AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.

The 2017 Regulatory Road Ahead

AGC's primary regulatory objective is to help build a construction-friendly regulatory environment. With President Trump in office, there are many Obama administration executive orders, rules, and other requirements in AGC's crosshairs. For a complete and comprehensive guide to AGC's regulatory agenda, see AGC's **"Make Federal Agencies Responsible Again"** Document.

Additionally, with a Republican Congress, opportunity exists to reform the regulatory process to curb executive overreach. Questions remain, nevertheless, as to where traditional business interests and the populist president's message will overlap and diverge. And, further uncertainty remains with many political appointees not yet nominated or confirmed by the Senate.

The regulations and actions discussed in this document include:

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The Regulatory Short-Term

Contractors Must Comply with the Law, Not Politicians' Promises

We can only be sure of one thing: what the law is today. No construction contractor should ignore the law on the books in reliance on a politician's promise. Remember, among candidate Barack Obama's biggest promises in 2008 was to close the prison at Guantanamo Bay, Cuba. That did not happen. Some of President Trump's promises may not come to fruition, or take longer to implement than expected. There are no guarantees. Again, construction contractors should not rely on politicians' promises when it comes to deciding how their companies comply with the law. The answer is simple; your company must comply or otherwise risk the penalties for violations.

Contractors will have to pay close attention to what's happing in Washington, D.C., which AGC always does for its members. So, AGC members should continue to read AGC's weekly newsletters, like the **Construction Legislative Week in Review** and check the latest AGC news **here**.

Existing Regulations of Note

Nevertheless, are a number of federal agency regulations that have or are slated to take effect—either partially or wholly—in the coming months. Let's begin to unravel several regulatory actions—the silica rule, the electronic injury and illness recordkeeping rule (drug testing), the extended statute of limitations for recordkeeping violations rule, the overtime rule, the new EEO-1 Report, and the WOTUS rule—which generally impact construction contractors regardless of owner—public or private. Then, this document will address some rules—Fair Pay and Safe Workplaces and Paid Sick Leave Executive Orders—that only impact direct federal construction contractors.[1]

U.S. Occupational Safety and Health Administration's Silica Rule

The Latest

Following a March 10, 2017, request from AGC and its coalition partners, OSHA announced on April 6, 2017, a three month delay its enforcement of this rule. Although OSHA enforcement of the rule is delayed until September 23, 2017, the announcement does not alter the compliance date of June 23, 2017. OSHA will not take enforcement action against contractors that fail to

[1] The Fair Pay and Safe Workplaces and Paid Sick Leave Executive Orders only impact companies that hold prime contracts directly with or subcontracts through federal agencies like the Army Corps, Naval Facilities Engineering Command, Department of Veterans Affairs or U.S. General Services Administration; these executive orders do not impact federally-assisted contracts from state agencies, like state departments of transportation.

meet the standard on their sites between June 23, 2017 and Sept. 22, 2017, but legally, the standard will still be in effect.

In addition, if your construction company operates under OSHA state-plans in one of **26 states or two territories**, it is important that you check to see if your OSHA state-plan agency is following the federal OSHA's lead in delaying enforcement of this rule to September 23, 2017.[2] That stated, federal OSHA informed AGC that there are is only one jurisdiction that will enforce the June 23 date. Specifically, Virginia has indicated that the will NOT delay enforcement and stick to the June 23, 2017, date. All other state-plans will begin enforcement on September 23, with the exception of Oregon, which long ago noted that it would enforce the rule in July 2018.

About the Rule

The rule reduces the permissible exposure limit silica to 50 micrograms per cubic meter of air, averaged over an 8-hour shift. That is five times lower than the previous limit for construction. To abide by that standard, OSHA requires employers to use engineering controls to limit worker exposure; provide respirators when needed; limit worker access to high exposure areas; develop a written exposure control plan; offer medical exams to highly exposed workers; and train workers on silica risks and how to limit exposures. For AGC's comprehensive silica educational website, **click here**.

Court Action

On April 4, 2016, AGC and other industry groups filed a lawsuit challenging this rule. Among other things, the suit challenges the rule as being arbitrary and capricious based, in part, on its technically feasibility. This argument is ground in the fact that the permissible exposure limit is beyond the capacity of existing dust filtration and removal technology to accurately record. Briefs were submitted to the court in March 2017 and oral argument is scheduled for September 26 before the U.S. Court of Appeals for the District of Columbia. A decision will NOT be issued before the September 23 enforcement date. And, given regulatory law under the Administrative Procedures Act, it is highly unlikely that another enforcement delay of the standard is forthcoming or could even stand up in court, unless a new notice and comment rulemaking process is undertaken. Even then, a delay would not likely be able to go into effect until the conclusion of the rulemaking and would undoubtedly face litigation from unions.

Trump Administration Action

Secretary of Labor Nominee Alexander Acosta **stated** before a Senate panel on March 22, 2017, that he will reexamine the rule under the White House's ordered review of regulations. However, he did not provide any further insight as to whether the rule would be delayed or undergo a new rulemaking. He also did not shed any light as to if DOL will continue to defend the lawsuit against the rule. Secretary Acosta remained similarly tight lipped on the topic during a June 15 **meeting** with AGC. About 90 members of Congress sent an AGC-backed letter to

[2] Note that, for example, O

President Trump on January 25, 2017 calling on him and his DOL to take any and all action to nullify this rule.

There is also no certain regulatory path forward on this rule, as candidate Trump never mentioned it during the campaign. President Trump's **regulatory vision** specifically requires agencies put forth a list of wasteful and unnecessary regulations "*which do not improve public safety*" for elimination. As this rule does not necessarily improve public safety—given the feasibility challenges of implementation—there may be room for negotiation. That stated, President Trump has met multiple times during his short presidency with union leaders, including the building trades unions, among others.

AGC Action

On March 10, 2017, AGC and its coalition partners called on then-Acting Secretary of Labor – Edward Hugler – to delay of the compliance date to align with general industry – June 23, 2018. As a result of the request, OSHA extended the compliance date until September 23, 2017. Upon confirmation of Secretary Acosta, the coalition on May 3 urged OSHA consider a **petition** for a limited re-opening and administratively stay the rule during this process.

AGC is working with Congress and the new Trump administration to address the problems with this rule by seeking an extension of the compliance date for the construction industry to June 23, 2018 and, ultimately, redress problems with the rule. Additionally, the association will continue to press its case in court, as noted above.

For more AGC information, **click here**. For AGC's comprehensive silica educational website, **click here**. For useful DOL information, **click here**.

U.S. Occupational Safety and Health Administration's Electronic Recordkeeping Rule (Drug Testing Position)

The Latest

On May 17, 2017, OSHA informally **announced** the agency's intent to extend the deadline for certain contractors to submit their injury and illness data. On June 28, 2017, OSHA formally announced a **proposal** to extend the original deadline for contractors to electronically submit their 2016 injury and illness data (Form 300A) from July 1 to December 1, 2017. OSHA now expects to launch the electronic data collection system by August 1, allowing contractors four months to familiarize themselves with the new system. AGC will submit comments in favor of the extension.

The revised regulation – Improved Tracking of Workplace Injuries and Illnesses – initially required certain contractors to submit information from their Form 300A to OSHA electronically by July 1, 2017, which would then be posted to the OSHA website for public access. An OSHA spokeswoman said that the agency delayed the rule to give the agency time to address

employers' "concerns about meeting their reporting obligations," ***The Washington Post*** reported. The agency could also be determining its path forward given ongoing litigation.

In its June 28 proposal, OSHA also announced its intention to issue a separate proposal to reconsider, revise or remove other provisions of the controversial May 2016 injury and illness recordkeeping final rule. The provisions under future consideration could include the **anti-retaliation provision** that focuses on post-incident drug testing, disciplinary policies and safety incentive programs. AGC will again submit comments to OSHA detailing its concerns with the provision, as it did with the head of OSHA **last year**.

About the Rule

Portions of the electronic reporting requirements of the rule were originally scheduled to go into effect on July 1, 2017, but are now likely to take effect on December 1, 2017. It is unclear if the previous electronic data submission requirements will be the same as those required in December. Though purely speculative, there could be a change to drop the requirement to submit incident specific information in the OSHA Form 300 and 301, leaving only the summary information in OSHA Form 300A left for submission electronically to the agency in December. Again, this is speculation and remains unconfirmed by the agency.

DOL previously put forth the following guidelines concerning the electronic record keeping requirements,

- Establishments with 250 or more employees must electronically submit information from their 2016 Form 300A by July 1, 2017.[3] These same employers will be required to submit information from all 2017 forms (300A, 300, and 301) by July 1, 2018. Beginning in 2019 and every year thereafter, the information must be submitted by March 2.
- Establishments with 20-249 employees must submit information electronically from their 2016 Form 300A by July 1, 2017,[4] and their 2017 Form 300A by July 1, 2018. Beginning in 2019 and every year thereafter, the information must be submitted by March 2.

Again, OSHA is not accepting electronic submissions of injury and illness logs in July 2017, but will likely do so on December 1, 2017.

On December 1, 2016, the **anti-retaliation provisions** of the new OSHA injury and illness recordkeeping rule went into effect. Legal action to date has not altered implementation of the rule.

[3] OSHA has delayed this July 1, 2017, requirement until further notice.
[4] *Id.*

Court Action

On July 11, 2017, a court granted a Trump administration motion to stay the litigation against the rule—meaning putting everything on hold. The court's order requires DOL to update the court every 90 days on the status of OSHA's efforts to revise the rule. What does this mean? The court case against the rule is effectively halted, as the judge wants to allow the agency time to undertake any regulatory changes. As a result, the ball is in DOL's court, proverbially speaking.

Trump Administration Action

As noted above, the Trump administration has delayed compliance with the electronic reporting requirements. Questions remain as to whether or how the administration will defend ongoing lawsuits against the rule, especially its anti-retaliation provisions. It appears, though, that DOL is open to undertaking regulatory changes through notice and comment processes to address at least some of AGC's concerns.

President Trump and Candidate Trump did not speak on point on this rule. However, when it comes to OSHA and other DOL enforcement, Republican administrations traditionally relax enforcement efforts. Nevertheless, the Trump administration is not necessarily a traditional Republican administration. And, while he did put in place a temporary freeze on new federal regulations,[5] he made an exception for regulations that involve public safety. The anti-retaliation provision, however, is—at a minimum—overbroad in its application to drug testing and an argument exists that it will actually jeopardize workplace safety rather than improve it.

The administration and DOL can address some of industries' concerns through guidance. Unlike rolling back or tweaking a regulation—which can take years—an agency can issue new guidance to help implement a regulation with a stroke of the pen.

AGC Action

AGC **successfully worked** with OSHA to recalibrate its stance on broadly banning mandatory post-incident employee drug testing—linked to the anti-retaliation provisions—in October 2016. However, limited drug testing restrictions remain where state workers' compensation laws do not address post-incident drug testing. AGC had previously **met with** the head of OSHA in August 2016, during which the association provided more than 130 collective bargaining agreements with unions across the country that included post-incident drug testing policies in the interests of maintaining safe, drug-free workplaces.

To the extent AGC can work with DOL to make existing guidance on this rule better reflect the concerns of the industry, the association will do so. That stated, given the fact that the agency noted its intention to issue a separate proposal to reconsider, revise or remove other provisions, undertaking the full regulatory process would provide a longer term solution, as a future Democratic administration's OSHA could simply reinstate the existing, offending

[5] The federal regulatory freeze expired on March 21, 2017.

guidance with the stroke of a pen. President Trump has not nominated anyone to lead OSHA to date.

AGC will work with the new administration and Congress to address construction industry concerns with this rule. AGC members may access a webinar on this topic, **click here**. For more AGC information on the OSHA's drug testing position for the rule, **click here**. OSHA guidance documents—with helpful examples and explanation—can be found **here** and **here**.

U.S. Occupational Safety and Health Administration's Extension of Statute of Limitations for Recordkeeping Violations Rule (REPEALED)

The Latest

On April 3, 2017, President Trump repealed this rule by signing a congressional resolution of disapproval following an AGC-led lobbying effort in Congress. The signing of the congressional resolution of disapproval formally repeals the rule and any other substantially similar rules from OSHA in the future. This is the second labor and employment rule repealed by President Trump through Congress, which AGC played an integral role in; the other being the bill invalidating the blacklisting regulations, which was signed into law on March 27, 2017 and further explained later.

About the Rule

OSHA put forth a new statute of limitations (SOL) for injury and illness recordkeeping liability that extended extend from six months to, essentially, five-and-a-half years its SOL under a new rule issued on December 19, 2016. The Occupational Safety and Health Act clearly states that "no citations may be issued after the expiration of six months following the occurrence of any violation." However, the rule would have allowed contractors to be cited for honest mistakes, or inaccuracies, related to recordkeeping dating back as far as five-and-a-half years.

Court Action

Previously, federal courts had struck down OSHA's interpretation that it could cite contractors for recordkeeping violations going back 5 years. For example, in a unanimous decision that vacated a series of citations OSHA leveled against Louisiana construction company Volks Constructors for failing to timely record injuries, a D.C. Circuit panel in 2012 said OSHA's rule extending the statute of limitations on penalizing late records to cover the existing five-year retention period exceeded its statutory authority. On December 29, 2016, the Fifth Circuit issued a similar ruling. Neither of these court decisions, however, impacted this OSHA rule on its SOL. The court decisions were based on OSHA's interpretation of the SOL—rather than its new rule establishing the SOL—being unlawful. After an agency undergoes a rulemaking process, different legal standards and parameters applied.

AGC Action

AGC led a lobbying effort in passing the rule's repeal legislation, generating hundreds of letters from AGC members to Capitol Hill, garnering constructive **media attention** and establishing a coalition of like-minded business organizations to press key leaders. After the Senate's vote for repeal, AGC **issued a statement** that the bill will preserve worker safety while protecting the Constitution and respecting court rulings.

U.S. Department of Labor's Wage & Hour Division Overtime Rule

The Latest

On November 22, 2016, a federal judge issued a nationwide injunction against the U.S. Department of Labor's (DOL) overtime rule, which was scheduled to take effect on December 1, 2016. As a result of this court order, implementation of the rule is effectively halted. However, the injunction is a temporary measure that suspends the regulation until litigation comes to a close.

About the Rule

The most significant change under rule is a doubling of the standard salary threshold for exempt employees – from $455 per week ($23,660 per year) to $913 per week ($47,476 per year). Many AGC contractors had already taken steps to implement this rule, such as by reducing employee hours or notifying employees of salary increases. Given the uncertain path ahead, those contractors may want to re-evaluate the overall impact of the changes made and either roll-back or keep those implementation efforts in place, considering both the impact on the company's bottom line as well as employee morale.

Court Action

On December 8, 2016, the U.S. Court of Appeals for the Fifth Circuit granted DOL's request for an expedited appeal of that injunction. The final deadline for briefs was originally January 31, 2017, but—with the new administration coming in—the court **delayed** that deadline three times to June 30, 2017, a deadline agency met.

That stated, DOL Secretary Acosta has the authority to withdraw the appeal and allow the district court to make the injunction permanent, effectively halting the new rules for good. The newly constituted DOL would then be free either to keep the 2004 salary levels, start a new rulemaking on the issue, or defer to the House and Senate to pass legislation. It should also be noted that the Texas AFL-CIO has also filed as an intervener in the case to potentially defend the rule in the event the Trump administration decides not to challenge the injunction.

Trump Administration Action

On March 22, 2017, then-DOL Secretary Nominee Alexander Acosta declined to commit to defend the rule in court during testimony before a Senate confirmation hearing. He did **express concern** as to whether the Secretary of Labor "even has the power to enact this [rule] in the first place." The rule is likely to be reviewed by the new administration and Secretary Acosta. It

may be reasonable—and purely speculative—to guess that DOL under Acosta's leadership would raise the overtime threshold from 2004 levels. However, that raise would likely be far less than the threshold sought under the existing Obama administration rule.

Recent DOL actions a signal a game plan. In its June 30 brief, DOL attempts to thread the needle by arguing that the Secretary of Labor should have the ability to set a salary basis level but declines to defend the salary level set by the 2016 rule. The Department also notes that it "intends to undertake further rulemaking to determine what the salary level should be" – provided the court upholds the department's statutory authority to set a salary level in the first place. Prior to submitting the brief, Secretary Acosta sent a "request for information" on the overtime rule to the White House's Office of Management and Budget for its review and approval. Such a request is typically made when the department intends to seek public input on new rules or changes to existing rules.

AGC Action

AGC has and will continue to support legislation and regulatory changes to repeal the Obama administration's overtime rule. Though AGC appreciated the DOL's attempt at modernizing the salary threshold for exempt workers under the FLSA, it urged regulators to reconsider the threshold amount and to instead implement a new lower threshold that made sense for today's construction employers nationwide. AGC noted its **objections** to more than doubling the salary threshold through **coalition** and its **own** comments.

For more AGC information on this rule, **click here**. For AGC information and resources, visit AGC's Labor & HR Topical Resources webpage at **www.agc.org/topicalresources**. The primary category is "Wages and Benefits" and the secondary category is "Overtime." Additional resources may be found in the secondary category "Fair Labor Standards Act."

U.S. Equal Employment Opportunity Commission's (EEOC) New EEO-1 Report

The Latest

On March 17, 2017, AGC and industry allies **called for** the Trump administration to review and reject the Equal Employment Opportunity Commission's (EEOC) expansion of data reporting in the new EEO-1 form. The EEOC's revisions to the EEO-1 form do not comply with the Paperwork Reduction Act. For example, as a result of EEOC's changes, the EEO-1 form has been expanded from 180 to 3660 data cells. By itself, this exponential increase in the amount of solicited data speaks volumes with regard to the burdensome nature of the new EEO-1 form.

About the Report

On September 29, 2016, the U.S. Equal Employment Opportunity Commission (EEOC) announced that starting March 2018, it will collect summary employee wage and hours-worked data from some employers concerning employee race, sex, gender and ethnicity, among other

bases. This reporting requirement is in addition to Davis-Bacon related information reporting. Under this requirement, certain employers are required to use new EEO-1 form in March 2018, when 2017 data will be reported.

How does it apply? All employers—public and private—with 100 or more employees have to submit the revised EEO-1 report in 2018. Federal and federally-assisted[6] prime and first-tier subcontractors that have 50 or more employees would be required to submit the currently used EEO-1 report that does not include compensation and hours-worked data, as they did before. Federal and federally-assisted contractors and first-tier subcontractors with 49 or fewer employees, and companies without federal or federally-assisted contracts with 99 or fewer employees, will not be required to complete the EEO-1 report. This new reporting requirement came as a result of an Obama administration Presidential Memorandum.

Trump Administration Action

Because this is a form, removal of the requirement may not necessarily require notice and comment action or other regulatory procedures. There is no clear indication to date how the Trump administration will act. Congress decided against undertaking a Congressional Review Act effort to repeal the form earlier this year.

The EEOC is an independent agency run by five appointed commissioners from both parties, a majority of which generally come from the president's party. As opposed to executive agencies like DOL and the DOT—which report directly to the president, and whose heads are members of the president's cabinet—independent agencies are usually established by Congress with bipartisan commissioners for which the president has less direct control, but can appoint commissioners, upon vacancies.

As it stands, there is only one Republican on the EEOC currently serving, with one Republican vacant seat and one commissioner's term expiring on July 1, 2017.[7] Thus a 3-2 Republican majority can be expected, but the process to confirm those picks and establish new policy will take time. This means that any changes to the new EEO-1 report will not likely be addressed until a majority of the commissioners are Republican.

[6] Federal and federally-assisted contractors refers to contractors that fall under Executive Order 11246. The Executive Order prohibits federal contractors and federally–assisted construction contractors and subcontractors, who do over $10,000 in Government business in one year from discriminating in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity or national origin. It applies to those contractors that work directly for federal agencies and those that work on federal-aid transportation contracts issued through state contracting agencies, like the U.S. Department of Labor.

[7] EEOC Commissioner Jenny Yang's (D) term expires on July 1, although she has announced she will exercise the legal option of remaining on the Commission for an additional 60 days. Assuming her seat is filled by a Republican and Dhillon's nomination is confirmed, the EEOC will include three Republican commissioners and two Democrats. President Trump has not yet nominated a replacement for the EEOC's general counsel position

At the end of June, President Trump nominated Janet Dhillon—a Fortune 500 executive vice president and general counsel—to chair the EEOC and fill the vacant Republican slot. The president will have the opportunity to make another nomination to the Commission by the end of the summer.

AGC Action

As noted above, AGC has called upon the Trump administration and Congress to rescind the Obama administration Presidential Memorandum calling for the new EEO-1 form, and the form itself. AGC submitted comprehensive comments explaining its position to the EEOC in **April** and **August 2016**. AGC also **testified** against this new requirement before Congress in September 2016. For more AGC information, **click here**. For helpful EEOC information, **click here**. For a sample of the new form, **click here**.

U.S. Environmental Protection Agency and U.S. Army Corps of Engineers' "Waters of the United States" Rule

The Latest

On June 27, 2017, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) announced **a proposed rule** to rescind the Obama-era 2015 "Waters of the United States" (WOTUS) rule that defines what streams, wetlands and other wet areas are controlled by the federal government and subject to the permitting requirements of the Clean Water Act. This action is the first step in a comprehensive, two-step process intended to review and revise the definition of WOTUS consistent with President Trump's Executive Order on "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule."

This first step (when finalized) would re-codify the regulatory text that existed prior to 2015 WOTUS rule. That is currently the controlling law, as a result of the U.S. Court of Appeals for the Sixth Circuit's stay of the 2015 rule. Therefore, this proposed rule does not change current practice with respect to what WOTUS definition applies: The agencies will continue to use the **1986 regulations and applicable jurisdictional guidance** (status quo as it existed before the 2015 rule) in making jurisdictional determinations or taking other actions based on the definition of WOTUS.

In a separate rulemaking (step two), the agencies plan to engage in a substantive re-evaluation of the definition of WOTUS. "In a second step, the agencies will pursue notice-and-comment rulemaking in which the agencies will conduct a substantive re-evaluation of the definition of 'Waters of the United States,'" the pre-publication notice states.

About the Rule

On May 27, 2015, USACE and the EPA issued a rule redefining the definition of WOTUS under the Clean Water Act, thereby expanding federal jurisdiction over the nation's wetlands. The rule, however, has not taken effect to date due to various legal challenges.

In short, the Obama administration rule defines which rivers, streams, lakes and marshes fall under the jurisdiction of EPA and the Corps. It asserts federal jurisdiction over work in traditionally navigable waters, interstate waters/wetlands, territorial seas, impoundments, and tributaries that have physical signs of flowing water (even if they do not flow year round), and over ditches that "look and act" like tributaries. In addition, the final rule extends federal jurisdiction to adjacent waters/wetlands that are within a certain proximity to other jurisdictional waters. For AGC's complete overview of the rule, **click here**.

Court Action

On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay of the Obama administration WOTUS rule. That stay has been in effect ever since, putting the rule on hold pending litigation. As it stands, the U.S. Supreme Court **agreed in January 2017** to determine a jurisdictional question—whether federal district courts or federal appeals courts should hear the case. Briefs in that case are due on July 28, 2017. Even if or when the Supreme Court issues its ruling on the jurisdictional issue, the case would have to be heard again at a lower court level for a ruling on the merits. In short, no final court decision on this rule is likely in 2017, at a minimum.

Trump Administration Action

Following AGC's **recommendation** to the Presidential Transition Team, President Trump issued on Feb. 28, 2017, the **executive order** (EO) that begins the process of unwinding the (WOTUS) rule. In addition, the EO—also in line with AGC's recommendation—calls for a new "review" of the WOTUS rule in a manner consistent with the late Justice Antonin Scalia's opinion in a 2007 Supreme Court case addressing the WOTUS definition.

The Trump EO in and of itself, does not remove the WOTUS rule from the books. Rather it merely directs the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers — who issued the rule in 2015 — to begin the lengthy and complex regulatory process necessary to rescind or revise the rule. That process will take time, as it is subject to the same notice and comment rulemaking processes as the rule underwent when it was written. And, that process is subject to legal challenge by environmental groups, which may use the government reports and documentation the agencies used to justify the rule as ammunition against their now altering it. Notably, the Order states for any revised proposed rule, the EPA and Corps "shall consider interpreting the term 'navigable waters,' as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006)."

The EO also directs the regulatory agencies to notify the U.S. Attorney General about the pending review of the WOTUS rule so he may "inform any court of such review and take such measures as he deems appropriate concerning any such litigation pending the completion of further administrative proceedings related to the rule." But, at this point, it remains unclear how this EO will impact current litigation against rule. In the midst of this uncertainty, the Corps continues to use the **1986 regulations and applicable jurisdictional guidance** (status quo as it existed before the new rule) in making jurisdictional determinations or taking other actions based on the definition of WOTUS.

AGC Action

AGC is working with the Trump administration in its effort to rescind the Obama administration's WOTUS rule and replace it with one that would work for the construction industry. Such a rule would provide more clarity as to what is and is not a WOTUS under the federal Clean Water Act. At the same time, such a rule would not allow the federal government to overreach when it comes to asserting federal jurisdiction over water.

Prior to the issuance of the final rule, AGC submitted extensive **comments** on the proposed Obama WOTUS rule and AGC **met** with OMB to lodge its concerns, as well as with the EPA and USACE. In addition, AGC worked with Congress in the hope of forcing the agencies to re-do the rule. That is exactly, what the current administration is seeking to do.

For AGC information on the WOTUS rule and where it generally stands, **click here** and **here**, respectively. For more AGC analysis on the Trump WOTUS EO, **click here**.

Fair Pay and Safe Workplaces (Blacklisting) Executive Order[8] (REPEALED)

The Latest

Thanks to AGC's advocacy efforts, contractors enjoyed a major victory on permanent nullification of regulations implementing Pres. Obama's Fair Pay and Safe Workplaces Executive Order, often referred to as the "blacklisting" rule. On March 27, 2017, Pres. Trump signed into law a joint resolution under the Congressional Review Act (CRA) by which Congress expressed disapproval of the rule and stripped it of all force and effect.

About the Rule

Under the blacklisting rule, both prime and subcontractors were required to report violations and alleged violations of 14 federal labor laws and "equivalent" state labor laws during the previous three years, and again every six months, on federal contracts over $500,000. Prime

[8] As noted above, the Fair Pay and Safe Workplaces and Paid Sick Leave Executive Orders only impact companies that hold prime contracts directly with or subcontracts through federal agencies like the Army Corps, Naval Facilities Engineering Command, Department of Veterans Affairs or U.S. General Services Administration; these executive orders do not impact federally-assisted contracts from state agencies, like state departments of transportation.

contractors were also responsible for evaluating the labor law violations of subcontractors at all tiers. A single alleged violation could have led a contracting officer to remove a contractor from an ongoing project or to deny to a contractor the right to compete for a contract. The rule also required contractors to provide certain pay information to employees and independent contractors, and it limited the use of mandatory arbitration of employment disputes. All but the paycheck transparency provisions had been on temporary hold since a federal court issued preliminary injunction in October 2016.

Unwinding the paycheck transparency requirements that were already in effect at the time the President signed the resolution may take time, and some federal contracting officers may not be aware of this development. Contractors responding to a request for proposal that includes FAR 52.22-60, Paycheck Transparency (Executive Order 13673), should ask the contracting officer to remove the provision in light of this development. Contractors already performing work on a contract that incorporates FAR 52.222-60 should consider evaluating the burden of continued compliance, and, if significant, ask the contracting officer to remove the clause by modification.

AGC Action

AGC continually pressed Congress and the administration—Obama and Trump—to repeal this rule. The association expressed a litany of reasons why it would not work and would bog down the construction procurement process in more than 30 pages of regulatory **comments**; met with the White House, **Office of Management and Budget**, Department of Labor, **Small Business Administration**, and key congressional leaders; and, ultimately worked with Congress and the Trump administration to repeal the rule. For more on AGC's efforts, **click here**.

Paid Sick Leave Executive Order[9]

The Latest

On January 1, 2017, the Paid Sick Leave Executive Order went into effect. The requirements of the FAR Council rule will be included in federal contract solicitations issued on or after January 1, 2017, and resultant contracts by virtue of new FAR Clause 52.222-62 (the "new clause"). In certain cases, the requirements may also be included in projects already underway, as the rule also (1) requires contracting officers to include the new clause in bilateral modifications extending the contract when such modifications are individually or cumulatively longer than six months; and (2) strongly encourages, but does not require, contracting officers to include the new clause in existing indefinite-delivery indefinite-quantity contracts when the remaining ordering period extends at least six months and the amount of remaining work or number of orders expected is substantial.

[9] See Footnote 2.

About the Rule

The order requires federal contractors to provide seven days (56 hours) of paid leave to employees for sickness and other purposes. The rule covers employees who perform work on or in connection with a covered contract. This includes employees who are exempt under the Fair Labor Standards Act. Independent contractors are also covered. However, in response to an AGC request, the rule clarifies that bona fide independent contractor owner-operators and sole proprietors are not covered if they are not entitled to prevailing wages. An exemption applies to employees who perform work in connection with covered contracts (but are not directly engaged in specific work called for by the contract) that amounts to less than 20 percent of their work hours in a given week.

Trump Administration Action

President Trump campaigned for six weeks of paid maternity leave for new mothers whose employers do not guarantee paid leave. And, his FY 2018 budget proposal includes paid parental leave. There is little information to reflect his position one way or the other on this particular executive order. However, the fact that he supports paid maternity/parental leave could make it difficult for him to oppose this paid sick leave order.

AGC Action

AGC notified Congress about its ability to repeal this executive order's implementing regulations—through the Congressional Review Act in November 2016 and continues to press for repeal, as it is administratively impracticable in the context of the construction industry. AGC has requested that the Trump administration repeal this executive order and unwind the Federal Acquisition Regulation rule that implements it. AGC previously submitted extensive comments on problems with this policy.

In the meantime, AGC is also working with the Wage and Hour Division to provide more guidance to help comply with the rule. A DOL spokesman was recently **quoted** as stating "WHD has received a number of questions regarding interpretation of certain provisions and implementation of the Final Rule. WHD is preparing responses to those questions, and is also updating training materials to provide further clarification. We anticipate that those materials will be available online later this summer."

For AGC information on the order, **click here** and **here**. For DOL's helpful FAQ document, **click here**.

The Regulatory Outlook

There are many things that can, cannot and may not happen in the regulatory sphere. Nevertheless, AGC will be there to fight for construction contractors. Among the first item on the agenda is addressing the current Project Labor Agreement (PLA) Executive Order. AGC will also seek ways to work with Congress to repeal regulations and the new administration to unwind or tweak costly and over burdensome regulations.

Rescind Obama's PLA Executive Order and Replace it with George W. Bush's PLA Executive Order that would Reinstate Government Neutrality in Contracting

AGC **has called** on the Trump administration to rescind the Obama PLA Executive Order and replace it with the George W. Bush PLA Executive Order. The Obama order encourages—but does not require—federal agencies to use project labor agreements on large scale construction projects estimated to cost $25 million or more. The order is limited to direct federal construction contracts. The Bush PLA order neither encouraged, restricted nor required PLAs on federal and federally-funded construction projects. The Bush order is in line with AGC's decades-held position on leaving the need for PLAs up to contractors to voluntarily decide.

As a refresher, the Bush PLA order preserved open competition and government neutrality towards government contractors' labor relations. The order allows construction contractors and labor unions to voluntarily institute PLAs on federal and federal-funded construction contracts. Under this order, two things happen: (1) there would be no federal agency mandated/government PLAs on construction contracts; and (2) there would be no state agency/government mandated PLAs on contracts that include federal funds. To the first point, direct federal contractors will not have to respond to sources sought notifications regarding the consideration of PLAs. These sources sought notices[10] will not be necessary and no longer be issued. To the latter point, federal-aid contracts issued from state agencies—like federal-aid highway contracts—could not require PLAs. However, this order could not and would not apply to state construction contracts that only use state funds—i.e., include no federal construction funds. Such an order would likely fail to pass constitutional muster under the Tenth Amendment, which protects states from certain types of federal government actions.

Assuming President Trump takes this course, regulatory action will be required to put the Bush PLA order back into effect. The Federal Acquisition Regulation Council and U.S. Department of Transportation, for example, will have to issue new regulations. This will take time, as proposed rules will have to go through the notice and comment period. This will not happen with the

[10] Federal agencies generally release what are called "sources sought" notices as a means to solicit and gather market information. Under the existing PLA FAR Rule, federal agencies must make case-by-case determinations as to whether it a government mandated PLA would increase the economy and efficiency of project delivery. These agencies released sources sought notices to help them gather market information, as these notices often included a host of survey questions.

simple stroke of President Trump's pen. AGC will keep its contractors closely informed about developments on this front.

Outside of the regulatory arena, AGC remains engaged with Congress in repealing the PLA mandate as well. Sen. Jeff Flake (R-Ariz.) and Rep. Dennis Ross (R-Fla.) recently introduced the AGC-supported "Fair and Open Competition Act" in both the **Senate** and **House** of Representatives, respectively. The legislation would prohibit federal contracting agencies from mandating that contractors and unions enter project labor agreements (PLAs) on direct federal projects. In addition, the bills would preserve the right of contractors and unions to voluntarily negotiate and execute project labor agreements on federal projects, if they so choose. AGC is committed to full and open competition for all public projects.

Contact your members of Congress and urge them to support passage of the "Fair and Open Competition Act". In addition, **send a letter** to President Trump urging him to repeal President Obama's Government-Mandated PLA executive order.

Other Rules and Agency Guidance Targeted for Rollback

When it comes to other rules, guidance and policy directives put forth by federal agencies during the Obama administration, federal agencies in the Trump administration may make changes or throw them out entirely. For rules that initially went through the notice and comment process under President Obama's term, the Trump administration can only change or repeal them through notice and comment rulemaking. Again, this takes time, amounting to years. In addition, those who oppose such changes or repeal could delay the process in court.

For agency directives or rules that did not go through the notice and comment rulemaking process, the Trump administration can instantaneously change or repeal them. In addition, the Trump administration, just as the Obama administration can, rather quickly, alter the overall enforcement efforts of agencies.

AGC has been successful in these other areas to date. Some "wins" in these areas include:

- The **rescinding** of OSHA guidance granting union representatives walk around rights at non-union jobs;
- The **withdrawal** of DOL's 2015 and 2016 guidance on joint employment and independent contractors, which took expansive interpretations of employment and threatened the traditional relationship between contractors and their partners.
- The **indefinite suspension** of the U.S. Department of Transportation's Greenhouse Gas Performance Measurements rule;
- The **rescinding** of Council on Environmental Quality's Obama administration National Environmental Policy Act (NEPA) guidance that would have encouraged agencies to quantify direct and indirect GHG emissions for construction projects during NEPA

review, for which environmental impact statements already take 4.6 years on average to complete; and

- The **rescinding** of an Obama administration **presidential memoranda** that created sweeping new authority for several federal permitting agencies, establishing a preference for compensatory mitigation to restore, establish, or enhance the environment within the scope of a construction project where unavoidable adverse environmental impacts may occur.

The DOL has also **begun** the process of rolling back the "persuader rule," which expands—beyond reason—the scope of reportable persuader activity for employers and outside labor relations consultants, including lawyers, and association staff who assist employers, and significantly limits the advice exemption from reporting contained in the Labor-Management Reporting and Disclosure Act. AGC will submit comments in favor of rescinding the rule.

Regulatory Reform Advances in Congress

Given the executive overreach of the Obama administration, AGC has been work with Congress to make significant changes to the regulatory process. AGC continues to push for reforms that allow Congress to have a greater say in the rulemaking realm and require agency guidance and directives that have the practical impact of law to undergo notice and comment rulemaking. The association is seeking a return to fact-based rulemaking, where regulations undergo thorough economic analysis; are based in sound science and/or substantial empirical data; and are transparent in methods and goals.

There are a host of regulatory reform bills moving in Congress, many of which AGC supports. However, the bill with the most bipartisan support and chance of passage in the Senate is the **Regulatory Accountability Act** introduced by Sens. Rob Portman (R-Ohio) and Heidi Heitkamp (D-N.D.). AGC has worked with both senators and their staffs—in Washington D.C. and in the states—to ensure that the legislation includes regulatory cost-benefit analyses, the consideration of regulatory alternatives (not "one-size fits all decrees") and greater transparency requirements in rulemaking, specifically concerning the studies and agencies base their proposals on sound data and science.

AGC Leading the Charge on Federal Environmental Permitting and Review Reform

Both Congress and the White House turned to AGC for common-sense **recommendations** on streamlining the federal environmental permitting and review processes. And, AGC has delivered. The primary reforms AGC has testified before Congress on in May 2017 include:

1- Requiring a nationwide merger of the NEPA and the Clean Water Act Section 404 permitting processes, with the U.S. Army Corps of Engineers issuing a 404 permit at the

end of the NEPA process, based on the information generated by NEPA. Data show these processes take the longest, are the most costly, and are subject to the most disagreements;

2- To reduce duplication, the monitoring, mitigation and other environmental planning work performed during the NEPA process must satisfy federal environmental permitting requirements unless there is a material change in the project; and
3- A reasonable and measured approach to citizen suit reform to prevent misuse of environmental laws.

AGC also **testified** before Congress in March 2017 on how to reduce environmental permitting paperwork. AGC has met and shared its reforms with the **EPA** and U.S. Army Corps of Engineers, among others. The association has also **submitted** detailed proposals at the request of the U.S. Department of Commerce, which was covered in the ***Washington Post***. And, the House Natural Resources Committee sought and **received** AGC's advice on reforming the Endangered Species Act.