Joint Comments of the International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART) and the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) in Response to the U.S. Department of Labor's Notice of Proposed Rulemaking Updating the Davis-Bacon and Related Acts Regulations

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Table of Contents

The International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART) and the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) jointly submit these comments in support of the DOL's Notice of Proposed Rulemaking, *Updating the Davis-Bacon and Related Acts Regulations*, to amend Parts 1, 3, and 5 of these regulations. These comments address amendments to Part 1.

SMART has approximately 203,000 members in diverse occupations, with about 136,000 members employed in the sheet metal trade, and more than 57,000 workers in the transportation trades. SMACNA is a national employer association representing 3,500 contributing unionized sheet metal contractors. In the construction industry, the sheet metal trade encompasses a broad range[1] of work functions, including but not limited to installation of duct and units on heating, ventilating, and air conditioning (HVAC) systems; testing, adjusting, and balancing of HVAC equipment and duct work; custom fabrication of duct;[2] architectural sheet metal work (e.g., sheet metal work on building "envelopes"), and welding.

[1] As discussed in these comments (page 59), the NPRM's discussion of the work of sheet metal workers misunderstands the sheet metal trade in stating that: "in some areas, a significant portion of work involving the installation of heating, ventilation, and air-conditioning (HVAC) duct work may be done by an HVAC Technician, whereas in other areas such work may be more typically performed by a Sheet Metal Worker." 87 *Fed.Reg*. at 15711. An "HVAC technician" in the construction industry is a sheet metal worker. In other words, all HVAC duct installers perform the work of sheet metal workers, but a sheet metal worker have the training and skill, and do, in fact, perform other work functions, as described in administrative code implementing state prevailing wage laws. *See* pages 39 to 40 and 60 for citations to these codes.

[2] *See* New Jersey State Prevailing Wage Act, N.J.S.A. 34:11-56.26(12), for a description of custom fabrication:

> "Custom fabrication" means:
>
> (a) the fabrication of any of the following: plumbing, heating, cooling, ventilation or exhaust duct systems, mechanical insulation, or one or more signs in a project which cost a total of more than $30,000 and are part of a project upon completion; or
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> (b) any other fabrication which is either of components or structures pre-fabricated to specifications for a particular project of public work or of other materials finished into components without further modification for use in a project of public work or for use in a type or classification of a project of public work.

SUMMARY OF COMMENTS

SMART and SMACNA appreciate the DOL's analysis of the federal survey process and its efforts to ensure that the proposed regulations effectuate the purpose of the Davis-Bacon and Related Acts (DBRA). The DOL has had 16 years of experience issuing wage surveys post-*Mistick* (2006)[3] and 23 years of experience from the effective date of the Final Rule in 1983 to 2006. Based on that 39-year record, the DOL has determined that modification of the definition of prevailing wage and rescission of Reagan-era rules are necessary to further the remedial purposes of the DBRA. Based on its review of the impact on survey results using post-1983 methodology, including overreliance on the conformance process – 10,000 per year – to fill in "missing" classifications on wage determinations, the DOL has produced cogent reasons for reversal of key elements of the 1983 rules and other significant changes to the definition of "prevailing wage."

Modal Rate and Updating Wage Determinations

The NPRM presents compelling evidence that shows that elimination of the 30% rule in 1983 has depressed the prevailing rates: workers are often paid wage rates that are substantially lower than average, particularly as the wages become stale during the long intervals between surveys. SMART and SMACNA strongly support a return to use of the modal rate and updating wage determinations that are based on open shop rates since those rates become increasingly out-of-date during the many years between surveys.

[3] *Mistick Construction*, ARB No. 04-051 (ARB Mar. 31, 2006).

Treating Certain CBA Rates as "Functionally Equivalent"

The *Mistick* ruling created dysfunction in the survey process, in large part, because it created a sea change in the determination of prevailing wages through an administrative decision that rejected the methodology developed during the seven-decade history of issuing wage determinations. Prior to this ruling, the Administrator's practice spanning over several decades was to treat "variable rates" paid to workers under "different CBA wage rates" as the "same" or a "single" wage rate CBA in computation of prevailing rates. SMART and SMACNA appreciate the DOL's proposal to permit the Administrator to count wage rates together – for the purpose of determining the prevailing wage – if the rates are functionally equivalent and the variation can be explained by a CBA.[4] However, to fully restore the survey process to its pre-*Mistick* state, SMART and SMACNA recommend that the DOL clarify that it intends to treat variations as functionally equivalent if the variations can be explained by "one or more" CBA(s) or a "local or national jurisdictional agreement." Aberrant results, such as the issuance of inconsistent wage determinations for "subclassifications" of certain mechanical workers – HVAC duct installers and HVAC unit installers – who work together in a composite crew, demonstrate the need for significant changes in methodology. The same person often performs installation of HVAC duct and units. Use of area practice survey when more than one trade submits data on the same work would prevent issuance of open shop rates when union practices govern local labor standards.

Artificial Subdivision of Key Classification

The survey results produced in the Bush-II era (post-*Mistick*) conclusively demonstrate that the DOL's administration of the survey process produces internally inconsistent and unreliable

[4] Proposed 29 C.F.R. §1.3(e).

results and skews rates downward. It is patently unreasonable to rely on a relative handful of data when vast amounts of highly probative data are available.[5] Common sense indicates that a system urgently needs modification when the methodology arbitrarily subdivides trades into so many work functions that the DOL has resorted, in some surveys, to relying on 2 contractors and 3 workers on a statewide basis in issuing wage determinations or combining data from rural counties that are geographical remote and demographically dissimilar. The greater the amount of data submitted and ultimately used by the DOL in issuing wage determinations for the sheet metal trade, the more reliable the results. When sheet metal work is stripped into indefinite number of subclassifications, there is essentially no data remaining on which to base a wage determination for the key classification of sheet metal worker. Most importantly, whichever methodology the WHD ultimately selects to avoid proliferation of subclassifications, SMART and SMACNA urge the WHD to choose a process that does not jeopardize SMART's ability to prevail or the lion's share of the work in the sheet metal industry – HVAC duct installation.

"Pre-Conformances" Should Treat "Mechanical Trades" as a Separate Category

SMART and SMACNA support use of the proposed "pre-conformance"[6] process to reduce the DOL's overreliance on the conformance process. In so doing, SMART and SMACNA recommend, among other things, that the DOL create a separate category of "mechanical trades" within the currently-used skilled crafts category to ensure that the pre-conformance and conformance processes do not deprive sheet metal workers and other mechanical trades (plumber, electrician, mechanical insulator, and pipefitter (including sprinkler fitter)) of wage rates that are

[5] In a 2011 report, the GAO states that "over one-quarter of the wage rates were based on six or fewer workers." GAO, March 2011, *Davis-Bacon Act/Methodological Changes Needed to Improve Wage Survey*, at 12.

[6] This is not the term used in the NPRM, but it aptly describes the process. *See* proposed 29 C.F.R. 1.3(f).

commensurate with their skills. We further recommend that the DOL codify All Agency Memorandum No. 213, [7] to prevent its future rescission without a rulemaking. AAM No. 213 eliminated two deficiencies in the conformance process: 1) use of the lowest rate on the wage determination within a "category" as the "automatic benchmark" in selection of conformed rates; and 2) the WHD's longstanding failure to consider the relative number of union rates and open shop rates on the wage determination in selecting conformed rates. Finally, we recommend that the DOL add the following language to proposed §1.3(f): "The listed classification and wage and fringe benefit rates do not subdivide a classification utilized in the area by the construction industry into one or more work functions within the classification if the conformed rate for the work function would produce a wage rate that is lower than the wage rate for the classification or work encompassed therein."

Discarding Federal Data Sharply Reduces Survey Data

SMART and SMACNA encourage the DOL amend §1.3(d) to permit the Administrator to establish prevailing rates for building and residential construction based on all usable wage data in the relevant county or other geographic area, without regard to whether wage data are federal and whether there are "insufficient" data on non-federal projects. Modifications to the survey methodology required by Reagan-era regulations caused a decrease in the data available to use in calculating prevailing rates. The WHD often discards far more than 90% of the data submitted on federal and federally-financed projects based on the current prohibition on use of such data in building and residential surveys when "sufficient" data – an undefined term[8] – are available in a

[7] AAM No. 213, *Application of the Davis-Bacon and Related Acts Requirement that Wage Rates for Additional Classification, When "Conformed" to an Existing Wage Determination, Bear a "Reasonable Relationship" to the Wage Rates in that Wage Determination*. SMART and SMACNA does not support codification of the Trump administration's subsequent modifications of AAM No. 213 in AAM No. 233, *Clarification of All Agency Memorandum (AAM) No. 213 (2020)*.

[8] *See Plumbers Local Union No. 27*, ARB Case No. 97-106 (July 30, 1998)("Nowhere in the regulation is the term 'sufficient data' defined, suggesting that the Administrator has discretion in making the determination whether the available wage data from private

county. This occurs even in counties where major federal installation has an overwhelming impact on the local economy, such as Department of Energy facilities, including Los Alamos National Laboratory, Idaho National Laboratory, and Oak Ridge National Laboratory. The DOL's "rigid" or "automatic" application of the 3 workers/2 contractors sufficiency has resulted in findings that the Administrator abused her discretion in three separate ARB decisions.[9] As a practical matter, scant private data dictate the results when the DOL discards abundant federal data.

Using Metropolitan Data in Rural Counties and "Individual Project-Specific" Wage Determination in Sparsely-Populated Data When Appropriate

As stated in the NPRM,[10] the DOL originally focused on "individual project-specific" wage determinations, but it has since eliminated that approach and now issues "general" wage determinations based on four construction types: residential, building, heavy, and highway. The DOL endeavors to issue general wage determinations in all counties, even those with populations with densities of fewer than one person per square mile,[11] and even though more than half of U.S. population lives in 4.6% of the counties.[12] The DOL wastes tremendous resources and makes itself

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sector projects is insufficient to issue a wage rate without also incorporating wage data from projects subject to Davis-Bacon wage standards. However, it is the Board's responsibility to ensure that the exercise of this discretion is in keeping with purposes of the Act and the regulations.") *See also Nevada Chapter of the Associated General Contractors of America, Inc*., ARB Case No. 2020-0058 (July 29, 2021) ("Significantly, neither the DBA nor its implementing regulations define what constitutes 'sufficient' data.")

[9] *Plumbers Local Union*, above at page 5; *New Mexico Nat'l Elec. Contractors Assoc*., ARB No 03-020 (May 28, 2004); and *Road Sprinkler Fitters Local Union No. 669*, ARB Case No. 10-123 (June 20, 2012). *See* pages 100 to 105 below for an analysis of these cases.

[10] 87 *Fed.Reg*. at 15699.

[11] All of the following counties have a density of ranging from 0.55 to 0.04 persons per square mile: counties of Loving and Kenedy in Texas; counties of Catron and Harding, New Mexico; counties of Yukon-Koyukuk, Lake and Peninsula Borough, Yakutat, North Slope Borough, Denali Borough, Northwest Arctic Borough, Dillingham Census Area, Valdez-Cordova Census Area, Southeast Fairbanks Census Area, Hoonah, Bethel, Aleutians East Borough, Kusilvak, and Nome in Alaska; Blaine County, Nebraska; counties of Eureka and Esmeralda Nevada; the counties of Powder River, Garfield, and Petroleum, Montana; Graham County, Kansas; and Eddy County, North Dakota. See *27 US Counties with Wide Open Spaces if You Want to Escape Crowded Cities* https://www.businessinsider.com/the-27-least-densely-populated-counties-in-america-2020-5

[12] Haya El Nasser. *More Than Half of U.S. Population in 4.6 Percent of Counties*, October 24, 2017. https://www.census.gov/library/stories/2017/10/big-and-small-counties.html

vulnerable to criticism from the Government Accountability Office (GAO) and others by undertaking building surveys in rural counties in which there is no local labor standard in the construction industry,[13] because no building construction takes place in those counties. In Texas, for example, 77 of the 254 counties do not even have a hospital.[14] If and when a federal or federally-funded building or residential project is bid in thinly-populated counties, the wage determinations for those rural counties should be an "individual project-specific" one. By bidding work in rural counties at meaningless wage rates (imported from a conglomeration of geographically remote and demographically dissimilar counties), the DOL depresses the local standards in the more populous counties from which data is imported. Use of the wage determination for the county in which the "nearest large city"[15] is located would provide a more accurate measure of the "labor standard" in counties with no appreciable building construction during the relevant survey period. In so doing, the DOL could reduce its "backlog of wage determinations"[16] by reallocating its limited resources to issuance of wage determinations in counties for which there is abundant data.

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[13] Since the DOL does not post sheet metal rates for highway and heavy construction, SMART and SMACNA take no position on the Agency's methodology as it relates to these types of construction.

[14] Texas Organization of Rural & Community Hospitals (2017). *Twenty-Five Things to Know About Texas Rural Hospitals*. https://capitol.texas.gov/tlodocs/85R/handouts/C2102017030910301/be43111d-e0d4-4de3-bc7d-935d111daced.PDF

[15] See Labor Department Regulation No. 503 (1935)(Document ID, WHD-2022-0001-0019), which states, in pertinent part, that:

> Sec. 7 (The scope of inquiry). The referee shall supplement such tabular presentation so far as possible by the affidavits of individual contractors and laborers, but need not include- (1) Projects completed more than 1 year before the date of request for predetermination (unless the number of recent projects is too small accurately to reflect local wage conditions) ; (2) Projects outside the county or other civil division in which the work is to be performed (unless there has been no construction of similar character in recent years, in which event the report shall cover wage conditions in the nearest large city).

[16] 87 *Fed.Reg*. at 15699.

COMMENTS

I. SMART AND SMACNA SUPPORT A RETURN TO THE MODAL RATE FOR DETERMINING PREVAILING WAGE RATES

SMART and SMACNA support the DOL's return to the ''three-step'' method or 30% rule in determining prevailing rates of pay to ensure that predominant rates prevail. In support of its return to this method, the DOL has thoroughly explained its rationale; and has presented compelling statistical evidence based on an analysis of the results of 17 surveys, nearly all of which were completed in 2015 or later.[17] It has also demonstrated that the policy supporting the three-step method is more consistent with the DBA, is supported by "good reasons," and better, in the Agency's belief, than the previous policy, as codified 40 years ago.[18]

The current ''majority'' rule uses averages or the mean instead of the rate that is actually paid to the significant plurality of the survey population. Use of the mode instead has an advantage over the mean in conducting surveys. When using the mean, unusually low or high values distort the data; the mode, by contrast, eliminates from the analysis data that grossly deviate from what workers are actually paid and, therefore, would depress labor standards if included. The downward skew is particularly likely to occur when the amount of data submitted (typically in a sparsely-populated rural county or group of rural counties) is limited to a few contractors. SMART and SMACNA appreciate that the NPRM recognizes this phenomenon in stating that "Using an average to determine the minimum wage rate on contracts allows a single low-wage contractor in the area to depress wage rates on Federal contracts." The WHD's 1986 Manual of Operations seeks

[17] *Id*. at 15703.

[18] *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 514 (2009)("And of course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.")

to limit the impact of data submitted by a single contractor by placing a cap of 60% on the total amount of data from a single contractor that it will use in determining prevailing rates:[19]

> [F]or surveys conducted in rural counties where construction activity is sparse, or for highly specialized classes, the number of employees for whom data are provided may be limited. In such cases, a wage rate for an individual class is to be recommended only when information on at least six workers is received from three or more contractors, none of which accounts for 60 percent or more of total reported employment.

While SMART and SMACNA appreciate the rationale for the 60% cap, limited data continue to skew rates, since under the current WHD's methodology, a single contractor that submits data at rates that are wildly disproportionate to modal rate may, nonetheless, skew wages downward under the 6 workers/3 contractors standard. If, for example, data were submitted on a total of 7 workers in a classification, and the rates of 3 workers were based on a single contractor, 42.9% of total data would be from one contractor. Data that are grossly disproportionate to the modal rate are often the result of misclassification and other practices that the DBA was designed to redress in the arena of government contracts.

When using the mode, an employer's failure to provide health insurance or other important fringe benefits is far less likely to distort the data, because extreme data is eliminated.[20] A mean rate, by contrast, enables outliers that pay "zero" in fringe benefits to skew these rates downward. In a 1996 rulemaking, the DOL recognized the adverse impact of averaging in "zeros" in the

[19] *Davis-Bacon Construction Wage Determinations*: *Manual of Operations* (1986), at 62.

[20] Under the DOL's methodology for determining entitlement to fringe benefits, the DOL first determines if more than 50% of the employees in a single classification are paid any fringe benefits, then fringe benefits prevail. If fringe benefits prevail in a classification and more than 50% of the employees receiving fringe benefits are paid the same total fringe benefit rate then that total rate prevails. If fringe benefits prevail, but 50% or less of the employees receiving benefits are paid at the same total rate, then the average of fringe benefits weighted by the number of workers who received fringe benefits prevails.

context of fringe benefit payments under the Service Contract Act.[21] According to the DOL, including ‘‘zeros’’ in its computation of fringe benefit – "that is data from companies that do not provide the benefit surveyed" – results in a "lower rate that does not accurately reflect the actual cost of such benefits."[22] The DOL observed that the "unions argued that inclusion of 'zeros' as amounts paid for health insurance distorts the cost of health insurance paid by employers which actually provide health insurance, and therefore artificially deflates the prevailing fringe benefit rate."[23]

II. SMART AND SMACNA SUPPORT THE DOL's PROPOSAL TO UPDATE WAGE DETERMINATIONS TO ENSURE THAT STALE WAGE DETERMINATIONS DO NOT DEPRESS LABOR STANDARDS

A. Update "Non-Collectively Bargained" Wage Determinations That are "3 or More Years Old"

SMART and SMACNA support the DOL's proposed revision to § 1.6(c)(1), which provides a mechanism to regularly update certain non-collectively bargained prevailing wage rates based on the Bureau of Labor Statistics Employment Cost Index. Under the proposed rule, non-collectively bargained prevailing (weighted average) rates that are published after the Final Rule becomes effective would be updated if they were not re-surveyed within 3 years after publication. SMART and SMACNA believe that this revision is imperative to prevent a growth in the disparity between stale rates and the actual prevailing rates between surveys, and thus, effectuates the purpose of the DBA. We are, however, concerned that, in most cases, open shop wage rates are

[21] *See* Final Rule, *Service Contract Act; Labor Standards for Federal Service Contracts*, 61 *Fed.Reg*. 68647 (Dec. 30, 1996), for the impact of "zeros" in the context of fringe benefit payments under the Service Contract Act.

[22] 87 *Fed.Reg*. at 68650.

[23] *Id*. at 68652.

stale before the WHD issues them. Over the past several years, the DOL has conducted building surveys in Arizona, Georgia, Idaho, Maryland, Michigan, Missouri, North Carolina, Oregon, and Washington.[24] The survey period for the statewide Washington survey was from 01/01/2017 to 12/31/2017, with a cut-off date of 09/28/2018. Data used in support of open shop rates in Washington and these other states will be out-of-date when the WHD issues the wage determinations. SMART and SMACNA request, therefore, that the WHD update non-collectively bargained rates on these wage determinations before it issues them.

In 1994, the WAB opined that "the very concept of a prevailing wage necessarily encompasses a current wage. A wage simply cannot be prevailing if it is outdated."[25] As stated in the NPRM, outdated and/or inaccurate wage determinations are inconsistent with the intent of Davis-Bacon labor standards, which aim to ensure that laborers and mechanics on covered projects are paid locally prevailing wages and fringe benefits.[26] SMART and SMACNA agree that an "artificially-low prevailing wage rate" that has not been adjusted over time does not "continue to reflect the wages paid to workers in a geographic area."[27]

In counties in which open shop rates prevail, the rates are often barely above the $15.00 minimum wage required on federal contracts by President Biden's Executive Order, with no or minimal fringe benefits.[28] Here is one example:

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[24] The WHD recently issued wage determinations for a Tennessee statewide building survey. This survey period was from 04/01/2016 to 03/31/2017, with a cut-off date of 04/30/2018. The weighted average rates were, thus, stale before issuance of the wage determinations.

[25] WAB Case No. 94-09, *Modernization of The John F. Kennedy Federal Building, Boston, Massachusetts* (Aug. 19, 1994). ("Changing the wage rate between bid opening and contract award would create a situation in which competing bidders could be treated differently.')

[26] 87 *Fed.Reg*. at 15710.

[27] *Id.*

[28] Executive Order 14026, *Increasing the Minimum Wage for Federal Contractors*, April 27, 2021.

- In Jackson County, Missouri (Kansas City), SMART Local 2 prevails on "Sheet Metal Worker: Includes HVAC Unit Installation (Excludes HVAC Duct Installation)" at wage rates of $47.19 and $24.44 in fringe benefits. Open shop rates (posted in 2010) prevail for "sheet metal worker (HVAC duct installation only) at a rate of $15.86 in wages and $2.08 in fringe benefits.

There are open shop rates on some wage schedules that are roughly equivalent to union rates at the time that the DOL issues a wage determination. In these cases, the disparity between union and open rates grows during the long intervals between Davis-Bacon surveys, as open shop rates become increasingly out-of-date. Here are two examples of where the open shop rates approximated the union rates when the WHD issued the applicable wage determinations but have grown stale:

- In many counties in Nevada, [29] SMART Local 26 were issued in 2016 for "sheet metal worker (HVAC duct and HVAC unit installation only)" or on "sheet metal worker (includes HVAC duct and unit installation)" at wage rates of $ 37.70 in wages and $28.06 in fringe benefits. In Churchill County, SMART Local 26 prevails on "sheet metal worker (HVAC unit installation only)" at these same rates and open shop (posted in 2016) prevails on "HVAC mechanic: HVAC duct installation only" at a rate of $43.01 in wages and $21.60 in fringe benefits.

- In Potter County, Pennsylvania, SMART Local 12 rates were issued in 2014 for "sheet metal worker (excludes HVAC duct installation)" at a wage rate of $38.76 and $29.38 in fringe benefits and open shop rates (posted in 2014) prevail for sheet metal worker (HVAC duct installation only) at a rate of $30.58 in wages and $24.04 in fringe benefits.

[29] In Douglas County, Elko, Eureka, and Lyon County, SMART Local 26 prevails on "sheet metal worker (HVAC duct and HVAC unit installation only). In the counties of Esmeralda, Lander, Mineral, Pershing, and White Pine are stagnant for "HVAC mechanic: HVAC duct installation only" and SMART Local 26 rates prevail for "sheet metal worker (includes HVAC duct and unit installation)."

B. Annual Incorporation of the Most Up-to-Date Wage Determinations in Certain Ongoing Contracts

SMART and SMACNA commend the DOL's proposal that would incorporate the most up-to-date applicable wage determination(s) annually on each anniversary date of a contract award for "certain ongoing contacts," and where there is no contract, on each anniversary date of the start of construction, or another similar anniversary date where the agency has sought and received prior approval from the Department for the alternative date.[30] As stated in the NPRM, under the current regulations, a wage determination is generally applicable for the entire duration of a contract once incorporated.[31] This proposal would further the purpose of the DBA, which is to ensure that government's overwhelming presence, which will expand dramatically under the Infrastructure Investment and Jobs Act of 2021, is not used to undermine local labor standards. The current, general freeze on wage rates after commencement of construction on a covered project contravenes the DOL's statutory mandate to ensure that all covered workers are paid prevailing rates of pay.

During the 1981-1982 rulemaking that resulted in this regulation, the Reagan DOL was dismissive of union comments that wage determinations would become "out of date."[32] It is unclear whether the DOL had the foresight to envision that some Davis-Bacon projects, such as the Olmstead Dam project in Kentucky, would continue for many years longer than originally intended by the contracting agencies responsible for bidding solicitations.[33] The current regulation

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[30] 87 *Fed.Reg*. at 15715.

[31] *Id.,* citing proposed 29 C.F.R. § 1.6(c)(2)(iii).

[32] During the Reagan-era rulemaking process, unions commented that "extending the duration of project determinations will increase the likelihood that rates contained in wage determinations will be out of date before the start of construction." 47 *Fed.Reg.* 23644, 23646 (May 28, 1982).

[33] See Elizabeth McLaughlin (Aug. 30, 2018). *The Olmsted Locks and Dam, a $3 Billion Project That Took Three Decades and More Than 45 Million Labor Hours to Complete*. ABC News. https://abcnews.go.com/US/30-years-billion-americas-largest-civil-works-projects/story?id=57505266

is also inconsistent with the DOL's frequently-stated goal of ensuring that no contractor is competitively disadvantaged in the bidding process. The DOL recognizes that the hallmark of a fair bidding system is one that ensures that "all bidders are developing their bid proposals with the same expectations regarding the prevailing wage and fringe benefit rates that will be paid on the project."[34] The WAB explained that the "fairness in the bidding process" was the reason for the "10-day rule" in current 29 C.F.R. § 1.6.[35] It further stated that competing bidders should not be "treated differently":

> The reason for not including updated wage rates in all situations right up to the start of construction is based upon the disproportionate effect that varying wage rates would have on the bidding process. Changing the wage rate between bid opening and contract award would create a situation in which competing bidders could be treated differently. In order to assure fairness in the bidding process all contractors must submit their bids based upon the same wage rates.

The current rule provides a process that treats union contractors "differently," and thereby, undermines the remedial purpose of the DBA. Indeed, signatory contractors are in a competitively weaker position than non-union contractors because the former contractually obligated to pay rates that are often higher than the current prevailing wage during the term of the construction contract. The latter have no contractual obligation to increase the wage rates during the term of the project. Current regulation 29 C.F.R. § 1.6 loses sight of the fact that the entire regulatory scheme is purportedly designed to protect all workers. It is evident that workers covered under a CBA may lose work opportunities when their employers are unable to compete with non-union contractors that do not have to factor in an increase of the wage rates during the term of the project.

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[34] In the context of interpreting the DOL regulation governing the conformance process, the ARB has repeatedly stated that "the limitations built into the conformance procedures are essential to maintaining fairness for all contractors competing for federal construction projects." *American Building Automation*, ARB Case No. 00-67, (May 30, 2001), quoting *Pizzagalli Construction Co*., ARB No. 98-090 (May 28, 1999).

[35] *See* 29 C.F.R. § 1.6(c)(2)(i)(A).

III. SMART AND SMACNA SUPPORT TREATMENT OF "FUNCTIONALLY EQUIVALENT" RATES AS THE SAME RATE IN COMPUTATION OF WAGE DETERMINATIONS

SMART and SMACNA support the DOL's proposal to include § 1.3(e), which would permit the Administrator to count wage rates together – for the purpose of determining the prevailing wage – if the rates are functionally equivalent and the variation can be explained by a CBA or the "written policy" otherwise maintained by the contractor.[36] The DOL's treatment of variable rates established under CBAs as not the same rates over the past 15 years has sometimes resulted in the issuance of open shop rates in counties or groups of counties in which more than 80 to 90% of the data in a survey was paid at union rates. This phenomenon is most likely to occur when there has been limited amounts of construction during the survey period in counties and/or groups of counties, particularly those with relatively sparse populations, and a trade has more than one local union with different CBA rates in a group or supergroup of counties. During the Obama administration, the WHD created "UAVG" to signify that 100% of the data submitted for a classification in a survey grouping (county, group, etc.) was performed under a CBA but no single CBA comprised more than 50% of the data.[37] It is self-evident that it is contrary to the remedial purposes of the DBA to adopt a methodology that requires unions to submit 100% of the data in a

[36] 87 *Fed.Reg*. at 15706.

[37] *See* the building wage determinations in West Virginia, where UAVG are listed for multiple subclassification or classifications in the following counties: Barbour, Braxton, Brooke, Calhoun, Doddridge, Fayette, Gilmer, Grant, Greenbrier, Hancock, Hardy, Harrison, Jackson, Lewis, Logan, Marshall, Mason, McDowell, Mercer, Mingo, Monroe, Nicholas, Pendleton, Pocahontas, Preston, Raleigh, Randolph, Ritchie, Roane, Summers, Taylor, Tucker, Tyler, Upshur, Webster, Wetzel, Wirt, Wood, and Wyoming. In the following counties, there was a UAVG for only one subclassification in a key classification: Berkeley, Boone, Cabell, Clay, Hampshire, Jefferson, Kanawha, Lincoln, Marion, Mineral, Monongalia, Morgan, Ohio, Pleasants, Putnam, and Wayne.

survey to receive annual updates to a classification on the wage determination when CBA rates increase for that classification.[38]

A. The DOL's Pre-*Mistick* Methodology Treated Variable Rates under One or More CBA(s) as the Same for the Purpose of Determining Prevailing Rates

Prior to the issuance of *Mistick*, the Administrator's practice spanning over several decades was to treat "variable rates" paid to workers under "different CBA wage rates" as the "same" or a "single" wage rate CBA. [39] In *Mistick*, the ARB referred to this practice as treating "variable rates" paid to workers under a CBA as a "single majority rate" for the purposes of determining the prevailing wage rate.[40] In defending this practice, the Administrator maintained in *Mistick* that 29 C.F.R. § 1.2(a)(2)[41] permits consideration of the "types of information listed in § 1.3,"[42] including "signed collective bargaining agreements," and thus, "expressly authorize[s]" her to "interpret" the terms of CBAs in determining prevailing wages. The Administrator's rationale for treating wage rates from different CBAs as the "same" or "single" wage rate was that some CBA rates vary because they cover different locations. The Administrator's pre-*Mistick* practice of taking CBAs into account recognized the industry and market practices that impact prevailing rates and the need

[38] "UAVG" rates were posted for "sheet metal worker, excludes HVAC duct and unit installation" in six counties in the "Dayton group" – Clark, Greene, Lawrence, Miami, Montgomery (Dayton), and Preble – and for "sheet metal worker (HVAC duct installation only)" in Washington County.

[39] *Mistick Construction*, at 4.

[40] *Id.* at 7.

[41] 29 C.F.R. § 1.2(a)(2): "In determining the prevailing wages at the time of issuance of a wage determination, the Administrator will be guided by paragraph (a)(1) of this section and will consider the types of information listed in § 1.3 of this part."

[42] "Signed collective bargaining agreements" are listed in 29 C.F.R. § 1.3 as types of information may be considered in making wage rate determinations.

to combine data from surrounding counties to ensure that sufficient data are available in determining prevailing rates. Those practices and factors include:

- More than one local union from the same trade often have geographic jurisdiction in contiguous counties. The DOL's "groups" or "supergroups," which are selected for the purpose of combining data when there is insufficient data on a county-wide basis, ignores these jurisdictional lines. This necessarily results in the combination of data paid at different CBA rates;

- The payment of higher "zone" rates to workers who travel from relatively high population centers to less populous parts of a county or in adjacent counties to work. The building rates in Berkeley County, West Virginia, for example, reflect that applicable CBA compensates workers for the time required to travel from home to another area at a rate of $2.50 to $3.00, which over an eight-hour day adds up to $20.00 to $24.00 per day.[43] As stated in the NPRM, zone pay compensates workers for the "burden of traveling or staying away from home" and does "not reflect fundamentally different underlying wage rates for the work actually completed";[44]

- Beginning in the 1930's, large projects are often constructed using workers from several surrounding counties that are subject to different CBAs;

- The practice of paying "overscale" to workers to retain their services in markets in which there is a high demand for their services;

- The nearly universal practice of paying working forepersons a higher rate of pay than journeypersons;[45]

- The limited amounts of residential and building construction in a large percentage of the 3,143 counties and "county equivalents" in the United States (about 1,300 counties have fewer than 20,000 residents). This circumstance was true in the 1930's because 1930 U.S. Census records demonstrate that for states

[43] *See* Wage Determination for Berkeley County in West Virginia,

SHEET METAL WORKER (Includes HVAC Duct Installation)
0-40 miles from City Hall, Cumberland, Maryland..... $27.73 24.03
41-65 miles from City Hall, Cumberland, Maryland……$30.23 24.03
66+ miles from City Hall, Cumberland, Maryland..... $30.73 24.03

[44] 87 *Fed.Reg*. at 15706.

[45] When a CBA sets forth a premium of an identified amount per hour (e.g., $2.00 to $3.00 per hour), the WD-10 submitter may include an explanation on the form that the base rate for the journeyperson work performed by the working foreperson is the same as the hourly rate for journeyperson and that the premium is for the foreperson work performed. This process is more complicated when the CBA provides a higher rate for working foreperson but does not specify the premium.

in existence at that time, only three had a change in the number of counties in their state;[46] and

- The differences in available data reflect the population density of local markets and the number of counties in a state. More than half of all U.S. residents live in 143 counties, with a predominance of these populous counties located on the east and west coasts.[47] That means less than half of the population is spread out across the remaining smaller counties. Some states have a limited number of counties relative to size of population. Texas, for example, has 254 counties, whereas, California has 58 counties. At least 14 states have none of the 143 most populous counties in the country.[48]

The Administrator's pre- and post-*Mistick* practices recognize that "different" rates paid in accordance with escalator clauses should be treated as the same wage in calculating prevailing rates, because the "difference" is produced by the "appearance of a variation that does not actually exist."[49] The "Dual Rates Cause by Time Variance" section in the WHD's 1989 Manual, *Conducting Surveys for Davis-Bacon Construction Wage Determinations: Resource Book*, addresses situations where the "old" and "current" negotiated rates appear on WD-10's, *Report of Construction Contractor's Wage Rates*. The 1989 Manual explains the reason for "data on one craft that shows two work weeks and two rates of pay":[50]

> Usually, this happens when you have a survey time fame that covers two or more CBA time periods. Each rate was the current negotiated rate at the time it was paid. Some unions negotiate one rate for a year's period. The [1986] manual says "data from different points in time may have of a variation in rates that does not actually exist. The apparent variation is caused by the time covered by the survey.

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[46] https://www2.census.gov/library/publications/decennial/1930/population-volume-1/03815512v1ch03.pdf The following states have had a change in the number of counties from 1930 to the present: Arizona (an increase from 14 to 15), Colorado (an increase from 63 to 64), and Georgia (a decrease from 161 to 159).

[47] Haya El Nasser (2017) .

[48] Alaska, Arkansas, Idaho, Iowa, Louisiana, Maine, Mississippi, Montana, New Hampshire, South Dakota, North Dakota, Vermont, West Virginia, and Wyoming.

[49] 1989 Manual, at 25.

[50] *Id.*; emphasis in original.

This WHD's recognition that escalator clauses create only an apparent difference in wage rates has had an immense impact on surveys because CBA rates are typically modified annually[51] and the usable data in a survey may span several years. This "exception" to the *Mistick* rule simply recognizes the reality that wages are not static over the time frame encompassed within the survey period. While the actual "survey period" is typically limited to one year,[52] under the WHD's survey methodology, [53] the "peak week" spans for several years. The peak week for trades, such as earthmovers, that arrive earliest on the project may occur years before the survey period.

B. SMART and SMACNA Request that the DOL Clarify the Full Range of Circumstances When the Proposed Rule Would Treat Variable Rates as Functionally Equivalent When Explained by a CBA or "Written Policy Otherwise Maintained by the Contractor"

As discussed below, there are at least five circumstances in which "apparent" or actual variable rates appear on wage determinations: 1) when explained by a single CBA; 2) when explained by one or more CBA(s); 3) when artificially created by the WHD's combination of CBAs from various counties at the group, supergroup, or state level; 4) when more than one trade submits data on work performed in a "subclassification" pursuant to a local or national jurisdictional agreement or based upon "unofficial" shared jurisdiction; and 5) when explained by a written policy otherwise maintained by a contractor. SMART and SMACNA request that the

[51] Some local CBAs provide for wage increases twice per year, i.e., January 1 and July 1. This practice implements a portion of the negotiated annual wage increase on separate dates.

[52] Acting Administrator Jessica Looman recently exercised her discretion to expand the survey period to 18 months for an Idaho building survey so that survey participants were permitted to include six months of pre-pandemic projects in their submissions.

[53] Under the peak week methodology, utilized by the WHD in surveys, submitters select the week in which the greatest number of workers in each classification are used on the project (employed by general, prime, or subcontractors). This week varies by classification and may occur before, during, or after the survey period, which is typically one year.

DOL clarify the full range of circumstances under which the proposed rule §1.3(e) would treat variable rates as functionally equivalent.

It is important to note that unlike the CBAs of many other trades, the CBAs negotiated by SMART and contractors that are affiliated with SMACNA provide a single rate for journeypersons regardless of the work function performed. Thus, combining data from different "subclassifications" of sheet metal work on projects performed under the home local's CBA at the county level does not contribute to *Mistick* problems for our trade.

1. *Variable Rates Explained by a Single CBA*

Through this rulemaking, the WHD recognizes that so-called differences in wages for the same work "as explained by a CBA" are not true differences but only apparent differences, because CBAs often provide compensation above the base rate to journeypersons for explainable reasons. In the NPRM, the DOL states that certain variable rates, such as zone pay and shift differentials, would be treated as "functionally equivalent" or the "same" rate in calculating prevailing rates under the proposed 30% rule. According to the NPRM, the DOL also considers "wage rates to be the same where workers made the same combination of basic hourly rates and fringe rates, even if the basic hourly rates (and also the fringe rates) differed slightly."[54] As noted in the NPRM, different rates paid in accordance with escalator clauses in a CBA have always been treated as the

[54] 87 *Fed.Reg.* at 15706. In *Mistick*, the ARB disagrees with the Administrator on this point. The decision quotes the Administrator as stating that she "'believe[d] it was appropriate' to treat other differing CBA wage rates as the 'same' or 'single' wage rate when a worker's total compensation (wage rate plus fringe benefits) was the same." In agreeing with Mistick's position that the Administrator's statement is "contrary" to the WHD's Operation Manual, the ARB misunderstood her point. Since consistent with 41 U.S.C. 3141(2)(A) and (B), the current language §1.2(a)(1) defines "prevailing wage" to include both the hourly rate of pay and fringe benefits, it is appropriate to look to total compensation when analyzing data to determine whether more than 50% (or 30% under the proposed rule) of the workers were paid the same rate. A contractor fully satisfies its prevailing wage obligations when total compensation meets the amount of the wage determination.

"same" in calculating prevailing rates. This is a statement of the WHD's existing practice, which was affirmed by the ARB in *Mistick*.[55]

The NPRM does not mention in its illustrative, non-exclusive list of variations that can be explained by a CBA the foreman premium often set forth in CBAs. In accordance with 29 C.F.R. § 5.2(m), "Working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the criteria of part 541, are laborers and mechanics for the time so spent." Consistent with guidelines in the WHD's 1989 Manual,[56] SMART and SMACNA's practice in submitting data on WD-10's has been to include data on working foremen at the rate of a journeyperson for the "mechanics" work that they perform, with an explanation in the "Comments or Remarks" section that the working foremen were paid a premium per the CBA for their foreman duties.[57] SMART and SMACNA have followed the same practice when an apparent difference in wages can be explained by a shift differential or other difference based on a single CBA.

2. *Variable Rates Explained by More than One CBA*

The DOL's treatment of differences in wage rates that can be explained by a single CBA as "functionally equivalent" is an important step in the right direction, but without further

[55] The Administrator asserted in the *Mistick* case that she "properly ignored escalator clauses found in CBA wage rates and instead relied on 'current' CBA rates when determining prevailing wage rates." The ARB rejected Mistick's challenge, finding the Administrator's "reliance on only 'current' CBA rates when determining prevailing wage rates is consistent with the policy described in the Administrator's Operations Manual" and does not exhibit an unexplained departure from past practice."

[56] *See* page 61 of the 1989 Manual.

[57] SMART and SMACNA oppose use of the word "working supervisor" in the proposed definition of "laborer or mechanic." While we support use of gender-neutral terms, the term "working supervisor" does not appropriately describe the many years of training and skill attainment necessary to achieve the stature of "journeyperson." In the construction industry, working foremen or "forepersons" are journeypersons who also have additional responsibilities and are compensated for these added duties. An additional reason for removing the word "supervisor" is that it has a specific meaning under the National Labor Relations Act that should not be imported into Davis-Bacon regulations. The term "working forepersons" would achieve the important goal of eliminating language that is not gender-neutral.

clarification, creates ambiguity as to whether the survey process would be restored to its pre-*Mistick* state. The proposed rule, as currently drafted, uses examples, such as wage escalators and zone pay, based on single CBA, but does not explicitly state how §1.3(e) would impact computation of wages when the "same" work at "different" rates in the same locality involve more than one CBA. These situations occur when: 1) a sister local from the same trade performs work in the geographic jurisdiction of another trade when there is a project(s) that demands more workers than the host local union can supply (more likely to occur when projects are large relative to size of the construction workforce in the host locality); 2) a local union has more than one CBA that covers the same work in different contexts, such as commercial building and industrial buildings;[58] and 3) the rates of pay for new construction differ from the rates of pay for renovation, alteration, or repair of existing buildings. The last scenario is less typical and is most likely to occur during an economic downturn when there is a lower demand for construction labor in a locality, especially one with a lower population density.[59] These differences, which are the product of collective bargaining, stand in stark contrast to artificial ones created by the groupings used by the WHD for combination of data when limited data were submitted during a survey.

3. *Variable Rates That are Artificially Generated by the WHD's Survey Methodology Create Mistick Problems*

The WHD artificially creates *Mistick* problems by subdividing key classifications and then combining counties in groups, supergroups, and/or at the state level when there are insufficient data for subclassifications. This practice involves deriving rates that often reflect only a fraction of the trade that a journeyperson is trained to perform, effectively "deskills" the craft, and

[58] See 1989 Manual at 27, where the WHD states that "some of the more common types of dual rates" include "industrial projects and commercial projects."

[59] When the West Virginia building survey was conducted, the journeyperson rate under National Maintenance Agreement was at 90% of new construction.

undercuts prevailing rates. The WHD then penalizes unions because the WHD-created groupings for subclassifications within a key classification result in the combination of "different" CBA rates for the same work. Use of fewer subclassifications would increase the quantity of wage determinations derived at the county level. The artificial subdivision of trades into many work subclassifications in issuing wage determinations is based on the fiction that workers sustain their livelihood over the course of three or four decades in the construction industry by mastering only one subclassification of work within a key classification. A sheet metal worker's employability and marketability in the construction industry is based on acquisition and maintenance of a broad base of skills as the technology used in the sheet metal trade evolves during a career. In determining the number of subclassifications for individual trades, the DOL should be mindful of the fact that the relationship between the number of different work functions for which it posts a separate wage rate and the amount of available data to support each rate is inversely proportional, i.e., the greater the number of subclassifications, the less data available to determine the prevailing rates for each subclassification.[60]

4. *Variable Rates Explained by a Written Local or National Jurisdictional Agreement*

Variable rates are often submitted for the same work when more than one trade has jurisdiction over the same work, such as HVAC unit installation, with different CBAs that provide different wage rates and fringe benefits, pursuant to a jurisdictional agreement executed before the date of announcement of the survey. As the WHD knows, submission of data by more than one

[60] While under the current methodology, it is beneficial to SMART and the UA to treat HVAC unit installation and HVAC duct installation as separate subclassifications from the key classification of sheet metal worker. As a general matter, since there is substantially more union data available to submit on HVAC duct installation and other trades do not submit data on this work (*see* Appendix A for an example), it would jeopardize SMART's ability to prevail on HVAC duct if all sheet metal data were included in computation of prevailing rates for the key classification of sheet metal worker. If, however, the DOL consistently uses area practice surveys when more than one union submits data on the same subclassification, the rates for HVAC duct work would not be jeopardized by combining data on this work function with data for other sheet metal work.

union for the same work may occur when there is no jurisdictional agreement, but more than one affiliate performs the work in the locality surveyed. In both situations, the combined amount of union data often comprises more than 50% of the data submitted.

The WHD fails to respect union governance of local standards in accordance with *Fry Brothers*,[61] when it combines predominant union data from two or more trades with data from open shop contractors and issues an open shop rate. The appropriate course of action is to conduct an "area practice" survey, in accordance with the administrative practices described in the *Davis-Bacon Construction Wage Determinations Manual of Operations* (1986)[62] and 1989 Manual.[63] The failure to conduct an area practice survey in instances where union data predominate greatly contributes to the increase in open shop rates in the post-*Mistick* era. As discussed below, SMART and SMACNA have a strong interest in area practice surveys since WHD identified in the 1989 Manual core work within the sheet metal trade as work over which area practice issues "frequently occur."[64]

5. *Variable Rates Explained by a Written Policy Otherwise Maintained by a Contractor*

SMART and SMACNA would like the DOL to clarify in the preamble to the Final Rule the types of policies it has in mind in stating that a "written policy otherwise maintained by the contractor" could be a potential reason for treatment of variable rates as "functionally equivalent."

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[61] *Fry Brothers Corp*., WAB Case No. 76-6 (1977).

[62] *See* 1986 Manual at 40: "APS's are to be conducted as part of the prevailing wage survey (Chapter VI(7)) and, in some instances, after wage determinations have been issued." *See also* 1986 Manual at 40: "Area practice must be determined when work traditionally performed by employees in one classification (occupation) is performed by workers in another class and at a different wage rate." *See also* 1986 Manual at 70: "Are classifications assigned correctly in terms of the type of work being performed and have area practice issues been identified and resolved? If not, data are excluded, reassigned, or developed to resolve the problem."

[63] 1989 Manual at 76. *See* Field Operations Handbook 15f05, *Area practice: determining proper classification of work*.

[64] *Id.*

In participating in wage surveys, it is common to come across data where a signatory contractor(s) voluntarily elects, in its sole discretion, to pay workers more than the amount required under the applicable CBA to retain their services when construction is booming and the demand for their services is high. Over the years, WHD wage analysts in regional offices around the country have provided inconsistent advice on how the WHD treats overscale wages and SMART and SMACNA have not been able to obtain a definitive answer on whether overscale wages are treated as the same rate of pay in calculating the amount of union data. Presently, while participating in surveys, SMART Local Unions and SMACNA chapters typically screen out "overscale" data so that the data do not adversely impact the likelihood that SMART rates will prevail in a survey. Screening out "overscale" rates does, of course, reduce the amount of data available for the WHD's use in determining prevailing rates for sheet metal work.

C. SMART and SMACNA Recommend Modifications to §1.3(e) to Clarify that the Proposed Rule Restores the Survey Process to its Pre-*Mistick* State

SMART and SMACNA recommend that the DOL add to proposed § 1.3(e) "one or more collective bargaining agreement(s)" and "a local or national jurisdictional agreement" so that it is clear that the rule treats variable rates as functionally equivalent in circumstances that typically have a great impact on survey results:

> (e) In determining the prevailing wage, the Administrator may treat variable wage rates paid by a contractor or contractors to employees within the same classification as the same wage where the pay rates are functionally equivalent, as explained by **one or more collective** bargaining agreement**(s)**, **a local or national jurisdictional agreement**, or written policy otherwise maintained by the contractor.

These modifications would ensure that the DOL no longer penalizes unions in administering the survey process when survey data reflect variable rates that are typically paid pursuant to one or more CBA(s) or a local or national jurisdictional agreement. As explained below, under its

administration of the *Mistick* decision and unwritten or informal survey methodologies, unions must submit far more than 50% of the data to prevail.

SMART and SMACNA request that the DOL clarify in proposed §1.3(e) that variable rates based on different CBAs in different counties for the same trade are functionally the same wage rate. As stated in *Mistick*, the Administrator treated different CBA wage rates as the "same" or "single" wage rate, because "some CBA rates varied because they covered different locations." The ARB rejected the Administrator's pre-*Mistick* practice. To fully restore the DOL's methodology to its pre-*Mistick* state, it is necessary to modify the proposed rule to add "as explained by one or more collective bargaining agreement(s)."

It is important to emphasize that the rates of pay and fringe benefits that unions negotiate on behalf of their members are based on local labor markets within their geographic jurisdiction. In the union sector, when workers ("travelers") are required to travel to the geographical jurisdiction of sister locals with lower rates in their CBAs, the contractor pays at least the rate that it is contractually obligated to pay regardless of the prevailing rates of pay in the host county. To do otherwise would doubly penalize workers: they would be required to travel a significant distance for work and/or stay in temporary lodging and receive lower wages. The prevailing rates of pay for travelers has long been an issue in the prevailing wage context. In 1954, for example, construction of the Oahe Reservoir, a huge public works project undertaken in sparsely populated, rural counties in South Dakota, required that workers be "drawn from the entire state and beyond."[65]

[65] Charles Donahue (1964), "The Davis-Bacon Act and the Walsh Healey Public Contracts Act: A Comparison of Coverage and Minimum Wage Provisions," *Duke Law Review*, pp. 488-513, at 510. ("[T]he Oahe Reservoir was being constructed in Stanley and Hughes counties, South Dakota. The reservoir was to be located about six miles northwest of Pierre, South Dakota, and was to be completed at an estimated cost of $300 million. It was to be 9,300 feet long and 242 feet high. The embankment was to contain some 78,000,000 cubic yards of earth, and 1,065,000 cubic yards of concrete were to be required for the spillway.)

The number of sister local unions for the same trade varies from state to state, but it is the exception and not the rule, for there to be only one local union for a trade in a state. As a general matter, the states with the highest union density, such as California, Illinois, New Jersey, New York, Pennsylvania, and others, have the greatest number of SMART Local Unions. Since the DOL's groups of counties are designed without regard to the geographic jurisdiction of the local unions in a state, the groups are often comprised of more than one local union from the same trade, with different CBA rates. With coordinated planning and training, local unions and signatory contractors can, to some degree, avoid submitting data in the geographic jurisdiction of a sister local. The effect of this coordination is to decrease the amount of data available to the DOL for determining prevailing rates. Unions have no control, however, over how the WHD combines data at the group, supergroup, and state level. Unions must submit far more than 50% of the data to prevail when the DOL combines data for a trade from counties with different CBA rates.

The wage determinations for building construction issued in 2014 for the counties in eastern Pennsylvania illustrate the impact of combining data paid at different CBA rates on the computation of prevailing rates.[66] In 8 of the 20 counties within SMART Local 44's geographic jurisdiction,[67] SMART Local 19 rates prevail for "sheet metal worker (excluding HVAC duct installation) and SMART Local 44 rates prevail for sheet metal worker (HVAC duct installation only)." In Clinton County (also within Local 44's geographic jurisdiction), SMART Local 12 rates for "sheet metal worker (excluding HVAC duct installation)" and Local 44 rates prevail for

[66] SMART Local 19 has geographic jurisdiction in the following counties in Pennsylvania: Adams, Bedford, Berks, Blair, Bucks Co., Centre, Chester, Cumberland, Dauphin, Delaware, Franklin, Fulton, Huntingdon, Juniata, Lancaster, Lebanon, Lehigh, Mifflin, Montgomery, Northampton, Perry, Philadelphia and York. SMART Local 44 has geographic jurisdiction in Bradford, Carbon, Clinton, Columbia, Lackawanna, Luzerne, Lycoming, Monroe, Montour, Northumberland, Pike, Potter, Schuylkill, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, and Wyoming.

[67] Those Local 44 counties are Bradford, Carbon, Northumberland, Sullivan, Susquehanna, Tioga, Union, and Wayne.

"sheet metal worker (HVAC duct installation only)."[68] In Schuylkill County and Snyder County (also withing Local 44's geographic jurisdiction), Local 19 rates prevail for "sheet metal worker (includes HVAC duct installation)." In another Local 44 county, Potter County, Local 12 rates were issued for "sheet metal worker (excludes HVAC duct installation)" and open shop rates[69] prevail for "sheet metal worker (HVAC duct installation only)."

The Ohio building survey (results posted in 2014) yielded similar patterns in metropolitan counties. *See e.g.*, counties of Adams, Pike, Scioto, where SMART Local 24 prevails on "sheet metal worker (HVAC duct and unit installation only) with $ 32.53 in wages and $26.31 in fringe benefits and SMART Local 33 prevails on "sheet metal work (excludes HVAC duct and unit installation) with $31.79 in wages and $26.21 in fringe benefits.

IV. A COMBINATION OF CONSISTENT USE OF AREA PRACTICE SURVEYS AND MODIFICATION OF PROPOSED §3(e) WOULD ELMININATE ISSUANCE OF OPEN SHOP RATES WHEN UNION RATES PREDOMINATE FOR A CLASSIFICATION, AND THUS, GOVERN LOCAL LABOR STANDARDS

In the NPRM, the DOL cites authority for the proposition that wage determinations "implicitly include the locally prevailing practice of classifying jobs."[70] The NPRM further states that "Where collective bargaining agreements form the basis of wage determinations, the practice of local signatory unions is conclusive under DOL precedent."[71] Where a wage determination is

[68] SMART Local 12 has jurisdiction in the following counties in western Pennsylvania: Allegheny, Armstrong, Beaver, Butler, Cambria, Cameron, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forest, Greene, Indiana, Jefferson, Lawrence, McKean, Somerset, Venango, Warren, Washington and Westmoreland.

[69] These open shop rates, $30.58 in wages and $24.04 in fringe benefits, were roughly similar to SMART Local 44 rates at the time the survey data was collected but have become stale over the past decade or more.

[70] *See Fry Brothers*, 614 F.2d at 733-34; *Framlau Corp. v. Dembling*, 360 F.Supp. 806, 809 (E.D.Pa.1973); cf. *United States ex rel. Plumbers & Steamfitters Local Union No. 38 v. C.W. Roen Constr. Co*., 183 F.3d 1088, 1093-94 (9th Cir.1999).

[71] *See Fry Brothers Corp*., WAB Case No. 76-6 1977); *see also* Field Operations Handbook, ch. 15, § 15f02.

based on a collective bargaining agreement, the proper classification of employees is determined exclusively by the practices of the signatory unions.[72] These principles support SMART and SMACNA's recommendations that would prevent shared jurisdiction over work functions in a locality from causing the issuance of open shop rates when survey data demonstrate that union practices govern local markets for the classification.

A. When More than One Trade Submit Data on the Same Work, the DOL May Address *Mistick* Issues Through Modification of Proposed §1.3(e) and/or Consistent Use of Area Practice Surveys

There are two means by which the DOL can address circumstances when more than one trade submits data on the same work and union rates collectively or individually (based on one union) predominate. SMART and SMACNA urge the DOL to adopt both means since a combination of both would be most effective in ensuring that union rates prevail when data submitted in surveys demonstrate union practices govern a local labor market. One method is to consistently use area practice surveys to determine which union has performed the greatest amount of the work in question. Instead of combining different CBA rates from various trades when union practices govern a local labor market and potentially issuing an open shop rate, the DOL should use area practice surveys to determine which of the unions represents the most workers performing the work in dispute.[73] SMART and SMACNA request that the DOL include its internal methodology concerning area practice surveys in the Final Rule. Without codification, it is doubtful that area practices will consistently be used to avoid *Mistick* issues.

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[72] *See Fry Brothers*, WAB Case No. 76-6; Field Operations Handbook, ch. 15, § 15f05(c)(2).

[73] 1989 Manual at 77: "Once you have identified an area practice issue, you resolve it by determining how many general craftsmembers and specialty craftsmembers performed the duties in question, determining which classification did the majority of that type of work, and determining the prevailing wage rate that the employees were being paid."

A second, and perhaps more straightforward and efficient, option is for the DOL to modify proposed §1.3(e) "as explained by one or more collective bargaining agreement(s), a local or national jurisdictional agreement…" The recommended addition of "jurisdictional agreement" is designed to address an issue that is important to two "key" classifications – sheet metal worker and pipefitter – that perform "HVAC unit installation" in federal buildings. SMART and the UA[74] share jurisdiction over HVAC unit installation work pursuant to a national agreement and their separate CBAs provide for different rates of pay and fringe benefits for the same work. This jurisdictional agreement governs the work performed by composite crews consisting of sheet metal workers performing HVAC duct installation, pipefitters performing HVAC pipe installation, an equal number of SMART and UA members performing HVAC unit installation, and work performed by other key classifications. The union data submitted in surveys on HVAC unit installation reflects the division of work under the jurisdictional agreement, and thus, reflects the same work paid at different rates of pay pursuant to two local CBAs. Under the DOL's interpretation of "same" wage rate, the different rates under the applicable SMART and UA CBAs are counted separately in reaching determining whether a union prevails. For either trade to prevail, more than 50% of the total data submitted (open shop, SMART, and the UA) must have been performed at same rate under a SMART or UA CBA. The WHD's failure to recognize the jurisdictional agreement and separate CBAs negotiated by the local unions for SMART and the UA as an explanation for the different rates for the same work makes it less likely that a union rate will prevail.

[74] The "UA" refers to The United Association of Journeymen and Apprentices of the Plumbing, Pipefitting and Sprinkler Fitting Industry of the United States and Canada.

1. The Failure to Acknowledge Locally Prevailing Practices, as Established by a Local or National Jurisdictional Agreement is Contrary to Fry Brothers

The DOL has issued open shop rates for HVAC unit installation work in high union density areas where: 1) the total amount of union data for HVAC unit installation far exceeds the amount of non-union data in the county or group; 2) SMART prevails on HVAC duct installation; 3) the UA prevails on HVAC pipe installation; and 4) nearly all the other rates in a wage determination are union. There are five results depending upon the participation of SMART, the UA, the signatory contractors of each union, and open shop contractors.

- Insufficient data submitted on HVAC unit installation and no rates are posted
- Data submitted at SMART rates exceed the total amount submitted by the UA and open shop and SMART rates prevail
- Data submitted at UA rates exceed the total amount submitted by SMART and open shop and the UA rates prevail
- The combined amount of data submitted by SMART and the UA are fewer than the open shop data and open shop prevails
- The combined amount of data submitted by SMART and the UA are greater than the amount of data submitted by open shop contractors and open shop rates prevail

Adherence to *Fry Brothers* would dictate that a union rate prevails when the data submitted by SMART and/or the UA govern local standards and would prevent issuance of open shop rates in these the above scenarios.

2. For Many Decades, the DOL has Recognized that "Overlapping Work" Involving Classifications "Most Often Occurs" in the Context of "HVAC Work"

The WHD has recognized for many decades that determining prevailing rates for "HVAC work" is often complicated because two key trades – sheet metal worker and pipefitter – perform "specialty" work included therein. *See* 1989 WHD Manual:[75] "When there are two classifications

[75] 1989 Manual at 95.

overlapping a third classification," this situation "most often occurs with the question of who does HVAC work." The 1989 Manual states that "As a general rule, two unions working in the same area do not claim the same craft work."[76] The Manual recognizes, however, that this "general rule" does not apply to "specialty" work shared by sheet metal workers and pipefitters.

SMART and UA members perform HVAC unit installation work on composite crews pursuant to a national agreement. As a result, both unions submit data on HVAC unit installation work in Davis-Bacon surveys. In addition, SMART members perform HVAC duct installation work and UA members perform HVAC pipe installation work on these crews. Each trade also submits data on their respective, non-overlapping work.

By way of further background, the WHD's 1989 Manual provides an overview of computation of prevailing rates when there are two "competing classifications."[77] It describes identification of "potential area practice issues" and defines job classifications as "general crafts" and "specialty crafts." The 1989 Manual states that there is an "area practice" issue if "some workers of the general craft are performing the same work as workers of the specialty craft."[78] According to the 1989 Manual, general crafts are those which traditionally perform a "number of different functions, such as carpenters, electricians, and plumbers."[79] The 1989 Manual states that specialty crafts have a "narrower focus and their job titles describe specifically what the employees do, such as drywall hanger, drywall finisher, alarm installer, or HVAC mechanic."[80] Pages 79 to

[76] *Id*. at 77.

[77] *Id.* at 88.

[78] *Id*. at 85.

[79] *Id*. at 77.

[80] *Id.*

80 of the Manual include a chart of the "specialty crafts and general crafts in which potential area practice issues frequently occur." Of the ten specialty crafts listed, two involve the general craft of sheet metal worker. [81] The following excerpt from the WHD's chart addresses HVAC work and includes in an asterisk describing how to address situations when more than one union submits data:

SPECIALTY CRAFT (Usually reported by open shop contractors)	GENERAL CRAFT	TYPE OF WORK (reported by all contractors)
HVAC mechanics (heating, ventilation, and air conditioning mechanics) Refrigeration mechanics/workers Furnace installers Burner repairmen	Sheet metal workers Plumbers* Pipe fitters* Electrician	Installation of commercial, industrial, or residential central air conditioning, refrigeration and/or heating systems. Mounting of components/parts; joining of tubes or pipes, installation of internal electrical circuitry, installation or duct work to central unit and testing or system

*When both are reported, this may constitute a separate classification based on duties.

3. *Post-Mistick Survey Results Illustrate the Impact of Shared Jurisdiction over HVAC Unit Installation*

SMART and SMACNA include the examples below from building surveys conducted in metropolitan counties in Minnesota, Connecticut, Nevada, West Virginia, and Texas during the post-*Mistick* era.

Building Survey of Metropolitan Counties in Minnesota

The wage determinations for the metropolitan counties of Anoka, Carver, Chisago, Isanti, Ramsey, Scott, Sherburne, and Washington in a Minnesota building survey (results issued in 2018) are an example of when the combined amount of data submitted by SMART and the UA are greater

[81] "Metal building assemblers/builders/erectors" is addressed in the 1989 Manual, at 80, and on pages 38 to 40 below.

than the amount of data submitted by open shop contractors and open shop rates prevail. In the ten-county group of the counties surrounding Minneapolis-St. Paul, SMART submitted about 38% of data on HVAC unit installers, the UA submitted about 35% of data, and open shop submitted about 27% of the data in this subclassification. Even though about 73% of the data was submitted by a union, open shop rates prevailed in eight of the ten counties in this group for "HVAC Mechanic: HVAC Unit Installation." Union rates prevailed in only two of the ten counties, Hennepin County and Wright County, in the "group." The proposed return to the modal rate would address the problem presented in Minnesota.

Building Survey of Counties in the State of Connecticut

The survey results in Connecticut are an example of circumstances where the data submitted at SMART rates exceed the total amount submitted by the UA and open shop and SMART rates prevail. SMART prevailed on all sheet metal (sub)classifications in all the counties for which the DOL posted a rate. There were no open shop rates for sheet metal work in any of the 8 counties in Connecticut. Regarding HVAC unit installation work, the DOL posted SMART rates for HVAC unit installation in five metropolitan counties: Fairfield, Hartford, Middlesex, New Haven, and Tolland. There was insufficient data in the remaining three counties (two metropolitan and 1 rural). The UA submitted data on HVAC unit installation on five workers on a single project in Fairfield and an open shop contractoone o submitted data on one worker on a project in Hartford. The remaining HVAC unit installation data was submitted by SMART.[82]

Building Survey of Clark County (Las Vegas), Nevada

Another recent illustration of problems presented by the DOL's failure to recognize the shared jurisdiction over HVAC unit installation pursuant to the national agreement between

[82] See Appendix A for a summary of the results of the Connecticut building survey.

SMART and the UA is the building survey in Clark County, Nevada (results issued in 2016). The data submitted at UA rates barely exceeded the total amount submitted by SMART and open shop and the UA rates prevailed. In that survey, SMART Local 88 submitted data on 56 HVAC unit installers on a total of 15 projects; UA Local 525 submitted data on a total of 111 HVAC unit installers on a total of 20 projects; and open shop contracts submitted data on 52 HVAC unit installers on 8 projects. The UA narrowly prevailed since its total of 111 was greater than the combined number of HVAC unit installers (108) on which SMART and open shop submitted data. Union data for HVAC unit installation constituted 76% of the total data submitted. The proposed return to the modal rate would have prevented the "near-miss" in Nevada.

Building Survey of Metropolitan Counties in West Virginia

SMART prevailed in all 21 metropolitan counties on "sheet metal worker, includes HVAC duct installation." SMART and its signatory contractors submitted data on "sheet metal worker" and "HVAC mechanic: HVAC duct installation," but did not submit data on "HVAC mechanic: HVAC unit installation." As noted above, new construction of buildings always involves HVAC duct installation and HVAC unit installation. In some West Virginia counties, data were submitted on dozens of "HVAC mechanic: HVAC duct installation" and/or "sheet metal workers," including: Cabell (65), Kanawha (42), and Monongalia (45). The majority of the projects for which data were submitted involved new construction, and numerous of these projects were multi-million-dollar projects with data reported by more than half a dozen unions or their signatory contractors. The construction of the following buildings at Marshall University in Cabell County well illustrates this phenomenon: Charles O. Erickson Alumni Center ($9,628,592); Marshall University Student Housing ($26,572,647); Marshall University Recreation Center ($31,338,206); Marshall University Forensic Science Annex ($4,217,193); and Marshall University Engineering

Lab Facility ($3,331,754). Other examples include but are not limited to: WVU Cancer Research Facility Addition in Monongalia County ($15 million); Memorial Hospital Teaching Center in Kanawha County ($78 million); and Camden Clark Hospital – Addition & Renovation in Wood County ($52 million).

DOL analysts should have known that new construction involves both HVAC duct installation and HVAC unit installation, and that outreach was needed to ensure that submitters understood that there is a separate peak week for each task. If properly advised by DOL wage analysts, SMART and its signatory contractors could have submitted data on HVAC unit installation work, and the wage determination would be "sheet metal worker, including HVAC unit installation and HVAC duct installation." The DOL's failure to fully educate the participants at pre-hearing briefings and to perform proper outreach when it became apparent that submitters misunderstood the concept of separate peak weeks for various work functions with a trade caused the Agency to issue no rate for HVAC unit installation in these 21 metropolitan counties. Inadequate outreach contributes to excessive use of the conformance process. If there is a disproportionate amount of data for HVAC duct installation relative to the amount of data for HVAC unit installation, the DOL should contact the submitter and SMART (if work was performed under a SMART CBA to inquire about the discrepancy so that there is an opportunity to submit data on both tasks. The failure to conduct this outreach leads to nonsensical results, with only a minute percentage of data on HVAC unit installation relative to the amount submitted on HVAC duct installation.

Building Survey of Harris County (Houston), Texas

The circumstances in Harris County are an example of when the combined amounts of data submitted by SMART and the UA are fewer than the amount submitted by open shop on HVAC unit installation and open shop prevails on that work. As shown on the WD-22's and WD-22a's[83] for Harris County and on the following chart, data were submitted for a total of 1,610 sheet metal workers during the survey, and that 93.8% of the data (1,510 workers) was recorded by the DOL as "sheet metal worker (HVAC duct installation only)." The information on the remaining 100 sheet metal workers was recorded on the WD-10 as "sheet metal worker, excludes HVAC unit installation), and "sheet metal worker (HVAC unit installation only)." The former constituted 2.2% or 35 workers and the latter constituted 4.0% or 65 workers.

Submitter of data	Sheet Metal Worker (HVAC Duct Installation Only)	Sheet Metal Worker (HVAC Unit Installation Only)	Sheet Metal Worker, Excludes HVAC Unit Installation
SMART Local 54	916 – 60.7%	0	36 – 55%
Other SMART Locals	48	0	0
Open Shop	546	31	29
Other crafts	0	4	0
Total	1,510 – 93.8 %	35 – 2.2%	65 - 4 %

The DOL could have avoided issuance of aberrant results for HVAC unit installation in the building survey in Harris County. As is evident, it is critical, under the current survey methodology, that unions understand that each "subclassification" has its own peak week and that wage analysts do appropriate outreach to ensure that the data are internally consistent. In the Texas building survey, there was confusion among participants as to the number of subclassifications for

[83] The WD-22a's compile a county-by-county summary of each project by name, the date of the project and its dollar value, the number of workers in each classification employed on each project, and the rates of pay and fringe benefits.

which data could be submitted (some Local Unions thought they could submit data on only one) and the WHD failed to conduct sufficient outreach and follow up to obtain data on HVAC unit installation. This occurred even though the regional office in Dallas was aware that when HVAC duct installation is performed, HVAC unit installation is also performed as part of the work of mechanical crews.

B. The DOL Should Calculate Wage Determinations for "Metal Roofing" in a Manner that does Not Diminish the Ability of Unions with Overlapping Jurisdiction on it to Prevail on Other Work Within Their "General Crafts," and Thereby, Minimize the Potential for *Mistick* Problems on this "Specialty Craft" Work

SMART and SMACNA commend the DOL on its understanding, as expressed in the 1986 and 1989 manuals, that combining data on "specialty crafts" over which "general crafts" have overlapping jurisdiction would detract from each general craft's total amount of work performed at the "same wage." Consistent use of area practice surveys would ensure that when union rates predominate, open shop rates do not prevail. Rather than combining all the data paid at different union rates from various trades that submit data on metal roofs, metal siding, and similar work when survey data demonstrates that union practice govern local standards and potentially issue an open shop rate, the DOL should use area practice surveys to determine which of the unions represents the most workers performing the work in dispute.[84] To reiterate, SMART and SMACNA requests that the DOL include its internal methodology concerning area practice in the Final Rule.

The WHD's practice is to calculate certain work described as "specialty craft" work in a manner that does not diminish the ability of the "general crafts" identified in the WHD's 1989

[84] 1989 Manual at 77: "Once you have identified an area practice issue, you resolve it by determining how many general craftsmembers and specialty craftsmembers performed the duties in question, determining which classification did the majority of that type of work, and determining the prevailing wage rate that the employees were being paid."

Manual to prevail on other nonoverlapping work within their crafts. As stated above, the WHD's 1989 Manual lists two "specialty crafts" within the sheet metal trade in its overview of computation of prevailing rates when there are two "competing classifications." In addition to HVAC work, the 1989 chart describes other work, "metal building assemblers/builders/erectors" as follows:

SPECIALTY CRAFT (Usually reported by open shop contractors)	GENERAL CRAFT	TYPE OF WORK (reported by all contractors)
Metal building assemblers/builders/erectors	Iron workers Sheet metal workers Laborers Carpenters	Installation or repair of metal buildings. Classes may vary depending on whether pre-fab or mechanical

At a pre-survey briefing to train participants in the 2018-2019 Maryland building survey, the WHD wage analyst advised that the WHD has a practice of clarifying which materials are used on "roof," because four trades claim jurisdiction over construction of metal roofs. This practice and the WHD's use of data clarified during the data analysis phase of the survey has produced different results: 1) one of the four unions identified on the chart above prevails on "metal roofing"; 2) insufficient data are submitted for metal roofs; or 3) open shop rates prevail.[85] The WHD does not, under any circumstances of which SMART and SMACNA are aware, combine the data on metal roofs with other data submitted for the four general crafts.

The 1989 Manual continues to reflect the "specialty crafts" within sheet metal "general craft" throughout the country, as demonstrated by the definitions of sheet metal worker in states that include definitions of trades in their statutes or administrative regulations for each trade covered by state prevailing wage law. In Alaska, for example, sheet metal worker includes "fabrication and installation of exterior wall sheathing, siding, metal roofing, flashing, decking

[85] The wage determinations in Washington's most populous counties (Clark, King, Kitsap, Pierce, Snohomish, Spokane, Thurston, Whatcom, and Yakima) illustrate all three scenarios.

and architectural sheet metal work" and 13 other work functions.[86] Washington State's administrative code defines sheet metal work as including, among other things, the "installation of metal siding and metal roof decking, regardless of the fastening method, or what it is fastened to."[87] Missouri is another state that includes significant detail in its description of trades. In Missouri's definition of sheet metal worker includes, among other things, "The performing of sheet metal work specified for use in connection with or incidental to steeples, domes, minarets, look outs, dormers, louvers, ridges, copings, roofing, decking, hips, valleys, gutters, outlets, roof flanges, flashings, gravel stops, leader heads, down spouts, mansards, balustrades, skylights, cornice molding, columns, capitals, panels, pilasters, mullions, spandrils, and any and all other shapes, forms and design of sheet metal work specified for use for waterproofing, weatherproofing, fire proofing, ornamental, decorative, or display purposes, or as trim on exterior of the buildings."[88] It is noteworthy that most states do not define each trade in a statute or regulation, but rather, define trades based on the scope of work in applicable CBAs. Sheet metal CBAs throughout the county include the work described in Alaska, Missouri, and Washington.

V. THE WHD HAS IMPLEMENTED UNWRITTEN RULES THAT AMOUNT TO A "HEADS" THE OPEN SHOP SECTOR WINS, AND "TAILS" THE UNION SECTOR LOSES

The NPRM addresses the major deficiencies in the survey process: abandonment of the majority requirement for determining prevailing wage that has enabled outliers to depress labor standards; the ban on combining metropolitan and rural data; the ban on use of federal and federal-

[86] *Laborers' & Mechanics' Minimum Rates of Pay*. Title 36. Public Contracts AS 36.05 & AS 36.10 Wage & Hour Administration Pamphlet No. 600. https://labor.alaska.gov/lss/forms/pamp600-4-1-06.pdf

[87] WAC 296-127-01372(5).

[88] *Mo. Code Regs*. tit. 8 § 30-3.060.

assisted data in building and residential surveys when "sufficient" data is available; and the artificial subdivision of key classifications into meaningless work functions. There are, however, many written and informal rules that compound the problems created by the 1983 rules and *Mistick.* Most unwritten rules limit the amount of data available to calculate prevailing rates; another unwritten rule – failure to discard data submitted by prevailing wage violators – has resulted in use of inherently unreliable data in wage surveys.

1. The DOL Treats Wage Data Submitted at the Same Rates as the Union Rates in the Locality as Non-Union Rates When the Work is Performed on State, County, and Municipal Prevailing Wage Projects by an Open Shop Contractor

The DOL has stacked the deck against unions and signatory contractors – with a "heads I win, tails you lose" dynamic – through its administration of the *Mistick* rule. The DOL's current regulations require that, for union rates to prevail, a "majority (more than 50 percent)" of workers in a classification must be paid the "same wage." This is a high hurdle, made far more difficult, by the DOL's exclusion from the total amount of data paid at "same" union rate open shop data paid at the union rate but not performed under a CBA. In addition, wage rates "need to be identical 'to the penny' in order to be regarded as the 'same wage,' and that nearly any variation in wage rates, no matter how small and regardless of the reason for the variation, might need to be regarded as reflecting different, unique wage rates."[89] Unions are further disadvantaged because the DOL also treats data submitted by non-union contractors paid at union rates on projects covered under state, county, or municipal prevailing wage laws as not the "same" wage rate in determining whether the same wage rate prevails. Thus, wage data paid at union rates by non-union contractors on county and municipal courthouses, county jails, schools, state and county administrative buildings, fire

[89] 87 *Fed.Reg*. at 15706.

stations, police stations, public libraries, etc. are not included as the "same" union rate. The DOL's practices skew the data base in surveys from which the prevailing wage is derived in favor of the open shop sector. Indeed, rather than giving "undue weight" to collectively bargained rates,[90] the WHD gives undue weight to open shop rates, with the end result being excessive overuse of weighted averages as a "fallback."

The language in the current definition of prevailing wage states that the "same wage" must be paid to a majority in the classification for a rate to prevail;[91] it does not state that the "same union wage" must be paid. By reading "union" into this term, the WHD has arbitrarily limited the amount of data available that would contribute toward establishing prevailing rate. This limitation has had a significant impact on the ability of unions to prevail, because data on state, county, and local prevailing wage projects – particularly on school construction – form a large percentage of the overall data – union and open shop – submitted in wage surveys. The treatment of state public works projects effectively ignores the impact of state prevailing wage law on local construction markets. Union rates are further skewed downward under the WHD's informal practice of treating data submitted by non-union contractors paid at union rates on projects subject to Davis-Bacon and Related Acts as not "same wage" in determining whether "more than 50 percent" of workers were paid at the same wage.

2. Unions Cannot Predict the "Subclassifications" on Which to Submit Data Because it is Not Known in Advance How Many Subclassifications will Appear on Wage Determinations

Under the current standard, in considering how to complete a Form WD-10, the union sector lacks a clear road map on how to best ensure that each union submits more than 50% of the

[90] 87 *Fed.Reg*. at 15706.

[91] 29 C.F.R. § 1.2(a)(1)

data at the same wage on each "subclassification" within key classifications. The "subclassifications" for which the DOL seek data are unknown in advance. This survey methodology causes unions and signatory contractors to effectively guess how to describe their work within their trade to increase the likelihood that key classifications and subclassifications within it prevail. Based on experience, unions know that if open shop contractors submit a sufficient amount of data on a work function or subclassification within their key classification, the DOL will issue a separate wage determination for that function instead of including the data in determining the rate for the key classification.

As a practical matter, all the work performed by sheet metal trade is sheet metal work. When a trade is stripped into indefinite number of subclassifications, there is essentially no work left within the classification. The union is left with limited guideposts in deciding to keep its key classification intact with the goal of prevailing on work of the entire trade or separate its work in subclassifications and defend each subclassification based on the 6 workers/3 contractors standard. This task is further complicated by the DOL's use of 17 craft identification numbers in matching the data submitted to its template for categorizing sheet metal work. [92] *See* Appendix B for a list of the work functions encompassed within the craft identification numbers; many craft identifications refer to architectural sheet metal work, such as installation of siding/wall panels, siding installation - metal/aluminum vinyl, metal roofing, metal flashing, gutters, etc. Others refer to sheet metal work involved on HVAC systems, industrial sheet metal work, and signage.

[92] The information in Appendix B was compiled before the DOL recognized in 2016 that the work of testing, adjusting, and balancing (TAB) work within the sheet metal classification is not the same as the work described in Field Operations Handbook 15e06 "Air balance engineers." For many decades, the DOL erroneously believed that TAB technicians and "air balance engineers" (known as "commissioning agents" in the sheet metal industry) were the same occupation. Unlike the professional work of commissioning agents, who are third-party certifiers of the work of TAB technicians, the work of TAB technicians primarily involves "physically" making "required corrections" to rectify imperfections or imbalances" in heating and air conditioning systems.

SMART Local Unions and signatory contractors face a quandary: submit all architectural sheet metal data (metal roofing, metal sidings, gutters, soffits, louvers, etc.) as "sheet metal work" in support of obtaining a CBA rate for the key classification of "sheet metal worker" or dilute architectural sheet metal work into separate "subclassifications" within the sheet metal trade in anticipation that open shop contractors will do the latter. The more subclassifications that the union sector elects to "defend" against submittals by open shop, the more unions dilute data needed to ensure that they prevail on key classifications. In a recent survey (results issued in 2017) of building rates in four contiguous counties in New York, SMART Local 58 rates prevail in the counties of Oswego, Madison, and Onondaga on the key classification of sheet metal and three "subclassifications" within the sheet metal trade: Sheet Metal Worker (Including Installation of HVAC Duct, Metal Flashing, and Siding (Aluminum, Metal, Vinyl)). In several metropolitan counties in SMART Local 12's jurisdiction in western Pennsylvania – Beaver, Erie, Washington, and Mercer, SMART rates were posted for "Sheet Metal Worker, including HVAC duct installation" and also including "subclassifications" within architectural sheet metal, "metal roof installation and metal flashing installation."

There is a disconnect between the number of "key" classifications purportedly used by the DOL in issuing prevailing rates and the actual number of so-called "key" classifications posted on wage determinations.[93] In a 2013 case, *Chesapeake Housing Development*,[94] for example, the

[93] See 1986 Manual of Operations, which includes in a "Survey Transmittal Letter" (Appendix A, at 99) the "mechanic and laborer occupations common to building and heavy construction." The Survey Transmittal Letter further states "For your convenience we have listed on the reverse side of this letter Where practical, please utilize these classifications in reporting. However, other classifications may be written in if necessary." Attached to the transmittal letter is a list of 57 classification (8 are "laborers" and 18 are power equipment operators). Two classifications are "Heating, A/C mechanics" and "sheet metal worker"

[94] *Coalition for Chesapeake Housing Development*, ARB Case No. 12-010 (Sept. 25, 2013), at 2.

ARB states that residential construction includes 12 "key classifications."[95] While the ARB does not cite to a source for this statement, it is consistent with the classifications for residential construction listed in the "Davis-Bacon Surveys" section of the *Prevailing Wage Resource Book* (2015), which are bricklayers, carpenters, cement masons, electricians, iron workers, laborers – common, painters, plumbers, power equipment operators (operating engineers), roofers, sheet metal workers, and truck drivers. In *Chesapeake*, the ARB states that the WHD was "able to recommend prevailing wage rates for six of the twelve classifications" and to "establish wage rates for at least 50% of the key classifications for the construction type." In so stating, the ARB ignores the fact that the challenged wage determinations involved two key classifications, plumber and truck driver, and crane operator, which is included within "power equipment operators (operating engineers)." Thus, in *Chesapeake*, the ARB conflates "key classification" of power equipment operator and work included within it – operation of a crane – in upholding the Administrator's exercise of discretion in issuing the challenged rates.

3. Unions Have Been Disadvantaged by the DOL's Use of Data Submitted by Prevailing Wage Violators in Calculating Prevailing Rates of Pay

SMART and SMACNA encourage the WHD to formally abandon its practice of using data submitted by contractors for projects on which they failed to pay the prevailing wages required under federal, state, or local prevailing wage law. This practice has disadvantaged unions in surveys because signatory contractors are contractually obligated to pay an established rate, and thus, are not the contractors that are failing to comply with prevailing rates. In accordance with

[95] Former Administrator David Weil cites to *Chesapeake* in stating the WHD "only expands data" to the supergroup or state level for "classifications that have been designated as 'key' crafts." *See* Sept. 5, 2014 opinion letter from former Administrator David Weil concerning an appeal concerning the Indiana residential survey filed by the Indiana Chapter of the Associated Builders & Contractors.

this practice,[96] the DOL used this inherently unreliable data and treated it "as though" it had been paid at the prevailing rate of pay in determining prevailing rates of pay.

SMART and SMACNA cannot quantify the percentage of wage determinations that are depressed by use of data submitted in Davis-Bacon surveys from prevailing wage violators, since it is unknown which situations have been corrected by the DOL after the WD-22's and WD-22a's are compiled. Two examples from separate surveys illustrate the adverse impact of this unwritten practice. In the West Virginia building survey, the WHD used data on a school project, Petersburg High School in Grant County, in which the submitter failed to pay prevailing rates under West Virginia prevailing wage law (now repealed). The WHD's use of this errant data caused a non-union rate to prevail for crane operator in 28 rural counties. When this data was removed, a union rate prevailed for crane operator in all 28 counties.

In another statewide survey, a Kentucky heavy survey, the WHD abused its discretion by using substantial data from a federal Department of Transportation project, the Daniel Boone National Forest project in Laurel County, where the contractor failed to pay 42 workers (21 operators, 16 laborers, and 5 truck drivers) the prevailing rates of pay on a project with an alleged value of $12,006. The WHD should have been on notice regarding the unreliability of this data because the number of workers allegedly employed relative to the value of the project is disproportionate. The WHD's internal guidelines inform staff that they should flag WD-10's which report a number of workers that is disproportionate to the dollar value of the project. [97] Rather than

[96] SMART and SMACNA believe that, in theory, the DOL has abandoned this practice but has not issued public written guidance regarding it. Unions brought to the Petersburgh High School and Daniel Boone projects to the DOL's attention. The former was corrected.

[97] *See* 1989 Manual at 22: "If the reported number of employees seems large (20 or more), but the dollar value of the project is between three and five million, accept the reported number of employees without calling to verify. For key classes, this apparently large number of employees, in fact, is relatively small for such a large contract."

limiting the impact of the unreliable data, the DOL used the data in the entire Laurel County group[98] and imported the data into the 17 counties in the separate Ballard County group. This data skewed the rates downward in all the rural counties in which it was used. The DOL can quantify the extent to which the Daniel Boone project data skewed the results of the Kentucky heavy survey by a review of the applicable WD-22's and WD-22a's.

4. *Union Data Used in Surveys is Further Reduced by the WHD's Failure to Notify Union(s) During the Verification Phase of the Survey Process When the WHD is Unable to Reach Signatory Contractors to Verify Wage Data Submitted by Union(s) as Third-Party Submitters*

Construction unions have repeatedly asked WHD's national office to direct wage analysts to consistently contact unions when they are unable to obtain from union signatory contractors verification of the accuracy of data submitted by unions. Unfortunately, these requests have not been honored on a consistent basis. A key motivation for these requests by unions is that the WHD does not use third-party data if it is not verified by the employer of the worker(s) for whom data is submitted. The WHD has, in the past, discarded data submitted by unions without notice, and thereby, has deprived unions of the opportunity to reach out to their signatory contractors to explain the importance of verification. Union representatives typically coordinate with signatory contractors to review payroll records to collect relevant information to complete WD-10's and are available and willing to ensure that the payroll office staff understand the importance of the DOL's inquiry and the need to make time in their schedules to confirm relevant data. Abundant union data is often discarded by the WHD's failure to reach out to unions, particularly when they are third-party submitters.

[98] The Laurel County group for the 2005-2006 survey period included the following 20 rural counties: Adair, Barren, Casey, Clinton, Cumberland, Green, Hart, Knox, Laurel, Logan, Marion, McCreary, Metcalfe, Monroe, Pulaski, Russell, Simpson, Taylor, Wayne, and Whitney. These 20 counties (group 100541) formed a supergroup with 21 counties in another rural group (100236).

The Harris County survey presents an example of a situation in which outreach to unions could have prevented issuance of internally inconsistent results before the deadline for submission of data expired. After the wage determination was published, SMART International confirmed with the regional office in Dallas that it made no effort to contact SMART Local 54 at any time to address the paucity of data on HVAC unit installation. DOL wage analysts should have been on notice that outreach to Local 54 was needed since new building construction involves both HVAC duct installation and HVAC unit installation.[99] The regional office advised SMART that the WHD does not contact unions to ascertain if additional work was performed on a project. If the WHD had contacted SMART Local 54 while the period for submission of data was open, the local union and its signatory contractors would have submitted data on HVAC unit installation that its members performed on the very same projects on which they performed HVAC duct installation.

The Harris County survey demonstrates that conferring with union representatives would serve the dual goals of increasing the amount of usable data and of issuing wage determinations that include all the component parts of the work performed by trade(s) on projects reported on WD-10's. The onus should have been on WHD personnel to correct the illogical results in Harris County. If properly advised by DOL wage analysts, SMART and its signatory contractors could have submitted data on HVAC unit installation work from the same projects on which SMART-represented workers performed HVAC duct installation. The resulting wage determination would have been "Sheet Metal Work, including HVAC unit installation and HVAC duct installation."

[99] The Regional office advised SMART that during the verification process, it looks for wage data on five "different components" of HVAC "system" work when contacting open shop and union contractors to verify WD-10's: unit, duct, pipe, thermostat, and wiring.

5. The DOL's Lack of Clear Guidance on How it Administers the Mistick Rule has a Chilling Effect on the Submission of Union Data

SMART and SMACNA anticipate that the amount of data submitted by unions and signatory contractors will increase significantly if the DOL modifies the definition of "prevailing wage" to recognize variable rates in a single CBA and in one or more CBAs as the same wage rate, because signatory contractors can submit data on a greater percentage of work after the effective date of the Final Rule. While SMART and SMACNA understand that the *Mistick* rule has been a guiding principle in administration of surveys, lack of clear guidance on the WHD's interpretation of *Mistick* and inconsistent advice from wage analysts constrain a fuller participation rate in the survey. This lack of clarity substantially decreases the amount of data that unions and signatory contractors submit in wage surveys. In recent years, the union sector has become acutely aware that submitting data paid at rates that are higher or lower than the CBA rates in a county makes it more likely that open shop rates will prevail.

Unions and signatory contractors are forced to figure out ways to strategically participate in surveys to avoid the type of pitfalls that SMART and SMACNA have discovered by studying WD-22's and WD-22a's. In the first five or six years after issuance of the *Mistick* decision, these pitfalls were essentially "hidden." During the George W. Bush administration, the WHD collected survey data in many states, but did not issue wage determinations until half a decade or more later.[100] While the WHD was forging ahead with plan to implement a "to the penny" approach, unions were unknowingly acting to their detriment because the WHD failed to inform the regulated community of its new rules.

[100] As stated in a GAO report, in 2007, the DOL decided not to initiate any new surveys in order to finalize and publish results from 22 open surveys, which accumulated after the DOL began conducting statewide surveys in 2002. As of September 1, 2010, results from 20 of the 22 surveys were published and results from the remaining 2 were in the process of being published. The DOL stated that once results from all 22 surveys are published, they will be able to focus on more recent surveys, which will reduce delays in processing and increase accuracy because more recently collected information is easier and less time-consuming to clarify and verify with contractors. GAO, March 2011, at 12.

The *Mistick* rule has made completing the WD-10's a cumbersome process and a costly drain on the resources of local unions, signatory contractors, and SMACNA chapters. For contractors with projects in dozens of counties during the survey period, hundreds of hours of expensive staff time were required to sort through payroll records to ascertain the peak week for each work function within the key classification of sheet metal worker. Then the staff must figure out why the wages paid to individual workers employed during the identified peak weeks were higher than the base rates, and then include an explanation in "Comments or Remarks" remarks section of the WD-10. Those reasons often include extra pay set forth in the CBA for hazardous work, shift differentials, zone differentials, or compensation to working forepersons. The rates for industrial and commercial work within the same county may also be different. This creates yet another administration burden for staff in payroll departments as they endeavor to avoid submitting data at "different" rates of pay.

In some instances, SMART and SMACNA can discern unwritten rules and practices by studying WD-22's and WD-22a's and figuring out patterns. Even after rigorous study and persistent inquiries with WHD staff, the WHD's practices are unclear regarding how it treats different rates of pay for the same work performed in commercial and industrial settings. Lack of guidance on this issue complicates participation in surveys in counties where significant amounts of industrial construction is performed. Depending upon the nature of the building work performed in a locality (*e.g.*, commercial or industrial) unions often have different rates in separate CBAs or within the same CBA. The DOL has, over the years, applied inconsistent methodologies in dealing with these differences. In an Idaho building survey, for example, unions submitted substantial data on industrial work, particularly at the Idaho National Laboratory (counties of Bonneville, Bingham, and Butte) and at Clearwater Mill (Nez Perce County). The wage determinations in eight

Idaho counties (Boundary, Camas, Cassia, Gooding, Jerome, Idaho, Lewis, and Lincoln) include a definition of building construction that encompasses industrial work: "Building Construction, including building construction projects on treatment plants and industrial (power plants, manufacturing plants, processing plants, etc.) sites." The counties in which abundant industrial data were submitted –Nez Perce, Bonneville, and Butte – do not include this definition of building on their wage determinations. Likewise, in the counties of Apache, Conchise Gila, Graham, Green Lee, La Paz, Mohave, Navaho, and Santa Cruz, in Arizona, the wage determinations encompass industrial work: "Building Construction, Includes Building Construction on Treatment Plants and on Industrial Sites (Chemical/Processing/Manufacturing Plants, Power Plants, Refineries, Nuclear Plants, Etc.)"

6. The DOL's Out-of-Date Categorization of Building Work in All Agency Memorandum No. 130 Further Disadvantages Unions by Limiting the Amount of Data Available to Submit in Building Surveys

In addition to the *Mistick*-related issues described above, the WHD further stacks the deck against unions by continuing to use an out-of-date paradigm for determining the applicable wage schedule for workers employed on the construction of apartment buildings in All Agency Memorandum No. 130 (1978). AAM No. 130 states that "apartment buildings (4 stories or less)" are classified as residential and "apartment buildings (5 stories and above)" are classified as building construction. Application of this paradigm when determining usable data in building surveys has the effect of excluding data performed at "mixed-use" buildings rates that are lower than 5 stories, despite the fact that this work is paid at building rates under CBAs.

Reexamination of the DOL's mechanical application of the 4-story/5-story standard, which was designed to differentiate between "walk-up, garden-type" (residential) and "high-rise"

apartments" (building), is long overdue.[101] The authors of AAM No. 130 did not envision that 21st century apartment buildings would evolve into small communities with retail space on the first and/or second floors and housing above. Beginning in the 2000's, apartments have evolved into small communities that span across entire city blocks. There has been a widespread growth of mixed-use buildings with commercial establishments on the first floor and/or second floors and housing above to achieve higher occupancy and use, as developers respond to the demand for urban, walkable neighborhoods.

In failing to update AAM No. 130, the DOL has artificially limited the data available in building surveys by misclassifying building work, such as mixed-use buildings, as residential. A recent building survey of metropolitan counties in Missouri (results of the survey not yet issued) provides an example of the downward impact of miscategorization of building work as residential. In the most recent Missouri building survey, SMART Local 36 submitted a substantial amount of the data on mixed-use buildings that are three stories in height with no underground parking garages. A failure to include this wage data, which was paid at building rates in the counties surveyed, would diminish the available data based on inaccurate classification of similar projects, and thereby, undermine the protections afforded to workers under the DBA. Without accurate selection of work classifications and type of construction, the accompanying wage determinations in a locality are meaningless. Compensation of workers at the wage schedule for a lesser-paid type of construction rather than at the wage schedule based on the character of the project deprives the workers of the amounts to which they are entitled under the DBA.

[101] The apartment buildings of the 1960s were generally two stories high, with no elevators, 4 known as "walk-up, garden-type." The building sizes of apartments constructed in the 1970's were slightly higher, often two to three stories in height, with no elevators. In determining the applicable wage schedule was general building or residential, the WAB noted in a 1965 case that "walk-up or garden-type residential construction includes two and three floor buildings usually without elevators" and that "high-rise apartment construction includes generally those buildings over three floors, always with elevators." *Mattapony Towers Apartments, at Bladensburg, Prince Georges County, Maryland*, WAB Case No. 64-02 (June 29, 1965).

VI. THE WHD's USE OF "PEAK WEEK" IN ADMINISTRATION OF SURVEYS GREATLY LIMITS SURVEY DATA

"Peak week" is a term that is not used in the DBA or in current or prior implementing regulations. The WHD defines peak week as the work "week in which the largest number of employees worked for each classification that the contractor used on a project. Thus, a contractor may have different peak weeks for different worker classifications."[102] During the Carter administration, the DOL invited "suggestions" regarding the "advisability and feasibility of alternatives" to using peak week, such as "surveying the total number of man-hours worked on similar projects in each classification or the number employed in each classification on similar projects in the area at a particular point in time, with consideration for the availability of wage rate data under the alternative methods."[103] Over the past 43 years, the WHD has not officially announced any progress in devising alternatives to peak week.

The use of peak week drives down the amount of data submitted. This methodology is confusing to survey participants and often leads to the underreporting of data on projects by persons who do not understand it. Under the current methodology, the WHD advises submitters (union and open shop) at pre-survey briefings to submit data for each possible subclassification recognized by the DOL since each "subclassification" has its own peak week. However, because the number of subclassifications is unknown until the results of the survey are analyzed, submitters often do not submit data for each subclassification and select a single peak week in which the greatest number of workers in a trade worked on a project. With advance notice of subclassifications for which the DOL plans to issue wage determines and/or elimination of the

[102] Davis-Bacon and Related Acts Frequently Asked Questions, IV. Davis-Bacon Wage, "What is a peak week?" https://www.dol.gov/whd/programs/dbra/faqs/peakweek.htm

[103] 44 *Fed.Reg*. 77026 (Dec. 28, 1979).

peak week methodology, altogether, the amount of survey data would increase. The DOL's proliferation of subclassifications for which it issues separate wage determinations contributes to confusion in submitting data based on peak week.

As a result of widespread misunderstanding of the peak week methodology, projects of greater value are not accorded appropriate weight relative to projects that have a lower value, and, thus, employ fewer workers. The WD-22's and WD-22a's for surveys issued in the post-*Mistick* era amply demonstrates that the projects with a high monetary value, such as new construction of a federal building, as contrasted with alteration or repair of existing facilities that may (not always) have a relatively low monetary value, are not given weight in the survey process commensurate with their impact in the locality.[104]

VII. THE PROLIFERATION OF ARTIFICIAL SUBCLASSIFICATIONS OF KEY CLASSIFICATIONS "DESKILLS" TRADES," UNDERCUTS PREVAILING WAGE RATES, DECREASES USABLE DATA FOR EACH SUBCLASSIFICATION, AND LEADS TO INCONSISTENT RESULTS

SMART and SMACNA support the WHD's commitment to preventing routine issuance of separate wage determinations based on work functions or "subclassifications" within a classification rather than upon the trade in its entirety. A reversal of the current administrative practice of artificially subdividing trades (as distinguished from subclassifications that may be necessitated by a local or jurisdictional agreement, for example), is needed to ensure that skilled tradespersons are compensated in accordance with local labor standards. Dr. Peter Philips refers

[104] 1989 Manual at 31: "Let's say you are conducting a survey in which large projects dominate (5% of projects have 60% or more of the dollar value of active construction activity) and they're union. In this situation small projects (whether open shop or union) won't affect the survey results much. This is an instance in which you can minimize the amount of follow-up."

to this practice as "disaggregating" trades,[105] into work functions or subclassifications. As Dr. Philips observed, Davis-Bacon's purpose—preserving local labor standards—is served by using craft classifications that help preserve wages by recognizing a "coherent collection of related skills making the worker more productive and more employable."[106] Craft organization provides a "coherence to skill formation and the accumulation of experience, knowledge and capabilities that not only prepares the worker for work, but also draws out a career path through the twisting tides of the industry."[107]

A. The WHD's Current Survey Methodology "Disaggregates" Skills into Tasks, and Thereby, "Deskills" Trades and Undercuts the Wages of Skilled Workers

Issues of "aggregation" and "disaggregation" present themselves in the process of conducting wage surveys of occupations. The current requirement that the WHD needs separate "proof," based on evidence submitted in the survey for each individual work function in a key classification disaggregates data, and thereby, undermines the ability of unions to prevail at the craft level. The WHD's practice of refusing to rely on abundant data for one or two "subclassifications" of work as a basis for issuing a wage determination for the entire key classification leads to a breakdown in the process. Indeed, the relationship between the number of subclassifications generated by the WHD in issuing wage determinations is inversely proportional to the amount of data available to support the wage determination. Disaggregation results in use of miniscule amounts of data for an indeterminate number of subclassifications and yields

[105] Dr. Peter Philips, Professor of Economics, University of Utah. *How Should Davis-Bacon Surveys Be Conducted?* December 2021, at 15-16. *See* section on "Determining How to Survey Construction Occupations."

[106] Philips (2021), at 16.

[107] *Id.*

inconsistent results. Furthermore, a failure to recognize the full array of skill sets included in a craft in determining prevailing rates effectively "deskills" a trade and undercuts labor standards. "Crafts are local labor standards" because "craft formations and boundaries describe and circumscribe the opportunities" a worker has in the local construction market.[108] The WHD's current artificial subdivision of crafts through its survey methodology has the same effect as the tactics used by contractors that seek to evade prevailing wage obligations.

The WHD recently issued wage determinations for Knox County (Knoxville) and six surrounding counties[109] in Tennessee illustrate the extent to which the WHD's process in skewed in favor of open shop rates. The results also demonstrate the inevitability, under the current methodology, of issuing open shop rates for subclassifications within a key trade in some counties even when an overwhelming amount of data are submitted on each of the subclassifications included with the key classification. SMART Local 5 prevails for the "subclassifications" of "sheet metal worker (siding (metal/aluminum/vinyl)" and "sheet metal worker (HVAC duct installation only)." "UAVG" rates were issued for "sheet metal worker (HVAC unit installation only)," which means that 100% of data for this "subclassification" were submitted at the CBA rates of two or more SMART locals (Locals 4, 5, or 177 have geographic jurisdiction in Tennessee). The WHD issued open shop rates for "sheet metal worker, excludes HVAC duct and unit installation." In so doing, the WHD separated all the data on three subclassifications – HVAC duct installation,

[108] *Id.* at 15.

[109] Those counties are Blount, Campbell, Grainger, Loudon, Morgan, and Union, all of which are in the Knoxville MSA. When the DOL announced the Tennessee building survey in 2017, Anderson and Roane were also included in this group. The WD-22's for this group of metropolitan counties appear to indicate that data from Anderson and Roane were not include in the DOL's calculations in determining the rates in some subclassifications within the sheet metal trade. The WD-22's summary the "sheet metal worker" data for Blount, Campbell, Grainger, Knox, Loudon, Morgan, and Union, as follows: "$24.19 $7.52 9 A 1," or "$24.19 $7.52 A" signifying that the data was combined at the group level. In Roane, the WD-22 summarizes data for this classification as "$0.00 $0.00 33 M†0." In Anderson, the WD-22 summarizes the "sheet metal worker" data as "$0.00 $0.00 30/21 M 1."

HVAC unit insulation, and siding (which is encompassed within architectural sheet metal work) – within the sheet metal trade and then issued an open shop rate for the key classification of sheet metal based on relatively small data. As noted above on pages 4 and 43, when a trade is stripped into indefinite number of subclassifications, there is essentially no work left within the key classification.[110]

Here is a summary of the data used to calculate rates for "sheet metal worker" in the Knox, Blount, Campbell, Grainger, Loudon, Morgan, and Union, all of which are reported on projects in Knox County:

County	Project	Open shop	SMART Local 5
Knoxville	East Tennessee Children's Hospital	2 contractors/1 worker per contractor, at a rate of $25.00/ $0.96	
Knoxville	Ely Building-406 Church Ave		1 contractor/3 workers, at a rate of $22.00/$11.41
Knoxville	Saint George Greek Orthodox Church -Renov	2 contractors/1 worker per contractor, at a rate of $25.00/$0.96	
Knoxville	TVA Greenway Mechanical		1 contractor/2 workers, at a rate of $25.85/$14.78

It appears that the same open shop contractor submitted all the non-union data on "sheet metal worker" since the wage and the fringe benefit rates for all four open shop workers are the same ($25.00/ $0.96). Thus, a single contractor dictated the rates for "sheet metal worker" in seven metropolitan counties. The survey rate based on the weighted average is $24.19 and $7.52. Under the proposed modal rate, SMART Local 5 would prevail since it submitted one-third of the data at same rate. Additionally, if the DOL adopts SMART and SMACNA's proposal that variations in rates explained by "one or more" CBA(s) are treated as functionally equivalent, SMART Local 5

[110] *See* Appendix C for a summary of the results of Tennessee survey for the sheet metal trade in the 20 most populous counties.

would have prevailed even without a return to the modal rate in establishing prevailing rates. Finally, the DOL could have avoided the problems presented in issuance of the "sheet metal worker" altogether because there was abundant data on other work within the key classification.

B. The Artificial Subdivision of Craft Work into Discrete Work Functions is Often a Tactic Used by Open Shop Contractors to Deprive Workers of the Wages that their Skills Demand in the Marketplace

Subdivision of general crafts into various work functions is a tactic used to undercut labor standards.[111] In a 2019 decision, the Washington Labor & Industries (L&I) rejected an application by a contractor, Northshore Sheet Metal, which would have resulted in the underpayment of sheet metal workers.[112] Northshore sought to undercut state prevailing wage rates for sheet metal workers who perform "custom prefabrication of architectural sheet metal for building exteriors" by applying the lower "Metal Fabricator" prevailing wage to "custom prefabrication of architectural sheet metal" on a Washington public works job. Northshore falsely claimed that that the ornamental metal work performed at the "Metal Fabricator" rate is the same as architectural sheet metal. After conducting an on-site investigation of the work performed by sheet metal workers, WA L&I stated that "sheet metal fabrication is distinct from plate steel fabrication" in the construction industry. According to L&I, the "skills are different. The applications are different. The wages are different," with the wages of plate steel fabrication "somewhere near half the levels of sheet metal fabrication wages." The WA L&I further stated that:

> Conflating these two disparate industry segments in prevailing wage administration and enforcement would represent both an inaccuracy and an injustice. Just as it would be unfair to inflate Metal Fabricator prevailing wages with the much higher sheet metal fabrication wage data, it would similarly be unfair to allow Northshore

[111] The federal conformance process is another means through which contractors and contracting agencies seek to pay disproportionately low rates to work by their misrepresenting the nature of the missing work. *See* pages 82 to 84 for a discussion of this topic.

[112] Industrial Statistician Jim Christensen to Northshore Sheet Metal, Jan. 4, 2019 decision: https://lni.wa.gov/licensing-permits/_docs/01042019.pdf

> to pay wages lower than the industry standard sheet metal wages paid by the bulk of contractors in this industry. Though certainly attractive, architectural sheet metal does not fit within the term "ornamental" as given in WAC 296-127-01352.

C. The Sheet Metal Trade is Broad, Diverse, and Highly Skilled

The sheet metal trade is broad, diverse, and highly skilled and encompasses architectural sheet metal work, installation of duct and units on heating, ventilating, and air conditioning (HVAC) systems; testing, adjusting, and balancing of HVAC equipment and duct work in new construction, renovation, and ventilation verification; custom fabrication of duct, and other related work. SMART and SMACNA appreciate the NPRM's recognition that "differences in industry practices mean that the precise types of work done and tools used by workers in particular classifications may not be uniform across states and localities."[113] However, the NPRM's discussion of the work of sheet metal workers demonstrates that the DOL fails to understand that HVAC duct work is core work in the sheet metal trade and constitutes the greatest percentage of work within the trade. The following statement in NPRM is incorrect: "in some areas, a significant portion of work involving the installation of heating, ventilation, and air-conditioning (HVAC) duct work may be done by an HVAC Technician, whereas in other areas such work may be more typically performed by a Sheet Metal Worker."[114] A HVAC technician in the construction industry is a sheet metal worker. In other words, all HVAC duct installers perform the work of sheet metal workers, but sheet metal workers have the training and skill, and do, in fact, perform other work functions, as described in the state statutes quoted above.[115] The DOL's misunderstanding of the

[113] 87 *Fed.Reg*. at 15711.

[114] *Id.*

[115] *See* also, Minn. Admin. Rules 5200.1102, Job Classification Descriptions; Special Crafts. § Subp. 21. Code No. 721, Sheet metal workers.

work involved in the sheet metal trade is a serious concern to SMART and SMACNA, because the WHD cannot issue meaningful wage determinations without a clear understanding of the work encompassed within the trade.

SMART and SMACNA encourage the DOL to visit the websites of the Sheet Metal International Training Institute (ITI) and the National Energy Management Institute Committee (NEMIC) to learn about our trade, including an overview of the International Certification Board/Testing, Adjusting and Balancing Bureau (ICB/TABB), which offers third-party certification to highly skilled technicians in HVAC fire life safety, fire and smoke dampers, and smoke control systems; testing, adjusting, and balancing; and other similar work.

D. Skilled Tradespersons do Not Sustain their Livelihoods Performing Only One Work Function within the Key Classification for They Attain the Status of Journeyperson

As described by Dr. Peter Philips, "All work is composed of tasks. Tasks combine to form a job."[116] Apprenticeable crafts are collections of skills that allow the craft worker to perform a range of jobs included therein, as that worker moves from project to project. These collections of skills evolve over time in response to "changing technologies, changing construction materials, and changing organizations of work."[117] In construction, to remain employable, a worker must learn how to address a "multiplicity of jobs."[118] The craft approach enables workers to carve out lifetime careers in a volatile industry. Crafts also benefit signatory contractors because they obtain a return on their investment through contributions to apprenticeship programs, which train

[116] Philips (2021), at 16.

[117] *Id*., at 15.

[118] *Id*. at 16.

apprentices in skills that are "worth" their "time and effort to obtain."[119] In response to the unique features of the construction sector, in which job sites are ever-changing, and employment is subject to cyclical and seasonal fluctuations, labor and management have developed a well-established partnership that ensures a steady supply of highly-qualified journeypersons who are available to work on short and long-term projects. Construction joint apprenticeship training committees (JATCs) are a "response to a seasonal and mobile labor market."[120]

There are different cycles of employment/unemployment within sectors of various trades in the construction industry, including the sheet metal industry. The relative percentage of work within a key classification differs depending upon the labor market in which a survey in conducted. There are many factors that impact the employability or marketability of a trade in a locality, such as population density. In metropolitan areas, there is a greater demand for all building and residential work. Local weather conditions also impact unemployment rates. According to the Federal Reserve Bank of Chicago, on a national level, construction employment reaches a "trough" in February—when employment is about 10% below the annual average—and a "peak" around August—when employment is about 7% above the annual average. [121] In a 2018 study, the FRBC reports on its analysis of the impact on seasonality on Florida, California, Kentucky, and Minnesota.[122] The amplitude of the seasonal cycle of construction employment is very different in

[119] *Id.*

[120] Sally Klingel & David B. Lipsky (2010). "Joint Labor-Management Training Programs for Healthcare Worker Advancement and Retention." Cornell University ILR School, *Research Studies and Reports*.

[121] Menelik Geremew & François Gourio (2018). *Seasonal and Business Cycles of U.S. Employment*. Federal Reserve Bank of Chicago. *Economic Perspectives*, Vol. 42, No. 3. https://www.chicagofed.org/publications/economic-perspectives/2018/3

[122] John Tschetter & John Lukasiewicz (1983). *Employment Changes in Construction: Secular, Cyclical, and Seasonal*. Bureau of Labor Statistics. (During recessions, construction employment declined more than total employment, and during recoveries, it generally took longer to recoup. Seasonality, an important factor in construction activity, could cause employment to rise and fall by as many as 1 million workers over a 12-month period.) https://www.bls.gov/opub/mlr/1983/03/art2full.pdf

these states. Florida is less seasonal than California, which is less seasonal than Kentucky, which is itself less seasonal than Minnesota.

In the sheet metal trade, exterior work, such as erecting metal roofs and wall, is seasonal. Rain, snow, and other work impact the ability to perform architectural sheet metal work. Different seasons and weather conditions within seasons dictate the types of work that may be safely performed.[123] Interior work, such as HVAC duct and unit installation, is year-round. When weather conditions make outside work is unfeasible, a sheet metal worker may go into a building that has already been covered (a shell is up); renovating, repairing, and altering building systems in existing buildings are also year-round activities. Breadth of skill and experience in an apprenticeable trade improves marketability.[124] In some localities, architectural sheet metal work may be a greater percentage of the total amount of sheet metal work in an area; at other times, it is a smaller portion of the total.

E. Protection of the Integrity of Craft Distinctions is Integral to the Protection of Labor Standards

The DBA provides that every federal construction contract shall contain a provision to the effect that the minimum wages being paid to various classes of laborers and mechanics shall be

[123] OSHA describes the safety challenges confronting sheet metal workers: "In the sheet metal trade, for example, sheet metal is heavy, and the edges and corners can be extremely sharp. Furthermore, metal is an excellent conductor of electricity and heat and will become hot quickly if exposed to the sun or other heat sources. Likewise, sheet metal exposed to the elements of a winter's day may be cold, icy or wet." https://www.osha.gov/sites/default/files/2019-03/sheetmetal.pdf

[124] Continuing education and opportunities for skills upgrades are the hallmark of quality training programs. The skills generated by JATCs facilitate an apprentice's initial transition into the labor market but may become obsolete decades before retirement without upgrades or re-training. To prevent obsolescence, a stable program also ensures that graduates have a program to which they can return for re-training so that they do not lose their investment of time in becoming a journeyperson. Studies of apprenticeship programs recognize the need for development of skills that will enable graduates to adapt to an ever-changing economy as technological advances render some vocational skills outdated or obsolete. *See* Russ Juskalian, "Rebuilding the Ausbildung,"*MIT Technology Review*, Jul/Aug 2018, Vol. 121, Issue 4, which states that some experts warn that Germany's vocational system will struggle to adapt as the economy grows more dependent on artificial intelligence and robotics and that it could "shackle much of the workforce to skills that will soon be outdated." The author quotes Eric Hanushek, an economist at Stanford University, as stating that "Germany has shown that they can prepare people for a range of jobs today and over the next decade. What they haven't shown is that they are preparing people who are as adaptable when the economy changes."

those determined by the Secretary "to be prevailing" for corresponding classes of laborers and mechanics. As recognized by the U.S. Court of Appeals for the District of Columbia, without corresponding classes – or occupational classifications – the protections in the DBA would be meaningless.[125] The integrity of the statutory scheme requires that each "class of laborers and mechanics" be comprised of "members" who perform "well-defined tasks" and do not perform traditional craft work of another, higher paid class. Otherwise, a skilled trade could be subdivided into various functions to the detriment of the journeypersons the DBA was intended to protect.

In 1935, Congress was quite clear that it understood that "prevailing wage scales [could be] broken down by intermediate classification,"[126] and that such "underclassifi[cation]," *id.,* was an evasion of the Act. The Senate committee reviewing the operation of the law in 1935 described the problem as follows: "The act also fails to be explicit on the matter of classification, with the result that many contractors were able to circumvent the law by hiring mechanics as common laborers, and then assigning them to tasks which fell within the purview of one of the skilled crafts."[127] (listing creation of "arbitrary classifications known as semiskilled labor" as a method or device "to underpay labor" engaged on public works programs). The report gave the example of "rough `saw and hammer' men" working on Public Works Administration projects who

> were paid at a rate considerably less than [the wages] prevailing for carpenters, although the work being performed was regarded by labor-union regulations as carpentry work. In a similar way, new grades and classifications sprang up all over the country, permitting high-grade skilled laborers to be placed in lower categories so that their rates of pay were less than those prevailing for skilled labor.

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[125] *Building & Construction Trades' Department, AFL-CIO v. Donovan*, 712 F.2d 611 (D.C. Cir., 1983).

[126] S.Rep. No. 332, 712 F.2d at 613, pt. 3, at 12.

[127] *Id.* pt. 2, at 5; *see also id*. at 2.

In 1964, Solicitor Charles Donahue recognized the importance of clear delineation between classes in describing an investigation of the Walsh Committee, which contributed to the enactment of the DBA in its present form.[128] In 1931, the DBA provided that "the rate of wage for all laborers and mechanics employed by the contractor or any subcontractor ... shall be not less than the prevailing rate of wages for work of a similar nature. . . ." The Walsh Committee's investigation disclosed that under the original act, there had been a failure to retain strict lines of demarcation between skilled and unskilled labor. As a consequence, the tendency had been for wages of the skilled group to descend toward the level of the unskilled group. As a result, the "work of a similar nature" standard in the original DBA was deleted, and in lieu thereof provision was made for wage determinations for "classes" of laborers and mechanics from the locally prevailing wages paid "corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work."

In 2007, the U.S. Court of Appeals for the District of Columbia Circuit recognized the importance of DOL-established classification in rejecting a contractor's internal system of classifying workers. The Court stated, quoting *Fry Brothers*, that "If a construction contractor who is not bound by the classifications of work at which the majority of employees in the area are working is free to classify or reclassify, grade or subgrade traditional craft work as he wishes, such a contractor can, with respect to wage rates, take almost any job away from the group of contractors and the employees who work for them who have established the locality wage standard."[129] It further opined that there will be "little left to the Davis-Bacon Act."

[128] Donahue (1964), at 508.

[129] *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007).

VIII. SMART AND SMACNA ENCOURAGE THE DOL TO ADDRESS COMPLICATED ISSUES PRESENTED BY USE OF "PRE-CONFORMANCES" TO POST WAGE RATES FOR "FREQUENTLY CONFORMED RATES" WHEN INSUFFICIENT USABLE DATA ARE SUBMMITTED DURING A SURVEY

SMART and SMACNA support the DOL's laudatory goal of trying to minimize overreliance on the conformance process to produce conformed rates for classifications that are "missing" from wage determinations. We agree with the DOL's decision to take action to avoid resorting to use of the conformance process 10,000 times per year,[130] since there is a gross "overuse" of conformances for wage rates for specific job classifications.[131] With the massive funding under the Infrastructure Investment and Jobs Act of 2021, the number of conformance requests will undoubtedly increase to far more than 10,000 per year as the volume and scope of infrastructure projects sharply increase. This anticipated increase in requests heightens the urgency of ensuring that administration of the "pre-conformance" and conformances processes does not depress local standards. While the proposed use of the pre-conformance process, which is modeled after the current conformance regulations, as an integral part of the survey process will ultimately reduce the number of artificial subclassifications that appear on wage determinations over the next decade or two, the issuance of pre-conformed rates in future surveys will not address excessive use of conformances in the short-term because the DOL undertakes only a handful of surveys annually.[132] SMART and SMACNA are optimistic that, once fully implemented, pre-conformances will be a reliable means to avoiding the waste of administrative resources currently

[130] 87 *Fed.Reg*. at 15723.

[131] 87 *Fed.Reg*. at 15699.

[132] Indeed, in AAM No. 238, FY2022 Davis-Bacon Survey Plan, the DOL has proposed six surveys: Maine metropolitan building, Guam (all types), statewide highway surveys in Florida, Georgia, and West Virginia, and a statewide heavy survey in New Hampshire.

expended by the WHD in reviewing and approving 10,000 conformance requests per year. Diversion of these wasted resources to improvement in conducting surveys would best effectuate the Secretary's statutory duty to issue prevailing wages that reflect local labor standards.

Use of pre-conformances, with our recommended modifications, would further the goal of posting rates on wage determinations that more accurately reflect the prevailing rates of pay for crafts when there is an insufficient amount of data submitted on the work encompassed therein during the wage survey. SMART and SMACNA's approach is far superior to the proposed use of the current conformance criteria in deriving pre-conformed rates, since it would produce rates that closely approximate the prevailing rates in a locality. Under the current conformance process, selection of conformed rates does not involve an extensive analysis of data in a locality and is, at best, an estimate or a rough approximation. As repeatedly acknowledged by the ARB, the conformance process "ensures that omitted classifications are paid an hourly rate not unreasonably out of proportion to the classifications which are listed in a wage determination," but is not intended to produce the prevailing rates.[133] SMART and SMACNA recommend important changes to the pre-conformance and conformances processes that will better effectuate the goal of ensuring that administration of the "reasonable relationship" criterion used in both processes will closely approximate the prevailing and prevent "underclassification" of highly skilled work.[134]

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[133] *Clark Mechanical Contractors, Inc*., WAB Case No. 95-01 (Sept. 29, 1995); *Audio-Video Corp*., ARB No. 95-047 (July 17, 1997) ("for purposes of the conformance process the use of a classification need not be the prevailing classification doing a specific job"); J.*A. Languet Constr*., WAB No. 94-18 (Apr. 27, 1995) ("our precedent does not require conformed classifications or denials to be based on prevailing practice").

[134] It is unclear how the pre-conformance process will work in practice. The DOL cannot cure the problem of an overabundance of conformances, which only roughly approximate prevailing rates, by in effect, issuing more conformances without more stringent safeguards to prevent underclassification of highly skilled classifications. We request that the DOL clarify in the preamble to the Final Rule whether the Agency will use the pre-conformance process when there is sufficient data for a key classification but insufficient data for a "subclassification" that is included within it. SMART and SMACNA also request clarification on whether the Administrator views subclassifications within a key classification as a separate classification for the purpose of issuing pre-conformances or conformances.

A. SMART and SMACNA Support the Use of Pre-Conformances as a Vehicle to Preventing the Proliferation of Subclassifications and/or Conformances

To decrease the number of conformance requests, the DOL proposes to issue "pre-conformances" when the WHD receives insufficient data in a survey data to publish a prevailing wage for a "classification for which conformance requests are regularly submitted."[135] Through use of the proposed pre-conformance process, the DOL will publish a pre-conformed rates on a wage determination provided that the criteria for issuance of conformances are met. The current conformance regulations require the issuance of a conformed rate for "any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract" provided that the following three criteria are satisfied: [136]

> (1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and
>
> (2) The classification is utilized in the area by the construction industry; and
>
> (3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

SMART and SMACNA agree that the pre-conformance process has the potential to redress the proliferation of artificial subclassifications in wage determinations in a manner that is fully consistent with the DBA if safeguards are adopted to ensure that the process does not result in the "deskilling" of highly skilled trades, and thereby, undercutting prevailing rates for sheet metal workers and other mechanical crafts.[137]

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[135] 87 *Fed.Reg*. at 15700.

[136] 29 C.F.R. § 5.5(a)(1)(ii)(A)(1)-(3).

[137] The pre-conformance proposal also has the potential to prevent use of miniscule, unrepresentative amounts of data in issuing wage determinations. As discussed above, the result has been to: 1) issue multiple wage determinations for subclassifications based on relatively minimal amount of data (and often unrepresentative amounts of data) and, thereby, produce inconsistent results within the same key classification; 2) allow "underclassification" of work by contractors that artificially subdivide the job tasks within a trade; and 3) expand the geographic scope to included demographically dissimilar counties in a manner that undercuts the intent of the statute.

Provided our recommended safeguards are adopted, preapproval of certain conformed classifications will be an important step toward reduction of the number of conformances issued annually. There is a strong recent history in both Democratic and Republican administrations of artificially subdividing classifications into work functions when issuing wage determinations. It is important, therefore, to place a regulatory restriction on the Administrator's ability to artificially subdivide key classifications through issuance of pre-conformances. Therefore, SMART and SMACNA recommend, among other things, that proposed §1.3(f) include a prohibition (similar to proposed §5.5(a)(1)(B))[138] against using the pre-conformance process to subdivide work functions in a key classification if the effect is to lower prevailing wage rates for the key classification and/or a work function encompassed therein.

B. SMART and SMACNA Recommend Important Safeguards to the Pre-Conformance Criteria to Ensure that the Pre-Conformed Rates Closely Approximate the Applicable Classifications in the Wage Determination

To ensure that the pre-conformance process achieves its intended goal – elimination of artificial subclassifications that undercut prevailing wages – SMART and SMACNA recommend the following modifications to the criteria in proposed in §1.3(f), which simply adopts verbatim the conformance criteria in 29 C.F.R. § 5.5(a)(1)(ii)(A)(1)-(3), to ensure that administration of the "reasonable relationship" criterion does not effectively "deskill" mechanical trades in the issuance of pre-conformed rates (recommendations in bold):

[138] "(B) The conformance process may not be used to split, subdivide, or otherwise avoid application of classifications listed in the wage determination."

(f) If the Administrator determines that there is insufficient wage survey data to determine the prevailing wage for a classification for which conformance requests are regularly submitted pursuant to § 5.5(a)(1)(iii) of this subtitle, the Administrator may list the classification and wage and fringe benefit rates for the classification on the wage determination, provided that:

(A)(1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and

(2) The classification is utilized in the area by the construction industry; and

(3) The proposed wage rates, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination **in the "applicable category," as defined below.**

(B) A "reasonable relationship" shall be determined as follows:

> **(i) If the wage rates in the applicable category in the wage determination are predominantly union prevailing wage rates, it is typically appropriate to look to union sector classifications.**
>
> **(ii) If the wage rates in the applicable category in the wage determination are predominantly weighted average, it is typically appropriate to look to non-union classifications.**

(C) In ascertaining "reasonable relationship," the "applicable category" shall include the following distinct categories when available on the wage determination, consistent with (f)(B): laborer, power equipment operator, truck driver, skilled crafts (excluding mechanical, electrical, and plumbing), and skilled crafts (mechanical, electrical, and plumbing only).

(2) The listed classification and wage and fringe benefit rates do not subdivide a classification utilized in the area by the construction industry into one or more work functions within the classification if the conformed rate for the work function would produce a wage rate that is lower than the wage rate for the classification or work encompassed therein.

C. The Language Recommended by SMART and SMACNA is More Consistent Than Proposed Rule §1.3(f) with WAB and ARB Precedent Finding that the Conformance Process is "Very Narrow in Scope" and that Conformed Rates are Not Prevailing Rates

While the Administrator has "broad discretion" in issuing conformed rates, [139] it is inconsistent with the DBA statutory scheme to produce so many conformed rates that the conformance process effectively supplants the survey process in areas in which the survey fails to produce data on commonly-used classifications.[140] The process by which prevailing rates are determined involves an "extensive analysis of statistical data in determining locally prevailing or collectively bargained rates."[141] By contrast, the conformance procedure is designed to be very narrow in scope."[142] Rather, it was designed to fill in the gaps "[w]here, due to unanticipated work or oversight some job classifications necessary to complete the work are not included in the wage determinations, a contractor may seek additional classifications through the conformance process."[143] The use of the conformance process for more than a *de minimis* amount of work, without improved benchmarks in determining the conformed rates, will fail to ensure that highly skilled workers receive the prevailing rates of wages and fringe benefits to which they are entitled. The "measure" of relief granted to contractors "(w)here due to unanticipated work or oversight, some job classifications necessary to complete the work are not included in the wage determination

[139] *Courtland Constr. Corp*., ARB No. 17–074 (Sept. 30, 2019).

[140] It is well-established that in a conformance situation the WHD is not required to determine that a classification in the wage determination actually is the prevailing craft for the tasks in question, only that there is evidence to establish that the classification actually performs the disputed tasks in the locality. *American Building Automation, Inc*., above at page 14, *citing U.S. Fire Protection, Inc*., ARB Nos. 99-008, 99-139 (Aug. 30, 1999).

[141] *Mistick v. Chao*, 440 F.3d 503, 507 (D.C. Cir. 2006).

[142] *Spencer Tile Co*., ARB Case No. (2001).

[143] *Clark Mechanical Contractors, Inc*., above at page 66.

. . . ,"[144] should not be at the expense of workers. With the parameters recommended by SMART and SMACNA, workers would have ample protection.

D. The Language Recommended by SMART and SMACNA Codifies an Essential Parts of All Agency No. 213

SMART and SMACNA's recommended language – §1.3(f)(B)(i) and (ii) above – would codify All Agency Memorandum No. 213. This AAM removed two significant deficiencies in the WHD's administration of the conformance process that historically caused conformed rates to be far lower than the rates for comparably skilled classifications listed on the wage determination in the locality: 1) use of the lowest rate on the wage determination within a "category" as the automatic benchmark in selection of conformed rates; and 2) the WHD's failure to consider the relative number of union rates and open shop rates on the wage determination in selecting conformed rates. These changes constitute critical improvements in the conformance process and should be codified regardless of whether the DOL ultimately includes the pre-conformance process in the Final Rule. Codification of the changes made in AAM No. 213 would prevent a future return, through an administrative rescission without a rulemaking, [145] to use of the lowest rate on the wage determination as the automatic benchmark, regardless of whether it is union or open shop, in deriving conformed rates. Administration of the pre-conformance and conformance processes in a manner that effectuates the remedial purpose of the DBA, is particularly important to the sheet metal trade since, as stated in AAM No. 213, the "majority" of conformance requests are within the "skilled classification category."

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[144] *Terrebonne Parish Juvenile Justice Center Complex,* 17-0056 (Sept. 4, 2020), *quoting Sumlin & Sons, Inc.*

[145] SMART and SMACNA note that in 2020 the DOL rescinded in All Agency Memorandum No. 212 (2013), which expanded coverage to survey crews, as described in the AAM.

Prior to the issuance of AAM No. 213, WAB and ARB cases repeatedly affirmed the Administrator's selection of the lowest rate on the wage determination as the conformed rate regardless of whether union rates predominated for skilled classifications on the wage determination. It is patently clear that selection of the lowest rate on a wage determination within a category is contrary to DOL's statutory obligation to require that covered workers are paid no less than the prevailing rates of pay. This dereliction of the DOL's duty was further compounded by the Agency's failure to use, as a factor in deriving conformed rates, the relative number of union rates and weighted-average rates. These two errors – using the lowest rate within a category as the automatic benchmark and ignoring the predominance of union rates on wage determinations deprived workers of the wages and benefits to which they were entitled under the DBA. This problem grew in magnitude as the number of conformances increased.

The primary focus of AAM No. 213 is on the third criterion – that the conformed rate bears a "reasonable relationship" to the "wage rates contained in the wage determination." As stated in AAM No. 213, in applying the "reasonable relationship" criterion, the WHD had a long-time prior practice of "automatically" using as a "benchmark" the lowest skilled classification or power equipment operator, respectively, in the applicable wage determination."[146] In this AAM, the WHD noted that abandonment of this approach is in "keeping with the purpose of the DBRA." [147] The WHD further recognized in AAM No. 213 that its new practice "better reflects the regulatory requirement" that conformed rates bear a reasonable relationship to wage rates contained in the wage determination.

[146] AAM No. 213, at 2.

[147] AAM No. 213, at 2.

For the first time in the history of the WHD's administration of the conformance regulation, the WHD acknowledged that where union rates predominate, it is "appropriate" to look to union rates within each category in selecting conformed rates:[148]

> [I]f a wage determination contains predominantly union prevailing wage rates for skilled classifications, it typically would be appropriate to look to the union sector skilled classifications in the wage determination and rates for those classifications when proposing a wage rate for the additional classification. Conversely, if a wage determination contains predominantly weighted average prevailing wage rates for skilled classifications, it would typically be appropriate to look to the weighted average/non-union sector skilled classifications in the wage determination and the rates for those classifications when proposing a wage rate for the additional classification.

Basing a conformed rate on union classifications when union rates predominate is consistent with *Fry Brothers*, which holds that when the DOL "determines that the prevailing wage for a particular craft derives from experience under negotiated arrangements, the Labor Department has to see to it that the wage determinations carry along with them as fairly and fully as may be practicable, the classifications of work according to job content upon which the wage rates are based."[149]

E. The Language Recommended by SMART and SMACNA Prevents Deskilling Mechanical Trades and Provides for Greater Accuracy in Selecting Wage Rates for Classifications When There is Insufficient Data in a Survey

SMART and SMACNA urge the DOL to codify a separate category of "mechanical trades" within the skilled crafts to ensure that the pre-conformance and conformance processes do not deprive sheet metal workers and other highly skilled trades of wage rates that are commensurate

[148] *Id*. at 3.

[149] *Fry Brothers*, WAB Case No. 76-06 (June 14, 1977).

with their skills.[150] This modification will prevent deskilling mechanical trades and provide for greater accuracy in selecting classifications that require comparable skill levels when deriving pre-conformed and conformed rates. The current breadth of the skilled crafts category has often motivated contractors and contracting agencies to seek a lower paid and lower skilled classifications on the wage determination in proposing a conformance request to the Administrator.[151] The protections in the Davis-Bacon Act are intended to protect individual workers; a process that deprives certain workers of the rates of pay commensurate with their skill sets and provides other workers with rates of pay that are greater than what prevails for comparably-skilled workers fails to effectuate the broader statutory scheme, which is based on corresponding classes of laborers and mechanics.

Mechanical trades include sheet metal worker, pipefitter (including sprinkler fitter), plumber, electrician, and mechanical insulator. The mechanical trades perform tasks and functions required to install HVAC systems, distribution of steam and chilled water, distribution of domestic and fire protection water, wet fire system testing, sewer and storms, natural gas systems, propane systems, building plumbing, medical and laboratory gas systems, and HVAC fire life safety and

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[150] In administering the conformance process, the WHD has exercised its discretion to create a separate category within construction classifications when it has determined that workers constitute a "separate and distinct subgroup of construction worker classifications." Administrators have determined that truck drivers and power equipment operators are each "a separate and distinct subgroup of construction worker classifications." *Tower Construction*, WAB Case No. 94-17 (Feb. 28, 1995). Consequently, when issuing a conformed rate for a missing operator classification, the WHD only looks to the operators to determine the rate.

[151] *American Building Automation, Inc.,* above at page 14, where the WHD denied the contractor's request that a conformed rates for "Building Automation and Controls Technician" (BACT)" be added to the wage determination. The contractor maintained that the work of installing building automation and controls work did not "fall squarely" within any single trade classification listed in the wage determination, because in order to properly integrate the building's systems, the workers had to be "knowledgeable in all of the traditional trades including electrical, mechanical, telecommunications, and networks." The ARB upheld the WHD; *See also*, *Terrebonne Parish Juvenile Justice Center Complex*, 17-0056 (Sept. 4, 2020), where the Administrator rejected a request for a conformed rate for "mechanical insulator" at a wage rate of $12.58 per hour, with no fringe benefits and approved a rate of $22.96 per hour plus $7.75 in fringe benefits, for a combined total of $30.71. The ARB rejected the contractor's contention that the skill level of a "mechanical insulator" is "more similar to the skill required of a common laborer and does not merit a combined wage rate of $30.71."; *See also, System Tech v. U.S. DOL* (2021). where the Administrator rejected a request for a conformed rates for "telecommunications installer" at a rate of $15.00 per hour, plus $4.75 in fringe benefits, and approved a conformed rate of $27.77 per hour plus $14.08 in fringe benefits, for a combined total of $41.85. The proposed rate was more than 50% lower than nearly every union skilled classification rate and was also lower than a majority of the non-union skilled classification rates.

smoke control systems. Mechanical trades should form a separate category for pre-conformances and conformances since they are a separate and distinct subgroup of construction worker classifications that construct building system. Further reasons in support of a skilled crafts for mechanical classifications include:

- The level of skill and training required to perform the individual mechanical trades is similar and distinct from the other skilled crafts;
- The work of the individual mechanical trades is functionally integrated and typically performed in composite crews. The WHD already recognizes the functional integration of mechanical work, since during the verification phase of the survey process, wage analysts look for wage data on five "different components" of HVAC "system" work when contacting open shop and union contractors to verify Form WD-10's: unit, duct, pipe, thermostat, and wiring. When contacting contractors to verify a WD-10 that may include only one of the five components, wage analysts ask whether the contractor also performed any other mechanical work; and
- Mechanical work is often bid separately from other work on a construction project.

Recognition of mechanical trades as a separate "category" would achieve the following benefits: 1) ensure that the wage rates for mechanical workers are not artificially depressed by deriving pre-conformed or conformed rates for mechanical trades based on the rates of lower skilled and lower paid crafts within the broad "skilled crafts" category; 2) provide a uniform approach, and thus, a reliable benchmark for contracting agencies and WHD staff involved in the conformance process; 3) protect the integrity of the bidding process by providing prospective bidders – both mechanical and other bidders - with a more reliable notice of the likely amount of the conformed rate; 4) eliminate any guess work by contracting officers who are involved in figuring out comparable levels of skills and duties for mechanical crafts;[152] 5) discourage

[152] It is important to emphasize that, while AAM No. 213 implemented major improvements, removal of the lowest rate for skilled classifications on the wage determination as the automatic benchmark, left contracting officers and WHD staff, with insufficient guidance or parameters for WHD staff who decide which skilled crafts bear a reasonable relationship to each other.

submission of illegitimate conformance requests by unfair contractors that seek to depress wages by obtaining lower rates for work already encompassed within a craft on the wage determination if they know in advance that the conformed rates will closely approximate the work allegedly missing from the wage determination;[153] and 6) reduce the number of appeals or other challenges to conformed rates since the Administrator's choices will be more limited in the selection of conformed rates.

1. The "Skilled Crafts" Category Used in Determining Conformed Rates is Too Broad and does Not Adequately Protect Mechanical Workers

In issuing AAM No. 213, the WHD stated that it uses four separate categories in deriving conformed rates: laborer, power equipment operator, truck driver, and "skilled crafts." [154] The WHD continues to use these four general categories in deriving conformed rates. The broadest category is skilled crafts, particularly as applied to classifications used in building construction, which include at least 16 key classifications.[155] By including at least 13 classifications in the category of skilled craft, the guidance in AAM No. 213 fails to acknowledge the vast disparity in skill sets required to master trades and, thus, opens the door to "underclassification" of work to avoid the payment of prevailing wages. As described in AAM No. 213, a proposed skilled craft classification is compared to skilled classifications in the wage determination, with no limitations on the Administrator's selection of trades within the skilled crafts.[156] In SMART and SMACNA's

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[153] *See Selco Air Conditioning, Inc*., ARB Case No. 14-078 (July 27, 2016) and *Pizzagalli Construction Co*., above on page 14.

[154] *See Mack Strickland*, ARB No. 13-088 (June 30, 2015).

[155] *See* "Davis-Bacon Surveys" section of the WHD's *Prevailing Wage Resource Book* (2015), at 6, which lists 16 "key classifications" for building surveys. *See also*, NPRM, 87 *Fed.Reg*. at 15723.

[156] AAM No. 213 at 3. According to this AAM, a proposed power equipment operator is compared to existing power equipment operator classifications, and a proposed truck driver classification is compared to existing truck driver classifications.

view, the breadth of the skilled crafts category is too wide for issuance of conformed rates, which are intended to be a rough approximation. The breadth of this category is, therefore, wholly inappropriate as a basis for posting pre-conformed rate since these rates should closely approximate prevailing rates.

2. Contrary to Mistick (2003),[157] AAM No. 213 Fails to Use Relative Skill Level of Trades on Wage Determinations as a Factor in Deriving Conformed Rates

While AAM No. 213 was truly a watershed improvement in the WHD's administration of conformances, the WHD's continued use of the overly broad "skilled crafts" category advantages some trades and disadvantages others depending upon the relative skill levels of individual trades. It is, of course, inconsistent with the DBA's goals to require the payment to some trades an amount that is lower than local labor standards, and this error cannot be offset by requiring that contractors pay other trades an amount that is greater than lesser skilled crafts in the "skilled crafts" category could command in the local marketplace. AAM No. 213 does not address the great disparity in skill sets among skilled crafts even though the WHD purports to consider "comparable" skill sets in issuing conformances.[158] The Administrator's explanation of the conformance process in *Mistick Construction*, clearly demonstrates that "most comparable in terms of skill" should be a key factor in deriving conformed (or pre-conformed rates): [159]

> The Administrator must: (i) determine which classification already listed in the wage determination is **most comparable in terms of skill** to the class of employee performing under the contract but omitted from the wage determination, and (ii)

[157] *Mistick Construction*, ARB Case No. 02-004 (June 24, 2003). The ARB issued the *Mistick* decision discussed above in the context of functionally equivalent rates.

[158] *Mistick Construction*, ARB Case No. 02-004 (June 24, 2003).

[159] *Id*. (emphasis added) citing, *Raytheon Systems Company*, ARB No. 98-157, slip op. at 17 (ARB Apr. 26, 2000) (parallel Service Contract Act conformance provision) ("The premise of the conformance process is that the conformed rates should bear a 'reasonable relationship' to the wage rates for jobs of comparable skill level that were listed in the applicable wage determination.")

> derive a wage rate for the omitted class which is reasonably related to the listed rates.

In affirming the ARB's decision in *Mistick Construction*, the U.S. Court of Appeals for the District of Columbia Circuit stated that the "consideration of comparable skills" is involved when selecting conformed rates.[160] The DOL's recognition of the dangers of underclassification should guide the WHD in development of pre-conformance and conformance regulations that provide far too much latitude in selecting conformed rates for "skilled crafts."[161]

3. The NPRM Includes in the "Skilled Crafts" Category Trades that Bear No Relationship to Each Other in Terms of Skill as an Example of its Administration of the Conformance Process

In the NPRM, the DOL provides the following example of the conformance process for skilled crafts, which demonstrates the need for improved consideration of skills when determining conformed rates:[162]

> When, for example, a wage determination lists only certain skilled classifications such as carpenter, plumber, and electrician (because they are the skilled classifications for which WHD received sufficient wage data through its survey process), the conformance process is used to provide contractors with minimum wage rates for other necessary classifications (such as, in this example, painters and bricklayers).

This example demonstrates the need for improved consideration of skills when determining conformed rates. A comparison of the wage and fringe benefit rates of electricians or plumbers with those for painters, carpenters, or bricklayers illustrates that electricians and plumbers would receive lower pay if conformed to the rates of painters, carpenters, or bricklayers and that the non-mechanical trades would receive higher pay through the conformance process. The NPRM's

[160] *Mistick v. Chao*, 440 F.3d 503, 507 (D.C. Cir. 2006).

[162] 87 *Fed.Reg*. at 15722.

example demonstrates the need for more precise parameters when selecting conformed rates for mechanical trades. The skill set of the five trades selected in the DOL's example are not comparable to each other in terms of skills.

4. Review Board Precedent Supports Creation of a Mechanical Category for Pre-conformance and Conformances

SMART and SMACNA's recommendation that the DOL create a separate mechanical category for pre-conformance and conformances is supported by review board precedent that recognizes that it may be an unreasonable exercise of the Administrator's discretion to conform mechanical trades to non-mechanical trades in the applicable wage determination. The rulings in *M.Z. Contractors I and II* address this matter in favor of ensuring workers in a highly skilled trade are not underpaid by issuance of a conformed rate based on an inapt comparison to a non-mechanical trade. [163]

In *M.Z. Contractors I*, the contractor first proposed a conformed rate for mechanical insulator at the laborers rate, alleging that the "proposed classification required no licensing or special training, knowledge or classification." The contractor subsequently proposed that the missing work be conformed to the painter's rate, which was the "lowest skilled classification" on the wage determination. In challenging the conformed rate for mechanical insulator, the union maintained that "the duties and skills of mechanical insulators are comparable to those of plumbers or steamfitters." The WHD defended conforming the rate for mechanical insulator, stating that it has been a "long-standing policy of the Department to require that the proposed rate for a skilled classification be equal to or exceed the lowest rate of the skilled classifications already contained

[163] *M.Z. Contractors, Inc*., WAB Case No. 92-06 (Aug. 25, 1992) (M.Z. Contractors I) and *M.Z. Contractors Company, Inc*., WAB Case No. 92-23 (Aug. 16, 1993)(M.Z. Contractors II).

in the WD." The WHD further maintained that an exception to this policy exists for "conforming a class within a clearly recognized group, such as power equipment operators. However, the instant request does not fall within this exception."

In reviewing the WHD's decision, the WAB found that application of the policy "without variation or exception" to all types of conformance situations is not reasonable. The WAB noted that the WHD "itself recognizes the need for some exceptions to the application of this policy," and concluded that it was unreasonable for the WHD to set a wage rate for mechanical insulator at the lowest skilled classification rate:[164]

> In our view, flexibility in application of Wage and Hour's policy is also demanded to accommodate a situation such as that presented by this case -- where almost all the skilled classifications have wage rates higher than the laborers' rate but a few skilled classifications are below the rate established for the laborers. In such circumstances, it was unreasonable to set a wage rate for mechanical insulators by simply setting the rate for that skilled classification at the same level as the laborers' rate. … under the circumstances of this case, and others where most of the wage rates and fringe benefits prescribed in a wage determination for "skilled" classifications are substantially higher than the wages and fringe benefits applicable to one or two other "skilled" classifications, mechanical adoption of the wage rate and fringe benefits applicable to the lowest paid "skilled" classification, or the wage rate and fringe benefits for the "Laborer" classification, whichever is higher, does not satisfy the requirement . . . that "[t]he proposed wage rate, including any fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination . . . ."

In remanding the case to the WHD, the WAB "urge[d] Wage and Hour in this and similar cases to take a closer look at the skills and tools required for fiberglass insulation technologies." Upon reconsideration, the WHD determined that the skills of the proposed classification were most similar to those of the so-called "mechanical trades" listed in the wage determination: plumbers

[164] *See Bryan Electrical Construction, Inc*., WAB No. 94-16 (Dec. 30, 1994), where the WAB approved the Administrator's conformance of a "linesman classification" to the wage determination rate for "electrician, which is the highest wage rate in the wage determination listed for any skilled classification other than that of boilermaker."); *Jordan & Nobles and W.R. Pierce*, WAB Case No. 81-18 (Aug. 19, 1983)(

and steamfitters. The WHD issued a new conformed rate for mechanical insulators at the wage determination rate for the lowest-paid mechanical trade.

The union challenged this conformance on the grounds that new conformed rate was unreasonable because the applicable CBA rates were higher than the rates for plumbers and steamfitters. In upholding the WHD's determination in *M.Z. Contractors II*, the WAB found that it was "not unreasonable" for the WHD to find a "reasonable relationship for mechanical insulator to the lowest mechanical trade's rate." The WAB further stated that "[T] here is nothing in the record to support the conclusion that a mechanical insulator's skills are greater or training more extensive than for the skilled trades paid more than steamfitter which was the mechanical trade's rate chosen as the conformed rate on remand." The WAB added that the Petitioner has not "suggested that the skills or training of a mechanical insulator are in fact any greater than those of the other, listed mechanical trades."

M.Z. Contractor I and II support SMART and SMACNA's recommendation that the DOL create a separate category for "mechanical trades" in issuing pre-conformed and conformed rates. This will ensure that trades with comparable skills and training receive comparable pay instead of the rates paid to trades with different levels of skills and training.

F. SMART and SMACNA Support the Proposed Prohibition Against Use of the Conformance Process to Split or Subdivide Classifications Unfair Contractors Have a History of Attempting to Use the Conformance Process to Avoid Payment of Prevailing Wage Rates

SMART and SMACNA support the DOL's proposal to add language to § 5.5(a)(1) to state that the conformance process may not be used to split or subdivide classifications listed in the wage determination, and that conformance is appropriate only where the work which a laborer or mechanic performs under the contract is not within the scope of any classification listed on the

wage determination, regardless of job title.[165] As the NPRM aptly states, "Even if workers perform only some of the duties of a classification, they are still performing work that is covered by the classification, and conformance of a new classification thus would be inappropriate." We agree with the concept that the WHD must "base its conformance decisions on the work to be performed by the proposed classification, not on the contractor's own classification or perception of the workers' skill," but believe that the proposed language should be modified, as described above, to better effectuate the WHD's goals.

We agree that it is important that the regulations include stringent safeguards to ensure that work within classifications is not artificially subdivided to thwart the purposes of the DBA. For that reason, SMART and SMACNA a parallel prohibition against the Administrator's use of the pre-conformance process to subdivide a classification utilized in the area by the construction industry into one or more work functions within the classification if the pre-conformed rate for the work function would produce a wage rate that is lower than the wage rate for the classification or work encompassed therein.[166]

1. *Unfair Contractors Have a History of Attempting to Use the Conformance Process to Avoid Payment of Prevailing Wage Rates*

The prohibition against splitting or subdividing classifications is an important step since reported cases demonstrate a long history of efforts by contractors (and at times, some contracting agencies) to misuse the conformance process to avoid the payment of prevailing rates of pay and fringe benefits. Unfair contractors orchestrate schemes to deprive workers of the prevailing wages in which they are entitled. In a 1996 case,[167] for example, an employer's superintendent testified

[165] 87 *Fed.Reg*. at 15735; 29 C.F.R. §5.5 (a)(1)(A)(iii)(B).

[166] *See* page 69 for SMART and SMACNA's recommended modifications to the pre-conformance process in proposed §1.3(f).

[167] *P&N, Inc./Thermodyn Mechanical Contractors, Inc*., ARB Case No. 96-116, 1994-DBA-72 (ARB Oct. 25, 1996).

that the foremen were instructed to tell the laborers not to use sheet metal tools unless directed by the foreman because the foreman could split the hours. The ARB held that this indicated an improper practice of utilizing employees who are otherwise classified as laborers to perform the work of sheet metal mechanics because it reflected a practice of segregating workers' hours for the different classifications in which work was performed. Based on published cases, contractors often seek conformed rates when the alleged missing classification already appears on the wage determination and/or at rates that are substantially lower than the rates for classifications requiring comparable levels of skill. Misclassification of workers through use of the conformance process takes many forms. Contractors sometimes deliberatively misrepresent the skill sets involved to perform a classification in support of a lower conformed rate;[168] inappropriately seek a conformance request for a "helper,"[169] misclassify highly skilled and highly compensated workers as "common/general laborer":[170] miscategorize workers that are not in registered apprenticeship programs as apprentices for the purpose of paying them a fraction of the journeyperson rates;[171] and seek conformances for work within the laborer classification at wage rates that are about half of the rates on the wage schedule for laborers.[172]

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[169] *Bryan Electrical Construction, Inc*., WAB Case No. 94-16 (Dec. 30, 1994) (The Administrator denied a request of a "linesman helper").

[170] *Jordan & Nobles Construction Co*., WAB No. 81-18 (Aug. 19, 1983). The contractor classified and paid "employees as laborers who were performing the work of plumbers."

[171] *In re North Country Constructors of Watertown*, WAB No. 92-22 (Sept. 30, 1992), aff'd *North Star Industries v. Reich*, 67 F. 3d 307 (9th Cir. 1995).

[172] *Rite Landscape Construction Co., Inc*., WAB No. 83-03 (WAB Oct. 18, 1983). The Administrator rejected conformance requests for "lawn sprinkler installer" and "landscape laborers" at a wage rate of $4.50 per hour for each classification. The Administrator ruled that landscape laborer classification was unnecessary because the wage determination already contained a laborer classification and approved the lawn sprinkler installer at a wage rate of $8.29 per hour plus fringe benefits. This rate was equal to the Laborers, Group 2.

In 1977, the WAB stated that the circumstances in *Fry Brothers* were an example of a "classical case of misclassification of the work" of covered employees. In so stating, the WAB asserted that dividing work that is "customarily" considered to be the work of a craft paid at a single into component functions, payable at different rates, based on the contractor's assessment of the skills involved contravenes the DBA:

> Under established principles of Davis-Bacon Act administration, when the wage predetermination schedule contains only one wage rate for the carpenter classification without intermediate rates, it is not permissible for contractors who come on the project site, whether organized or unorganized, to divide work customarily considered to be the work of the carpenters' craft into several parts measured according to the contractor by his assessment of the degree of skill of the employee and to pay for such division of the work at less than the specified rate for the carpenters' craft.

2. *Reported Cases Demonstrate WHD Must be Proactive in Reviewing Requests for Conformed Rates*

Administrators have often exercised their discretion to reject conformance requests because the "work to be performed by the classification requested is not performed by a classification in the wage determination."[173] Administrators also reject conformance requests because the proposal does not bear a reasonable relationship to the wage rates contained in the wage determination.[174]

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[173] *See e.g.*, *Sumlin & Sons*, WAB No. 95-08 (November 30, 1995), the Administrator rejected a conformance request for "reinforcing rods-concrete," at a rate of $10.11 per hour with no fringe benefits since the since ironworker was on the wage schedule. The wage rate for "ironworker" was $14.28 per hour, plus $5.25 in fringe benefits. *See also Pizzagalli Construction*, above at page 14, where the Administrator denied the request for a conformed rate for "reinforcing Ironworker." because the work "could be performed by the "ironworker" on the wage schedule. As stated by the ARB, there was a "sole ironworker classification in the wage determination, with no differentiation between structural and reinforcing ironwork." *See also*, *U.S. Fire Protection*, ARB Nos. 99-008 (1999), where the Administrator rejected a conformance request for "residential sprinkler installer" at a rate of $9.50 per hour since the work could be performed by the classification of sprinkler fitter at a wage rate of $22.80 per hour and $6.95 per hour in fringe benefits.

[174] *See Norse, Inc*., Case No. 95-05 (Feb. 29, 1996), where the Administrator ruled that a conformed rate of $15.79 per hour wage rate, with no fringe benefits, for a "resilient floor covering installation worker" was not reasonably rated to the other wage rates listed on the wage determination and that a rate of $19.60 – the painter's rate – was appropriate. The painter's rate was "lowest rate for a skilled craft that is above the general laborer wage rate" on the wage determination. *See also Courtland Constr. Corp.,*

G. At Times, the WHD's Administration of Conformance Criteria Contributes to the Proliferation of Conformances

At times, the DOL's current administration of conformance criteria contributes to the proliferation of conformance requests because the DOL itself artificially subdivides the work of trades in determining whether issuing of a conformed rate is appropriate under the current criteria. And, in so doing, the Administrator fails to issue a conformed rate that fairly compensate workers performing a missing classification. In *Selco Air Conditioning*,[175] the prime contractor on the project, requested on Selco's behalf that the addition to wage determination of three additional job classifications for the work that Selco would perform on a HUD project, which were: Residential NC Journey Person, Residential NC Specialist, and Residential Service Technician. HUD determined that the request did not meet the first criteria for granting a conformance stated that it "believe[d] the work can be performed by a classification listed on the wage decision, Sheet Metal Worker." HUD recommended that the WHD deny the conformance request. Notwithstanding HUD's recommendation, the WHD approved addition of the three new job classifications initially and upon reconsideration, and thus, reversed HUD's denial of a request that three additional job classifications on the project be added to the wage determination. In 2016, the ARB reiterated in *Selco* its position that it is inappropriate to issue conformed rates for tasks or functions included within a key classification posted in a wage determination. The ARB considered the first condition, 29 C.F.R. 5.5(a)(1), "The work to be performed by the classification is not performed by a classification in the wage determination."

ARB No. 17–074 (Sept. 30, 2019), where the Administrator rejected a conformance request for "concrete finisher" at a rate of $25.34 per hour, with no fringe benefits, and issued a conformed rate of $21.69 in wages and $17.39 in fringe benefits, which the median of median of three skilled classifications on the contract wage determination.

[175] *Selco Air Conditioning*, above at page 76.

IX. SMART AND SMACNA URGE THE DOL TO INCLUDE ALL USABLE DATA ON FEDERAL AND FEDERALLY-ASSISTED PROJECTS IN BUILDING AND RESIDENTIAL SURVEYS

In seeking comments on modernizing § 1.3(d), which governs when survey data from DB-covered Federal or federally-assisted projects may be used in determining prevailing wages for building and residential construction wage determinations, the DOL suggested two alternatives.[176] The first would, in "all circumstances," establish prevailing rates for building and residential construction based on "all usable wage data in the relevant county or other geographic area, without regard to whether particular wage data was 'Federal' and whether there was 'insufficient' non-Federal project data.".[177] The second alternative would amend the definition of "insufficient wage data" in § 1.3(d), and thereby, provide "increased clarity regarding when Federal project data may and may not be used in establishing prevailing wage rates for building or residential construction."[178] SMART and SMACNA support unrestricted use of federal data in building surveys. However, to be responsive to the NPRM's requests for specific information, these comments identify "specific circumstances that particularly warrant greater use of Federal project data" and discuss the possibility of including a definition of "insufficient wage data" in § 1.3(d).

SMART and SMACNA urge the DOL to rescind § 1.3(d), as it relates to both residential and building construction for the reasons described below.

The most fundamental reasons are:

[176] Section 1.3(d) currently states that "in compiling wage rate data for building and residential wage determinations, the Administrator will not use data from Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements unless it is determined that there is insufficient wage data to determine the prevailing wages in the absence of such data."

[177] 87 *Fed.Reg.* at 15709.

[178] *Id.*

- Since there are limited data available in residential surveys and building surveys in isolated, sparsely-populated rural counties without the use of federal data, it is not "practicable" to exclude federal and federally-assisted data.[179]

- History demonstrates that the federal government has had an "outsized"[180] role in creating construction jobs, redressing widespread unemployment, and in influencing local labor markets.

- Overwhelming evidence demonstrates that a strong federal presence in labor markets spurs economic growth and private investment, creates employment opportunities for employment in middle class jobs in the construction industry and other sectors, creates higher per capita median incomes, and has a stabilizing impact on local markets during economic or other crises, such as the Great Recession and the pandemic. The DOL effectively ignores the local labor market when it fails to use federal data, particularly in counties in which federal work dominates the construction labor market, creates a "regional hub,"[181] and/or is a major employer in the area.

- The Infrastructure Investment and Jobs Act of 2021, the Coronavirus Aid, Relief, and Economic Security Act, and the Coronavirus Response and Relief Supplemental Appropriations Act vastly expand the federal government's influence on residential and building construction in local labor markets.

- Construction and/or repairs and alterations of essential facilities often does not occur without federal funding. According to a BLS study, history has demonstrated that private construction does not increase to offset reductions in federal funding for building and residential construction of structures that are essential areas of public welfare, such hospitals, housing, and schools.[182]

- As recognized in three ARB cases, the failure to use federal data results in issuance of arbitrary and capricious survey results that are sometimes based on a minor fraction of the overall data submitted in a survey.

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[179] Final Rule, *Procedures for Predetermination of Wage Rates*, 47 *Fed.Reg*. 23644, 23645 (May 28, 1982).

[180] Peter Philips, at 9. (The "government often builds large projects than can play a sustained, outsized role in disrupting a local labor market.")

[181] Scott Andes, Mark Muro, & Matthew Stepp (2014). Department of Energy's National Labs Can Also Be Regional Hubs, Brookings Institute. https://www.brookings.edu/blog/the-avenue/2014/09/11/department-of-energys-national-labs-can-also-be-regional-hubs/

[182] *BLS Spotlight on Statistics: The Recession of 2007–2009*, February 2012. U.S. Bureau of Labor Statistics. https://www.bls.gov/spotlight/2012/recession/pdf/recession_bls_spotlight.pdf

- Unrestricted use of federal data in residential and building surveys is more consistent with the plain text of the DBA than the DOL's "dramatic break with the past" practice in 1982[183] and would best effectuate the purpose of the DBA. Since the goal of the DBA is prevent use of the federal government's purchasing power to depress labor standards, it makes little sense to ignore the federal government's impact on local markets in determining prevailing rates.

- Where federal data mirrors private data in terms of the percentage performed by workers employed under a CBA, discarding federal data needlessly decreases the total amount of available data on which to base wage determinations.

- The WD-22's and WD-22a's compiled by the DOL based on data submitted during building surveys demonstrates that the DOL's unwritten rules concerning federal prevailing data, as well as data from state, county, and municipal projects performed on projects covered by prevailing wage law skews prevailing rates downward, and thus, depresses local standards.[184]

If the DOL decides not to rescind § 1.3(d), SMART and SMACNA request that the DOL, at a minimum, define the terms "insufficient wage data" in the regulation so that it takes into account the total value of Davis-Bacon projects in a county relative to the total value of the private projects in the county. The DOL's use of an undefined term – "insufficient wage data" – affords the Administrator far too much discretion in determining, on a case-by-case basis, whether there is enough data to justify discarding abundant data. In drafting regulations to implement the Secretary's statutory responsibility to determine prevailing rates of pay, it is important, on the one hand, to adopt regulations that provide the administrative flexibility needed to address unusual circumstances. On the other, it is important to ensure that the standards provide sufficient direction to prevent issuance of inconsistent, arbitrary results that might vary from administration to administration since "the correctness of the Secretary's determination is not open to attack on judicial review." *United States v. Binghamton Constr. Co., Inc*., 347 U.S. 171, 177 (1954).

[183] *Bldg. & Constr. Trades' Dep't, AFL-CIO v. Donovan*, 712 F.2d 611, 619 (D.C. Cir. 1983). We agree with the Court's characterization of the legislative history on use of federal data as "somewhat offhand and isolated remarks." (*Id*. at 620).

[184] *See* page 41 to 42 above for a discussion of this issue.

A. A Dearth of Private Data in Two-thirds of Residential Surveys and in Building Surveys in Isolated, Sparsely-Populated Rural Counties Necessitates the Use of Federal and Federally-Funded Data in These Surveys

In the 1981-1982 rulemaking, the DOL concluded that, "where practicable, it would be appropriate to exclude wage data from Davis-Bacon projects in determining prevailing wages."[185] The DOL stated that "it would not be practical to determine prevailing wages for 'heavy' and 'highway' construction projects if Davis-Bacon covered projects are excluded in making wage surveys because such a large portion of those types of construction receive Federal financing. The regulation therefore permits the use of such data on these types of projects.[186] Based on that rulemaking and nearly 40 years of administration of §1.3(d), SMART and SMACNA point out an obvious reason for rescission. As a practical matter, an insufficient amount of data is submitted in residential surveys even under the 3 worker/2 contractor standard because at least two-thirds of the time and in building surveys in isolated, sparsely-populated rural counties.[187] Thus, the DOL's explanation during the 1981-1982 rulemaking for using federal data in heavy and highway surveys applies equally in these contexts. As the DOL stated in that rulemaking, it had no choice but to use federal highway and heavy data in surveys, because there is no private data available.

[185] Final Rule, *Procedures for Predetermination of Wage Rates*, 47 *Fed.Reg.* at 23645.

[186] *Id.*

[187] 2011 GAO Report, at 26.

B. History Demonstrates that the Federal Government has had an "Outsized" Role in Creating Construction Jobs, Redressing Widespread Unemployment and Influencing Local Labor Markets

The progress of industrialization in the second half of the nineteenth century brought with it what has been called the "discovery of unemployment."[188] The depressions of 1893-1897, 1907-1908, and 1914-1915 brought home the point that "cyclical fluctuations in business activity could make it impossible even for industrious and capable workers to maintain a job."[189] By the 1900's, public works, which were first used on the municipal level, became a "widely practiced form of municipal relief dispensation."[190] The motivation was the conviction that "rewarding an individual's own efforts was preferable to corrupting" citizens with "handouts."[191]

Between 1929 and 1933, unemployment in the United States jumped from 3.2% to 24.9%, almost a quarter of the official labor force.[192] During this period, construction spending plummeted 78%. The crisis of the Great Depression challenged traditional notions of the limited role of the federal government. The Depression brought the private construction of new factories and homes to a virtual standstill. Public works construction on the part of state and local governments also collapsed. To meet this challenge, the New Dealers vastly increased the federal funding of public works construction. This funding, however, was increased only enough to cover the amount state and local governments had been spending.

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[188] Udo Sautter, Government and Unemployment: The Use of Public Works before the New Deal, *The Journal of American History*, pp. 59-86.

[189] *Id*.

[190] *Id*.

[191] *Id.*

[192] Michael B. Katz, *In the Shadow of the Poorhouse*, 10th ed. (New York: BasicBooks, 1996), p. 214. https://socialwelfare.library.vcu.edu/eras/great-depression/american-social-policy-in-the-great-depression-and-wwii/

During the late 1920s, federal spending on public works construction averaged $200 million annually. This amounted to about 2% of the total public and private spending on new construction. By 1932, the last year of the Hoover administration, the federal spending jumped to nearly $400 million. Until 1930, state and local governments had been spending $2.4 billion annually on public works. By 1933, spending from these sectors was reduced to only $700 million. The New Deal filled the gap by hiking federal funds for public works to an annual average of $1.6 billion from 1933 to 1939. Because private construction in these years also fell dramatically from more than $7 billion to just over $3 billion annually, federal spending now accounted for fully one third of the total spent on new construction.[193]

One of the purposes of the massive federal building program in the 1930's was to distribute employment and federal money equally throughout the country.[194] Local contractors and workers, used to a certain wage and living standard, could not compete with the migratory labor of the winning bidder.[195] ("I think it is a fair proposition where the Government is building these post offices and public buildings throughout the country that the local contractor and local labor may have a 'fair break' in getting the contract."); 10 *Comp.Gen.* 294, 295 (1931) (" 'The Government should be the last employing agency to expect or countenance the performance of its construction contracts at the sacrifice of its citizens.'") (quoting letter from Treasury Secretary proposing administrative predecessor of Davis-Bacon Act). The WPA built, improved or renovated 39,370

[193] Daniels, Roger. The Relevancy of Public Works History: The Case of the 1930's. Chicago: Public Works Historical Society, 1975. Leuchtenburg, William. "Franklin Delano Roosevelt and the New Deal." *In The Flood Control Challenge: Past, Present and Future*, edited by H. Rosen and M. Reuss. Chicago: Public Works Historical Society, 1987. Rosen, H., and S. Pudloski. "An Interview with Donald C. Stone." Chicago: Public Works Historical Society, 1992. Rosenman, Samuel I., comp. The Public Papers and Addresses of FDR. Vol. III. New York, 1938. http://socialstudies.org/sites/default/files/publications/se/6005/600506.html

[194] S.Rep. No. 1445, 71st Cong., 3d Sess. 1-2 (1931).

[195] *Id.* at 2; *see also* 74 *Cong.Rec*. 6510 (1931) (remarks of Senator Bacon).

schools; 2,550 hospitals; 1,074 libraries; 2,700 firehouses; 15,100 auditoriums, gymnasiums and recreational buildings; 1,050 airports, 500 water treatment plants, 12,800 playgrounds, 900 swimming pools; 1,200 skating rinks, plus many other structures.[196] In 1962 Secretary Goldberg testified before Congress, that when "When [the DBA] was written, the Federal Government's construction activity was concerned primarily with the erection of buildings in which to house its operations."[197]

Another important example of the "outsized" role of the federal government is its funding of construction of hospitals in communities where health care was deficient. In 1946, Congress enacted the Hospital Survey and Construction Act (known as "Hall-Burton"), which provided construction grants and loans to communities that could demonstrate viability — based on their population and per capita income — in the building of health care facilities. Over the subsequent decades, new facilities sprang up all around the country, including many in the 40% of U.S. counties that lacked hospitals in 1945.[198] By 1975, Hill-Burton had been responsible for construction of nearly one-third of U.S. hospitals. That year Hill-Burton was rolled into bigger legislation known as the Public Health Service Act. By the turn of the century, about 6,800 facilities in 4,000 communities had in some part been financed by the law. These included not only

[196] Andrea Stone (2014). When America Invested in Infrastructure, These Beautiful Landmarks Were the Result. Smithsonian Magazine. https://www.smithsonianmag.com/history/when-america-invested-infrastructure-these-beautiful-landmarks-were-result-180953570/ It also dug more than 1,000 tunnels; surfaced 639,000 miles of roads and installed nearly 1 million miles of sidewalks, curbs and street lighting, in addition to tens of thousands of viaducts, culverts and roadside drainage ditches.

[197] Administration of the Davis Bacon Act: Hearings before the Spec. Subcomm. of Lab. Of the H. Comm. on Educ. and Lab., 87th Cong. 811–12 (1962), at 50.

[198] *A Bygone Era: When Bipartisanship Led to Health Care Transformation Hospital Survey and Construction Act, Hill-Burton*

https://www.npr.org/sections/health-shots/2016/10/02/495775518/a-bygone-era-when-bipartisanship-led-to-health-care-transformation

hospitals and clinics, but also rehabilitation centers and long-term care facilities. In 1997, this type of direct, community-based federal health care construction financing came to an end.

C. Overwhelming Evidence Demonstrates that a Strong Federal Presence in Labor Markets Promotes Economic Growth, Private Investment, and Employment Opportunities in the Construction Industry and Other Sectors

Throughout the country, the physical presence of the federal government – military bases, DOE facilities, GSA-owned or leased buildings, federally-owned electric utility corporations, federal laboratories and research centers, etc.– greatly impacts local economies, employment, and private investment. The total employment impacts of federal spending include "jobs created in one county due to the military installation or DoD contracting in another," termed the "trade flow effect."[199] Of the ten counties in the U.S. with the highest per capita incomes, two have Air Force installation (Douglas County, Colorado) or DOE laboratories (Los Alamos, New Mexico) as a major determinant of economic growth and prosperity. Six of the ten counties are contiguous to or within close proximity to Washington, DC: Arlington, Fairfax city, Fairfax, Falls Church, and Loudoun, VA, and Howard County, Maryland.[200] The following examples of regions with a strong federal government presence demonstrate the outsized impact on local labor markets.

1. *DOE Sites in New Mexico Spend Billions of Dollars Annually*

Los Alamos National Laboratory spans almost 40 square miles of DOE-owned property and has almost 900 individual facilities, 13 nuclear facilities, 8.27 million square feet in buildings,

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[199] Summit Economics, LLC (2018). *The Economic Impact of Department of Defense, Veterans and Military Retirees, and the Department of Veterans Affairs Activities in Colorado* ("Colorado study"), at 17. https://coloradospringschamberedc.com/wp-content/uploads/2018/08/18colomilstudyabr.pdf

[200] Andrew DePietro (Dec. 21, 2021). "Richest Counties in The U.S." *Forbes*. https://www.forbes.com/sites/andrewdepietro/2021/12/21/richest-counties-in-the-us/?sh=37b438652ecd

and $33.2 billion replacement plant value and has a $2.92 billion budget.[201] It employs 13,806 individuals, including approximately Triad National Security, LLC (9,827), Centerra-LA (Guard Force) (374), contractors (570), students (1,374), unionized craft workers (1,195), and post-doctoral researchers (466). Each year, the Laboratory invests and partners in economic development initiatives that stimulate business growth, create jobs, and strengthen communities—particularly those in the seven counties surrounding the Laboratory: Los Alamos, Mora, Rio Arriba, Sandoval, San Miguel, Santa Fe and Taos.[202] The population of these counties from smallest to largest are: Mora (4,623), Los Alamos (20,512), Taos (32,795), Rio Arriba (38,615), Sandoval (151,704), and Santa Fe (152,149). Federal funding for Sandia National Laboratories in fiscal year 2021 is $4.46 billion.[203] About 3% of its budget or $135.5 million is for construction and $85.6 million or 1.9% of its budget is for capital equipment. Sandia employs about 15,000 workers.

2. *Oak Ridge National Laboratory's Impact on Tennessee's Economy is $5.6 Billion Annually*

The economic impact of Oak Ridge National Laboratory (ORNL) "reaches across" Tennessee.[204] ORNL employs 4,700 workers from 29 Tennessee counties, 80 different countries,

[201] Los Alamos National Laboratory, Facts and Figures: https://www.lanl.gov/about/facts-figures/index.php#:~:text=Total%20employees%3A%2013%2C806%2C%20including%20approximately,Triad%20National%20Security%2C%20LLC%3A%209%2C827

[202] Economic Impact 2021: New Data Shows Spending $505 Million with New Mexico Businesses and $1.3 Billion in Employee Salaries https://discover.lanl.gov/news/stories/0125-economic-im

[203] Sandia National Laboratory, Facts & Figures: https://www.sandia.gov/about/facts_figures/index.html

[204] Oak Ridge National Laboratory's economic impact reaches across TN https://www.wbir.com/article/news/local/oak-ridge-national-laboratorys-economic-impact-reaches-across-tn/51-610369853

and has a $435 million payroll. The DOE's impact on Tennessee's economy totals $5.6 billion.[205] The federal reservation's quickly evolving facilities require flocks of skilled laborers. Y-12 National Security Complex in Oak Ridge has begun constructing the $6.5 billion Uranium Processing Facility, which is the largest construction project in the history of the state.

As a general matter, federal and federally-funded projects for which data are submitted in building surveys typically have a far greater monetary value than private projects for which data are submitted. In Roane County in Tennessee, for example, data on 24 workers preforming the classification of "HVAC mechanic: HVAC duct installation" were submitted on a $300 million project, reported as K-33, K-31, K-29 Decommissioning Project. For the same classification, data were submitted for 5 workers on a $400 million project reported as DOE K-25 Decontamination & Decommissioning Project. In Roane County, data on 35 sheet metal workers were submitted on a $285 million project, reported as TVA Kingston SCR Project Kingston (Emission Upgrade). Likewise, in Anderson County, a metropolitan county in Tennessee, data on 14 workers preforming the classification of "HVAC mechanic: HVAC duct installation" were submitted on a $48.5 million project, reported as the DOE ORNL Center Lab and Office Building. In the same county, data on 17 sheet metal workers and 17 HVAC duct installers were submitted on a $47.5 million project, reported as DOE ORNL Target Building. In Anderson County, crafts, including sheet metal worker and HVAC duct installer, reported data on a $1 billion project, reported as DOE SNS Project (Spallation Neutron Source).

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[205] *DOE's Impact on Tennessee Economy Totals $5.6 Billion in Fiscal Year 2017*, Brittany Crocker, Knoxville https://www.knoxnews.com/story/news/2018/05/22/tennessee-oak-ridge-national-laboratory-department-energy-economic-impact-doe-supercomputer/619954002/

3. *Idaho National Laboratory is the Seventh Largest Employer in Idaho*

The Idaho National Laboratory (INL) employs 5,022 workers, making it Idaho's seventh largest private employer and tenth largest employer when compared to all public and private businesses.[206] The dominance of federal funding at DOE sites is illustrated by the WD-22's and WD-22a's for Idaho. The collective dollar value of data on projects at INL demonstrates its influence on the labor market in the three counties in which INL work is performed – Bonneville, Bingham, and Butte. In Bonneville, data were submitted on a INL project with a value of $230 million. [207] In Bingham, data were submitted on a $222.56 million INL project.[208] In Butte, data were submitted on a $400 million INL project.[209]

4. *The U.S. Air Force Invests Billions of Dollars into the Economies of El Paso County and Douglas County, Colorado*

Douglas County shares borders with Denver County and El Paso County (Colorado Springs) and is part of the Denver-Aurora-Lakewood, Colorado, metropolitan statistical area. It is located midway between Colorado's two largest cities, Denver and Colorado Springs, and contains a portion of Aurora, the state's third-largest city. Station Buckley Air Force Base is in Aurora, Colorado. El Paso County has a large military presence, including four military installations – Fort Carson Army Base, Peterson Air Force Base, Schriever Air Force Base, and the United States Air Force Academy. In El Paso, there were 39,285 military jobs and 13,377 civilian jobs in 2016. [210]

[206] Economic Impact Summary, FY 2020: https://inl.gov/wp-content/uploads/2021/05/FY20_Economic-Impact-report.pdf

[207] INL – Integrated Waste Treatment Unit

[208] INL – Idaho Cleanup Project

[209] INL – Idaho Clean-up Project

[210] Colorado study, at 18. Colorado's major military installation include the Greeley Air National Guard Station, Buckley Air Force Base (AFB), the United States Air Force Academy, Peterson AFB, Cheyenne Mountain Air Force Station, Schriever AFB, Fort Carson, the Pueblo Chemical Depot, and the Pinon Canyon Maneuver Site. There is also High Altitude Army Training Facility in Eagle County, as well as ICBM missile sites in northeastern Colorado.

The DOD pours billions of dollars into military installations in this MSA. A chart, *DOD Contracts (Prime and Sub) by County, 2016,*[211] reports the following influx of federal funding in the following counties in the Denver-Aurora-Lakewood MSA and the Colorado Springs MSA that share borders with Douglas County: El Paso ($2,143,956,817), Teller ($11,899,660), Douglas ($ 9,126,923), Denver ($96,768,914), Arapahoe ($2,306,136,422), Elbert ($106,862), and Park ($1,961,867).

5. *Military Installations in Other States*

The following example illustrates the "outsized" impact of the federal government operations on local labor markets: [212]

- **Texas Military Installations:** A 2020 study by the Texas Comptroller estimates that military installations contributed at least $123.6 billion to the Texas economy in 2019 and supported more than 630,000 jobs in communities across the state.[213]
- **Los Angeles Air Force Base**: Space Systems Command (SSC) in El Segundo, California: SSC has an annual budget of approximately $8 billion and an annual payroll of more than $635 million – much of which is spent in the local economy. The local economic impact is approximately $1.8 billion annually.[214]

- **Minot Air Force Base** in Minot, North Dakota: The local economic impact of MAFB was $622 million in FY2000 and $607 in FY2021.[215]

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[211] *Id*., at 22.

[212] See also Jim Lee, BRAC's Impact on Regional Economies, https://stedc.tamucc.edu/files/Econ_Pulse_2014_2.pdf; Tadlock Cowan, Military Base Closures: Socioeconomic Impacts Congressional Research Service, February 7, 2012, https://sgp.fas.org/crs/natsec/RS22147.pdf; Peter L. Stenberg, Rural Communities and Military Base Closures, Rural Development Perspectives, Vol 13, No. 2 (1998).

[213] *Texas Military Bases Are Boosting Local Economies According to New Study*, June 22, 2020 https://www.tpr.org/military-veterans-issues/2020-06-22/texas-military-bases-are-boosting-local-economies-according-to-new-study

[214] https://www.losangeles.spaceforce.mil/Home/localcommunity/

[215] Jim Monk, KVRR Local News. Minot Air Force base has $607 million economic impact, February 4, 2022 https://www.kvrr.com/2022/02/04/minot-air-force-base-has-607-million-economic-impact/

- **State of Nebraska**: Spending at military bases and installations in FY 2018 accounted for $2.34 billion in economic output, $1.32 billion in employee compensation, and 24,954 jobs generated in Nebraska.[216] In addition, the Department of Defense (DOD) funds new construction for the Nebraska Army National Guard (NEANG) in varying amounts. The DOD also funds repair and modernization of NEANG facilities, in the amount of $1,065,873 between 2006-2010, to $30 million between 2011-2016, and over $24 million in 2017 alone.[217]

- **Robins Air Force Base** in Warner Robins, Georgia:[218] This AFB added $5.46 billion to the state's economy, with more than $900 million awarded in contracts, and a quarter of those contracts were awarded to contractors in Bibb and Houston counties.

- **State of Utah**: For FY2019, non-payroll spending on construction at the following military sites was Hill Air Force Base ($53,270,165), Dugway Proving Ground ($1,730,913), Tooele Army Depot ($11,777,092),Utah National Guard ($37,236,994), and Regional and Local Office VA ($12,523,851).[219]

D. Where Federal Data Mirrors Private Data in Terms of the Percentage of Work Performed by Workers Employed under a CBA, Discarding Federal Data Needlessly Decreases the Total Amount of Data Available on Which to Base Wage Determinations

The discarding of highly probative federal or federally-assisted data that mirror private data in the same counties unnecessarily decreases the amount of usable data for no reasonable purpose.

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[216] Eric Thompson & Mitchel Herian (2019). *The Economic Impact of Nebraska Military Assets: An Update for Fiscal Year 2018*. Prepared for the Nebraska Commission on Military and Veteran Affairs by the University of Nebraska Bureau of Business Research. https://nebraskalegislature.gov/FloorDocs/106/PDF/Agencies/Veterans_Affairs__Department_Of/610_20191115-104724.pdf

[217] *Id*. at 9.

[218] *Robins Air Force Base Discusses JSTARS, Economic Impact in Annual State of the Base Address*. https://ourcommunitynow.com/news/robins-air-force-base-discusses-jstars-economic-impact-in-annual-state-of-the-base-address *See also*: "'That's our lifeline': Robins Air Force Base Generates $5.84 Million to Local Economy Through Tourism." https://www.13wmaz.com/article/news/local/robins-air-force-base/thats-our-lifeline-robins-air-force-base-generates-584-million-to-local-economy-through-tourism-2/93-8ad9b547-869c-4dcb-b02d-7df46446ab4e

[219] Joshua Spolsdof (2021). *Utah's Defense Economy: Economic Impacts and Industry Trends.* https://gardner.utah.edu/wp-content/uploads/Utah-Defense-Economy-August2021.pdf?x71849&x

The building surveys in two metropolitan counties in Maryland, Montgomery County and Prince George's County, that are contiguous to Washington, DC illustrates this point. SMART Local 100 prevails in both counties on "sheet metal worker (including HVAC duct installation)" in both counties. The influence of the federal government on the local economies in these counties, as well as in other counties in the Washington–Arlington–Alexandria MSA is well-known. Prince George's County, for example, has significant federal facilities, such as Joint Base Andrews, NASA Goddard Space Flight Center, FDA, NOAA, USDA Beltsville Agricultural Research Center, and the U.S. Citizenship and Immigration Services headquarters.[220] In the building survey of Montgomery County, the DOL discarded data on "HVAC mechanic: duct installation" and/or "sheet metal worker" on at least 67 federal projects.[221] Likewise in Prince George's County, the DOL discarded data on "HVAC mechanic: duct installation" and/or "sheet metal worker" on at least 27 federal projects on which 70 workers in the sheet metal trade were employed.[222]

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[220] https://anthonybrown.house.gov/news/documentsingle.aspx?DocumentID=187; https://commerce.maryland.gov/Documents/ResearchDocument/PrGeorgesBef.pdf; and https://pgccouncil.us/DocumentCenter/View/3161/The-Economic-Drivers-and-Catalysts-FUll

[221] Bethesda Naval Hospital; Carderock Naval, Building 9; Department of Energy; FDA Consolidation Phase 2A Cder; FDA Consolidation Phase 2B Cder; FDA Consolidation Phase 3; National Imagery and Mapping Agency/Freemont Building Renovations; General Services Administration, 1 White Flint North; National Maritime Tech Center, U.S. Coast Guard; National Human Genome Research Institute; National Institute of Health, Building 30; "NIH"; NIH #10 Level Loading Dock; NIH #10 Phase 1B; NIH #103 Animal Center; NIH #12A Computer Rm.; NIH #13 3rd Floor 3E41 Lab Area; NIH #21 Steam Bridge; NIH #4 Lab B-29; NIH 31A; NIH 4TH Floor Renovation; NIH Bethesda MRI; NIH Bldg #10 & 49; NIH Bldg #10 DRD PH II; NIH Bldg #101P-3 Level; NIH Bldg #102; NIH Bldg #112 @ Poolesville; NIH Bldg #14-H; NIH Bldg #14F; NIH Bldg #1O/P-3 Level; NIH Bldg #30 3rd Floor; NIH Bldg #49 Vivarium Corr.; NIH Bldg #50; NIH Bldg #9; NIH Bldg 10; NIH Bldg 10 Generator; NIH Bldg 10 MRI; NIH Bldg 10 NMR Center; NIH Bldg 29; NIH Bldg 30; NIH Bldg 30 5th Floor; NIH Bldg 31, Eye Institute; NIH Bldg 45; NIH Bldg 8 & 10; NIH Bldg #9; NIH Bldg #49; NIH Bldg 10 8th Floor ACRF; NIH Bldg 112; NIH Bldg 62; NIH Parking Structure; NIH Porter Neuroscience RC; NIH Post – Occupancy Work; NIH Trans. Mouse Lab; NIH West Gate; NIMA Visitor Center; National Institute of Standards and Technology (NIST); NIST Bldg 233; Navy/Marine Corps Intranet (NMCI) 304NCRDR; National Naval Medical Center (NNMC) Bldg #79; NNMC GI Clinic Bldg # 19; NRC Chiller Replacement; NRC Cooling Tower; NRC Lan Room 2 G 3; NRC OPS Center; NSWC Carderock 3rd FL.; US Pharmacoperical; USHUS Phase 10; Walter Reed Bldg 14; and White Oak Federal Research Center

[222] AAFB #1632 & #1673; AAFB Aircraft Maintenance; AFB BEQ Bldg 1686; AAFB Bldg 3500; AAFB Pharmacy Renovation; AFB-Clinton; ATF LABS; Commissary - Task Order Contract IDIQ; CSC EPA CDX; Dept. of Agriculture-Bldg 500; FDA B513 Suite Reno; FDA Beltsville FAC; GSA Federal LABS 202948; NASA; NASA Bldg #21; NASA Bldg #5; NASA Bldg 14 Rm E 171; NASA Bldg #5 PRE-ENG.; NASA Goddard Bldg 33 Clean #04S009MD; NASA Office Kitchen; NASA Room W228; New Census Bureau HQ Bldg - Parking Garage; NOAA Satellite Operations Facility; National Security Administration (NSA) Building; USDA; USDA Human Nutrition; and USPS Southern MD.

E. Unrestricted Use of Federal Data Would Acknowledge the Economic Realities in Localities and Avoid Issuance of Arbitrary and Capricious Results

The DOL's administrative practices in implementing § 1.3(d) have ignored the economic realities in localities. Regardless of the magnitude of federal spending, either quantitatively or as a percentage of the total construction in a locality, the DOL uses the same methodology, which accords that same weight to low value projects as it does to projects that employ hundreds of workers. As stated in the proposed rule, the WHD first attempts to calculate a prevailing wage based on non-federal project survey data at the county level, without use of data from Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements.[223] If there is "insufficient non-federal project survey data for a particular classification in that county, then WHD considers survey data from Federal projects in the county if such data is available."[224] While the current formulation of § 1.3(d) does not prohibit all uses of Federal project data in establishing prevailing wage rates for building and residential construction projects subject to Davis-Bacon requirements, it enables miniscule amount of data from mom-and-pop businesses to dictate prevailing wages even when the federal government invests millions or even billions of dollars on military installations, DOE sites, and other federal facilities. This is especially true in surveys when the WHD has applied the 3 workers/2 contractors standard. However, application of the 6 workers/3 contractors standard also results the determination of prevailing wage based on a miniscule percentage of the data submitted, particularly in localities with a dominant federal presence.

[223] 87 *Fed.Reg*. at 15708.

[224] *Id*.

The ARB's description of the word "sufficient" demonstrates that use of an undefined term will necessarily result in inconsistent decision-making regarding what it means in different contexts.[225] As stated by the ARB in *Plumbers Local Union*, "Definitionally, the word 'sufficient' suggests that a criterion is to be evaluated in a specific context, i.e., in relationship to some purpose." The ARB then quoted the definition of "sufficient" from Black's Law Dictionary to underscore that its meaning depends upon context and that the Administrator must use common sense in applying it to individual surveys. *Black's Law Dictionary* defines "sufficient" as "[a]dequate, enough, as much as may be necessary, equal or fit for end proposed, and that which may be necessary to accomplish an object. Of such quality, number, force, or value as to serve a need or purpose."[226] An amount or quantum that may be "sufficient" for one purpose plainly might be insufficient in another context.

In conducting surveys, the Administrator's underlying "object" or "purpose" is to produce wage determinations that reflect the prevailing labor standards in a locality. Rejection of the virtually all the data submitted when a 3 workers/2 contractors or 6 workers/3 contractors standard is satisfied does not effectuate the underlying object or purpose of the survey process and does not comport with commonsense. Presently, the DOL excludes data on building and residential projects subject to a DBRA when there is "sufficient" private, state, or local data under the Agency's 6 workers/3 contractors standard. This is an important issue generally, but particularly so, when surveys are undertaken of counties with a dominant federal presence in the construction market. Those markets include the counties in which Department of Energy sites are located, such as Idaho National Laboratory, Oak Ridge National Laboratory, and Los Alamos National Laboratory, and

[225] *Plumbers Local Union No. 27*, above at 5.

[226] *Id*. quoting *Black's Law Dictionary*, at1443 (6th ed. 1990).

counties with a military installation(s). In these areas, the DOL sometimes ends up relying on data from a handful of projects of relatively minor value in issuing wage determinations and discards data on more than 100 workers on costly federal projects. In essence, the "tail wags the dog." In the early 1980's, anti-union advocates claimed that allowing data from federal prevailing wage projects would be "inflationary." Over the past 40 years, discarding this data has decreased local standards.

The DOL's sufficiency standards do not take into consideration the monetary value of the projects. Data on multi-million-dollar projects are collected in the same manner as data on a repair project that may barely meet the $2,000 threshold. The data submitted in the Tennessee building survey illustrate the importance of calculating the relative monetary value of federal versus private data.[227] In Anderson County, the only data that were submitted for sheet metal workers (457), laborers: common or general (758), and electricians (423) was federal. Use of this great quantity of data in computation of prevailing rates should not hinge upon whether projects with a fraction of the value of federal projects happen to meet a six workers/three contractors sufficiency standard. That bare minimum amount of data constitutes only 1.2% of the sheet metal worker data, 0.79% of the laborer data, and 1.4% of the electrician data.

The full extent to which scant private data dictates prevailing wages when the federal government dollars predominate in a local labor market is unknown because the WHD's current administration of §1.3(d) has a chilling effect on the submission of federal data in surveys. The DOL's message in its pre-survey briefings for building and residential surveys is that federal data will be discarded if there are sufficient data under the applicable sufficiency standard. While the

[227] The DOL recently issued the results of a statewide survey in Tennessee, with a survey was from 04/01/2016 to 03/31/2017, and a cut-off date of 04/30/2018. The data quoted above is based on an earlier Tennessee survey, the results of which were published in 2009.

DOL "strongly encourages robust participation in Davis-Bacon prevailing wage surveys, including building and residential surveys," interested parties are reluctant to submit federal data, particularly in building survey, because the process of submitting is time-consuming and laborious. There is a disincentive to compile this data when there is a strong likelihood that it will be dismissed.

F. The ARB Has Repeatedly Reversed the Administrator's Decision to Discard Federal Data

Beginning in 1998, the ARB has found that the Administrator abused her discretion in failing to use federal data in determining prevailing rates of pay in three separate cases.[228]

1. The WHD Abused its Discretion in Discarding 99% of the Data

In 1998, the ARB found that the WHD abused its discretion when it discarded more than 99% of the data submitted in issuing the results of a 1996 residential survey in Allegheny County, Pennsylvania.[229] In that case, a local union timely submitted wage data on approximately 505 plumbers working on residential projects in Allegheny County. Since these data were on federally-funded projects, the WHD exercised its discretion to discard union data in calculating the wage determination rate. The WHD relied on wage data on only six plumbers that performed work on privately-funded residential projects in Allegheny County during the survey period and issued an open-shop wage determination solely based on that data.

[228] During the Obama administration, the Administrator declined to act on pending appeals from several unions that contested the results of the surveys in West Virginia, Kentucky, and Michigan. If opinion had been issued, those cases would have demonstrated a further abuse of discretion in discarding abundant data.

[229] *Plumbers Local Union*, above, at page 2.

In *Plumbers Local Union*, the ARB stated that the "Administrator's wholesale reliance on the fixed 3 workers/2 contractors formula is misplaced because large amounts of relevant wage data on federally-funded projects are excluded based solely on a de minimis showing of data from privately-funded jobs." The ARB further stated that "nowhere in the regulation" is the term "sufficient data" defined, which "suggest[s] that the Administrator has discretion in making the determination whether the available wage data from private sector projects is insufficient to issue a wage rate without also incorporating wage data from projects subject to Davis-Bacon wage standards."[230]

2. *The WHD Abused its Discretion in Rigidly Applying the 3 Workers/2 Contractors Sufficiency Standard*

In 2004, the WHD published a wage determination for electrician in Eddy County, New Mexico, [231] based on survey data received from 3 private contractors employing 25 workers. The majority of the wage information came from a contractor based in Texas, a state in which wage rates were significantly lower than in New Mexico. The Texas-based contractor employed 19 electricians from Texas on a job site in Eddy County. The WHD applied its 3/2 standard to the data received for electricians in Eddy County and determined there was sufficient private data to issue a wage determination. The resulting wage determination contained wage rates that were 48% lower than the previously published wage determination to the county. On appeal, the ARB concluded that the significant disparity "should have alerted [WHD] that the survey data likely were unrepresentative and that follow-up was necessary." The ARB emphasized that the WHD had not acknowledged, discussed, or tried to explain the disparity. The Board concluded that WHD

[230] *Id*. at 5.

[231] *New Mexico Nat'l Elec. Contractors Assoc*., above at page 6.

had abused its discretion by rigidly applying its 3/2 standard despite the small amount of data received and concluded that, under those circumstances, "consideration of additional private sector data and of data on federally funded work is appropriate."

3. The WHD Abused its Discretion in Automatically Relying on the 3 Workers/2 Contractors Sufficiency Standard

Eight years later, [232] the ARB held that it was an abuse of discretion to automatically rely on its internal guidelines – the 2/3 rule – to determine if it had sufficient data to adopt a prevailing wage applicable to the sprinkler fitter classification in Davis County, Utah. The survey efforts yielded wage data observations (reported jobs) for approximately 54 sprinkler fitter jobs in Utah but representing only 8 of the 29 counties in Utah. Davis County is the third most populous county in Utah and had a population of 307,906 in 2010 The Board described the WHD's reliance on the 3/2 rule as "clearly contradict[ing] the common sense purpose" of the regulation permitting use of data from "merely three workers in a the metropolitan county for a common job is 'sufficient data' to eliminate the need to expand" consideration of data from other counties or include data from federal jobs. The ARB cited *Plumbers Local Union* and *New Mexico Nat'l. Elec. Contractors Assoc*. by relying on the "3/2 Rule to conclude that three sprinkler fitter jobs was sufficient data. The ARB further stated that while the 3/2 Rule might be useful in "limited instances" the Administrator is "attempting to set the prevailing rate for uncommon classifications in sparsely polluted areas," the per se application of this guide is improper.

[232] *Road Sprinkler Fitters Local Union No. 669*, above at page 6. The term "sufficient is not defined in the DBA or its implementing regulation, "but it is commonly understood to mean 'adequate' or 'enough.'

G. The WHD Persists in Discarding a Disproportionate Amount of Federal Data

Following these decisions, the WHD has continued to abuse its discretion in implementing § 1.3(d). In deriving building rates in Bonneville County, Idaho, for example, the DOL discarded huge amounts of federal data and issued wage rates based on relatively miniscule amounts of data. For one NABTU-affiliated craft, the DOL discarded 91.2% of the data submitted for work in Bonneville County.[233] The DOL did not use federal data on 104 workers from Idaho National Laboratory in determining rates for the NABTU-affiliated trade. Union rates were derived at the county level based on data on a total of ten workers submitted by a union and open shop on non-federal work.[234] For the carpenter craft, the DOL discarded 92.7% of the data. The WHD discarded data on 102 workers employed by contractors at INL in the carpenter classification. Open shop rates were issued for "carpenter, excludes drywall hanging, and metal stud installation." Open shop contractors submitted data on eight workers employed on private projects.[235]

X. SMART AND SMACNA SUPPORT ELIMINATION OF THE STRICT PROHIBITION ON USE OF METROPOLITAN DATA IN DETERMINING PREVAILING RATES OF PAY IN RURAL COUNTIES

SMART and SMACNA support elimination of the strict prohibition in § 1.7(b) of combining metropolitan and rural data in determining prevailing rates of pay. In conducting surveys, the DOL is tasked with locating the source of labor for federal project(s) and ensuring that the rates paid to "imported" workers do not undermine prevailing rates in the market into

[233] SMART derived this information from the WHD's WD-22a's, Project Wage Summary, of the 2010 Idaho building survey.

[234] Bonneville County Jail Expansion (3 workers), Common Cents Food Store (1 worker), Hockey Rink Addition for City of Idaho Falls (2 workers), Technology Center for Bonneville Joint School (2 workers), and Idaho Fall 65th South Booster Pump. Station (2 workers).

[235] Dist. 93 Auto Mechanics & Auto Body (4 contractors/6 workers); Melaleucca Processing Plant/Office (1 contractor/1 worker); and Technology Center for Bonneville Joint School (1 contractor/1 worker).

which the labor is imported and in the market from which the labor was exported. It is a complicated task for which regional and demographic differences necessitate solutions that reflect the realities of local markets. The differences in available data on a county-by-county basis are influenced by population density; relative levels of unemployment in regions of a state; federal, state, or local government investment in construction of hospitals, libraries, prisons, administrative buildings, schools (strongly influenced by local tax base),[236] and other buildings that house governmental functions; private-sector economic growth: and the degree of integration between rural labor markets and the labor markets of more populous counties, including commuting patterns and use of travelers to construct building when the host county lacks qualified workers.

A. Selection of Appropriate "Civil Subdivisions" of a State or Groupings Thereof for the Purpose of Combining Data When Sufficient Data is Unavailable at the County Level Must be Informed by an Understanding that County Lines do Not Dictate Local Labor Markets

In adopting regulations concerning selection of the appropriate "civil subdivisions" of the State" or groupings thereof for the purpose of combining data when sufficient data are unavailable at the county level,[237] SMART and SMACNA encourage the DOL to strike a balance between affording the Administrator appropriate flexibility to consider regional economic markets on a case-by-case basis and adopting meaningful parameters that guide the Administrator in so doing. As discussed above, the unlimited discretion afforded the WHD to administer the undefined term, "insufficient wage data" in § 1.3(d), led to the reversal of the Administrator's decisions in at least three ARB cases and an overall poor exercise of discretion. Regulations that govern the grouping

[236] A 1996 GAO Report states that poor conditions in schools are concentrated in high-poverty schools that serve minority students. Schools that predominantly serve white students spend nearly 50% more on capital construction than those serving minority students, and wealthy districts spend nearly triple their high-poverty counterparts. U.S. Government Accountability Office (1996). *America's Schools Report Differing Conditions.* https://www.gao.gov/assets/hehs-96-103.pdf

[237] 40 U.S.C. § 3142(b).

of counties for the purpose of combining data should be informed by an understanding that county lines do not dictate local labor markets, that selection of groupings must be informed by labor standards that exist in the counties included in groups, and that there is great diversity on a state-by-state basis in how county lines are drawn. The economic factors listed above, along with great variability in the demographics of metropolitan and rural counties, make rigid rules banning the use of metropolitan data in rural counties unreasonable.

The diversity in how county lines are drawn ranges from the number of counties in a state and the geographic size (square miles), all of which vary markedly from state to state, and determine population density on a county-by-county basis. County lines in the 48 states in existence in 1931 have been virtually static over the nine decades since enactment of the DBA, as populations within counties grow at different rates. In the west and southwest, for example, counties are, in general, vaster in terms of square miles than they are in other parts of the counties. Seven of the 21 largest counties in the country are in Arizona.[238] Coconino (Flagstaff) is the second largest county in the country in physical size, with a total land area of 18,617.42 square miles, and is larger than each of the nine smallest states in the United States.[239] Eight of Nevada's 17 counties have a population from between 9,570 to 1,030;[240] Nevada's population – 3,143,991[241] – is concentrated in two metropolitan counties, Clark County (2,228,866) and Washoe County (464,182), in which Las Vegas and Reno are located. Five of the ten least populous states in the country have large numbers of counties, and thus, have very low per capita populations on a

[238] Coconino, Mohave, Apache, Navaho, Maricopa, Pima, and Yavapai.

[239] The nine smallest states in square miles are Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont.

[240] White Pine, Pershing, Lander, Lincoln, Mineral, Storey, Eureka, and Esmeralda.

[241] https://www.census.gov/quickfacts/NV

county-by-county basis: Wyoming (23), Alaska (30), North Dakota (53), South Dakota (66), and Montana (56).[242] The State of Virginia is an example of a state with unusual county lines. It has a great number of counties and independent cities (county-equivalents for Census purposes) relative to other states. With 95 counites and 39 independent cities, Virginia ranks behind only Texas (254) and Georgia (159) as the state with the most counties. Virginia's size is, however, small relative to other states in the country; it ranks 35th. The mean area of Virginia's counties ranks 49th; 18 counties have populations of less than 10,000;[243] and 34 counties have between 10,000 and 20,000 residents.[244]

B. The WHD Undermines the Remedial Purpose of the DBA by Depressing Wages by Importing Data from Rural Counties with High Poverty Rates, Low Median Incomes, and Limited or No Government Investment in Public Buildings into More Prosperous Rural Counties

In determining prevailing rates in rural counties, the WHD undermines the remedial purpose of the DBA by importing data from rural counties with high poverty rates, low median incomes, and limited or no government investment in public buildings or public works into more prosperous rural counties. The use of wage data from rural counties with lower standards in determining prevailing rates in other more economically advantaged, geographically remote counties thwarts the very purpose of the Davis-Bacon Act. The "evil" sought to be remedied in enacting the DBA was the lowering of local wage standards by the award of federal contracts to

[242] Vermont (14), Maine (16), Delaware (3), Rhode Island (5), and New Hampshire (10).

[243] Cumberland, Richmond, Mathews, Franklin city/county, Rappahannock, Lexington city/county, King and Queen, Charles City, Buena Vista city/county, Surry, Galax city/county, Bland, Covington city/county, Emporia city/county, Craig, Bath, Norton city/county, and Highland.

[244] Greene, Westmoreland, Radford city/county, Southampton, Patrick, Manassas Park city/county, Colonial Heights city/county, Buckingham, King William, Giles, Brunswick, Appomattox, Floyd, Grayson, Nottoway, Williamsburg city/county, Allegheny, Nelson, Dickenson, Clarke, Falls Church city/county, Madison, Amelia, Martinsville city/county, Lunenburg, Northumberland, Poquoson, Charlotte, Northampton, Greensville, Sussex, Essex, Lancaster, and Middlesex.

contractors who paid workers the lowest wages, and were thus, able to underbid other contractors.[245] Congress viewed the DBA as a vehicle to ending wage-based competition from fly-by-night operators.[246]

SMART and SMACNA's recommended changes to the survey process for rural counties are designed to ensure that the WHD uses only meaningful data in deriving wage determinations so that the WHD's methodology does not undermine the purposes of the DBA. The DOL's effort to issue general wage determinations in all rural counties, even those with populations with densities of fewer than one person per square mile, is a futile endeavor since it is often impossible to collect significant data within counties or contiguous counties. There are rural counties in which abundant data may be available, particularly in counties where there is a dominant federal presence. In those counties, it would be appropriate to continue to issue general wage determinations that are based on local standards. Consistent with SMART and SMACNA's recommendations concerning § 1.3(d), inclusion of all usable data would be appropriate.

The DOL can avoid combining miniscule amounts of meaningless data in issuing wage determinations in rural areas where there are no actual labor standards for building or residential construction by using "individual project-specific" wage determinations for building projects, based on wage determinations of the "nearest large city."[247] The GAO's criticism of the DOL's

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[245] *Building & Const. Trades Dept., AFL-CIO v. Donovan*, 712 F.2d 611, 613 (D.C. Cir. 1983), *cert. denied* 464 U.S. 1069 (1984).

[246] *See,* William G. Whittaker (2007). *Federal Contract Labor Standards Statutes: An Overview*, Congressional Research Service, at 3. See also this article's citations to Lloyd Smith, "To Eliminate Irresponsible Bidders," The Constructor, January 1925, at 23, 64; "When Low Bids Are Too Expensive," The Constructor, February 1930, at 40-41 and 58; C. W. Butts, "The Necessity for Prequalification: Over Optimism on the Part of Contractors Requires a Check," The Constructor, March 1930, at 40-41; E. A. St. John, "Cooperation Eliminating Irresponsibility," The Constructor, April 1930, at 35-36; and "Hard Facts About Contractors," The Constructor, September 1930, at 28-3. https://crsreports.congress.gov/product/pdf/RL/RL32086/7

[247] *See* footnote 15 above for Labor Department Regulation No. 503 (1935), which states addresses use of data from the "nearest large city."

reliance on limited data and combining data from areas more expansive than county level is, at its essence, a criticism of using a general wage determination when an individual project-specific wage determination would better serve the remedial purposes of the DBA.

C. The WHD has Erred in Treating All Rural Counties as a Monolith Rather than as Diverse Entities with Differing Levels of Integration with and Access to "Metropolitan" Counties and a Wide Range of Populations and Economic Activity

It is a mistake to treat all rural counties alike in devising a methodology for conducting building and residential surveys in counties that the WHD characterizes as "rural" for survey purposes. A key part of the problem with the DOL's administration of surveys since adoption of current §1.7(d) is that it has not issued a subregulatory definition of "rural" that recognizes that rural counties are not a monolith and should not be treated as such in determining prevailing rates. Rural counties differ markedly, with differing levels of integration with and access to "metropolitan" counties and a wide range of populations and economic activity. While "there is no single, universally preferred definition of rural" and no "single rural definition that can serve all policy purposes,"[248] grouping of diverse counties, with differing levels of integration with and access to metropolitan counties, for the purpose of determining prevailing rates of is consistent with the purposes of the DBA. As observed in the NPRM, the exclusion of metropolitan data from surveys of rural counties, particularly when counties are contiguous, "ignores the potential for projects in both counties to compete for the same supply of construction workers and be in the same local construction labor market."[249]

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[248] Andrew F. Coburn, A. Clinton MacKinney, Timothy McBride, Keith J. Mueller, Rebecca T. Slifkin, & Mary K. Wakefield, *Choosing Rural Definitions: Implications for Health Policy*, Rural Policy Research Institute Health Panel Issue Brief #2, March 2007.

[249] 87 *Fed.Reg*. at 15719.

For the purpose of conducting building and residential surveys, SMART and SMACNA encourage the WHD to envision counties as at least two different types: 1) counties that are isolated from urban centers, have no ongoing federal presence in residential and building construction, have sparse populations, minimal private construction (if any) of a similar character to the types of work involved in the construction of DBA-covered project, and lack a construction labor force within the county to construct a DBA-covered project if and when one is bid in the county; and 2) rural counties in which there is an ongoing federal presence in residential or building construction and/or are economically integrated with "metropolitan" counties, with commuter patterns as one of many possible measures. In counties that fall into the first category, use of individual project-specific wage determinations would avoid use of meaningless data in issuing wage determinations. In counties that fall into the second category, inclusion of meaningful data from metropolitan counties would be consistent with the demographic realities in labor markets that include metropolitan counties and counties designated by the WHD as "rural" (an undefined term in the regulations). Nationwide, there are 308 counties with a population of 4,999 or fewer residents and 1006 counties with a population of 5,000 to 19,999 residents.[250]

Studies establish that prosperity in cities and metropolitan areas "effectively subsidizes public investments in rural areas."[251] Nationally, many of the states that receive the highest per-capita rates of federal investment have greater shares of their population in rural communities, such as South Carolina, North Dakota, and Louisiana. Meanwhile, many of the states that receive the lowest rates of federal investment have greater shares of their population in urban centers,

[250] Haya El Nasser (2017).

[251] Nathan Arnosti & Amy Liu (2018). *Why Rural America Needs Cities.* Brookings Institute. https://www.brookings.edu/research/why-rural-america-needs-cities/

including Delaware, Illinois, and Ohio. "Access" to cities and metropolitan areas is an important factor in achieving prosperity in rural areas. As found by the Brookings Institute, the communities that are "most closely connected to larger markets did better." In support of this position, the Brookings Institute cites research at Headwaters Economics, which divided U.S. counties into three groups for the purpose analysis: "metropolitan," "connected" (defined as rural counties that were connected to the rest of the world through airports with daily service), and "isolated" counties. Headwater Economics found that "metropolitan" counties performed best and that "connected" rural counties had higher rates of educational attainment, population growth, average earnings, and high-wage service jobs, and less income volatility than "isolated" counties did.

D. Use of Individual Project-Specific Wage Determinations in Rural Counties with No Local Labor Standards for Building and Residential Data Best Effectuates the Purpose of the DBA

SMART and SMACNA strongly encourage the WHD to use individual project-specific wage determination in sparsely-populated counties, with limited access to more populous counties, and minimal or no private or federal data on which a local labor standard can be determined. This approach better effectuates the purpose of the DBA than deriving general wage determinations from a conglomeration of geographically remote and demographically similar counties. It is far more likely that the labor supply for a DBA-covered residential and building project in a thinly-populated rural county will come from the "nearest large city" rather than from another rural county located at the opposite border of the state.

By bidding work in rural counties at meaningless wage rates (imported from demographically similar and geographically remote areas), the DOL depresses the local standards in the more populous counties from which data is imported. Use of the wage determination for the county in which the "nearest large city" is located would provide a more accurate measure of the

"labor standard" in counties with no appreciable building construction. In so doing, DOL could reduce its "backlog of wage determinations"[252] by reallocating its limited resources to issuance of wage determinations in counties for which there is abundant data.

In its zeal to fully abandon issuance of "individual project-specific" wage determinations for building and residential surveys, the WHD has issued general wage determinations in sparsely-populated, rural counties where no construction covered by the DBRA occurs or such construction takes place at such limited intervals that the rates are stale before available for use by contracting agencies.[253] Congress recognized the lack of a federal presence in rural counties when it enacted the Rural Development Act of 1972, as amended (7 U.S.C. 2204b-1), to revitalize and develop rural areas and to help foster a balance between rural and urban America. The regulations implementing the RDA state that the "significant and widespread presence means that GSA's real estate decisions on where to locate, how to design and orient our buildings, and how our buildings are used can have a significant impact on the surrounding community."[254] The regulations further state that the RDA "directs Federal agencies to develop policies and procedures to give first priority to the location of new offices and other Federal facilities in rural areas." The GSA owns and leases over 376.9 million square feet of space in 9,600 buildings in more than 2,200 communities nationwide.

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[252] 87 *Fed.Reg*. at 15699.

[253] As noted above, SMART and SMACNA addresses in these comments survey methodology related only to residential and building construction. Unlike heavy and highway construction, residential and building construction is confined to a single county and the issues presented by the same worker earning different rates of pay while working in different counties on the same heavy or highway project do not arise. The 1986 Manual indicates that the WHD recognizes that there is a greater urgency to issue general wage determinations for highway and heavy rates. The 1986 Manual states that "As of 1985, about one-half of the counties in the United States were covered by general wage determinations for building construction. General determinations for highway construction applied to nearly all areas and, as for heavy, approximately three-quarters of the counties were encompassed by general wage determinations. Few general determinations are issued for residential construction." 1986 Manual at 32.

[254] GSA in Your Community: https://www.gsa.gov/real-estate/design-construction/urban-developmentgood-neighbor-program/gsa-in-your-community

E. SMART and SMACNA Agree that the WHD Has Used ‘‘Arbitrary Geographic Divisions” in Combining Wage Data from Groups of “Rural” Counties that are Demographically Dissimilar and Geographically Remote

The WHD’s division of rural counties into groups and supergroups in statewide surveys appear to be drawn without regard to anything other than groupings of rural counties must not include metropolitan counties. In a West Virginia building survey, for example, the WHD divided the 34 counties classified as rural into two groups (which were also designated as supergroups). One group had 28 counties;[255] the other had 6 counties. This random collection of non-contiguous counties is not a “civil subdivision” of a state and is not a reasonable basis for evaluating integrated labor markets. The primary thing that “rural” counties have in common is that they are not within a metropolitan statistical area (MSA).[256]

The WHD’s selection of West Virginia as a state in which to conduct a building survey following the Great Recession, which began in Dec. 2007 was ill-advised. The survey period for the survey was from February1, 2008 to January 31, 2009. From December 2007 to September 2009, West Virginia lost 11.2% of its construction job (a drop from 38,550 to 34,200).[257] While privately-funded jobs decreased, the federal government continued to fund major projects in the

[255] The larger group included the counties of Barbour, Braxton, Calhoun, Fayette, Gilmer, Grant, Greenbrier, Hardy, Jackson, Lewis, Logan, Mason, McDowell, Mercer, Mingo, Monroe, Nicholas, Pendleton, Pocahontas, Raleigh, Randolph, Ritchie, Roane, Summers, Tucker, Upshur, Webster, and Wyoming.

[256] *See Laborers’ District Council*, ARB No. 04-011 (Apr. 29, 2005), quoting the Acting Administrator’s characterization of the DOL’s 1986 Manual of Operations (“For purposes of Davis-Bacon, if a county is located in an area designated by the Office of Management and Budget as Metropolitan Statistical Area (MSA), it is to be classified as a metropolitan area for survey purposes. If not included in such an area, it will be considered rural.”)

[257] Ted Boettner, Paul Miller, & Rick Wilson (2009). *The State of Working West Virginia: The Great Recession*. West Virginia Center on Budget & Policy. https://wvpolicy.org/wp-content/uploads/2018/5/WVCBP_Working_WV_2009.pdf

State,[258] such as V hospitals and facilites,[259] national guard facilities, federal office buildings,[260] and post offices, but the WHD declined to use this data in most counties for most classifications.

In another survey,[261] the WHD incorporated "meaningless" wage data on heavy projects from the eastern counties of Kentucky in the Appalachian Mountains into the western counties of Kentucky despite the fact that the labor markets were not comparable at the time of the survey (they remain dissimilar) and are geographical remote.[262] There were profound differences in the economic conditions in the 17 contiguous counties included in the Ballard group in western Kentucky and those in eastern Kentucky. These differences are well illustrated by a comparison of median household income, poverty rates, and negotiated rates in applicable collective bargaining agreements. The incorporation of wage data from rural counties with staggering poverty rates and very low medium incomes into counties that are more economically advantaged undermines the remedial purposes of the DBA.

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[258] *See* Berkeley County (Hagerstown-Martinsburg, MD-WV Metropolitan Statistical Area), where at least 20 of 57 projects were federal: ATF Needy Road Facility Expansion ($168,000), CPC-3 Interior Renovations – VAMC Martinsburg ($357,818), Dept. of VA Hospital Generator Install – VMAC ($2,118,557), IRS Emergency Equipment Enhancement ($1,757,036), Psych Ward 6A Safety Correct - VAMC Martinsburg ($520,344), Site Access Control Improvements – VAMC Martinsburg ($184,750), VA Ambulance Bay Mechanical Insul (Martinsburg) ($26,000,000), VA Hospital Building 215 Renovation (Martinsburg)($8,050), VA Hospital Mechanical Insulation (Martinsburg)($4,300), VA Medical Center Hosp Breezeways (Martinsburg) ($24,930), VAMC Mobile GI (Martinsburg) ($57,000), Veterans Outpatient Pharmacy Remodel (Martinsburg)($39,451), VMAC Martinsburg - EMSHG Trailer Park ($2,058,770), VMAC Martinsburg-Add Ambulance Bays ($637,920), VMAC Martinsburg-B-413 Office Expansion ($342,084), WV Air National Guard Fire Station ($162,150), WV Air Natl Grd-C5 Final Infrastructure Upgrade ($176,652), WV Air Natl Guard 167th Airlift Wing C5 Hangar ($998,146), WV Air Natl Guard Airport /c5 Hangar ($2,001), and WV Air Natl Guard Fire Station/Supply Facility ($13,722,303).

[259] *See e.g*., Veterans Hospital CT Scan in Wayne County ($278,794) and Veterans Hospital Solarium in Harrison County ($284,895).

[260] *See e.g.,* Kanawha County: Social Security Admin Electric Install – St Albans ($206,800) and Social Security Admin Renov - Charleston ($392,238)

[261] The survey period for the Kentucky heavy survey was January 1, 2005 to December 31, 2005. Selection of the construction type to survey was ill-advised because there were a limited number of substantial heavy rural projects under construction in the State of Kentucky. During the survey period, the Olmsted Dam project in Ballard County and the major bridge work in Livingston and McCracken County are examples of substantial heavy projects. For the vast majority of 120 counties in the State of Kentucky, there were no substantial heavy projects under construction during the survey period.

[262] *See* 46 *Fed.Reg*. 4306-01, 4310 (Jan. 16, 1981).

1. Comparison of Poverty Rates in Rural Counties in Eastern and Western Kentucky

Of the 25 counties in the Bath group, (KY193),[263] ten had poverty rates in excess of 30% in 2005 when the poverty rate in Kentucky was 16.9%: Breathitt (33.8), Carter (37.2), Johnson (31.1), Knott (36.2), Lawrence (34.7), Lewis (35.6), Magoffin (42.2), Morgan (30.9), Owsley (45.4), and Wolfe (33.7). An additional 10 counties in the Bath group had poverty rates in excess of 20% in 2005: Bath (22), Harrison (24.4), Lee (28.1), Leslie (27.2), Letcher (29.1), Menifee (27.4), Perry (29.6), Pike (24.7), Robertson (22.4), and Rowan (23.5).[264] By contrast, of the 17 counties in the Ballard County group, only one county – Fulton – had a poverty rate of more than 20% in 2005.[265]

2. Comparison of Median Incomes in Rural Counties in Eastern and Western Kentucky

The median income in Kentucky in 2005 was $37,377. Of the 25 counties in the Bath group, 11 had median household income of less than $25,000 in 2005: Breathitt ($22,545), Carter ($19,728), Knott ($21,847), Lawrence ($21,024), Lee ($22,164), Letcher ($24,182), Lewis ($21,653), Magoffin ($22,368), Menifee ($24,921), Owsley ($17,524), and Wolfe ($22,189). An additional six counties had median incomes of less than $30,000: Bath ($28,317), Harrison ($28,619), Leslie ($25,549), Morgan ($26,119), Perry ($27,405), and Pike ($27,922). Only two counties, Harlan ($39,290) and Mason ($41,380) had median household incomes above $35,000 per year. By contrast, of the 17 counties in the Ballard group, only one county – Fulton – had a median income of less than $30,000 in 2005. Eight counties had a median household income over

[263] The following counties in eastern Kentucky were combined in a group and included in the KY193 wage schedule: Bath, Breathitt, Carter, Elliott, Harlan, Harrison, Johnson, Knott, Lawrence, Lee, Leslie, Letcher, Lewis, Magoffin, Martin, Mason, Menifee, Morgan, Nicholas, Owsley, Perry, Pike, Robertson, Rowan, and Wolfe.

[264] As noted above, Owsley County, a county contiguous to the Bath group, had a poverty rate of 45.5 percent in 2005.

[265] https://www.infoplease.com/us/census/kentucky/fulton-county

$35,000: Ballard ($36,575), Hickman ($35,857), Hopkins ($35,522), Livingston ($41,562), Lyon ($35,191), Marshall ($38,436), McCracken ($37,758), and Union ($36,612).[266]

F. From the 1930's to the Present, an Important Characteristic of Construction Labor Markets is that "Travelers" Work in Both Rural and Metropolitan Areas to Remain Continuously Employed, as Available Work and Weather Permit and to Provide a Reliable Source of Highly Skilled Labor on Projects in Less Densely Populated Areas

At the time the DBA was enacted, issuing general wage determinations for rural counties would have been unworkable since populations were sparser on a county-by-county basis than they presently are and the amount of construction, particularly during the Depression years, was a fraction of the levels in the 21st century. The number of counties in the country is nearly the same as it was in 1931 and the population in 1930 was 123,202,624 (about 37% of the current population).[267] Thus, it was not possible, at any time during the more than 90-year history of the DBA, to issue general wage determinations with sufficient data on a county-by-county basis in all rural areas across the country. Prior to the 1981-1982 rulemaking, the WHD consistently relied on data from more populous areas in deriving prevailing rates for thinly-populated areas. As noted above, for the Oahe Reservoir constructed in rural South Dakota in 1954, the WHD "obviously had to be drawn from the entire state and beyond," since there were no projects of a character similar in the "civil subdivisions" involved.[268]

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[266] *Kentucky: By The Numbers Data Series.* College of Agriculture, Food, and Environment. https://kybtn.ca.uky.edu/

[267] *Id.*

[268] Donahue (1964), at 510.

1. In Enacting the DBA, Congress was Aware of the Rampant Use of Travelers to Work on Government Construction Projects

In enacting the DBA, Congress clearly understood that the Secretary would exercise discretion in selecting the appropriate localities within which to collect and combine data. The Davis-Bacon Act and the 1935 amendments passed through both houses of Congress with no discussion of the problem of how the prevailing wage would be determined in villages too small to have a settled wage for the various crafts needed. However, during the House debate on the vetoed 1932 amendments, which were substantially identical to the 1935 amendments on this point, the floor manager, Representative Connery of Massachusetts, addressed the question of how to derive prevailing wages when there is no data available from the locality in which the DBA-covered work will be constructed:[269]

> Mr. O'CONNOR. But there may be many villages that have no plumbers in them, men actually working as plumbers. Bricklayers and metal workers and other highly skilled trades may not be found in a village in sufficient numbers to enable the Secretary of Labor to establish a prevailing rate of wage.
>
> Mr. CONNERY. I think the Secretary of Labor, when he figures out these predetermined rates of wages, will be able to determine that. Generally, there is a town near enough to ascertain the prevailing rate of wage for that town. If there is a job in a little town in New York, there will be a city near enough in order to determine the prevailing rate of wage for that little town.
>
> Mr. O'CONNOR. But the bill reads "in the city, town, or village where the public work is carried on."[]
>
> Mr. CONNERY. As a practical matter, they have had no trouble in that regard in connection with the Davis-Bacon bill.
>
> Mr. O'CONNOR. If they limit it to the language in this bill, there may be trouble about it.
>
> Mr. O'CONNERY. In the Davis-Bacon bill there is the same proposition, and they have been getting along.

[269] *Building & Constr. Trades' Dep't, AFLCIO v. Donovan*, 712 F.2d 611, 616, 617-618 (D.C. Cir. 1983), citing 75 *Cong.Rec*. 12,366 (1932).

2. The DOL Ignored the Realities of Traveling Patterns in the Construction Industry in Adopting §1.7(d)

In the 1981-1982 rulemaking, the DOL's justification for adoption of §1.7(d) ignored the realities of traveling patterns in the construction industry. In explaining the change in the longstanding policy, the DOL noted commenters had stated that ''importing'' higher rates from metropolitan areas caused labor disruptions where workers were ''unwilling to return to their usual pay scales after the project was completed.'' The DOL further stated that a "more appropriate alternative would be to use data from rural counties in other parts of the State.[270] Forty-years of history have amply demonstrated the DOL was wrong and that use of data from rural counties from opposite ends of the state have depressed local standards. Furthermore, the DOL's predictions in adopting §1.7 have proven to be wildly inaccurate. In the preamble to the Final Rule, the DOL grossly miscalculated the extent to which statewide data, particularly in residential surveys would be used in issuing prevailing rates of pay. The DOL clearly did not envision that use of statewide data would be the norm rather than the exception in stating "We believe that the use of "in the State" data is consistent with our policy, but we do not envision **except in most extraordinary circumstances** that data from an entire State would be needed to make a wage determination."[271]

CONCLUSION

SMART and SMACNA appreciate the opportunity to submit extensive recommendations on the WHD's survey methodology, particularly as it impacts the sheet metal trade, and to provide evidence in support of the proposed rules and our recommended revisions. As detailed above, we fully support a return to the pre-1983 survey methodology. Our fundamental concerns about the

[270] *See* 47 *Fed.Reg*. 23644 (May 28, 1982).

[271] *Id*., emphasis added.

survey process relate to the computation of rates for the key classification of sheet metal worker and all the work encompassed within our trade, which is broad, diverse, and highly skilled. If the DOL implement our recommendations, it would prevent the following methodological problems: 1) dividing survey data submitted on sheet metal worker into an indefinite number of subclassifications, and thereby, leaving very limited, and thus, unreliable data to derive a rate for the key classification of sheet metal worker; 2) producing open shop rates for HVAC unit installation by failing to address the division of jurisdiction between SMART and the UA on composite crews pursuant to a national agreement between SMART and the UA; and 3) jeopardizing the ability of SMART to prevail on "sheet metal worker" by combining architectural sheet metal data performed under SMART CBAs with data by other trades in the union sector on the same work. Most importantly, whichever methodology the WHD ultimately selects to avoid proliferation of subclassifications, SMART and SMACNA urge the WHD to choose a process that does not jeopardize SMART's ability to prevail on the lion's share of the work in the sheet metal industry – HVAC duct installation.

Date submitted: May 17, 2022

APPENDIX A

Summary of the Results of the Connecticut Building Survey for the Key Classification of Sheet Metal Work

The information on this chart was derived from WD-22's that were issued on January 9, 2019 for the metropolitan (7) and rural (1) counties in Connecticut.

County	SMART Rates Prevail	Amount of Data Submitted on HVAC Unit Installation	Amount of Data Submitted on HVAC Duct Installation
Fairfield	LU 38: Sheet Metal Worker (Metal Flashing and HVAC Duct Installation Only) **LU 40: Sheet Metal Worker (including HVAC unit installation)** LU 40: Sheet Metal Worker (Metal Roofs Installation)	32 (M†1)[272]	144 workers (M 0)
Hartford	**LU 40: Sheet Metal Worker (Including HVAC Unit Installation)** LU 40: Sheet Metal Worker (Metal Flashing and HVAC Duct Installation Only) LU 40: Sheet Metal Worker (Metal Roof Installation)	68/67 (M 0)	315/307 (M 0)
Litchfield (rural county)	LU 38: Sheet Metal Worker (Including Metal Flashing)	No data	No data
Middlesex	**LU 40: Sheet Metal Worker (Including HVAC Unit Installation)** LU 40: Sheet Metal Worker (Metal Flashing and HVAC Duct Installation Only)	72/71 (M 1)	324/316 (M 1)
New Haven	**LU 40: Sheet Metal Worker (Including HVAC Unit Installation)** LU 40: Sheet Metal Worker (Metal Flashing and HVAC Duct Installation Only) LU 40: Sheet Metal Worker (Metal Roofs Installation)	32 (M†1)	560/555 (M 0)
New London	LU 40: Sheet Metal Worker (Metal Flashing and HVAC Duct Installation Only) LU 40: Sheet Metal Worker LU 40: Sheet Metal Worker (Metal Roofs Installation)	3/3 – insufficient data	136/136 (M 0)

[272] The WD-22's use "†" to designate that federal data are included in deriving wage determinations and the numbers 0 and 1 to designate that the rates were derived at the county or group level, respectively.

Tolland	**LU 40: Sheet Metal Worker (Including HVAC Unit Installation)** LU 40: Sheet Metal Worker (Metal Flashing and HVAC Duct Installation Only) LU 40: Sheet Metal Worker (Metal Roofs Installation)	72/71 (M 1)	324/316 (M 1)
Windham	LU 40: Sheet Metal Worker (Metal Flashing and HVAC Duct Installation Only) LU 40: Sheet Metal Worker LU 40: Sheet Metal Worker (Metal Roofs Installation)	3/3 – insufficient data	139/139 (M 1)

APPENDIX B

Craft Identification Numbers Used by the WHD to Derive
Wage Determinations for the Sheet Metal Trade

Craft ID #'s	Tasks or Functions
1381	Sheet Metal Worker
26502	Sheet Metal Worker (HVAC Duct Installation Only)
1562	HVAC Mechanic: Duct Installation
26536	Sheet Metal Worker, Excludes HVAC Duct Installation
29880	Sheet Metal Worker (HVAC Duct and HVAC Unit Installation Only)
29998	Sheet Metal Worker (Metal Buildings - Installation of Siding/Wall Panels)
28890	Sheet Metal Worker, Excludes HVAC Duct and Metal Roof Installation
30934	Sheet Metal Worker (Siding Installation Only)
30935	Sheet Metal Worker, Excludes HVAC Duct and Siding Installation - Metal/Aluminum Vinyl
27046	Sheet Metal Worker, Excludes HVAC Duct and Unit Installation
27592	Sheet Metal Worker (HVAC Unit Installation)
30869	Sheet Metal Worker (HVAC Unit Installation Only)
27994	HVAC Mechanic (Installation of HVAC Unit Only, Excludes Installation of HVAC Pipe and Duct)
12378	Industrial: Sheet Metal Worker
12571	Industrial: HVAC Mechanic – Duct Installation
12713	Installer – Metal Flashing
1643	Installer – Siding
1034	Installer – Sign
1354	Installer – Gutters
30929	Sheet Metal Worker (Metal Roof Installation Only)
30949	Sheet Metal Worker, Excludes HVAC Duct, Metal Roof, and Metal Flashing Installation

SMART received the information used to compile this chart before the Wage and Hour Division recognized that testing, adjusting, and balancing (TAB) work is covered under the Davis-Bacon Act, and that this work is not the same occupation as "air balance engineer" listed in Field Operations Handbook 15e06.

APPENDIX C

Tennessee Building Surveys: Result for 20 Most Populous Counties and Roane County

County	SMART Prevails	"UAVG" (100% of the data submitted is union but no single rate comprises more than 50% of the data)	Open Shop
Anderson (Oak Ridge)[273]	Local 5 prevails on sheet metal worker (siding (metal/aluminum/vinyl)); sheet metal worker (HVAC duct installation only); and sheet metal worker (HVAC unit installation only)		
Blount	Local 5 prevails on sheet metal worker (HVAC duct installation only)	sheet metal worker (HVAC unit installation only)	sheet metal worker, excludes HVAC duct and unit installation
Bradley	Local 4 prevails on sheet metal worker (excludes HVAC duct installation) and Local 5 prevails on sheet metal worker (HVAC duct installation only)		
Davidson (Nashville)	Local 4 prevails on sheet metal worker (excludes HVAC duct installation) and Local 177 on sheet metal worker (HVAC duct installation only)		HVAC mechanic (installation of HVAC unit only)
Hamilton (Chattanooga)	Local 4 prevails on sheet metal worker (excludes HVAC duct installation) and Local 5 prevails on sheet metal worker (HVAC duct installation only)		

[273] Oak Ridge National Laboratory is located in Anderson and Roane counties. Although Roane is not one of the 20 most populous counties in Tennessee, it is included on this chart because of the dominant federal presence in it.

Knox (Knoxville)	Local 5 prevails on sheet metal worker (HVAC duct installation only)	sheet metal worker (HVAC unit installation only)	sheet metal worker, excludes HVAC duct and unit installation
Madison	Local 4 prevails on sheet metal worker		
Maury/Macon[274]	Local 4 prevails on sheet metal worker (excludes HVAC duct installation) and Local 177 prevails on sheet metal worker (HVAC duct installation only)		HVAC mechanic (installation of HVAC unit only)
Montgomery	Local 4 prevails on sheet metal worker		
Putnam/Pickett	Local 5 prevails on sheet metal worker		
Roane	Local 5 prevails on sheet metal worker (HVAC duct installation only) and sheet metal worker (excludes HVAC duct and unit installation)	sheet metal worker (HVAC unit installation only)	
Rutherford	Local 4 prevails on sheet metal worker (excludes HVAC duct installation) and Local 177 prevails on sheet metal worker (HVAC duct installation only)		HVAC mechanic (installation of HVAC unit only)
Shelby (Memphis)/ Fayette	Local 4 prevails on sheet metal worker (HVAC duct installation only); sheet metal worker (HVAC unit installation only); and sheet metal worker (excludes HVAC duct installation)		
Greene/Johnson	Local 5 prevails on sheet metal worker		
Robertson/Smith	Local 4 prevails on sheet metal worker (excludes HVAC duct installation) and Local 177 prevails on		HVAC mechanic (installation of HVAC unit only)

[274] The WHD included both counties – Maury and Macon – on the same wage determination. The WHD issued a single wage determination for other counties, as indicated on this chart.

	sheet metal worker (HVAC duct installation only)		
Sevier/Van Buren	Local 5 prevails on sheet metal worker		
Sullivan/Hawkins	Local 5 prevails on sheet metal worker (HVAC unit installation only)		sheet metal worker, excludes HVAC unit installation
Sumner	Local 4 prevails on sheet metal worker (excludes HVAC duct installation)		HVAC mechanic (installation of HVAC unit only)
Washington	Local 5 prevails on sheet metal worker (HVAC unit installation only)		sheet metal worker, excludes HVAC unit installation
Williamson	Local 4 prevails on sheet metal worker (excludes HVAC duct installation) and Local 177 prevails on sheet metal worker HVAC duct installation only)		HVAC mechanic (installation of HVAC unit only)
Wilson	Local 4 prevails on sheet metal worker (excludes HVAC duct installation) and Local 177 prevails on sheet metal worker (HVAC duct installation only)		HVAC mechanic (installation of HVAC unit only)