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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
Attn: CECW-CO-N (Ms. Mary Coulombe)
441 G Street, NW
Washington, DC 20314-1000

Submitted by:

The Associated General Contractors of America
Leah Pilconis, Senior Counsel, Environmental Law and Policy
2300 Wilson Boulevard, Suite 300
Arlington, Virginia 22201

Ex. 6

pilconisl@agc.org

The Associated General Contractors of America
Jordan Howard, Director, Federal and Heavy Construction
2300 Wilson Boulevard, Suite 300
Arlington, Virginia 22201

Ex. 6

jordan.howard@agc.org

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

- I. Problems During NEPA/Permitting Documentation Preparation and Agency Review: General Comments
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APPENDIX A: FEDERAL ENVIRONMENTAL REVIEW AND PERMIT FLOWCHART

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

NEPA³ 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/ed3tdm.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 404⁹ 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 Flowchart¹² 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.

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) guidelines¹⁸ 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:

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. Env’t’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

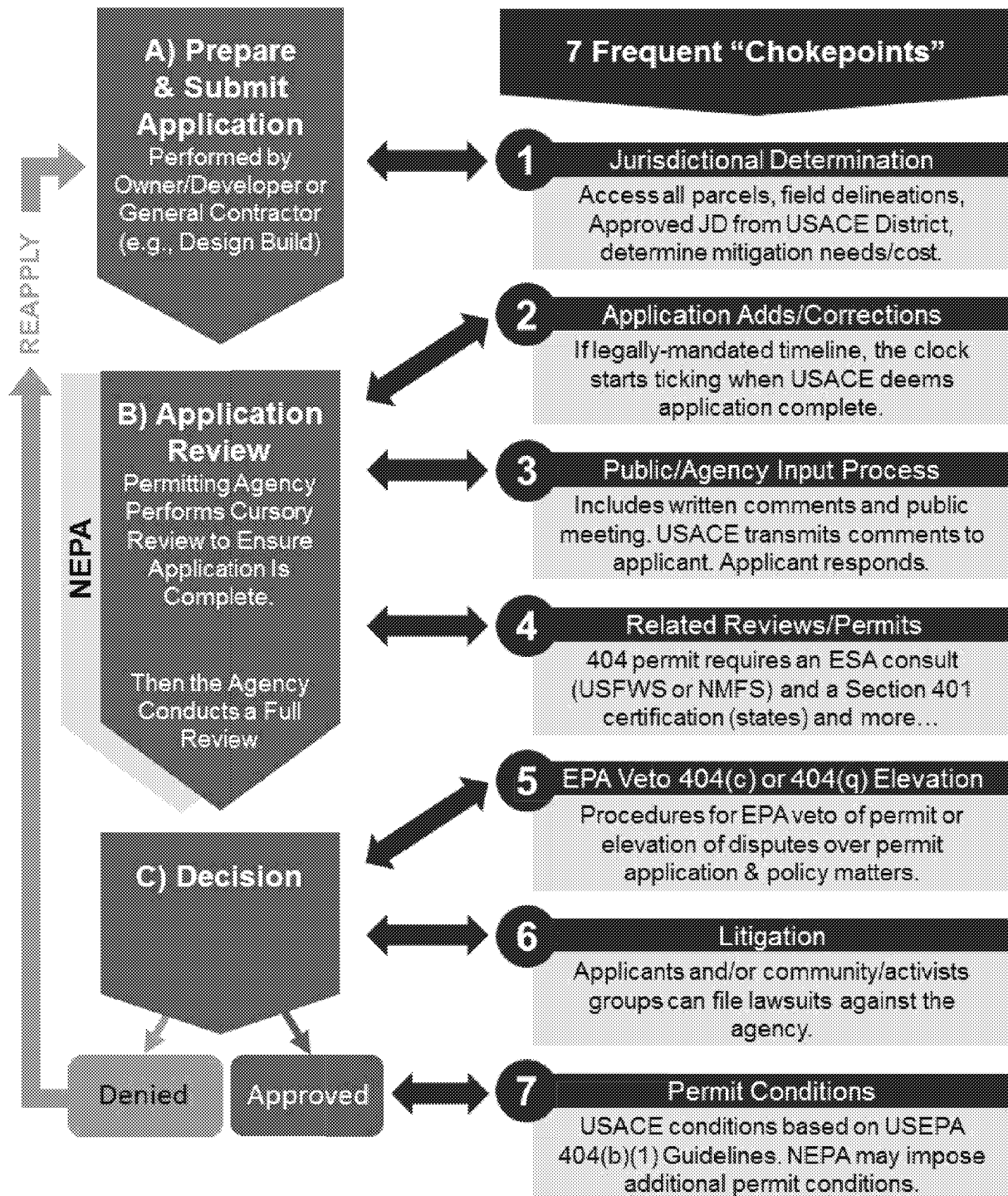
As stated above, the Corps’ NEPA regulations establish the procedures required by the Corps for NEPA review of permit applications. It requires the District Engineer undertaking a NEPA review to establish the scope of the NEPA document to address the impacts of the activity, or those portions of a project 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.

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 Opinion³² 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 MOA⁴⁴ 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-404q-memorandum-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 NWP’s 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/values 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 14⁵⁶ 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

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 NWP projects 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 NWP projects 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 or 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 2017-14⁷⁰ 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 process⁷¹ 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/districtcourts/federalclaims/cofcl/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 to 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.

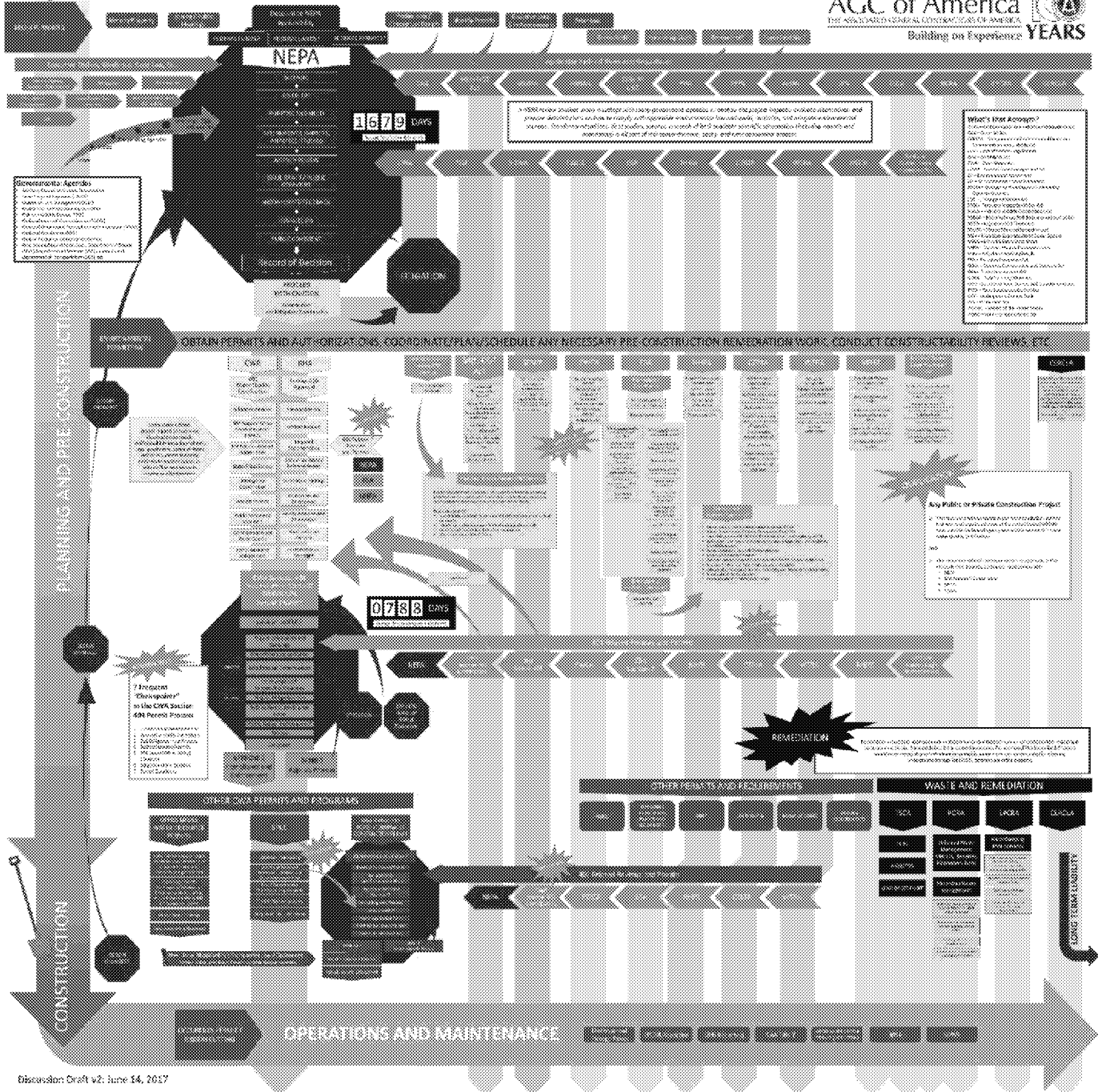
REFORMS: USACE should return to the original function of the QCS Module by only requiring information related to quality control functions, and prohibit the inclusion of other project management functions.

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

So you want to BUILD? Good luck with that...



Discussion Draft v2: June 14, 2017

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