Written Statement of

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On behalf of

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to the

United States Senate

Committee on Environment & Public Works

For a hearing on

"Improving the Federal Environmental Review and Permitting Processes"

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The Associated General Contractors of America (AGC) is the leading association in the construction industry representing more than 28,000 firms, including America's leading general contractors and specialty-contracting firms. Many of the nation's service providers and suppliers are associated with AGC through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, levees, locks, dams, water conservation projects, defense facilities, multi-family housing projects, and more.

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I. Introduction

Chairman Capito, Ranking Member Whitehouse, and members of the Environment and Public Works Committee, thank you for the opportunity to testify. My name is Leah Pilconis, and I am the general counsel at the Associated General Contractors of America (AGC). AGC is the leading association in the construction industry representing more than 28,000 firms, including America's leading general contractors and specialty-contracting firms, many of which are small businesses. Many of the nation's service providers and suppliers are also associated with AGC through a nationwide network of 88 chapters. AGC contractors are both union and open shop and are engaged in the construction of the nation's commercial buildings, highways, bridges, tunnels, airports, transit systems, waterworks facilities, waste treatment facilities, levees, locks, dams, multi-family housing projects, and more.

As general counsel for AGC, I serve as a strategic advisor to the association's leadership on legal matters affecting the construction industry. I manage AGC's programs and services aimed at helping contractors mitigate business and operational risk in an evolving construction landscape – such as insurance coverage, contract administration, and safety, health, and environmental regulations. I collaborate closely with the vice president of government affairs on AGC strategy and respond to regulatory and legislative challenges affecting the construction landscape and oversee judicial advocacy efforts, including litigation in federal and state courts.

Infrastructure funding has historically been a major roadblock for infrastructure projects to break ground. Recent investments in infrastructure have largely appeased that concern, but we haven't seen an influx of major projects breaking ground, like we had hoped, in part due to environmental review and permitting delays.

Project delays caused by prolonged National Environmental Policy Act (NEPA) reviews, permitting, and litigation increase costs and harm the construction workforce by delaying job creation, disrupting hiring, and reducing economic activity.

- **Escalating Costs**: Delays increase labor and material costs, forcing contractors to reprice projects and potentially leading to cost overruns. Inflationary pressures and supply chain disruptions worsen the financial burden on both contractors and taxpayers.
- **Workforce Disruptions**: When projects stall, construction firms delay hiring or lay off workers, creating uncertainty for skilled tradespeople and harming local economies.
- **Lost Economic Benefits**: Delayed infrastructure projects slow down economic growth, particularly in regions where construction drives local economies. According to industry studies, every $1 billion spent on infrastructure supports roughly 13,000 direct and indirect jobs across various sectors.[1]
- **Litigation-Driven Delays**: Late-stage NEPA lawsuits halt projects that have already undergone years of environmental review. This results in wasted resources and discourages investment in public infrastructure.

AGC supports responsible reforms to the federal review and environmental permitting process that will reduce unnecessary delays and legal uncertainty in commercial construction and will still maintain environmental protections.

II. Continued Need for Environmental Review and Permitting Reform

NEPA[2] requires federal agencies to assess the environmental impacts of their major federal actions before making decisions. Over the last two decades, this committee demonstrated strong bipartisan leadership in modernizing and supplementing the NEPA review and corresponding permitting process, particularly for federally funded surface transportation projects, through the "Efficient Environmental Review for Project Decisionmaking and One Federal Decision"[3] provisions. Through landmark legislative efforts, including SAFETEA-LU (2005), MAP-21 (2012), the FAST Act (2015), and IIJA (2021), Congress has taken meaningful steps to improve efficiency while ensuring thorough environmental review.[4]

Additionally, through FAST-41 (Fixing America's Surface Transportation Act of 2015, Title 41),[5] this committee created a framework to enhance the coordination and transparency of the federal environmental review and authorization process for certain covered infrastructure projects across a broad range of sectors. While these reforms have been instrumental, FAST-41 remains voluntary,[6]

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[1] *See* American Society of Civil Engineers (ASCE) study analyzing the impacts of federal infrastructure investment.

[2] 42 U.S.C. 4321 *et. seq*.

[3] 23 U.S.C. § 139 (applies to "major [surface transportation and multimodal] projects" that require approval by the U.S. Department of Transportation.

[4] *See* Section 139 Environmental Review Process: Efficient Environmental Reviews for Project Decisionmaking and One Federal Decision Interim Final Guidance | FTA.

[5] 42 U.S.C. § 4370m *et seq*.

[6] 42 U.S.C. §§ 4370m-2(a)(1), (b)(2)(A)(ii). A project sponsor of a potentially "covered project" must file an "Initiation Notice" with "sufficiently detailed information" to be considered. Per OMB Guidance, the facilitating or lead agency will determine whether the project qualifies as a "covered project' only after it has sufficient information. Indeed, FAST-41 does not require the facilitating agency or the lead agency to take any action if a project sponsor does not voluntarily submit an Initiation Notice to initiate the process. *See* OMB and CEQ guidance Official Signed FAST-41 Guidance M-17-14 2017-01-13[1].pdf.

covering only about 30 covered projects at any given time,[7] while federal agencies prepare around 150 Environmental Impact Statements (EIS) annually.[8]

Building on this legacy, Congress enacted the Fiscal Responsibility Act (FRA) of 2023,[9] amending NEPA for the first time in nearly 50 years. These changes signal Congress's intent to extend provisions similar to those in IIJA (applicable only to surface modes) and FAST-41 (applicable to only certain covered infrastructure projects that opt into the voluntary program and the corresponding facilitating agencies) to all federal agencies assessing the environmental impacts of their proposed "major federal actions" (covering construction projects requiring federal approvals or funding).[10] These key reforms include the development of a unified project schedule and a single environmental document, imposing time and page limits, clarifying the scope of review and agencies' role, and narrowing key definitions.

However, gaps remain—particularly in the applicability of judicial review reforms. While Congress has taken important steps to limit litigation-driven project delays, these provisions do not apply broadly to all projects, leaving many infrastructure initiatives vulnerable to extended legal challenges. Expanding the scope of these existing reforms would provide greater certainty for project sponsors and further align the permitting process with Congressional intent.

Congress has taken meaningful steps to streamline environmental reviews and improve permitting efficiency through bipartisan reforms like the FRA and past measures under MAP-21, the FAST Act, and IIJA. However, federal agencies continue to introduce regulatory obstacles that conflict with congressional intent and delay critical infrastructure projects.

My testimony will outline <u>AGC's Call to Action</u> in which we are urging this Committee to:

- **Ensure NEPA implementation aligns with the FRA's reforms.**
- **Build on past judicial review reforms by broadening their applicability and increasing their utility.**
- **Expand the scope of permitting efficiencies, as outlined in the following pages.**

III. AGC's NEPA Reform Recommendations

For the construction industry, delays caused by NEPA reviews and environmental permitting create significant workforce challenges. Contractors rely on long-term project planning to maintain a stable workforce, but when projects stall, they must scramble to find alternative work for their employees—an especially difficult task for large projects requiring substantial labor. To safeguard jobs and keep critical infrastructure moving, AGC urges Congress to support an environmental permitting and approval process that enhances project certainty, minimizes litigation risks, and prevents unnecessary delays by:

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[7] *See* current FAST-41 portfolio online at https://www.permitting.gov/projects/current-fast-41-portfolio.
[8] *See* Environmental Impact Statement Timelines (2010 - 2018).
[9] The Fiscal Responsibility Act of 2023 amended NEPA section 102(2)(C) and added sections 102(2)(D) through (F) and sections 106 through 111 (42 U.S.C. 4332(2)(C)-(D), 4336-4336e).
[10] NEPA only applies when a proposed action is a "major federal action." Congress has redefined this term to mean an action that the agency carrying out the project "determines is subject to substantial Federal control and responsibility."

- **Preventing Regulatory Fragmentation** – Statutory clarity is needed to prevent agencies from adopting inconsistent NEPA rules, which could delay infrastructure projects requiring approvals from multiple agencies. Courts would have to try to harmonize based on their interpretations of the statute in a post-Chevron environment.
- **Aligning Environmental Reviews with Congressional Intent** – The FRA sought to streamline NEPA review and permitting, and Congress should provide oversight to prevent future regulatory agency overreach and reinforce the FRA's intent to prevent delays.
- **Establishing a Uniform Judicial Review Period** –Time-limited legal challenges are needed to prevent lawsuits from derailing approved projects.
    - *Expand and Automatically Apply the 150-day Limit to All Critical Infrastructure Projects*
    - *Eliminate the Statute of Limitations (SOL) Notification Requirement*
    - *Further Expand FAST-41 Protections to Prevent Litigation Delays on Surface Transportation Projects*
    - *Corner Post: The Need for NEPA Finality*
- **Making Permitting Reform a Durable Bipartisan Legislative Solution** – Regulatory clarity and consistency are powerful streamlining tools. Agencies must be bound by clear statutory requirements (i.e., durable bipartisan legislative solutions) rather than executive actions and discretionary guidance that can shift with each administration. Congress can further streamline the Clean Water Act (CWA) section 404 permitting process by facilitating faster approved jurisdictional determinations, codifying key (and bipartisan) exemptions, protecting and strengthening CWA general permits, limiting excessive mitigation requests, and encouraging innovative mitigation solutions.

a. Prevent Regulatory Fragmentation

Two recent court rulings—*Marin Audubon Society v. FAA*[11] and *Iowa v. Council on Envtl. Quality*[12]—found that the White House Council on Environmental Quality (CEQ) lacks rulemaking authority, with the *Iowa* decision vacating the 2022 NEPA regulations. Additionally, President Trump's recent executive orders revoked prior authority and directed CEQ to issue new guidance instead of regulations, further complicating the process.[13]

With judicial scrutiny increasing, especially with the Supreme Court[14] set to rule on a key NEPA case and the loss of *Chevron* deference,[15] the need for Congressional action is urgent to provide clarity and maintain an efficient and reliable environmental review and permitting framework. Otherwise, infrastructure projects could face inconsistent and unpredictable environmental approval processes, increasing costs and discouraging investments in critical infrastructure projects. **AGC urges**

[11] No. 23-1067 (D.C. Cir. 2024) (the court ruled that CEQ lacked authority to issue regulations binding on other federal agencies). The D.C. Circuit denied the petition on Jan. 31, 2025, from the Biden Administration and various environmental groups seeking *en banc* review of the *Marin Audubon* decision.
[12] 1:24-cv-089 (D.N.D. Feb. 3, 2025) (vacating the Biden administration's Phase 2 NEPA rule, finding that NEPA does not authorize CEQ to issue binding regulations; however, the court did not rule on the legality of CEQ's rules issued prior to Phase II).
[13] Trump, D. J., *Unleashing American Energy*, Exec. Order (Jan. 20, 2025); Revocation of Exec. Order No. 11991, *Relating to the Protection and Enhancement of Environmental Quality* (May 24, 1977).
[14] *Seven County Infrastructure Coalition v. Eagle County*, No. 23-975 (argued Dec. 10, 2024).
[15] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

Congress to provide clarity and efficiency in environmental reviews, ensuring projects are not derailed by shifting agency rules, litigation, or unnecessary bureaucracy.

b. Align Environmental Reviews with Congressional Intent

The most recent round of CEQ's regulations implementing NEPA directly conflicted with the FRA—landmark legislation passed by Congress in 2023, and supported by many members of this committee, to streamline environmental reviews and reduce permitting delays.[16]

AGC strongly supported the FRA provisions, which include:

- Established hard deadlines, page limits on reviews for *all types of construction projects* and streamlined processes that allow agencies to use another agency's categorical exclusion.
- Narrowed litigation exposure, requiring agencies to assess only "*reasonably foreseeable* environmental effects" of a proposed project, thereby abandoning the current practice to document and consider any environmental effects, no matter how remote or speculative.
- Improved review process by ensuring federal agencies need only consider and defend a "*reasonable range* of alternatives" to a proposed project that are "*technically and economically feasible*" instead of any possible alternatives, no matter how implausible.

By codifying these reforms, Congress made clear its intent to cut red tape, improve permitting efficiency, and accelerate all critical infrastructure projects. In May 2024, CEQ finalized its "NEPA Implementing Regulations Revisions Phase 2" rule,[17] which ran counter to the FRA's intent and, conversely, introduced "innovative approaches to NEPA" that directed reviews toward the Biden administration's priorities of climate change and environmental justice. A federal district court vacated these regulations on February 3, 2025,[18] reinforcing the importance of ensuring that agency rulemaking aligns with Congressional intent.

Congress must provide oversight to ensure that NEPA implementation aligns with the FRA's intent. Congress should hold CEQ and the federal agencies accountable for adhering to the law, prevent future regulatory overreach, and consider additional legislative or oversight measures to reinforce NEPA reforms and prevent further permitting delays.

c. Establish a Uniform Judicial Review Period

Citizen suits under NEPA are increasingly used as obstruction tactics rather than tools for environmental protection.[19] Although NEPA contains no provision for judicial review, courts allow

[16] Fiscal Responsibility Act of 2023, P.L. 118-5; CEQ NEPA implementing regulations, 40 C.F.R. §§ 1500–1508. CEQ and agency-specific NEPA regulations are subject to change by the executive branch and are generally reviewable in the courts under the APA.

[17] 89 FR 35442 (May 1, 2024).

[18] *Iowa v. Council on Envtl. Quality,* see footnote 12.

[19] *See* The Breakthrough Institute's report, "Understanding NEPA Litigation" (July 2024), that analyzes 387 NEPA cases brought to the U.S. appellate court system over the 2013-2022 period. According to the report's Executive Summary, "NEPA litigation overwhelmingly functions as a form of delay, as most cases take years before courts ultimately rule in favor of the defending federal agency." Between 2013 and 2022, NEPA appeals court cases increased 56% over the rate from 2001 to 2015. On average, 4.2 years elapsed between publication of an environmental impact statement or environmental assessment and conclusion of the

plaintiffs to challenge agency compliance with NEPA by filing challenges under the Administrative Procedure Act (APA). Claims arising under the APA are subject to a six-year statute of limitations[20] which allows project opponents to file litigation long after the agencies' environmental reviews are complete. For construction, the uncertainty and delay caused by lengthy judicial review timelines drive up project costs, stall job creation, disrupt the construction workforce, and hinder economic growth by jeopardizing critical infrastructure investments.

AGC appreciates this committee's reforms which imposed a 150-day time limit on lawsuits challenging environmental approvals for highway or transit projects,[21] but asserts that it should apply to all critical infrastructure projects. Certain projects across other eligible infrastructure sectors may opt into a two-year time limit under FAST-41.[22] As explained in Part II above, only the handful of "covered projects" apply for and obtain FAST-41 coverage to take advantage of the enhanced legal protections. The Water Resources Reform and Development Act of 2014 established a three-year statute of limitations for judicial review of any permits, licenses, or other approvals for water resources development project studies.[23] However, most projects remain subject to a six-year statute of limitations under the APA, exposing them to prolonged legal uncertainty.

AGC urges Congress to establish a clear, consistent, and reasonable time limit for filing lawsuits after a project has received necessary environmental approvals. AGC also recommends reforms to eliminate procedural paperwork steps that are creating uncertainty and unnecessary delay.

- **Expand and Automatically Apply the 150-day Limit to All Critical Infrastructure Projects** – Instead of requiring project sponsors to opt into a shorter litigation window by filing paperwork,[24] Congress should establish a clear and automatic 150-day time limit for all projects receiving federal environmental approvals, not just highways and transit. This would ensure consistency across infrastructure sectors and prevent lawsuits that arise long after agencies have completed environmental reviews.

- **Eliminate the *SOL Notification* Requirement and Make it Automatic** – Currently, the 150-day time limit applies only if the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), or Federal Railroad Administration (FRA) publishes a "statute of limitations (SOL) notification" in the *Federal Register* announcing that a Federal agency environmental permit, license, or approval is final. This extra step is unnecessary, creates procedural uncertainty, and adds paperwork and complexity to the process. Each DOT agency has developed different processes for implementing the SOL provision. There

corresponding legal challenge at the appellate level. NGOs instigated 72% of the total challenges; agencies won about 80% of challenges.

[20] 28 U.S.C. § 2401.

[21] The 150-day statute of limitations under 23 U.S.C. § 139(l) was enacted as part of the Moving Ahead for Progress in the 21st Century Act (MAP-21) in 2012. This provision applies specifically to surface transportation projects, including highway and transit projects, and was intended to streamline the environmental review process under NEPA by limiting the timeframe for legal challenges to project "approvals."

[22] 42 U.S.C. § 4370m-6 (Litigation, judicial review, and savings provision).

[23] 33 U.S. C. § 2348(k).

[24] FAST-41 is a voluntary program for qualifying infrastructure projects; project sponsors must apply for and obtain FAST-41 coverage for their projects, see footnote 6.

is evidence to suggest that agencies are already disregarding this requirement in order to mitigate risk.[25] Congress should eliminate this requirement and apply the 150-day limit automatically.

By expanding the 150-day statute of limitations and removing procedural hurdles, Congress can provide the predictability needed for infrastructure projects to move forward without years of legal uncertainty. These reforms would align with broader efforts to modernize environmental permitting, reduce litigation abuse, and support economic growth and job creation. For construction, it would ensure that once a project is approved, it is not subject to years of legal uncertainty.

i. *Further Expand FAST-41 Protections to Prevent Litigation Delays on Surface Transportation Projects*

While FAST-41 provides important safeguards against litigation delays—*i.e.*, restricts the types of claims that can be raised and factors the courts must consider when deciding whether to halt a project under judicial review—its benefits are limited to projects that voluntarily opt in and successfully obtain coverage. Notably, these limits on litigation do not apply to highway and public transportation projects under the U.S. Department of Transportation (DOT). This means that most critical infrastructure projects—including highway and public transportation capital projects—do not benefit from FAST-41's stricter limits on lawsuits.

AGC supports expanding FAST-41's litigation protections to all critical infrastructure projects to prevent unnecessary legal delays. Specifically, AGC urges Congress to:

- **Require challengers to raise concerns early** – Under FAST-41, lawsuits must be based on issues that were raised with "sufficiently detailed comments" during the environmental review process. This ensures that stakeholders engage during project planning rather than using litigation as an after-the-fact obstruction tactic. Expanding this requirement to all critical infrastructure projects would reduce surprise lawsuits that stall approved projects.
- **Ensure courts consider economic impacts** – FAST-41 directs courts to weigh economic harm, including job losses, before issuing preliminary injunctions that could stop a project. Extending this protection to all critical infrastructure sectors would help prevent unnecessary delays in delivering major projects.

Expanding these proven litigation safeguards beyond FAST-41's voluntary, limited framework would provide greater certainty for all infrastructure projects, ensuring they can move forward without unnecessary legal obstacles.

[25] The DOT's Interim Guidance for the sec. 139 Environmental Review Process cautions its components "to consider the context, scope, and level of controversy surrounding the project, among other factors, when deciding whether to publish an SOL Notice." The guidance gives each FHWA Division Officer the authority to decide whether or not to comply with the requirement. *See* Appendix C – "The FHWA Division Offices must work closely with their FHWA field legal counsel *to determine whether and when* to publish a SOL notice.... Each FHWA Division Office *determines whether publication of the SOL notice is the best* course in light of all factors affecting the project."

ii. *Corner Post*: *The Need for NEPA Finality*

In *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*,[26] the U.S. Supreme Court ruled that the six-year statute of limitations for challenges under the APA begins not when an agency takes "final action" on the project authorization but when a plaintiff first experiences harm from that action. In fact, a plaintiff does not even need to have existed at the time a decision was made. Under this ruling, when you create a new company, non-profit, or interest group, you get six years to challenge any agency decision that impacts your goals.

Both the holding and opinion create uncertainty that "hinders the ability of businesses to plan effectively" and reinforces the need for clear finality in environmental reviews and permitting. If courts apply *Corner Post* broadly,[27] new plaintiffs could potentially challenge NEPA-related analysis or actions, like EISs or environmental assessments (EA) years after the final Record of Decision is published in the *Federal Register*.[28] This increases the legal risk for contractors, as projects could be delayed indefinitely.

Contractors rely on the finality of NEPA-related action before starting work. **AGC strongly supports Congressional action to ensure finality in environmental approvals by:**

- **Applying a firm 150-day legal challenge deadline to NEPA reviews, as outlined above.**
- **Restricting lawsuits to those who raised concerns during the environmental review process, as outlined above.**
- **Preventing last-minute injunctions that halt projects already underway.**

Allowing litigation to disrupt fully approved projects undermines regulatory certainty, wastes taxpayer dollars, and jeopardizes jobs. Worse still, granting injunctive relief for projects already under construction creates unnecessary risk and delays. Congress must act to protect the taxpayers who benefit from infrastructure projects from indefinite legal challenges.

d. The Impact of NEPA-Related Litigation Delays on Infrastructure Projects: Delays, Costs and Workforce Disruptions

Despite years of effort to streamline the process, NEPA has led to long protracted legal challenges that delay critical infrastructure projects and stifle economic development. The data and real-world project impacts highlight these challenges.

According to the Biden administration's CEQ analysis, median EIS review times improved to 2.2 years, down from 3.1 years in the first Trump administration. However, this data ignores the

[26] 603 U.S. 799 (2024) (an APA claim does not accrue for purposes of § 2401(a)'s 6-year statute of limitations until the plaintiff is injured by final agency action; NEPA uses the same statute of limitations provision).
[27] Dicta suggests the holding might be limited to ultra vires claims. In response to the government's policy concerns that the holding would expose agencies to a flood of litigation on long-standing rules, the majority noted that "the "Board's policy concerns are overstated because regulated parties may always challenge a regulation as exceeding the agency's statutory authority in enforcement proceedings against them."
[28] The *Corner Post* decision specifically applies to lawsuits brought under the Administrative Procedure Act (APA), which governs challenges to federal agency rules. The ruling does not directly impact lawsuits under the Clean Water Act (CWA), for example, because that statute has its own judicial review provisions, including specific statutes of limitations and deadlines for filing legal challenges.

growing number of NEPA lawsuits, which can add years to already-reviewed projects. Once an agency prepares an EA or EIS, interest groups and other stakeholders can initiate litigation under NEPA to challenge the adequacy of the agency's review.

A report from the Breakthrough Institute, *Understanding NEPA Litigation*,[29] found that an average of 4.2 years elapsed from when an environmental review was published to when a legal challenge of a project was resolved at the appellate level. Per a review of appeal cases contesting EAs and EISs between 2013 to 2022:

- Energy projects faced an average 1,415-day delay before appeals were resolved.
- Infrastructure projects saw an average 1,250-day delay.
- NEPA litigation added nearly four years to energy development projects—including both clean and traditional energy sources.

Court challenges to NEPA are on the rise. From 2013 to 2022, circuit courts experienced a 56 percent increase in NEPA appeals cases annually in comparison from 2001 to 2015, according to the Breakthrough Institute's report. According to CEQ's NEPA Litigation Surveys covering the 2001 to 2013 time period, an average of 115 new NEPA cases were filed annually.[30]

While NEPA aims to ensure community input, special interest groups have increasingly weaponized it to block projects. The Breakthrough Institute reports that 72.1 percent of NEPA appeal cases originate from non-governmental organizations (NGOs). Despite branding themselves as environmental litigation experts, these NGOs succeed only 26 percent of the time. According to the report's Executive Summary, "NEPA litigation overwhelmingly functions as a form of delay, as most cases take years before courts ultimately rule in favor of the defending federal agency."

See the appendix to this testimony for an AGC-prepared list of projects stalled by litigation related to environmental reviews and approvals.

AGC maintains that reforming NEPA litigation is critical to keeping infrastructure projects on track and protecting American jobs.

IV. AGC's CWA Permitting Reform Recommendations

a. Fully Implement the Sackett Ruling on the Definition of "Waters of the United States" (WOTUS)

Congress and the new administration should embrace this opportunity to resolve the endemic regulatory uncertainty over federal jurisdiction over waters. The CWA grants the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) jurisdiction over "navigable waters," defined in the act as "Waters of the United States" (WOTUS) without further clarification. For decades, federal agencies and courts have struggled to define WOTUS, determining which waters fall under federal versus state and local control. The ability to obtain CWA section 404 permits required for construction activities in WOTUS is critical to the completion of the private and public infrastructure that forms the literal

[29] The Breakthrough Institute's report, "Understanding NEPA Litigation" (July 2024), that analyzes 387 NEPA cases brought to the U.S. appellate court system over the 2013-2022 period.
[30] *See also* National Environmental Policy Act: Judicial Review and Remedies, Congressional Research Service, (September 2021).

foundation of the nation's economy. Section 404 is a single permit, but it encompasses several other authorizations in a timeline of review: The Corps routes the permit applications to numerous other agencies for review and comment. Section 404 is second only to NEPA as a roadblock in the environmental approvals and permitting of infrastructure projects. Federal jurisdiction over a waterbody triggers all CWA programs (not just dredge and fill/wetlands permits) and imposes costly, time-consuming permitting and management requirements on construction sites—including mitigation.

The last four administrations have issued multiple, divergent definitions of WOTUS and guidance, causing significant regulatory uncertainty for projects and impacting contractors' ability to plan and execute their work efficiently. The Biden administration's initial effort greatly expanded federal reach over waters and wetlands, relying on the "significant nexus test" to assert federal jurisdiction over almost any wet area. Notably, both chambers of Congress rejected this rule. Then a U.S. Supreme Court decision (May 25, 2023, *Sackett v. EPA*) struck down the significant nexus test and stated that the CWA does not extend to all wetlands and ephemeral features. The Justices clarified that isolated water features, non-adjoining wetlands, and ordinarily dry features are not WOTUS. A few months later, the agencies released a "conforming" version of the rule. The conforming rule failed to fully implement Sackett, nor did the agencies address the initial rule's broader legal flaws. They also did not solicit public feedback on their revisions. The conforming rule continues to impose an overly broad interpretation and, in its implementation, relies on case-by-case analysis and decisions, creating widespread confusion. As a result of litigation from AGC and others, the conforming rule is on hold in 27 states.

AGC urges Congress to facilitate a CWA section 404 process that enhances project certainty, minimizes litigation risks, and prevents unnecessary delays by providing oversight and support of the following agency actions:

- **Fully align the conforming rule with the U.S. Supreme Court decision in *Sackett*.** The rule remains unlawful. Contractors must be given a seat at the table in the drafting of a truly durable definition of WOTUS, which AGC encourages the current administration to do. Congressional collaboration and support of this effort would strengthen the resulting definition and help it endure through future administrations.
- **A clear, predictable, and enduring definition of WOTUS will reduce risk of non-compliance.** Congress can impress upon the agencies the importance of issuing a rule that provides the requisite certainty for compliance with the law without fear of shifting agency interpretations. In addition to significant project delays and costs, contractors could face fines and jail time if they "guess wrong" about the need for a federal permit to cover a ditch or even an unassuming, dry patch of land on their project. The Justices recognized the imperative for regulatory certainty in the *Sackett* case and raised "serious vagueness concerns" that implicate due process requirements for penal statutes like the CWA.[31]
- **Limit the case-by-case analysis and guesswork that exposes contractors to regulatory ambiguity.** The Biden administration regulated WOTUS through guidance by elevating some project permits for extensive review and releasing field memos describing their reasoning. However, applicability remains unclear, because all the rationale was specific to

[31] *See* U.S. Supreme Court, *Sackett v. EPA* (2023). "[T]he EPA's interpretation gives rise to serious vagueness concerns in light of the CWA's criminal penalties, thus implicating the due process requirement that penal statutes be defined 'with sufficient definiteness that ordinary people can understand what conduct is prohibited.'" Available online at: https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf.

the project at hand. This practice leaves stakeholders wading through unclear regulations and then analyzing scenario-based memos for clues on whether their project can move forward. AGC encourages the Trump administration to withdraw these field memos. Congressional oversight is necessary to help federal agencies avoid regulating through guidance.

b. Further Opportunities to Streamline the Permitting Process

Unraveling the regulatory confusion related to WOTUS is only part of the solution. AGC and its members have identified opportunities to streamline the section 404 permitting process itself.

- **Facilitate the issuance of Approved Jurisdictional Determinations (AJDs).** AGC members are reporting that the Corps is not providing AJDs in a timely manner, which results in projects instead pursuing the more expensive option of a Preliminary Jurisdictional Determination (PJD) to advance the project. By moving ahead with a PJD, the project team assumes that the federal government has jurisdiction and acts accordingly. Fully implementing the *Sackett* decision will go a long way in reducing delays in obtaining AJDs and reduce the need for PJDs. Furthermore, Congress should explore and encourage innovative approaches, such as allowing approved consultants to make determinations, thereby reducing some of the administrative burden on agency staff. The Corps could vet the consultants and audit their determinations to ensure compliance.
- **Codify key exemptions.** Multiple administrations under both political parties have recognized the importance of exempting certain features from CWA jurisdiction under the section 404 program, for example, the prior converted cropland and wastewater exemptions. Most important to the construction industry are exclusions specific to: roadside ditches and other components of a municipality's storm sewers; stormwater features such as retention/detention ponds; and water filled depressions such as those caused by the use of construction equipment. The wording of the exemptions may have varied by administration, but the exemptions themselves have proved useful to retain. Congress should codify key exemptions to provide regulatory stability and ensure that these exemptions remain available for future projects.
- **Protect and strengthen general permits.** The general permit used for routine activities with minimal environmental impacts is a current streamlining tool. Nonetheless, the utility of these general permits (of all types) is limited due to ever-increasing requirements that reduce their effectiveness and do little to protect the permittee from regulatory risk. Over the years, more requirements have been added to the section 404 general permits (called Nationwide Permits or NWPs) through pre-construction notifications (PCNs) or conditions placed on the permit by a state within the CWA section 401 process. For another example, stormwater general permits under CWA section 402 are seeing increases in requirements, monitoring, and sampling. Regulators are also inserting ambiguous language into stormwater permits that introduce risk to permittees and threaten the CWA permit shield.[32] Congress should reaffirm

[32] *See* U.S. Supreme Court docket for the *City and County of San Francisco v. EPA*, available online at https://www.supremecourt.gov/docket/docketfiles/html/public/23-753.html. Arguments heard Oct. 16, 2024. AGC submitted an amicus brief challenging a lower-court decision allowing generic prohibitions in federal water discharge permits, which remove "permit shield" protections.

the need for general permits as a streamlining measure, protect the CWA permit shield, and ensure that the utility of these permits remains intact.

- **Curtail agency use of mitigation as a penalty for economic investment.** The Federal agencies are incorporating mitigation into all types of permitting. Under the Biden administration's rules, NEPA factored mitigation for climate and environmental justice, mitigation for species is now considered a "reasonable and prudent measure," stormwater permits may include mitigation for environmental justice, and CWA section 404 permits (and increasingly in the Nationwide Permits) have long included some measure of compensatory mitigation. State agencies are following suit for state waters (and climate) and adding high mitigation ratios for projects. An AGC member shared that mitigation for an acreage with dry washes that had not seen water in decades cost about $400,000 on one project in the arid West. One strategy that provides for reasonable mitigation while limiting abuse is to establish a maximum expenditure for federal reimbursement of mitigation costs. For example, Congress could limit federal funding to only cover federally required mitigation. There is precedence for mitigation constraints: U.S. DOT limits reimbursement for some environmental restoration or pollution abatement.
- **Address the mitigation credit shortage that delays projects.** AGC has been raising concern for years that mitigation banks are not sufficient to meet the demand and permittee responsible mitigation can be very costly. The extra layers of mitigation imposed by the prior administration only further strained available resources. In a recent report, U.S. DOT highlights the lack of mitigation credits as one of the challenges to their projects obtaining a timely CWA section 404 permit. Reasonable mitigation measures for projects, limiting reimbursements, as well as fully implementing the *Sackett* decision will all help control costs and alleviate shortages in the banking markets. Congress should also foster agency adoption of innovative mitigation solutions to make credits more accessible to projects.

V. Conclusion & Call to Action

Congress has taken meaningful steps to streamline environmental reviews and improve permitting efficiency through bipartisan reforms like the FRA and past measures under MAP-21, the FAST Act, and IIJA. However, federal agencies continue to introduce regulatory obstacles that conflict with Congressional intent and delay critical infrastructure projects. **I would like to reiterate AGC's Call to Action and urge this Committee to ensure NEPA implementation aligns with the FRA's reforms, build on past judicial review reforms by broadening their applicability and increasing their utility, and expand the scope of permitting efficiencies, as outlined above.**

I thank the Committee for the opportunity to testify today and appreciate its continued efforts to help improve our nation's infrastructure by enacting policies that create good-paying jobs in America. I look forward to answering any questions you may have.

Appendix

Case Studies: Projects Stalled by Litigation Related to Environmental Approvals

In August 2017, the Central Maine Power Company issued a Notice of Intent with the Maine Department of Environmental Protection to construct the **New England Clean Energy Connect** (NECEC), a new clean power electric transmission line from Quebec to Massachusetts, delivering hydropower to 1.2 million homes. After three years of environmental review, the project was set to move forward. Unfortunately, it was stopped after a lawsuit was filed by the Sierra Club, Natural Resources Council of Maine, and Appalachian Mountain Club targeting its NEPA-required environmental assessments. While the lawsuit was unsuccessful, it held the project up for five months and led to the environmental groups creating a ballot initiative and legal appeals to stop the project, which slowed it even more. After a Maine court found the ballot initiative unconstitutional, the project was finally able to move forward after 21 months of delays and over 50 percent more in costs than initially expected. The legal logjam to get this energy project off the ground shows how protracted NEPA has become and how it can be used to enact a veto on national infrastructure.

The **SunZia Energy Transmission** project in Arizona ($10 billion) fought a legal challenge from tribal and environmental groups. A U.S. district judge dismissed the challenges in 2024. The project, 15 years in the planning stage, will deliver wind energy through a network stretching from New Mexico to Arizona. The draft EIS was completed in 2012; however, the Bureau of Land Management (BLM) approved the project with a final EIS in 2023. The project will create 2,000 construction jobs.

BLM approved another green energy transmission project, **Sunrise Powerlink**, in San Diego County in 2009, which faced challenges beginning in 2010. It was still facing legal challenges even after it had been completed in 2012. Planning for that project started well before its 2005 application to the Public Utilities Commission for the State of California—some argue it began in the 1980s with multiple stalled efforts and challenges. The eventual project delivered power to over 650,000 homes and funded over 580 residential rooftop solar installations.

Delays extend beyond the renewable energy examples listed above. Some projects end up being stuck in legal reviews for decades. For example:

- The **Cape Wind project**, which would build a wind farm in the Nantucket Sound of Massachusetts, began in 2001 and suffered many permitting and legal challenges, lease rights for the site were terminated in 2017 following the difficult legal challenges.
- The **Regional Connector in Los Angeles**, an underground light rail transit loop, was first envisioned in 1984. The project's environmental reviews were completed in 2010, but construction was delayed by lawsuits. After prevailing in court, the project finally opened in the summer of 2023.
- The **Illinois Tollway Authority, I-355**, Southern Extension, 12.5 miles of four-lane toll road, was delayed for years because of lawsuits. The project ultimately opened on Veterans Day, 2007, eighteen years after the state General Assembly initially authorized studying the extension.

- The **US 99 Grand Parkway Segments** E, F, and G, 55 miles of four-lane toll road on a new location in northwest **Houston**, took 15 years to complete NEPA, which included an EIS, Supplemental EIS, FEIS Revaluation, and was litigated and blocked from construction due to a court injunction. The roadways were completed in 2016.
- The **Hudbay Rosemont Mine in southern Arizona** was delayed by about 15 years by lawsuits and suspension of permits. It's now on hold, waiting for appeal.
- Rebuilding a portion of **I-70 in Denver** was delayed for years via NEPA challenges, with construction finally starting in 2018 and completed in 2023.
- Planning began in 2012 on a **light-rail expansion in Federal Way in Seattle, WA**; citizen issues delayed the project, and construction just started in 2019. The project is nearly complete, with testing underway and the projected opening slated for 2026.
- The permitting process for a **desalination plant in San Diego** lasted almost 10 years and suffered 14 legal challenges. The project overcame the legal battles and opened in December 2015.
- **Raising the roadway of the Bayonne Bridge** took a five-year approval process due to challenges with its environmental assessment. While the project was expected to be completed by June 2017, it was not reopened until May 2019.
- In **Denver, a new water storage facility** began its process in 2003. The EIS took almost 10 years. The permit was signed in 2017, and the project is still tied up in legal review. In December 2024, environmental activists pushed for the U.S. District Court to file an injunction to halt work on the project.
- **Reconstruction of the Wisconsin Zoo Interchange** near Milwaukee began in the early 2000s but was held up for new bus routes, finally resolved in 2014. The project was completed in November 2023.
- In **Little Rock, work on I-630** was able to proceed after a challenge to its environmental review because it would not extend outside of the existing right-of-way. An injunction was denied in 2019, and the project was completed in 2020.
- Another project in **Little Rock, I-30 Crossing Project**, was also threatened by an environmental lawsuit. Planning for the project initially began in 2014, while legal reviews questioning its environmental assessments delayed the final completion until December 2024.