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U.S. Environmental Protection Agency  
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National Center for Environmental Economics Office of Policy  
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Washington, DC 20460

RE: Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process; Advanced Notice of Proposed Rulemaking, 83 Fed. Reg. 27524 (June 13, 2018)  
**Docket ID No. EPA-HQ-OA-2018-0107**

To Whom It May Concern:

The Associated General Contractors of America (AGC) submits these comments in response to the U.S. Environmental Protection Agency's (EPA) [advance notice of proposed rulemaking](#) (ANPRM) seeking input on how EPA can better use cost-benefit analysis in the rulemaking process, consistent with applicable statutes.

AGC has long advocated for EPA programs that are cost-effective, flexible, based on sound science and capable of achieving their intended objectives. AGC supports action that would increase the consistency and transparency of EPA's cost-benefit analysis, across rulemakings from different program offices with different statutory authorities, to improve the quality and effectiveness of federal rules and minimize burden.

As discussed further below, EPA regulations account for most of the annual estimated benefits and costs of all major federal regulations. Construction activities are [extensively regulated by EPA](#). AGC routinely comments on regulations and permits and provides data and related information aimed at balancing business and economic interests with the nation's environmental concerns – keeping an eye out for opportunities to streamline requirements and reduce regulatory burdens. With tens of thousands of new federal regulations, interpretive guidance and agency policy issued over the last decade, there are numerous examples of inconsistency and lack of transparency in how the EPA has considered and determined costs and benefits in the regulatory process.

In the sections that follow, AGC provides a few examples of specific regulatory actions that were met with strong industry objections because: the costs significantly outweighed the benefits that the regulation purported to provide; the regulatory impact analysis was performed with incomplete or inaccurate data (studies, models, science, etc.); the analytical approach heavily relied on non-quantified or indirect benefits (e.g., tons of pollution avoided; “ancillary or co-benefits” that are orders of magnitude higher than the direct benefits) as a basis for justifying tighter controls; or the baseline assumptions about industry practices were outdated or ill-informed. AGC is available to meet and

discuss any of the issues identified below at EPA's convenience and to provide its perspective on improvements to EPA's programs that influence and impact the environmental review and permitting processes for construction work.

## **A. Introduction**

AGC represents more than 26,000 members—the largest commercial construction trade association—through a network of over 90 chapters in 50 states, the District of Columbia and Puerto Rico. Our commercial construction firms are engaged in building, heavy, civil, industrial, utility and other construction for both public and private property owners and developers. Collectively, AGC member firms build much if not most of the nation's public and private infrastructure.<sup>1</sup>

EPA, states and localities heavily regulate construction site stormwater runoff, dredge and fill activities in U.S. waters and wetlands, oil and chemical storage and spills, air emissions, lead and asbestos handling/abatement, and solid/hazardous waste storage and disposal. Construction practices may also be subject to rules on hazardous substances (Superfund liability), historic properties, coastal zones, vegetation and habitat protection, indoor air quality, energy and equipment use, as well as requirements resulting from the National Environmental Policy Act (NEPA) processes. In addition to these (and other) strict and abundant requirements, public and private project owners often ask contractors to employ "green" construction practices such as materials recycling and reuse, and voluntary diesel retrofit of their off-road construction equipment. See AGC's Flowchart of Environmental Approvals and Permits Applicable to Construction – Attachment 1.

## **B. Cost-Benefit Analysis and Environmental Regulations**

Looking back over the last decade, EPA has issued the most and the costliest regulations by a wide margin, when compared to other federal agencies.<sup>2</sup>

The most extensive and broadly applicable of the regulatory analytical requirements (e.g., cost-benefit analysis) are in Executive Order (EO) 12866 and the Office of Management and Budget (OMB) Circular A-4. EO 12866 on Regulatory Planning and Review generally directs federal agencies, including

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<sup>1</sup> While AGC members rarely build single family homes, they are regularly engaged in the construction of all other improvements to real property, whether public or private. These improvements include the construction of commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing development.

<sup>2</sup> See March 2017 [U.S. Chamber of Commerce report](#) – "Taming the Administrative State: Identifying Regulations That Impact Jobs and the Economy." According to the Office of Management and Budget (OMB) 2017 draft [report to Congress](#), from fiscal years 2006 through 2016, EPA's regulations account for the majority of the estimated benefits and costs of major federal regulations (with numbers nearly four times as high as those recorded for other federal agencies. See also a May 2017 report by the [Competitive Enterprise Institute](#), "[Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State](#)," which estimates the burden of federal regulations on the American public reached a record \$1.9 trillion in 2016.

EPA, to assess the economic effects of their “economically significant rules”<sup>3</sup> by preparing detailed regulatory-impact analyses (RIA) for the Office of Information and Regulatory Affairs (OIRA) to review. EO 12866 directs EPA to impose requirements “in the most cost-effective manner to achieve the regulatory objective” and “only upon a reasoned determination that the benefits of the intended regulation justify its costs.” Many of the key terms are not defined and have largely been left to agency discretion, often resulting in substantial disagreements during rulemaking.<sup>4</sup>

OIRA and EPA have improved their best-practice guidelines that are used to inform the individual RIAs, that are called for by EO 12866.<sup>5</sup> These guidelines are meant to present an updated assessment of the “state of the art” in cost-benefit analysis methodology.<sup>6</sup> Notably, OMB Circular A-4 states that it was “designed to assist analysts in the regulatory agencies by defining good regulatory analysis ... and standardizing the way benefits and costs of Federal regulatory actions are measured and reported.”

### C. Opportunities for Improvement

In this ANPRM, EPA is seeking comment on potential approaches for addressing the publics’ concerns regarding how costs and benefits are considered in regulatory decisions – including changes to its analytic approach to quantifying the costs and benefits of EPA regulations, with an eye to providing greater consistency, in keeping with applicable authorizing statutes.

AGC acknowledges that EPA faces unique challenges in that many of its authorizing statutes differ on whether or how, and in what form, cost-benefit analysis can inform its rulemakings.<sup>7</sup> **EPA should apply cost-benefit analysis principles to the maximum extent possible under law, unless the statute**

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<sup>3</sup> Executive Order 12866, “Regulatory Planning and Review,” 58 Fed. Reg. 51735, October 4, 1993, online at <http://www.whitehouse.gov/omb/inforeg/eo12866.pdf>. “Economically significant rules,” as defined in Executive Order 12866, include those rules that will have an annual impact on the economy of \$100 million or more or will have any material adverse effect on “the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities.”

<sup>4</sup> The preamble to the *Federal Register* notice states: Virtually all environmental statutes leave the specifics on how costs and benefits are to be considered to EPA. ... Even where Congress does include language ... there is considerable variation ... and the statutory instruction provides little, if any, direction on what constitutes ‘appropriate consideration,’ ‘reasonableness,’ ‘practicable,’ ... and related terms. ... This has resulted in a variety of concepts of “costs” that may be considered across statutes and even under the same statute.”

<sup>5</sup> An RIA is one component of the decision-making process. Other factors that may influence decision makers’ selection of regulatory options include enforceability, technical feasibility, affordability, statutory or legal mandates, and ethical concerns.

<sup>6</sup> OMB Circular A-4, “Regulatory Analysis,” September 17, 2003, online at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>. EPA has issued updated guidelines roughly every ten years – “EPA Guidelines for Preparing Economic Analyses” (updated December 2010, 2014 and 2016), online at <https://www.epa.gov/sites/production/files/2017-09/documents/ee-0568-52.pdf>. See also, OMB agency checklist for the regulatory impact analyses required by Executive Order 12866 and OMB Circular A-4 (Oct. 28, 2010) and OMB’s “Regulatory Impact Analysis: Frequently Asked Questions” (Feb. 7, 2011).

<sup>7</sup> As the preamble to the *Federal Register* notice states: “Most statutory provisions require or allow some consideration of cost and benefits when setting pollution standards, but there is variation in terminology and specificity provided in each law regarding the nature and scope of the cost and benefit considerations.”

**expressly prohibits such analysis. Even in situations where the underlying statute is vague about its application, EPA should employ robust cost-benefit analysis because it can improve decisions and limit arbitrary and capricious decisions.** This practice is supported by two recent U.S. Supreme Court cases. In *Entergy Corp. v. Riverkeeper*, 556 U.S. 208 (2009), the Court upheld Clean Water Act (CWA) regulations that were challenged on the basis of EPA’s consideration of cost in the final regulations. The Court found that, when regulating, EPA had authority under CWA Section 316(b) to consider both the benefits of the regulations and the cost of achieving them. More recently, *Michigan v. EPA*, 135 S. Ct. 2699 (2015), held that EPA incorrectly interpreted Section 112 of the Clean Air Act (CAA) when it found cost to be irrelevant in its decision to regulate power plants. As the Supreme Court has said, “[c]onsideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions.”<sup>8</sup>

**As recognized by recent reports by the Government Accountability Office (GAO),<sup>9</sup> EPA could enhance the usefulness of its RIAs by improving its adherence to OMB’s “best practices” as described in OMB Circular A-4.** To this end, conducting a well-executed cost-benefit analysis requires the analyst to follow a logical sequence of steps. Any analysis of a proposed regulation should: (1) clearly state the need for the proposed action, (2) show that the agency considered alternative approaches (including no regulation), and (3) evaluate the benefits and costs—quantitative and qualitative— of the proposed action and the main alternatives identified by the analysis, and (4) a description of assumptions and treatment of uncertainty.<sup>10</sup>

**To provide consistency in the regulatory process, EPA should require a quantifiable cost-benefit analysis, demonstrating that the benefits justify the costs. In those situations where quantification is neither feasible nor possible, EPA should justify its proposal to show it has not acted arbitrarily. If the agency cannot justify its actions, it should not promulgate the regulation.** While Circular A-4 acknowledges that quantified cost-benefit analysis (in monetary units) may not be feasible in every situation, quantified cost-benefit analyses often reveal the most efficient and reliable approach to regulation. Only after clearly explaining why a such cost-benefit analysis is impossible should EPA explore non-quantitative and indirect factors deemed important enough to warrant consideration.<sup>11</sup> To this end, EPA should clearly justify the need for qualitative data analysis, recognizing that in such cases “it is less useful, and it can even be misleading.”<sup>12</sup> By clearly justifying any departure from a true cost-benefit analysis, the agency can better avoid the appearance of arbitrary decision-making.

**Any standard procedure should ensure that EPA considers the full range of costs imposed on small businesses by a proposed rule, including costs often overlooked.** Small business firms face a disproportionate burden compared to larger firms, especially when it comes to the cost of

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<sup>8</sup> *Michigan* at 2707.

<sup>9</sup> U.S. Government Accountability Office, “EPA Should Improve Adherence to Guidance for Selected Elements of Regulatory Impact Analyses,” GAO- 14-519 at 12 (July 2014) (noting that EPA often fails to monetize important costs and benefits, thus limiting the usefulness of its impact analyses))- online at <https://www.epa.gov/sites/production/files/2018-02/documents/ee-0222-1.pdf>.

<sup>10</sup> See *supra* note 5.

<sup>11</sup> *Wikipedia, The Free Encyclopedia: Quantitative* information or data is based on quantities obtained using a **quantifiable** measurement process. In contrast, **qualitative** information records qualities that are descriptive, subjective or difficult to measure.

<sup>12</sup> OMB Circular A-4, p. 10.

environmental regulations.<sup>13</sup> For example, as pointed out in the National Federal of Independent Business, Inc.'s comments posted to this docket,<sup>14</sup> agencies often overlook the cost of the value of a small business owner's own time needed to gain an understanding of and to comply with a rule, which is a real and substantial cost to a small business. AGC agrees with NFIB's assessment that small business owners rarely have the wherewithal to hire lawyers, accountants, and other already-experienced experts to explain, advise on, and ensure compliance with rules; so, owners often must devote a significant amount of their high-value time to learning about rules and complying with them.<sup>15</sup>

## D. Transparency

[As EPA's Federal Register notice states](#), the Agency is seeking input on perceived inconsistency and lack of transparency in how EPA considers costs and benefits in rulemaking. According to OMB guidance, RIAs should communicate information supporting regulatory decisions and enable a third party to understand how the agency arrives at its conclusions. **Per Executive Order 12866, EPA should provide information to the public in plain, understandable language, and per OMB Circular A-4 guidance, elements EPA's analysis and development of estimates should be understandable to a qualified third-party reader.**

AGC also notes that EPA currently has Information Quality Guidelines compliant with the 2001 Data Quality Act, which require transparency for all information disseminated by EPA, including economic analyses. **Per EPA Information Quality Guidelines, economic analyses conducted by EPA should specify the methodological process and data that EPA used in the analysis.**

As noted above, AGC recognizes that some environmental laws such as the Clean Air Act and the Clean Water Act place more emphasis on the level of cleanup to be achieved than on the costs involved in achieving those levels (e.g., National Ambient Air Quality Standards are to "protect public health" and the Clean Water Act limits the kinds of technologies (alternatives) that can be considered in an Effluent Limitations Guidelines rulemaking to the "best available technology economically achievable"). **EPA should better educate the public in each regulatory action, in executive summary form, those cost-benefit analyses that cannot be used in environmental rulemaking because of legal restrictions.** Indeed, OMB Circular A-4 states that the agency should describe the statutory or judicial directives that authorize the action.<sup>16</sup>

To this end, OMB's *Regulatory Impact Analysis: Frequently Asked Questions* document provides even further direction that EPA should present its RIAs **in plain language and include a clear executive summary of their central conclusions and an accounting statement with a table summarizing the expected costs, benefits, and transfers.**

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<sup>13</sup> In 2010, the Office of Advocacy released a study by Nicole V. Crain and W. Mark Crain titled "The Impact of Regulatory Costs on Small Firms."

<sup>14</sup> <https://www.regulations.gov/document?D=EPA-HQ-OA-2018-0107-0084>.

<sup>15</sup> *Id.*

<sup>16</sup> Executive Orders 12866 and OMB Circular A-4 repeatedly reference the phrase "to the extent permitted by law" when referencing the principles of rulemaking and the analytical requirements, confirming that agencies must adhere to the requirements contained in their authorizing statutes, and may only apply the principles and procedures of the executive orders if the statutes permit them to do so.

Even where environmental laws limit the use of cost-benefit analysis in setting standards and the accompanying regulations, EPA will act under federal executive order and prepare a cost-benefit analysis for any rule designated as “economically significant” and that information is made available to the public – for informational purposes only. This is confusing and should be better explained in each regulatory action, as applicable.

## **E. Example Regulatory Actions**

Following are select summaries and excerpts from previous AGC comment letters to the agency that highlight the association’s concerns with how EPA performed its analysis of the costs and the benefits of various rulemakings under different environmental statutes. Each example includes the EPA Docket ID number so agency staff may review AGC’s more detailed comments in full and the applicable RIA. This information is being offered by way of example only and is by no means an exhaustive list.

### **1. *Clean Air Act* *Review of National Ambient Air Quality Standards for Ozone* *EPA-HQ-OAR-2008-0699***

- In 2015, EPA released its final rule tightening the ozone National Ambient Air Quality Standards (NAAQS) to 70 parts per billion (ppb). This is at the top end of the range that EPA had proposed; the agency had solicited comment on a level as low as 60 ppb. With the annual cost of compliance reported at \$1.4 billion each year (not including California), according to agency estimates, the rule remains one of the most expensive in history.
- During the public notice-and-comment process, AGC expressed concern that the agency had not analyzed or accounted for the significant adverse social, economic, and energy effects that may occur if EPA were to adopt the proposed rule. AGC strongly disagrees with EPA’s findings that the proposed action would have no significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act; that it did not contain unfunded mandates or federalism implications; and that it would have no effect on energy production.
- In the association’s comments, AGC also expressed concern that EPA had not adequately accounted for the real-world economic impacts and burdens the proposed ozone NAAQS would impose on state and local governments, businesses and American consumers. While the U.S. Supreme Court<sup>17</sup> has held that EPA does not consider costs in setting the appropriate level for the NAAQS, this does not absolve EPA from all consideration of adverse impacts, AGC wrote. EPA’s [Regulatory Impact Analysis](#) of the proposed rule estimates the costs of a 70 ppb standard to be \$3.9 billion, the costs of

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<sup>17</sup> *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 471 (2001). As Justice Breyer explained, EPA may take into account contextual factors when determining the levels that are requisite to protect public health with an adequate margin of safety. *Id.* at 495 (Breyer, J. concurring) (The Clean Air Act allows EPA “to take account of context when determining the acceptability of small risks to health.”).

a 65 ppb standard to be \$15 billion, and the costs of a 60 ppb standard to be \$39 billion. Industry experts say the costs would be far higher.<sup>18</sup>

- In setting NAAQS, AGC strongly maintains that EPA must consider the adverse impacts that would result from a tighter standard to assess what level in the continuum of exposures/effects is “requisite” to protect public health and welfare.<sup>19</sup>
- EPA’s methodology for estimating the economic costs versus benefits of tighter NAAQS is questionable. In the case of the 2015 ozone standard, AGC takes issue with the fact that much of EPA’s claimed health benefits under the proposal are derived from “co-benefits” of reducing particulate matter emissions, not from the reduction of ozone (or ozone precursors) itself. AGC also is concerned about the reports that a stricter ozone standard could have a negative impact on public health. More study is needed in this area.

## **2. California Air Resources Board In-Use Off-Road Diesel-Fueled Fleets Regulation**

- On July 26, 2007, the California Air Resources Board (CARB) adopted a regulation to reduce diesel particulate matter (PM) and oxides of nitrogen (NOx) emissions from in-use (existing) off-road heavy-duty diesel vehicles in California. Such vehicles are used in construction, mining, and industrial operations. The regulatory language and information can be found online here: <https://www.arb.ca.gov/msprog/ordiesel/ordiesel.htm>.
- Responding to members’ concerns that CARB had vastly overestimated emissions from the existing fleet of construction equipment, AGC conducted an independent analysis of emissions inventories that formed the basis of the rule and CARB’s computer model. AGC’s initial findings documented a wide disparity between the model’s estimates and actual data on off-road diesel fuel consumption, causing the Board to (1) to delay its enforcement of the rule, (2) to abandon its original estimates of the emissions from the regulated fleets and (3) to make at least some changes to the rule. However, AGC continued to press CARB to go much further.
- Finally, in late 2010, CARB admitted that its original “emissions inventory” was far too high and that it needed to make changes. In the end, the CARB staff came remarkably close to agreeing with the

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<sup>18</sup> See <https://www.regulations.gov/document?D=EPA-HQ-OAR-2013-0169-0057> (link updated Aug. 12, 2018). EPA writes in its proposed regulation at page 75238 that its “task is to establish standards that are neither more nor less stringent than necessary for these purposes. In so doing, the EPA *may not consider* the costs of implementing the standards” (*italics added*). EPA all but discredits its 575-page Regulatory Impact Analysis, stating on page 543: “Accordingly, although an RIA has been prepared, the results of the RIA have not been considered in issuing this proposed rule.” A February 2015 NERA Economic Consulting study commissioned by the [National Association of Manufacturers](#)<sup>18</sup> finds that an ozone standard of 65 ppb could cost the economy \$140 billion per year and place over one million jobs at risk.

<sup>19</sup> As the National Association of Manufacturers and other commenters have pointed out, NAAQS are not intended to eliminate all risk. As the U.S. Supreme Court has explained, “requisite to protect” means “not lower or higher than is necessary.” *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 476 (2001). Thus, in setting NAAQS, EPA must determine the levels of a pollutant that are “sufficient, but not more than necessary” to protect the public health and welfare. *Id.* at 473 (internal quotation marks omitted). As noted by Justice Breyer in *Whitman*, §109 “does not require the EPA to eliminate every health risk, however slight, at any economic cost, however great.” *Id.* at 494 (Breyer, J., concurring). The D.C. Circuit confirmed that setting primary NAAQS may require a contextual assessment such as described by Justice Breyer. *Mississippi v. EPA*, 744 F. 3d 1334, 1343 (D.C. Cir. 2013).

results of AGC's emissions study, which found that CARB's original numbers were off by a factor of 3.5 (in other words, CARB overestimated actual emissions by at least 350 percent).<sup>20</sup>

- In May 2010, AGC invited Margo Oge, past director of the Office of Transportation and Air Quality to meet with AGC's General Counsel and staff to discuss AGC's CARB analysis and what bearing it may have on the national model EPA uses to estimate pollution from off-road vehicles and equipment for State Implementation Plans (SIPs), as required by Clean Air Act, and other regulatory needs. In establishing the need to adopt the off-road rule, CARB used its OFFROAD2007 model<sup>21</sup> to develop a baseline emissions inventory for the vehicles subject to regulation. Recognizing the strong correlation between U.S. EPA's NONROAD emission inventory model and CARB's OFFROAD2007 model, AGC was (and still is) very concerned that EPA's numbers also could be wide of the mark.
- EPA has declined AGC's offer to meet.

**3. Clean Water Act  
Effluent Limitation Guidelines and New Source Performance Standards  
for the Construction and Development Category (C&D ELG)  
Docket ID No. EPA-HQ-OW-2008-0465 and  
Docket ID No. EPA-HQ-OW-2010-0884**

- On Dec. 1, 2009, EPA finalized its C&D ELG imposing nationally-applicable numeric effluent limits on stormwater discharges from construction sites impacting 10 or more acres of land at any one time. The rule also specifies erosion and sediment controls that contractors must employ to control stormwater discharges at all regulated construction sites (i.e., that disturb one or more acres of land).
- EPA estimated that the new rule would reduce approximately four billion pounds of sediment per year (for a monetized benefit of \$368.9 million), at an annual cost of \$810-\$935 million. The rule took effect on Feb. 1, 2010 (with a four-year phase-in period).
- AGC and other industry stakeholders expressed great concerns that the estimated costs of compliance (as stated in the rule's technical supporting documents) were more than twice the estimated benefits, and EPA also had not demonstrated that any particular "technology" would universally ensure compliance across the country.
- EPA vaguely discussed in the final rule documents that it was not obligated to do a "pure" cost-benefit analysis.
- The U.S. Small Business Administration petitioned EPA April 2010 under the Administrative Procedures Act to reconsider the C&D ELG and its numeric standard. SBA estimated that EPA's final rule would cost businesses, including small businesses, more than \$9.7 billion per year. The National Association of Home Builders (NAHB) also took legal action to challenge EPA's C&D ELG rule as arbitrary and based on flawed analyses. Several lawsuits were consolidated in the Court of Appeals for the Seventh Circuit.
- In August 2010, EPA abruptly decided to abandon the first nationwide numeric limit on the amount of sediment that can run off of construction sites. Citing evidence that both AGC and NAHB included

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<sup>20</sup> AGC's comments and related information is online here: <https://www.agc.org/california-road-diesel-engine-emission-standards>.

<sup>21</sup> CARB's OFFROAD2007 model online at <http://www.arb.ca.gov/msei/offroad/offroad.htm>.

in their comments on EPA's original proposal – and in direct in response to the ongoing legal action – EPA admitted that its new C&D ELG was fundamentally flawed.<sup>22</sup>

- In the end, EPA has concluded that it improperly interpreted the data underlying the numeric limit it adopted.

**4. Clean Water Act**  
**Definition of “Waters of the United States”**  
**Docket ID No. EPA-HQ-OW-2011-0880 and**  
**Docket ID No. EPA-HQ-OW-2017-0203**

- In 2015, EPA and the U.S. Army Corps of Engineers finalized a rulemaking to define “Waters of the United States” (WOTUS). The Sixth Circuit Court stayed implementation of the rule nationwide shortly afterwards. On Feb. 28, 2017, the Trump Administration issued EO Restoring the Rule of Law, Federalism, and Economic Growth directing the agencies to rescind and/or revise the rule. That summer, the agencies proposed to withdraw the 2015 (Step 1) rule and reissue another WOTUS definition rule (Step 2). Meanwhile, the Supreme Court decided that challenges to the 2015 rule should happen at the district court level, lifting the nationwide stay and reinitiating several court cases in the district courts. EPA finalized a rule to delay the applicability date of the 2015 rule until 2020, giving the agencies time to complete Steps 1 and 2.
- AGC expressed concern that the Economic Analysis for the proposed WOTUS rule (2014) failed to provide a reasonable assessment of the proposed rule's costs and benefits. Specifically, AGC has pointed out in numerous comment letters that the agencies failed to address valid concerns with the cost-benefit analysis including the fact that it did not include a full analysis of the proposed rule's impact on all CWA programs that rely on the definition of WOTUS. In addition, AGC maintains that the agencies incorrectly certified that the proposed rule would not have a significant economic impact on a substantial number of small entities.
- Below are excerpts/summaries from a review of the agencies' Economic Analysis by Professor David L. Sunding, Ph.D., Thomas J. Graff Chair of Natural Resources Economics at the University of California, Berkeley.<sup>23</sup>
  - As Professor Sunding notes, “The errors, omissions, and lack of transparency in EPA's study are so severe as to render it virtually meaningless.”<sup>24</sup> The Economic Analysis fails to provide a reasonable assessment of the proposed rule's increase in jurisdictional waters. The Economic Analysis suggests that the proposed rule will increase overall jurisdiction under the CWA by only 2.7 percent. But the agencies arrive at this percentage using a flawed methodology. The agencies' reliance on data from the Corps' ORM2 database is problematic. As explained by Professor Sunding, the agencies cannot accurately quantify the proposed rule's increase in

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<sup>22</sup> See the August 13 motion that EPA filed with a federal court of appeals asking it to declare that its numeric turbidity limit is void and to send that limit back to the agency for reconsideration - <https://www.agc.org/sites/default/files/epas-elg-motion.pdf>.

<sup>23</sup> Review of 2014 “EPA Economic Analysis of Proposed Revised Definition of Waters of the United States,” prepared for the Waters Advocacy Coalition and available at [http://www.brattle.com/system/publications/pdfs/000/005/014/original/WOTUS-EconomicReport\\_Sunding\\_WAC\\_0514.pdf?14019757](http://www.brattle.com/system/publications/pdfs/000/005/014/original/WOTUS-EconomicReport_Sunding_WAC_0514.pdf?14019757).

<sup>24</sup> *Id.* at 2.

jurisdiction by using the ORM2 database because the database only accounts for the section 404 program, and its data do not fit this exercise.<sup>25</sup>

- Indeed, the Economic Analysis looks at Corps jurisdictional determinations (JDs) that concluded under current regulations there is no jurisdiction but that would change under the proposed rule. But this analysis fails to recognize that landowners and project proponents would not have sought JDs for most of the features that would now newly be considered WOTUS under the proposed rule, such as ditches and ephemeral washes.<sup>26</sup>
- In addition, the Economic Analysis relies on figures extrapolated from statistics from FY2009-2010, a period of historically low construction activity.<sup>27</sup> Moreover, the agencies' calculation of increased jurisdiction fails to account for the universe of waters and features for which landowners have not previously sought CWA permits.<sup>28</sup> Relying on the 2.7 percent calculation throughout the Economic Analysis, the agencies systematically and drastically underestimates the impact of the proposed rule's new definition of WOTUS.
- The agencies' calculations of incremental costs and benefits are also deficient. The cost analysis is focused on costs associated with the section 404 program. Yet the analysis omits the costs of avoidance and delay, which are likely the largest out-of-pocket expenses of the permitting process.<sup>29</sup> The Economic Analysis largely ignores the cost impact of the changes to other CWA regulatory programs due to lack of data. *Id.* at 20. Costs to other programs, like the section 303 program (State WQS and implementation plans) and section 402 (NPDES and stormwater), are assumed to be "cost-neutral or minimal" without providing any analysis to support this conclusion. Although the effects of the proposed rule's definitional change are likely to vary significantly from program to program, the agencies omit careful assessment of program-specific effects, and instead offer simplistic, generalized estimations.
- Likewise, the Economic Analysis's benefit calculation overestimates the benefits and is riddled with errors. Professor Sunding concludes that the benefit transfer analysis used to approximate section 404 benefits is poorly documented and not consistent with best practices in environmental economics.<sup>30</sup> The agencies use third-party studies conducted 10-30 years ago to estimate an average willingness to pay for wetland mitigation. These studies are largely irrelevant and do not provide accurate estimates of benefits.<sup>31</sup> Moreover, the agencies' benefits calculation is based on an unstated and improbable assumption that all of the incremental wetlands affected by the proposed rule's definitional change would be filled (destroyed) if federal jurisdiction is not expanded to cover these areas.<sup>32</sup>
- In addition to the methodological errors, the Economic Analysis suffers from a lack of transparency. Professor Sunding explains that "[e]xplanations of calculations, basic assumptions, and discrepancies between various EPA analyses are rarely provided."<sup>33</sup>

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<sup>25</sup> *Id.* at 4-9.

<sup>26</sup> *Id.* at 8.

<sup>27</sup> *Id.* at 10-11.

<sup>28</sup> *Id.* at 8.

<sup>29</sup> *Id.* at 17.

<sup>30</sup> *Id.* at 27.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 28.

<sup>33</sup> *Id.* at 32.

**5. Toxic Substances Control Act  
Section 610 Review of Lead-Based Paint Activities; Training and  
Certification for Renovation and Remodeling Section 402(c)(3)  
Docket ID No. EPA-HQ-OPPT-2016-0126**

- EPA, the U.S. Department of Housing and Urban Development (HUD) and the U.S. Occupational Safety and Health Administration (OSHA) all have rules governing the disturbance of lead paint during renovation, repair and painting (RRP) work. EPA and HUD regulations may overlap where lead paint (as defined by each agency) is presumed to be present during construction work in “target housing” or a “child occupied facility.” But whenever EPA’s Lead RRP rules apply, there always will be overlap with the U.S. Occupational Safety and Health Administration’s (OSHA) Lead Standard for the Construction Industry.
- On every construction job where any detectable trace of “lead coatings” are present, OSHA requires monitoring, training, a written compliance plan, recordkeeping and establishment of a housekeeping program sufficient to maintain all surfaces as “free as practicable” of accumulations of lead dust. Yet EPA has a separate Lead RRP Program with training, certification and extensive recordkeeping requirements.
- EPA recently reviewed its Lead RRP rule under Section 610 of the Regulatory Flexibility Act to assess the cost impact of this rule on small entities and to consider whether the Lead RRP rule should be amended, consistent with the objectives of applicable statutes. AGC urged EPA to consider whether it can accomplish the objectives of certain work practice and training requirements under the 2008 Lead RRP rule by adopting the approaches (i.e., incorporating by reference or accepting “qualifying” programs) already taken by OSHA or other government agencies.
- Published August 2018, “The Results of EPA’s Section 610 Review of the Final Rule for Lead; Renovation, Repair, and Painting Program”<sup>34</sup> states: “EPA does not believe similar synergies exist between the EPA/HUD programs and OSHA’s requirements. Therefore, EPA has concluded that neither HUD’s nor OSHA’s regulations overlap, duplicate, or conflict with RRP... so there is not a need to streamline the lead work practice requirements for the regulated small business community.” AGC disagrees with EPA’s findings.
- The Section 610 review also concludes “there is a large universe of RRP jobs that are not covered by the OSHA requirements.” However, EPA then goes on to contradict this finding when it surmises that “industry commenters have exaggerated the cost of complying with the RRP rule” because they “included the cost of a HEPA vacuum, HEPA filters, and the labor needed to clean the work site with a HEPA vacuum” in the work practice costs for the RRP program when “they were already using the vacuums to comply with OSHA requirements.”

**6. Toxic Substances Control Act  
Lead; Renovation, Repair, and Painting Program for Public and  
Commercial Buildings  
Docket ID No. EPA-HQ-OPPT-2010-0173**

- With the publication of an Advance Notice of Proposed Rulemaking in March 2010, EPA announced that it is looking into expanding the application of its current Lead RRP rule to potentially all

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<sup>34</sup> <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2016-0126-0019>.

commercial buildings and pre-1978 public buildings.<sup>35</sup> Notably, per [Reginfo.gov](http://www.reginfo.gov), this action has been moved to EPA's "Long-term" list and EPA has indicated that review under the Regulatory Flexibility Act is "undetermined" and there is no reference to any Small Business Regulatory Enforcement Fairness Act (SBREFA) panel<sup>36</sup> – despite the fact that a Lead RRP Pre-Panel Outreach Meeting on Dec. 9, 2014, and half a dozen individuals, including myself, were invited to serve as "potential" Small Entity Representatives (SERs) and asked to provide preliminary written comments.

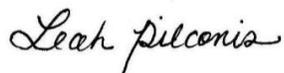
- To date, EPA has produced no data to show the RRP activities in the existing building stock would cause a lead-based paint "hazard."
- AGC and its real estate and development coalition partners have told EPA that relying on dust studies done in residential settings and schools is not sufficient for promulgating rules on all existing commercial buildings. If EPA does not currently have sufficient data on the lead hazards in commercial buildings, it must study those lead hazards and gather that data prior to issuing regulations.<sup>37</sup>

## F. Conclusion

Federal environmental policies have a direct impact on the construction industry, governing how a project may be built in order to minimize its impact on the environment. Complying with environmental rules and regulations can be cumbersome, time-consuming, and costly. As a result, environmental policies must be based on sound science and their costs must be fully justified.

AGC appreciates this opportunity to provide input in how EPA will potentially revise its approach to evaluating the costs and benefits of major and economically significant regulatory actions. If you have any questions, please contact me, Leah Pilconis, directly at [pilconisl@agc.org](mailto:pilconisl@agc.org) or (703) 837-5332.

Respectfully submitted,



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Senior Counsel, Construction & Environmental Risk Management  
AGC of America

Attachment: AGC's Flowchart of Environmental Approvals and Permits Applicable to Construction

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<sup>35</sup> 75 Fed. Reg. 24848 - <http://edocket.access.gpo.gov/2010/pdf/2010-10097.pdf>.

<sup>36</sup> <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=2070-AJ56>.

<sup>37</sup> In a 2010 report, EPA recognized the "scarcity of data related to dust exposures in public and commercial buildings and other non-residential settings."