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29 CFR Part 5

Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act); Final Rule

DEPARTMENT OF LABOR

Office of the Secretary

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RIN 1215–AB21

Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act)

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor adopts as a final rule an amendment to the regulations, 29 CFR Part 5, which define the Davis-Bacon Act language *construction, prosecution, completion,* or *repair* at 29 CFR 5.2(j), and *site of the work* at 29 CFR 5.2(l). Specifically, this document revises the *site of the work* definition to include material or supply sources, tool yards, job headquarters, *etc.*, in the site of the work only where they are dedicated to the covered construction project and are adjacent or virtually adjacent to the location where the building or work is being constructed. Also changed is the regulatory definition of *construction* to provide that the off-site transportation of materials, supplies, tools, etc., is not covered unless such transportation occurs between the construction work site and a dedicated facility located "adjacent or virtually adjacent" to the construction site.

This document also revises section 5.2(l)(1) to include within the *site of the work*, secondary sites, other than the project's final resting place, which have been established specifically for the performance of the Davis-Bacon covered contract and at which a significant portion of the public building or work called for by the contract is constructed. In conjunction with this change, section 5.2(j) has been amended to provide that transportation of portion(s) of the building or work between a secondary covered construction site and the site where the building or work will remain when it is completed is subject to Davis-Bacon requirements.

EFFECTIVE DATE: January 19, 2001.

FOR FURTHER INFORMATION CONTACT: Timothy Helm, Office of Enforcement Policy, Government Contracts Team, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3018, 200 Constitution Avenue, NW., Washington, D.C. 20210. Telephone (202) 693–0574. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

This regulation does not contain any new information collection requirements and does not modify any existing requirements. Thus, this regulation is not subject to the Paperwork Reduction Act.

II. Background

A. Statutory and Regulatory Framework

Section 1 of the Davis-Bacon Act (DBA or Act) requires that "the advertised specifications for contracts * * * for construction, alteration and/or repair, including painting and decorating, of public buildings or public works * * * shall contain a provision stating the minimum wages to be paid to various classes of laborers and mechanics * * * and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers *employed directly upon the site of the work* * * * the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, * * * and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work * * *." 40 U.S.C. 276a (emphasis added).

Section 2 of the Act requires that every covered contract provide that in the event the contracting officer finds that "any laborer or mechanic employed by the contractor or any subcontractor *directly on the site of the work covered by the contract* has been or is being paid less than required wages, the government "may terminate the contractor's right to proceed with the work or such part of the work as to which there has been a failure to pay the required wages" and to hold the contractor liable for the costs for completion of the work. 40 U.S.C. 276a–1 (emphasis added).

The Congress directed the Department of Labor, through Reorganization Plan No. 14 of 1950 (5 U.S.C. App., effective May 24, 1950, 15 FR 3176, 64 Stat. 1267), to "prescribe appropriate standards, regulations and procedures" to be observed by federal agencies responsible for the administration of the Davis-Bacon and related Acts "[i]n order to assure coordination of administration and consistency of enforcement." 64 Stat. 1267.

On April 29, 1983, the Department promulgated a regulation (29 CFR 5.2(l)) defining the term *site of the work* within the meaning of the Davis-Bacon Act (see 48 FR 19540). This regulation reflected the Department's longstanding, consistent interpretation of the Act's *site of the work* requirement. See, *e.g., United Construction Company*, Wage Appeals Board (WAB) Case No. 82–10 (January 14, 1983); *Sweet Home Stone*, WAB Case Nos. 75–1 & 75–2 (August 14, 1975); *Big Six, Inc.*, WAB Case No. 75–3 (July 21, 1975); *T.L. James & Co.*, WAB Case No. 69–2 (August 13, 1969); CCH Wage-Hour Rulings ¶ 26,901.382, Solicitor of Labor letter (July 29, 1942).

The Department's regulations provide a three-part definition of *site of the work*. The first part at 29 CFR 5.2(l)(1) provides that "the *site of the work* is the physical place or places where the construction called for in the contract will remain when work on it has been completed and, as discussed in paragraph (l)(2) of this section, other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the site."

The second part at 29 CFR 5.2(l)(2) provides that "fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, *etc.*" are part of the *site of the work* provided they meet two tests—a geographic test of being "so located in proximity to the actual construction location that it would be reasonable to include them," and a functional test of being "dedicated exclusively, or nearly so, to performance of the contract or project."

The third part at 29 CFR 5.2(l)(3) states that fabrication plants, batch plants, borrow pits, tool yards, job headquarters, etc., "of a commercial supplier or materialman which are established by a supplier of materials for the project before the opening of bids and not on the project site, are not included in the *site of the work*." In other words, facilities such as batch plants and borrow pits are not covered if they are ongoing businesses apart from the federal contract work.

The regulatory definition of the statutory terms *construction, prosecution, completion,* or *repair* in section 5.2(j)(1) applies the *site of the work* concept. It defines these statutory terms as including the following:

[a]ll types of work done on a particular building or work *at the site thereof*, including work at a facility which is dedicated to and deemed a part of the *site of the work within the meaning of § 5.2(l)*—including without limitation (i) [a]lteration, remodeling, installation

(where appropriate) on the *site of the work* of items fabricated off-site; (ii) [p]ainting and decorating; (iii) [m]anufacturing or furnishing of materials, articles, supplies or equipment *on the site of the building or work* * * *; and (iv) [t]ransportation between the actual construction location and a facility which is dedicated to such construction and deemed a part of the *site of the work within the meaning of § 5.2(l).* (Emphasis added.)

B. The Department of Labor's Longstanding Interpretation of the Regulatory Site of the Work Definition

Prior to the recent appellate court rulings, the Department's longstanding, consistent application of the regulatory definition of *site of the work*—the area where laborers and mechanics are to be paid at least the prevailing wage rates, as determined by the Secretary of Labor—included both the location where a public building or work would remain after work on it had been completed, and nearby locations used for activities directly related to the covered construction project, provided such locations were dedicated exclusively (or nearly so) to meeting the needs of the covered project.

The Wage Appeals Board, which acted with full and final authority for the Secretary of Labor on matters concerning the labor standards provisions of the Davis-Bacon and related Acts (see 29 CFR 5.1 and 7.1 (c)),[1] consistently interpreted 29 CFR 5.2(l) to include as part of the *site of the work*, for purposes of Davis-Bacon prevailing wage coverage, support facilities dedicated exclusively to the covered project and located within a reasonable distance from the actual construction site. Consistent with the regulations, the Board also treated the transportation of materials and supplies between the covered locations and transportation of materials or supplies to or from a covered location by employees of the construction contractor or subcontractor as covered Davis-Bacon work. *See, e.g., Patton-Tully Transportation Co.*, WAB No. 90–27 (March 12, 1993) (distances of 5.4 to 14 miles, and 16 to 60 miles); *Winzler Excavating Co.*, WAB No. 88–10 (October 30 1992) (12½ miles); *ABC Paving Co.*, WAB Case No. 85–14 (September 27, 1985) (3 miles).

[1] On April 17, 1996, the Secretary redelegated jurisdiction to issue final agency decisions under, *inter alia*, the Davis-Bacon and related Acts and their implementing regulations, to the newly created Administrative Review Board (ARB or the Board). Secretary's Order 2–96 (Apr. 17, 1996), 61 FR 19978, May 3, 1996.

C. Federal Appellate Decisions and Subsequent Decision of the Administrative Review Board (ARB)

The D.C. Circuit first discussed the Department's *site of the work* definition in *Building and Construction Trades Department, AFL–CIO* v. *United States Department of Labor Wage Appeals Board*, 932 F.2d 985 (D.C. Cir. 1991) (*Midway*). That case involved truck driver employees of the prime contractor's wholly owned subsidiary, who were delivering materials from a commercial supplier to the construction site. The material delivery truck drivers spent ninety percent of their workday on the highway driving to and from the commercial supply sources, ranging up to 50 miles round trip and stayed on the *site of the work* only long enough to drop off their loads, usually for not more than ten minutes at a time.

At issue before the D.C. Circuit was whether the "material delivery truckdrivers" were within the scope of *construction* as defined by the regulatory provision then in effect at section 5.2(j), which defined the statutory terms *construction, prosecution, completion*, or *repair* to include, among other things, "the transporting of materials and supplies to or from the building or work by the employees of the construction contractor or construction subcontractor." The court held that "the phrase 'mechanics and laborers employed directly upon the site of the work' restricts coverage of the Act to employees who are working directly on the physical site of the public building or public work being constructed." 932 F.2d at 992. The court further stated that "[m]aterial delivery truckdrivers who come onto the *site of the work* merely to drop off construction materials are not covered by the Act even if they are employed by the government contractor," and consequently held that "29 CFR § 5.2(j), insofar as it includes off-site material delivery truck drivers in the Act's coverage, is invalid." *Id.*

The court expressly declined to rule on the validity of the regulation defining the *site of the work* at 29 CFR 5.2(l). 932 F.2d at 989 n.6, 991 n.12. However, it expressed the view that Congress intended to limit Davis-Bacon coverage to "employees working directly on the physical site of the public building or public work under construction." 932 F.2d at 990 n.9, 991.

On May 4, 1992, the Department promulgated a revised section 5.2(j) to accommodate the holding in *Midway*. 57 FR 19204. The revised regulation limits coverage of offsite transportation to "[t]ransportation between the actual construction location and a facility which is dedicated to such construction and deemed a part of the *site of the work* within the meaning of § 5.2(l)." 29 CFR 5.2(j)(1)(iv) (1993).

In the two more recent rulings, *Ball, Ball and Brosamer* v. *Reich*, 24 F. 3d 1447 (D.C. Cir. 1994) (*Ball*) and *L.P. Cavett Company* v. *U.S. Department of Labor*, 101 F.3d 1111 (6th Cir. 1996) (*Cavett*), the D.C. Circuit and Sixth Circuit, respectively, focused on the proper geographic scope of the statutory phrase *site of the work* in relation to borrow pits and batch plants established specifically to serve the needs of covered construction projects. In *Ball*, the D.C. Circuit ruled that the Department's application of section 5.2(l)(2) was inconsistent with the Act to the extent it covers sites that are at a distance from the actual construction location. The case involved workers at the borrow pit and batch plant of a subcontractor who obtained raw materials from a local sand and gravel pit and set up a portable batch plant for mixing concrete. The pit and batch plant were dedicated exclusively to supplying material for the completion of the 13-mile stretch of aqueduct that the prime contractor had contracted to construct. As described by the court, "the borrow pit and batch plant were located about two miles from the construction site at its nearest point." 24 F.3d at 1449.

In holding that the Davis-Bacon prevailing wage requirements did not apply to the borrow pit and batch plant workers, the court cited *Midway*, in which it had found "no ambiguity in the text [of the Davis-Bacon Act]" and thought it clear that "the ordinary meaning of the statutory language is that the Act applies only to employees working directly on the physical site of the public building or public work under construction." 24 F.3d at 1452. The court added that "the reasoning in *Midway* obviously bears on the validity of § 5.2(l)(2) to the extent that the regulation purports to extend the coverage of the Davis-Bacon Act beyond the actual physical site of the public building or public work under construction," (*id.*), and accordingly ruled that "the Secretary's regulations under which Ball was held liable are inconsistent with the Davis-Bacon Act. *See* 29 CFR § 5.2(l)(1)." 24 F.3d at 1453. The court nevertheless indicated that the regulations at section 5.2(l)(2) might satisfy the geographic limiting principle of the Davis-Bacon Act and *Midway* if the regulatory phrase in section 5.2(l)(2) "so located in proximity to the actual construction location that it would be reasonable to include them" were

applied "only to cover batch plants and gravel pits located in actual or virtual adjacency to the construction site." 24 F.3d at 1452.

In *Cavett* (arising under the Federal-Aid Highway Act, a Davis-Bacon related Act), the Sixth Circuit held that truck drivers hauling asphalt from a temporary batch plant to the highway under construction three miles away were not entitled to Davis-Bacon prevailing wages. The contract involved resurfacing of an Indiana state road, and as characterized by the court, "the Department of Labor included in the *site of the work* both a batch plant located at a quarry more than three miles away from the highway construction project and the Indiana highway system that was used to transport materials from the batch plant to the construction project." 101 F.3d at 1113–1114.

Relying on the D.C. Circuit's reasoning in *Midway* and *Ball*, the Sixth Circuit disagreed with the views of the lower court that the statutory language was ambiguous and that the *Ball* decision recognized ambiguity in the statutory text when it declined to decide whether coverage could extend to batch plants adjacent to or virtually adjacent to the boundaries of the completed project. The Sixth Circuit reasoned that it was not inconsistent for the *Ball* court to "conclude that while a facility in virtual adjacency to a public work site might be considered part of that site, a facility located two (or in this case three) miles away from the site would not." 101 F.3d at 1115. Thus, agreeing with *Ball*, the Sixth Circuit concluded that the statutory language means that "only employees working directly on the physical site of the work of the public work under construction have to be paid prevailing wage rates." *Id.*

Subsequent to the rulings in *Midway*, *Ball*, and *Cavett*, the Department's Administrative Review Board (ARB) addressed the Davis-Bacon Act's *site of the work* provision in *Bechtel Contractors Corporation (Prime Contractor), Rogers Construction Company (Prime Contractor), Ball, Ball and Brosamer, Inc., (Prime Contractor), and the Tanner Companies, Subcontractor,* ARB Case No. 97–149, March 25, 1998, reaffirming ARB Case No. 95–045A, July 15, 1996.

This case involved a dispute over whether the Davis-Bacon provisions applied to work performed at three batch plants established and operated in connection with construction work on the Central Arizona Project (CAP), a massive Bureau of Reclamation construction project consisting of 330 miles of aqueduct and pumping plants. The batch plants were located less than one-half mile from various pumping stations that were being constructed as part of the project. The Board initially ruled on the case on July 15, 1996 (*Bechtel I*) and later reaffirmed that decision on March 25, 1998 (*Bechtel II*).

The Board observed that the D.C. Circuit's recent decision in *Ball* had "created a good deal of confusion with respect to the coverage of the DBA." *Bechtel I*, slip op. at 6. The Board declined to read *Ball* or *Cavett* to mean that the statutory phrase "directly upon the site of the work" limits the wage standards of the DBA to "the physical space defined by contours of the permanent structures that will remain at the close of work." *Id.* Rather, the Board read *Ball* and *Cavett* as only precluding the Secretary from enforcing section 5.2(l)(2) of the regulations in a manner that did not respect the geographic limiting principle of the statute, while reserving ruling on section § 5.2(l)(1), since that provision was not at issue in those cases. *Bechtel II*, slip op. at 5; *Bechtel I*, slip op. at 6. The Board stated that interpretation of § 5.2(l)(1) requires examination of the question of whether the temporary facilities are so "located in virtual adjacency" to the site of the work that it would be reasonable to include them. *Id.*

The Board found that the work performed at the plants satisfied the test set out in § 5.2(l)(1), since aerial photographs of the construction sites showed the temporary batch plants to be located on land integrated into the work area adjacent to the pumping stations. The Board believed there was no principled basis for excluding the batch plant workers since they were employed on sites of the work to the same extent as the workers who cleared the land and the workers who inventoried, assembled, transported or operated tools, equipment or materials on nearby or adjacent property. The Board also observed that

> it is the nature of such construction, *e.g.*, highway, airport and aqueduct construction, that the work may be long, narrow and stretch over many miles. Where to locate a storage area or a batch plant along such a project is a matter of the contractor's convenience and is not a basis for excluding the work from the DBA. The map of the project introduced at hearing * * * abundantly illustrates that the project consisted of miles of narrow aqueduct connected by pumping stations. The only feasible way to meet the needs of the aqueduct construction was to have the concrete prepared at a convenient site and transported to the precise area of need. This equally holds true for the storage and distribution of other materials and equipment. Faced with such a project, the Board finds that work performed in actual or virtual adjacency to one portion of the long continuous project is to be considered adjacent to the entire project.

Bechtel I, slip op. at 6.

D. The Proposed Rule

The Department, by Notice of Proposed Rulemaking (NPRM) published in the **Federal Register** on September 21, 2000 (65 FR 57270), proposed for public comment an amendment to the regulations that define the Davis-Bacon Act language *construction, prosecution, completion,* or *repair* at 29 CFR 5.2(j), and *site of the work* at 29 CFR 5.2(l). The Department explained that revisions to these definitions are needed (1) to clarify the regulatory requirements in view of the three appellate court decisions, which concluded that the Department's application of these regulatory definitions was at odds with the language of the Davis-Bacon Act that limits coverage to workers employed "directly upon the site of the work," and (2) to address situations that were not contemplated when the current regulations were promulgated.

Specifically, the Department proposed to revise the *site of the work* definition to include material or supply sources, tool yards, job headquarters, *etc., only* where they are dedicated to the covered construction project *and* are adjacent or virtually adjacent to a location where the building or work is being constructed. The Department also proposed to revise the regulatory definition of *construction* to provide that the off-site transportation of materials, supplies, tools, etc., is not covered, except where such transportation occurs between the construction work site and a dedicated facility located "adjacent or virtually adjacent" to the construction site. However, the proposal did not alter the Department's view that truck drivers employed by construction contractors and subcontractors must be paid Davis-Bacon wage rates for any time spent on-site which is more than *de minimis*. Moreover, the Department did not propose to define the terminology "adjacent or virtually adjacent," leaving this question to be determined on a case-by-case basis, given that the actual distances will vary depending upon the size and nature of the project in question.

The Department also proposed to revise the *site of the work* definition so that it will address certain construction situations that the Department believes warrant coverage, which were not contemplated by the current regulations. The Department explained, by way of example, that new construction

technologies have been developed that make it practical and economically advantageous to build major segments of complex public works, such as lock and dam projects and bridges, at locations some distance up-river from the locations where the permanent structures will remain when their construction is completed. The Department noted that, in such situations, much of the construction of the public work is performed at a secondary site other than where it will remain after construction is completed, and therefore, believed that it is reasonable and consistent with the language and intent of the statute to cover such a location where it has been established specifically for the purpose of constructing a significant portion of a "public building or public work". The Department further stated that, to the best of its knowledge, projects built in such a manner are currently rare, and that it did not anticipate that the proposed rule would create a major exception to the normal rule limiting the *site of the work* to the place where the building or work will remain when the construction is completed. The Department, therefore, proposed to revise § 5.2(l)(1) to include within the *site of the work*, secondary sites, other than the project's final resting place, which have been established specifically for the performance of the Davis-Bacon covered contract and at which a significant portion of the public building or work called for by the contract is actually constructed.

In conjunction with this change, the Department also proposed to amend § 5.2(j) to provide that transportation of portion(s) of the building or work between a secondary covered construction site and the site where the building or work will remain when it is completed is subject to Davis-Bacon requirements. The Department stated that the *site of the work*, under these circumstances, would be literally moving between the two work sites, and therefore the laborers or mechanics who transport these portions or segments of the project should be reasonably viewed as "employed directly upon the site of the work."

The Department received 50 responses to the NPRM during the public comment period: two from federal agencies: the U.S. Army Corps of Engineers and the Department of the Air Force; four from state Departments of Transportation (DOT's) in Utah, Oregon, Iowa and West Virginia; thirteen contractor associations: the Associated General Contractors of America, Inc. (AGC) and the California AGC, AGC of Washington, the New York State AGC Chapter, the General Contractors Association of New York (which represents the heavy construction industry active in New York City), Associated Builders and Contractors, Inc. (ABC), the American Road & Transportation Builders Association (ARTBA), the National Asphalt Pavement Association (NAPA), the National Ready Mixed Concrete Association (NRMCA), an attorney for the California Dump Truck Owners Association, the Wisconsin Transportation Builders Association (WTBA), and the Contractors Association of Western Pennsylvania; the American Society of Civil Engineers (ASCE); an engineering firm—Johansen & Tuttle Engineering, Inc.; seventeen construction companies, ten reflecting AGC views; and the Pinal Gila Community Child Services, Inc.

Also submitting comments were ten union and union-supported organizations: the Building and Construction Trades Department, AFL-CIO (Building Trades), the International Union of Operating Engineers (IUOE), the Laborers International Union of North America (LIUNA), and the International Brotherhood of Teamsters, AFL-CIO; the National Alliance for Fair Contracting, and the Illinois Foundation for Fair Contracting (FFC), the Indiana-Illinois FFC, and the Midwest FFC; and the International Brotherhood of Electrical Workers, Local Unions Nos. 193 and No. 146 (Springfield and Decatur, Illinois, respectively). An individual who has been involved in wage regulation for twelve years also provided comments.

III. Comments and Analysis

The following is an analysis of all the principal comments received. Each submission has been thoroughly reviewed, and each criticism and suggestion has been given careful consideration. For each proposed revision, the analysis contains a description of the major comments and the Department's conclusions regarding those comments.

A. Site of the Work—§ 5.2(l)

1. Limiting Coverage of Dedicated Facilities to Those That Are "Adjacent or Virtually Adjacent" to the Construction Location

The Building Trades, LIUNA, the Teamsters and the Operating Engineers oppose this change, urging the Department to adopt a rule that would extend prevailing wage coverage to locations that are dedicated exclusively, or nearly so, to the performance of the covered project without regard to their geographic proximity to the actual construction site. The General Contractors Association of New York, Inc. also opposes this change, urging the Department to retain its previous interpretation of the law, *i.e.*, covering facilities that are located "within a reasonable distance" from the actual construction site. Johansen & Tuttle Engineering, Inc. expressed concern that disputes would arise if everyone working on a Davis-Bacon contract were not paid on the same basis.

The Building Trades, based on its reading of the legislative history of the Davis-Bacon Act, stated that the term "site of the work" was intended to refer to *any* location where tasks relating to construction of the public building or public work are performed by laborers and mechanics employed by contractors and subcontractors otherwise covered by the Davis-Bacon or related Acts. The Building Trades stated that the merits of this legislative history argument have never been considered by the courts, and therefore, the Secretary is not precluded from adopting a site of the work definition that extends coverage beyond the physical site of the public building or public work under construction. The Operating Engineers commented that the statutory language "directly upon the site of the work" is ambiguous, and can fairly be construed to mean any location where work in furtherance of the contract occurs.

The Department believes that both the D.C. Circuit and the Sixth Circuit have spoken clearly on these issues and that the Department is constrained by these courts' decisions in *Ball* and *Cavett*, respectively, to limit prevailing wage coverage of off-site, dedicated support facilities to those that are either adjacent or virtually adjacent to the construction location.

The Building Trades and LIUNA both stated that the same justification for including locations established specifically for the purpose of constructing a significant portion of a building or work in the definition of "site of the work" for Davis-Bacon purposes applies with equal force to locations used for activities such as temporary batch plants, fabrication facilities, borrow pits and tool yards that are directly related to the covered construction project, provided those locations are dedicated exclusively or nearly so to supporting that project. In the Department's view, the underlying justification for covering secondary construction sites where significant portions of the building or work are being constructed has no application to dedicated support facilities, such as those mentioned in the regulation. The

basis for the Department's proposed change (discussed below), to include secondary construction sites where a significant portion of the public building or work called for by the contract is constructed, is that the Department views such locations as the actual physical site of the public building or work being constructed. On the other hand, the Department does not view the location of dedicated support facilities, which typically involve the furnishing of materials or supplies, as an actual physical location of the public building or public work. Rather, such dedicated support facilities are viewed as "included" within the "site of the work" only where they are located on, adjacent, or virtually adjacent to the site of the public building or public work.

In its comments, the AGC questioned whether a facility located two miles away from a Davis-Bacon construction site is "adjacent or virtually adjacent" to it, and expressed concern that the Department's proposal provides inadequate guidance as to the geographical range for covering support facilities. The AGC of Texas urged the Department to define "site of the work" precisely and to exempt facilities not located directly upon the physical site of the work. The ABC, on the other hand, sees no purpose to engaging in rulemaking to define "adjacent," because it means "next to; adjoining," and any attempts to expand the Davis-Bacon Act's coverage to non-adjacent locations violates the holdings in *Ball* and *Cavett*. The Air Force stated that it took no exception to this proposed change, based on its assumption that the Department would "not attempt to expand the term into something more closely resembling its previous 'in proximity' test."

The state DOT's of Oregon, Utah, Iowa, and West Virginia, and the National Ready Mixed Concrete Association stated that the Department should clarify the meaning of "adjacent or virtually adjacent" in terms of the distance from the actual construction site within which dedicated support facilities will be deemed covered. The West Virginia DOT recommended that facilities located one-fourth of a mile from the construction site be considered "virtually adjacent"; the Iowa DOT suggested that "virtually adjacent" should be defined as a specific distance, such as "1,500 meters from the limits of the work site or from the project right of way, etc."; and the Utah DOT recommended setting the distance at "approximately one-half mile, with the qualifier that if the facility is set up more than a half-mile away just to avoid paying Davis-Bacon, [the contractor] must pay Davis-Bacon anyway."

The Operating Engineers, on the other hand, commented that, if the Department continues to include a geographic test in its site of the work definition, it should not define the terminology "adjacent or virtually adjacent" because a strict limitation in a definition of those terms would have the potential to create results contrary to the intent of the Act. The Operating Engineers agreed with the Department's observation in its NPRM that "actual distance may vary depending upon the size and nature of the project," and commented that "[t]he Wage and Hour Division must have the latitude to reach results that make sense given the parameters of the particular project under construction."

The U.S. Army Corps of Engineers commented that "[c]ase by case referral to the Department for resolution of 'actual or virtual adjacency' would disrupt both contract administration and effective management of project appropriations." However, the Corps' discussion of this concern related primarily to the Department's proposal to expressly cover secondary sites where substantial portions of the project are constructed, which does not contain an "actual or virtually adjacent" limitation. In this same vein, the Nicholas Grant Corporation commented that if the question of whether a support facility is "adjacent or virtually adjacent" is to be determined on a case-by-case basis, such determination "must be made prior to bid time so the contractor can bid the project with reasonable knowledge that their construction costs are covered."

After review of the relevant comments, the Department continues to be of the view that it should not include a precise definition of the terms "adjacent or virtually adjacent" in its regulations. The Department believes that by using the term "virtual" the courts intended the Department to apply the "site of the work" requirement narrowly, but with common sense and some flexibility. As the Board observed in *Bechtel II*, "[i]t is not uncommon or atypical for construction work related to a project to be performed outside the boundaries defined by the structure that remains upon completion of the work." The Board cited as an example construction cranes that are typically positioned outside the permanent site of the construction because it would not be possible to place the crane where the building is to stand. Another common example would be work at a temporary batch plant constructed for the exclusive purpose of supplying asphalt for the construction of a highway project. It would certainly appear unlikely for practical reasons that the contractor would install the batch plant directly on the site of the highway because it would stand in the way of the paving process. Rather, the batch plant would more likely be located somewhere off to the side of the highway, *i.e.*, nearby, but not directly upon the site of where the highway will remain upon completion. Thus, while the Department clearly recognizes that the courts have narrowed the geographic limitation for covering temporary support facilities as previously applied under the regulations, we also believe that the courts allowed the Department some leeway to determine whether such facilities are in "virtual adjacency" to the permanent construction site.

Since it is apparent that in certain circumstances dedicated support facilities not located directly on the site where the permanent construction will remain should be covered, the question arises of just how far such a facility can be from the actual construction site and still be considered part of the "site of the work." The Department is of the opinion that establishing a specific maximum distance would be ill-advised because it would create an arbitrary, artificial benchmark for determining Davis-Bacon coverage that ignores the differing nature of various construction processes. This would enable contractors to locate dedicated support facilities immediately beyond any such boundary solely for the purpose of avoiding Davis-Bacon coverage, thereby defeating the purposes of the Act.

The Department has concluded that the only fair and practical method for determining whether a temporary facility is virtually adjacent to the "site of the work" is on a case-by-case basis. The Department believes that the Board's analysis in the two *Bechtel* decisions, following close on the heels of the issuance of the court opinions in *Ball* and *Cavett*, provides an excellent example of such a determination and, as such, provides considerable guidance on how the amended definition will be applied by the Department. In the *Bechtel* matter, the record was unclear as to the exact measurement of distance between the location of the temporary batch plants and the permanent location of the pumping stations, which were constructed as part of the 330-mile aqueduct project. The distances were estimated at somewhere between several hundred feet and one-half mile. Because of the narrow, linear nature of the project, concrete from the batch plants was delivered to construction locations up to 15 miles from the batch plants.

Based in part on its examination of aerial photographs, the Board determined that the batch plants were located "on land integrated into the work area adjacent to the pumping plants," and that "[w]orkers at the batch plants were employed on the sites of work equally as much as the workers who cleared the land and the workers who inventoried, assembled, transported or operated tools, equipment or materials on nearby or adjacent property." *Bechtel I*, slip op. at 6. The Board concluded that "in examining a project like the [Arizona aqueduct project]—a huge project stretching over approximately 330 miles—'it is not unreasonable' to consider the three batch plants in 'virtual adjacency' to the project, given their proximity to the pumping stations as clearly shown by the photographs in evidence." *Bechtel II*, slip op. at 6.

The Department believes that the *Bechtel* matter illustrates the difficulties inherent in establishing a specific distance for defining the terms, "virtually adjacent." As demonstrated in *Bechtel*, it can be almost impossible to determine the exact outer boundaries of large public works projects, such as the aqueduct project in *Bechtel* or a major highway construction project. Thus, a numerical figure representing the maximum distance a dedicated facility can be located from the construction site would be arbitrary and impractical to apply. In addition, the Department does not believe that a single linear measurement of distance could be fairly applied to determine the coverage of all off-site facilities, given that Davis-Bacon projects vary to such a wide degree in size and nature. *See, e.g., Bechtel II*, slip op. at 6. For example, it was reasonable, given the magnitude and the nature of the aqueduct project in *Bechtel*, for the Board to conclude that the batch plants located somewhere up to one-half mile from the actual construction sites (the pumping stations) were located "virtually adjacent" to the project. In contrast, the "site of the work" limits applicable to a project for the construction of a single building in an urban location would likely be more constricted. In such a case, a dedicated facility located only a few city blocks away from the building project would most likely *not* be considered "virtually adjacent" for Davis-Bacon purposes.

The Department believes that in practice the determination of the site of the work will not be difficult. In fact, the *Bechtel* case is the only case we are aware of in which the issue has arisen since the *Ball* and *Cavett* decisions. The Department would expect contracting agencies and contractors to perform a practical analysis similar to that employed by the Board in the *Bechtel* decisions to determine whether temporary facilities established nearby to serve the federal or federally-assisted project are covered by the Davis-Bacon provisions, just as they do with respect to other issues as a regular matter.

2. Inclusion of Secondary Sites Established Specifically for the Performance of the Davis-Bacon Covered Contract and at Which a Significant Portion of the Public Building or Work Called for by the Contract Is Constructed

In support of this proposed change, LIUNA, the Building Trades, and the Operating Engineers have each, to a varying degree, provided detailed descriptions of the innovative construction techniques developed and currently in use, which allow significant portions of public buildings and public works to be constructed at locations other than the final resting place of the building or work. The Building Trades stated that the amount of so-called "off-site" work specifically related to many construction projects has steadily expanded in ways never contemplated when the Davis-Bacon Act was amended in 1935 to include the language "directly upon the site of the work." The Operating Engineers stated that Congress clearly intended to cover actual construction sites, but could never have envisioned that "significant portions" of public works could be constructed other than at the final resting place of the public work. The General Contractors Association of New York similarly commented that new construction technologies have made it practical for "major segments of complex public works" to be built off-site and then transported by barge or rail to be put into place at the final location, and that such projects were not contemplated by the Department's current rules because such technology did not exist at the time of their promulgation.

LIUNA, the Building Trades, and the Operating Engineers each cite the Braddock Locks and Dam project on the Monongahela River in Allegheny County, Pennsylvania as an example that illustrates the compelling need for modification of the current site of the work regulation. The Braddock project involves the construction of two massive floating structures, each about the length of a football field, which would comprise the vast bulk of the new gated dam. The actual construction of these floating structures is at an upriver location on or near the water. They are then floated down the river to the point where they are submerged into the dam and gate piers. According to these commenters, the Army Corps of Engineers, which is contracting for this work, views the construction of these 300-foot structures as "off-site" work, and thus, has taken the position that the workers who build the structures are not entitled to Davis-Bacon coverage. Citing language in the *Cavett* decision, LIUNA stated that there is "no doubt" that the place where the floating structures will be constructed is "the actual physical site of the public work under construction." 101 F.3d at 1115.

The Operating Engineers also cited two Wage Appeals Board cases as demonstrating the need for this regulatory change—*ATCO Construction, Inc.*, WAB Case No. 86–1 (August 22, 1986), and *Titan IV Mobile Service Tower*, WAB Case No. 89–14 (May 10, 1991). The Operating Engineers suggested that the absence of a regulation allowing coverage of a construction site other than the place where the building or work will remain resulted in the Board inappropriately applying the geographic test set forth in section 5.2(l)(2) in reaching inconsistent conclusions regarding coverage of the remote construction locations that were at issue in those two cases.

In *ATCO*, the Board found that Davis-Bacon coverage applied to workers at a temporary dedicated facility in Portland, Oregon that was established exclusively for the construction of about 405 military housing units, which were then shipped 3,000 miles for final placement at Adak Naval Air Station in the Aleutian Islands, Alaska. The Operating Engineers stated that the Board reached the right result for the wrong reason, and by finding the construction facility in Portland to meet the regulatory geographic test of reasonable proximity to the Naval Air Station 3,000 miles away, left the Department vulnerable to criticism from the courts. In *Titan*, the Board reached an opposite result with respect to workers who constructed several "modular units" that were to be transported to a distant location where they would be assembled into a 300-foot mobile service tower for building and servicing Titan missiles. According to the Operating Engineers, the largest of the modular units was equivalent in size to a three-story building. The units were originally constructed at a dedicated facility in Tongue Point, Oregon, and then transported by barge to Vandenberg AFB, which was located approximately 1,000 miles away, where the units were finally assembled. The Board found that the Tongue Point location did not

satisfy the geographic prong of the two-part site of work test for covering off-site facilities, and thus, denied Davis-Bacon coverage to nearly 400 construction workers, notwithstanding that they performed 40% of the total amount of work called for by the contract.

The Operating Engineers stated that there is no rational basis for the selection of one site of work over another where substantial construction work occurs at more than one site, and that the proposed change to section 5.2(l)(1) will ensure that Davis-Bacon coverage applies to projects such as the Braddock Lock and Dam, the Titan missile service tower, and the ATCO housing unit project, where significant portions of a public work are constructed at dedicated sites other than where the public work will remain.

The ABC, AGC, several other contractor associations, individual contractors, the Oregon Department of Transportation, the Air Force and the Army Corps of Engineers opposed this proposed change to the definition of "site of the work," stating it amounts to an expansion of statutory coverage and would result in vague standards for coverage without objective criteria for determining what constitutes a "significant portion" of the project. The ABC also commented that the Department has not provided any credible basis for its assertion that this proposed change will not create a "major" exception to the normal rule limiting the site of the work to the place where the building or work will remain. The ABC also expressed concern that the new rule would threaten to expand the Act's coverage to "many existing off-site pre-fabrication specialty contractors."

The Air Force and the Army Corps of Engineers expressed concern that this proposed change would present significant procurement and administrative problems. The Air Force states that agencies would be compelled in some instances "to solicit and award contracts without knowing where all of the various possible sites of 'significant work' may be located after award, and that some solicitations would require "numerous wage determinations to cover all the possible 'areas' where some construction might occur, depending upon which bidder might be awarded the contract. The Corps similarly commented that "[a]ny effort on the part of the contracting agency to 'guess' the location of potential secondary sites planned by potential bidders can not be fairly administered."

After review of these comments, the Department continues to be of the view that the current *site of the work* definition does not adequately address certain rare situations that warrant coverage. As many of the comments have demonstrated, new construction technologies currently exist that make it practical and economically advantageous to build major segments of complex public works, such as lock and dam projects and bridges, at locations some distance up-river from the locations where the permanent structures will remain when their construction is completed. Several commenters have provided actual examples of current, ongoing projects where payment of Davis-Bacon wages for work performed at the secondary locations is in dispute. These comments have also shown that, in such situations, much of the actual construction of the public work itself is performed at a secondary site other than where it will remain after construction is completed.

The existing regulatory definition in § 5.2(l)(1) states that coverage is "limited to the physical place or places where construction called for in the contract will remain * * * and other adjacent or nearby property." As the Operating Engineers demonstrated with reference to past Wage Appeals Board cases, literal application of the current regulatory language can result in the exclusion from coverage construction at a location some distance from the final resting place of a project, even if a significant portion of the project is actually constructed at that location. The Department does not believe such a result to be consistent with either the language or intent of the Davis-Bacon Act.

The Department does not believe that this change constitutes an expansion of statutory coverage beyond the geographical requirement "directly upon the site of the work," as several commenters have alleged. As the court in *Cavett* stated, "The statutory phrase 'employed directly on the site of the work' means that only employees working directly on the physical site of the public work under construction have to be paid prevailing wages." 101 F.3d at 1115. The Department believes that when a significant portion of a project, like the 300-foot floating structures that comprise the Braddock Lock and Dam, the three-story Titan missile service tower modules, or the 405 Adak housing units, is constructed at a secondary location, such location is, in actuality, the physical site of the public work being constructed. Or, as the Operating Engineers succinctly stated, "it is the covered construction project." Therefore, the Department concludes that a location established specifically for the purpose of constructing a significant portion of a "public building or public work" is reasonably viewed as an independent "site of the work" within the meaning of the Davis-Bacon Act and that employees performing construction work at such a location should receive prevailing wages, regardless of the distance between the location of their construction site and the final resting place of the project.

The Department emphasizes that it does not intend that this change to the definition of the site of the work will create a major exception to the normal rule limiting the site of the work to the place where the building or work will remain when the construction is completed. Ordinary commercial fabrication plants, such as plants that manufacture prefabricated housing components, would *not* be covered by this amendment because they are not "established specifically for the performance of the contract or project." Furthermore, ordinary material supply sites, even if dedicated to the project, would not involve the construction of a "significant portion" of the building or work being constructed pursuant to the government contract. This definitional change is designed to apply Davis-Bacon coverage only to locations where such a large amount of construction is taking place that it is fair and reasonable to view such location as a site where the public building or work is being constructed. In the past, the Wage Appeals Board has termed such a situation an "anomaly," but the Department has treated such anomalous situations with inconsistent results under the current regulations (*ATCO* and *Titan*). It is the Department's intention in this rulemaking to require in the future that workers who construct significant portions of a federal or federally-assisted project at a location other than where the project will finally remain, will receive prevailing wages as Congress intended when it enacted the Davis-Bacon and related Acts.

Following review of the comments, the Department continues to be of the view that it is rare for projects to be built in this manner. While LIUNA in particular has described various types of structures that can be built at one location and then transported to another, the commenters, as a whole, have identified only two ongoing lock and dam projects (Braddock and Olmsted) as examples of projects that could fall within the criteria of this amendment. Additionally, the Department is aware of only two administrative cases considered by the Department's Wage Appeals Board or Administrative Review Board where a

significant portion of a project was constructed at a location established specifically for the project before being transported to another location for installation (*ATCO* and *Titan*).

With respect to the comments urging the Department to specifically define the terms "significant portion," we believe that it is both unnecessary and unwise to do so. We think that a precise definition would be unwise because the size and nature of the project will dictate what constitutes a "significant portion" under this provision. We believe such a definition to be unnecessary because, in those rare situations where projects are constructed in this manner, application of this provision should normally be obvious. However, if the agency is unable to determine whether this provision should apply, we anticipate that any question would typically arise early in the procurement process so that advice could be obtained from the Department of Labor in a timely manner.

We appreciate the concerns raised by the contracting agencies since some changes in their procedures may be necessary. However, since these projects will likely be rare, the Department does not anticipate that this amendment will place any significant additional burden on the contracting agencies with respect to their procurement practices. The Department recognizes that contracting agencies will need a mechanism to ascertain in advance the locations where potential bidders would build the project so that wage determinations may be obtained for each location. The Department believes these mechanisms are best developed through the agencies' procurement regulations. The Department points out that most wage determinations are published and widely available. The Department is of the view that, in most instances where a significant portion of a major project is to be constructed at a secondary site, the possible locations of the construction sites would be limited as a practical matter, and therefore, it would not be onerous for the contracting agency to include a wage determination covering the possible construction locations when soliciting bids for the project. One option may be the two-step process utilized under the McNamara-O'Hara Service Contract Act. *See* 29 CFR 4.54(b).

B. Coverage of Transportation—§ 5.2(j)

1. Limiting Coverage of Off-Site Transportation of Materials, Supplies, Tools, etc., to Transportation Between the Construction Work Site and a Dedicated Facility Located "Adjacent or Virtually Adjacent" to the Construction Site

The Building Trades, LIUNA and the Teamsters oppose this amendment, urging the Department to reinstate or repromulgate the definition of "construction, prosecution, completion, or repair" that was withdrawn in 1992, which included transportation of materials and supplies by laborers and mechanics employed by contractors and subcontractors covered by the Davis-Bacon and related Acts. These commenters maintained that the Department's revision of section 5.2(j) in response to *Midway* to limit coverage of off-site transportation to that occurring between the actual construction site and dedicated, nearby facilities was unnecessary. In their view, *Midway* did not address the question of whether the regulatory definition of "construction," in effect at that time, could validly be applied to truck drivers hauling off-site to and from projects covered by the so-called "related Acts," which require the payment of Davis-Bacon prevailing wages on federally-assisted projects. They note that the related Acts generally do not contain the "site of the work" language relied upon by the court in *Midway*. They believe that the Department should in each case look to the particular statute applicable to the project to determine whether it contains a site-of-work limitation that would preclude coverage of off-site truck driving activities.

This request in effect asks the Department to apply different standards for prevailing wage coverage to projects subject to the Davis-Bacon Act from those applicable to the related Acts. The Department believes that such a result would run contrary to the spirit and intent of Reorganization Plan No. 14 of 1950, which authorizes the Secretary of Labor to "prescribe appropriate standards, regulations, and procedures" in order to "assure consistent and effective enforcement" of the labor standards provisions of the Davis-Bacon Act and the related Acts. Coverage standards that would differ for the same type of work depending upon the applicable statute would likely result in confusion in the construction industry among both contractors and contracting agencies and likely would lead to labor dissatisfaction and disputes. Furthermore, the Sixth Circuit rejected the notion that different coverage standards might be applied to related Act projects, when it concluded that the Federal-Aid Highways Act, a Davis-Bacon related Act, "incorporates from the Davis-Bacon Act not only its method of determining prevailing wage rates but also its method of determining prevailing wage coverage. In other words, if 29 CFR 5.2(l) is inconsistent with the Davis-Bacon Act it must also be inconsistent with the Federal-Aid Highways Act." *Cavett*, 101 F.3d at 1116. An exception would of course exist if the language and/or clear legislative history of a particular Davis-Bacon related Act reflected clear congressional intent that a different coverage standard be applied. *See*, e.g., the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996.

The AGC and the ABC oppose the proposed amendment to section 5.2(j), contending that the regulation should instead be amended to "exempt" delivery truck drivers from Davis-Bacon coverage while engaged in hauling activities, regardless of who employs them and how much time they spend on-site. The AGC, the ABC, the Wisconsin Transportation Builders Association and the American Road & Transportation Builders Association also object to the Department's statement in the NPRM that "truck drivers employed by construction contractors and subcontractors must be paid at least the rate required by the Davis-Bacon Act for any time spent on-site which is more than *de minimis*." 65 FR 57272. The AGC states that the "de minimis" threshold is "subjective, vague and ambiguous," but assuming such a threshold is appropriate, 50 percent would be the proper standard, *i.e.*, only where the employee spends more than 50 percent of his or her total time in a workweek performing work as a laborer or mechanic on-site should the worker be compensated at prevailing wage rates.

The Department disagrees that *Midway* exempts all material delivery truck drivers regardless of how much time they spend on the site of the work. Clearly, truck drivers who haul materials or supplies from one location on the site of the work to another location on the site of the work are "mechanics and laborers employed directly upon the site of the work," and therefore, entitled to prevailing wages. Likewise, truck drivers who haul materials or supplies from a dedicated facility that is adjacent or virtually adjacent to the site of the work pursuant to amended section 5.2(l) are employed on the site of the work within the

meaning of the Davis-Bacon Act and are entitled to prevailing wages for all of their time spent performing such activities.

It is also the Department's position, as stated in the NPRM, that truck drivers employed by construction contractors and subcontractors must be paid at least Davis-Bacon rates for any time spent on-site which is more than de minimis. It must be noted that this is not a regulatory change, nor is it a subject of this rulemaking. However, the Department will provide some discussion on this issue in order to provide some clarification as to its position.

In the wake of *Midway* and the corresponding change to our regulations, the Department no longer asserts coverage for time spent off-site by material delivery truck drivers. *Midway* determined that material delivery truck drivers are not covered because their work is not performed on the site of the work, not because of the type of work they perform. The court held "that the Act covers only mechanics and laborers who work on the site of the federally-funded public building or public work, not mechanics and laborers employed *off-site,* such as suppliers, materialmen, and material delivery truckdrivers, regardless of their employer." 932 F.2d 992 (emphasis added). Thus, *Midway* provided material delivery truck drivers no blanket exception to Davis-Bacon coverage, as some commenters seem to suggest.

Giving the Act a literal reading, as the courts have done in *Midway, Ball,* and *Cavett,* all laborers and mechanics, including material delivery truck drivers, are entitled to prevailing wages for *any* time spent "directly upon the site of the work." The *Midway* court noted that the Midway truck drivers came on-site for only ten minutes at a time to drop off their deliveries and that the time spent "directly upon the site of the work" constituted only ten percent of their workday, but that no one had argued in the case that the truckdrivers were covered only during that brief time. Our reading of *Midway* does not preclude coverage for time spent on the site of the work no matter how brief. However, as a practical matter, since generally the great bulk of the time spent by material truck drivers is off-site beyond the scope of Davis-Bacon coverage, while the time spent on-site is relatively brief, the Department chooses to use a rule of reason and will not apply the Act's prevailing wage requirements with respect to the amount of time spent on-site, unless it is more than "de minimis." Pursuant to this policy, the Department does not assert coverage for material delivery truckdrivers who come onto the site of the work for only a few minutes at a time merely to drop off construction materials.

2. Covering Transportation of Portions of the Building or Work Between a Secondary Covered Construction Site and the Site Where the Building or Work Will Remain When It Is Completed

The Department received only a few comments in connection with this proposed change. The ABC stated that "the Department has no authority to extend the Act's coverage to the nation's highways or rivers for the action of transporting items of any kind to or from a construction site, or between sites of any kind." The ABC further stated that the Department's explanation that the site of the work is "literally moving" between the two work sites is "completely unsupported and contrary to law." The American Road & Transportation Builders Association objected to this provision on the grounds that it will increase transportation costs. The Army Corps of Engineers stated that "moving sites of work" is an impractical concept because multiple wage determinations might have to be issued in cases where the project was transported across more than one wage determination area. The Foundations for Fair Contracting favored this proposal.

The Department does not anticipate that this proposed change will have a substantial impact since the Department believes that the instances where substantial amounts of construction are performed at one location and then transported to another location for final installation are rare. Thus, the Department believes that this type of transportation activity will occur rarely. The Department nonetheless continues to believe that workers who are engaged in transporting a significant portion of the building or work between covered sites, as contemplated in § 5.2(l)(1), are "employed directly upon the site of the work," and therefore, are entitled to prevailing wages, provided they are "laborers and mechanics" under the Act. However, not included in such coverage would be the separate transportation of materials and supplies between the two covered "sites of the work." With respect to the Corps' concern that multiple wage determinations might apply in some instances, the Department has made an administrative determination that when faced with the prospect that transportation will take place in more than one wage determination area, the applicable wage determination will be the wage determination for the area in which the construction will remain when completed and will apply to all bidders, regardless of where they propose to construct significant portions of the project.

IV. Executive Order 12866; Small Business Regulatory Enforcement Fairness Act; Unfunded Mandates Reform Act

No comments were received on the Department's initial determinations under this section that the proposed rule was neither a "significant regulatory action" within the meaning of section 3(f) of Executive Order 12866, nor a "major rule" under the Small Business Regulatory Enforcement Fairness Act of 1996, and that this rulemaking is not subject to the Unfunded Mandates Reform Act of 1995. Because of the interests expressed by some of the contracting agencies, the final rule is nonetheless being treated as a significant rule. However, the rule is not economically significant and does not require preparation of a full regulatory impact analysis. The rule is not expected to have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a section of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. The modifications to regulatory language in this final rule limit coverage of off-site material and supply work from Davis-Bacon prevailing wage requirements as a result of appellate court rulings. In addition, the final rule makes only a limited amendment to the *site of the work* definition to address an issue not contemplated under the current regulatory language—those instances where significant portions of buildings or works may be constructed at secondary sites which are not in the vicinity of the project's final resting place. It is believed that such instances will be rare, and that any increased costs which may arise on such projects would be offset by the savings resulting from the other changes that limit coverage.

The Department also concludes that the rule is not a "major rule" requiring approval by the Congress under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*). The Department continues to be of the view that the rule will not likely result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for

consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

For purposes of the Unfunded Mandates Reform Act of 1995, this rule does not include any federal mandate that may result in excess of $100 million in expenditures by state, local and tribal governments in the aggregate, or by the private sector. Furthermore, the requirements of the Unfunded Mandates Reform Act, 2 U.S.C. 1532, do not apply here because the rule does not include a Federal mandate. The term *Federal mandate* is defined to include either a Federal intergovernmental mandate or a Federal private sector mandate. 2 U.S.C. 658(6). Except in limited circumstances not applicable here, those terms do not include an enforceable duty which is a duty arising from participation in a voluntary program. 2 U.S.C. 658(7)(A). A decision by a contractor to bid on federal and federally assisted construction contracts is purely voluntary in nature, and the contractor's duty to meet Davis-Bacon Act requirements arises from participation in a voluntary federal program.

V. Executive Order 13132 (Federalism)

The Department has reviewed this rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have federalism implications. The rule does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

VI. Regulatory Flexibility Analysis

The Department has determined that this regulation will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. This rule will primarily implement modifications resulting from court decisions interpreting statutory language, which would reduce the coverage of Davis-Bacon prevailing wage requirements as applied to construction contractors and subcontractors, both large and small, on DBRA covered contracts. In addition, the rule will make a limited amendment to the *site of the work* definition to address an issue not contemplated under the current regulatory language—those instances where significant portions of buildings or works may be constructed at secondary sites which are not in the vicinity of the project's final resting place. The Department believes that such instances will be rare, and that any increased costs which may arise on such projects would be offset by the savings due to the other limitations on coverage provided by the rule. The Department of Labor has certified to this effect to the Chief Counsel for Advocacy of the Small Business Administration. Notwithstanding the above, the Department prepared and published a Regulatory Flexibility Analysis in the NPRM. After reviewing comments on the proposed rule, the Department has prepared the following final regulatory flexibility analysis regarding this rule:

(1) The Need for and Objectives of the Rule

The Department is promulgating this new rule to clarify the regulatory requirements concerning the Davis-Bacon Act's *site of the work* language in view of three appellate court decisions. These decisions concluded that the Department's application of its regulations to cover certain activities related to off-site facilities dedicated to the project was at odds with the Davis-Bacon Act language that limits coverage to workers employed "directly upon the site of the work." This amendment to the Department's regulations is therefore necessary to bring the Department's regulatory definitions of the statutory terms *construction, prosecution, completion,* and *repair* at 29 CFR 5.2(j), and *site of the work* at 29 CFR 5.2(l) into conformity with these court decisions.

The Department is also issuing this new rule in order to address situations that were not contemplated when the current regulations concerning *site of the work* were promulgated. The revised regulations make clear that the Davis-Bacon Act's scope of coverage includes work performed at locations established specifically for the purpose of constructing a significant portion of a building or work, as well as transportation of portions of the building or work to and from the project's final resting place. These regulatory changes are necessitated by the development of new construction technologies, whereby major segments of a project can be constructed at locations some distance from where the permanent structure(s) will remain after construction is completed.

(2) Summary of Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis

None of the commenters raised any issues specifically related to the Department's Initial Regulatory Flexibility Analysis. Some commenters expressed concerns that the Department's proposal to cover work performed at locations established specifically for the purpose of constructing a significant portion of a building or work, as well as transportation of portions of the building or work to and from the project's final resting place, would result in an expansion of Davis-Bacon coverage and an increase in costs. The Department has responded to these concerns by explaining that the number of projects affected by this change would be very limited and that the prevailing wage implications would not be substantial, especially with regard to the transportation activities attendant to these types of projects.

(3) Number of Small Entities Covered Under the Rule

Size standards for the construction industry are established by the Small Business Administration (SBA), and are expressed in millions of dollars of annual receipts for affected entities, *i.e.*, Major Group 15, Building Construction—General Contractors and Operative Builders, $17 million; Major Group 16, Heavy Construction (non-building), $17 million; and Major Group 17, Special Trade Contractors, $7 million. The overwhelming majority of construction establishments would have annual receipts under these levels. According to the Census, 98.7 percent of these establishments have annual receipts under $10 million. Therefore, for the purpose of this analysis, it is assumed that virtually all establishments potentially affected by this rule would meet the applicable criteria used by the SBA to define small businesses in the construction industry.

(4) Reporting, Recordkeeping, and Other Compliance Requirements of the Rule

There are no additional reporting or recording requirements for contractors under this rule. There may be rare instances where, pursuant to the new rule, contractors, including small entities, engaged in the construction of a significant portion of a Davis-Bacon project at a secondary site specifically established for such purpose, would be required to comply with Davis-Bacon wage and recordkeeping requirements with respect to certain laborers and

mechanics in circumstances not required under the current regulations.

(5) Description of the Steps Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Objective of the Davis-Bacon and Related Acts

As stated above, the Department has determined that this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. Furthermore, an alternative standard for small entities would not be feasible.

VII. Document Preparation

This document was prepared under the direction of John R. Fraser, Deputy Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

List of Subjects in 29 CFR Part 5

Administrative practice and procedure, Government contracts, Investigations, Labor, Minimum wages, Penalties, Recordkeeping requirements, Reporting requirements, Wages.

For the reasons set out in the preamble, Title 29, Part 5, is amended as follows:

PART 5—LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE TO NONCONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT)

1. The authority citation for part 5 is revised to read as follows:

Authority: 40 U.S.C. 276a–276a–7; 40 U.S.C. 276c; 40 U.S.C. 327–332; Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix; 5 U.S.C. 301; 29 U.S.C. 259; and the statutes listed in § 5.1(a) of this part.

2. Section 5.2 is amended by revising paragraphs (j) and (l) to read as follows:

§ 5.2 Definitions.

* * * * *

(j) The terms *construction, prosecution, completion,* or *repair* mean the following:

(1) All types of work done on a particular building or work at the site thereof, including work at a facility which is deemed a part of the site of the work within the meaning of (paragraph (l) of this section by laborers and mechanics employed by a construction contractor or construction subcontractor (or, under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996, all work done in the construction or development of the project), including without limitation—

(i) Altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site;

(ii) Painting and decorating;

(iii) Manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work (or, under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996 in the construction or development of the project);

(iv)(A) Transportation between the site of the work within the meaning of paragraph (l)(1) of this section and a facility which is dedicated to the construction of the building or work and deemed a part of the site of the work within the meaning of paragraph (l)(2) of this section; and

(B) Transportation of portion(s) of the building or work between a site where a significant portion of such building or work is constructed, which is a part of the site of the work within the meaning of paragraph (l)(1) of this section, and the physical place or places where the building or work will remain.

(2) Except for laborers and mechanics employed in the construction or development of the project under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996, and except as provided in paragraph (j)(1)(iv)(A) of this section, the transportation of materials or supplies to or from the site of the work by employees of the construction contractor or a construction subcontractor is not "construction, prosecution, completion, or repair" (see *Building and Construction Trades Department, AFL–CIO* v. *United States Department of Labor Wage Appeals Board (Midway Excavators, Inc.),* 932 F.2d 985 (D.C. Cir. 1991)).

* * * * *

(l) The term *site of the work* is defined as follows:

(1) *The site of the work* is the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, *provided* that such site is established specifically for the performance of the contract or project;

(2) Except as provided in paragraph (l)(3) of this section, job headquarters, tool yards, batch plants, borrow pits, etc., are part of the *site of the work, provided* they are dedicated exclusively, or nearly so, to performance of the contract or project, *and provided* they are adjacent or virtually adjacent to the *site of the work* as defined in paragraph (l)(1) of this section;

(3) Not included in the *site of the work* are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of the work as stated in paragraph (l)(1) of this section, are not included in the *site of the work.* Such permanent, previously established facilities are not part of the *site of the work,* even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

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Signed in Washington, DC. on this 14th day of December, 2000.

T. Michael Kerr,

Administrator, Wage and Hour Division.

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