U.S.C. § 4370(m); https://www.congress.gov/114/bills/hr22/BILLS-114hr22enr.pdf.

[36] AGC-members have observed that each project, though very similar in type and scope of work (e.g., maintenance dredging), seems to start from the beginning, with no credit given to decisions made for previous permit efforts. There is a lack of uniform standards and guidelines for regulatory agency personnel to follow, spanning all district offices. Congress should instruct the federal environmental agencies build online databases of technical information (e.g., biological opinions,

- Granting agencies specific authority to set spending limits for NEPA documents on critical infrastructure; and
- Providing federal agencies with adequate resources/tools to achieve the two-year goal for all covered projects: namely, mandatory staff training on Corps permit application procedures and protocols (there has been too much inconsistency among districts), as well as construction means and methods to better understand the real-world aspects of construction. Corps Headquarters must assert centralized control over its regulatory program to reduce uncertainties in the permitting process.

6. **PREVENT UNACHIEVABLE PERMIT REQUIREMENTS: Congress should take steps to ensure that the regulatory and environmental considerations under the CWA Section 404 permitting process DO NOT create unachievable requirements.** Depending on the nature and location of the construction project, the Corps may be required by other environmental laws to consult with other federal agencies that have jurisdiction over any affected resource or that have special expertise in determining the project's regulated impacts. Those agencies may specify limits or "conditions" under which the project may proceed and/or recommend methods to mitigate impacts to a protected resource; in accordance with the federal law(s) they administer. The Corps will include the language that results from the consultation process, in its CWA Section 404 permit.[37] Conflicts can arise from the imposition of permit conditions like seasonal work windows (limited time when dredging is allowed, relocation, avoidance) or water quality protections (restrictions or barge overflow or other types discharge limits) to protect "known" endangered species and habitat (fish/shellfish migration and spawning, bird nesting and foraging).[38] Regulatory agency personnel appear to lack perspective on how their decisions will impact a project's schedule, costs or plans and quality. Government staff are too rigidly interpreting statutory provisions without allowing any flexibility for real-world implementation issues and challenges or going above-and beyond the black letter law.[39] In interagency consultations between the Corps and FWS, contractors have observed Corps staff interpreting ESA Section 7 consult requirements even more stringently than FWS staff – at times calling for a re-evaluation of the project's CWA 404 permit conditions due to minor changes or adjustments to the project (see #4 above). This puts the permit

previous permit conditions or mitigation requirements) so that information does not have to be gathered anew for every project operating in a similar watershed or geographic area.

[37] During the ESA Section 7 consultation projects, the U.S. Fish and Wildlife service may "condition" a 404 permit to ensure agency actions to not jeopardize listed species or destroy or adversely modify critical habitat.[37] Similarly, the Corps/permit applicants have a legal obligation to comply with the Coastal Zone Management Plan in the state where the project is located (if applicable) to the "maximum extent practicable" – or no permit can be issued. In addition, the Clean Water Act includes a process, Section 401 certification, whereby states can veto or impose conditions on a variety of federal permits, including Section 404 permits, to ensure that the permits comply with state water quality standards. *See* 33 U.S.C. § 1341.

[38] *Id.*

[39] For example, for maintenance dredging jobs located at an active Navy base, an AGC member is now required to provide the following environmental controls:

- Full time monitors on the dredge for ESA species (marine mammals, green sea turtles),
- Use of silt curtains (environmental clamshell buckets alone are not acceptable),
- Monitor water quality continuously,
- Conduct visual surveys with underwater cameras of the entire dredge area just prior to dredging to identify any endangered species or habitats (corals, eel grass), and
- Conduct continuous side-scan sonar searches for submerged ESA species.

All of these requirements were for a maintenance water job within an active Navy harbor where ships, submarines and tugboats transit daily, 365 days per year.

back in the queue for review, reopens the consult process with FWS and potentially other resource agencies, stops work on the project. For example, Corps regulatory staff may firmly impose limits on construction work (i.e., time-of-year restrictions) due to species spawning/migration seasons; however, the work window may coincide with extreme cold or when the river is flowing at its highest rate/capacity – thereby making work impossible.

- **Congress should provide clearer guidelines to Corps regulatory staff on how to interpret the ESA Section 7 consult requirements and any recommendations to prevent inconsistent and inflexible application of the environmental regulations; goal being to protect the environment but not place unreasonable restrictions on construction.** For example, Congress should direct the Corps and FWS to coordinate on the criteria for managing construction windows (i.e., timing restrictions) and mitigation requirements for resources (e.g., the Corps' wetlands vs. FWS species concerns).
- **Congress should hold the Corps accountable for how much money it spends to protect the environment, in terms of fiscal responsibility.** This could be a budget for environmental protection and the percentage allocated to each project could be variable depending on the type of work, location and other factors that would determine potential impacts to the environment.
- **If unforeseen, undisclosed listed species or critical habitat are encountered during a water resource construction project, Congress should allow the contractor to manage and resolve the issue quickly through proactive mitigation efforts.** Multi-phase, multi-year infrastructure projects can be brought to a standstill if the environmental studies surveys for ESA-species are "stale" (see #4 above – regarding the re-evaluation of environmental surveys) or protected species are newly discovered, or "listed." *(Scenario 1: Ongoing large, multi-phased infrastructure project ready to perform bridge work and listed species discovered; Section 404 permit conditions re-evaluated to push work window into June 1 to Sept. 30 timeframe, based on species spawning; schedule not possible to meet due to how high and fast river was running and project at a standstill. Scenario 2: Dredging work underway; uncover listed aquatic species not previously known; instructed to stop work for prescribed "wait period" to allow performance of surveys and biological studies.)*
- **Congress should require Corps regulatory staff to receive training on Corps permit application procedures and protocols (there has been too much inconsistency among districts), as well as construction means and methods to better understand the real-world aspects of construction.** Corps Headquarters must assert centralized control over its regulatory program to reduce uncertainties in the permitting process. Generally, AGC-members have experienced that the Corps' regulatory and environmental field staff are untrained and unfamiliar with construction activities. They are making decisions without any knowledge of the impacts to project operations and the costs associated with those impacts.

7. **<u>ADVANCE RELIABLE MITIGATION OPPORTUNITIES</u>: Congress should provide the construction industry with more certainty upfront regarding the requirements for and availability of suitable compensatory mitigation.** AGC members support coordinated mitigation planning and efforts to reduce transaction costs. We recommend greater flexibility for project sponsors to develop advanced mitigation programs (that establishes a programmatic/ standard approach that defines upfront the mitigation requirements for similar activities in similar regions) and then receive credit for this mitigation.

In addition, Congress should consider directing regulatory agencies to:

- Provide a nationwide ratio or mitigation evaluation criteria for permanent impacts at a federal level; (Note: this would require significant cooperation from the Corps and FWS.) For example, the Corps' process and its methods for determining mitigation for stream impacts results in excessive mitigation and inconsistencies across districts.
- Exempt temporary impacts from compensatory mitigation if the resource is restored to preconstruction conditions and functions at the end of the project.
- Include in the ROD conditions for species protection, mitigation plans, approved construction windows that limit the impact on species, and other related requirements – to streamline and provide consistency for permitting; facilitate agency coordination; and ensure that project limitations are realized by the owner and properly addressed by the contractor during bidding and scheduling.
- Address the lack of mitigation banking capacity in many regions of the country, by developing 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. The funding from the national account would be apportioned among the districts base on where impacts were taken and applied toward wetlands/habitat preservation and promoting banking opportunities.

8. **CONCURRENTLY PROCESS RHA 408 AND CWA 404: Congress should require the Corps to concurrently process the River and Harbors Act (RHA) Section 408 permission and CWA 404 permit on all infrastructure projects, as applicable.** Construction projects are being delayed because of Section 408 burdens.[40] The Corps will *not even begin* to process many CWA Section 404 Nationwide and individual permits until the 408 permission is granted.[41] This means that delay on the 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.

   WRDA 2014 requires the Secretary of the Army to establish benchmark goals for "improving and expediting the planning and environmental review process (including completing Section 408 permits in a timely fashion.)[42] **Congress should set a deadline for the Corps to implement this WRDA 2014 provision.**

   WRDA 2016 states that if a review under NEPA is required, and the Corps is not the lead agency for the review, the Corps should conduct its 408 review concurrently, as a cooperating agency, using the same environmental documents. WRDA 2016 also directs the Corps to ensure coordination of other permit

[40] *See* http://www.nola.com/environment/index.ssf/2017/05/corps_attempting_to_speed_coas.html; http://www.journalscene.com/news/waiting-on-the-final-leg-of-berlin-g-myers-parkway/article_72b28f28-1309-11e7-a986-1f5ecfa794a9.html.

[41] RHA Section 14, codified at 33. U.S. C. 408, 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, the Corps 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 Corp's flood control projects, and simply modification of existing Corps' projects—e.g., levees—by state and local entities.

[42] 33 U.S.C. § 2348(n); *see supra* footnote 2.

reviews under RHA Sections 9/10 and CWA 404, for example, with any review under section 408.[43] **Congress should evaluate whether these provisions are being implemented to their fullest extent.**

AGC members report that the Corps has recently undertaken action to more rigorously ensure compliance with Section 408, setting forth nine steps to obtain the 408 permission.[44] 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. In addition, the Corps needs to review the relevant project area under the requirements of NEPA (see related discussion and streamlining recommendations in #1-2 above) and other environmental statutes (e.g., the ESA, NHPA, CZMA, Marine Protection, Research and Sanctuaries Act, etc. where applicable) – see related discussion and streamlining recommendations in #3 above. The Corps must also consider factors that may be relevant to the public interest depend upon the type of Corps 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. A "public interest" review is also part of the 404 permit issuance process, as described above. 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.

AGC also recommends that Congress:

- 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.
- 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.

9. **<u>LIMIT JOINT ADMINISTRATION OF 404 PROGRAM</u>: Congress should grant the Corps greater authority to run the 404 permit program – see footnote #45 for a detailed description of the U.S. Environmental Protection Agency's (EPA) role in the 404 program.[45]** This would promote greater consistency and certainty because project proponents would be able to rely on Jurisdictional Determinations (JDs) and Section 404 permits received from the Corps - they would not have to question whether EPA will also get involved in the permit process or disagree with the Corps' decision-making. **Congress should consider the following streamlining reforms:**

[43] 33 U.S.C. § 408(a); *see supra* footnote 2.

[44] USACE Policy - Engineering Circular 1165-2-216.

[45] The Corps has responsibility for running the day-to-day permitting under Section 404 of the CWA. In its supporting role, EPA develops and interprets environmental criteria for evaluating permit applications; has final authority to determine the scope of geographic jurisdiction; approves and oversees state assumption; identifies activities that are exempt from permitting; reviews and comments on individual permits; has authority to prohibit, deny or restrict the use of any defined area as a disposal site (CWA Section 404(c)); can elevate specific proposed Corps permits (CWA Section 404(q)); and enforces Section 404 provisions. In addition, EPA and the Corps are standing members of the mitigation banking Interagency Review Teams (IRT), an interagency group of federal, tribal, state, and/or local regulatory and resource agency representatives that reviews documentation for, and advises the district engineer on, the establishment and management of a mitigation bank or an in-lieu fee programs.

- Eliminate the 1979 Attorney Civiletti Opinion[46] that gives EPA final authority over CWA JDs, and (by law, regulations, or executive order) give sole authority to the Corps. Also direct the agencies as follows:
    - Corps and EPA should amend the 1989 Memo of Agreement (MOA) that establishes practical divisions of responsibility for JDs.
    - Corps should revise Regulatory Guidance Letter 16-01[47] on the procedures for determining what geographic areas on a project are WOTUS.
    - Corps should accept NEPA planning-level decisions – including "wetlands determination" and "wetlands delineation" – to support advance mitigation strategies that are both more economical and more effective from an environmental stewardship perspective.
- Revisit the use of CWA Section 404(q) to dispute 404 permit decisions and request higher authority review by the Office of the Assistant Secretary of the Army for Civil Works; a re-evaluation is needed to avoid delay in individual permit applications when interagency disagreements arise.
- Remove EPA's authority to veto a final 404 permit decision made by the Corps, pursuant to CWA Section 404(c).
- Eliminate the "Interagency Review Team" for mitigation banks and authorize the Corps to review and approve banks after a simple 30-day review and comment period offered to EPA, USFWS, and NMFS. This will save considerable time, costs, and reduce staff effort which can be re-directed to expediting permit reviews or other work.

10. **<u>REFORM CITIZEN SUIT PROVISIONS</u>: Congress should consider a reasonable and measured approach to citizen suit reform designed to prevent the misuse of environmental laws.** All too often, as suggested throughout this statement, the construction industry is caught up in frivolous and obstructive litigation that is delaying, and sometimes defeating, proposed projects. **AGC recommends that Congress consider the following:**
    - Further shorten and standardize the statute of limitations for challenges to final NEPA decisions or claims seeking judicial review of an environmental permit, license or approval issued by a federal agency for an infrastructure project;[48]
    - Require interested parties to get involved early in a project's review process to maintain standing to sue later;

[46] *See* https://www.epa.gov/cwa-404/1979-civiletti-memorandum (last visited, Jan. 12, 2018).
[47] *See* http://www.mvr.usace.army.mil/Portals/48/docs/regulatory/RGL%2016-01%20Files/RGL%2016-01.pdf?ver=2016-11-08-114929-523 (last visited, Jan. 12, 2018).
[48] WRDA 2014 limits judicial review of a permit, license, or other approval issued by a federal agency for a project study to three years after the publication of a notice in the *Federal Register* announcing that approval. 33. U.S.C. § 2348(k). MAP-21 reduced the time limit to 150 days after publication of a notice in the *Federal Register* announcing that a permit, license or approval is final, for parties to file lawsuits that challenge agency environmental decisions regarding surface transportation projects. 23 U.S.C. § 139(l). FAST-41 reduced the statute of limitations for NEPA challenges from six to two years to provide more certainty for applicants; however, most NEPA lawsuits already are filed well within two years. However, the re-issuance of a permit or the preparation and announcement of a "supplemental" EIS, when required, restarts the clock.

- Require bonds[49] to be posted by plaintiffs seeking to block activities to reduce abuse and delay tactics that harm private parties and taxpayers; and
- Require that the enforcement of federal environmental rules on a construction site 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 the "notice period" beyond the current 60 days (giving regulatory agencies more time to review notice of intent letters and initiate formal actions);
    - Clarify the definition of "diligent prosecution" of alleged violations, thereby allowing federal/state authorities to exercise their primacy in enforcement and preventing unnecessary citizen suit intervention.

AGC members have a considerable interest in the effort to improve the NEPA and environmental permitting processes through legislative (or administrative reform) and applaud this subcommittee for its leadership to this end. Thank you again for inviting AGC to testify before the subcommittee today. I look forward to answering any questions you may have. My contact information is below.

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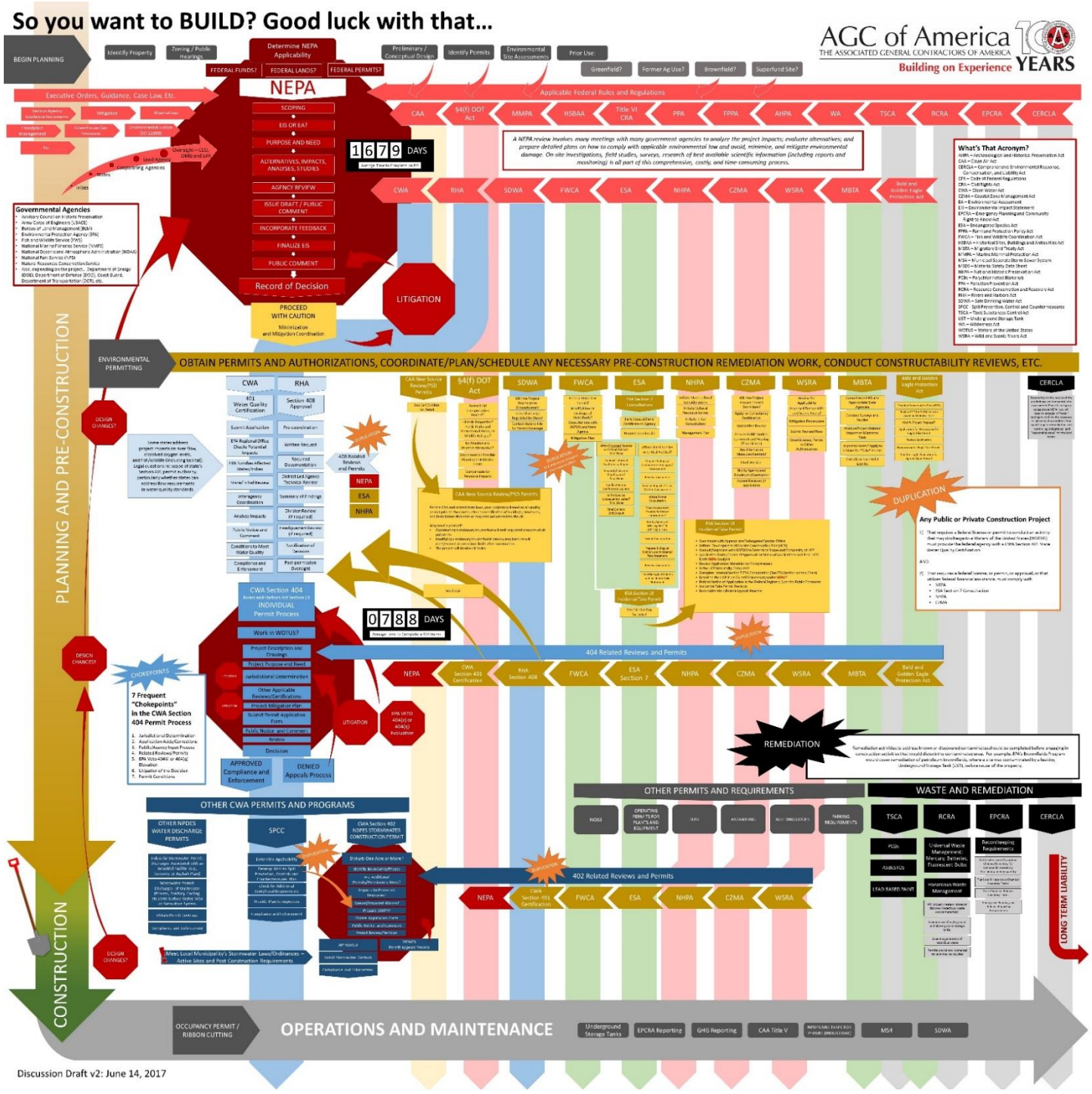
[49] Possible bonding calculation methods/factors to consider: (i) liquidated damages based on "end user cost," per hour or per day; (ii) daily overhead and engineering costs to maintain project team during delays – this cost could be calculated on a per day basis; (iii) daily rate for the jobsite overhead costs; (iv) costs associated with a state acquiring specific project funding through a public bond; (v) loss of federal funds committed and not used within the determined funding period. These cost factors could be combined, based on the project and the impact of delays.


So you want to BUILD? Good luck with that…
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Building on Experience
100 YEARS
BEGIN PLANNING
Identify Property
Zoning / Public Hearings
Determine NEPA Applicability
FEDERAL FUNDS?
FEDERAL LANDS?
FEDERAL PERMITS?
NEPA
Preliminary / Conceptual Design
Identify Permits
Environmental Site Assessments
Prior Use:
Greenfield?
Former Ag Use?
Brownfield?
Superfund Site?
Executive Orders, Guidance, Case Law, Etc.
Applicable Federal Rules and Regulations
CAA
§4(f) DOT Act
MMPA
HSBAA
Title VI CRA
PPA
FPPA
AHPA
WA
TSCA
RCRA
EPCRA
CERCLA
SCOPING
EIS OR EA?
PURPOSE AND NEED
ALTERNATIVES, IMPACTS, ANALYSES, STUDIES
AGENCY REVIEW
ISSUE DRAFT / PUBLIC COMMENT
INCORPORATE FEEDBACK
FINALIZE EIS
PUBLIC COMMENT
Record of Decision
1679 DAYS
A NEPA review involves many meetings with many government agencies to analyze the project impacts; evaluate alternatives; and prepare detailed plans on how to comply with applicable environmental law and avoid, minimize, and mitigate environmental damage. On site investigations, field studies, surveys, research of best available scientific information (including reports and monitoring) is all part of this comprehensive, costly, and time-consuming process.
CWA
RHA
SDWA
FWCA
ESA
NHPA
CZMA
WSRA
MBTA
Bald and Golden Eagle Protection Act
What's That Acronym?
Governmental Agencies
LITIGATION
PROCEED WITH CAUTION
Minimization and Mitigation Coordination
ENVIRONMENTAL PERMITTING
OBTAIN PERMITS AND AUTHORIZATIONS, COORDINATE/PLAN/SCHEDULE ANY NECESSARY PRE-CONSTRUCTION REMEDIATION WORK, CONDUCT CONSTRUCTABILITY REVIEWS, ETC.
PLANNING AND PRE-CONSTRUCTION
DESIGN CHANGES?
401 Water Quality Certification
Section 408 Approval
CWA Section 404 Rivers and Harbors Act Section 10 INDIVIDUAL Permit Process
0788 DAYS
Work in WOTUS?
Project Description and Drawings
Project Purpose and Need
Jurisdictional Determination
Other Applicable Reviews/Certifications
Proposed Mitigation Plan
Submit Permit Application Form
Public Notice and Comment
Review
Decision
APPROVED Compliance and Enforcement
DENIED Appeals Process
CHOKEPOINTS
7 Frequent "Chokepoints" in the CWA Section 404 Permit Process
1. Jurisdictional Determination
2. Application Adds/Corrections
3. Public/Agency Input Process
4. Related Reviews/Permits
5. EPA Veto (404(c) or 404(q)) Elevation
6. Litigation of the Decision
7. Permit Conditions
LITIGATION
EPA VETO 404(c) or 404(q) Elevation
ADR Related Reviews and Permits
NEPA
ESA
NHPA
DUPLICATION
Any Public or Private Construction Project
404 Related Reviews and Permits
NEPA
CWA Section 401 Certification
RHA Section 408
FWCA
ESA Section 7
NHPA
CZMA
WSRA
MBTA
Bald and Golden Eagle Protection Act
REMEDIATION
OTHER CWA PERMITS AND PROGRAMS
OTHER NPDES WATER DISCHARGE PERMITS
SPCC
CWA Section 402 NPDES STORMWATER CONSTRUCTION PERMIT
Meet Local Municipality's Stormwater Laws/Ordinances – Active Sites and Post Construction Requirements
OTHER PERMITS AND REQUIREMENTS
NOISE
OPERATING PERMITS FOR PLANTS AND EQUIPMENT
SPILL
ANTI-HAZING
SOLID WASTE
PARKING REQUIREMENTS
WASTE AND REMEDIATION
TSCA
RCRA
EPCRA
CERCLA
PCBs
ASBESTOS
LEAD BASED PAINT
Universal Waste Management: Mercury, Batteries, Fluorescent, Bulbs
Hazardous Waste Management
Recordkeeping Requirements
402 Related Reviews and Permits
NEPA
CWA Section 401 Certification
FWCA
ESA
NHPA
CZMA
WSRA
LONG TERM LIABILITY
CONSTRUCTION
OCCUPANCY PERMIT / RIBBON CUTTING
OPERATIONS AND MAINTENANCE
Underground Storage Tanks
EPCRA Reporting
GHG Reporting
CAA Title V
MS4
SDWA
Discussion Draft v2: June 14, 2017

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ATTACHMENT 1: Associated General Contractors of America's Comments Regarding the U.S. Army Corps of Engineers' Evaluation of Existing Regulations (82 Fed. Reg. 33470; July 20, 2017) in Accordance with Executive Order 13777 ("Enforcing the Regulatory Reform Agenda"), Dated: October 18, 2017.

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DOCKET ID No. COE-2017-0004

Associated General Contractors of America's Comments Regarding the U.S. Army Corps of Engineers' Evaluation of Existing Regulations

(82 Fed. Reg. 33470; July 20, 2017)
in Accordance with Executive Order 13777
("Enforcing the Regulatory Reform Agenda")

Attention:
U.S. Army Corps of Engineers
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Date: October 18, 2017

INTRODUCTION

AGC is the leading association for the construction industry, representing both union and non-union prime and subcontractor/specialty construction companies. AGC represents more than 26,000 firms including over 6,500 of America's leading general contractors and more than 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all 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, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

AGC has a unique knowledge of USACE regulations concerning construction and procurement. Based on that experience and this request, AGC puts forth the following comments for your consideration.

PART 1: RECOMMENDATIONS TO IMPROVE ENVIRONMENTAL REVIEW AND PERMITTING FOR INFRASTRUCTURE PROJECTS

AGC 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 one such challenge, repeatedly echoed by AGC members across the country; it is a process that is circuitous, costly and time-intensive for many infrastructure projects.

Delays in environmental review and permitting decisions, as well as lengthy procurement processes, often derail the efficient delivery of needed infrastructure projects by many years. Such delays deny the public the substantial benefits that come from a construction project: improving our economy, our competitiveness, and our quality of life.

AGC members strongly maintain that improving environmental approval processes alone, while maintaining the integrity of those processes to mitigate environmental impacts, could allow the public to receive and benefit from infrastructure projects in a timelier fashion. In addition, such improvements could generate project cost savings.

Based on significant input from AGC members, **Section I** below points to significant problems that government agencies face during document preparation and interagency reviews that bog down the National Environmental Policy Act (NEPA) process. In **Section II**, AGC points to the common, or key, characteristics of streamlined projects: those that make it through the environmental approval process in "two years, not ten."[1] In **Section III**, AGC points out several ripe, high-level opportunities for USACE and its interagency partners to strengthen existing policy and pursue new administrative actions. AGC is principally focused on a requirement to merge the NEPA and Clean Water Act (CWA) Section 404 permit processes, which would greatly expedite project decision-making and avoid duplication and procedural inefficiencies. AGC also provides a detailed "chokepoints" analysis and comprehensive recommendations that are *specific* to the 404 program.

Finally, AGC is an active member of the Washington, DC-based Waters Advocacy Coalition (WAC); that group has submitted detailed comments on existing regulations that should be considered for repeal, replacement, or modification pursuant to the President's Executive Order 13777.[2] AGC herein incorporates by reference the points raised in WAC's letter submitted to this docket.

I. Problems During NEPA/Permitting Document Preparation and Agency Review: General Comments

NEPA[3] requires the preparation of an Environmental Impact Statement (EIS) for all major *federal actions* significantly affecting the quality of the human environment. NEPA requires the project proponent and the lead agency to 1) consider the environmental, social and economic impacts of their decisions; 2) evaluate all reasonable alternatives; 3) mitigate impacts to the extent practical; and 4) solicit comments from other agencies, stakeholders and the public.[4] The Council on Environmental Quality's (CEQ) regulations implementing the procedural aspects of NEPA are found at 40 C.F.R. Sections 1500–1508.[5]

[1] Executive Order ("EO") 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects" (Aug. 15, 2017), sets a goal of completing the Environmental Impact Statement (EIS) within two years from the Notice of Intent (NOI) to prepare an EIS.
[2] 82 *Fed. Reg.* 33470 (Jul. 20, 2017).
[3] National Environmental Policy Act (NEPA), 42 U.S.C. § 4321–4347.
[4] *See* Federal Highway Administration's (FHWA) Environmental Review Toolkit online at https://www.environment.fhwa.dot.gov/projdev/pd3tdm.asp.
[5] The CEQ's regulations also require each agency to adopt implementation procedures to "supplement" its provisions. 40 C.F.R. § 1507.3(a) (2014).

USACE follows CEQ's NEPA regulations; further, the Corps promulgated its own NEPA procedures for the Corps' programs, including the Section 404 permit program.[6]

USACE actions that "normally require an EIS" include: feasibility reports for authorization and construction of major civil works projects; proposed changes in projects which increase size substantially or add additional purposes; and proposed major changes in the operation and/or maintenance of completed projects.[7] The Corps will normally be the lead agency for Corps' civil works projects and will normally avoid joint lead agency arrangements.[8] In addition, the issuance of a permit under CWA Section 404[9] or Section 10 of the Rivers and Harbors Act (RHA)[10] constitutes a federal action subject to the requirements of NEPA, including the preparation of an EIS if the environmental effects of the permit issuance are deemed to be significant.

AGC members have pointed to a host of technical and procedural problems that government agencies face, in general, during document preparation and interagency reviews: they inevitably lead to inconsistencies in the NEPA approval process, schedule delays and costs overruns. Such uncertainty spurs legal challenges, which can ultimately threaten the viability of the project.

Based on AGC members' first-hand experiences, technical and procedural risks typically stem from:

- Poor interagency communication (leads to missed deadlines and conflicting agency requests and responses);
- Inability of the lead agency to make timely decisions, particularly where projects are "political" or controversial;
- Lack of qualified government staff to conduct reviews (leads to delays in document review/publication and resource-agency comments that are conflicting, redundant, repetitive, or inconsistent);
- Confusion during NEPA reviews with joint lead agencies (federal and state) because not all agencies have the same directives/thresholds;
- Disagreement over the project's "Purpose and Need;"
- Insufficient "Alternative Analysis;"
- Ineffective stakeholder outreach and engagement;
- Uncertainty over the level of analytical scrutiny to apply in reviewing projects (agencies are risk averse and often choose not to pursue streamlined options out of concern that such "short-cuts" will increase litigation); and
- Complex overlay of laws and regulations that apply to infrastructure projects – *in addition to NEPA* – complicates the permitting process (*e.g.*, the number of species listed and the breadth of critical habitat identified under the Endangered Species Act grows every year).

[6] 33 C.F.R. § 230, 53 *Fed. Reg.* 3127 (1988); 33 C.F.R. Appendix B to Part 325 (NEPA Implementation Procedures for the Regulatory Program).
[7] 33 C.F.R. § 230.6 - Actions normally requiring an EIS.
[8] 33 C.F.R. § 230.16 - Lead and cooperating agencies. Lead agency status for regulatory actions will be determined on the basis of 40 C.F.R. 1501.5(c).
[9] 33 U.S.C. Section 1344.
[10] 33 U.S.C. Section 403.

II. Common, or Key, Characteristics of Streamlined Projects

Some infrastructure projects can, and do, get through the NEPA review and permitting process in a timely and effective manner (*i.e.*, "two years, not ten").[11] What makes these projects different? What do these projects have in common that makes them "successful"? In AGC members' (and their consultants') experiences, streamlined projects possess the following common, or key, characteristics:

- A **designated leader or champion** within the lead agency who is responsible for **defining and maintaining a schedule** and advancing the process, making key decisions in a timely manner, and clearly outlining the requirements and expectations that the participating resource agencies and project sponsor/applicant need to follow;
- Early and effective **public outreach** and stakeholder engagement (potential project opponents need to be identified, engaged, and educated on the project early and regularly throughout the process);
- Effective and positive **communication between the lead agency and the project sponsor/applicant** regarding the review and permitting;
- A **defined end date** upon which all key parties agree;
- Coordinated and **concurrent NEPA review and regulatory/permitting review processes** (the applicable permit applications should be prepared in conjunction with the NEPA review);
    - Cooperating agencies acceptance, in writing, at the end of the Scoping Phase of the lead agency's determination of the project's Purpose and Need, Range of Alternatives to be analyzed, scope of any special studies, and project schedule; and
- Reliance on a **single environmental document** prepared under NEPA to satisfy federal permit requirements and approvals.
- Use **programmatic approaches/agreements** to eliminate repetitive discussions of the same issues.

Under current law, USACE has the authority to carry out many of the above-referenced elements that help to accelerate or "streamline" the delivery of a project. However, there are notable flexibilities, exceptions and qualifications built into nearly every authorized measure that allow the lead agency and participating resource agencies on a project to miss deadlines, defer assessments/analyses, and postpone the bulk of the regulatory/permitting work until after the Record of Decision (ROD).

On Capitol Hill, AGC has presented a compelling case before congressional committees in both the House and Senate for further improving the environmental review and permitting process. Urging Congress to act, AGC also created a chart (see AGC's Federal Environmental Review and Permitting Flowchart[12] in Appendix A) to illustrate the shortcomings in current laws that seek to streamline approvals for energy, transportation, water, and other "infrastructure projects." For example, the Moving Ahead for Progress in the 21st Century Act (MAP-21) and Title 41 of the Fixing America's Surface

[11] EO 13807 *supra* note 1. *See e.g.,* FHWA's "Success in Stewardship" newsletter https://www.environment.fhwa.dot.gov/strmlng/newsletters/feb16nl.pdf; "Eight Case Studies Demonstrating Successful Efforts in Environmental Streamlining." https://www.environment.fhwa.dot.gov/strmlng/casestudies/index.asp.

[12] AGC's flowchart graphically illustrates the dozens of enviro approvals needed before a contractor can break ground on most large infrastructure projects. While the Corps' regulatory program is just one piece of the puzzle, the Section 404 permit program is often one of the costlier and time consuming environmental processes and an area to look at for streamlining environmental approvals.

Transportation (FAST-41) both contain ambiguities and exceptions allowing lengthier – as well as separate and sequential – reviews and permitting.

In the face of this statutory and regulatory reality, the delays add up; and it's clear that Congress and the federal regulatory agencies can do more.

III. Potential for New Administrative Actions for USACE and Interagency Partners

AGC points to the following opportunities for USACE to take near-term action (through policy guidance or rulemaking) to improve our delivery of important infrastructure projects across the nation. In particular, a mandatory merger of the NEPA and Section 404 permitting processes would greatly expedite project decision-making and avoid duplication and procedural inefficiencies. AGC also provides a detailed "chokepoints" analysis and comprehensive recommendations that are *specific* to the 404 program.

A. NEPA/404 Permit Merger

The current process of performing sequential and often duplicative environmental reviews and permits on the same project – performed by all levels of government following the NEPA approval process – is presenting massive legal hurdles to infrastructure approvals (see AGC's Federal Environmental Review and Permitting Flowchart in Appendix A). A builder of infrastructure—whether a contractor or government agency—must seek approval not from "the government," but from a dozen or more different arms of the government. According to bonding companies that finance large public works projects, two environmental approvals are critical in rating a project's risk for bond financing. Those are the NEPA review (1,679 days, on average, to complete an EIS) and CWA Section 404 permit authorization (788 days, on average, to obtain an individual permit).[13] Obtaining these approvals prior to bonding greatly reduces risk and achieves a higher bond rating to the benefit of the project sponsor and taxpayers for public projects.

Due to the inability of project owners (*e.g.*, state departments of transportation or private developers) to obtain Section 404 permits quickly following NEPA approval, 404 permitting risk is often transferred to the construction contractor.

REFORMS: For federal transportation projects, several states have merged their NEPA and CWA Section 404 permitting processes; this should be the national standard and USACE's current regulations already point in this direction but do not go far enough.[14] (Across the nation there is considerable variation in

[13] 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 six years (or longer) until the environmental reviews are complete.) *Rapanos v. United States*, 547 U.S. 715 (2006).

[14] *See* 32 C.F.R. § 651.14(e) (2014) ("Several statutes, regulations, and Executive Orders require analyses, consultation, documentation, and coordination, which duplicate various elements and/or analyses required by NEPA and the CEQ regulations; often leading to confusion, duplication of effort, omission, and, ultimately, unnecessary cost and delay. Therefore, Army proponents are encouraged to identify, early in the NEPA process,

the usage and emphasis of merger processes.) In an integrated process, the project sponsor would submit the 404-permit application to USACE simultaneously with the publication of the draft EIS. USACE would be required to issue the 404 permit at the end of the NEPA process based on the information generated by NEPA.

Both the NEPA and Section 404 processes involve the evaluation of alternatives, the assessment of impacts to resources, and the balancing of resource impacts and project need. Conducting two processes simultaneously (or allowing the former to satisfy the latter) would greatly expedite project decision-making and avoid duplication and process inefficiencies.[15] The federal funding agency should assume a lead role in shaping the project "purpose and need" and "range of alternatives" during the NEPA review. To simplify the review process, and reduce the potential for impasses over minor changes, Congress should modify any existing requirements for lead agencies to obtain participating agencies' "concurrence" in project schedules or the adoption/use of "planning products."

More generally, and as AGC recommends below, it should be a requirement for all government agencies involved in the issuance of a federal permit for any given project to complete concurrent reviews (in conjunction with the NEPA review process) within established time periods. From the perspective of the permit applicant, a coordinated concurrent review under all major federal and state authorities avoids duplication and delays and helps to avoid potentially conflicting permit conditions or limitations (*e.g.*, differing mitigation requirements). There must be timelines and deadlines for completing the environmental permitting process as well as NEPA review deadlines.

1. Integrating CWA 404 Permitting into the NEPA Process

AGC urges the Corps to adopt nationwide procedures to ensure that its Division and District Offices always serve as a "cooperating agency" in the NEPA review process (if not already serving as the lead agency) for all projects with water or wetlands impacts. Project proponents who must comply with NEPA and CWA Section 404 permitting can integrate the steps involved in complying with the 404 regulations and permit requirements into the NEPA process. USACE should assume the responsibility for ensuring that the monitoring, wetlands delineation, mitigation planning and other environmental consultation work performed during the NEPA review (and included in the final EIS and Record of Decision documents) is sufficient to meet the 404 permit authorization requirements, without the need to re-do processes, unless there is a material change in the project.

While this will require more focus and involvement on the front end, it will streamline the entire process and ultimately reduce costs and get these important projects underway faster.

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opportunities for integrating those requirements into proposed Army programs, policies, and projects. Environmental analyses required by this part will be integrated as much as practicable with other environmental reviews, laws, and Executive Orders (40 C.F.R. § 1502.25). Incorporation of these processes must ensure that the individual requirements are met, in addition to those required by NEPA.").

[15] The "2015 (update) Red Book -- Synchronizing Environmental Reviews for Transportation and Other Infrastructure Projects" describes a process that satisfies the NEPA requirements and synchronizes environmental permitting for all agencies involved. It includes examples of successful NEPA/404 merger process agreements whereby the documentation and coordination conducted comply with NEPA and any preferred alternative selected under the joint process comply with CWA § 404(b)(1) guidelines.

Integration While Determining Lead Agency and Other Federal Resource Agencies. The practice of integrating 404 permitting into the NEPA process begins by identifying the NEPA lead agency and the permits required to carry out the project. Next, the lead agency must consider the environmental resource information that can be used to satisfy both processes. Early participation and coordination of resource agencies is needed to define the proposed project in ways to avoid hurdles in permitting later in the process:

- If the proposed project affects a water or wetland, the lead agency should contact USACE to determine what information is required for a USACE permit(s).
- The lead agency (or project proponent) should request species lists from the National Marine Fisheries Service (NMFS), U.S. Fish and Wildlife Service (USFWS), and the state department of fish and game. This early stage is also a useful time to elicit input from NMFS and USFWS and to request that they participate on an agency review team. Early and continuing participation by these agencies can reduce or eliminate the need to prepare a Fish and Wildlife Coordination Act report.
- A records search should be conducted by a cultural resources specialist to determine whether any known cultural or historic resources exist on or near the project site. This information can be used to avoid impacts on these sites when the proposed project and alternatives are designed.

Integration While Preparing Statement of Purpose/Need and Alternatives. If the proposed project will require a CWA Section 404 permit, it is important to carefully consider the CWA Section 404(b)(1) guidelines (see discussion below) when preparing a statement of project "purpose and need" and "range of alternatives." At this point in the process, the project proponent can also have the NEPA lead agency contact USFWS to determine whether the preparation of a Fish and Wildlife Coordination Act report will be required for the project.

To the extent possible, alternatives should be developed that avoid adverse impacts on listed species or critical habitat, as well as impacts to cultural resources identified on the project site, and impacts on rivers designated wild and scenic, coastal zones, among other things. If avoidance is not possible, reasonable efforts should be made to design alternatives that reduce/minimize such impacts. (Appropriate conservation measures should be included in the draft EIS to mitigate any impacts.)

Integration When Circulating Draft EIS. If a Section 404 permit application has been prepared, it can be submitted to USACE for review with a request that public review of the application be concurrent with the NEPA review period. Also, for example, if a Determination of Effects report has been prepared under NHPA Section 106, it can be submitted by the NEPA lead agency to the SHPO. If a draft Coastal Zone Management Act Consistency Determination has been prepared, it can be circulated with the EIS.

Successful Merger Examples. Many agencies already have integrated substantive 404 permitting considerations into their NEPA EIS processes. FHWA recently updated its *2015 Red Book: Synchronizing Environmental Reviews for Transportation and Other Infrastructure Projects* – which describes a process that satisfies the NEPA requirements and synchronizes environmental permitting for all agencies involved. (The Red Book is a collaborative effort among USACE, the U.S. Coast Guard, USEPA, USFWS, the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Department of Transportation (DOT).) It includes examples of successful NEPA/404 merger process agreements that

comply with NEPA and CWA Section 404(b)(1) guidelines – see below. Earlier versions of the Red Book included similar language and state DOTs have looked to it to set up "merger agreements" on single projects or broader programmatic agreements (sometimes in the form of MOUs).[16] Such examples show that proponents can save resources they would otherwise have to expend at the permitting stage by demonstrating during the EIS process, for example, that their project is the "least environmentally damaging practicable alternative."[17]

2. Practical Alternatives Restriction in the 404(b)(1) Guidelines

NEPA requires the identification of a proposed action's "purpose and need," which helps to guide the identification of a "reasonable range" of alternatives and the evaluation of how well those alternatives satisfy the project's underlying goals. The 404(b)(1) guidelines[18] of the CWA require the identification of "overall project purpose," which also serves as the basis for an analysis of alternatives, known as the "practicable alternatives test." In the latter case, USACE may not issue a Section 404 permit "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences."[19] An alternative is "practicable" if it is "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes."[20] Where special aquatic sites, including wetlands, will be affected, and the activity is not "water dependent," "practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise," and are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.[21]

REFORMS: Additional guidance or revised regulation is needed to reinstate – *and perhaps strengthen* – the Corps' longstanding flexibility in application of USEPA's 404(b)(1) guidelines. In 1993, recognizing that the impacts from discharges of dredged or fill material vary greatly, the Corps and EPA jointly issued guidance that provides that the Guidelines "do not contemplate that the same intensity of analysis will be required for all types of projects but instead envision a correlation between the scope of the evaluation and the potential extent of adverse impacts on the aquatic environment."[22] If the project's purpose is defined sufficiently narrowly, the range of alternatives that will achieve that purpose and be considered "practicable" will be narrowed as well. With respect to actions subject to NEPA, the Section 404(b)(1) guidelines specifically state:

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[16] Following are some successful NEPA/404 merger programs and project examples: California; Colorado; Kentucky; North Carolina; Southwest Light Rail Transit Project (SWLRT) Project; Tappan Zee Bridge Replacement.

[17] The documentation required to satisfy NEPA's alternatives analysis will "generally provide the information necessary for evaluating alternatives under CWA guidelines." John Schutz, *The Steepest Hurdle in Obtaining A Clean Water Act Section 404 Permit: Complying with EPA's 404(b)(1) Guidelines' Least Environmentally Damaging Practicable Alternative Requirement*, 24 UCLA J. Envt'l L. & Pol'y 235,240 n.30 (2006).

[18] The "guidelines" were issued by USEPA through the notice-and-comment rulemaking process, *see* 45 *Fed. Reg.* 85336 (Dec. 24, 1980), and are codified at 40 C.F.R. § 230.

[19] 40 C.F.R. § 230.10(a).

[20] *Id.* at § 230.10(a)(2).

[21] *Id.* at § 230.10(a)(3).

[22] *See* U.S. Army Corps of Engineers, RGL 93-02, *Guidance on Flexibility of the 404(b)(1) Guidelines and Mitigation Banking* (Aug. 23, 1993). This RGL remains valid unless superseded by subsequently issued RGLs or regulations.

> [W]here the Corps of Engineers is the permitting agency, the analysis of alternatives required for NEPA environmental documents . . . will in most cases provide the information for the evaluation of alternatives under these Guidelines. On occasion, these NEPA documents may address a broader range of alternatives than required to be considered under [the Section 404(b)(1) Guidelines] or may not have considered the alternatives in sufficient detail to respond to the requirements of these Guidelines. In the latter case, it may be necessary to supplement these NEPA documents with this additional information.
>
> 40 C.F.R. § 230.10(1)(4).

Additional guidance may also be needed on when an alternative is "practicable" under 40 CFR 230.10(a)(2) and when a practicable alternative has basis for elimination.[23]

3. Define Scope of USACE's NEPA Review

As stated above, the Corps' NEPA regulations establish the procedures required by the Corps for NEPA review of permit applications. It requires the District Engineer undertaking a NEPA review to establish the scope of the NEPA document to address the impacts of the activity, or those portions of a project that the District Engineer has "sufficient control and responsibility" to require NEPA review.[24] To determine the scope, the regulations set forth several factors for the District Engineer to consider, and afford broad discretion to consider additional relevant factors. The scope of review of the Corps' NEPA analyses has become problematic in two ways. First, individual Districts have abused this discretion and have required NEPA reviews to address irrelevant aspects that are far beyond the scope of the activity authorized by the Corps permit. Second, environmental groups have frequently targeted the Districts' NEPA decisions in litigation, at times capitalizing on a lack of precision or clarity as to the scope of NEPA analysis (and basis for that analysis) employed by the Corps in the environmental assessment/statement of findings.

REFORMS: To correct this, the Corps should clarify and instruct its Districts to limit the scope of their NEPA review documents to addressing the impacts of the permitted discharge of dredge and fill material. In addition, the Corps should instruct the Districts to provide a specific explanation and justification of the NEPA scope of review for each individual permit, based on the four factors outlined in the regulations and other relevant factors. This explanation will provide a solid basis in the administrative record for this frequently litigated issue.

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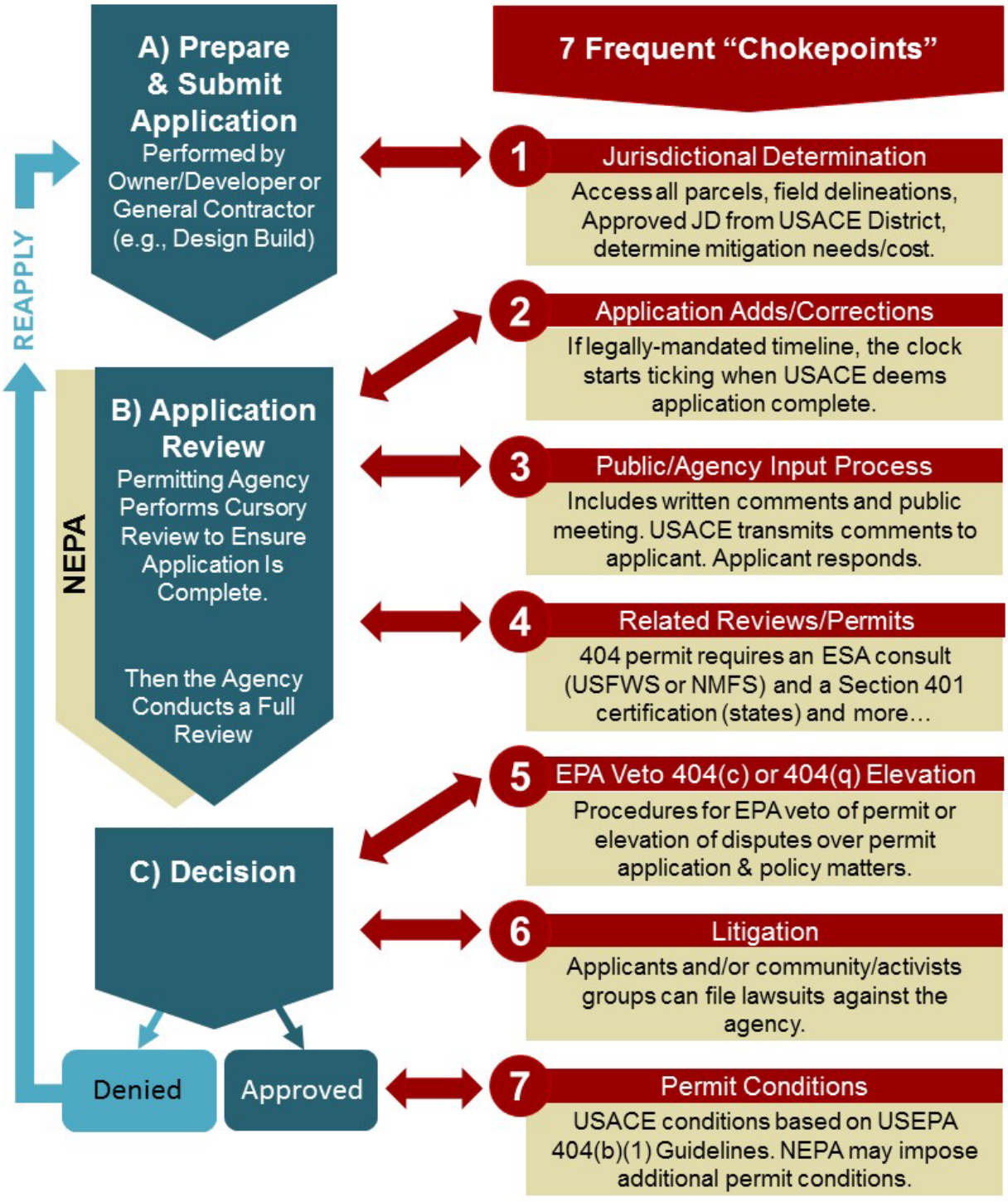
[23] For example, USACE may inquire why a transportation agency would eliminate an alternative that the transportation agency has determined meets the established purpose and need, has similar costs and number of relocations as other alternatives, but has notably fewer impacts to aquatic resources. An alternative like this would initially appear practicable and less environmentally damaging under the Section 404(b)(1) guidelines. However, if the transportation agency is able to explain to USACE how the other screening criteria are defined and weighted, such as the presence of Section 4(f) resources or non-wetland critical habitat, presence of federally listed species and designated critical habitat, system linkages, and safety, the USACE will be able to conduct a more thorough and informed analysis of which alternatives are practicable under CWA 404. 2015 Red Book at pp. 16-17.

[24] 33 C.F.R. § 325, App'x B(7)(b).

B. "Chokepoints" in CWA Section 404 Individual Permit Process



The ability to obtain Section 404 permits required for construction activities in "Waters of the United States (WOTUS)" is critical to the completion of the private and public infrastructure that forms the literal foundation of the nation's economy.[25] Therefore, administration of the Section 404 regulatory program is important not only to AGC members but to the nation as a whole. Following are details of the main chokepoints that project proponents often encounter during the permit issuance process.[26]

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). (Specifically, AGC members have observed that the Corps is moving away from the use of preliminary JDs in favor of Approved JDs for approving 404 permits.) Moreover, USACE staff will not accept NEPA analysis findings. More and more, USACE will not approve a 404 permit without the Approved JD. The USACE's insistence on better delineation data is holding up the permit issuance process because the general contractor does not have access to the entire project area to perform field studies until well into the construction process (for example, approval of right-of-way acquisitions). As a result, it is impossible to manage cost/risk due to the unknowns regarding project schedule and mitigation responsibilities.

2. Application Adds/Corrections

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

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

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

3. Public/Agency Input Process

Notice must also be sent to all parties who have specifically requested copies of public notices and to the appropriate officials at the U.S. Environmental Protection Agency (USEPA), the USFWS, the NMFS, and state historic preservation officers. When Section 404, or CWA 401 – see below, applications are

[25] 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.
[26] The Corps' regulatory program regulations at 33 C.F.R. §§ 320-332 set forth the process for issuing Section 404 permits.

submitted, the agencies generally accept public comments regarding the applications for 30 days.[27] If, during the initial comment period, someone requests a public hearing regarding the applications, the agencies must issue another public notice scheduling a public hearing at least 30 days into the future.[28]

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 denying 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.[29]]
- 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

[27] 33 C.F.R. § 325.2(d)(2).
[28] 33 C.F.R. § 327.11.
[29] 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.

designation decisions, USFWS and NMFS are taking an ever-increasing role in the regulation of infrastructure projects.
- National Historic Preservation Act must account for potential impacts to historical and cultural resources (SHPO Consultation / Antiquities Permits)
- Fishery Conservation and Management Act (Essential Fish Habitat Consultations)
- Depending on location, Coastal Zone Management Act (CZMA Consistency Determination) and Wild Scenic Rivers Act
- Migratory Bird Treaty Act
- Bald and Golden Eagle Protection Act

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

The 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). Some Districts fear loss of regulatory program funding for staff as a result of having to pay for litigation. In the event litigation costs are borne out of the regulatory program budget—which also funds regulatory staff positions—such a linkage must be removed. To do otherwise feeds into the regulatory staff's need to create "litigation proof"—or endless reams of—documentation that adds further delay. The fact remains that there is no such thing as "litigation proof" documentation in today's litigious environment.

7. Permit Conditions

CWA 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. See AGC's recommended reforms in Part I, Section III.A.2 at page 9 of this letter.

C. Reforms to Ease "Chokepoints" in 404 Program

To help alleviate the "chokepoints" described above, AGC offers the following reforms that are *specific* to the Section 404 permit program.

1. Jurisdictional Determinations: Corp's Desire to Be "Litigation Proof" Is Unduly Delaying Permitting Process

Some USACE District Engineers *generally* will not accept wetland delineations that were developed during the NEPA process and will hold up project approvals until they have in-the-field surveys collected from the entire project site. The project may be well underway before the design-build contractor has access to 100 percent 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 (see C.4 below), 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 and schedules and to minimize cost and delay.[30] 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.

REFORMS: USACE should follow Justice Scalia standards (rather than Kennedy standards) in *Rapanos v. United States*[31] for determining jurisdictional status. His simple bright-line rule is based on the specific characteristics of the water (or wetland), such as its physical connection to traditionally covered waters and its relative permanence. This clarity maximizes resource allocation to protect the nation's natural resources, maintains fidelity to the nation's system of federalism, and reinforces confidence in private land use and development.

AGC further recommends the following:

- Eliminate the 1979 Attorney Civiletti Opinion[32] that gives USEPA final authority over CWA jurisdictional determinations, and (by law, regulations, or executive order) give the authority exclusively to the Corps.

[30] Creates access and construction phasing issues because no impacts, temporary or permanent, can be taken until the permit is issued. Temporary crossings are held up until the permit is issued; large areas can be inaccessible due to potential WOTUS. Contractor cannot take permanent impacts to construct drainage including culvert crossings, typically a pre-cursor to other construction, and bridges which are long lead time item.

[31] 547 U.S. 715 (2006).

[32] 43 Op. Att'y Gen. 15 (1979) at https://www.epa.gov/cwa-404/1979-civiletti-memorandum. After USEPA and the Corps disagreed over which agency had authority to define the scope of WOTUS for purposes of the Section 404 program, the Corps requested the U.S. Attorney General to resolve the dispute.

- Amend the 1989 Memorandum of Agreement (MOA) between USACE and USEPA that establishes practical divisions of responsibility for jurisdictional determinations.[33] The 1989 MOA recognizes that the Corps will make most jurisdictional determinations in the course of administering the 404 program; however, USEPA reserves the authority to determine jurisdiction in "special cases" – and JD's by either agency are binding on the government as a whole. In fact, both agencies have posted online separate JD Websites.[34] This has created confusion and controversy. USACE implements the 404 program and district engineers have the experience and expertise of issuing approximately two million jurisdictional determinations; USACE should make all JDs.
- Revise USACE's Regulatory Guidance Letter (RGL) 16-01 on the procedures for determining what geographic areas on a project are WOTUS.

In addition, AGC strongly maintains that USACE and other federal permitting agencies should accept NEPA planning-level decisions – including "wetlands determination" and "wetlands delineation" – to support advance mitigation strategies that are both more economical and more effective from an environmental stewardship perspective. To this end, 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. USACE should revise its guidance documents to clearly state that the potential permit applicant can obtain a Section 404 individual or Nationwide Permit authorization based on a preliminary JD, or even without a JD, at the project proponent's discretion.[35]

2. 404 Related Reviews/Permits: Excessive Consult Requirements Are Forcing Sequential Reviews by Multiple Agencies and Duplicative Requests for Project-Specific Information

USACE's obligation to consult with other agencies on CWA 404 permit applications arises from several legal sources. USACE's regulations recognize that many additional federal laws are related or applicable to Section 404 permits.[36] For example, USFWS has statutory consultation rights under the FWCA and the ESA.[37] Through consultation, however, the processing of permit applications is often delayed by the need for complete coordination with other federal agencies. Applicants are generally asked to provide additional information, beyond what was originally submitted, to enable the Corps to satisfy or resolve

[33] Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exceptions Under Section 404(f) of the Clean Water Act (Jan. 19, 1989) [hereinafter 1989 MOA].
[34] USEPA CWA Approved JD's Website - https://watersgeo.epa.gov/cwa/CWA-JDs/ and USACE Regulatory Programs and Permits Website – Corps JD Public Interface http://corpsmapu.usace.army.mil/cm_apex/f?p=340:11:0::NO.
[35] The Corps, in RGL 16-01, does not specify any circumstances that require the property owner, developer, or affected party to obtain a JD. Nor does it state if there are circumstances when the Section 404 permit applicant can obtain the permit without a JD. (For example, if contractor cannot get 100 percent access to property until right-of-way is purchased, USACE should use wetland delineations done for NEPA to process 404 permit application.)
[36] 33 C.F.R. § 320.3.
[37] 16 U.S.C. §§ 661-666c; 16 U.S.C. §§ 1531-1544.

the views of the consulting agencies. Further, USEPA has the authority under Section 404(c) to review individual permits, further explained in #3 below.[38]

Section 404(q) Memorandum of Agreements (MOA). Pursuant to Section 404(q), the Corps has executed and, from time to time, revised MOAs with USEPA, USFWS, and NOAA within the Department of Commerce. The MOAs establish procedures and time frames for elevating disputes over both specific permit applications and general policy matters.[39]

REFORMS: USACE must revisit how USEPA, USFWS, and NOAA are using Section 404(q) to dispute 404 permit decisions and request higher authority review by the Office of the Assistant Secretary of the Army for Civil Works; a reevaluation is needed to avoid delay in individual permit applications when interagency disagreements arise. Specifically, USACE should revise the series of interagency MOAs executed in 1992 (between the Corps and the other environmental resource agencies involved in 404 permitting) that provide distinct routes for elevation of policy issues and issues involving specific permit applications. (These MOAs are essentially the same in terms of the process and time frames for elevation.) For the most part, 404(q) has had no appreciable value, either to the proposed project/activity or environmental protection, because most elevation requests do not involve aquatic resources of national importance or unacceptable and substantial impacts to those aquatic resources.

In addition, USACE should re-evaluate and update RGL 92-01, *Federal Agencies Roles and Responsibilities* (May 12, 1992), as needed, based on any changes made to the above-referenced MOAs. While the Corps consults with EPA, the USFWS, and NOAA as part of the permit review process, the Corps retains the ultimately authority to decide whether to issue or deny the Section 404 permit.

Historic Properties. Pursuant to Section 106 of the National Historic Preservation Act (NHPA)[40] and the Corps' regulations, 33 C.F.R. Section 325 Appendix C - Procedures for the Protection of Historic Properties the Corps must take into account "the effects, if any, of proposed undertakings on historic properties both within and beyond the waters of the U.S." Further, where the undertaking that is the subject of a permit action may directly and adversely affect any national historic landmark, as defined in the NHPA,[41] the Corps shall, to the maximum extent possible, place conditions in permits to minimize harm to such landmarks.[42] Archaeological sites may also be protected historic properties.

In making these determinations the Corps must consult with the applicable state historic preservation officers and the Federal Advisory Council on Historic Preservation (ACHP or Advisory Council). If there are properties on or eligible for listing on the National Register of Historic Places,[43] and if the permitted activities will have an adverse effect on the places, the parties must attempt to enter into an MOA[44] that contains provisions specifying how the project will be conducted to avoid or mitigate adverse effects on

[38] 33 U.S.C. § 1344(c).
[39] *See e.g.*, Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army, Concerning Clean Water Act Section 404(q) (Aug. 11, 1992) at https://www.epa.gov/cwa-404/clean-water-act-section-404qmemorandum-agreement.
[40] 16 U.S.C. § 470f (1988).
[41] 36 C.F.R. § 800.2(j).
[42] *Id.*
[43] *See* 36 C.F.R. § 800.4(b).
[44] 36 C.F.R. § 800.5(e)(2).

the properties. If no agreement is reached, the Corps may request comments from the Advisory Council. However, the Corps can proceed with the action without accepting the views of the Advisory Council. The commenting authority is extensive, however, and delays caused by reviewing effects on historic properties may defeat a project. In addition, district engineers may add those permit conditions which they determine are necessary to avoid or reduce effects on historic properties.

REFORMS: By new law, amended regulation, or Executive Order, declare that Appendix C, Historic Properties, the regulation used by the Corps to comply with Section 106 of the NHPA, is an agency "Program Alternative" fully compliant with 36 C.F.R. Section 800, thereby ending confusion and controversy, saving considerable time, costs, and litigation, and avoiding arguments over inappropriately expanded scopes of analysis. [Note: In 1979 the ACHP stated in a letter that they collaborated on drafting Appendix C and that it satisfies 106 requirements.] By law, eliminate the ACHP's independent federal agency status and put them under another federal agency to add discipline and save the costs of significant delays caused by unnecessary and often political controversies that delay projects or involved disputes over expanded permit areas and project scopes (areas of potential effect). In addition, remove the National Trust for Historic Preservation from the Advisory Council on Historic Preservation; they frequently sue federal agencies on Section 106 issues, and therefore, there is a strong perception that they cannot be an objective, fair, and neutral member of the Council.

Endangered Species. The Corps must also consider the effect of permit activities on endangered species. Section 7 of the ESA requires federal agencies to "insure that any action authorized, funded or carried out by such agency … is not likely to jeopardize … any endangered or threatened species," or to adversely affect such species' critical habitat.[45] Thus, the Corps must consider how any listed species may be impacted by issuance of a Section 404 permit.

The scope of the analysis of the effects from permit activities on endangered species that is necessary for making Section 404 permit decisions is confusing and controversial. Generally, the Corps assesses permit activity effects only in the permit area. The Corps, however, will assess such effects beyond the immediate permit area in certain situations (*e.g.*, linear projects with multiple 404 permit authorizations).

REFORMS: Establish an expedited review and approval process for ESA review and consultation for Nationwide General Permits by requiring that USFWS and NMFS complete their action in 60-90 days or less under the recognition that activities performed under NWPs would have no more than minimal environmental effects under ESA, absent strong science and data to the contrary.

Section 401 Water Quality Certification. Applicants for Section 404 permits are required to obtain a certification (from the state in which the discharge originates) that the discharge will not violate the state's water quality standards under Section 401.[46] The Corps' regulations provide that "[n]o permit will be granted until required certification has been obtained or waived."[47] A state may waive the water quality certification requirement either expressly or by refusal to act on a certification request within 60 days after receiving the request.[48] The Corps has discretion to determine a longer period of time is

[45] *See* 16 U.S.C. § 1536.
[46] 33 U.S.C. § 1341(a)(1).
[47] 33 C.F.R. § 325.2(b)(1)(ii).
[48] *Id.*

reasonable for the state's review, not to exceed one year.[49] This waiver period begins when the applicant makes a "valid request" to the state certifying agency, but the Corps' regulations do not define the term "valid request." Permit applicants face substantial uncertainty and inconsistent procedures across various states and Districts with respect to when a "valid request" has been made. In some instances, for example, the certifying state agency will not deem a "valid request" to have been made until the applicant has responded to *numerous requests* for additional information.

Furthermore, the Corps' regulations do not provide any procedure for determining when a state is deemed to have waived its certification right. This has caused confusion over how to effectuate a waiver and has resulted in instances of a state denying a certification long after a waiver should have occurred.

REFORMS: AGC urges the Corps to develop a clear process for Section 401 water quality certification that applies consistently nationwide. The Corps should revise Section 325.2(b)(ii) to clarify that a permit applicant makes a "valid request" (and therefore the one-year waiver time limit begins) on the date an applicant submits its request to the state certifying agency. EPA's regulation governing certification of federally-issued National Pollutant Elimination Discharge System (NPDES) permits, 40 C.F.R. § 124.53(a)(3), provides a good example of language the Corps should adopt. It makes clear that the certification request is made, and the clock for waiver begins, "from the date the draft [federal] permit is mailed to the certifying State agency."

In addition, AGC urges the Corps to amend Section 325.2(b)(ii) to specify the process for effectuating a waiver and make it clear that a state will waive certification if it does not act within one year of the date of the request. These changes would provide much needed consistency, certainty, and predictability for permittees, the Corps, and the state certifying agencies.

3. USEPA's Authority to Veto a Duly Issued Permit Casts Uncertainty on Development

Courts have upheld USEPA's authority under the CWA to change, if not revoke, Section 404 "dredge-and-fill" discharge permits that have already been approved and issued by USACE if it determines that the discharge will have an "unacceptable adverse effect" on identified environmental resources. This creates uncertainties for Section 404 permittees, their lenders, and others in business with them, which drives up financing and construction costs. USEPA has adopted regulations setting forth the process for implementing Section 404(c).[50]

REFORM: Eliminate USEPA's authority to veto a final 404 permit decision made by the Corps and let the result of the evaluation process stand without the extensive delays, costs, and controversy associated with either a veto or a threat of a veto by USEPA (uncertainty, inconsistency, delays, added costs). Direct USEPA to revise its "unacceptable adverse effect" regulations.

4. Mitigation Uncertainty and Risk Is Driving Up Construction Costs

Complex procurement strategies, construction scheduling, habitat modification, and competition for potential mitigation sites can encumber the already challenging task of mitigating for "like" value and

[49] *Id.*
[50] *See* 40 C.F.R. § 231.1 *et seq.*

function. These challenges, routinely faced by AGC members, further reinforce the need for project proponents to examine mitigation strategies *as early as possible*. Yet, there is a shortage of wetland and stream mitigation banking credits in some parts of the country, and many USACE Districts are unwilling to accept in-lieu fee arrangements or they are simply unavailable, as further explained below.

If a permittee cannot secure credits, it will negatively impact construction phasing, schedules and cause excessive cost and delay. What is more, design-build contracts that transfer the responsibility to the contractor to obtain Section 404 permits generally do not provide such contractor with cost or schedule relief for permitting delays or unanticipated mitigation costs that may arise at the outset of a procurement. This forces contractors to add-in cost contingencies upfront that ultimately result in higher construction costs to the owner – and/or responsible contractors dropping out of the procurement due to untenable risk.

AGC's recent examination of the RIBITS (Regulatory In-lieu fee and Bank Information Tracking System) database found limited ILF programs in the Western half of the country – see analysis below. The lack of wetland mitigation alternatives may get worse: AGC predicts that President Trump's recent Executive Order 13778 directing the USEPA and USACE to modify or rescind the 2015 WOTUS rule is likely to stall and further depress the establishment of any new mitigation banks because it is likely that the federal government will eventually relinquish control over work in remote streams and isolated waters/wetlands.

RIBITS (Regulatory In-lieu fee and Bank Information Tracking System) - AGC's Review and Analysis. RIBITS was developed by USACE with support from USEPA and USFWS to provide better information on mitigation and conservation banking and ILF programs across the country. AGC closely reviewed RIBITs in June 2017. At that time, there were 1,090 approved or pending ILF sites in RIBITs, of which 422 are approved, 352 are pending and the rest are terminated. The site generated a map of the United States, which clearly showed that the Western one-half of the country is woefully underserved. A very cursory sampling of the individual ILF site data showed many sites with no credits available, although AGC understands that RIBITS can be out of date for these details. Also, many sites were small in area, suggesting they were for a single project or client. Even in the East, where ILF sites are more prevalent, the availability of ILF credits is restricted because, like banks, ILF sites are approved for service in one or two watersheds for which they are located.

REFORMS: Eliminate the "Interagency Review Team" for mitigation banks and authorize the Corps to review and approve banks after a simple 30-day review and comment period offered to USEPA, USFWS, and NMFS. This will save considerable time, costs, and reduce staff effort which can be re-directed to expediting permit reviews or other work.[51] To address the lack of mitigation banking capacity in many regions of the country, USACE should develop a national in-lieu fee (ILF) mitigation option whereby sponsors of 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 – see AGC's

[51] In November 2000 the Corps, USEPA, FWS, and NOAA issued interagency guidance on the use of in-lieu fees to offset wetland fill impacts (*Fed. Reg*. 65, Nov. 7). That guidance reiterated the Corps' and USEPA's mitigation MOA preference for on-site, in-kind mitigation but recognized that such mitigation may not always be available, practicable, or environmentally preferable. With respect to compensating for impacts from individual permits, the guidance provides that in-lieu fee arrangements may be used if there is a formal agreement that is developed, reviewed, and approved through the interagency Mitigation Bank Review Team (MBRT) process.

recommended national model, as described below. Per AGC's conversations with USACE regulatory program staff, this would require a change to current law that would allow the Corps to receive funds for this purpose. The funding from the national account would be apportioned among the seven USACE Districts base on where impacts were taken and applied toward habitat preservation and promoting banking opportunities.

In addition, USACE should revise the "2008 Mitigation Rule"[52] at 33 C.F.R. Sections 332.3(b)(2) and (3) to provide greater flexibility to determine appropriate mitigation for wetlands impacts, ILF mitigation banking or alternative processes – thereby allowing for bundling within one agency/applicant.

National Model: In-Lieu Fee Program. The State of North Carolina (NC) operates a state-wide ILF program that may serve as a perfect model for AGC's recommended national program. NC Department of Environmental Quality (DEQ) has operated the state-wide ILF program since the 90's. According to the Website:

> DMS offers four voluntary In-Lieu Fee (ILF) mitigation programs to the public and private sectors to satisfy *compensatory-mitigation* requirements in state and federal laws and regulations.[53] The initiatives offset unavoidable environmental damage from transportation-infrastructure improvements and other economic development, and help to prevent harmful pollutants from endangering water quality in sensitive river basins.

AGC has learned that NC has a statewide banking instrument with USACE that provides advanced mitigation credits for projects anywhere in the state under the condition that the state submit to the USACE a final mitigation plan within a year and then execute the plan. The state charges the customer on a per credit basis. NC initially developed the program to serve the Department of Transportation's needs but since has expanded the program to public and private customers. The state administers the program with DEQ staff and contract out for the mitigation design and construct. AGC understands the program brings stability and predictability to the credit market, which helps everyone, except for possibly the banks, which are generally run by a handful of companies that object to the competition. To address this the NC legislature recently passed a law requiring DEQ's ILF program to be used only if bank capacity was not available.[54]

5. USACE HQ Must Assert Centralized Control and Oversight Over Stream and Wetlands Valuation Metrics

Several USACE Districts have developed a "functions and values" type of assessment to calculate mitigation ratios for stream and wetland impacts (*e.g.*, Fort Worth and Galveston Districts in Texas, the Charleston District in South Carolina and the Huntington District, West Virginia and the four USACE Offices in Ohio – Huntington, Buffalo, Pittsburg and Louisville). AGC members report that the functions

[52] 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.
[53] https://deq.nc.gov/about/divisions/water-resources/water-resources-permits/wastewater-branch/401-wetlands-buffer-permitting/401-certification-isolated-permitting.
[54] The program is authorized under NCGS 143-214.8 and the program rules are codified within 15A NCAC 02R. The program Website's at: https://deq.nc.gov/about/divisions/mitigation-services/about-dms/dms-programs. Four programs are listed - The Statewide Stream/Wetland Program would serve as the model for a national program.

and values methods are inconsistent among Districts and the mitigation ratios calculated by these methods are generally higher using these function/vales methods, than the traditional way of applying a standard mitigation ratio such as 1.5 feet of mitigation for one foot of stream impact (particularly for stream mitigation). The current functions and values methods currently being implemented by many Districts are overestimating stream mitigation credit requirements. As a result, demand for mitigations credits (stream credits in particular) have increased, creating supply shortages in some areas and forcing applicants to delay work on projects waiting for bank credit releases or undertaking permittee-responsible mitigation. (To help alleviate this supply shortage AGC has recommended the USACE implement a national ILF program -- see related discussion in #4 above.)

REFORMS: USACE Headquarters (HQ) should review the methods developed at the District level to determine their reasonableness in calculating mitigation ratios. Instead of each region developing its own method, HQ should develop a standardized method that calculates reasonable mitigation ratios. In the absence of strong oversight and central guidance from Headquarters on important regulatory interpretations, there has been inconsistency among the different Corps Districts in implementing the Corps' CWA Section 404 program. This inconsistency creates uncertainty that makes it difficult for AGC members to navigate the regulatory process, and for the Corps to administer the Section 404 program.

USACE HQ should have clear lines of authority to direct the Districts' implementation of key Corps regulations and policies. Headquarters should not merely make suggestions to be interpreted and implemented by those in the field. Clear guidance and direction from Corps Headquarters is critical for certainty and consistency.

6. Delay on the RHA Section 408 Side Puts Off the CWA Section 404 Review Process and Further Delays Construction

Construction projects are being delayed because of Section 408 burdens.[55] USACE will *not even begin* to process many CWA Section 404 Nationwide and individual permits until the 408 permission is granted. This means that delay on the River and Harbors Act (RHA) Section 408 side puts off the CWA Section 404 review process and further delays construction. And, many of the reviews required under RHA Section 408 may be reviewed, yet again, under the CWA Section 404 process.

RHA Section 14 [56] 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.[57] Those steps include pre-coordination, written request,

[55] *See* http://www.nola.com/environment/index.ssf/2017/05/corps_attempting_to_speed_coas.html; http://www.journalscene.com/news/waiting-on-the-final-leg-of-berlin-g-myers-parkway/article_72b28f28-1309-11e7-a986-1f5ecfa794a9.html.
[56] 33 U.S.C. § 408.
[57] USACE Policy - Engineering Circular 1165-2-216.

required documentation (including environmental compliance, if applicable), district-led Agency Technical Review (ATR), Summary of Findings, division review, USACE Headquarters review, notification, and post-permission oversight.

Not all steps are applicable to every RHA Section 408 request, such as the Division or Headquarters office's review. That stated, the Corps requires the RHA Section 408 requester to provide all information that 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 such rigor has come to make the 408 permission processes redundant, administratively burdensome, and inefficient—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*"[58] (emphasis added).[59] 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.[60] However, that is not what Section 408 says, nor is it what Congress intended in enacting Section 14 of the RHA.[61]
- 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.[62] A common example would be a highway or pipeline that crosses Corps' property.[63] To be clear, the Corps has a right to review and approve that proposal as property owner and potentially as a regulator under CWA Section 404 or other authorities.[64] However, if the project

[58] *See* EC 1165-2-216, ¶ 6.a.
[59] https://waterways.org/wordpress2/wp-content/uploads/2014/10/NWC-Comments-WRRDA-Webinar-III.pdf.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*

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.

D. Nationwide General Permits: Acreage Limits and Pre-Construction Notification Thresholds

In the Corps' own words, "the purpose of the NWP [Nationwide Permit] program is to reduce regulatory delays and burdens on the public, to place greater reliance on state and local controls, and to free our limited resources for more effective regulation of other activities with greater potential to adversely impact the aquatic environment."[65] For nearly four decades, the Corps has managed its workload by issuing general permits.[66] Over time, the Corps has revised the Nationwide Permit (NWP) program to include more, and increasingly stringent, conditions as prerequisites to authorization of general permits. The Corps argues that these additional restrictions and limitations are necessary to ensure authorization of only activities with "minimal impacts." The Corps makes available individual permits to address those activities with greater impacts. In practice, however, the general permits are now more like individual permits, in terms of the large amount information and data required.

For the construction industry, it is important that the Corps maintain a streamlined permit program that avoids duplication with other federal and state regulatory agencies.[67] To remain competitive, contractors must adapt quickly to changes due to fluctuating markets, contract revisions, and geological anomalies. The general permit provides the kind of flexibility required for construction jobsites that are temporary and ever changing. What is more, projects can save significantly in both time and money if their activities are authorized by a general permit.[68]

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[65] *See* 56 *Fed. Reg.* 14,598 at 14,605 (Apr. 10, 1991) (significant proposal to amend the NWP regulations and issue, reissue and modify NWPs).

[66] NWP are designed to provide an efficient and streamlined approach for authorizing activities with minimal impacts on "waters of the U.S." with little or no delay or paperwork. 33 C.F.R. § 330.1.

[67] *See* 33 U.S.C. § 1344 (q) (requiring the Secretary of the Army to enter into agreements with the Departments of Agriculture, Commerce, Interior and Transportation and the heads of other appropriate agencies to minimize duplication, needless paperwork and delays in the issuance of permits).

[68] The average time for processing NWPs in 2010 was 32 days, compared to an average of 221 days for processing individual permit applications. *See* U.S. Army Corps of Engineers, *Reissuance of Nationwide Permits,* 77 *Fed. Reg.* 10184, 10190 (Feb. 21, 2012). Regarding cost, a 2002 study found that the cost of preparing the documentation necessary to undertake activities authorized by a nationwide permit was about 1/10 the cost of preparing the documentation necessary for an individual permit. *See* David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Res. J. 59, 74 (2002).

REFORMS: AGC recommends that USACE consider increasing the permissible numeric limit, the PCN threshold, and refrain from imposing a linear-foot cap for NWPs that support public health and welfare and/or environmental protection, such as NWP 3 (Maintenance), NWP 12 (Utility Line Activities), NWP 13 (Bank Stabilization), NWP 14 (Linear Transportation Projects), NWP 35 (Maintenance Dredging Existing Basins), NWP 41 (Reshaping Drainage Ditches) and NWP 43 (Stormwater Management Facilities). These changes would further congressional intent and legal precedent for a streamlined permitting process for projects with minimal adverse environmental effects. The NWPs have strong protections through the District Engineer's prescribed decision process; the agency coordination requirement; general, regional and sometimes *"special-project"* conditions; and a PCN requirement to ensure proper review.

E. Clarify and Expand Exemption for Work in Roadside Ditches

If a ditch is under federal CWA jurisdiction, modifications or disturbance (including certain maintenance) may be subject to CWA Section 404 permitting requirements. CWA Section 404(f)(1)(B) exempts dredge-and-fill activities "for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures." Additionally, the construction or maintenance of irrigation ditches, as well as the maintenance, but not construction, of drainage ditches are exempt activities under CWA 404(f)(1)(C).[69]

REFORMS: Notwithstanding the exceptions noted above, Section 404 permitting requirements can be a significant burden on transportation project development, especially for minor maintenance and construction activities that only impact man-made wetlands or ditches located adjacent to roads. AGC recommends USACE clarify and expand exemptions for activities involving maintenance and/or construction of roadside ditches, emergency activities, impacts on low-quality wetlands within the highway median. This may also require an amendment to 33 C.F.R. Section 325.

PART 2 - RECOMMENDATIONS TO IMPROVE CONTRACTING WITH THE CONSTRUCTION INDUSTRY

I. Partnering

AGC members believe that partnering as committed team members with USACE will improve project execution, staff efficiency (USACE and contractors), safety and trust. During the past five to seven years AGC members have observed a severe reduction in project level partnering. Many have commented that partnering is now the rare exception rather than the rule.

The purpose of partnering is to: (1) keep open the lines of communication and trust between project stakeholders to address issues as they arise; and (2) establish issue resolution procedures among

[69] More information can be found in the USACE Regulatory Guidance Letter (RGL) 07-02: *Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches under Section 404 of Clean Water Act*.

stakeholders to help avoid litigation. Partnering helps stakeholders identify potential problems before construction begins, increase project efficiency, reduce project cost and time, and deliver a better project.

The partnering process entails an initial workshop—which could last a day or two, or less, depending upon the size and scope of a project and happen in conjunction with the pre-construction meeting—during which stakeholders discuss the contract terms and identify methods to execute the project in a collaborative manner. This should occur before construction begins. The initial workshop sets the stage for periodic follow-up meetings throughout the life of the project where owner and stakeholders solve ongoing issues and evaluate work performed.

For partnering to be effective, USACE and contractor staffs must be involved. The greatest problem when it comes to partnering is for anyone from the USACE District or Division offices to participate in these meetings on a periodic basis. As a result, there can be a lack of oversight on the project that can lead to problems. Without getting someone with authority to the project or to engage in a proactive manner, problems that could have been addressed often fester until a District of Division office can no longer ignore it. By requiring that USACE engage in proactive, periodic meetings at the District/Division levels, problems can be identified either before they happen or before they become worse.

REFORMS: AGC recommends that USACE leadership encourage partnering at the field level. USACE and contractors should address partnering specifics on a project-by-project approach. The return of investment from partnering is directly proportional to a project's success rate. AGC members are encouraged by USACE issuance of ECB 2017-14[70] that underlines the importance of partnering. USACE should work to enforce compliance with this ECB and issue more similar directives. AGC recommends that USACE engage in a project level partnering process. AGC suggests USACE issue requirements on all projects that include partnering parameters. Lastly, AGC members support the 3x3x3 process[71] for pre-construction project streamlining on the Civil Works side. USACE should take steps to ensure that actual construction happens with such effective and efficient oversight and communication.

II. Improve Processing and Payment of Contract Change Orders

Construction projects are subject to a wide array of variables that may require a USACE to alter their initial plans through a change order.[72] Consequently, reasonable delays and changes may be required to meet conditions on the ground. The concern is not that with reasonable delays and changes to the initial contract. Rather, AGC members' concern rests with USACE failing to execute change orders and make payment to contractors for months—and even years—at a time. Unsurprisingly, this delay causes serious harm to the project schedule and has a deleterious impact upon payment to the prime and subcontractors, especially small businesses which depend upon that cash flow to remain in business.

When a USACE fails to process and pay a change order in a timely manner, the contractor is left with few options. In the interim period, the contractor tries—as best as possible—to work around the issue. Depending on the issue, the contractor can be left in the precarious position of either (1) self-financing

[70] Engineering and Construction Bulletin 2017-14.
[71] Planning Bulletin 2014-01.
[72] 48 C.F.R. § 42.2.

the work to meet project schedule; or (2) stopping work altogether. Either option brings real problems and threats to businesses. When work must be stopped or slowed down because of untimely processing of change orders, overhead costs remain. If demobilization and remobilization are required, that only adds to unnecessary and inefficient costs related to the use of that equipment. Contractors will go to great lengths to keep the project going, but there are times when the agency issued change orders dictate the schedule.

AGC members further note a lack of direction from USACE during the interim period when the change order is being processed. When change order processing takes an extended period of time, project direction from USACE is necessary to maintain on budget and on time delivery of the project as a whole. This lack of direction generally leaves the contractor at risk to either support the owner or having to pay itself for rework. Problems with issuing change orders force contractors to include the risk of delayed payments in their bid, ultimately costing taxpayers more. USACE should centralize and keep data regarding whether the Contracting Officer had informed the Contractor whether unobligated funds were available to pay the costs of any additional work.[73]

REFORMS: AGC recommends USACE empower USACE members to solve problems at the lowest organizational level possible. Empowering lower level USACE representatives increases collaboration, limits cost overruns, and keeps projects on schedule. USACE should increase greater transparency in the USACE decision making process—to help allow for greater accountability—during the construction execution phase of project delivery. Additionally, USACE should reduce the links in the chain of command necessary to obtain timely decisions during construction, and reward USACE employees based on project performance. Lastly, USACE should use metrics and data to track and evaluate USACE District Offices that underperform in the processing of change orders. To the extent USACE HQ can use commercially-off the shelf data systems to collect and review data from its jobsites, AGC would support such an effort to help hold all parties accountable. However, AGC does note that USACE should not create any mandate upon the construction industry to utilize one company's software, thereby creating a monopoly for one vendor and forcing an industry to utilize that single vendor's wares.

In addition, to help ameliorate this issue, we recommend modifying DFARS section 252.236-7000 to hold COs accountable for making timely decisions. Specifically, we recommend the inclusion of a new subsections to the provision, stating:

(e) The Contracting Officer shall provide to the Contractor a written acceptance or denial of a proposal for a contract modification no later than:

> (1) Thirty (30) calendar days from receipt of a qualifying proposal with a cost of less than $250,000;
> (2) Sixty (60) calendar days from receipt of a qualifying proposal with a cost of $250,000 to less than $500,000;
> (3) Ninety (90) calendar days from receipt of a qualifying proposal with a cost of $500,000 to less than $1,000,000; or
> (4) One hundred-twenty (120) calendar days from receipt of a qualifying proposal with a cost $1,000,000 or more.

[73] 48 C.F.R. § 43.105.

(f) A Contracting Officer shall only deny or request the re-submittal of a Contractor's proposal for contract modification for a material reason.

(g) When a Contracting Officer does not provide to the Contractor a written acceptance or denial of a proposal for a contract modification within the applicable deadlines set forth in paragraph (e), the proposal is denied.

(h) The Contracting Officer shall record in the contract file the date on which it receives from the Contractor any proposal for a contract modification.

Such a provision will help provide some level of accountability to COs to make timely decisions. In the event no decision is reached, contractors can still proceed with a level of certainty that does not currently exist. In addition, it will help provide some record of CO receipts of proposals that could be used to help track CO performance and effectiveness. Lastly, the proposal will help prevent COs from re-starting the clock by denying a proposal or requesting a resubmittal of a proposal based on non-material proposal defects, such as a meaningless typo.

III. Overseas Military Construction

DFARS section 252.236–7010, entitled "Overseas Military Construction – Preference for United States Firms," also known as the "American Preference Policy," establishes a federal government bidding preference for United States (U.S.) firms in the award of construction contracts overseas. This provision allows a 20 percent differential between the bids of U.S. contractors and foreign contractors before the foreign contractor's price would be treated favorably.

The American Preference Policy defines a "United States firm" as a firm incorporated in the United States that complies with the following:

- The corporate headquarters are in the United States;
- The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years, has filed State and Federal income tax returns for 2 years, and has paid any taxes due as a result of these filings; and
- The firm employs United States citizens in key management positions.

Offers from firms that do not qualify as U.S. firms will be evaluated by adding 20 percent to the offer. However, the language in the DFARS does not clarify whether joint ventures (JV) between American firms and foreign firms qualify as a "United States firm" for purposes of applying the American Preference Policy to a joint venture proposal.

In a 2008 U.S. Court of Federal Claims case, *Watts-Healy Tibbits a JV vs. The U.S. and IBC/TOA Corporation*, [74] the court stated that "the Government should clarify the policy [as it pertains to JVs]" through "guidelines for the source selection personnel" or "definitive regulation establishing some bright lines after both notice and comment as well as agency assessments of what rules or guidelines will really promote the ability of United States contractors to fairly compete in these contracts."[75] Such guidance or regulations have not been issued and confusion in the marketplace continues.

This provision must be amended to clearly identify the criteria a joint venture must meet in order to qualify for the 20 percent differential between the bids of U.S. contractors and foreign contractors. Clarification of the provision as it applies to joint ventures will eliminate the current agency practice of evaluating the standard on a contract-by-contract basis and provide consistency within and between DOD agencies and to contractors generally. Failure to clarify this provision as such increases costs to taxpayers through less competition, the incurrence of litigation fees, stayed and delayed contracts, and potential re-solicitation of contracts, among others.

In order for a joint venture to qualify as a "United States firm," the provision should be amended as such:

OVERSEAS MILITARY CONSTRUCTION--PREFERENCE FOR
UNITED STATES FIRMS (JAN 1997)

(a) *Definition.* "United States firm," as used in this provision, means a firm incorporated in the United States that complies with the following:

(1) The corporate headquarters are in the United States;
(2) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and
(3) The firm employs United States citizens in key management positions.

A "United States firm" includes a business entity where:

(1) A United States firm is the majority owner, maintaining at least 51 percent ownership, of the business entity; and
(2) Fifty-one (51) percent of key management positions in the business entity are employed by the majority owner United States firm.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms will be evaluated by adding 20 percent to the offer.

(c) *Status.* The offeror _____ is, _____ is not a United States firm.

[74] Watts-Healy Tibbits a JV vs. The U.S. and IBC/TOA Corporation, Fed. Cl. (Case No. 08-261C), May 2, 2008, available at: https://cases.justia.com/federal/districcourts/federalclaims/cofce/1:2008cv00261/23160/26/0.pdf?ts=1294701842.
[75] *Id.* At 6-7.

IV. Innovative Project Delivery Methods

AGC appreciates that USACE recognizes the value in undertaking the early contractor involvement (ECI) project delivery method. However, AGC is disappointed that USACE does not utilize this tool often or too its full extent. For example, the U.S. General Services Administration has used its version of ECI—Construction Manager as Constructor (CMc)—regularly and with successes for more than a decade. It is AGC's understanding that the DFARS blocks experimentation or effective use of ECI.

REFORM: USACE should undertake regulatory action needed to level the DFARS playing field so that it can undertake ECI as GSA undertakes CMc.

V. Safety Officer Accreditations

AGC members are committed to a safe construction workplace and considers the promotion of construction safety as a part of the association's core mission. Over last several years AGC members, and the construction industry at large, have made credible and tangible improvements to workplace safety. While it is important to help promote a culture of safety in the construction industry, it is important that USACE have reasonable requirements for Site Safety & Health Officers (SSHO).

Currently, USACE requires a SSHO to have a Certified Safety Professional (CSP) certification, ten years construction experience, and five years similar experience in particular to the construction project.[76] For example, if a contractor is building a large office building for USACE, the agency requires SSHO to have five years of experience in supervising safety on other large office building construction projects. The combination of these three requirements can be very difficult for contractors to meet. These requirements will often force the contractor to choose between reassigning a SSHO from one project to another. However, oftentimes contractors are left with little choice but to hire a third-party consultant that can meet USACE's SSHO requirements. Incorporating third-party consultants have the unintended consequence of increased costs while reducing value. While it may be easy for some companies to provide SSHO with experience on certain projects, it can be particularly onerous and burdensome on less common projects and for small business contractors.

REFORMS: USACE should reform the five-year similar experience requirement to allow for greater flexibility for contractors to meet the SSHO requirements. USACE should consider that many SSHO skills are fungible and experienced SSHO are capable of supervising a diverse array of projects. This can be done by creating a threshold number of years of experience in construction safety experience that would waive the five years similar experience requirement. For example, it would make little sense to bar a SSHO of thirty years from a USACE project simply because the SSHO does not have five years' experience in that type of construction project. Lastly, USACE should allow for greater flexibility of SSHO experience for unique, or less common, USACE projects where it would be difficult for contractors to find SSHOs who are experienced in that particular type of project.

[76] EM 385-1-1.

VI. Quality Control System

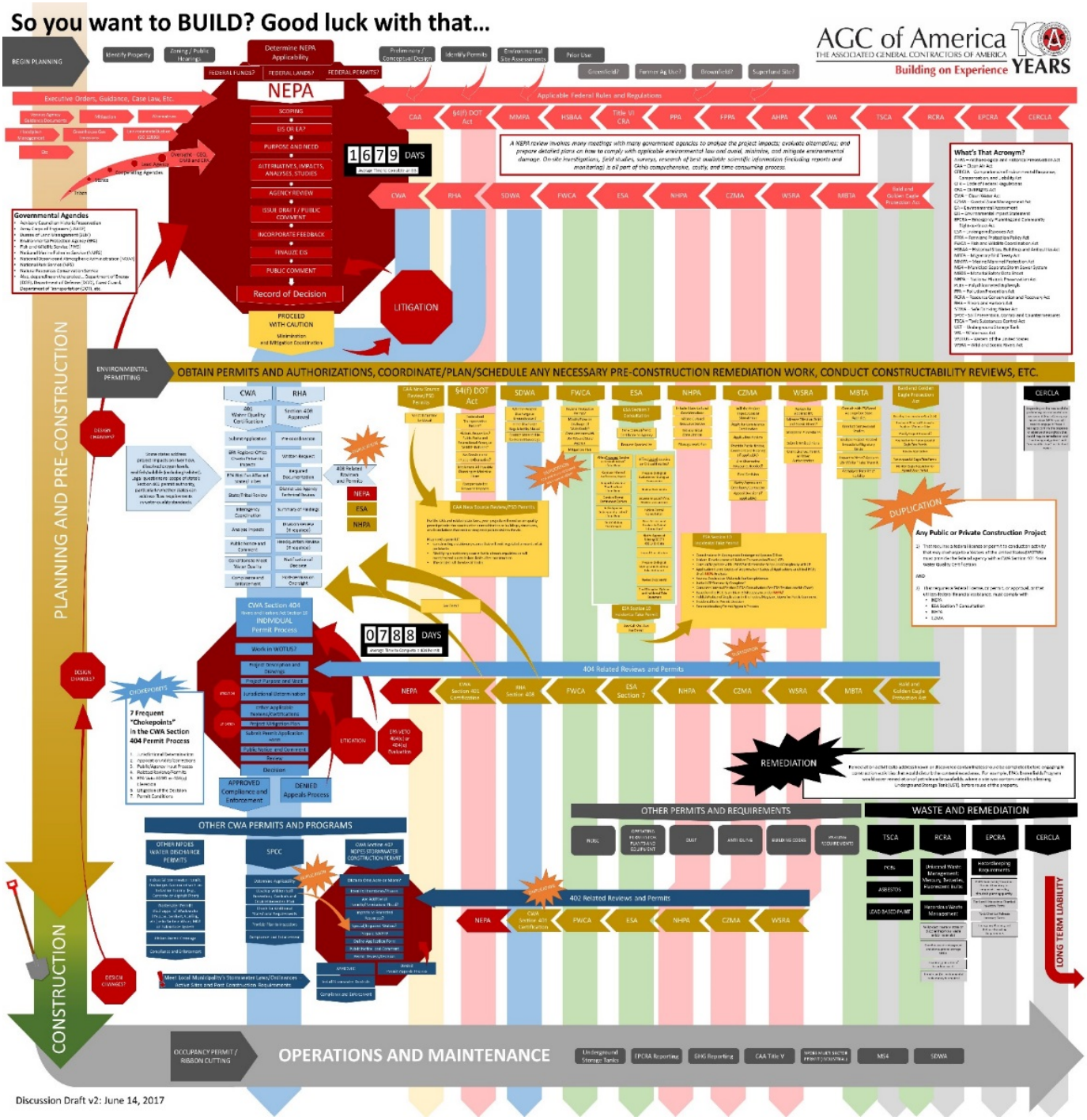
Currently, USACE uses the Quality Control System Module (QCS Module) on all USACE construction projects. However, AGC members have seen USACE expand the use of QCS Module from its original purpose. USACE now uses QCS Module not only to keep track of quality control functions but most other project management functions, such as payment processing, daily reports, submittals, schedule updates, etc. AGC members report that several hours are required for contractors to input daily reports into the QCS Module. The QCS Module antiquated system is extremely slow and antiquated. Often submission of monthly requisitions requires an overnight upload time.

REFORMS: USACE should return to the original function of the QCS Module by only requiring information related to quality control functions, and prohibit the inclusion of other project management functions.

CONCLUSION

AGC appreciates the opportunity to share our insights with you and to help advance our common goals of fair competition and of economic and efficient performance of USACE construction projects. If you would like to discuss this matter with us further, please do not hesitate to contact AGC of America.

APPENDIX A - FEDERAL ENVIRONMENTAL REVIEW AND PERMITTING FLOWCHART



(Full file version available upon request to AGC's Director of Environmental Services Melinda Tomaino at tomainom@agc.org)