July 24, 2017

The Honorable Elaine Chao
Secretary
U.S. Department of Transportation
1200 New Jersey Ave., SE
Washington, D.C. 20590

Dear Secretary Chao:

Thank you for your interest in identifying requirements that the US Department of Transportation (US DOT) imposes on the delivery of transportation infrastructure projects that should be removed or revised. The Associated General Contractors of America (AGC) believes there are numerous such provisions which are part of US DOT’s process for delivering federal-aid highway, transit and other transportation infrastructure that are burdensome, unnecessary, costly and inefficient and should be revised. These regulatory and administrative burdens impede transportation infrastructure projects.

AGC, representing 26,000 construction industry businesses in all fifty states, represents the stakeholder group that is on the immediate front line for delivering the nation’s transportation infrastructure. AGC supports President Trump’s focus on significantly reducing regulatory requirements that increase inefficiencies and costs in government programs and believes that there are opportunities for US DOT to reduce the regulatory burden. AGC is optimistic that you will focus US DOT in ways that will help President Trump accomplish his objectives of revitalizing the Nation’s infrastructure, spurring economic growth and creating new jobs.

AGC would like to offer recommendations and stands ready to work with you to accomplish these objectives. AGC has organized these recommendations under the following headings for your consideration:

- Reforms for Streamlining the Disadvantaged Business Enterprise Program;
- Rescind Local Hire Pilot Program and Regulations;
- Promulgate Needed Work Zone Safety Regulation;
- Reforms for Improving Federal Motor Carrier Safety Administration Regulations;
- Adjust Surface Transportation System Funding Alternative Program; and
- Reforms for Improving Federal Environmental Review and Permitting.

To further explain some of these recommendations, AGC has appended the following documents to these comments:

- AGC Legal Memorandum on Hiring Preferences for In-State and/or Local Residents;
- AGC’s Chart on Current U.S. DOT Environmental Streamlining Programs & Deficiencies
- AGC’s Federal Environmental Review and Permitting Flowchart, dated June 14, 2017; and
Reforms for Streamlining the Disadvantaged Business Enterprise (DBE) Program

The US DOT Disadvantaged Business Enterprise (DBE) program has been operating since 1982 and applies to the highway, transit and aviation programs administered by US DOT.\(^1\) With the DBE program now 35 years old, it is appropriate to examine the program’s results as well as determine its successes and shortfalls.

To do so, AGC will focus it comments on the program’s two primary objectives, which are:

1. To ensure non-discrimination and a level playing field on which DBEs can compete fairly for US DOT-assisted contracts; and
2. To assist the development of firms that can compete successfully in the marketplace outside the DBE program.\(^2\)

AGC contends that, in practice, the DBE regulations may not always successfully achieve both of these objectives. The requirements for DBEs and prime contractors alike can be difficult to understand, difficult to comply with, costly, burdensome and deleterious to on-time project delivery. As such, reforms are ripe for consideration to these regulations.

Commonly Cited Problems with the DBE Program: General Comments

AGC members—both DBEs and non-DBE prime contractors—have cited a wide range of problems. On the DBE side, such contractors have communicated that:

- Certification procedures for DBEs are cumbersome and costly, making it difficult for DBEs to participate in the program; and
- The regulations establish barriers between DBEs and prime contractors, rather than encouraging a working business relationship that helps DBEs learn and grow through its working with a prime contractor.

Non-DBE prime contractors tell AGC that:

- DBE goals are not often a realistic reflection of available and qualified DBE construction contractors and subcontractors in the state;
- There is no list of definitive steps a prime contractor can take to count towards its “good faith” effort to meet the DBE goal;
- Determining a DBE capabilities—or whether it can in fact perform a commercially useful function—prior to having actually worked with DBEs on a project is difficult and the standard itself hampers business development for DBEs; and
- Suppliers of materials that are owned and operated by DBEs do not count towards meeting the contract goal if the DBE is neither a manufacturer nor a regular dealer.

Below, AGC explains these reported problems in more detail and provides suggested reforms to address them.

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\(^2\) 49 C.F.R. 26.1
Top Barriers to Improved Functioning of the DBE Program: Recommended Administrative and Legislative Reforms

PROBLEM: Certification procedures for DBEs are cumbersome, costly, and confusing, making it difficult for DBEs to participate in the program: Documentation requirements for DBEs take huge amounts of time away from business operations. Many DBEs become discouraged and simply walk away from the process. For example, the Unified Certification Application Supporting Documents Checklist\(^3\) is 14 pages long and requires many, many more pages worth of documentation with the application.\(^4\) This required information is not generally indicative of whether a DBE has the business acumen to succeed.

To be certified as a DBE, business must be (1) a small business; (2) be at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged; and (3) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.\(^5\) Here, though, we focus on what the term “small business” means under U.S. DOT’s regulations.

To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by the U.S. Small Business Administration (SBA) standards.\(^6\) Under those standards, DBEs must be certified as small businesses under the appropriate North American Industrial Classification System (NAICS) code.\(^7\) Each NAICS code has a size standard (that vary from $15 million to $36.5 million, generally).\(^8\) The NAICS code size standards are set SBA—adjusted for inflation every five years—and for construction is a three year average annual volume amount but is capped for the DBE program at $23.98 million—despite the fact that NAICS codes for small business construction firms go up to $36.5 million.\(^9\) In spite of this,

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\(^4\) That application requires, among other things: Resumes for all owners, officers, and key personnel of the applicant firm; personal net worth statement for each socially and economically disadvantaged owners comprising 51 percent or more of the ownership percentage of the applicant firm; personal federal tax returns filed by the firm and its affiliates, with related schedules, for the last three years; documented proof of contributions used to acquire ownership for each owner; signed loan and security agreements, and bonding forms; list of equipment and/or vehicles owned and leased including VIN numbers, copy of titles, proof of ownership, insurance cards for each vehicle; titles, registration certificates, and U.S. DOT numbers for each truck owned or operated by the firm; licenses, license renewal forms, permits, and haul authority forms; descriptions of all real estate owned and leased and documented proof of ownership/signed leases; documented proof of any transfers of assets to or from the firm and/or to/from any owners over the last two years; bank authorization and signatory cards; schedule of salaries paid to all officers, managers, owners and/or directors of the firm; list of all employees, job titles, and dates of employment; and proof of warehousing/storage facility ownership or lease arrangements.
\(^5\) 49 C.F.R. 26.5
\(^6\) 49 C.F.R. 26.65(a).
\(^7\) NAICS classifies business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. economy. The NAICS industry codes define establishments based on the activities in which they are primarily engaged. For construction, those codes are broken down according to whether a contractor is a general contractor or subcontractor and then what particular type of construction work the contractor performs, i.e., road construction, installing guardrails, and so forth.
\(^8\) NAICS codes for construction currently go up to $36.5 million, not $23.9 million.
\(^9\) 49 C.F.R. 26.65(b).
U.S. DOT is supposed to adjust its $23.98 million cap annually using the Department of Commerce price deflators for purchases by State and local governments as the basis for this adjustment.\(^\text{10}\)

NAICS code certification—for which there are dozens of codes in construction—is confusing for both DBEs and non-DBE prime contractors in that a certified DBE can be eligible to do certain types of work but not others based on various dollar thresholds. It stIFles the ability of DBE firms to grow their businesses (as non-DBE firms are able to do) as they become siloed into one business operation and discouraged from moving into others. NAICS code size standards can result in a currently certified DBE that is a small business under the SBA definition becoming too large and therefore not available to meet contract goals. The general contractor can select a certified DBE to work on a contract that counts towards goal achievement only to find out later that the DBE’s volume is too large and they are no longer certified under a particular NAICS code for which they were performing work.\(^\text{11}\)

Furthermore, as pointed out in a 2013 U.S. DOT OIG report, the Department has had limited success in achieving its program objective to develop DBEs to succeed in the marketplace because recipients place more emphasis on getting firms certified as DBEs rather than assisting them to identify opportunities and market themselves for DBE work on federally funded projects.\(^\text{12}\) The report points out that DOT does not require recipients to actively track or report utilization data showing the number of DBEs actually receiving work on federally funded DBE projects. As a result, the DOT has no way to measure achievement of this program objective. Also, state DBE officials stated that certified DBE firms are not sure how to market themselves or identify work opportunities. Without developing these skills DBEs cannot grow and develop their businesses to be able to compete outside the program. DBEs are not prepared for business and the associated risks. It’s not fair to the DBE on a personal level to put them in a high risk situation of personal bankruptcy.

**AGC REFORMS: Rethink Certification Process to Enhance DBE Program Success**
- Adjust 49 C.F.R. 26.65 to establish NAICS Code 237310—at its $36.5 million threshold—as the sole dollar threshold for DBEs across all operational administrations within U.S. DOT’s DBE program: The current requirement that DBEs be certified in various, specific NAICS codes is cumbersome to implement, but, more importantly, undermines the ability of a DBE to grow its business. Requiring DBEs to be certified in a variety of different NAICS codes, each with a different size standard, can keep the DBE from pursuing a variety of lines of work within the industry. Because the volume of work that is counted is cumulative, DBEs can find themselves eligible in some categories and ineligible in others, impacting their ability to grow. Specifically, if a DBE develops an expertise in a particular specialty line of work, it may have to abandon that line because it no longer qualifies under that particular NAICS code size standard’s threshold. Also the lower size standard can stifle a firm growth as it attempts to manage its business based

\(^{10}\) 49 C.F.R. 26.65(c).
\(^{11}\) Excerpt from Official Questions and Answers (Q&A’s) Disadvantaged Business Enterprise Program Regulation (49 CFR 26) available at https://cms.dot.gov/sites/dot.gov/files/docs/Official%20Questions%20and%20Answers%20Disadvantaged%20Business%20Enterprise%20Program%20Regulation%20%2849%20CFR%2026%29-16_1.pdf: Suppose that the SBA size standard for a specialty subcontractor in a particular field is $4 million. Firm Y sometimes performs work in that field, but other times acts as a general contractor. The SBA size standard for general contractors is in excess of the Department’s $23.98 million dollar statutory size cap. Firm Y’s gross annual receipts are $10 million. Firm Y can be certified as a DBE and receive DBE credit toward goals in its capacity as a general contractor. It cannot be certified as a DBE, and cannot receive DBE credit toward goals, in its capacity as a specialty contractor.
\(^{12}\) https://www.oig.dot.gov/library-item/29195
on government determinations rather than its business plan and the demands of the marketplace itself.

- NAICS code 237310—highway, street and bridge construction—comprises establishments primarily engaged in the construction of highways (including elevated), streets, roads, airport runways, public sidewalks, or bridges. The work performed may include new work, reconstruction, rehabilitation, and repairs. Specialty trade (sub) contractors are included in this group if they are engaged in activities primarily related to highway, street, and bridge construction (e.g., installing guardrails on highways). The SBA size standard threshold for this NAICS code is $36.5 million, yet DBEs are limited to $23.98 million under current U.S. DOT regulations. To eliminate the confusion and problems DBEs face—dealing with numerous NAICS codes—AGC urges U.S. DOT to adopt the SBA’s NAICS code 237310 for the single size standard for the enter federal-aid program. Rather than having U.S. DOT setting different thresholds, allow for a standard, unified code across U.S. DOT programs.

- Reform the DBE certification processes to more closely resemble prequalification programs—as used by many state DOTs: Prequalification is a practice used by state DOTs and other owners to determine whether a business is eligible to bid projects or work as a subcontractor in their program. Prequalification is part of the business process and, to be successful in the construction industry, any business must develop a successful track record to allow them to meet prequalification requirements. Prequalification also includes evaluation of available equipment, vendor relationships, financial status, past project experience, management personnel and other factors. Unlike the existing DBE certification paperwork requirement, the prequalification process actually considers factors that can help determine whether a DBE is capable of performing work. Prequalification should be a part of the certification process to ensure there is sufficient business acumen present to give the DBE firms a chance to succeed and to avoid liability issues under the program.

**PROBLEM: DBE Goals May not always be based on a Determination of Available DBEs that are Ready, Willing and Able to Perform Work:** States must set an overall goal for DBE participation in DOT-assisted contracts. “The size of the annual goal . . . influence[s] the number of contracts that the agency will set goals on and the vigor with which they insist goals be met, but the key motivator for contractors is the contract specific goal.” In establishing a goal, the regulations contemplate relative state differences and require state DOTs to base their goals “on demonstrable evidence of the availability of ready, willing and able DBEs.”

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13 49 C.F.R. 26.65

14 It should be noted that there is bipartisan support for such a change even in Congress. For example, the Senate’s Federal Aviation Administration Reauthorization Act of 2017, S. 1405, includes such a reform for the FAA DBE program in section 1223. AGC supports this change and, again, urges U.S. DOT to take regulatory action to make this change across all operational administrations, as legislative action is not necessary to effectuate the change.

15 For example, see

- Michigan DOT’s prequalification program here: [http://www.michigan.gov/mdot/0,4616,7-151-9625_21539_21545---,00.html](http://www.michigan.gov/mdot/0,4616,7-151-9625_21539_21545---,00.html)

- Georgia DOT’s prequalification program here: [http://www.dot.ga.gov/PS/Business/Prequalification/PrequalContractors](http://www.dot.ga.gov/PS/Business/Prequalification/PrequalContractors)


and able DBEs relative to all businesses ready, willing and able to participate . . . [in] DOT-assisted contracts.”

However, many state DOTs’ goals do not necessarily reflect a true availability of DBEs ready, willing and able to perform on highway and bridge projects. Because the regulations only define a DBE in terms of size, composition, and control, factors like qualification, experience, and ability are left undefined and thus are an amorphous factor—at best—in the determination of whether a company is actually ready, willing, and able to participate.

Additionally, in setting the goal, the regulations call for states to rely on the directory of certified DBEs as starting point for setting annual state goals. Many state directories include large percentages of DBEs that are not in the highway construction business or that do not actively pursue work. As noted in a recent legal article:

Many times the awarding governmental agency will maintain a list of certified DBE participants. A DBE’s appearance on such a list of certified DBE contractors does not, however, confirm that it is ready or capable of performing a commercially useful function on a project. Although such appearance may support an “intent” defense, it is not dispositive of DBE compliance. In other words, contractors are not necessarily immunized from liability simply by using a DBE that has been certified by the awarding agency.

**AGC REFORMS:**

- **U.S. DOT must set forth specific instructions for states to consider qualification, experience and ability of DBEs in formulating goals.** As AGC has previously noted, many state DOTs already have prequalification programs that take such considerations into account. Using those existing programs as examples, U.S. DOT can set forth more clear requirements for states to consider these DBE attributes in formulating goals. This would help DBEs by giving them some objective criteria to measure their capabilities against when considering which work to bid.

- **Provide a safe harbor for non-DBE prime contractors who utilize DBEs on state DBE directories.** State DOTs should focus—in part—their certifications and their lists of available DBEs on the qualifications of DBE to preform work. The 2013 U.S. DOT OIG report found that at least six states had less than 20 percent of certified DBEs participate on federally assisted contracts. It is patently unfair for non-DBE contractors to rely on those lists and be held liable for shortcomings of state-DOT listed DBEs. Some form of safe harbor defense should be provided to non-DBE contractors that rely to their detriment on the government’s information.

- **The DBE program goals should take into account performance of the program itself.** Currently the only DBE program metric used is the achievement of an annual utilization goal. Additional metrics could be established and reported for both the DOT and for DBEs participating in the program:
  - Annually determine number and dollar value of DBE contracts and subcontracts performed in each of the immediately preceding five years.

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17 49 C.F.R. 26.45(b).
18 See 49 C.F.R. 26.5
Measure percent of certified firms that have been awarded contracts.

Measure the aggregate number of bids, quotes and proposals that DBEs have submitted or otherwise provided to prime contractors.

Establish metrics to determine individual DBE’s progress towards meeting a business development plan.

Measure aggregate bonding capacity for the immediately preceding year.

Report on number of DBEs that have graduated from program annually.

Report on percent of DBE’s that are in business in the five years following graduation.

**PROBLEM: The Rigidness of “Commercially Useful Function” Standard for Non-DBEs Undermines the DBE Program as a Business Development Program.** U.S. DOT’s regulations put non-DBE prime contractors in the position of being suspicious of any DBE for which they are unfamiliar. The non-DBE prime contractor must act as a probing regulator, rather than a business partner who should assist in the DBE’s development. This is the case because non-DBE prime contractors need to ensure, 20 under the “commercially useful function” (CUF) standard, 21 that DBEs:

- Estimate the work itself, receive all material and subcontractor quotes, and negotiate and write P.O.’s and subcontracts;
- Manage and supervise the work with its own managers and superintendents;
- Performs the work with its own forces;
- Subcontracts work consistent with industry practice. Work that a DBE subcontracts to a non-DBE does not count towards the contract goal; and
- If the DBE subcontracts an unusual amount or does not intend to perform at least 30% of the work with its own forces, U.S. DOT will presume the DBE is not performing a commercially useful function. Some state rules may require subcontractors to perform more than 30% of the subcontract with its own forces.

To follow these requirements, legal experts recommend that non-DBE prime contractors “adopt a DBE compliance program that provides for the appointment of a compliance officer to closely monitor DBE subcontractor relationships.” 22

Therefore, sharing of resources between the non-DBE and DBE is strictly regulated. A non-DBE’s providing of assistance to the DBE to help it develop and grow could run afoul of the many restrictions under the definition of CUF.

**AGC REFORM:**

The DBE regulations and CUF standard should be revised to allow for flexibility and true business development like that in the SBA’s Mentor Protégé Program: The SBA Mentor Protégé Program allows for a small business (protégé) to form a joint venture with a small or non-small business, i.e., large business, (mentor) on federal contracts. An SBA-approved mentor-protégé joint venture (JV) between a large business and a small business concern is exempt from the prohibition on affiliation between large and small businesses. And, as a result,

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20 In keeping with normal contract requirements, it is the primary responsibility of the prime contractor to ensure that the DBE is performing a CUF. Federal Highway Administration, FHWA Tips on Evaluating a Commercially Useful Function, available at: [https://www.fhwa.dot.gov/federal-aidessentials/commusefunction.pdf](https://www.fhwa.dot.gov/federal-aidessentials/commusefunction.pdf)


the mentor-protégé JV is therefore considered a small business able to bid on small business set-aside contracts. Under the SBA program, small and large businesses have flexibility in sharing and providing financial assistance in the form of equity investments and/or loans and bonding; contracting assistance involving help with contracting processes, capabilities, acquisitions and performs; and management and technical assistance that involves internal business management systems, accounting processes and technology. Exceptions should be made to the CUF in the DBE program where a non-DBE and DBE contractor seek to form a joint venture or teaming agreement like that under the SBA’s Mentor-Protégé Program. Such a model encourages non-DBE’s development of DBEs, rather than invasive regulatory audits.

PROBLEM: Not allowing Materials Supplied by Certain DBEs Count towards DBE Participation:
Materials supplied by a DBE do not count towards meeting the contract goal if the DBE is neither a manufacturer nor a regular dealer. Only commissions and transportation charges for the delivery of materials can be counted towards DBE goals. This hurts DBEs that are attempting to be in the material delivery business.

AGC REFORM:
- Change the rules to allow for DBE material suppliers’ contributions to count towards DBE goals. The DBE program should not pick and choose amongst DBEs for which it will confer benefits. Rather the program should provide an opportunity to all DBEs that participate in U.S. DOT-assisted contracts. As such, U.S. DOT should change the regulations to allow for all DBEs that contribute to the contract to be counted towards the goals.

PROBLEM: Actions Sufficient to Justify Good Faith Efforts are not always Deemed Sufficient:
A contractor must make good faith efforts to meet the DBE contract goal, either by meeting the goal or by documenting adequate good faith efforts to meet the goal. If the contractor does not meet the DBE contract goal, after making sincere and aggressive efforts, then the contractor must document adequate good faith efforts to meet the goal.

The regulations detail a very long list of steps that a contractor must take in making good faith efforts. However, the regulations also make it clear that there is no finite check list of steps a contractor can take to ensure that its efforts will be deemed “good faith” and therefor acceptable. While states are allowed to award a contract when the prime does not meet the goal but has made good faith efforts, it rarely happens.

AGC REFORM:
- Establish a definitive list of actions sufficient for a good faith effort finding. AGC strongly urges U.S. DOT to set forth a definitive list of actions that non-DBE contractors must take in order to suffice—without a doubt—as a good faith effort. This will eliminate subjectivity in the GFE determination.

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Rescind Local Hire Pilot Program and Regulations

US DOT established a pilot program\(^{24}\) to overturn a long-standing policy that prohibited states from imposing local hire mandates on Federal-aid contracts in the highway program and at the same time issued a Notice of Proposed Rulemaking\(^ {25}\) to make this change permanent. While U.S. DOT has not yet moved forward with the rulemaking. However, in a last-minute action, the Obama administration extended the pilot program for an additional five years.

PROBLEM: Local Hire Requirements Restrict Competition and Violate the Law. Local hire requirements restrict competition and violate the U.S. Supreme Court’s landmark ruling in United Building & Construction Trades Council of Camden City. v. Mayor & Council of the City of Camden (Camden), which held that in-state hiring preferences discriminate against non-residents and therefore violate the Privileges and Immunities Clause of the Constitution. A legal review of local hire requirements obtained by AGC concludes, “The Department’s pilot program and proposed rule ignore the Privileges and Immunities Clause and could easily mislead the recipients and sub recipients of its financial assistance to believe that hiring preferences for in-state or local residents are lawful so long as they do not unduly limit competition. Merely complying with the Department’s pilot program and proposed rule, even on “an experimental basis,” would not be enough – in most if not all cases – to comply with the Privileges and Immunities Clause and the case law interpreting and applying it. U.S. DOT can find enclosed in this document the complete legal review noted here.

The net effect of local hire requirements is that contractors could be forced to hire unneeded workers or unskilled workers and potentially lay off current employees. Meeting these mandates can create safety concerns not only for the new hires, but current employees as well. In addition, these mandates unnecessarily increase project costs.

While the construction industry is facing a workforce shortage and is undertaking efforts to recruit, train and retain the construction workforce of the future, local hire mandates impede rather than help this effort.

AGC REFORM:

- Eliminate Local Hire Pilot Program and formally withdraw the Rulemaking. AGC urges U.S. DOT to abandon the pilot program and to continue ongoing efforts to work with the industry in meeting workforce needs in a way that provides individuals with long term--rather than fleeting--career opportunities. As such, the pilot program should be eliminated and the notice for proposed rulemaking withdrawn.

Promulgate Needed Work Zone Safety Regulation

The safety of the construction workforce is the top priority for AGC and for our member companies. Unfortunately, statistics show that 23 percent of all worker fatalities in highway construction work zones are due to workers on foot being struck during a third-party work zone space intrusion. Crash statistics

\(^{24}\) [https://www.fhwa.dot.gov/construction/cqit/sep14local.cfm](https://www.fhwa.dot.gov/construction/cqit/sep14local.cfm)

from New York DOT indicate that the use of positive protection strategies in that state led to a 20 percent reduction in fatal work zone crashes. Because construction employers cannot control the behavior of third parties, they must instead devise strategies to protect their workers from these behaviors. Worker and motorist safety should be the factors that determine what protection measures are used during construction. Unfortunately, sometimes the immediate cost becomes an overriding factor rather than considering the long-term costs of not providing the most appropriate level of safety.

MAP-21 directed the FHWA to draft regulations to remedy this situation. FHWA was directed to require states, at a minimum, to use positive protective measures to separate workers from motorized traffic under the following circumstances: where conditions offer workers no means of escape (e.g., tunnels and bridges); in stationary work zones lasting two weeks or more and when the project design speed is 45 mph or greater; and, when the nature of the work requires workers to be less than one lane-width from the edge of an open travel lane. The provision allows states to choose alternative safety protection measures other than positive protection if an engineering study determines that positive barrier did not offer the best protection for motorists and workers in these circumstances.

Inexplicably, FHWA has not responded to this requirement in MAP-21, putting highway construction workers at risk. In the FAST Act, Congress once again directed FHWA to move forward with regulations implementing this MAP-21 provision. To date nothing has been forthcoming from US DOT. AGC urges you to move forward with this rule making.

Reforms for Improving Federal Motor Carrier Safety Administration Regulations

AGC members are directly impacted by the Federal Motor Carrier Safety Administration’s (FMCSA) Hours of Service (HOS) regulations and indirectly by how these rules impact their suppliers. The requirement scheduled to be implemented in December 2017 that all motor carriers required to maintain Records of Duty Status (RODS) for HOS record keeping install and use of electronic logging devices (ELD) to assure compliance with HOS restrictions is unnecessary for the construction industry and, if extended, would create unreasonable impacts on construction. AGC urges FMCSA to exempt the construction industry from the ELD mandate.

Retain Short Haul Exemption:

Many drivers in the construction industry qualify for the short haul operations exemption. Therefore, AGC strongly supports FMCSA’s proposal allowing short haul drivers that normally record their HOS using time cards pursuant to the provisions of 395.1 (e) to continue to do so and not be required to use ELDs for verifying driving hours. Furthermore, AGC also supports FMCSA’s proposal to allow short haul drivers to continue to use RODs, rather than ELDs to record their driving time, when occasionally they drive in excess of the limits on short haul drivers. Regardless of how the ELD proposal is finalized, it is important that the short haul exemption be adopted.

Extend Construction Exemption to ELD Requirement:

FMCSA has proposed to consider additional ELD exemptions, especially for industry fleets that have demonstrated strong compliance with the hours of service regulations in the past. AGC believes that construction industry fleets meet this standard. AGC notes that Congress directed FMCSA to provide special consideration to construction drivers in the HOS regulations by allowing construction drivers to
reset the on-duty clock after an off-duty period of 24 or more consecutive hours. This provision applies to transporting construction and pavement materials, construction equipment, and construction maintenance vehicles by a driver to or from an active construction site within a 50-air mile radius of the normal work reporting location of the driver. The record shows that this provision has not been detrimental to public safety nor has it had adverse effects on driver health. AGC also believes this provision has benefitted the nation by allowing the delivery of vitally needed infrastructure in a timely and cost-effective manner.

Congress created the exception for the construction industry in recognition of the unique circumstances faced by the industry’s drivers. These unique circumstances include: seasonal limits on when work can be done, materials that must be put in place within tight time limits or be lost forever, drivers spending much of their time not actually driving but waiting in lines to pick-up or deliver materials, and drivers being under constant supervision as they return continuously to the job site or the source of the materials. Construction industry drivers generally only drive in good weather conditions and no studies have concluded that there is a safety deficiency specific to construction workers driving under these rules.

In providing this exception in 1995, Congress recognized that the hours-of-service regulations were too restrictive on several industries, including the construction industry. In granting this exception in the National Highway System Designation Act of 1995 (section 345), Congress also directed the Secretary of Transportation to ensure that granting the construction industry exemption would be in the public interest and would not have a significant adverse impact on the safety of commercial motor vehicles. If at any time the Secretary determined that this was not the case, the Secretary could “prevent the exemption from going into effect, modify the exemption, or revoke the exemption.” Now, nearly twenty years after the rules’ implementation, no specific adverse impact has been identified. FMCSA should consider the record and extend the construction industry exemption to the new ELD proposal.

- Impact on Construction industry:

AGC has concerns about the impact of the requirement to install and use ELDs on construction industry businesses that have drivers that are required to prepare RODs under the current HOS rules. AGC’s concerns are: impact of construction environment on ELDs, cost of implementation and administration issues.

- Impact of Construction Environment on ELDs:

The environment in which construction vehicles operate is a primary concern with the ELD proposal. Construction vehicles are generally used to deliver materials like concrete, asphalt and aggregate to construction projects or are engaged in digging operations or placement of these materials. Handling these materials generates significant amounts of dust. The impact of dust of this intensity on the operation of an ELD is a major concern.

Also, the terrain on which construction vehicles operate is rough. The nature of construction means that vehicles are operating on unfinished roads. The constant vibrations, jarring movements and bumps are likely to have an impact on ELD operations, longevity and accuracy. There has been little experience with these devices in general and even less concerning how they will operate in the extreme conditions of construction. The agency must not move forward with this mandate until it addresses some of the device design and performance specifications as they relate to the extreme conditions in constructions.
• **Cost of Implementation:**

Purchase and installation of ELDs will be far more expensive than maintaining records with paper RODs. FMCSA estimates that the cost of purchase and installation of an ELD unit ranges from $525 to $785. While AGC has not done extensive research into the cost of ELD purchase and implementation, a sampling of members who have researched the costs suggests that the FNCSA estimates fall far short of the actual costs. Furthermore, FMCSA’s estimates do not appear to include the additional costs for data plans, training, programming and support. For companies in the highway construction business, large fleets of trucks are needed to haul and deliver aggregates, concrete, asphalt and other bulk commodities. The costs of the devices themselves will be significant. The additional overhead will add significantly to the costs. There tends to be substantial turnover of drivers in the construction industry, therefore the training costs alone will be significant.

• **Administrative Issues:**

For construction operations, there will likely be several different drivers operating a given truck over a weekly and in some cases a daily basis. Identifying the specific driver will be a problem. FMCSA proposes to require that the ELD identify drivers by use of codes as assigned by their employers. Construction trucking operations are variable with significant variance in driving times and deliveries depending on the stage of construction. It is not uncommon to use temporary drivers or workers who do not drive on a regular basis when there is a spike in activity. Ensuring that the correct driver is being charged with the driving hours may be an issue. FMCSA should establish a more secure means to positively identify the driver operating the vehicle and tying the resulting ELD records to that driver.

Another concern for construction drivers is that much of their time is spent waiting in line to pick up or deliver materials and movement around the loading yard and at times the truck may be moved by a driver other than the driver assigned to the vehicle. Because ELDs automatically track vehicle movement and will record movements of trucks as driving time it can lead to recording errors. This could have an impact on the driver’s driving and on-duty time limits. For this reason, AGC urges the agency to include a provision allowing short vehicle movements within a closed facility (e.g., less than 2 miles in the aggregate) to be recorded as on-duty/not driving time.

**Adjust Surface Transportation System Funding Alternative Program**

The FAST Act established the Surface Transportation System Funding Alternative Program to provide grants to states or groups of states to demonstrate user-based alternative revenue mechanisms that utilize a user fee structure to maintain the long-term solvency of the Highway Trust Fund. The program which is known by its section of the FAST Act – 6020—has thus far awarded eight states with a total of $14.2 million in grants to explore these funding alternatives. AGC feels that the lessons learned from the state pilot programs is imperative to identifying an alternative revenue mechanism to help sustain the long-term solvency of the Highway Trust Fund. As such, AGC and our partners in the Mileage Based User Fee Alliance (MBUFA) have identified areas where Section 6020 current design and implementation of the program could be improved to encourage more states to participate in the program.

According to our partners at MBUFA—whose membership includes several state departments of transportation—the state legislative calendar and the timing of the issuance of the Notice of Funding Opportunity (NOFO) are substantive barriers to participation. Specifically, for states to apply, they need
legislative approval and if the NOFO is issued before the state legislative sessions are completed, generally by June, many are not in position to apply. Many states suggested that if the schedule were adjusted so that the NOFO was released in the fall or the end of the calendar year and combined with a longer application period, it would allow for greater state participation with pilots that could occur the following summer.

Several states also indicated that the program’s non-federal 50/50 match is a barrier and that an 80/20 cost share would make it easier for them to participate.

The consequence of these two participation limits, timing and match, is that there may not be sufficient applications to preclude the implementation of the requirement that unused funds be returned to the Federal Highway Administration’s research program for use in other areas. Rather than serve as a well-intentioned incentive to stimulate applications, this requirement may have the effect of penalizing interested states because of legislative calendars which can’t be changed. Some states recommend holding remaining funds in this account for use in future years. Several states also observed that there is a wide disparity among the states regarding awareness and understanding of alternative financing options like mileage based fees. Lessons being learned are not being fully communicated and they suggested allowing remaining funds to be used by applying organizations or state DOTs for outreach and education on the issue for FY18 and beyond.

Reforms for Improving Federal Environmental Review and Permitting

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. These processes are bureaucratic, lengthy, complex and duplicative. They involve multiple interrelated approvals within a labyrinth of numerous agencies. Throughout these processes, too often, litigation abounds. Delays deny the public the substantial benefits that come from a construction project: improving our economy, our competitiveness, and our quality of life.

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

The National Environmental Policy Act (NEPA)\textsuperscript{26} 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\textsuperscript{27} 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.\textsuperscript{28} The Council on Environmental Quality’s (CEQ) regulations implementing the procedural aspects of NEPA are found at 40 C.F.R. §§ 1500–1508.\textsuperscript{29}

\textsuperscript{26} National Environmental Policy Act (NEPA), 42 U.S.C. § 4321–4347.
\textsuperscript{27} “Lead agency” means the “the Department of Transportation and, if applicable, any State or local government entity serving as a joint lead agency pursuant to this section.” 23 U.S.C. § 139(a)(4).
\textsuperscript{28} See FHWA’s Environmental Review Toolkit online at https://www.environment.fhwa.dot.gov/projdev/pd3tdm.asp.
\textsuperscript{29} The CEQ’s regulations also require each agency to adopt implementation procedures to “supplement” its provisions. 40 C.F.R. § 1507.3(a) (2014).
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 environmental approval process, schedule delays and costs overruns. Such uncertainty spurs legal challenges, which can ultimately threaten the viability of the project.

Based on AGC’s 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., number of species listed and the breadth of critical habitat identified under the Endangered Species Act grows every year).

**Opportunities to Strengthen/Improve Existing Structure**

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”).\(^3\) 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 elements:

- A designated leader or champion within the lead agency who is responsible for advancing the process, making key decisions in a timely manner, and clearly outlining the requirements and expectation 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;

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• Coordinated and concurrent NEPA review and regulatory/permitting review processes (the applicable permit applications should be prepared in conjunction with the NEPA review);
  o 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.

Current U.S. DOT Environmental Streamlining Programs & Deficiencies

There are many federal environmental statutes, regulations, and executive orders establishing requirements applicable to the environmental review and approval of transportation infrastructure projects that receive financial support from the U.S. Department of Transportation (DOT). Under current law, DOT 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). AGC has created a chart to illustrate these deficiencies, in each instance: see AGC’s Environmental Streamlining Chart (see page 40 through 43).

To facilitate discussion, AGC’s Environmental Streamlining Chart (see page 40) summarizes, at a glance, the following environmental streamlining laws: Efficient Environmental Reviews for Project Decisionmaking, 23 U.S.C. § 139, (initially established in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Section 6002) calls for environmental streamlining and the timely delivery of transportation projects, while protecting and enhancing the environment. Central to this process is early collaboration to obtain input from the public, Tribes, and federal, state, and local agencies. The Moving Ahead for Progress in the 21st Century Act (MAP-21) §§ 1305–1309 added requirements to 23 U.S.C. § 139 and set forth a policy and a series of provisions to accelerate project delivery: programmatic approaches for environmental reviews; an issue resolution process, including timelines to prevent delays; limits on lawsuits; the opportunity for project sponsors to receive technical assistance to resolve outstanding issues on certain Environmental Impact Statements (EIS); and provisions promoting interagency coordination and efficient collaboration. The Fixing America’s Surface Transportation Act (FAST Act) § 1304 made more changes to 23 U.S.C. § 139; it builds on the authorities and requirements in MAP-21 with a goal of accelerating the environmental review process for surface transportation projects. Title 41 of the FAST Act contains additional environmental review and permitting process improvement initiatives that apply to federal agencies other than the U.S. Department of Transportation, including early consultation, coordinated project plans and timetables and public tracking on the “Permitting Dashboard.”

31 Section 11503(b) of the FAST Act (Pub. L. 114-94) exempts programs administered by the U.S. Department of Transportation or its operating administrations under Titles 23, 46, and 49 of the United States Code from the requirements and provisions of Title 41 of the FAST Act. In addition, projects subject to 23 U.S.C. 139, which includes all FHWA, FRA, and FTA projects, are not considered “covered projects” as defined in Title 41 of the Fast Act (Section 41001(6)(B)(i)). However, Section 41003(b)(1) requires the maintenance of an online database for posting project information (the “Permitting Dashboard”). In addition, Integration of Planning and
Environmental Review, 23 U.S.C. § 168, sets out a process where a “planning product,” which may include decisions, analyses, studies, or other documented information developed in the planning process, may be adopted and relied upon in the proposed project’s NEPA review. Also relevant is 23 U.S.C. § 169 - Development of Programmatic Mitigation Plans.

Current law\textsuperscript{32} provides steps for the lead agency of a project to coordinate and establish schedules with participating agencies and other interested stakeholders. But, importantly, as the “deficiencies” column on AGC’s Environmental Streamlining Chart (see page 40 through 43) shows, the lead agency must consult with, and obtain the concurrence of, each participating agency before establishing or shortening a “schedule for completion of the environmental review process” AND there is no deadline for the government to complete the NEPA review process, from start to finish. In addition, where current law does set deadlines for agency actions under NEPA, or for issuing permits and permissions, those deadlines are missed because the list of exceptions is as long as the list of approvals you need to be in compliance with the 30-plus federal environmental statutes that may apply to any given project (see AGC’s Federal Environmental Review and Permitting Flowchart, dated June 14, 2017 – on page 44).

Current law (per MAP-21) does go so far as to impose penalties on federal agencies that fail to meet deadlines. Even so, these deadlines are not being met and the fines have never been levied. It is not happening because the lead agency can certify, for example, the permit application was not complete – or that the participating agency is waiting on another entity to make “some” decision before it can move forward with its permit, license or approval; and there is apparently a reluctance to elevate disputes. This also is clearly shown on the “deficiencies” column on AGC’s Environmental Streamlining Chart (see page 40 through 43).

In addition, the “deficiencies” column on AGC’s Environmental Streamlining Chart (beginning on page 40) brings to light the following missed opportunities:

- The government also is not conducting federal and state permitting reviews concurrently, and together with NEPA. It is not happening because the law states that agencies do not need to carry out their obligations concurrently if it would impact their ability to conduct any analysis or meet any obligation.
- Current law requires the lead agency to provide the participating agencies and public the opportunity for “involvement” in determining the project’s Purpose and Need and Range of Alternatives; however, the participating agencies are not required to engage in any meaningful way or to ensure these procedural steps produce information to satisfy other federal approvals and/or permits required for the project.
- The “Planning and Environmental Linkages” provisions in current law intend to use the information, analysis, and products developed during transportation planning to inform the environmental review process. But there are 10 conditions spelled out in statute -- and participating agencies, the lead agency, and project sponsors must all concur that these conditions have been met.
- The lead agency must develop an “environmental document” sufficient to satisfy federal permits, approvals or other federal action required for the project, but only “to the maximum extent

\textsuperscript{32} 23 U.S.C. 139 contains statutory requirements that supplement the process required by NEPA, the CEQ regulations at 40 C.F.R. § 1500, and the FHWA/FTA joint environmental regulations at 23 C.F.R. § 771.
practicable,” per the current law.

AGC believes that we can make the federal environmental review process faster, better and cheaper without sacrificing environmental protections. In the sections that follow, AGC points out several ripe, high-level opportunities for DOT (and its interagency partners) to strengthen existing policy and pursue new administrative actions. In addition, AGC provides input on the top environmental barriers to large transportation and infrastructure projects and the association’s recommended administrative and legislative reforms. AGC also offers some meaningful reforms to the Clean Air Act and its implementing regulations that require transportation plans, programs, and highway and transit projects to conform to the “State Implementation Plan” that provides for attainment of the National Ambient Air Quality Standards. Finally, AGC incorporates by reference its May 23, 2017, letter to the U.S. House of Representatives Natural Resources Committee wherein AGC has identified legislative and administrative improvements to the Endangered Species Act (ESA) that support: the protection of listed species; responsible land and resource management; and streamlined delivery of critical infrastructure projects (see AGC’s ESA Letter to the U.S. House of Representatives Natural Resources Committee, dated May 23, 2017, beginning on page 47).

**Potential for New Administrative Actions for DOT and Interagency Partners**

The Department of Transportation’s (DOT) procedures for compliance with NEPA and other environmental requirements are found in DOT Order 5610.1C, “Procedures for Considering Environmental Impacts.” Federal Highway Administration (FHWA)/FTA have their own specific NEPA procedures and regulations at 23 C.F.R. § 771. In addition, 23 C.F.R. § 450, Appendix A details the procedures for linking transportation planning processes.

At a minimum, Section 1304(k) of the FAST Act requires the Secretary to complete a rulemaking to implement the provisions of 23 U.S.C. § 139(b)(3), Programmatic Compliance, as amended by the FAST Act. DOT plans to issue a supplemental notice of proposed rulemaking, which will build upon the programmatic approaches proposals found in the Nov. 20, 2015, notice of proposed rulemaking. DOT also announced on its website that it plans to issue additional guidance. Considering these anticipated actions, and the current “environmental streamlining” program deficiencies as outlined in the section above, AGC points to the following opportunities for DOT to take near-term action (through policy guidance or rulemaking) to improve our delivery of important infrastructure projects across the nation.

**Project Schedules:** FAST Act § 1304 requires lead agencies to establish project schedules for the completion of the environmental review processes after consultation with and the concurrence of each participating agency for the project; MAP-21 made development of these project schedules optional. FAST also requires concurrence of participating agencies for changes to project schedules. As environmental processes are only one of many components in project schedules, DOT should require that only the environmental portion of the schedule needs participating agency concurrence. Coordination plans should contain only major project milestones and provide states the flexibility to establish schedule deadline ranges. AGC urges DOT to clearly establish that schedule changes require the concurrence of only the affected federal agencies, not all participating agencies. Establish a deadline for agency responses; lack of response indicates concurrence. FHWA issued preliminary Q & As on the environmental process changes. The environmental process changes will be implemented by rulemaking. This would require amending 23 U.S.C. § 139(g).

Duplicate Analyses and Reviews: Time and money is being wasted on redoing project analyses and reviews and on collecting duplicative information from permit applicants (see AGC’s Federal Environmental Review and Permitting Flowchart, dated June 14, 2017 – on page 43). A key provision of the FAST Act directs the lead agency to “develop an environmental document sufficient to satisfy the requirements” for all federal approvals, actions, and permits to the maximum extent possible. Complete and successful implementation of this one provision alone could take years off the environmental approval process timeline. Most importantly, where DOT is acting as the lead agency, every effort must be made to ensure that the monitoring, mitigation and other environmental planning work performed during the NEPA process, and included the final EIS/ROD, will satisfy the federal environmental permitting requirements, unless there is a material change in the project.

Current law allows the use of errata sheets, rather than rewriting the draft EIS, when minor modifications are needed in a final EIS. DOT should strengthen this practice and reinforce support for the lead agency’s authority to use a single document for the final EIS and ROD, as much as possible. Preventing the needless production of multiple additional documents will reduce the amount of time involved in EISs. Building on this framework established by MAP-21, the FAST Act strengthens the push to reduce multiple NEPA documents by continuing to encourage the use of programmatic approaches for environmental reviews to eliminate duplication, as well as the making it somewhat easier to use previous planning work to meet NEPA requirements. To this end, AGC encourages DOT to issue further guidance on the following:

- Make maximum use of online databases of technical information (e.g., on distributions of endangered species, critical habitat, or previous permit requirements) so that information does not have to be gathered anew for every project operating in a similar watershed or geographic area;
- Allow environmental reviews to adopt material from previously completed environmental reviews from the same geographic area; and
- Require federal agencies to use regional- or national-level programmatic approaches for authorizations and environmental reviews, for frequently occurring activities as well as those activities with minor impacts to communities and the environment.

Planning and Environmental Linkages: Planning and environmental linkages (PEL) allow for planning decisions to be carried forward into NEPA without having to revisit these decisions in NEPA. PEL was first established in 23 C.F.R. § 450 Appendix A. MAP-21 developed and then the FAST Act updated PEL in statute. However, the statutory language contains 10 stringent conditions that must be met prior to carrying planning decisions forward into NEPA, including resource agency concurrence. It is confusing to states to have two different PEL authorities with two different processes and requirements. AGC recommends that DOT amend 23 U.S.C. § 168 to ensure that the statutory authority provided to adopt planning decisions in the NEPA process includes all of the flexibility previously provided in the planning regulations (23 C.F.R. § 450 Appendix A).

NEPA-Programmatic Categorical Exclusion Agreements: FHWA may enter into programmatic agreements with States to allow States to make NEPA categorical exclusion (CE) determinations. Traditionally, FHWA Division Offices and the states included in their programmatic CE agreements (PCEs), CEs listed in regulation and additional CEs for actions specifically relevant to the state programs and practices that have been shown to not have significant impacts. The FAST Act provides that these PCE agreements may include the CEs listed in FHWA regulation as well as additional CEs that meet federal requirements. FHWA, through rule and guidance, implemented this provision to require that proposed new CEs be documented, published for public comment, and be approved by USDOT and CEQ.
Amend FHWA/FTA regulations and guidance to allow PCEs to include CEs listed in FHWA/FTA regulations in addition to other CEs that meet federal standards, as determined by FHWA and the States. This would require amending 23 C.F.R. § 771(g).

**Top Environmental Barriers to Large T&I Projects: Recommended Administrative and Legislative Reforms**

AGC members report three environmental processes, and a related proceeding, that generate unreasonable contractual/legal risk and unnecessarily drive up costs for large projects, particularly those using a design-build or a public-private partnership method of project delivery: (1) NEPA Reviews, (2) Section 404 Permitting, (3) Hazardous Waste Management and (4) Citizen Suits. Under the scenarios described below, insurance coverage can be difficult to obtain and other negative consequences follow, including a lengthy contract vetting process that leads to: multiple contract addendums causing a protracted and costly procurement process, inflated contract prices (bidders add in cost contingencies); and limits on the universe of competitive bidders or the exclusion of highly-qualified candidates.

1. **NEPA Reviews**

**PROBLEM: Trend of owners initiating design-build procurements prior to the NEPA approval (to offset lengthy NEPA schedules)**

- Inevitable NEPA delay (6-12 months typically) has significantly increased procurement costs
  - Delay extends overhead, labor/consultant costs to owner and contractors - and is particularly costly to contractors because effort remains steady due to continuation of the contract vetting process, continued release of owner documents, and redesign in response to evolving owner expectations

- These costs are lost if a NEPA challenge forces reopening of the process for additional study
  - Addressing court-ordered NEPA revisions typically takes one or more years to complete and usually results in termination of the procurement process, or the owner terminating the contract and compensating the contractor (who was awarded the work) for mobilization and delay costs
  - Owners, upon satisfying court order NEPA requirements, initiate a new procurement process from the beginning

**AGC REFORMS:** Initiate a pilot program for projects involving “federal action,” whereby the project sponsor does not initiate procurement until the ROD is issued that closes the NEPA process. Many AGC members report that such a change would substantially decrease procurement costs and increase the integrity of the NEPA process by removing any notion that the NEPA outcome was pre-determined. (State DOTs could choose to enter the pilot, at their discretion, thereby maintaining flexibility.) Another means to reduce owner and contractor costs would be to simplify the procurement process by standardizing the design-build agreement for federally funded projects. Owners incur sizable legal fees for outside counsel and consultants to draft, contractor vet, and re-draft design-build agreements for each project. Contractors incur high legal and staff costs as well in the vetting process.

**PROBLEM: NEPA reevaluation for minor changes/adjustments to project design or location**

- It is common for the project limits defined during preliminary design, and used to establish the NEPA project footprint, to be changed to accommodate all project aspects – such as drainage features, small temporary or permanent easements and additional right of way (ROW) slivers
• These minor additions generally cause *de minimis* impacts but require re-evaluation under current NEPA requirements
• This causes delay by reopening the NEPA and agency coordination processes and provides another opportunity for challenges by opponents
• Current FHWA regulations are hindering project sponsors’ ability to take advantage of private sector innovation and potential cost savings (see 23 C.F.R. § 636.109(b)(6)) (under no circumstances may a private entity have any decision-making responsibility in the preparation of any NEPA document) and 23 C.F.R. § 636.209(b) (after the NEPA process is complete, project sponsors may only accept alternative technical concepts (ATCs) if they do not conflict with the criteria agreed upon in the environmental decision-making process)

**AGC REFORMS:** Minor changes to a project should NOT result in reevaluation of the project under NEPA. *De minimis* impacts do not need a formal reevaluation, but could undergo review with the owner to prove *de minimis*. The *de minimis* threshold could be based the definition of Section 4(f) properties codified in 49 U.S.C. § 303 and 23 U.S.C. § 138, as implemented by FHWA through the regulation at 23 C.F.R. § 774. Also, amend FHWA regulations at 23 C.F.R. § 636109(b)(6) and 23 C.F.R. § 636.209(b). In addition, if the project sponsor accepts a change (i.e., ATC) as proposed by the designer/builder, and it results in project delay, due to the need for further environmental reviews, then the costs associated with that delay should be equally shared by the owner and the general contractor.

To cite a program worthy of replication: Once a natural gas infrastructure project under the Federal Energy Regulatory Commission (FERC) jurisdiction is authorized, project sponsors can request changes as “variances.” FERC will consider approval of variances upon the project sponsor’s written request, if it agrees that a variance:
• provides equal or better environmental protection;
• is necessary because a portion of this Plan is infeasible or unworkable based on project-specific conditions; or
• is specifically required in writing by another federal, state, or Native American land management agency for the portion of the project on its land or under its jurisdiction.  

AGC recommends that all federal and state agencies regulating approved publicly-needed infrastructure have a clearly defined variance process to follow to efficiently make project changes while maintaining environmental protection.

**PROBLEM: Forced reevaluation of previously approved NEPA documents**
• There is a three (3)-year validity period for Environmental Impact Statements, for all levels of environmental documentation; if no action to advance the project has occurred, a written reevaluation is required

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34 Variances are not specifically mentioned in FERC’s regulations but rather in its standard best management practices for operators found in the “UPLAND EROSION CONTROL, REVEGETATION, AND MAINTENANCE PLAN” and “WETLAND AND WATERBODY CONSTRUCTION AND MITIGATION PROCEDURES.” Note that these plans are referenced in the regulations at 18 C.F.R. 380.12(i)(5) and 380.12(d)(2) – but not the details of the plans. Both plans were updated in 2013, but the variance process has been in place since at least 2003. See Sections I.A., Applicability in these online documents: https://www.ferc.gov/industries/gas/enviro/plan.pdf; https://www.ferc.gov/industries/gas/enviro/procedures.pdf.
This may be a case where a project has been “shelved” due to lack of funding or simply put aside due to changes in statewide or regional priorities.

If the reevaluation process described above reveals that there have been changes which result in adverse impacts not identified in the approved document, a new EIS or a Supplemental EIS (SEIS) must be prepared and circulated.

**AGC REFORMS:** Three-year reevaluations are not required under the National Environmental Policy Act (42 U.S.C. § 4321) or Council on Environmental Quality (CEQ) regulations (40 C.F.R. §§ 1500-1508). They are, however, required by the FHWA/FTA regulations at 23 C.F.R. § 771.129.

Congress should require agencies to report to congressional committees on the expiration of various environmental reviews/permits. Projects that have completed environmental reviews should be prioritized for federal funding. An adequate source of funding should be available before a public sponsor initiates any environmental reviews or studies. In addition, to avoid inefficiencies and costly delays, it is imperative that the environmental reviews and permitting processes for capital projects be time-limited.

2. **Section 404 Permitting**

**PROBLEM: Section 404 Permitting takes too long and costs too much**

Many transportation projects require permits under Section 404 of the Clean Water Act (CWA) for the discharge of dredged or fill material into “waters of the United States.” The typical process of performing sequential and often duplicative environmental reviews and permitting 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, dated June 14, 2017 – on page 43). As explained above, current law provides that agencies must coordinate and carry out activities concurrently and in conjunction with the NEPA review, but that requirement is waived if doing so “would impair the ability of the Federal agency to conduct needed analysis or otherwise [meet] obligations.”

According to bonding companies that finance large public works projects, two environmental approvals are critical in rating a project’s risk for bond financing:

- NEPA review (1,679 days, on average to complete an EIS)
- CWA Section 404 permit authorization (788 days, on average to obtain an individual permit)

Due to the inability of owners to obtain Section 404 permits quickly following NEPA approval, 404 permitting is often transferred to the contractor.

**AGC REFORMS:** Several states have merged their NEPA and CWA Section 404 permitting processes; this should be the national standard and the U.S. Army Corps of Engineers’ (USACE) current regulations already point in this direction but do not go far enough.35 (Across the nation there is considerable

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35 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, 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
variation in 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.36

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.37 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.”38

More generally, it should be a requirement for all government agencies involved in the issuance of a federally-required 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.

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 located adjacent to roads. AGC recommends that DOT work with its interagency partners to 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 would require an amendment to 33 C.F.R. § 325.

PROBLEM: Permitting processing time is further extended (by several months) when USACE will not process a Section 404 permit with the wetlands delineation data produced during the NEPA process

As explained above, current law provides that agencies must develop an “environmental document” sufficient to satisfy federal permits, approvals or other federal action required for the project, but only “to the maximum extent practicable.” USACE District Engineers generally will not accept preliminary 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.”.

36 For major interstate natural gas transmission projects, FERC requires applicants to file applicable federal and federally-delegated permit applications, such as Section 404 individual permit application, at the same time as the FERC application for construction and operation of facilities under the Natural Gas Act. USACE is typically a cooperating agency with the FERC for the development of an EIS, but the 404-application process often requires different information. FERC requires that federal agencies provide permit decisions within 90 days of the final EA/EIS, pursuant to the Energy Policy Act of 2005.

37 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.

jurisdictional determinations (JD) resulting from the NEPA process and will hold up project approvals until they have data collection (field surveys/delineations) from the entire project.

- It is well into the construction phase until the contractor has access/ability to perform 100 percent ground surveying and field studies
- Creates access and construction phasing issues because no impacts, temporary or permanent, can be taken until the permit is issued
  - Temporary crossings held up until the permit is issued; large areas can be inaccessible due to potential “waters of the United States” (WOTUS) (e.g., field project areas not well served by the highway network)
  - Construction progress impacted until the permit is issued; 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

**PROBLEM:** Mitigation cost is unquantifiable when USACE pushes field delineations forward (and continues to refine scope of federal jurisdiction) into construction

- Quantity of impacts and the quality of waters impacted remain in question – all of which are considered by the USACE in determining the type of mitigation (enhancement vs replacement) and mitigation ratios
- This risk, combined with the lack of wetland bank capacity in many parts of the country and limited in-lieu fee options, requires contractors to speculate on mitigation costs and availability

**AGC REFORMS:** The use of remote sensing, geographic information systems (GIS) mapping software, and decision support systems for evaluating conservation strategies have made it possible to evaluate areas where WOTUS impacts must be avoided and identify areas for mitigation investments very early in the environmental planning process. Federal permitting agencies should accept NEPA planning-level decisions to support advance mitigation strategies that are both more economical and more effective from an environmental stewardship perspective. Revise the “2008 Mitigation Rule” at 33 C.F.R. § 332.3(b)(2) and (3) and USACE’s Regulatory Guidance Letter (RGL) 16-01 on the procedures for determining what geographic areas on a project are WOTUS.

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

3. **Hazardous Waste Management**

**PROBLEM:** Owners are increasingly transferring to the contractor all “risk” for “unknown” contamination, defined as any contamination not disclosed by owner or reasonably ascertainable by

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39 In 2008, USACE and USEPA published compensatory mitigation rules (2008 Mitigation Rule). See 73 Fed. Reg. 19,594 (Apr. 10, 2008). While the Corps 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.
contractor due diligence (no provisions allowing contractor schedule and cost relief for managing site contamination)

- Contamination risk is often unquantifiable (inadequate site investigation/testing data; testing inadequate to characterize contamination; disposal costs vary)
- Agreements typically require the contractor to manage, treat, handle, store, remediate, remove, transport and dispose of site contamination as required by law
- Creates exposure to long-term CERCLA liability
- Practice of assigning the contractor the risk for managing site contamination while providing no contractual relief forces contractors to add cost contingencies, often well exceeding actual costs, is driving up construction costs
- The term hazardous waste in design-build contracts typically is defined as any site contamination that requires special handling.

AGC REFORMS: Where the public owner is unwilling to compensate the designer/builder for unforeseen events or circumstances, particularly related to encountering hazardous materials, negative consequences follow: limited universe of competitive bidders because some will walk away from such extreme risk scenarios; shut out of highly-qualified, environmentally-sophisticated firms; inflated contract prices because bidders are pricing risk into the contract that is going back to the owner (and ultimately being borne by the taxpayer).

Government is in the best position to bear the following risk:
- Environmental risk associated with unforeseen hazardous material that was not disclosed pre-bid
- Environmental risk associated with finding out after the contract has been awarded that a part of the project site, or any property or waterbody to which the project site drains runoff, is a newly-listed “Superfund” site

On all federally funded projects, Congress should: 1) prohibit transfer of CERCLA liability for pre-existing contamination to the contractor by requiring public owner (DOTs) to retain generator and arranger status and 2) require public owner (DOTs) provide contractual relief through cost sharing mechanisms such as allowances and schedule relief through delay clauses that compensate the contractor for responding to site contamination.

4. Citizen Suits

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

AGC REFORMS: Citizen suit reforms are necessary to prevent their abuse.
- Further shorten and standardize the statute of limitations for challenges to final NEPA Records of Decision or claims seeking judicial review of an environmental permit, license or approval issued by a Federal agency for an infrastructure project;
- Require interested parties to get involved early in a project’s review process to maintain standing to sue later;
• Require bonds be posted by plaintiffs seeking to block activities to reduce abuse and delay tactics that harm private parties and taxpayers; and
• Require that the enforcement of federal environmental rules on a construction site be enforced only by trained staff of government agencies -or-
• Limit citizen suit penalties to violations of objective, numeric limitations rather than subjective, narrative standards;
• Extend the “notice period” beyond the current 60 days (giving regulatory agencies more time to review notice of intent letters and initiate formal actions);
• Clarify definition of “diligent prosecution” of alleged violations, thereby allowing federal/state authorities to exercise their primacy in enforcement and preventing unnecessary citizen suit intervention.

Clean Air “Conformity” Reforms

Application of Initial Transportation Conformity: After a new National Ambient Air Quality Standard (NAAQS) is established, nonattainment areas are designated. One year after this designation, transportation conformity applies. State Implementation Plans (SIPs) however, are not due for three years after nonattainment areas are designated. The SIPs establish the pollutant budgets and determine the percentages attributable to various contributors (including transportation). Due to the timing requirement related to transportation conformity, conformity must occur two years before the SIP is developed and budgets and contributors are established. To conduct transportation conformity, Metropolitan Planning Organizations (MPOs) must conduct complicated analysis and “build vs. no build” scenario evaluations to predict future emissions. If transportation conformity were not required until after a SIP is developed, MPOs could use the actual SIP budgets rather than conducting complicated and sometimes unnecessary analysis. Require that initial transportation conformity does not apply until six months after EPA approves the SIP motor vehicle emissions budgets. This would require an amendment to 42 U.S.C. § 7506.

Most Recently Issued National Ambient Air Quality Standard: Currently, there are three standards for particulate matter—1997, 2006 and 2012 and three standards for ozone—1997 and 2008 and 2015. Each successive standard tightens air quality standards. MPOs that are in nonattainment must document how they plan to achieve cleaner air for all applicable existing standards. Require that when a new standard is established, transportation agencies only need to conform to the most recent standard. Amend 42 U.S.C. § 7506 to require transportation conformity for only the most recently issued NAAQS for each criteria pollutant. Also, amend 42 U.S.C. § 7506(c)(2) to exempt marginal nonattainment and attainment-maintenance from transportation conformity requirements.

Programmatic Approaches: Currently, conformity determinations must be made when an MPO updates or amends its plan or transportation improvement plan (TIP) — regardless of whether the changes being made are likely to have any material effect on air quality. In addition, conformity determinations are required for every project (with the exemption of certain ‘exempt’ projects), even when there is no realistic chance that the project will cause the region to violate applicable air quality standards. Programmatic approaches have been used to help streamline many other types of environmental requirements, and they can be used in the conformity context as well. Programmatic conformity determinations could greatly reduce the time and cost needed to demonstrate compliance with conformity requirements, without changing in any way the underlying air quality standards that projects must meet. Amend the transportation conformity regulations (40 C.F.R. § 93) to allow DOT, in
consultation with EPA, to make programmatic conformity determinations that can be relied upon as the basis for demonstrating conformity for individual plans, programs, and projects. The programmatic conformity determinations could be made at a national, state or local level. Conditions could be specified in the regulations so that the programmatic determinations can be used only for plans, programs, and projects that meet specified criteria. Examples of programmatic conformity determinations include:

- Programmatic determinations for areas in which there is a substantial margin between modeled emissions – as reported in regional conformity analyses – and allowable emissions as defined in motor vehicle emission budgets. In these areas, the outcome of a conformity determination is normally a foregone conclusion. A programmatic determination would avoid the need to undertake a time-consuming modeling exercise when there is no realistic likelihood that the changes made in the plan or TIP would result in a violation of the NAAQS. The programmatic determination could be accompanied by monitoring and reporting requirements to ensure that the applicable emissions budgets continue to be met.

- Programmatic determinations for updates or amendments to transportation plans and programs that do not exceed de minimis criteria in terms of their expected effect on emissions. Currently, a conformity determination is required for an update or amendment to a plan or TIP (except for amendments solely involving exempt projects), regardless of whether the changes involved in that update or amendment have any realistic chance of materially increasing emissions. A programmatic determination could include a set of criteria for determining an update or amendment to have a de minimis effect on air quality. When those criteria are met, the programmatic determination would apply.

- Programmatic determinations for any newly designated marginal nonattainment area where EPA-approved data shows that the area will achieve the applicable NAAQS within three years through implementation of existing federal emission-control regulations applicable to motor vehicles.

- Programmatic determinations for projects in maintenance areas where the applicable State or MPO has entered into an agreement with EPA and the applicable State air agency under which the State or MPO will annually report on emissions of the applicable criteria pollutants to demonstrate that applicable emissions budgets for that pollutant are being met. If emissions budgets are exceeded, the State and MPO would need to resume making individualized conformity determinations.

**Endangered Species Act Reforms**

In the association’s [May 23, 2017, letter](#) to the U.S. House of Representatives Natural Resources Committee (see AGC’s ESA Letter to the U.S. House of Representatives Natural Resources Committee, dated May 23, 2017, beginning on page 47), AGC flags construction specific concerns and offers possible ESA reforms related to:

- species listing or delisting;
- critical habitat designation;
- timing, length and application of the Section 7 “consultation” process; and
- compensatory mitigation practices and policies.

Additionally, AGC explained how the current interplay between the ESA and NEPA is forcing excessive paperwork, duplicate consultation procedures and reviews, and inefficient project planning and construction phasing (due to, in the case of ESA, time-of-year restrictions relating to tree and bush
clearing and species surveys). AGC suggested improvements to current law that would reduce the frequency of NEPA document/decision re-evaluations and related ESA re-analysis.

Thank you for consideration of AGC’s comments. We look forward on working with you on implementing the enclosed and attached regulatory and legislative reforms considered above and in the attached documents.

Sincerely,

/S/

Jimmy Christianson
Regulatory Counsel
Associated General Contractors of America
MEMORANDUM

TO: Associated General Contractors of America
FROM: Philip E. Beck & Kathleen Hsu, Smith, Currie & Hancock LLP
DATE: April 8, 2015
RE: Constitutionality of Hiring Preferences for In-State and/or Local Residents

QUESTION PRESENTED

On March 6, 2015, the U.S. Department of Transportation (Department) announced a pilot program on “local and other geographic-based hiring preferences,” and simultaneously proposed a new rule on “geographic-based hiring preferences.”¹ The pilot program is a Department “initiative to permit, on an experimental basis, [FHWA and FTA] recipients and subrecipients to utilize various contracting requirements [for the hiring of in-state and/or local residents that the Department has] disallowed in the past.”² The proposed rule would specifically “permit recipients and subrecipients to impose geographic-based hiring preferences.”³ For reasons that remain elusive, neither the announcement of the pilot program nor the preamble to the proposed rule makes any reference to the Privileges and Immunities Clause of the United States Constitution or the many cases interpreting and applying it.

The question presented is whether the Department has designed the pilot program and the proposed rule to protect state and local recipients and subrecipients of the Department’s financial assistance from the extremely high risk that any hiring preferences for in-state or local residents will violate the Privileges and Immunities Clause of the U.S. Constitution.

SHORT ANSWER

The short answer is no. The Department’s pilot program and proposed rule ignore the Privileges and Immunities Clause and could easily mislead the recipients and subrecipients of its financial assistance to believe that hiring preferences for in-state or local residents are lawful so long as they do not unduly limit competition. Merely complying with the Department’s pilot program and proposed rule, even on “an


² Id.

³ Id.
experimental basis," would not be enough – in most if not all cases – to comply with the Privileges and Immunities Clause and the case law interpreting and applying it.

The Department’s pilot program and proposed rule are overbroad to the very great extent that they would authorize hiring preferences for in-state or local residents in complete disregard for the U.S. Supreme Court’s landmark ruling in United Building & Construction Trades Council of Camden Cnty. v. Mayor & Council of the City of Camden (Camden) and its progeny. The Department has not provided recipients and subrecipients with any guidance on the Privileges and Immunities clause. It has not even warned them that the encouraged discrimination against non-residents would, in all likelihood, be unconstitutional and lead to costly litigation.

The Camden case makes it clear that a nonresident’s interest in employment with a private company constructing a public project is a fundamental right protected by the U.S. Constitution’s Privileges and Immunities Clause. The case adds that this protection is strong and that a public authority may lawfully impair an individual’s right to such employment only if, when, and to the extent: (1) it has a substantial reason for doing so, in order to achieve a legitimate objective; (2) the nonresidents themselves are the “peculiar source” of the problem being addressed; and (3) less restrictive means of achieving the objective are not available.

While the Camden decision left public authorities some small room to argue that they have a good reason to discriminate against nonresidents, subsequent federal and state lower court decisions have routinely rejected those arguments and have made it clear that very few, if any, state and local governments can satisfy the very high threshold established by the U.S. Supreme Court in Camden. In fact, courts have specifically rejected the two arguments the Department makes for discrimination against non-residents: that such discrimination is necessary (1) to alleviate high unemployment in a particular jurisdiction or (2) to steer the short-term economic benefits of a public construction program to the local taxpayers funding the work.

The preamble to the proposed rule does state that the “deviation [from the Department’s prior policy] would only apply to the extent that such geographic hiring preferences are not otherwise prohibited by Federal statute or regulation.” This blanket statement is, however, far from enough to justify the Department’s glaring omission of any discussion of the Privileges and Immunities Clause, which the courts have specifically held to prohibit the very requirements the pilot program and the proposed rule invite recipients and subrecipients to impose. The

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4 State and local governments are not permitted to “experiment” with violations of citizens’ fundamental constitutional rights.


6 U.S. Const. amend. XIV, § 1, cl. 2.

7 Camden, 465 U.S. at 219-23.

Department has created a significant risk that the pilot program and the proposed rule will lead states and local governments to unwittingly violate the Privileges and Immunities Clause.

The Department’s omission is not only surprising but also troubling, for it was just two years ago that the Department participated in a legal research project that reached the same conclusions that we have independently arrived at in the process of preparing this memorandum.9

It was just two years ago, in April of 2013, that the National Cooperative Highway Research Program (NCHRP) issued “Legal Research Digest 59 – ENFORCEABILITY OF LOCAL HIRE PREFERENCE PROGRAMS,”10 in which the NCHRP stressed that the Privileges and Immunities Clause and the Camden decision severely restrict any discretion that state or local governments may have to require hiring preferences for in-state or local residents. The digest correctly concludes that “challenged local hire programs and policies are unlikely to meet the burden of establishing a substantial reason to discriminate against nonresidents,” and accordingly, “they most likely will be held unconstitutional.”11 Citing the state court rulings on discrimination against non-residents, the digest adds:

Because the showing needed to overcome a violation of the Privileges and Immunities Clause is so difficult to make, nearly all state courts that have adjudicated Privileges and Immunities Clause challenges to local hire laws have found such resident preferences to be unconstitutional.12

EXPLANATION

The Privileges and Immunities Clause states that: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”13 This clause applies to both states and municipalities14 and prohibits discrimination on the basis of both citizenship and residency.15 The analysis of a Privileges and Immunities Clause claim consists

9Transportation Research Board of the National Academies, Legal Research Digest 59 – ENFORCEABILITY OF LOCAL HIRE PREFERENCE PROGRAMS (Apr. 2013).

10 Id.

11 Id. at 8.

12 Id. at 8 (footnote omitted). For additional support for this statement, see the five cases cited in footnote 74 of the Transportation Research Board paper, three of which precede Camden, but are still good law; and two of which post-date Camden. These cases stand for the proposition that state and local hiring preferences are unconstitutional unless there is strong evidence that the nonresidents harmed by these preferences are a “peculiar source of the evil” and that the discrimination is narrowly tailored to accomplish the governmental entity’s objective.

13 U.S. CONST. amend. XIV, § 1, cl. 2.


of two elements: (1) whether the right is fundamental and therefore protected by the Privileges and Immunities Clause, and (2) whether there is a substantial reason for the discrimination related to the state’s objective.

A privilege is fundamental when it is “sufficiently basic to the livelihood of the Nation” so as to fall under the Privileges and Immunities Clause. Courts have held that private employment and employment on a public works contract are fundamental rights under the Privileges and Immunities Clause. Employment on a public works contract is fundamental even though the project is funded by the city because employees of private contractors and subcontractors have a fundamental right to private employment.

Whether public employment is a fundamental right under the Privileges and Immunities Clause is less clear. The court in Camden stated that “[p]ublic employment, however, is qualitatively different from employment in the private sector; it is a subspecies of the broader opportunity to pursue a common calling.” The Camden court did not specifically state whether

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16 The Slaughter-House Cases, 83 U.S. 36, 76 (1873); Camden, 465 U.S. at 218 (citing Baldwin v. Montana Fish & Game Comm’n, 436 U.S. 371, 383 (1978)). See also Connecticut ex rel. Blumenthal v. Crotty, 346 F.3d 84, 94 (2d Cir. 2003); Salem Blue Collar Workers Ass’n v. City of Salem, 33 F.3d 265, 268 (3d Cir. 1994).


20 Camden, 465 U.S. at 221-22 (citing Baldwin, 436 U.S. at 388).


22 Camden, 465 U.S. at 221-22 (“The opportunity to seek employment with such private employers is sufficiently basic to the livelihood of the Nation as to fall within the purview of the Privileges and Immunities Clause even though the contractors and subcontractors themselves are engaged in projects funded in whole or in part by the city.”).

direct public employment is a fundamental right protected by the Privileges and Immunities Clause. The 
Camden court did mention that there is no fundamental right to government employment under the Equal Protection Clause but also noted that different constitutional amendments and clauses have different aims and standards and thus different analyses. Only the Third Circuit has made a definitive ruling on the subject, finding that direct public employment is not a fundamental right protected by the Privileges and Immunities Clause. As noted above, however, the Camden decision makes it clear that the right to work for a private contractor performing public work is a fundamental right.

The Privileges and Immunities Clause is not an absolute bar even with respect to laws impacting fundamental rights. If the right is fundamental and protected by the Privileges and Immunities Clause, states may still discriminate against nonresidents if they can prove that there is a substantial reason for the difference in treatment that bears a substantial relationship to the state’s objective. States have “considerable leeway in analyzing local evils and in prescribing appropriate cures.” For there to be a substantial reason for discrimination against nonresidents, nonresidents must constitute a “peculiar source of the evil at which the statute is aimed,” not just contribute to the problem. Further, to determine whether the discrimination bears a close relationship to the State’s objective, the court must consider the availability of less restrictive means.

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24 See Camden, 465 U.S. at 219. See also Salem, 33 F.3d at 268 (“Up to this point, the Supreme Court has dealt only with prohibitions involving the practice of trades and businesses – private employment.”); Int’l Organization of Masters, 831 F.2d at 846 (citing Camden, 465 U.S. at 219-20) (“However, whether public employment is a fundamental right within the Privileges and Immunities Clause remains unsettled.”).


26 Camden, 465 U.S. at 220 (explaining that the Commerce Clause has different aims and different standards for state conduct than the Privileges and Immunities Clause and thus, analysis under the Commerce Clause is not dispositive in a Privileges and Immunities context).


28 Friedman, 487 U.S. at 67 (citing Piper, 470 U.S. at 284; Camden, 465 U.S. at 222; Toomer, 334 U.S. at 396).

29 See supra note 17.

30 Camden, 465 U.S. at 223 (citing Toomer, 334 U.S. at 396).

31 Id. See also Silver, 760 F.2d at 38 (citing Toomer, 334 U.S. at 398); A.L. Blades, 121 F.3d at 871 (citing Toomer, 334 U.S. at 298; Hicklin, 437 U.S. at 525-26); W.C.M. Window Co., Inc. v. Bernardi, 730 F.2d 486, 492 (7th Cir. 1984) (citing Toomer, 334 U.S. at 398); Nelson v. Geringer, 295 F.3d 1082, 1095 (10th Cir. 2002) (citing Camden, 465 U.S. at 222); Metro. Washington Chapter, 2014 WL 3400569, at *14. Contra Blumenthal, 346 F.3d at 94 (stating that the second prong of the analysis is “whether there is sufficient justification for the discrimination”).

32 Piper, 470 U.S. at 284. See also O’Reilly, 942 F.2d at 285 (quoting Friedman, 487 U.S. at 69) (asking if there are “equally or more effective means” for accomplishing the same objective).
The Department pilot program and its proposed rule both ignore the two-step process in determining whether a geographic hiring preference violates the Privileges and Immunities Clause. 33 The pilot program requires several things, but not this kind of analysis. The Proposed Rule would broadly authorize the use of geographic hiring preferences in “contracts that are awarded by recipients and sub-recipients with Federal financial assistance.” 34 Even though these contracts are federally funded, under Camden, employees of the recipients and sub-recipients of the contracts have a fundamental right to private employment under the Privileges and Immunities Clause. 35 In order for states to discriminate on the basis of residency, those nonresidents would have to be a peculiar source of evil that the residency requirement addresses 36 and there cannot be less restrictive means to accomplish the same goal. 37 Promulgating a broad rule that allows the use of local hiring preferences on public works contracts without explaining that the reason for the preference must be substantiated and closely related to the individual state’s objective may lead states to unknowingly violate the Privileges and Immunities Clause.

ANALYSIS OF CASE LAW AFTER CAMDEN

As indicated in the footnotes, the Supreme Court has not changed the law since its decision in Camden, but has merely clarified, through Piper, that courts must consider the availability of less restrictive means in determining whether the discrimination bears a close relationship to the state’s objective. 38 The following circuit court and federal district court cases after the Supreme Court’s decisions in Camden and Piper have further clarified this precedent regarding geographic hiring preferences.

SUPREME COURT TREATMENT


A bar examinee living in Vermont applied to take the bar examination in New Hampshire and submitted a statement of intent to become a New Hampshire resident. 39 After passing the bar examination, the bar examinee requested special dispensation from the residency requirement, which was subsequently denied by the Supreme Court of New Hampshire. 40

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34 Id.
35 Camden, 465 U.S. at 221-23.
36 See supra note 31.
37 See supra note 32.
38 Piper, 470 U.S. at 284.
39 470 U.S. at 275.
40 Id. at 276.
bar examinee filed suit, arguing that the residency requirement violated the Privileges and Immunities Clause. The Supreme Court of New Hampshire justified its residency requirement and stated that nonresident members of the bar would be less likely to be familiar with local rules, to behave ethically, to be available for court proceedings, and to do pro bono work in the state.

The Court stated that the right to practice law is protected by the Privileges and Immunities Clause and that the Supreme Court of New Hampshire’s justifications for its residency requirements were insufficient to meet the test of “substantiality.” The Supreme Court of New Hampshire provided no evidence that nonresidents would be less abreast of local rules and issues, that they would behave less ethically, or that they would not endeavor to perform pro bono services. Further, the Court held that the discrimination did not bear a close relation to the state’s objectives because they were not the least restrictive means to achieve its goals. The Court suggested that there were other means to achieve the Supreme Court of New Hampshire’s goals, such as mandatory attendance at seminars on state practice or a requirement that any out-of-state attorney retain a local attorney for unscheduled meetings and hearings.

Piper is significant because it clarified that when deciding whether discrimination bears a close relation to the state’s objective, the court must look to whether the state can protect its interest with less restrictive means.

Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988).

A Maryland resident barred in Illinois and the District of Columbia who maintained a place of business in Virginia applied for admission to the Virginia Bar by motion, seeking admission by reciprocity. The Maryland resident’s application was subsequently denied by the Supreme Court of Virginia for failing to satisfy the residency requirement. The Maryland resident filed suit against the Supreme Court of Virginia, alleging that the residency requirement violated the Privileges and Immunities Clause. The Supreme Court of Virginia argued that the residency requirement was justified because nonresidents are not as committed or familiar with

41 Id. at 277.
42 Id. at 285.
43 Id. at 283-84.
44 Id. at 285-86.
45 Id. at 284.
46 Id. at 285, 287.
47 487 U.S. at 62.
48 Id. at 62-63.
49 Id. at 63.
Virginia law and that the residency requirement facilitated enforcement of the full-time practice requirement.\footnote{Id. at 67-68.}

Following the precedent set in \textit{Piper}, the Court held that the right to practice law is protected by the Privileges and Immunities Clause.\footnote{Id. at 65.} Further, in similar analysis to \textit{Piper}, the Court held that there was no evidence that nonresidents would be less committed or less familiar with Virginia law and that there were less restrictive alternatives to ensure that attorneys were abreast of legal developments and followed the full-time practice requirement.\footnote{Id. at 69-70.}

\section*{CIRCUIT COURT TREATMENT}

\textit{Salem Blue Collar Workers Ass'n v. City of Salem}, 33 F.3d 265 (3d Cir. 1994).

A laborer directly employed by the city was notified, after moving out of the city, that he was in violation of the city’s ordinance, which stated that all city employees were required to live in the city.\footnote{33 F.3d at 266.} The laborer filed suit, arguing that the city’s ordinance was a violation of the Privileges and Immunities Clause.\footnote{Id. at 267.} The court disagreed and relied on the \textit{Camden} court’s distinction between public and private employment to hold that direct public employment is not a fundamental right protected by the Privileges and Immunities Clause.\footnote{Id. at 270.} The court explained that the \textit{Camden} court held that private employment was a fundamental right protected by the Privileges and Immunities Clause but recognized a clear distinction between private and public employment.\footnote{Id.}

The court distinguished the case from the facts in \textit{Camden}, where contractors and subcontractors were under contract with the city, but their employees were under private contracts, with the facts in this case, where the laborer was a direct employee of the city.\footnote{Id.} Because there was no intervening private employment in this case, the court held that no fundamental right was implicated and found it unnecessary to discuss the second issue of substantial relatedness.\footnote{Id.}
The Third Circuit is the only circuit that has specifically stated that direct public employment is not a fundamental right protected by the Privileges and Immunities Clause. However, the decision in Salem has been cited for that proposition by the Sixth Circuit in a footnote as well as by the Northern District of California.

A.L. Blades & Sons, Inc. v. Yerusalim, 121 F.3d 865 (3d Cir. 1997).

A contractor and its nonresident employees on a public works contract brought action against a state DOT, alleging that an act requiring contractors to employ residents on state-funded public works projects was in violation of the Privileges and Immunities Clause. Following the precedent in Camden, the court found that the fundamental right to private employment was implicated in this case because the case concerned a public works project.

The state argued that there were two substantial justifications for the residency requirement: “alleviating high unemployment in the [state]’s construction industry and avoiding the loss of economic benefits resulting from the expenditure of [state] funds on nonresident workers.” The court rejected the unemployment justification because the state did not proffer any evidence to prove that the nonresident employees were a “peculiar source” of the high unemployment in the state’s construction industry or that there was any difference between nonresident and resident construction workers. Moreover, while the court conceded that legislative history proved that the state act was aimed to prevent the migration of economic benefits, the court rejected the justification because the state did not proffer any evidence that nonresident construction workers derived a larger amount of their income from the state than nonresident workers in other industries. The state also did not provide any evidence that the migration of economic benefits in the construction industry was damaging the state’s economy in any significant way so as to justify the act. Because neither justification was valid, the court found that the act was unconstitutional.


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59 Jones, 531 F. App’x at 709 n.1.
60 Marilley, 2013 WL 5745342, at *11.
61 121 F.3d at 867.
62 Id. (citing Camden, 465 U.S. at 221).
63 Id. at 871.
64 Id. at 872.
65 Id. at 874.
66 Id. at 875.
67 Id. at 876.
A contractor and its nonresident subcontractor sought to enjoin the state from enforcing a state act which provided that contractors on public works projects were required to employ only resident laborers unless resident laborers were unavailable or incapable of performing the work. The court found that the fundamental right of private employment was implicated because the case concerned a public works project. The state did not present any information “statistical or otherwise, evidentiary or subject to judicial notice, at trial or on appeal – concerning the benefits of the preference law.” Therefore, the court held that the state act was unconstitutional.

**FEDERAL DISTRICT COURT TREATMENT**


Nonresident contractors brought suit against the District of Columbia, alleging that the D.C. resident preference statute for the construction industry violated the Privileges and Immunities Clause. Because the issue concerned a public works project, the court found that the fundamental right of private employment was implicated. D.C. argued that the statute was “necessary to counteract the grave economic disparity that it faces as a result of its inability to levy a commuter tax on nonresidents, who hold 70 percent of jobs in the District.” While the court stated that it could be persuaded that this inability to levy a commuter tax was a peculiar evil that the statute was enacted to address, D.C. did not provide sufficient substantive evidence that the resident hiring preference statute was narrowly tailored to address this evil.


Contractors brought an action against the city, alleging that the city ordinance, which required that residents be given preference in hiring on a one-of-every-two ratio on public works

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68 730 F.2d at 489.

69 Id. at 497.

70 Id. at 497-98.

71 See id.

72 While it is unclear whether the Privileges and Immunities Clause applies to the District of Columbia, 2014 WL 3400569, at *12 (citing *Banner v. United States*, 303 F. Supp. 2d 1 (D.D.C. 2004), for the purposes of this case, the court found it unnecessary to reach the question. 2014 WL 3400569, at *13.

73 Id., at *8.

74 Id., at *13.

75 Id.

76 Id., at *16.
projects, violated the Privileges and Immunities Clause. Following *Camden*, the court found that the ordinance implicated the fundamental right to private employment. However, since the city did not offer any justifications for the discrimination, the court found that the ordinance was invalid.


Contractors brought suit against the city, alleging that the city ordinance, which mandates that recipients of economic incentives from the city make a good faith effort to hire 51% of city residents for construction jobs. Because the ordinance restricted the ability of nonresidents to seek private employment, the court found that it violated a fundamental right protected by the Privileges and Immunities Clause. The city argued that high rates of poverty and unemployment were a substantial reason for discrimination against nonresidents. However, because the city was unable to show that the nonresidents were a source of unemployment and poverty, the court found that the city did not meet its burden to prove that there was a substantial reason for the discrimination.

**STATE COURT TREATMENT**

See the NCHRP Legal Research Digest paper referenced above, and the cases cited therein, for a survey of state court decisions applying *Camden*. Numerous state court decisions have held local residents hiring preferences to violate the U.S. Constitution’s Privileges and Immunities Clause, both before and after the *Camden* decision. It is logical to conclude from a review of this state court case authority that very few, if any, state and local governments are capable of satisfying the very stringent evidentiary requirements imposed by the rule of law established by *Camden*. In fact, the only state court decision we have found which actually held a local residents hiring preference constitutional in the aftermath of *Camden* is *Wyoming v. Antonich*, 694 P.2d 60 (Wyo. 1985). This decision appears to be an anomaly and the exception which proves the rule. The decision has been sharply criticized and is in direct conflict with the overwhelming weight of authority.

**CONCLUSION**

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77 2011 WL 4710875, at *3.
78 Id., at *13.
79 Id.
80 960 F. Supp. at 826-27, 829.
81 Id. at 830.
82 Id.
83 Id.
For the reasons summarized above, the Department’s pilot program and proposed rule are ill-advised because they invite recipients and subrecipients to discriminate against nonresident employees by enacting contracting requirements granting a preference to local residents which almost certainly will violate the Privileges and Immunities Clause of the U.S. Constitution and the rule of law established by the U.S. Supreme Court in *Camden*.
### Current U.S. DOT Environmental Streamlining Programs & Deficiencies

<table>
<thead>
<tr>
<th>CATEGORY</th>
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<tbody>
<tr>
<td><strong>Early Coordination/ Collaboration</strong></td>
<td><strong>MAP-21 &amp; Title I FAST ACT</strong> 23 U.S. Code Chapter 1, §139, 168-69</td>
<td><strong>MAP-21 &amp; Title I FAST ACT</strong> 23 U.S. Code Chapter 1, §139, 168-69</td>
<td><strong>FAST-41</strong> 42 U.S.C. Chapter 55, SubCh. IV §§4370m – 4370m-12</td>
<td><strong>FAST-41</strong> 42 U.S.C. Chapter 55, SubCh. IV §§4370m – 4370m-12</td>
</tr>
<tr>
<td><strong>FAST Act §1304</strong>  AFTER NOI, LEAD MUST:</td>
<td>No increased authority of lead agency over other partic. agencies</td>
<td>Project sponsor applies to be “covered project”</td>
<td>Def of “covered proj” excl MAP-21 &amp; WRRDA projects</td>
<td></td>
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<tr>
<td>• Identify other agencies w/in 45d</td>
<td>Partic. agencies must “concur” on proj. schedule in coordination plan and modifications to shorten it; can lengthen schedule for “good cause”</td>
<td>Federal Permitting Improvement Council</td>
<td>Limited application – MORE THAN $200M</td>
<td></td>
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<tr>
<td>• Coordination plan w/in 90d; incl NEPA completion schedule</td>
<td>Obtaining concurrence is a challenge, esp for controversial projects</td>
<td>Early consultation (w/in 60d proj sponsor request), coordinated project plans (w/in 60d entry on Dashbd), project timetables, public Dashbd tracking...</td>
<td>Proj sponsor must “opt in”</td>
<td></td>
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<tr>
<td>• Dev chklist w/ partic. agencies to help proj sponsor identify all resources</td>
<td>Lead agency can extend deadline for agencies/public to comment NEPA docs for “good cause”</td>
<td>President must appoint ED; each of 13 agencies must appoint member to council (Deputy Sec. or higher) ... positions remain vacant</td>
<td></td>
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<tr>
<td>• Respond comments from partic. agencies</td>
<td></td>
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<td></td>
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<tr>
<td>• Dev enviro doc sufficient to satisfy all proj permits/approvals</td>
<td>PARTIC AGENCIES MUST:</td>
<td></td>
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<tr>
<td><strong>MAP-21 §1305</strong> Requires concurrence of partic. agencies for enviro review schedules</td>
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<td><strong>MAP-21 §1305</strong> Requires concurrence of partic. agencies for enviro review schedules</td>
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<tr>
<td><strong>Deadlines Conflict Resolution</strong></td>
<td><strong>MAP-21 §1306</strong> 30d after DEIS – lead may convene schedule check</td>
<td>180-day window for fed agency decision on enviro review or authorization – starts from date agency has all info needed</td>
<td>Does not set specific NEPA review or permitting schedule</td>
<td></td>
</tr>
<tr>
<td>• POST-NEPA 180-day deadline – for permits, licenses, &amp; other approval decisions (clock starts aft applc complete)</td>
<td><strong>NEPA: No deadlines</strong></td>
<td>Completion date in recommended performance schedule for each category cannot exceed the avg time to complete an environmental review or authorization for projects within that category. Calculation based on analysis of time req’d to complete item (for projects within the relevant category of covered projects) during the preceding two calendar years.</td>
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<tr>
<td>• Disputes – Go to head disputing agency, CEQ, then President</td>
<td><strong>PERMITTING:</strong> No increased authority of lead over partic. agencies – agencies decide when applc. “complete”</td>
<td><strong>Disputes re: Timeline</strong> Go to ExDir Fed Perm Impr Council – if 30d pass then OMB &amp; CEQ facilitate a resolution by day 60. Action taken by Dir. OMB is final and conclusive and not subject to judicial review</td>
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<tr>
<td>Penalty if Miss Deadline: 180 days after (1) lead agency has issued final decision &amp; (2) complete permit app filed... Funds</td>
<td>Partic. agencies can say application not complete or can’t move ahead until another entity makes a decision... Eg, Federal permit, license, or approval dependent on:</td>
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AGC CHART: Current U.S. DOT Environmental Streamlining Programs & Deficiencies

July 2017

40
<table>
<thead>
<tr>
<th>CATEGORY</th>
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<td></td>
<td>rescinded from office of head of agency, or head of office to which permit decision was delegated. Amount: per week after 180-day deadline passes – $20k if project requires a financial plan (Major Project) / $10k for all other projects Exceptions: No funds rescinded if lead agency concurs that delay is not the fault of the permitting agency.</td>
<td>✓ 401 CWA Water Qual Cert; ✓ NHPA - no effect; ✓ CZMA determination; ✓ NPDES sw permit; ✓ Floodplain permit by the local floodplain mgmt. administrator; ✓ FWS/NMFS Section 7 consult; and ✓ Tribal concurrence Reluctance to elevate dispute or exercise penalties – Partic. agency self-policies</td>
<td></td>
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<td></td>
<td>MAP-21 §1309 If EIS underway 2+ yrs, USDOT provide add’l assistance, establish permitting/approval schedule .... need concurrence – FINISH w/ in 4 years of start date</td>
<td>Concurrence</td>
<td></td>
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<td></td>
<td>Waived if it “would impair the ability” of any agency to meet obligations</td>
<td>Requires that state/federal permitting reviews run concurrently for a “covered project”</td>
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<tr>
<td></td>
<td>Requires that state/federal permitting reviews run concurrently for a “covered project”</td>
<td>So long as doing so does not impair a federal agency’s ability to review the project</td>
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</table>

**MAP-21 & Title I FAST ACT**

23 U.S. Code Chapter 1, §139, 168-69

**FAST-41**

42 U.S.C. Chapter 55, SubCh. IV §§4370m – 4370m-12

**MAP-21 §1305** Agencies coordinate and carry out activities concurrently, instead of sequentially, and in conjunction with the NEPA review

**FAST Act §1313** Coordinated/concurrent reviews & permitting for Title 49 projects, ALSO

- Purpose and Need (P&N) and Range of Alternatives must be suff to provide resource agencies w/ needed info
- P&N issues must be resolved during scoping – all other “issues” resolved expeditiously

**Concurrent Reviews**
<table>
<thead>
<tr>
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</table>
| **Alternatives Analysis** | FAST Act §1304  
Lead agency must provide partic. agencies and public opportunity for "involvement" in defining P&N and determining Range of Alternatives – used for fed enviro reviews/permits req’d for proj | As early as practicable in the review process  
Partic agencies not required  
To the max extent practicable … unless alternatives must be modified to address sign new info/ circumstances or to do NEPA in timely manner | N/A | N/A |
| **Use of Planning Products in Enviro Reviews** | MAP-21 §1310; FAST Act §1305  
USDOT integrate “planning products” in NEPA (e.g., mitigation needs) … narrows concurrence reqm’t | "Planning & environmental linkages" – far from simple: 10 conditions and need concurrence | Adoption, incorporation by reference, and use of state documents | Must meet complex process/procedural standards |
| **Programmatic Approaches** | MAP-21 §1305  
Use programmatic approaches for enviro reviews, eliminate repetition |  |  |  |
|  | MAP-21 §1318; FAST Act §1315  
Programmatic Agreement (PA) Template  
• PA w/ States – state can make NEPA categorical exclusion (CE) determinations |  |  |  |
|  | FAST Act §1303; 1311  
• Waive case-by-case Section 106 & 4(f) review certain bridges/culverts  
• Adopt/incorp. by ref another Federal or state agency’s docs |  |  |  |
|  | MAP-21 §1311  
Allows “programmatic mitigation plans” to be developed in transp |  |  |  |
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<tr>
<td><strong>Accelerate Review</strong></td>
<td><strong>MAP-21 §§1319; FAST Act §1304</strong>&lt;br&gt;Codifies use of errata sheets and FEIS/ROD as single document</td>
<td>Unless FEIS makes substantial changes to proposed action or significant new circumstances</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td><strong>Reduce Paperwork</strong></td>
<td><strong>FAST Act §1311</strong>&lt;br&gt;Expanded provision to Title 49 projects</td>
<td>Only to the maximum extent practicable</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td><strong>Single Enviro Document</strong></td>
<td><strong>FAST Act §1304</strong>&lt;br&gt;LEAD AGENCY MUST: Develop “enviro document” sufficient to satisfy fed permits, approvals, etc.</td>
<td>Report to Congress in one year</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td><strong>Modernize NEPA</strong></td>
<td><strong>FAST Act §1317</strong>&lt;br&gt;• Explore electronic and other innovative technology options</td>
<td>Most NEPA challenges brought well before deadline&lt;br&gt;Prep &amp; announcement of a “supplemental” EIS, when required, restarts the 150-day clock</td>
<td>180-day SOL&lt;br&gt;NEPA – “get in or get out”&lt;br&gt;Prelim Inj – consider harmful economy impacts (already was done when “balance equities”)&lt;br&gt;NEPA challenges brought well before deadline&lt;br&gt;Prep &amp; announcement of a “supplemental” EIS, when required, restarts to 150-day clock</td>
<td>N/A</td>
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BACKGROUNDER
AGC’s Flowchart of Environmental Approvals for Infrastructure Projects

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

Overview

- Before breaking ground, most large infrastructure projects must receive many environmental approvals pursuant to many environmental laws administered by many different regulatory agencies and program offices.
- These projects generally do not qualify for efficient general permitting procedures and must obtain extremely costly and time-consuming individual permits, on a project-by-project basis.

- From top to bottom, AGC’s flowchart walks you through the environmental aspects that need to be considered at each stage of a project:
  - BEGIN PLANNING [Grey Boxes - Top]: identify property, perform preliminary engineering and environmental site assessments and studies.
  - NEPA PHASE [Red Sign - Top]: identify the project’s purpose and need, study environmental impacts and alternatives, conduct public/agency outreach, publish a final environmental impact statement (EIS), including mitigation plans.² NEPA is an “umbrella” statute because other environmental laws, policies, executive orders, and guidance are considered as part of the review process [Red Arrows - Top].
  - ENVIRONMENTAL PERMITTING [Gold Bar - Middle]: meet the specialized pre-construction requirements that apply to the project, each directed at a specific environmental medium or concern (i.e., air [Yellow Path], water [Blue Path], wildlife habitat [Green Path], cultural and aesthetic resources [Pink Path], waste and other aspects [Light Grey Path]). Dozens of federal statutes, and innumerable implementing regulations – that are ancillary to NEPA – apply to construction activities.
  - DURING CONSTRUCTION: meet environmental commitments, permit terms and conditions, and other environmental requirements – e.g., maintain management plans, inspect, monitor, report, take corrective action, fulfill mitigation measures, manage waste streams, etc.
  - OPERATIONS AND MAINTENANCE [Grey Footer]: occupy and operate or transfer property; perform required environmental follow-up – be aware of long-term legal risk and liability associated with the disposal and clean-up of hazardous substances.

¹ AGC's Updated Flowchart – Discussion Draft v2: June 14, 2017
² AGC of America created this poster-sized flowchart to diagram and describe the environmental review and permitting process for a federally-funded or federally-permitted infrastructure project in the United States.
Problem

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

- The current practice of performing sequential and often duplicative environmental reviews, following the NEPA record of decision, is presenting massive schedule, budget and legal hurdles to project delivery.

- Project proponents are being forced to repeat: analyses and studies; mitigation and management planning; as well as interrelated “authorizations” (i.e., certifications, consultations, consistency determinations, etc.) – all before they can submit their permit applications and receive the necessary approvals to proceed with construction.

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

AGC Recommended Reforms

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

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

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

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

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

Additional details:

- Not all these permits and related “authorizations” (i.e., certifications, consultations, consistency determinations, etc.) are required to start work on every project. The scope of the environmental review process will depend on the location/nature of the project.
- AGC’s flowchart displays federal requirements only; it does not include the additional state and local requirements that “go beyond” the national baseline to address region-specific needs and concerns.
- U.S. EPA has authorized states to administer some of the fed. programs depicted on this chart (e.g., stormwater permits).

If the federal action may or may not cause a significant impact the “lead agency” can first prepare a shorter Environmental Assessment (EA) to determine whether an EIS is required. If the EA indicates that no significant impact is likely, the agency can release a finding of no significant impact (FONSI) and proceed. A limited number of federal actions may avoid the EA and EIS requirements under NEPA if they meet the criteria for a categorical exclusion (CATEX).

In its May 2017 testimony before Congress, AGC presented reforms included in its comprehensive paper: “Reforms for Improving Federal Environmental Review and Permitting,” April 30, 2017 Discussion Draft. AGC also testified before Congress in March 2017 on how to reduce environmental permitting paperwork. AGC has met and shared its reforms with the U.S. Environmental Protection Agency (EPA) and the Army Corps, among others. In addition, the association submitted detailed proposals at the request of the U.S. Department of Commerce, which was covered in the Washington Post. And, the House Natural Resources Committee sought and received AGC’s advice on reforming the Endangered Species Act.
May 23, 2017

The Honorable Raúl R. Labrador  
The Honorable Mike Johnson  
Subcommittee on Oversight and Investigations  
Committee on Natural Resources  
United States House of Representatives  
Washington, DC  20515

Dear Chairman Labrador and Vice-Chairman Johnson:

On behalf of the Associated General Contractors of America (AGC) and its 26,000 commercial construction company members, I appreciate your interest in identifying federal requirements and policies that are ineffective or excessively burdensome and exploring ways to reform them.

AGC has reached out to the Trump administration, Congress, the federal regulatory agencies and the U.S. Small Business Administration with recommendations that highlight the need for fewer and smarter regulations, greater industry assistance and involvement, and reduced barriers to approving and moving forward on important infrastructure projects.

The issues outlined below are under the jurisdiction of the House Committee on Natural Resources. Please consider AGC’s recommendations on how to reduce costs, delays and inefficiencies in project delivery.

Endangered Species Act (ESA)

The ESA\(^1\) has not been significantly updated since 1988; AGC applauds the 115th Congress for making its change a priority. The ESA is frequently used to stop or impede major federal infrastructure projects. It has the power to shape even local land use decisions across the nation. Over the past several years, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (the Services) have proposed and/or finalized rules to list numerous species as either threatened or endangered with ranges that extend across the country. In addition, because of settlement agreements with various conservation groups, the Services are required to issue listing decisions on hundreds of additional species over the next several years. These listings have the potential to significantly impact existing and planned infrastructure work. Additionally, the Services have been steadily rolling out new policies and regulations focused on the designation of critical habitat, mitigation options, and the listing process. Many of these rules are subject to litigation. AGC expects there to be greater citizen involvement, including pushback on any regulatory changes proposed by the Trump administration, as well as citizen suits to enforce the ESA’s provisions.

\(^1\) 16 U.S.C. §§ 1531 – 1544.
**Listing Process**

The Section 4 listing of a species as threatened or endangered (and its critical habitat designated) triggers the “take” prohibition.

AGC continues to have concerns regarding the contents of listing petitions: Congress should establish a higher threshold for the petitioner to meet before the petition can be considered by FWS. AGC is aware of recent FWS rulemaking on the petition process; however, legal experts report this amounts to merely a codification of current practice. A higher threshold of reliable data and species specific knowledge is warranted. AGC also has concerns with the Service’s longstanding practice of prioritizing listing and uplisting petitions over delisting and downlisting petitions.

AGC also points out that currently ESA does not allow the Service to consider economics when deciding whether to list a species; such considerations are allowed only in the designation of critical habitat. For example, in late 2016 the U.S. Court of Appeals for the Ninth Circuit reversed a district court opinion and held for the first time that a species may be listed under the Endangered Species Act based on projections about what could happen nearly 80 years from now in terms of habitat loss and species response.  

**Critical Habitat**

When a species is listed under Section 4, the Service generally must also designate “critical habitat” for the species. Critical habitat designations for listed species include areas, occupied or not, that are deemed essential to species survival and recovery.

AGC is concerned that FWS has become bogged down with the critical habitat process. There continues to be widespread debate about whether critical habitat is for a species survival or its recovery. Recognizing that any construction project within any area so designated will need to be evaluated, there is merit to exploring ideas on how to make the critical habitat process more efficient and more transparent, including a better analysis of related economic impacts. See “Consultation” section below for further discussion.

**Take Prohibition**

The Section 9 “take” prohibition puts commercial contractors at risk of criminal or civil liability. “Taking” is broadly defined under the statute and regulations, and has been broadened even further by caselaw to include construction (or land use) activities that destroy or alter critical habitat and thereby cause actual death or injury to a listed species (on federal or nonfederal land), which may include:

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3 *Alaska Oil & Gas Ass’n v. Pritzker* (NMFS did not act arbitrarily and capriciously in concluding that the effects of global climate change on sea ice would endanger the Beringia bearded seals distinct population segment in 80 years) - [https://cdn.ca9.uscourts.gov/datastore/opinions/2016/10/24/14-35806.pdf](https://cdn.ca9.uscourts.gov/datastore/opinions/2016/10/24/14-35806.pdf).
4 The “no-take” provision of ESA mandates civil and/or criminal penalties for “taking” threatened or endangered species, and for attempting, soliciting another, or causing another to violate any of ESA’s provisions. 16 U.S.C. §§ 1538(a), (g). Criminal penalties may include jailtime. Additionally, citizen suits and injunctive relief are always available. Any person may commence a civil suit to enjoin any activity alleged to be in violation of the Act. 16 U.S.C. § 1540(g)(1). If the party bringing the suit prevails, he or she may recover attorney’s fees and costs. 16 U.S.C. § 1540(g)(4).
• Removal of large woody debris or riparian shade canopy, dredging, discharge of fill material, and draining, ditching, blocking or altering stream channels or surface or ground water flow
• Blocking fish passage through fills, dams, or impassable culverts

AGC recommends that Congress clarify that the take prohibition only applies to actions that result in actual death or injury to a listed species.

Consultation

The incidental take permitting processes provide that a “take”—which is incidental to an otherwise lawful activity—may be permitted in certain circumstances and under certain conditions. Section 7 requires all federal agencies to “consult” with FWS or NMFS to “insure” that projects (on public or private land) that have a “federal nexus” are not likely to “jeopardize” the continued existence of any listed species. Agencies must also ensure that their actions do not cause the “destruction or adverse modification” of designated critical habitat.

The designation of “critical habitat” under Section 4 is interrelated with the application of the “adverse modification of critical habitat” standard in the Section 7 consultation process. AGC is concerned by new federal regulations that increase the likelihood that the Services will make adverse modification findings, and could make it more likely that the Services will designate critical habitat, and do so across larger areas of land than in the past. The revised regulatory regime provides discretion and flexibility for the Services, while creating much uncertainty for the construction and development community. This will increase costs for project proponents, who require federal permit authorizations or licenses, and restrict land use and activities.

Congress should consider removing the “adverse modification of critical habitat” regulatory standard under Section 7 and clarifying that the “jeopardy” standard addresses both habitat and direct impacts to species. AGC maintains that the act of evaluating and designating critical habitat, and application of the destruction or adverse modification standard through Section 7 consultation, duplicates the protection already provided by the jeopardy standard.

AGC also recommends that Congress provide additional support for the development of programmatic consultations and direct the Services to further streamline project-level Section 7 consultation activities as follows: clarify date of initial consultation; set a time limit on concurrences; increase the increase the applicant’s level of involvement in consultation. See also AGC’s related recommendations below - “Interaction Between NEPA and ESA.”

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5 Section 7 “consultation” applies to projects (on public or private land) that receive federal funding, a federal permit/license or other type of federal approval (e.g., U.S. Department of Transportation construction, the issuance of a Clean Water Act Section 404 “dredge-or-fill” permit, FERC licensing, etc.).

6 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02.

7 The Services issued two rules and a policy that revise regulations governing the designation of, and Section 7 consultation on, critical habitat. First, the Services issued a rule to revise the criteria for designation of critical habitat, 81 Fed. Reg. 7,414 (Feb. 11, 2016). Second, the Services promulgated a revised definition of “destruction or adverse modification” of critical habitat, 81 Fed. Reg. 7,214 (Feb. 11, 2016). Finally, the Services adopted a final policy regarding the implementation of ESA Section 4(b)(2) for exclusion of areas from critical habitat designation, 81 Fed. Reg. 7,226 (Feb. 11, 2016).
**Mitigation**

President Trump’s Executive Order on Energy Independence rescinded the Presidential Memorandum of Nov. 3, 2015, “Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment,” and directed a reexamination of the mitigation policies and practices of the federal government to balance conservation strategies and policies with the need for creating jobs. Per Department of Interior Secretary Zinke’s related Secretarial Order 3349, the reexamination will include FWS Mitigation Policy issued on Nov. 21, 2016, and ESA Compensatory Mitigation Policy issued on Dec. 27, 2016. Both policies emphasize FWS’ goal to strive for a “no net loss” or a “net gain” for protected species, despite comments from stakeholders that there is no requirement under the ESA to achieve such an outcome.

We urge Congress to provide more certainty upfront regarding the requirements for and availability of suitable mitigation (see more below under “Interaction between ESA and NEPA”). AGC members support coordinated mitigation planning and efforts to reduce transaction costs. Congress should provide greater flexibility for project sponsors to develop advanced mitigation programs and then receive credit for this mitigation. In addition, FWS should be required to give substantial weight to programmatic mitigation plans. Overall, a well-implemented, credit-based mitigation policy could provide high-quality, cost-effective mitigation.

In addition, if a general contractor is fully implementing the required ESA mitigation actions adopted in the National Environmental Policy Act (NEPA) process and included as conditions in the project’s permits, the contractor should be indemnified and “held harmless” for any unauthorized “take” of a listed species. (Scenario: A bird got stuck and died in netting that was approved through a mitigation plan. The contractor is fined/sued for a taking and the project manager held personally responsible.) On some complex infrastructure projects, this unreasonable risk is unnecessarily driving up the cost for design-build projects.

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9 81 Fed. Reg. 95,316.
10 The Presidential Memorandum’s goal of “net benefit” or “no net loss” was in conflict with the ESA because the ESA provides no authority for FWS to impose on permit applicants mitigation measures that are intended to result in a net benefit or no net loss. ESA Section 7 “consultation” requires federal agencies to ensure their actions are not likely to jeopardize the continued existence of listed species or destroy or adversely modify their critical habitat. 16 U.S.C. § 1536(a)(2). Additionally, in the context of a private party obtaining ESA “take” coverage using a habitat conservation plan under ESA Section 10, FWS must ensure that the permit applicant will “to the maximum extent practicable, minimize and mitigate the impacts” of incidental take authorized by the permit. 16 U.S.C. § 1539(a)(2)(B).

11 FWS has adopted the definition of “mitigation” that appears in the Council on Environmental Quality (CEQ) the National Environmental Policy Act (NEPA regulations (40 C.F.R. § 1508.20). FWS application of mitigation in the NEPA context is covered in the Services mitigation policy (81 FR 83440, Nov. 21, 2016 – Appendix B), which is undergoing review and likely to be withdrawn. The policy states: “To the fullest extent possible, the Service should coordinate with State, tribal, local, and other Federal entities to conduct joint mitigation planning, research, and environmental review processes.”

12 To help improve FWS’s ability to evaluate the effectiveness of its compensatory mitigation strategies and ensure that the agency appropriately plans the obligations necessary for this purpose, a 2017 GAO report recommends that FWS establish a timetable with milestones for modifying the RIBITS database to incorporate FWS’s in-lieu fee program information. *U.S. Fish and Wildlife Service's American Burying Beetle Conservation Efforts*, GAO-17-154: Published: Dec 22, 2016. FWS concurred with this recommendation.
Interaction between ESA and NEPA

NEPA drives the evaluation of biological resources associated with the project. All levels of NEPA documentation require an evaluation of impacts to federally-listed species. The detail of the analysis will depend on the scope of the project, ecological importance and distribution of the affected species, and potential impacts of the project.\(^\text{13}\)

The NEPA and the ESA Section 7 “consultation” processes should interact in the early phases of the environmental analysis of a project. Statutory language and agency guidance\(^\text{14}\) indicate that interagency coordination and consultation should begin prior to or at the time of the release of the Draft Environmental Impact Statement (EIS) or Environmental Assessment. When the final EIS is issued, Section 7 consultation should be completed, and the NEPA Record of Decision (ROD) for an EIS should address the results of Section 7 consultation.

In recent years, many newsworthy examples of listed animal, plant and insect species have halted or delayed infrastructure development projects across the country.\(^\text{15}\) AGC contractors report that projects are delayed in breaking ground (or stopped mid-cycle) because ESA consultations (or FWS concurrence) must occur before the necessary environmental approvals, permits or permissions are granted. Notably, the “consultation” requirement is triggered if project “may affect” listed species (plants or animals) or designated critical habitat. The provision also applies with equal force to actions that either have not yet occurred or actions that may be near completion. For that reason, construction projects are frequently halted mid-way – at extraordinary cost – if a protected species is discovered that may be adversely affected.

Unfortunately, for large infrastructure projects (including those that are vital to clean water, safer roads and bridges and a more reliable energy system), the typical environmental approval scenario plays out as follows: extremely lengthy NEPA review process (1,679 days, on average, to complete and EIS), followed by protracted federal environmental permitting process (e.g., 788 days, on average, to obtain individual Clean Water Act Section 404 permit). What is more, inefficient bureaucratic processes are forcing the reevaluation of previously approved NEPA documents and decisions. Even a relatively minor modification to the project footprint may reopen environmental analyses. This invariably leads to excessive paperwork, duplicate consultation procedures and related inter-agency reviews, and inefficient project planning and construction phasing (due to, in the case of ESA, time-of-year restrictions relating to tree and brush clearing and species surveys).

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\(^\text{13}\) For example, a “categorical determination” (CE) through NEPA does not exempt any project from sufficient environmental analysis to determine the likely presence and potential impacts of the project on listed species, unless a programmatic determination to that effect has been made at the local level with the concurrence of the Fish and Wildlife Service/National Marine Fisheries Service (Services).


\(^\text{15}\) Media have reported on the desert tortoise in the Southwest, the northern spotted owl in the Pacific Northwest and the delta smelt on the West Coast. Plant species listed as endangered or threatened — such as running buffalo clover, which can be found in Indiana, Kentucky, Missouri, Ohio and West Virginia; or snow trillium, which can be found in 14 Midwestern states — also have caused significant impacts on development projects across the U.S. Even insects can be federally protected under the ESA. FWS recently proposed listing the rusty patched bumble bee (*Bombus affinis*) as an endangered species.
Reevaluations and Supplemental EISs

Prior to proceeding with major project approvals or authorizations, the lead agency generally seeks to ensure that the environmental documentation for the proposed action is still valid. In some projects, such as certain highway projects, a final EIS is only valid for up to three years following the last major approval. If no action to advance the project has occurred in the last three years, a written reevaluation is required. This may be a case where a project has been “shelved” due to lack of funding or simply put aside due to changes in statewide or regional priorities. The scope and breadth of the reevaluation generally is dependent on: the type and degree of public controversy, possibility or reality of litigation, and the original and anticipated types of environmental resources and project impacts.

A draft EIS or final EIS may need to be supplemented if an agency receives new information or a change is made regarding a project.

In practice, AGC members report that even minor changes or adjustments to the project design or location – such as small additions or changes to right-of-way, small temporary or permanent easements or drainage pond features to accommodate schematics – will trigger another round of lengthy coordination at the federal and state level and public review and possibly a supplemental EIS. It is common for the project limits, as defined during preliminary design and used to establish the NEPA project footprint, to be inadequate to accommodate all project aspects – such as drainage features, utilities and construction access. Therefore, minor changes to the NEPA footprint are required to construct the project. Because of the overarching fear of litigation brought by advocacy groups alleging noncompliance with NEPA’s procedural requirements, agencies are overzealous in producing a “litigation-proof” EIS. This attitude results not just in the over documentation of minor changes (that should not trigger NEPA), but it also impacts value engineering the contractor performs during a design-build procurement by stifling innovation of design changes capable of capturing larger cost savings.

Per FHWA regulations, under no circumstances may a private entity have any decision-making responsibility in the preparation of any NEPA document (23 C.F.R. § 636.109(b)(6)). After the NEPA process is complete, project sponsors may only accept alternative technical concepts (ATCs) if they do not conflict with the criteria agreed upon in the environmental decision-making process. (23 C.F.R. § 636.209(b)). This also is hindering project sponsors’ ability to take advantage of private sector innovation.

AGC recommends that Congress consider the following reforms:

- The completed NEPA documents and federal permit approvals should remain valid and in effect unless (or until) there is a material change to the scope of the project.
- Minor changes to a project should NOT result in reevaluation of the project under NEPA. De minimis impacts do not need a formal reevaluation, but could do a review with the owner to prove de minimis.

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16 Reevaluations are not required under NEPA (42 U.S.C. § 4321) or Council on Environmental Quality (CEQ) regulations (40 C.F.R. §§ 1500-1508). They are, however, required by the FHWA/FTA regulations at 23 C.F.R § 771.129. In cases of a draft EIS, where a final EIS has not been issued and where no action to advance the project has occurred in the last three years, 23 C.F.R. § 771.129 also requires a written reevaluation of the determination that the original document is still valid and formalizes the consultation between FHWA and a state DOT.

17 23 C.F.R. § 771.130.
The *de minimis* threshold could be based the definition of Section 4(f) properties codified in 49 U.S.C. § 303 and 23 U.S.C. § 138, as implemented by the Federal Highway Administration (FHWA) through the regulation at 23 C.F.R. § 774. (Also, amend FHWA regulations at 23 C.F.R. § 636109(b)(6) and 23 C.F.R. § 636.209(b) for the reasons outlined above.)

- For infrastructure projects previously analyzed under NEPA for the original construction, a streamlined process or CE should exist for repairs, upgrades or replacement.
- If unforeseen, undisclosed listed species or critical habitat are encountered during a construction project, the contractor should be allowed to manage and resolve the issue quickly through proactive mitigation efforts. (*Scenario 1: Ongoing multi-phased infrastructure project previously cleared with a Categorical Exclusion for upgrade and improvements; general contractor in second year of planning and permitting – ready to perform bridge work; Section 404 permit conditions re-evaluated to push work window into June 1 to Sept. 30 timeframe, based on species spawning; schedule not possible to meet and project at a standstill. Scenario 2: Site excavation and grading underway for large highway project; uncover shallow cave that is preferred habitat of a listed spider species; instructed to stop work for prescribed “wait period” to allow performance of biological studies and species surveys – including “baiting” to see if spider is in fact present.*)
- Conditions for species protection, mitigation plans, approved construction windows that limit the impact on species, and other related requirements should be included as part of the ROD in order to: streamline and provide consistency for permitting; facilitate agency coordination; and ensure that project limitations are realized by the owner and properly addressed by the contractor during bidding and scheduling.
- Project owners/operators (e.g., general contractors) in compliance with the required mitigation and protection measures should be protected from environmental enforcement action. See also AGC’s related recommendations above under “Mitigation.”
- Project funding should be available before a public sponsor initiates any environmental reviews or studies. Funding priority should be given to those projects that have completed environmental approvals.
- Federal environmental reviews and permitting processes for capital projects should be time-limited to avoid inefficiencies and costly delays.

**Federal Permitting**

Endangered species present tough permitting challenges for a considerable number of projects. ESA issues often arise late in the land acquisition, entitlement or construction process. The law is confusing and often misapplied, by both agencies and consultants.

As a threshold matter, and as clearly depicted on “AGC’s Flowchart of Environmental Approvals and Permits Applicable to Construction,” any construction project that requires a federal license, or permit, or approval, or that utilizes federal financial assistance, must comply with:

- NEPA
- ESA Section 7 Consultation
- National and Historic Preservation Act (NHPA)
- Coastal Zone Management Act (CZMA)
Redoing Permit Documentation and Analyses Wastes Time and Money

Time and money is wasted on redoing project analyses and review and on collecting duplicative information from permit applicants. Challenges with environmental documentation and permitting processes are root causes for delays on infrastructure projects. The environmental permit approval process generally entails sequential reviews by multiple agencies and various requests for project-specific information. Even though each agency has slightly different forms and different information requirements, some of the information (like project descriptions) is duplicated across applications. This means that there can be multiple forms requesting the same information in different ways.

AGC recommends the following reforms:

- The monitoring, mitigation and other environmental planning work performed during the NEPA process must satisfy federal environmental permitting requirements, unless there is a material change in the project.
- Implement an integrated “one-stop” permitting system by creating a single form that collects all information needed for major permits. That way, applicants only need to provide information once (and to fill out one long form and file it once);
- Also, build an online database of technical information (e.g., on distributions of endangered species, critical habitat, biological opinions or previous permit requirements) so that new information does not have to be gathered anew for every project operating in a similar watershed or geographic area;
- Allow environmental reviews to adopt material from previously completed environmental reviews from the same geographic area; and
- Require federal agencies to use regional- or national-level programmatic approaches for authorizations and environmental reviews for frequently occurring activities as well as those activities with minor impacts to communities and the environment.

Citizen Suit Reforms

Conservation organizations devote great effort toward ensuring that agencies adhere strictly to the requirements of the ESA, but such efforts can lead to litigation-driven agendas that divert available resources away from other, potentially more beneficial, conservation actions.

Ninety percent of the settlements federal agencies entered into with plaintiffs under ESA were with environmental groups. Environmentalists have been aggressively filing suits against FWS and NMFS for missing statutory deadlines under ESA Section 4. Two dozen environmental groups filed 79 percent of the 141 ESA deadline suits during fiscal years 2005 through 2015, according to a 2017 Government Accountability Office (GAO) report. The suits involved 1,441 species and cited a range of Section 4 actions, but most suits were related to missed deadlines for making findings on petitions to list or delist species as threatened or endangered. See also AGC’s related recommendations above - “ESA – Listing Process.”

AGC is increasingly concerned by reports that the citizen suit provisions in 20 environmental statutes are being used to challenge all types of projects, land restrictions and permit requirements relating to the projects. These lawsuits can take years to resolve and the delay not only impacts the ability to secure the necessary

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environmental approvals and the financing of the project, but – in far too many cases – impedes projects that are vital to the renovation and improvement of our nation’s municipal water supplies, wastewater treatment facilities, highway and transit systems, bridges and dams.

Citizen suit reforms are necessary to prevent their abuse. AGC recommends the following reforms:

- Further shorten and standardize the time limit on challenges to final NEPA RODs or claims seeking judicial review of an environmental permit, license or approval issued by a Federal agency for an infrastructure project;
- Require interested parties to get involved early in a project’s review process to maintain standing to sue later;
- Require bonds be posted by plaintiffs seeking to block activities to reduce abuse and delay tactics that harm private parties and taxpayers; and
- Require that the enforcement of federal environmental rules on a construction site be enforced only by trained staff of government agencies -or-
  - Limit citizen suit penalties to violations of objective, numeric limitations rather than subjective, narrative standards;
  - Extend “notice period” beyond the current 60 days (giving regulatory agencies more time to review notice of intent letters and initiate formal actions);
  - Clarify definition of “diligent prosecution” of alleged violations, thereby allowing federal/state authorities to exercise their primacy in enforcement and preventing unnecessary citizen suit intervention.

Thank you for your consideration of AGC’s recommendations. AGC is available to meet and discuss any of the issues identified above at the committee’s convenience and to provide further perspective on environmental streamlining.

Respectfully,

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19 MAP-21 reduced the time limit to 150 days after publication of a notice in the Federal Register announcing that a permit, license or approval is final, for parties to file lawsuits that challenge agency environmental decisions regarding surface transportation projects. However, the preparation and announcement of a “supplemental” EIS, when required, restarts to 150-day clock. As currently written, the FAST Act’s judicial review changes are limited and not likely to provide additional relief.