Statement of

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For

The Associated General Contractors of America

to the

U.S. House of Representatives

Committee on Transportation & Infrastructure's
Subcommittee on Water Resources & Environment

For a hearing on

"Building a 21st Century Infrastructure for America: The Role of Federal Agencies in Water Infrastructure"

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President
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Kenner, Louisiana
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Chairman Graves, Ranking Member Napolitano and members of the committee, thank you for inviting me to speak before you today. I am Jonathan Kernion, President of Cycle Construction Company based in Kenner Louisiana. Our company is a family-operated general construction firm. Founded in the late 1990's, we focus on heavy/civil construction, environmental infrastructure, underground utilities, demolition, waste management, and emergency response.

I testify before you as a member of and representing the Associated General Contractors of America (AGC). AGC is a national association of more than 26,000 businesses involved in every aspect of construction, with 92 chapters representing member companies in every state.

In order to build 21st century infrastructure, we need to be able to build it sometime this century. Sadly, that's easier said than done. There are many kinks in the water infrastructure project chain that can delay construction not only years, but even decades.

In my testimony today, I will try to highlight some opportunities to more efficiently deliver water infrastructure projects. As such, I will cover:

I. The Pre-Construction Phase
   A. Opportunities for Additional Efficiencies in Environmental Review/Permitting
   B. Opportunities for Additional Efficiencies in Project Study and Planning Processes

II. The Construction Phase
   A. The Need for Long-Term Funding and Certainty
   B. Incentivizing Efficient and Timely Construction Execution

I. The Pre-Construction Phase

There are many chapters in the life of a construction project. For simplicity's sake, today I will generally review the two major components—the pre-construction and construction phases—of a water infrastructure construction project. Two areas within the pre-construction phase where AGC would like to work with the committee to more efficiently and quickly deliver needed water resources infrastructure are: (A) the environmental review and permitting processes; and (B) the project study and planning processes.

A. Opportunities for Additional Efficiencies in Environmental Review/Permitting

Over the last 50 years, Congress enacted a host of laws that seek to ensure a balance among environmental, economic and health concerns. To implement those laws, Congress provided a range of federal agency review and permitting processes. Those federal processes that can impact water infrastructure projects include, but are not limited to:

- The National Environmental Protection Act Reviews and Approvals;
- Consultation with the Department of the Interior's (DOI) Fish and Wildlife Service (FWS) and the Department of Commerce's NOAA Fisheries;
- The Bald and Golden Eagle Protection Permit issued by DOI's FWS;
- Migratory Bird Treaty Act Permits issued by DOI's FWS;
- The Environmental Protection Agency's (EPA) National Pollutant Discharge Elimination System Permits and Spill Prevention and Control Countermeasures Program;
- Consultation with the Department of Commerce's (DOC) National Oceanic and Atmospheric Administration (NOAA) Fisheries under the Magnuson-Stevens Fishery Conservation and Management Act;
- Consultation with the DOC's NOAA Fisheries under the National Marine Sanctuaries Act;
- Fish and Wildlife Coordination Act Review with the DOI's FWS;
- Wild and Scenic Rivers Act Determination and Coordination under DOI's Bureau of Land Management;
- Flood Plain or Wetland Assessment which all the aforementioned agencies could have some role in when it comes to the Section 404 permit of the Clean Water Act issued by the Army Corps of Engineers.[1]

From this list, it should be apparent that there are many federal agency cooks in the environmental review and permitting kitchen. It should also come as no surprise that many of these laws and their implementing processes came about independently and are layered on top of one another with little or no regard for how they fit in the overall environmental review process of a water infrastructure project.

As such, water infrastructure projects have been delayed years and even decades waiting for environmental reviews to be completed. Take the harbor deepening dredging project at the Port of Savannah for example. The environmental review there took 14 years and the project itself delayed for about 30 years.[2]

In my home state of Louisiana, we are trying to restore our coastline after the devastation of the BP Oil Spill and protect our wetlands from rising sea levels. Time is of the essence. Louisiana is losing on average a football field of coastline per hour.[3] However, as the environmental reviews may drag on for years, our environmentally sensitive coastline erodes away. It is alarmingly ironic that the lengthy environmental permitting and review processes that are intended to protect our coastline, could—in part—lead to its further destruction.

The state this year released an updated version of its 50-year master plan for restoring the coast. It predicts that even if everything works as planned, 2,800 square miles of coast still could be lost in the next four decades.[4] In addition, about 27,000 buildings may need to be flood-proofed, elevated or bought

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[1] *See* THE FEDERAL INFRASTRUCTURE PERMITTING DASHBOARD, FEDERAL ENVIRONMENTAL REVIEW & AUTHORIZATION INVENTORY, OCT. 1, 2016 *available at*: https://www.permits.performance.gov/sites/permits.performance.gov/files/docs/Federal%20Environmental%20Review%20and%20Authorization%20Inventory_2016-10-01_2.pdf

[2] PHILIP K. HOWARD, TWO YEARS, NOT TEN YEARS: REDESIGNING INFRASTRUCTURE APPROVALS, SEPT. 2015 *available at:* http://commongood.3cdn.net/c613b4cfda258a5fcb_e8m6b5t3x.pdf

[3] *Rising water is swallowing up the Louisiana coastline*, CBS NEWS, Jan. 18, 2017 *available at:* http://www.cbsnews.com/news/louisiana-coastline-disappearing-50-billion-dollars-to-save-climate-change-erosion/

[4] Bob Marshall, *2017 Coastal Master Plan predicts grimmer future for Louisiana coast as worst-case scenario becomes best-case*, THE NEW ORLEANS ADVOCATE, Jan. 3, 2017 *available at:*

out, including about 10,000 in communities around New Orleans.[5] That's if we act now. But the longer we wait, the more expensive it will be to build. Delays in creating wetlands and ridges in open water with sediment dredged from elsewhere could balloon costs by 200 percent to 600 percent.[6] The cost per acre created for more than doubles in 20 years, and cost per acre continues to increase over time even for scenarios and fill criteria where less land is created over time.[7]

For more than a decade, the House Transportation and Infrastructure Committee has worked to find ways to make NEPA work in a more efficient, yet sufficiently thorough manner through reforms in SAFETEA-LU, MAP-21 and the FAST Act. AGC appreciates and thanks the committee for those reforms. However, many of them only apply to federal-aid transportation construction projects and not water infrastructure projects. Additionally, NEPA is only one part of the environmental review and permitting processes. More reforms are needed on a more global basis.

During this Congress, AGC would like to work with the committee on:

- Better integrating environmental reviews and permitting processes into a more cohesive, efficient—yet environmentally responsible—process starting with Section 404 permitting;
- Extending previous NEPA reforms in SAFETEA-LU, MAP-21 and the FAST Act to water infrastructure projects, where they do not otherwise apply;
- Eliminating agency vetoes of previously approved environmental permits;
- Granting final federal agency environmental review/permitting approvals deference as agencies are afforded under Supreme Court precedent in the federal rulemaking process;
- Investigating the rolling of environmental review and permitting responsibilities into a single or—at least—fewer agencies;
- Establishing a six month time limit for completing all federal NEPA reviews. If no decision has been made by the end of those six months, the project should automatically be allowed to be approved; and
- Instituting a loser-pays environmental citizen suit provision requiring any such plaintiff seeking to block an infrastructure project to pay all related legal fees if their challenge is unsuccessful as a means to deter frivolous lawsuits.

B. Opportunities for Additional Efficiencies in Project Study and Planning Processes

To build water infrastructure involves study and planning. The poster child for what was wrong with the federal study process is the Morganza-to-the-Gulf Hurricane Protection Project. A reconnaissance study began in 1992. A final Chief's Report from the U.S. Army Corps of Engineers was issued in 2013. A total of twenty-two years of study. Thanks in large part to members of this committee—through the 2014 Water Resources Reform and Development Act—who supported the 3x3x3 rule,[8] this will hopefully never happen again. Thank you.

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http://www.theadvocate.com/new_orleans/news/environment/article_5ac81e86-d1e7-11e6-9177-1bbd55b599b7.html

[5] *Id.*

[6] Mark Schleifstein, *Louisiana coastal work delays could cost billions of dollars, study says*, THE TIMES PICAYUNE, Dec. 13, 2016 *available at:* http://www.nola.com/environment/index.ssf/2016/12/delays_in_building_wetlands_pr.html

[7] *Id.*

[8] A planning study shall be no more than $3M, 3 years with 3 concurrent levels of review.

Nevertheless, there remains room for continued improvement elsewhere in the process, like the Preconstruction Engineering and Design (PED) Phase. PED is the phase during which project design is finalized, the plans and specifications are prepared, and the construction contract is prepared for advertising. The process requires more engineering studies on top of those already completed during the project study phase and multiple reviews and sign offs from various levels of Corps' offices.[9] It also requires reviews of plans and specifications for infrastructure project types that have been repeatedly built.

During this Congress, AGC would like to work with the committee on:

- Identifying duplicative and unnecessary review processes during the PED stage;
- Standardizing plans and specifications for project types to reduce project delivery time and maintain more consistent cost estimates; and
- Determining areas where concurrent reviews among Corps' components could expedite project delivery during the PED Stage.

II. The Construction Phase

The construction phase is when dirt is turned and the actual project is built. During this phase of a water infrastructure construction project three things are critical: (1) funding; (2) the contractor; and (3) the owner. Without funding, there will be no construction. How a project is funded impacts project execution. Similarly, the relationships between and incentives for the contractor and the owner of the project—public or private—impact project execution. Here, I will discuss: (A) the need for long-term project funding and certainty; and (B) incentivizing efficient and timely construction execution.

A. The Need for Long-Term Funding and Certainty

We do not build our homes from the ground up over the course of 30 years. However, we too often build our nation's water infrastructure that way. While we can point to federal agencies as the cause for many problems, the buck starts and stops with Congress, literally.

Congress ultimately provides federal construction agencies with funding necessary to execute water infrastructure projects. However, that funding is subject to the whims of the annual appropriations process. That process has been dysfunctional for many decades under the leadership of both parties. Since FY1977, all of the regular appropriations bills were enacted before the beginning of the fiscal year in only three additional instances (FY1989, FY1995, and FY1997).[10] Federal agencies have had to operate on uncertain funding levels based on continuing resolutions in every fiscal year since FY 1997.[11] Very few members of this committee have been in Congress long enough to remember when one appropriations bill was passed before October 1, let alone all of them.

It is not only incredibly difficult, but practically impossible to efficiently execute water infrastructure projects with the funding spigots opening and closing to varying degrees throughout the process. Building levees, locks, and dams, dredging harbors and rivers, and constructing clean drinking and wastewater facilities requires the use of very expensive, heavy equipment. When work must be stopped or slowed down because of funding restraints, those overhead costs remain. If demobilization and remobilization are

[9] *See* Engineer Regulation 1110-2-1150.
[10] James V. Saturno & Jessica Tollestrup, *Continuing Resolutions: Overview of Components and Recent Practices*, CONGRESSIONAL RESEARCH SERVICE, Jan 14, 2016 *available at:* https://fas.org/sgp/crs/misc/R42647.pdf
[11] *Id.*

required, that only adds to unnecessary and inefficient costs related to the use of that equipment. It is also difficult to maintain a qualified and reliable workforce when you have to ask them to move between projects or lay them off as a result of such work delays or stoppages.

These statements apply to water infrastructure funding for the Army Corps and the Environmental Protection Agency (EPA). Here, it must be noted that the State Revolving Loan Funds (SRFs) for drinking water and clean water are administered by the EPA. Through the SRFs, the EPA awards grants to states to help them meet their drinking water and waste water infrastructure and facility needs. The EPA, therefore, essentially acts as a pass through for funding state and local infrastructure needs. Arguably, these funds are subject to congressional budget cuts—at least in part—because of the agency through which these funds flow. Federal investments in water infrastructure also are often the best way to ensure the health, safety and economic vitality of sparsely populated rural communities. We must ensure that this committee meets its commitments to those populations and the needs of others facing clean and safe water issues.

As the authorizing committee, you do not have the ultimate say as to when or how the project funds will be appropriated. That is a decision that rests with your colleagues on the Appropriations Committee. That stated, the toughest battles are often the ones worth fighting. With this in mind, AGC would like to work with the committee on enacting mechanisms that will help ensure greater water infrastructure funding certainty, including:

- Allowing the biannual Water Resources Development Act bill to include contract authority for water infrastructure projects similar to what is done in transportation reauthorization bills;
- Making water infrastructure funding mandatory and not discretionary spending;
- Allowing for Civil Works funding to have treatment similar to Military Construction funding;
- Establishing a capital budget program—which some states have[12]—for water infrastructure funding; and
- Considering if another agency would be better suited to run the SRF programs.

B. Incentivizing Efficient and Timely Construction Execution

The construction business is a people business. The people on the jobsite—both contractor and owner—will ultimately determine project success. In the private sector, owners have various incentives to complete a project on time and on budget, or even ahead of schedule or under budget. An oil or gas company may need harbor work completed to enable its liquefied natural gas terminal to become fully operational and, hence, revenue generating. A non-profit organization may want environmental restoration work to be completed in time for tortoises to lay their eggs. These private owners have finite resources. Their employees can be hired, fired, rewarded or held accountable with relative ease based on performance. There are clear incentives for getting the job done as efficiently as possible.

In federal government water infrastructure construction, there are not always similar economic or ideological incentives to efficiently or quickly complete the job. Federal employees may be entrenched and protected—in many ways—from being held accountable. Jobsites can be in remote locations where field staff can be left to their own devices. The agencies are not paid based on how quickly or efficiently

[12] NATIONAL ASSOCIATION OF STATE BUDGETING OFFICERS, CAPITAL BUDGETING IN THE STATES, 2014 *available at:* https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/Reports/Capital%20Budgeting%20in%20the%20States.pdf

they complete work. Rather, they are paid based on the amount of project funding Congress appropriates. To our knowledge, there is no clear, incentive-based payments for agencies or their employees to deliver a project on time or on budget, let alone ahead of schedule or under budget.

Lastly, one of the greatest challenges contractors face on the federal water infrastructure jobsite is obtaining decisions, especially timely ones, from federal agency employees. Former President Theodore Roosevelt is credited with saying, "[i]n any moment of decision, the best thing you can do is the right thing, the next best thing is the wrong thing, and the worst thing you can do is nothing."

As with any construction project, unforeseen issues may emerge. The problem comes with getting the federal agency to make a decision to act—or not. Decisions may have move up the chain of command. If the right person or persons are not available, the decision sits on their desks.

In the interim period, the contractor tries—as best as possible—to work around the issue. Depending on the issue, the contractor can be left in the precarious position of self-financing the work that needs to be done to meet the project schedule or stopping work altogether. Stopping work in the midst of indecision can lead to negative past performance evaluations issued by the federal agency for the contractor. Those negative evaluations play a role in whether the agency will give the contractor another job in the future.

What I have said above, however, is not applicable to every agency or agency employee. Just as there are good contractors and not so good ones; there are good federal construction employees and not so good ones. Just as the federal government tries to avoid the not so good contractors; I try to avoid the not so good federal construction employees or, at least, bid accordingly. And, after major disasters like Hurricane Katrina, no agency—state or federal—was more motivated and able to rise to the occasion to rebuild New Orleans better than the Army Corps of Engineers. It's those times when there are not major disasters or the eyes of the country are not on us that we must find ways to ensure federal agencies and employees are properly motivated—economic or otherwise—to perform in an efficient manner.

During this Congress, AGC would like to work with the committee on:

- Ensuring greater transparency in the agency decision making process—to help allow for greater accountability—during the construction execution phase of project delivery;
- Reducing the links in the chain of command necessary to obtain timely decisions during construction;
- Reevaluating how agencies are paid for the projects they deliver; and
- Rewarding federal agency employees based on project performance.

Thank you again for inviting AGC to testify before the committee today. I look forward to answering any questions you may have.