

OSHA TO EPA: ENVIRONMENTAL & SAFETY REGULATORY PREDICTIONS UNDER A TRUMP PRESIDENCY

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In-House Counsel Forum
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OSHA to EPA

What does a Trump Presidency mean for Enforcement?

What does the Trump presidency mean for OSHA enforcement?

- Budget Cuts
- Regulation Cuts
- Enforcement Questions



Budget Cuts for Department of Labor

- Pres. Trump's 2018 proposed budget requests \$9.6 billion for Department of Labor
 - 21% decrease from 2017



OSHA Citations and Inspections

- 10,000 less inspections in 2016 than in 2010
 - 96k citations issued in 2010
 - 58k citations issued 2016
- Conducted a few more thousand whistleblower investigations in 2016 than 2010
 - Result of a renewed focus on anti-retaliation provisions
- Starting a 70% penalty reduction in initial calculation for employers with 1-10 employees
- Average penalty reduction is around 40%
 - Conducted 60% unprogrammed/40% programmed inspections
 - 5 years ago it was the opposite

Penalty Increases

- OSHA increased penalties as mandated by 2016 revisions to Federal Civil Penalties Inflation Adjustment Act
 - Applies to all violations after November 2, 2015 assessed after January 13, 2017



OSHA Penalty Increases

- OSHA increased maximum penalties by over 78%
 - Effective August 1, 2016
 - Maximum penalty for serious violations: from \$7,000 to \$12,675
 - Maximum for each willful or repeat violation: from \$70,000 to \$126,749



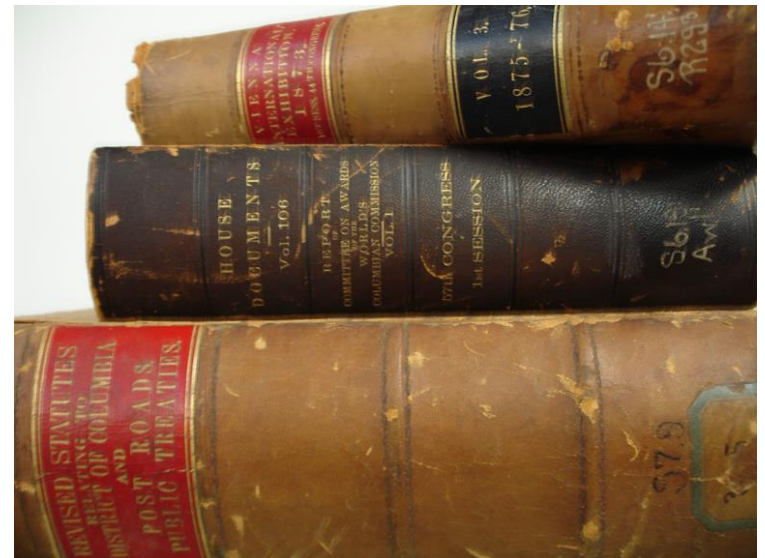
Under Pres. Trump: Penalties

- Since increases were part of federal budget mandate, changes would have to be through the legislative process
- Reduced funding could cause less enforcement



Congressional Review Act

- Gives Congress at least sixty legislative days to vote down any significant rule before it goes into effect
- If Congress approves, and the President signs, the rule is repealed



Fair Pay and Safe Workplaces Executive Order

- Also known as the “Blacklisting Rule”
- Signed by Pres. Obama on July 31, 2014
 - Published August 25, 2016
- Required prospective federal contractors to disclose labor violations for contracts over \$500k and gave agencies guidance on how to consider labor violations
- Mandated paycheck transparency



Under Pres. Trump: Fair Pay and Safe Workplaces Executive Order

- March 27, 2017 - President Trump signed Executive Order reversing the Fair Pay and Safe Workplaces Executive Order



Volks Rule

- Rule made in response to decision in *AKM LLC d/b/a Volks Constructors v. Sec'y of Labor*, 675 F.3d 752 (D.C. Cir. 2012)
- Authorized OSHA to issue citations to employers for not recording work-related injuries/illnesses during 5 year retention period
 - Contrary to 6 month statute of limitations



Volks Rule

- July 29, 2015 - OSHA issued proposed rule
 - Clarified “that the duty to make and maintain an accurate record of an injury or illness continues for as long as the employer must keep and make available records for the year in which the injury or illness occurred. The duty does not expire if the employer fails to create the necessary records when first required to do so.”
 - Finalized in December 2016 and went into effect in January 2017

Under Pres. Trump: Volks Rule

- March 2017 - A resolution to nullify OSHA rule was approved by House and Senate
- Yesterday, President Trump signed the resolution.



Injury and Illness Recordkeeping Rule

- Requires some employers to electronically submit injury and illness data to be published on OSHA's website
- Includes anti-retaliation provisions to prohibit employers from discouraging workers to report injuries or illnesses



Enforcement of Anti-Retaliation Provisions

- The rule “allows OSHA to issue citations to employers for retaliating against employees for reporting work-related injuries and illnesses and require abatement even if no employee has filed a Section 11(c) complaint”
- OSHA’s prima facie burden of proof lowered to “reasonable cause”



Anti-Retaliation Provisions

- Eight industry groups filed a legal challenge to block the anti-retaliation provisions
 - Judge denied the motion in November 2016



Under Pres. Trump: Illness and Injury Recordkeeping and Anti-Retaliation

- Since Pres. Trump took office, not one company fine or citation has been published on OSHA's website
- Trump could do away with this rule
 - OSHA could issue new guidance
 - Could be changed by a budget rider
 - Formal rulemaking



Rule Update and Status

- OSHA's silica rule is in danger of being repealed
 - Reduces the permissible exposure limit to 50 micrograms per cubic meter of air averaged during an 8 hour shift
- Combustible dust rule and process safety management reform are unlikely to advance
- OSHA has proposed a delay of the Beryllium regulation until May 20, 2017 in order to review and consider the rule
 - Based on January 20, 2017 Regulatory Freeze from the White House

Workplace Violence

- Focus item for Trump administration
- Any act or threat of physical violence, harassment, intimidation or other disruptive behavior
- Nearly 2 million American workers report having been victims of workplace violence
 - Many go unreported



Develop Workplace Violence Prevention Plan

- Zero tolerance policies
 - Give leverage to make quick termination decisions
- Implement engineering and administration controls
 - Separate reception areas
- Training and annual retraining



The image shows the top portion of the EPA logo, which consists of a horizontal bar divided into two sections: a lighter green square on the left and a darker green rectangle on the right. The letters "EPA" are written in white, sans-serif font within the darker green section.

EPA

Changes are coming

ENVIRONMENTAL POLICY

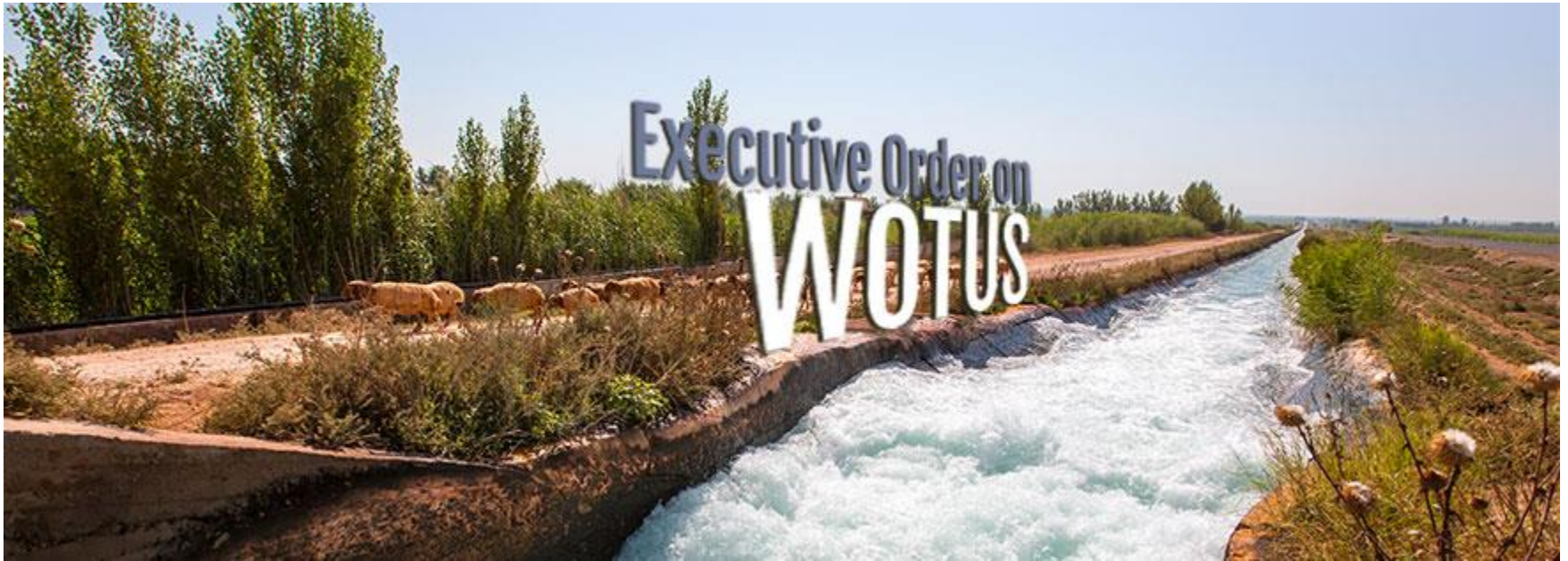
WOTUS



PARIS
 AGREEMENT



WATERS OF THE UNITED STATES



The Clean Water Act covers “navigable waters”

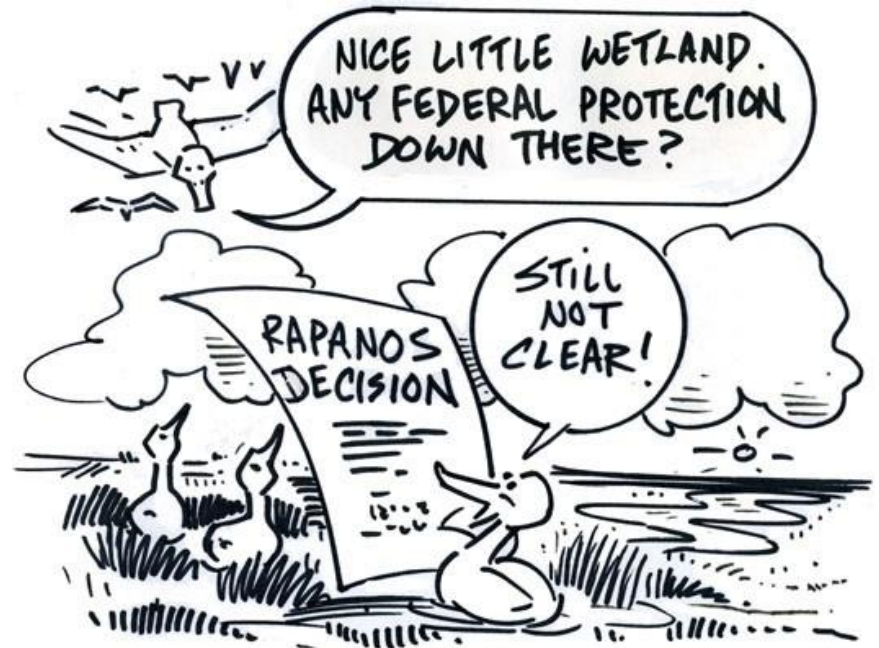


What is a navigable water?

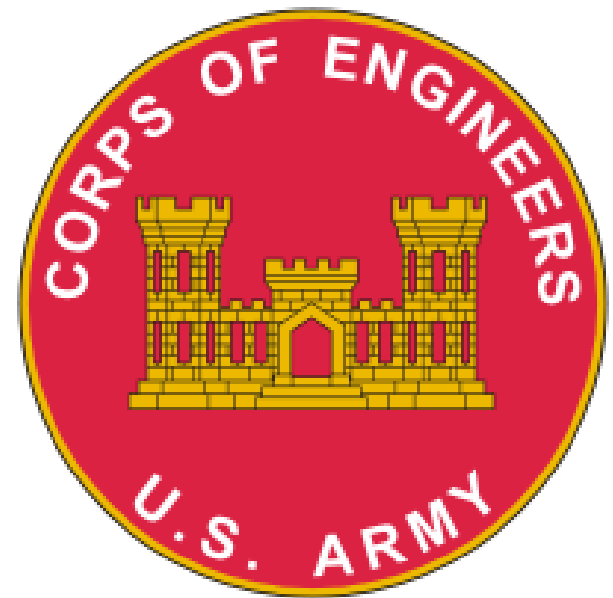


Rapanos v. United States (2006)

- Developer filled individual wetlands without a permit as part of a mall construction project
- EPA halted the project, invoking broad definition of “navigable waters”
- Supreme Court did not reach a majority decision
- Plurality opinion (Scalia) stated that WOTUS should only include relatively permanent, standing or continuously flowing bodies of water (consistent with Webster’s definition of “water”)
- Because no majority, the controlling test was unclear



In an effort to clarify the confusion created by *Rapanos*, in 2015 the Obama administration issued a new rule defining the scope of “Waters of the United States”





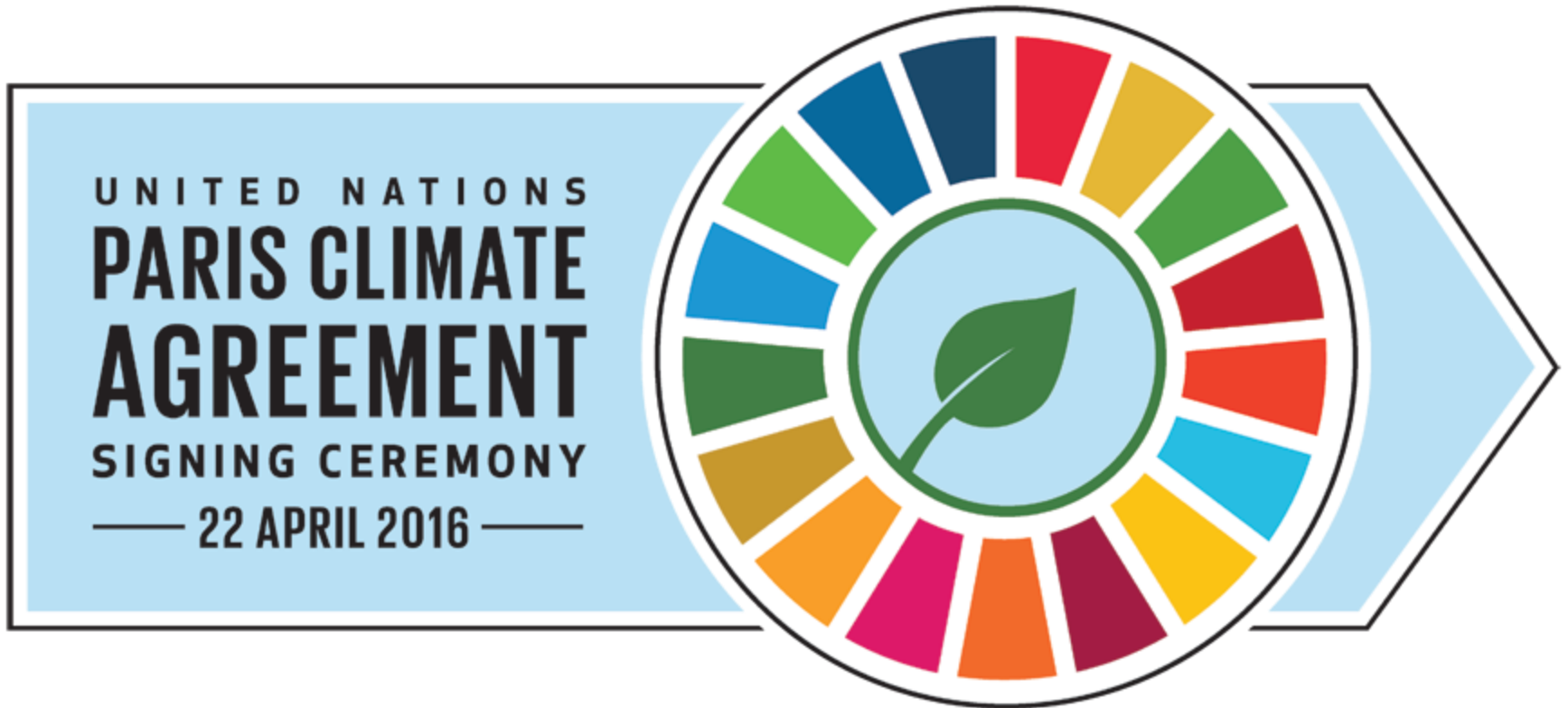
- The 2015 rule expands federal jurisdiction over waterways to include smaller creeks, wetlands and other waterbodies
- The rule was immediately challenged by a number of states and private parties – it was stayed on a nationwide basis by the 6th Circuit Court of Appeals in October 2015
- In February 2016 the 6th Circuit ruled that it has exclusive jurisdiction over the challenge

On February 28, President Trump issued an Executive Order directing review of the 2015 rule

- Reviewers tasked with assessing the rule's consistency with “promoting economic growth” and “minimizing regulatory uncertainty,” among other factors
- President Trump has stated that the EO would pave the way for elimination of the rule

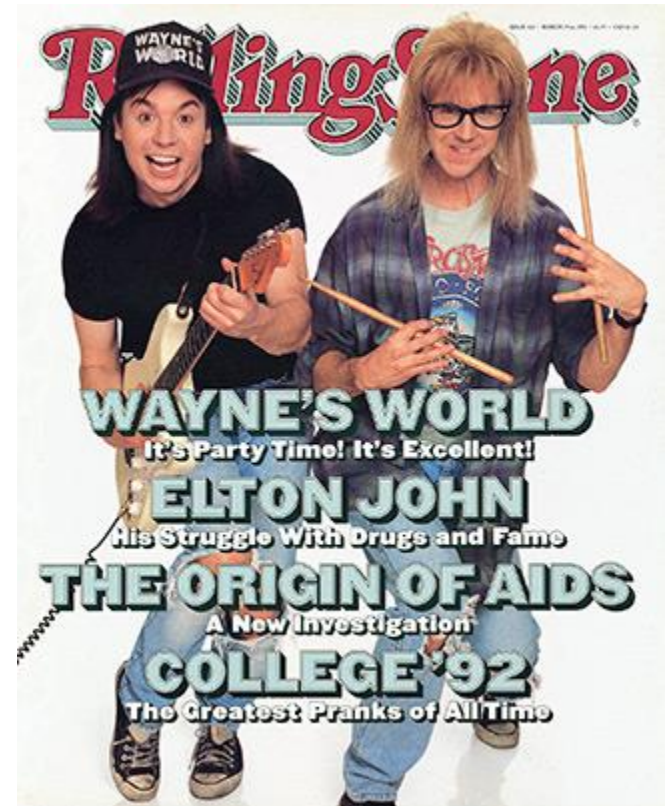


PARIS AGREEMENT



1992 U.N. Framework Convention on Climate Change (UNFCCC)

- Parent treaty of the Paris Agreement
- Ratified by U.S. Senate in 1992
- As a result, Paris Agreement does not need further legislative consent to become effective

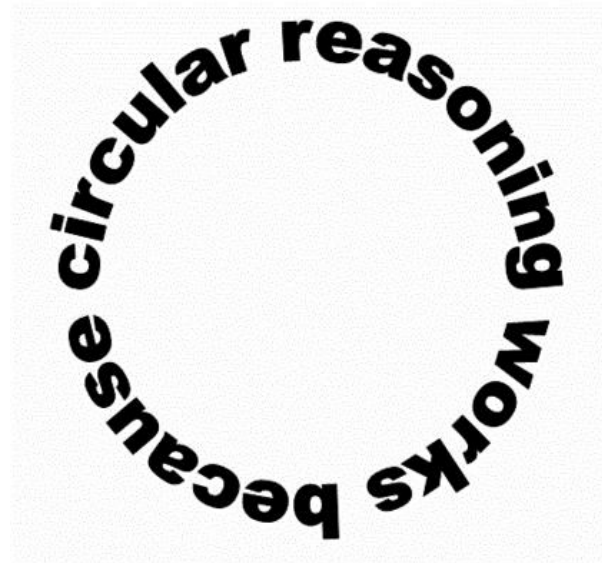




- Agreement would only become fully effective if 55 countries that produce at least 55% of global emissions accepted
- On April 1, 2016, USA and China (~40% of total emissions) confirmed that they would sign the Agreement
- That same day, 20 other countries issued a joint statement of intent to join the Agreement as soon as possible
- The Agreement obtained enough parties to become effective on November 4, 2016

Structure of the Agreement

- No binding commitment targets – voluntary and nationally-determined targets
- Specific climate goals are instead politically encouraged
- Sometimes described as circular reasoning – the Agreement presupposes in advance what it wants to achieve



During the campaign, President Trump promised to withdraw from the Agreement



The White House, however, is divided over whether to withdraw

- Senior advisor Steve Bannon and EPA Administrator Pruitt want to withdraw
- Secretary of State Tillerson and Ivanka Trump want to stay in the Agreement



There was speculation last month that initiation of the withdrawal process was imminent

- Conventional wisdom was that the White House would try to get out of the Paris Agreement before it addressed the Clean Power Plan and other Obama climate initiatives
- However, there has been no action on the Agreement, perhaps due to the internal conflict



Process for withdrawal

- Any country pulling out of the Agreement after ratifying it must wait four years



Quicker alternatives?

- Withdrawing from the 1992 framework accord
- Voiding U.S. involvement in both the Paris Agreement and the 1992 treaty
- Issuing a Presidential order simply deleting the U.S.'s signature from the Agreement

CLEAN POWER PLAN



Centerpiece of President Obama's environmental legacy

- Would have regulated CO₂ emissions from existing fossil-fuel power plants, re-organizing the power-generation industry in the USA by shifting the focus towards renewable sources
- Immediately challenged in the D.C. Circuit Court of Appeals by state and private parties – does EPA, rather than Congress, have the authority under the Clean Air Act to address climate change?
- Supreme Court stayed implementation of the CPP pending a full judicial review in February 2016
- Oral argument held before an en banc panel of the D.C. Circuit in late September 2016

Then....



Getty Images

On March 28, 2017, President Trump issued an Executive Order targeting Obama-era climate policy, including the CPP

EXECUTIVE ORDER

PROMOTING ENERGY INDEPENDENCE AND ECONOMIC GROWTH

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. (a) It is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation. Moreover, the prudent development of these natural resources is essential to ensuring the Nation's

- Order seeks to support to inclusion of the oil, gas and coal industries as part of the nation's energy platform
- EPA is instructed to review the CPP and, if appropriate, rescind, suspend or revise the rule
- EPA immediately moved to hold the D.C. Circuit litigation in abeyance in light of the EO

Even if the CPP is rescinded, EPA is legally required to use official rulemaking for the repeal process. A legal challenge to any repeal is a virtually certainty.



OSHA and EPA Take-Aways

- ❑ Increased penalties for OSHA and EPA violations will probably remain
- ❑ OSHA's Volks Rule has been nullified
- ❑ Fair Pay and Safe Workplaces Executive Order has been reversed
- ❑ Injury and Illness Recordkeeping/Anti-Retaliation Rule's effect will likely be reduced
- ❑ Companies would be wise to create a workplace violence plan
- ❑ 2015 rule on scope of Waters of the United States will likely be eliminated by Trump
- ❑ Trump wants to withdraw the U.S. from Paris Agreement
- ❑ Clean Power Plan could be rescinded but most likely there would be a legal challenge to a repeal

ANY QUESTIONS?

