Statement of

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on behalf of

The Associated General Contractors of America

to the

Subcommittee on Water Resources and Environment

Committee on Transportation and Infrastructure

U.S. House of Representatives

For a hearing on

"EPA's Expanded Interpretation of Its Permit Veto Authority Under the Clean Water Act"

July 15, 2014

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 25,000 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, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

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Statement of Leah F. Pilconis, Esq.
The Associated General Contractors of America
Transportation and Infrastructure Committee
Subcommittee on Water Resources and Environment
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Chairman Gibbs, Ranking Member Bishop, and members of the Subcommittee, thank you for inviting the Associated General Contractors of America (AGC) to testify on the U.S. Environmental Protection Agency's (EPA) reinterpretation of its authority under the Clean Water Act and the implications for the construction industry. My name is Leah Pilconis, and I am the Senior Environmental Advisor to AGC. The association represents over 25,000 construction contractors, suppliers and service providers across the nation, and has members involved in all aspects of nonresidential construction. Through a nationwide network of 93 chapters in all 50 states, DC, and Puerto Rico, AGC contractors are engaged in the construction of the nation's public and private buildings, highways, bridges, water and wastewater facilities and more.

AGC's Environmental Program

One of my core functions for AGC is to monitor, summarize, and regularly comment on federal legislation and regulations that may implicate either the scope or nature of the construction industry's obligations to the environment. On behalf of AGC, I maintain liaison with EPA and other federal agencies that interpret and enforce federal environmental laws.

In a pro-active effort to help AGC members meet federal environmental requirements, I also develop and disseminate practical "compliance tools" for construction contractors, and help to organize and hold environmental seminars, forums, and other programs for such contractors. I serve as the editor of AGC's monthly newsletter on clean water laws and other environmental issues that affect construction. I also develop and distribute fact sheets on environmental requirements, and brochures and flyers highlighting the association's environmental initiatives.

AGC also tracks and summarizes data on the size and scope of the construction industry and its numerous segments, including the variety of economic and policy influences on each one. The association also advises lawmakers, regulators and the media of the impact that various economic forces and policy choices are likely to have on the construction industry.

The Clean Water Act Section 404 Permitting Process

In carrying out my work for AGC, I have been following the debate surrounding CWA jurisdiction and Section 404 permits for quite some time. The Federal Water Pollution Control Act Amendments of 1972, better known as the Clean Water Act (CWA), requires anyone who wants or needs to perform *work* in "waters of the United States" to get a Section 404 permit from the U.S. Army Corps of Engineers (Corps). Specifically, that permit authorizes the discharge of dredged material (i.e., addition of dredged material into water, including redeposits from

mechanized landclearing or other excavation)[1] or fill material (i.e., material placed in waters such that dry land replaces water—or a portion thereof—or the water's bottom elevation changes)[2] into a water of the United States. It is hard to conceive a construction activity in U.S. waters that would not need a Section 404 permit. CWA Section 404(a) provides that the Corps, "may issue permits ... at specified disposal sites" for the dredging or filling of navigable waters. Section 404(c) grants EPA the power to veto or place restrictions on the areas designated as disposal sites, if the proposed discharge would have an "unacceptable adverse effect" on municipal water supplies, shellfish beds and fishing areas, wildlife, or recreational areas.[3] The Corps is the permitting agency, but again, EPA has certain veto authority.

The question is how much. As a matter of law and policy, AGC believes that EPA's authority does not – and should not – extend beyond the point at which the Corps issues a Section 404 permit. Once the Corps issues a permit, the contractor needs to have confidence that it can lawfully proceed without concern that EPA will unexpectedly halt a project. AGC has been troubled to see EPA take a much more expansive view of its authority and argue that it can come in before, during, or after the Corps has issued a permit and unilaterally frustrate a permitee's reasonable, well-settled and investment-backed expectations. EPA is disrupting a well established and legitimate process that gives a contractor permission to work. This is fundamentally unfair to the business community, for it provides no protection for the community's legitimate interest in finality and conflicts with the broader public interest in both public and private infrastructure.

Unfortunately, one court has sided with EPA. AGC believes that it is now up to Congress to step in and solve this problem. AGC believes it is up to Congress to relieve the construction and real estate development industries of the uncertainty that is deterring necessary investment in the nation's infrastructure. It is up to Congress to ensure that the business community will continue to make the investments needed to support the physical infrastructure on which all Americans are heavily dependent.

AGC Members Rely on Section 404 Permits to Build the Nation's Infrastructure

Collectively, AGC member firms build much if not most of the nation's public and private infrastructure.[4] Many of their highway, bridge, building and other construction projects unquestionably lie in "waters of the United States," within the meaning of the Clean Water Act, and therefore require federal permits. In the near future, many other projects may or may not lie in such "waters," depending on the precise contours of that term, which continues to be a source of much discussion and debate among regulators and the regulated community, not to mention ongoing rulemaking processes.

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[1] 33 C.F.R. Part 323.
[2] *Id.*
[3] 40 C.F.R. Part 231.2(e).
[4] While AGC members rarely build single family homes, they are regularly engaged in the construction of all other improvements to real property, whether public or private. These improvements include the construction of commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing development.

Many AGC contractors currently seek coverage under Section 404 permits authorizing the discharge of dredged or fill material into U.S. waters. AGC members are required to comply with the permitting process and they are directly affected by the issues currently before this committee. Construction professionals, as well as private real estate developers and public stewards of both transportation and other critical infrastructure ALL need to be able to rely on their Section 404 permits to protect themselves from liability under the CWA for making unlawful discharges into jurisdictional waters of the United States.

Working without a permit is not a viable option. The penalties for failing to obtain a necessary CWA permit can be severe. The civil fines can reach $37,500 per day per violation and the criminal penalties for "negligent" violations can include $50,000 per day, three years' imprisonment, or both. As the "operators" of construction sites, courts have found both property owners and their construction contractors to be responsible for compliance, at least where the contractor has control over the discharge activity, and whether or not the contractor reasonably relied on the owner to obtain a necessary permit. As such, both owner and contractor risk such fines and penalties for any failure to comply with the CWA. In addition to CWA penalties, an assertion that land contains "waters of the United States" subject to CWA jurisdiction exposes project proponents to third-party litigation pursuant to the CWA citizen-suit provision.

And the potential penalties and litigation costs are just the tip of the iceberg. Many of today's infrastructure projects cost billions of dollars to construct. Just the direct costs of major disruptions of the work on these projects can reach easily tens if not hundreds of millions of dollars. Scarce resources are wasted. Economic benefits are delayed. And construction workers lose their jobs.

Construction contractors are sensitive to the many risks of environmental degradation, and they therefore seek to comply with their environmental permits. When they do, they are entitled to the confidence that they are meeting their environmental responsibilities.

The Changing Landscape

The precise contours of the key jurisdictional term "waters of the United States" (which is defined only via regulatory text) are currently being revisited by EPA and the Corps – and AGC fully expects the scope of federal jurisdiction over wet areas to significantly increase in the near term.[5] Under a joint EPA and Corps proposal[6] to revise the definition of "waters of the United States" under the CWA, virtually any public or private sector construction project that involves the creation of dry, flat areas for construction (where even an occasionally or seasonally wet area exists) or any mechanized earth moving activities (where even an occasionally or seasonally wet area exists) will likely require a Section 404 permit from the Corps.

[5] Although the CWA describes the applicable waters for Section 404 permitting as "navigable," the CWA defines that term to simply mean "waters of the United States." 33 U.S.C. § 1362(7).
[6] 79 *Fed. Reg.* 22188-22275 (April 21, 2014).

This is an issue that Congress has also taken an increasing interest in addressing, and has been the subject of multiple recent hearings in the House of Representatives, including this Committee, for which AGC is grateful.

As we enter an era where more and more public and private infrastructure or development projects will depend on the issuance – and guaranteed operation – of the Section 404 permit, recent actions indicate EPA may be seeking to expand its Section 404(c) role. First, the decision in *Mingo Logan*[7] to retroactively nullify a Corps permit several years after it was issued represents the first time the agency had ever blocked a project after the permit was approved. Second, EPA recently announced that it intends to preempt the Pebble Mine project in Alaska, even before a Section 404 permit application was filed for that project.[8] Third, as stated above, EPA proposed a rulemaking that would expand which water features are subject to federal jurisdiction, and thus the number of potential projects that must obtain Section 404 permits.

Indeed, EPA's website currently proclaims that its "Section 404(c) authority may be exercised before a permit is applied for, while an application is pending, or after a permit has been issued."[9]

Threat of Losing Permit Authorization

Every project with a Section 404 permit is under threat of losing its permit authorization if EPA unilaterally determines, at any time, that the project could have adverse effects on the environment—even where EPA itself was involved in and approved of the permit in the first instance.

The idea that EPA has unbounded authority to retroactively revoke or modify existing permits already approved by the Corps, which has the job of issuing Section 404 permits, has sparked considerable concern and action from AGC members. AGC members are gravely concerned that EPA can render years of development planning and billions of dollars in investments for naught based on nothing more than a reassertion of concerns that did not prevail in the inter-agency review process.

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

EPA is denying the regulated community certainty that is a central goal of the CWA. It is denying investors in both public and private infrastructure of the certainty they need to invest in

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[7] *Mingo Logan Coal Co. v. U.S. Environmental Protection Agency*, No. 13-599, *cert. denied* (U.S. Mar. 24, 2014).
[8] *See* Letter of EPA Regional Administrator to Thomas Collier, *et. al.*, Feb. 28, 2014.
[9] *See* Section 404(c) "Veto Authority" Factsheet, *available at* http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/upload/404c.pdf.

critical job-creating sectors of the economy. It is delaying and deterring the necessary effort to repair, replace and upgrade public infrastructure. It is inhibiting project financing. These harmful effects will be felt throughout the economy.

AGC simply seeks to ensure contractors can continue their critical work that both sustains and enhances the nation's productivity and its quality of life.

Delays and Work Stoppages

Businesses routinely incorporate the permit application and approval processes into their strategic planning. Ensuring compliance with environmental, preservation, zoning and building permit requirements at the federal, state and local levels is an extremely costly and time consuming process. Businesses assume the validity of these permits in their financial forecasting, and plan their business activities around the sanctity of these permits. In addition, many construction projects are designed before being built. Businesses regularly invest millions of dollars upfront on property, technology, personnel, and machinery on the assumption that their activities can continue unabated so long as they comply with the terms of their Section 404 permit. However, right now, all Section 404 permits – those in discussion, in process, and already issued – are vulnerable to the possibility of an EPA veto.

Many of today's infrastructure projects cost billions of dollars to construct. Just the direct costs of major disruptions of the work on these projects can easily reach tens if not hundreds of millions of dollars. Scarce resources are wasted. Economic benefits are delayed. And construction workers lose their jobs.

Further, it is likely that opponents of controversial construction projects will bring citizen suits to attempt to compel EPA to modify or revoke the Section 404 permits. Such opponents may seek a preliminary injunction against continued construction while their information is being considered; but even a short delay can mean the loss of an entire construction season in areas where weather conditions or U.S. Fish and Wildlife Service restrictions limit the time that contractors can work. During any delay, overhead costs continue to accumulate. Construction workers are idled. Economic benefits are postponed. And contactors can face liquidated or other penalties for the consequential damages that result from not completing a project on time.

Construction Surety Bonding

Most public owners require their construction contractors to post performance bonds that commit a third party, known as a surety, to step in and meet the contractors' contractual obligations if they should fail to do so. A bond constitutes a legal guarantee to the project owner. If a bonded contractor fails to perform, its surety has to provide a remedy, generally by arranging for another contractor to complete the work. Unlike an insurance carrier, the surety will then seek reimbursement of all of its costs from the bonded contractor, under an indemnification agreement that the surety will require of the contractor, as a condition of issuing the bond.

If a project is halted in mid-stream because EPA has vetoed a lawfully issued Section 404 permit, there may be no surety remedy other than cash restitution to the project owner. By

extension, the contractor will need to return that money to the surety. The adverse credit impact on the contractor could be significant, company accounts and equipment will be liquidated and limits will be placed on working capital needed for other projects and/or incurring bank debt and interest fees.

Even if these unfortunate circumstances can be avoided, for instance via *force majeure* provisions in the underlying contract, the contractor will still face the unanticipated loss of liquidity resulting from the aborted project, the costly and uncertain reassignment of its resources and workers, and similar consequences borne by its subcontractors, suppliers, and their workers. The negative financial effects may cause sureties and lenders to raise their rates, reduce capacity, or withdraw capacity. As most government entities mandate bonding on construction contracts, the contractor's ability to bid and perform to its full potential and public benefit may unnecessarily constrict on account of the work stoppage alone.

EPA's Unconstrained Veto Power Dismantles the Regulatory Certainty That Is a Central Goal of the CWA

As contract delivery methods evolve, more and more permitting responsibilities are shifting from the project owner/developer (e.g., Bid-Build method) to the general contractor (e.g., Design-Build and general contractor/construction manager or GC/CM method). Importantly, the contractor is therefore assuming more and more of the risk burden of the permit, and will risk great financial hardship, if not ruin, if EPA changes its mind about the merits of a particular permit.

Allowing EPA to revisit the environmental impact of Section 404 permits at any time leaves the permittee, often the general contractor, in the untenable position of not being able to rely upon the sole statutory mechanism for measuring CWA compliance: the permit. The purpose and effect of a government-issued permit is to induce certain behavior by declaring it lawful. As explained above, the fines, penalties and threat of third-party actions for discharging dredged or fill material without a permit are significant.

Section 404(p) establishes a safe harbor for regulated entities, assuring them that they will not face liability under the CWA so long as they comply with a Corps-issued permit.[10] Indeed, once a CWA permit is issued, the recipient is assured that it generally will not be modified even to reflect subsequent regulatory developments. As EPA has emphasized, "[i]n general, permits are not modified to incorporate changes made in regulations during the term of the permit. This is to provide some measure of certainty to both the permittees and the [EPA] during the term of the permits."[11]

Yet, EPA's assertion of an unconstrained veto power means that any Section 404 permit could be vulnerable, regardless of the permit-holder's compliance with the permit or the State's or Corps's views. Having invested substantial resources in a project requiring a Section 404 permit (including substantial resources in the permitting process itself), the permit holder would have no assurance, contrary to Section 404(p), that it would be allowed to reap the benefits of its

[10] 33 U.S.C. § 1344(p).
[11] 49 *Fed. Reg.* 37,998, 38,045 (Sept. 26, 1984).

investment if it complies with the permit and be shielded from CWA liability. Instead, there would be great uncertainty and regulatory limbo regarding whether any permit was going to be vetoed and whether validly permitted projects will be able to be completed.

The Corps consistently has respected Congress' call for regulatory certainty. Corps regulations specifically address permit modification or suspension and lay out five factors to be balanced in that inquiry.[12] EPA should not have the ability to eviscerate issued permits. Once the permit is issued, the Corps—not EPA—determines whether the permit should be modified or revoked, and it does so by applying regulatory standards that fully protect Congress' interest in finality. If EPA continues to assert this "broad veto power" over permits issued by the Corps, it will disregard Congress' explicit choice to give the Corps primary authority over the Section 404 permitting process.

EPA's position means that it has continuing jurisdiction to oversee Section 404-permitted construction activities and to continually evaluate the impact those projects may have on the surrounding municipal water supplies (including surface or ground water), fisheries, shellfishing, wildlife habitat, recreation areas, etc. EPA asserts that the agency has the unfettered option to change its mind at any time, up until project completion. All parties to the construction and development processes face the ongoing threat that at any point during the course of a project, EPA may decide to revisit the discharge authorization, and perhaps reengage on any of the issues raised during the Section 404 permit application process. Permittees now have the additional burden of being prepared at all times to address these after-the-fact objections, or face the risk that EPA will unilaterally decide to withdraw (or deny or restrict the use of) previously approved disposal sites, effectively revoking all or part of the permit.

EPA's Unconstrained Veto Power Will Chill Private Investment and Negatively Impact the Economy

The Corps reportedly issues roughly 60,000 discharge permits annually under Section 404 and more than $220 billion of investment annually is conditioned on the issuance of these discharge permits.[13] This represents a huge share of the $911 billion in public and private investment in the construction of residential and nonresidential structures that occurred in 2013. If EPA continues to assert a broad and unconstrained "veto power" over permits issued by the Corps, it will substantially deter investment in projects requiring Section 404 authorization, which will translate directly into lost jobs and lost economic activity across the whole economy. This will have a disproportionate and negative impact on gross domestic product (GDP). Billions of dollars of investment are dependent on the finality that comes with a duly-issued Corps permit.

Leaving projects un-built has consequences far beyond the owner and users who are deprived of the use of that project. Construction is a major contributor to employment, GDP and

[12] These five factors include whether any "circumstances … have changed since the permit was issued," "any significant objections to the authorized activity which were not earlier considered," and "the extent to which modification, suspension, or other action would adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit." 33 C.F.R. Section 325.7(a).

[13] *See e.g.*, David Sunding, *Economic Incentive Effects of EPA's After-the-Fact Veto of a Section 404 Discharge Permit Issued to Arch Coal* (May 30, 2011).

manufacturing. An extra $1 billion in nonresidential construction spending adds about $3.4 billion to GDP, about $1.1 billion to personal earnings and creates or sustains 28,500 jobs.[14] Two-thirds of those jobs occur outside of construction—in industries ranging from mining and manufacturing to a host of services, locally and across the country.

Overall employment in the construction industry peaked at 7.73 million in April 2006, fell to 5.44 million (down 30%) by January 2011 and has recovered only a quarter of the losses since then, reaching 6.02 million in June 2014. This gradual and still-fragile recovery would be severely threatened if EPA is able to revoke Section 404 permits at any stage.

Construction is an important source of orders for U.S. manufacturing. In 2013 U.S. manufacturers shipped $517 billion in construction materials and supplies (9% of total factory shipments) and $55 billion in new construction equipment (13% of total machinery shipments). A precipitous drop in investment in projects that require a Section 404 permit would cut deeply into these shipments and potentially end the recovery that has occurred in recent years in manufacturing employment. Similarly, the cancelation of these projects would result in significant job losses in industries that supply raw materials, design and other professional services to construction, as well as businesses that depend on purchases by the workers and owners of construction companies and their suppliers.

Investors expect the permitting process to be followed, so that a project has a full opportunity to present its plans, defend its science, and modify the project to meet any legitimate regulatory concerns. The financial risk of backing a project that requires a Section 404 permit is significantly increased if a possibility exists that EPA can veto a project (1) even before an applicant has an opportunity to propose a specific project or to demonstrate its ability to meet the CWA criteria or (2) years after the permit has been duly issued and relied upon by the permittee.

EPA's Unconstrained Veto Power Will Disrupt Vital Infrastructure Projects and Impact Public Health and Safety

Raising new obstacles to public and private infrastructure investment, as EPA has done by asserting unconstrained veto power over Section 404 permits, will exacerbate the difficulty of achieving the necessary funding level.

The United States currently faces "a significant backlog of overdue maintenance across [its] infrastructure system" and "a pressing need for modernization."[15] The suspension, restriction or lack of financial support for Section 404 projects could result in intolerable delays to the renovation and improvement of public infrastructure, including highway and transit construction projects, bridge construction and repairs, and dam repairs. Forty-two percent of America's major urban highways remain congested. Disruptions that delay highway construction projects could

[14] This breaks down as follows: 9,700 jobs direct construction jobs; 4,600 jobs indirect jobs from supplying construction materials and services; and 4,300 jobs induced when workers and owners in construction and supplier businesses spend their additional wages and profits.

[15] *See* American Society of Civil Engineers, *Report Card for America's Infrastructure* (2013). The report thoroughly documents the condition of the nation's water, transportation, energy and public infrastructure. Cumulatively, ASCE's 2013 report gave the nation's infrastructure a "D+"— signaling a need to substantially increase public investment in a wide range of infrastructure.

also delay numerous safety-related projects, resulting in increased potential for injuries and fatalities to the traveling public. Highway improvement projects improve traffic flows and reduce congestion, which decreases air pollution associated with idling. The Federal Highway Administration estimates that $170 billion in capital investment per year is needed to significantly improve conditions and performance; the current level of investment is approximately half of that number. Even a temporary freeze on new highway construction could prevent states from "obligating" their federal highway funds, which could, in turn, result in a loss of those federal dollars. The long-term impacts of losing federal funding would have substantial impacts on the states' ability to keep highways safe and prevent accidental deaths and injuries.

Among other examples of infrastructure needs that should be urgently addressed:

- One in nine of the nation's bridges are rated as structurally deficient[16] – and 15 states have had their number of structurally deficient bridges increase since 2011;
- There are 14,000 high-hazard dams, and 4,000 deficient dams, in the U.S.;
- The reliability of the nation's massive levee system, which increasingly protects developed communities, is essentially unknown;
- Water and wastewater infrastructure systems are aging rapidly and require roughly $1 trillion of investment to meet current public health and environmental standards;
- Some sewer systems are 100 years old and many treatment facilities are past their recommended life expectancy.[17]

EPA's Unconstrained Veto Power Will Inhibit Project Financing

Also, the risk of permit revocation will drive up the cost of municipal bond financing, a common funding vehicle for projects requiring large capital outlays. The debt rating agencies will account for this risk through lowered bond ratings, particularly on controversial projects, resulting in increased underwriting fees and interest rates, the cost of which could be quite sizable. In some cases project proponents may not be able to obtain necessary financing or public funding.

As a result, AGC members are concerned that the increased level of uncertainty on projects that require a Section 404 permit will reduce investment in vital infrastructure such as roads, pipelines and rail lines. Communities and jurisdictions in need of this infrastructure may find it an untenable, as the cost of servicing the municipal bond debt outpaces any reasonable economic benefit they can expect from the improvements.

Thank you again for this opportunity to testify on behalf of AGC.

[16] "Structurally deficient" – Bridges require significant maintenance, rehabilitation, or replacement.
[17] *Id.*