C's allocable share of the unrealized appreciation from the intangible exceeds the section 732(b) basis increase in the intangible, the entire $90 of basis increase is amortizable by A. Accordingly, after the distribution, A will be treated as having two intangibles, an amortizable section 197 intangible with an adjusted basis of $90 and a new amortization period of 15 years and a nonamortizable intangible with an adjusted basis of $60.

(iii) In applying the anti-churning rules to future transfers of the distributed intangible, under paragraph (h)(12)(ii)(C) of this section, one-half of the intangible will continue to be subject to the anti-churning rules, determined as follows: The sum of the amount of the distributed intangible's basis that is nonamortizable under paragraph (g)(2)(ii)(B) of this section ($60) and the total unrealized appreciation inherent in the intangible reduced by the amount of the increase in the adjusted basis of the distributed intangible under section 732(b) to which the anti-churning rules do not apply ($120 − $90 = $30), over the fair market value of the distributed intangible ($180).

*Example 31. Partnership distribution causing section 734(b) basis adjustment to section 197(f)(9) intangible.*

(i) On January 1, 2001, A, B, and C form a partnership (ABC) in which each partner shares equally in capital and income, gain, loss, and deductions. On that date, A contributes a section 197(f)(9) intangible with a zero basis and a value of $150, and B and C each contribute $150 cash. A and B are related, but neither A nor B is related to C. ABC does not adopt the remedial allocation method for making section 704(c) allocations of amortization expenses with respect to the intangible. On December 1, 2004, when the value of the intangible has increased to $600, ABC distributes $300 to B in complete redemption of B's interest in the partnership. ABC has an election under section 754 in effect for the taxable year that includes December 1, 2004. (Assume that, at the time of the distribution, the basis of A's partnership interest remains zero, and the basis of each of B's and C's partnership interest remains $150.)

(ii) Immediately prior to the distribution, the assets of the partnership are revalued pursuant to § 1.704–1(b)(2)(iv)(*f*), so that the section 197(f)(9) intangible is reflected on the books of the partnership at a value of $600. B recognizes $150 of gain under section 731(a)(1) upon the distribution of $300 in redemption of B's partnership interest. As a result, the adjusted basis of the intangible held by ABC increases by $150 under section 734(b). A does not satisfy any of the tests set forth under paragraph (h)(12)(iv)(B) and thus is not an eligible partner. C is not related to B and thus is an eligible partner under paragraph (h)(12)(iv)(B)(*1*) of this section. The capital accounts of A and C are equal immediately after the distribution, so, pursuant to paragraph (h)(12)(iv)(D)(*1*) of this section, each partner's share of the basis increase is equal to $75. Because A is not an eligible partner, the anti-churning rules apply to A's share of the basis increase. The anti-churning rules do not apply to C's share of the basis increase.

(iii) For book purposes, ABC determines the amortization of the asset as follows: First, the intangible that is subject to adjustment under section 734(b) will be divided into three assets: the first, with a basis and value of $75 will be amortizable for both book and tax purposes; the second, with a basis and value of $75 will be amortizable for book, but not tax purposes; and a third asset with a basis of zero and a value of $450 will not be amortizable for book or tax purposes. Any subsequent revaluation of the intangible pursuant to § 1.704–1(b)(2)(iv)(*f*) will be made solely with respect to the third asset (which is not amortizable for book purposes). The book and tax attributes from the first asset (*i.e.,* book and tax amortization) will be specially allocated to C. The book and tax attributes from the second asset (*i.e.,* book amortization and non-amortizable tax basis) will be specially allocated to A. Upon disposition of the intangible, each partner's share of gain or loss will be determined first by allocating among the partners an amount realized equal to the book value of the intangible attributable to such partner, with any remaining amount realized being allocated in accordance with the partnership agreement. Each partner then will compare its share of the amount realized with its remaining basis in the intangible to arrive at the gain or loss to be allocated to such partner. This is a reasonable method for amortizing the intangible for book purposes, and the results in allocating the income, gain, loss, and deductions attributable to the intangible do not contravene the purposes of the anti-churning rules under section 197 or paragraph (h) of this section.

(l) * * * (1) *In general.* This section applies to property acquired after January 25, 2000, except that paragraph (c)(13) of this section (exception from section 197 for separately acquired rights of fixed duration or amount) applies to property acquired after August 10, 1993 (or July 25, 1991, if a valid retroactive election has been made under § 1.197–1T), and paragraphs (h)(12)(ii), (iii), (iv), (v), (vi)(A), and (vii)(B) of this section (anti-churning rules applicable to partnerships) apply to partnership transactions occurring on or after November 20, 2000.

(2) *Application to pre-effective date acquisitions.* A taxpayer may choose, on a transaction-by-transaction basis, to apply the provisions of this section and § 1.167(a)–14 to property acquired (or partnership transactions occurring) after August 10, 1993 (or July 25, 1991, if a valid retroactive election has been made under § 1.197–1T) and—

(i) On or before January 25, 2000; or

(ii) With respect to paragraphs (h)(12)(ii), (iii), (iv), (v), (vi)(A), and (vii)(B) of this section, before November 20, 2000.

* * * * *

**Robert E. Wenzel,**

*Deputy Commissioner of Internal Revenue.*

Approved: November 9, 2000.

**Jonathan Talisman,**

*Acting Assistant Secretary of the Treasury.*

[FR Doc. 00–29524 Filed 11–17–00; 8:45 am]

BILLING CODE 4830–01–U

---

## DEPARTMENT OF LABOR

## Office of the Secretary

## Employment Standards Administration

## Wage and Hour Division

## 29 CFR Parts 1 and 5

**RIN 1215–AA94**

## Procedures for Predetermination of Wage Rates; Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction and to Certain Nonconstruction Contracts

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

**ACTION:** Final rule.

**SUMMARY:** This document adopts as a final rule an amendment to the regulations that govern the employment of ''helpers'' on federally-financed and assisted construction contracts subject to the prevailing wage standards of the Davis-Bacon and Related Acts (DBRA). Specifically, this document amends the regulations to incorporate the Wage and Hour Division's longstanding policy of recognizing helper classifications and wage rates only where their duties are clearly defined and distinct from those of journeyworker and laborer classifications in the area; the use of such helpers is an established prevailing practice in the area; and the term ''helper'' is not synonymous with ''trainee'' in an informal training program.

**EFFECTIVE DATE:** January 19, 2001.

**FOR FURTHER INFORMATION CONTACT:** William W. Gross, Director, Office of Wage Determinations, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3028, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone (202) 693–0569. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:**

**I. Paperwork Reduction Act**

This rule does not contain any new information collection requirements and does not modify any existing requirements. Thus, the rule contains no reporting or recordkeeping requirements subject to the Paperwork Reduction Act of 1995.

**II. Background**

Apart from the brief periods, as discussed below, when the suspended ''helper'' regulations were implemented, the longstanding practice of the Department of Labor (''DOL'' or ''the Department'') has been to allow the use of helper classifications on DBRA-covered construction projects only where (1) the duties of the helper are clearly defined and distinct from those of the journeyworker and laborer; (2) the use of such helpers is an established prevailing practice in the area; and (3) the term ''helper'' is not synonymous with ''trainee'' in an informal training program.

On May 28, 1982, Wage and Hour published revised final Regulations, 29 CFR Part 1, Procedures for Predetermination of Wage Rates, and 29 CFR Part 5, Subpart A—Davis-Bacon and Related Acts Provisions and Procedures (47 FR 23644 and 23658, respectively), containing new provisions intended to allow contractors to expand their use of helpers on Davis-Bacon covered projects at wages lower than those paid to skilled journeyworkers.[1]

These regulations were challenged in a lawsuit brought by the Building and Construction Trades Department, AFL–CIO, and a number of individual unions. On December 23, 1982, the U.S. District Court for the District of Columbia Circuit held that the new helper regulations conflicted with the Davis-Bacon Act and enjoined DOL from implementing the regulations. *See Building and Construction Trades Department, AFL–CIO, et al.* v. *Donovan, et al.,* 553 F. Supp. 352 (D.D.C. 1982). On appeal, the U.S. Court of Appeals for the District of Columbia upheld the Department's authority to allow the increased use of helpers, concluding that the Secretary's regulatory definition was ''not clearly unreasonable.'' *Building and Construction Trades Department, AFL–CIO, et al.* v. *Donovan, et al.,* 712 F.2d 611, 630 (D.C. Cir. 1983), *cert. denied,* 464 U.S. 1069 (1983). However, the court struck down that part of the regulation that allowed for the issuance of a helper wage rate where helpers were only ''identifiable.'' *Id.* at 624.

On remand, the district court lifted the injunction as it applied to the helper definition, but maintained it as to the remaining helper regulations. The district court added that the Secretary ''may, however, submit to this Court reissued regulations governing the use of helpers, and if these regulations conform to the decision of the Court of Appeals, they will be approved.'' 102 CCH Labor Cases ¶ 34,648, p. 46,702 (D.D.C. 1984).

In accordance with the district court's order, DOL published in the **Federal Register** (52 FR 31366, August 19, 1987) proposed revisions to the helper regulations to add the requirement that helpers must prevail in an area in order to be recognized. The Department, on January 27, 1989, published a revised final rule governing the use of helpers on federal and federally assisted construction contracts subject to the Davis-Bacon and Related Acts (54 FR 4234).

On September 24, 1990, the district court vacated its injunction, and on December 4, 1990, Wage and Hour published a **Federal Register** notice implementing the helper regulations, effective February 4, 1991 (55 FR 50148).

In April 1991, Congress passed the Dire Emergency Supplemental Appropriations Act of 1991, Public Law 102–27 (105 Stat. 130), which was signed into law on April 10, 1991. Section 303 of Public Law 102–27 (105 Stat. 152) prohibited the Department from spending any funds to implement or administer the helper regulations as published, or to implement or administer any other regulation that would have the same or similar effect. In compliance with this directive, the Department did not implement or administer the helper regulations for the remainder of fiscal year 1991.

After fiscal year 1991 concluded and subsequent continuing resolutions expired, a new appropriations act was passed that did not include a ban restricting the implementation of the helper regulations. On January 29, 1992, Wage and Hour issued All Agency Memorandum No. 161, instructing the contracting agencies to include the helper contract clauses in contracts for which bids were solicited or negotiations were concluded after that date. On April 21, 1992, the U.S. Court of Appeals for the District of Columbia invalidated the regulation that prescribed a ratio of two helpers for every three journeyworkers for being without sufficient support in the record, but upheld the remaining helper provisions. *Building and Construction Trades Department, AFL–CIO* v. *Martin,* 961 F.2d 269 (D.C. Cir. 1992). To comply with this ruling, on June 26, 1992, Wage and Hour issued a **Federal Register** notice removing the invalidated text, 29 CFR 5.5(a)(4)(iv), from the Code of Federal Regulations. 57 FR 28776.

Subsequently, Section 104 of the Department of Labor Appropriations Act of 1994, Public Law 103–112, enacted on October 21, 1993, prohibited the Department of Labor from expending funds to implement or administer the helper regulations during fiscal year 1994. Accordingly, on November 5, 1993, Wage and Hour published a **Federal Register** notice (58 FR 58954) suspending the regulations governing the use of semi-skilled helpers on DBRA-covered contracts, and reinstating the Department's prior policy regarding the use of helpers. The Department of Labor Appropriations Act for fiscal year 1995 again barred the Department from expending funds with respect to the helper regulations (Section 102, Public Law 103–333). That prohibition extended into fiscal 1996 as a result of several continuing resolutions. There was no such prohibition in the Department of Labor's Appropriations Acts for fiscal 1996 and 1997, Public Law 104–134, enacted on April 26, 1996, and Public Law 104–208, enacted on September 30, 1996.

On August 2, 1996, Wage and Hour published in the **Federal Register** (61 FR 40366) a proposal to continue to suspend the implementation of the helper regulations while additional rulemaking procedures were undertaken to determine whether further amendments should be made to those regulations. On December 30, 1996, a

[1] The following four new provisions were promulgated:

- A new definition of the term ''helper,'' allowing a helper's duties to overlap with those of a journeylevel worker: ''A *helper* is a semi-skilled worker (rather than a skilled journeyman mechanic) who works under the direction of and assists a journeyman. Under the journeyman's direction and supervision, the helper performs a variety of duties to assist the journeyman such as preparing, carrying and furnishing materials, tools, equipment, and supplies and maintaining them in order; cleaning and preparing work areas; lifting, positioning, and holding materials or tools; and other related, semi-skilled tasks as directed by the journeyman. A helper may use tools of the trade at and under the direction and supervision of the journeyman. The particular duties performed by a helper vary according to area practice.'' [29 CFR 5.2(n)(4), 47 FR 23667.]
- A provision allowing a helper classification to be included in the wage determination if it was an ''identifiable'' local practice. 29 CFR 1.7(d), 47 FR 23655.
- A provision limiting the number of helpers to two for every three journeyworkers. 29 CFR 5.5(a)(4)(iv), 47 FR 23670.
- A provision allowing the addition of helper classifications on contracts containing wage determinations without helper classifications, where helpers are utilized in the area. 29 CFR 5.5(a)(1)(ii)(A), 47 FR 23688.

final rule was published in the **Federal Register** (61 FR 68641) continuing the suspension. Pursuant to that final rule, the November 5, 1993 suspension of the helper regulations continues in effect until Wage and Hour either (1) issues a final rule amending (and superseding) the suspended helper regulations; or (2) determines that no further rulemaking is appropriate, and issues a final rule reinstating the suspended regulations.

By decision dated July 23, 1997, the U.S. District Court for the District of Columbia upheld the Department's December 30, 1996 final rule continuing the suspension of the helper regulations until the completion of rulemaking proceedings. *Associated Builders & Contractors, Inc.* v. *Herman,* C.A. No. 96–1490, 1997 WL 525268 (D.D.C. July 23, 1997).

The Department, by Notice of Proposed Rulemaking (NPRM) published in the **Federal Register** on April 9, 1999 (64 FR 17442), proposed for public comment an amendment to the regulations that would reflect the longstanding policy of recognizing helpers as a distinct classification on DBRA-covered work only where Wage and Hour determines that (1) the duties of the helpers are not performed by other classifications in a given area, *i.e.,* the duties of the helper are clearly defined and distinct from those of the journeyworker and laborer; (2) the use of such helpers is an established prevailing practice in the area; and (3) the term ''helper'' is not synonymous with ''trainee'' in an informal training program.

In addition to the proposed rule, the Administrator also presented for comment the reasons the Department had concluded that the suspended rule should not be implemented, as well as the various other alternatives that had been considered by the Department: (1) Add a ratio requirement to the suspended helper definition; (2) change the ''helper'' definition to emphasize the semi-skilled nature of the classification; (3) define ''helpers'' based on the Bureau of Labor Statistics, Occupational Employment Statistics (OES) Dictionary of Occupations, which focuses on unskilled duties and the worker's interaction with journeylevel craft workers; and (4) explicitly delineate the semi-skilled tasks performed by each helper classification. The Administrator also presented for comment an Economic Impact Analysis comparing the economic costs of the proposed rule governing the use of helpers under the DBRA to those under the suspended rule and the other alternatives considered by DOL, and a Regulatory Flexibility Analysis.

The Department received 23 responses to the NPRM. These included 18 responses providing substantive comments, one with no comments, and four requesting an extension of the comment period. Comments were received from three groups of Congressional Representatives: Representatives Charlie Norwood, Bill Goodling, Cass Ballenger, John Boehner, Peter Hoekstra, Buck McKeon, and Ron Paul; Representatives William L. Clay, Major R. Owens, and James E. Clyburn; and Representatives Jan Schakowsky and Anthony Weiner. Comments were also submitted by six contractor associations: The Associated General Contractors, Inc. (AGC); the Associated Builders and Contractors, Inc. (ABC); the Small Business Survival Committee (SBSC); the Associated Prevailing Wage Contractors, Inc. (APWC); the AGC of Texas (Highway, Heavy, Utilities and Industrial Branch); and the Mechanical Electrical Sheet Metal Alliance (MESMA), which is a coalition of members of the Mechanical Contractors Association of America (MCAA), the National Electrical Contractors Association (NECA) and the Sheet Metal and Air Conditioning Contractors National Association (SMACNA).

Also submitting comments were three union organizations and a union-contractor group: The Building and Construction Trades Department, AFL–CIO (Building Trades); the Laborers' International Union of North America (LIUNA); the International Brotherhood of Electrical Workers (IBEW); and the National Joint Apprenticeship and Training Committee for the Electrical Industry (NAJTC), which was jointly created by the IBEW and NECA.

The Texas Department of Transportation (TxDOT) commented on the proposal, as did two academic sources: A.J. Thieblot, Ph.D., Adj. Prof., University of Baltimore and the Regulatory Studies Program, Mercatus Center, George Mason University, Wendy L. Gramm, Director. Comments were also provided by two individual companies, Halliburton/Kellog Brown & Root (through in-house counsel) and Elevator Control Service (Elcon).

Finally, two elevator contractors' associations (the National Association of Elevator Contractors and the National Elevator Industry, Inc.) and two elevator contracting companies (Quality Elevator Co. and Barbee Curran Elevator Co., Inc.) requested an extension of the comment period. Requests for extension of time were not granted.

### III. Comments and Analysis

In the NPRM, the Department proposed not to implement the suspended ''semi-skilled'' helper rule, but instead, to issue a rule reflecting the current, longstanding practice of recognizing helpers only where they are a separate and distinct class with clearly defined duties. The Department also provided therein a detailed explanation of the problems it identified with respect to the suspended helper definition, as well as a discussion of other alternatives for identifying helpers that were considered.

As explained in the NPRM, the Department had preliminarily concluded that the suspended rule was not capable of being administered and enforced effectively in accordance with the goals and requirements of the Davis-Bacon Act, especially in view of the court-ordered abandonment of the ratio provision. The Department stated that the suspended rule is problematic because it represents a sharp departure from the Department's traditional practice of identifying job classifications based on the duties performed by such classifications. The suspended helper definition is unique in that it allows the determination of a Davis-Bacon classification based on subjective standards—the worker's skill level (''semi-skilled'') and the existence of work-site supervision. Furthermore, the Department noted that the definition is internally inconsistent in that the examples given of the types of assistance the helper might provide to a journeyworker are not semi-skilled, but rather are largely unskilled duties commonly performed by laborers. The Department also stated that the requirements that the helper be ''semi-skilled'' and work under the supervision of a journeyworker are vague and would provide little assistance in enforcement.

The Department reasoned that, because the suspended rule allows the duties of a helper to overlap with those of both journeyworkers and laborers and provides no readily ascertainable means for distinguishing helpers from other classifications, contractors would find it difficult to determine whether they were in compliance and the Department in turn would find it difficult to enforce the regulation. Additionally, the Department expressed concern that the ambiguities in the suspended rule would make it difficult to prevent unscrupulous contractors from intentionally reclassifying large numbers of both journeyworkers and laborers as helpers when they work on DBRA projects, thus undermining locally prevailing wages for construction job classifications. The Department indicated that this is an even greater concern now that there is no longer any numerical limitation to using helpers on DBRA projects.

The Department also concluded that there seemed to be no generally accepted meaning for the term ''helper'' in the construction industry, and therefore there was reason to believe that the definition in the suspended rule did not in fact represent industry practice. For this reason, the Department was concerned that it would be difficult to conduct meaningful wage surveys and, therefore, specifically requested that commenters submit evidence regarding how helpers are in fact used.

Wage data collected by the Department during the implementation period provided further support for the Department's decision to reconsider the advisability of implementing the suspended rule. A key underpinning of the helper rule at the time it was proposed was the notion that helper use is widespread in construction in the private sector. According to the preamble to the proposed rule published in 1987, the Secretary projected that helpers would prevail in two-thirds to 100% of all craft classifications.[2] The wage survey data submitted to the Department during the implementation period, though admittedly limited in quantity and geographic scope, indicated to the Department that use of helpers might not be as widespread as previously thought. This led the Department to examine other available data sources in order to reassess its previous assumption that helper use is widespread.

The Department also became concerned, as a secondary matter, that the suspended rule might have a negative impact on apprenticeship and training by lessening the incentive for contractors to employ apprentices and trainees participating in formal programs.

After a full and careful review of the suspended rule, as well as a number of alternative approaches, the Department decided to propose for implementation the duties-based approach to recognizing helpers, which reflects longstanding policy. As discussed in the NPRM, it is the Department's view that this approach is more consistent with the intent of the Davis-Bacon Act to assure that workers employed on federal and federally-assisted construction work are paid at least the wages paid to workers doing similar work on similar construction in the area. The Department also stated in the NPRM that this approach, in sharp contrast to that under the suspended rule, would provide an objective basis for administration and enforcement of helper use, as well as clear criteria to facilitate compliance.

The following is a summary and analysis of the comments received as they relate to the proposed regulation, the alternatives considered, the problems identified by the Department with respect to the suspended rule, and the Department's analysis and conclusions concerning the proposed rule set forth in the NPRM. Each submission has been thoroughly reviewed and each comment has been carefully considered.

*Problems With the Suspended Helper Definition*

1. The Suspended Helper Definition Would Be Difficult To Administer and Enforce

The Building Trades commented that the suspended rule would be unenforceable because it is simply too difficult to distinguish a helper from a journeylevel worker on a job site. The Building Trades stated that, if contractors and subcontractors were permitted to assign helpers to perform the tasks of any and all classes of laborers and mechanics at less pay, as the suspended definition would allow, the requirement in the Davis-Bacon Act that wages be based on ''corresponding classes'' would effectively be read out of the statute. The AGC, the ABC, and Dr. Thieblot, on the other hand, stated in their respective comments that the Department should be able to identify helper classes through area practice surveys as easily as it differentiates among the various trade classifications.

The Department believes that it is much more difficult to identify a helper classification under the suspended rule, than to identify a craft or laborer classification under the traditional duties-based approach. Under DBRA, a laborer or mechanic is entitled to be paid the prevailing rate for the work performed according to the local area practice, and therefore, is classified based on the duties the worker performs. Because under the suspended definition, helpers may perform the duties of other classifications—both journeylevel workers and laborers—without any limitations other than that they be supervised by and assist a journeyworker, it would be extremely difficult for the Department to identify the work of a helper in any given area, both for enforcement and wage determination purposes.

Comments suggesting that the Department can simply examine prevailing practices to identify helpers provide no practical guidance for resolving the suspended rule's inherent definitional problems. Construction craft workers generally perform certain basic, core duties that are specific to their respective classifications and therefore, are more easily identifiable for both enforcement and wage determination purposes. For example, it is widely understood that carpenters use hammers, saws and other tools of the trade to construct structures made of wood. Area practice issues arise concerning gray areas, where in a particular locality certain types of duties may be performed by another craft as an adjunct to its core duties, or may be carved out as a separate classification altogether. Thus, in some areas, carpenters may install drywall, while in others it may be installed by a specialty classification referred to as ''drywall installers.'' An area practice survey can make this determination. But it is not necessary for Wage and Hour to conduct an area practice survey to determine the work of each and every classification. For example, an area practice survey would not be needed to determine whether, instead of building wood structures, carpenters install water pipes, because such work is part of the basic, core duties of a plumber. Conversely, helpers, under the suspended rule, cannot be identified under the duties-based approach because there is no generally accepted subset of duties performed by helpers that would distinguish the helper from other classifications.

LIUNA commented that the combination of the suspended rule's allowance of overlap with laborers' duties and the lower wages generally paid to helpers would result in either the displacement of laborers in favor of workers classified and paid at lower helpers' rates, or the performance by the existing laborer workforce of the same work at lower wage and fringe benefit rates—contrary to the purpose of the Davis-Bacon Act to prevent Federal construction from depressing locally prevailing wages. LIUNA observed that many of the work activities of certain construction laborer classifications are precisely the same as the potential helper duties specifically enumerated under the suspended rule. LIUNA noted, for example, that a wide variety of ''tender'' classifications, which are negotiated between the Laborers' local unions and construction employers throughout the country, include the

[2] The final rule stated, without quantification, that this percentage would be reduced to the extent that collectively bargained rates were found to prevail and did not provide for a helper classification. 54 FR 4234, 4242 (January 27, 1989).

same duties that would be performed by helpers under the suspended regulations.[3] Dr. Thieblot, however, stated that the fact that the suspended helper definition may include work that would otherwise be done by laborers should be of no more concern to the Department than the performance by ''tender'' classifications of work that could be done by laborers.

The Department believes that LIUNA's concerns on the overlap of helper duties with other existing laborer classifications under the suspended rule are valid. The Department also believes that the recognition of a wide variety of tender classifications under its current policy demonstrates the manner in which helper classifications will be recognized under the final rule. The Department under its current policy, and under the final rule, will issue rates for helper classifications where the duties they perform are distinct from those of other classifications, including the journeyworkers they assist and other laborer or tender classifications. Tender classifications recognized by the Department must meet these criteria. While tender classifications do perform laborer-type duties, their performance of such work must be prevailing in the locality, *i.e.,* more tenders than any other classification perform the work in question in that particular locality. In contrast, under the suspended rule, the *use* of helpers by contractors must be prevailing in the locality and the duties they perform is determined by area practice, but there is no requirement that their performance of certain duties be prevailing in relation to those performed by other classifications in the locality. Thus, the suspended rule would allow the duties of a helper to overlap with those of other classifications that prevail within the locality, possibly leading to the employment of helpers to perform the work of other classifications at lower wages. Because tender/helper classifications must perform distinct duties for which the tender/helper classifications prevails in the locality, the recognition of such classifications does not carry the same potential for abuse and, therefore, the undermining of prevailing wages associated with the use of helpers under the suspended rule.

The Department indicated in the NPRM that it does not believe that the suspended rule can be effectively enforced under the vague, subjective criteria of its definition. For instance, the Department stated in the NPRM that the suspended definition's failure to distinguish between ''semi-skilled'' and ''skilled'' workers presented the Department with a ''fundamental problem'' when it tried to develop enforcement guidelines. LIUNA commented that the suspended definition provides no guidance for distinguishing between a ''semi-skilled'' helper who uses tools of the trade, and a journeyworker with little experience. The ABC stated, on the other hand, that contractors have developed methods for recognizing differences between skilled and semi-skilled work and have implemented pay scales based on such differences. None of the commenters, however, has identified any methods or criteria used by contractors that would be helpful to the Department in distinguishing between skilled and semi-skilled work. Similarly, the AGC stated that contractors routinely make hiring decisions based on skill level and compensate craft workers based on their training and experience. The Department believes that these practices are reflective of the normal practice of non-union employers in many industries where workers within an occupation are paid a range of rates based on their training and experience. The Department does not believe that such a practice demonstrates the existence of separate classes of workers within the meaning of the Davis-Bacon Act.[4]

The AGC stated that whether a skilled worker would accept and perform a ''semi-skilled'' job as a helper is an irrelevant concern, because compliance should focus on ensuring that individuals are properly compensated for the work they actually perform. This point echoes one of the Department's main concerns which led it to reject the suspended helper rule in favor of the traditional duties-based approach under the proposed rule. Under the suspended rule, individuals classified as helpers, who may perform the work of both higher paid craft workers and laborers, would not be compensated based on the work they perform, but rather on their comparatively lower skill levels. Furthermore, the Department still does not believe it could draw the line effectively between semi-skilled and skilled work, especially given that, in today's construction market, skilled craft workers may perform a whole range of duties from unskilled to semi-skilled to skilled, and laborers often perform what may be considered semi-skilled work as well.

The Department also observed in the NPRM that the supervision aspect of the suspended helper definition would provide little assistance in distinguishing a helper from other classifications of workers. LIUNA agreed that supervision by a journeyworker is not a practical standard for distinguishing ''semi-skilled'' helpers from others on the work-site, because many classifications are supervised by other workers or supervisors. LIUNA stated that laborers, apprentices, trainees and lesser skilled journeyworkers all may work under the ''direction and supervision'' of other, more highly skilled journeyworkers. The AGC, on the other hand, stated that the definition of a helper does not need to ''indicate the nature or amount of direction that helpers must receive to distinguish them from others on a worksite,'' because this should be left to local prevailing practice. None of the commenters offered suggestions as to how, from a practical standpoint, the Department could determine local supervisory practices.

Nothing in the comments received by the Department contradicts its view that laborers and journeylevel construction workers, like helpers under the suspended rule, also may work under the ''direction and supervision'' of other journeyworkers. In the Department's experience, which is supported by LIUNA's comments, supervision on a construction worksite is often an amorphous concept, especially where it is performed by a ''team leader,'' and therefore, does not lend itself to objective evaluation. Thus, the Department continues to be of the opinion that supervision by a journeyworker is not a practical standard for distinguishing *semi-skilled* helpers from other classifications on the worksite.

The Department also stated in the NPRM that it believes the problems resulting from the suspended rule's

[3] LIUNA stated that the laborer's role as a ''tender'' or ''helper'' to other trades has a long history, as demonstrated by the American Federation of Labor's 1903 charter to LIUNA, which described the laborer's work as ''tending to masons, mixing and handling all materials used by masons (except stone setters), building of scaffolding for mason's plasters, building of centers for fire proofing purposes, tending to carpenters, tending to and mixing of all materials for plastering, whether done by hand or any other process, clearing of debris from buildings, scoring, underpinning and raising of old buildings * * *.'' LIUNA also stated that, although today the term ''tender'' is preferred over ''helper'' in describing laborers' support relationship to other craft workers, the two terms are interchangeable in the construction industry and that DOL's Davis-Bacon *General Wage Determinations* include ''literally hundreds of examples of 'tender' or 'helper' job titles (mason tender, plasterer tender, carpenter tender, plumbing tender, etc.) listed as part of the laborer classification.''

[4] See the recent decision of the Administrative Review Board in *Miami Elevator Company* and *Mid-American Elevator Company, Inc.,* ARB Case Nos. 98–086 and 97–145 (April 25, 2000), pp. 33–34.

definitional ambiguities are compounded by evidence that the term ''helper'' has multiple, quite different meanings within the construction industry. LIUNA stated that the examples of duties that a helper may perform, as listed in the suspended definition, are not ''semi-skilled,'' but rather include a range of skilled, semi-skilled, and unskilled duties commonly performed by other classifications. AGC, on the other hand, stated that many different craft classifications have multiple, quite different meanings within the construction industry, and that this is the primary reason that no standard definitions have ever been promulgated for craft classifications performing Davis-Bacon work.

While it is true, as discussed above, that craft classifications may have somewhat different meanings within the industry, craft classifications generally encompass certain well-recognized duties that are widely understood to be the core duties of the craft occupation. Thus, despite the occasional need for clarification regarding the prevailing classification used by contractors in an area for workers performing specialized work, the fundamental scope of work of most construction craft occupations is not usually in question.

In contrast, it appears to the Department, as demonstrated by the rulemaking record, that a helper classification can have various meanings and uses even within the same locality. For example, the APWC stated that helpers, in its view, ''are semi-skilled workers who work under the direction of and provide assistance to journeymen,'' whereas the AGC of Texas described the use of helpers in the State of Texas as ''allow[ing] construction contractors to utilize *unskilled* workers while teaching them a trade or skill through our on-the-job training programs.'' [Emphasis added]. Similarly, commenters on the proposed rule to continue the suspension of the helper regulations, variously characterized helpers as skilled workers who have not been trained in the full range of journeylevel work, short-term entry-level workers assisting journeyworkers in unskilled laborer duties, and longer-term specialized workers who perform a limited number of duties that overlap journeylevel workers. 61 FR 68646. In this regard, the Department, in the NPRM, invited commenters to submit further evidence regarding how helpers are in fact used by contractors, particularly any data regarding whether there is in fact a generally recognized definition of helpers that is capable of being objectively identified. No such data were submitted by the commenters. The Department therefore believes that it was correct in its view that no definition of helpers exists that could adequately reflect ''the actual and varied practice in the construction industry as a whole or even in any particular area.''

The Department also expressed its concern that Wage and Hour would not be able to conduct a meaningful wage determination process using the suspended definition of helpers in light of the likelihood that contractors responding to area wage surveys would ascribe very different meanings to the term ''helpers.'' Dr. Thieblot stated that surveying for helper rates presents no special difficulties since it is Wage and Hour's practice ''to accept the rates and job titles as submitted by the contractors who paid them, whatever those titles might be'' without analyzing job content. Dr. Thieblot stated, for example, that it should be no more difficult for Wage and Hour to determine if the job title ''mason's helper'' prevails in a given area, than to determine if the job title ''mason's tender'' prevails.

This comment highlights a common misunderstanding of the Department's wage determination process. Wage and Hour, in gathering wage data, does not automatically accept the job titles as submitted by reporting employers. Wage and Hour's experience in collecting wage data is that contractors may use different job titles for the same craft work. When faced with more than one name for the same type of work, Wage and Hour must determine whether the workers with the various job titles in question perform the same basic duties, in which case the data for such work will be combined for the purpose of determining the prevailing classification and issuing a single prevailing rate for the particular work performed. In other cases, Wage and Hour might determine that it is the prevailing practice in a certain area for workers under a more specific job title (*e.g.,* drywall hanger) to perform a subset of the duties of a more generalized craft (*e.g.,* carpenter), and thus issue a separate wage rate for the specific job title where the data indicate that the specialized classification prevails for such work in the area. Thus, Wage and Hour does not automatically accept job titles as submitted by employers, but rather analyzes job content, as appropriate, as part of the wage determination process.

The problem with gathering data for helper classifications differs significantly from the difficulty presented where workers in an area perform the same craft work, but under different job titles. A helper classification, even if referred to by many different names within the locality, could nonetheless be surveyed effectively if the duties performed by workers with the various job titles for a helper were distinct from those of other classifications and essentially the same under each title. The problem with identifying helpers during the wage determination process is that the term ''helper'' under the suspended rule can serve to describe a variety of workers performing many different types of work. The Department is additionally concerned that the suspended helper rule, which imposes upon the wage determination process a definition of a helper that was created by the Department, may not necessarily reflect the reality of how helpers are in fact utilized in any given locality. Some employers may classify workers performing the work of helpers under the suspended rule as journeylevel workers, craft workers, or semi-skilled workers, while still others may classify such workers as laborers, unskilled workers, or tenders. In this regard, the Department notes that several contractors surveyed in the processing of helper conformance requests during the period the suspended regulations were in effect indicated that they used the job title ''laborer'' for workers meeting the definition of ''helper'' under the suspended regulation. Thus, because their practices vary from each other and from the definition in the suspended rule, the Department continues to be of the view that contractors, when responding to Davis-Bacon wage surveys, would likely be inconsistent in how they classify workers as helpers. This in turn would raise questions regarding the reliability of any wage data received for a given locality concerning employment of helpers.

The SBSC acknowledged that the suspended helper rule is a break from the tradition under the DBRA of identifying and differentiating among job classifications on the basis of tasks performed by each classification. SBSC commented, however, that the Wage and Hour Division has an outdated construction mentality and that its complaints about the use of helpers suggest a hesitancy to modernize its views. SBSC's comments also questioned the Department's concern that helpers will replace laborers, stating that it is a misclassification to insist that helpers are laborers; it ''is the old class of laborer that has become suspect.'' SBSC's comments provide little practical guidance on how to create a definition of helpers that could be effectively enforced consistent with the underlying intent of the DBRA. In addition, the substantial number of laborers reported in the wage surveys in the record, as well as the comments submitted by LIUNA in support of the interests of laborers in this rulemaking procedure, do not support SBSC's view that laborers no longer constitute a viable worker classification on Davis-Bacon covered construction.

The Mercatus Center acknowledged that the Department's enforcement and administrative concerns may be justified, but cautions that they must be balanced against the productivity and cost-saving benefits from the suspended definition of helpers. The Mercatus Center further noted that by proposing to eliminate the flexibility of a helper to perform the duties of other job classifications, the Department would eliminate one of the most important cost-saving features of the helper position. While the Department believes that cost-saving features are certainly desirable, they cannot be determinative where the approach in question (*i.e.,* the definition of helpers under the suspended rule) cannot be fairly and effectively administered in a manner consistent with the goals of the statute to protect prevailing wages for the corresponding classes of work performed. Indeed, one of the principal objectives of the Davis-Bacon Act was to set a floor on wages so that wages would not be reduced below the prevailing wage as a result of competitive bidding for Federal construction contracts.

The ABC stated that the absence of a significant number of complaints or incidents of abuse during the time the suspended rule was in effect should be viewed as evidence that the Department's stated concerns about enforcement difficulties are overstated. Neither the absence nor presence of complaints had a bearing on the Department's determination that the suspended helper rule cannot be administered and enforced effectively; rather, as explained in the NPRM, it was the difficulty encountered in attempting to develop effective enforcement guidelines during the implementation period that initially raised these concerns. The suspended helper regulations were in effect for too brief a period for the absence of complaints to be indicative of a lack of enforcement difficulties. Though the suspended rule had an implementation period of approximately 20 months, it was nearly a year after implementation before the helper provisions could begin to be included in DBRA-covered construction contracts, following changes to the Federal Acquisition Regulations and the Defense Acquisition Regulations. Thus, the suspended helper rule simply was not in force for a sufficient period of time to draw any conclusions from the number of complaints received during its application.

After carefully reviewing the comments, the Department is persuaded that the suspended rule cannot be effectively administered and enforced. The suspended rule provides no objective basis for distinguishing between helpers and other classifications, and furthermore is vague and internally inconsistent. Its effect, contrary to the intent of the statute, would be to allow contractors and subcontractors on DBRA projects to assign the duties of both craft workers and laborers to helpers who are paid at lower wage rates, with virtually the only restriction being that the worker receive some supervision. As a result, the Department remains concerned that implementation of the suspended rule would lead to many instances of intentional and unintentional misclassification of workers and potential abuse of the rule, which the Department would be unable to prevent or remedy. None of the comments submitted provided any information or arguments which alleviated these concerns.

Additionally, the Department believes it would not be able to collect meaningful, consistent wage data regarding use of helpers for wage determination purposes. The Department believes that the ambiguous language of the definition in the suspended rule would not give contractors adequate guidance and would lead to inconsistent wage reporting. Because there is no generally recognized practice regarding how helpers are used, contractors reporting wage data in accordance with the definition in the suspended rule in some instances probably would report as helpers workers whom they consider journeymen or laborers.

The court of appeals, in its review of the Department's original rulemaking concerning helpers, stated that its deference to the Secretary's choice of policy ''is properly near its greatest when his decision turns on the enforceability of various regulatory schemes.'' *Donovan,* 712 F.2d at 629. The Department has been unable to develop a method for determining whether workers classified as helpers have been correctly classified under the suspended rule, consistent with the fundamental statutory goal of preserving locally prevailing wages for construction job classifications. Since the rulemaking record does not demonstrate that the suspended rule is capable of practical and efficient administration and enforcement to achieve the statutory goals under DBRA, the Department must reject implementation of the suspended rule.

2. Helpers Are Less Widespread Than Previously Believed

As explained in the preamble to the proposed rule, the belief that a distinct class of ''helpers'' was in widespread use in the construction industry was a key assumption underlying the Department's development of the suspended helper regulation. 64 FR 17445. Although not a representative sample, the data submitted to the Department in the 78 surveys conducted during the brief period the suspended rule was in effect failed to substantiate that assumption. In its earlier rulemaking, the Department had projected that use of helpers would be found to be a prevailing practice in from two-thirds to 100 percent of all craft classifications surveyed, except where collectively bargained rates were found to prevail and did not provide for a helper classification. 52 FR 31366, 31369–70 (August 19, 1987); 54 FR 4234, 4242 (January 27, 1989). The Department's experience with the survey data collected in 1992 and 1993 during the brief time that the suspended regulations were in effect was quite different. In the 78 surveys conducted, the use of helpers prevailed in only 69, or 3.9 percent of the 1763 classifications issued, and only 48 of the 69 helper classifications, or 2.7 percent of the 1763 classifications, were based on the practices of non-union contractors and subcontractors. Furthermore, in only 20 of the 78 surveys conducted were any non-union helper classifications found to prevail.

The Economic Impact and Flexibility Analysis in the proposed rule also provided data showing that helpers were less widespread than previous analyses had assumed. The 1996 Current Population Survey (CPS), compiled and published by the Bureau of Labor Statistics (BLS) and the Bureau of the Census, shows that helpers constituted only 1.2 percent of total construction employment. Data from the Occupational Employment Statistics (OES) program showed that helpers comprised 8.7 percent of the total construction work force. Because OES does not contain a separate classification for construction laborer, and its definitions of the helper classifications appear to include laborers, the Department believes the OES overstates the use of helpers. For this reason, the Department developed an alternative estimate, adjusting the OES data by utilizing the percentage of laborers in the CPS workforce. The adjusted OES data resulted in an estimate that helpers constituted 3.4 percent of the total construction workforce.

In their comments, the Building Trades stated that the Department's data on helper use are consistent with the 1996 Current Population Survey (CPS) compiled by BLS and the Bureau of the Census, which showed that helpers only account for 1.2 percent of total construction industry employment. The Building Trades believes that these data support its longstanding contention that the underlying purpose of the suspended helper regulation was not to reflect locally prevailing practices, but to ''artificially interject'' a non-prevailing classification of construction workers into Davis-Bacon covered projects as a means of undercutting prevailing wages.

The ABC questioned the appropriateness of the Department's consideration of whether the use of helpers in the construction industry is ''widespread.'' The ABC stated that the proper test for determining the existence of helper classifications under the statute is not whether the use of helpers is ''widespread,'' but rather whether it ''prevails.'' The Department acknowledges that a basic prerequisite to issuing wage rates for classifications under Davis-Bacon, including helper classifications, is a determination of whether such classifications and corresponding pay rates prevail in the particular locality where the project is to be performed. However, the Department believes its consideration of the overall extent of helper use in the construction industry, *i.e.,* whether helper use is ''widespread,'' is appropriate as part of a broad inquiry concerning the advisability of implementing the suspended regulations. As the Department stated in the NPRM, ''[t]he belief that a distinct class known as 'helpers' was in widespread use in the construction industry was a key assumption underlying the Department's development of the helper regulation.'' 64 FR 17445. It is appropriate for the Department to determine, before taking further regulatory action, if the original underlying assumption concerning the extent of helper use, which provided the impetus for the suspended rule, was borne out by the data collected during the period the regulations were in effect, or by any other more recent, relevant data available to the Department. The Department believes this is a particularly significant consideration where there is so little consensus on a definition of helpers or how helpers are used.

Several commenters expressed their belief that the Department has underestimated the prevalence of helpers in the construction industry. Representative Norwood and the congressmen who joined in his comments state that ''[o]ver 75 percent of all construction in the private sector are performed by contractors who use semi-skilled helpers. One study found that on a given open-shop job, 35–50 percent of the workers in each craft are likely to be helpers.'' The source for these data was not identified, and therefore, the Department is unable to weigh this information against the data already available to the Department concerning the prevalence of helpers. These data, furthermore, do not indicate to what extent helper classifications actually prevail in the construction industry.

The AGC stated that more recent BLS survey data contradict the Department's conclusions regarding employment of helpers. In support, the AGC cites the NCS test surveys discussed above for Jacksonville and Tucson, which, according to the AGC, showed that helpers comprise 13.6 percent and 14.8 percent, respectively, of the total number of construction craft workers in those two localities.

The AGC is referring to four fringe benefit pilot surveys in Tucson, Arizona; Jacksonville, Florida; Salt Lake City, Utah; and Toledo, Ohio, which BLS conducted pursuant to its National Compensation Survey (NCS) program to test the feasibility of collecting detailed fringe benefit data for occupations within the construction industry. In these surveys, helpers [5] constituted 9.6 percent, 8.3 percent, 4.2 percent, and 2.5 percent, respectively, of the total construction workforce.[6] Laborers constituted 14.3 percent, 6.9 percent, 9.9 percent, and 10.1 percent, respectively, of the total workforce. Combined, helper employment in these areas was 5.8 percent of total construction employment.

It is important to note that the four pilot surveys, which included Jacksonville and Tuscon, were not designed to collect data on the employment of helpers, and do not report helpers by craft. In addition, because the NCS studies obtained data for only four geographic areas, the information produced by these studies cannot be projected to a nationwide estimate of the percent of helpers relative to the construction workforce as a whole. The Department believes that the information provided by these surveys is generally in line with the estimates used for the cost impact analysis provided in the NPRM.

The helper data reported in these four pilot studies also reflect inconsistencies between the level of skill associated with the ''helper'' and their compensation levels. Logically, a semi-skilled job would be expected to command a higher wage than an unskilled one, but this was not borne out by the NCS survey data. Helpers are defined, for purposes of these surveys, as ''semi-skilled'' workers; however, Table 2 of the NCS surveys shows that ''semi-skilled'' helpers are paid approximately the same wage as ''unskilled'' non-union laborers.[7] This inconsistency lends credence to the view that there is a widely disparate use of ''helpers'' in the construction industry.

The ABC stated that the Occupational Employment Statistics (OES) data show as many as 500,000 helpers currently working in the construction industry. As explained in the NPRM, the OES survey did not include a separate construction laborers definition, and the helper definition appears to encompass laborers where they assist craft workers. It is likely therefore that the OES figures include many laborers and other

[5] ''Helpers, construction trades'' were defined by the National Compensation Survey as ''[s]emi-skilled workers who assist other workers of usually higher levels of competence or skill. Helpers perform a variety of duties such as furnishing another worker with materials, tools, and supplies; cleaning work areas, machines, and equipment; feeding or offbearing machines; holding materials and tools; and performing routine duties. Helpers specialize in a particular craft or trade. A helper may learn a trade but does so informally and without contract or agreement with the employer.''

The AGC mistakenly refers to the helper definition used in the NCS surveys as the OES definition. The OES definition is set forth *infra* at note 15. In the future, NCS surveys (and OES surveys) will use the new Standard Occupational Classification (SOC) definition. Under the SOC definition, helpers are described as follows: ''Help [craft worker] by performing duties of lesser skill. Duties include using, supplying or holding materials or tools, and cleaning work area and equipment.''

[6] The percentage figures cited by the AGC are considerably higher than those previously cited by the Department because those cited by AGC reflect the elimination of supervisory construction workers from the total number of construction workers surveyed. The percentage of helpers in relation to the entire construction workforce is the appropriate percentage to compare to the data utilized in the NPRM.

[7] The NCS surveys actually show that the average wage rates reported for helpers are *below* the wage rates reported for ''unskilled'' construction laborers. However, the lower average wage rate paid helpers in these NCS surveys appears to be due to the fact that the laborer's rates are an average of wage rates paid to both union and non-union workers, while the helper's rates are based only on non-union data.

unskilled workers in the helper category. For this reason, the Department believes that OES figures overstate the use of helpers in the construction industry.

The ABC also noted that the Department, when first publishing the suspended rule in 1982, relied upon earlier BLS estimates that helpers constitute between 3 and 9 percent of the total workers in the industry, and stated that these estimates do not differ greatly from the statistics cited in the most recent NPRM. In the preamble to its 1982 Final Rule, the Department stated that BLS survey data of large metropolitan areas indicated that the estimated helper share of employment in the construction industry was between 3.2 percent and 5.6 percent. 47 FR 23650. However, the Department indicated that this estimate might be understated because the survey was limited to areas that were ''heavily unionized.'' *Id.* To correct this understatement, the Department assumed that the true union share of Davis-Bacon employment was 50 percent and, accordingly, adjusted the estimate of the helper share of employment in the construction industry to between 5.98 and 9.4 percent. *Id.* The Impact Analysis in the 1987 proposed rule utilized the OES survey as the basis for its assumption that 15 percent of employees in construction will be helpers. 52 FR 31368–31369. As discussed in the Impact Statement published in the NPRM, the Department now believes these estimates overstate the percentage of helpers in construction employment.

However, none of these surveys and studies shows the degree to which the use of helper classifications is actually prevailing within the meaning of the DBRA.[8] As discussed above, the 1987/1989 rulemaking projected helper classifications would prevail in two-thirds to 100% of all non-union craft classifications. The Department's limited experience, as reflected in the data collected during the implementation period, does not support these projections.

Several commenters stated that the 78 wage surveys conducted in 1992–93, upon which the Department relied in part to assess the extent of helper use, constituted too small a sample to be a reliable measure of the extent of helper employment throughout the construction industry. The AGC and the ABC cited a GAO audit of the Davis-Bacon wage survey process as the basis for their opinion that the Davis-Bacon surveys are unreliable and should not be used as a basis for estimating the extent of helper employment. GAO/HEHS–96–130 (May 1996). The ABC suggested that these survey results might also be unreliable because a large number of non-union contractors either did not voluntarily participate in the survey process or were not aware that helpers should be reported during the implementation period. Dr. Thieblot also expressed his belief that factors other than scarcity explain why relatively few helper rates were determined to prevail during the implementation period. Dr. Thieblot stated that the Department's inability to find helper rates prevailing during this period was due to the type of surveys conducted, where they were conducted, and how the results were interpreted.

The Department agrees with the comments that the 78 surveys were not a statistically valid sample and are not a reliable measure of the extent of helper employment in the industry. However, the Department has found its 1992–1993 survey data to be consistent with the relatively low incidence of helpers reflected in the other available data sources discussed in the Impact Analysis. The Department believes that a sufficient number of surveys were conducted to provide evidence that the earlier estimates of the extent to which use of helpers prevails were overstated. It is also worth noting that most of the surveys were selected to target areas where the Department believed that use of helpers would likely be found to be prevailing.[9]

While the report from the GAO raises the possibility that some prevailing wage decisions issued during this period might be affected by the submission of erroneous data, there is no evidence that the data collected by the Department concerning prevalence of the use of helpers were inaccurate or skewed by the submission of erroneous data.[10] Erroneous reporting of an employee's classification is not a typical error mentioned in the GAO report.[11] Thus, the GAO findings are not relevant to the issue of prevalence of the use of helpers and cannot be used to support the conclusion that the surveys conducted during the time that the semi-skilled helper rule was in effect are an unreliable source of information on that issue. The Department also disagrees with the comment that contractors were not made aware that they should be reporting helper employment during the implementation period. Specific instructions were included on the WD–10 survey forms to inform contractors of the definition of ''helper'' and that workers falling within that definition should be listed as helpers, regardless of job title.

Dr. Thieblot re-analyzed the non-union data on helper use, discarding all surveys which, based on the areas in which the surveys were performed and the type of construction surveyed, he did not believe would be likely to produce helper classifications. He then proceeded to eliminate all classifications that he believed would not ordinarily utilize helpers, such as truck drivers and equipment operator classifications. After paring down the data in this manner, Dr. Thieblot concluded that helper use prevails in 14.5% (48 of 331) of those non-union classifications he believed could possibly use helpers.

The assumptions on which Dr. Thieblot's analysis was based, regarding which geographic areas and which types of construction and classification are likely to produce helper classifications, appear to be speculative and inconsistent with the data in the surveys.[12] In any event, this total is much less than the two-thirds to 100% of all (non-union) craft classifications in which the Department previously estimated helpers would prevail.

Dr. Thieblot also questioned what he termed the Department's ''unexplained rejections of helper rates as prevailing

[8] In this regard, the AGC commented that ''[t]he percentage of helpers in the 'construction industry' is likely to underestimate their numbers and reveals nothing about their employment with respect to a particular craft.''

[9] The Department also reopened unpublished surveys that were conducted before the helper rules were in effect in order to include helper data.

[10] As the Department stated in the Final Rule, continuing the suspension of the ''semi-skilled'' helper regulations, ''It is inappropriate to draw conclusions concerning the accuracy of survey results based on the GAO report. The report did not examine or verify the accuracy of wage determination data, survey response rates, or calculation of prevailing wages. It focused on the policies and procedures utilized to prevent the use of inaccurate data, and proposed changes to strengthen those policies and procedures.'' 61 FR 68641, 68645.

[11] The typical errors mentioned in the GAO report concerning data submissions include:

- Reporting the wrong peak week,
- Reporting a slightly incorrect wage or fringe benefit rate (*e.g.,* reporting the rates currently being paid rather than the rates that were paid during the peak week that occurred ten months previously), or
- Reporting an average wage rate rather than the wage rate paid to each individual worker within the classification (*e.g.,* an employer might report five electricians paid one average rate when in fact each electrician was paid a slightly different rate).

[12] For example, although Dr. Thieblot eliminated highway construction and truck drivers from his count on the assumption that these types of construction and classifications would not use helpers, the Department found 6 instances in which truck driver distributor helpers prevailed and 3 instances in which mechanics' helpers prevailed on highway construction.

* * *.'' However, the Department followed the suspended rules at 29 CFR 1.7(d) for determining the circumstances in which a helper classification is found to prevail. For example, where the union electrician's rate was found to prevail, an electrician's helper classification would not be found to be prevailing unless it was the practice for union contractors to hire electrician's helpers. Where the electrician's rate was based on an average of wages paid, the determination of whether use of electrician's helpers prevailed was based on a comparison of the number of craft workers (journeymen, apprentices, trainees and helpers) working on projects utilizing electrician's helpers with the number of craft workers (journeymen, apprentices, and trainees) working on projects without helpers. Finally, the Department's data sufficiency guidelines in effect at the time required that the Department not list a classification and wage rate where the number of helpers used (or any other classification), or the number of contractors using helpers was not sufficient to determine a prevailing wage.[13]

After review of the comments, the Department continues to believe that helpers are not as widespread as it had previously assumed.

3. The Suspended Regulation Could Have a Negative Impact on Formal Apprenticeship and Training Programs

Although not its primary concern in this rulemaking, the Department believes that the potential impact of the suspended rule on formal apprenticeship and training programs merits discussion, given the Secretary's broad authority to protect and promote the welfare of workers, including the authority under the National Apprenticeship Act of 1937, 29 U.S.C. 50, *et seq.* (also known as the Fitzgerald Act) to promote apprenticeship. As stated in the NPRM, the Department believes that the suspended helper regulations could undermine effective training in the construction industry if contractors are permitted to use helpers, who may never become journeylevel workers, in lieu of apprentices and trainees participating in formal programs that place ratio limits on their use, assure that they receive full training, and lead to jobs at the journey level.

[13] Wage and Hour procedures in effect at the time required that, in order for a prevailing rate to be issued, there must be at least 6 workers employed by at least 3 contractors if the contractor-response rate was less than 50 percent, and at least 3 workers employed by at least 2 employers if the response rate was 50 percent or more.

Several commenters were concerned about the negative impact the suspended helper rule would have on formal apprenticeship and training programs. Congressional Representatives Clay, Owens, and Clyburn stated that minority and female workers would suffer reduced earning opportunities and/or lost wages and benefits if the suspended helper regulation were implemented. These congressmen expressed concern that the suspended rule would trap younger workers, including a disproportionate share of minority workers, in the new helper classifications; as a result these workers would never enter apprenticeship programs, which are the primary route to obtaining decent wages and fringe benefits. Representatives Schakowsky and Weiner echoed these concerns, stating that the suspended rule, which contains no requirement that contractors provide any training to helpers, would have an adverse impact on construction worker training and apprenticeship programs, thus exacerbating the current skills shortage in the construction industry. These congressmen also stated their belief that the suspended regulation would reduce opportunities available to minority and female workers within the construction industry by relegating them to helper status.

The Building Trades commented that, in the NPRM, the Department greatly understated the long-term negative impact the suspended regulation would have on formal apprenticeship and training programs. The Building Trades stated that the suspended helper regulations would permit almost unfettered use of low-paid semi-skilled helpers on DBRA-covered projects, thus offering contractors and subcontractors savings in labor costs without the *quid pro quo* of investing in apprenticeship training. The Building Trades stated that contractors and subcontractors who participate in and provide financial support for formal apprenticeship and training programs would be placed at a competitive disadvantage *vis-a-vis* contractors using helpers, thus undermining their continued participation in such programs. The Building Trades also expressed its concern that the suspended rule's failure to encourage formal craft training would eventually lead to a severe shortage of skilled craft workers in the industry.

LIUNA cited the GAO's finding that a ''major incentive'' for contractors to use apprentices has been the ability to pay less than the prevailing wage on DBRA projects. GAO/HRD–92–43 (1992), p. 11. LIUNA stated that the reduced apprenticeship opportunities that would accompany the suspended rule would result in additional costs for training workers, a long-term shortage of skilled workers, fewer genuine training opportunities for women and minority craft workers, and an increase in construction injuries, since most injuries occur to new, entry-level workers who are untrained or inadequately trained.

MESMA noted that prevailing wage laws support the funding and viability of many labor-management apprenticeship programs that provide state-of-the-art training and produce the most productive workers in the industry. MESMA stated that the overuse of helpers could lead to a reduction in skills and diminishing quality of construction, as well as an increase in industrial accidents, because helpers generally receive little or no safety training.

The NJATC commented that helpers under the suspended definition would likely perform the same role that apprentices now perform on the jobsite, only at a lower cost. The NJATC stated its belief that this practice would result in fewer indentured apprentices, as contractors, in competition to win federal construction contracts, would replace ''journeymen-in-training'' apprentices with lower-paid helpers in continually increasing numbers. NJATC stated that, within five to ten years, this replacement of apprentices with helpers on DBRA projects would result in an acute shortage of skilled construction workers.

The IBEW commented that, if use of helpers is allowed extensively on DBRA projects, contractors would no longer be motivated in a competitive setting to spend 2 percent or more of their payroll on training, and use an apprenticeship system requiring ratios, when they could use helpers and avoid such requirements.

On the other hand, both the ABC and the AGC commented that there is no basis for the Department's concern that increased recognition of helper classifications may have a detrimental effect on apprenticeship and training programs. The ABC stated that, over the last decade, funding and participation by open shop contractors in apprenticeship and training programs has increased significantly, independent of the Davis-Bacon regulatory process. The ABC stated that the Department's policies regarding apprenticeship programs and ratio requirements have made apprenticeship training unavailable to some workers who desire to enter the construction industry in semi-skilled jobs. The ABC further stated that the helper classification is an important point of entry into the construction industry for young people, women and minorities, and that it is improper for the Department to refuse to recognize the prevailing practice of employing helpers in an effort to force into training programs workers who either may not be qualified or may not desire such training.

While acknowledging that the helper classification cannot be used as an informal training program, the APWC stated that it fulfills an important entry-level job opportunity for many construction workers. The AGC of Texas, on the other hand, stated that the use of helpers allows contractors to utilize unskilled workers while teaching them a trade or skill. Dr. Thieblot expressed concern that a larger number of skilled journeymen will be needed to sustain the construction industry in the future than the number which can be provided by existing apprenticeship and formal training programs. Dr. Thieblot also expressed his belief that the suspended helper rules, to the extent they would allow informal, on-the-job training of semi-skilled workers, would provide a necessary alternative to formal apprenticeship and training programs for training and upgrading workers to journeyman status.

The Mercatus Center expressed its belief that the increased employment of helpers under the suspended rule would provide greater employment and training opportunities for minorities and women. The ABC recommended more study on the potential impact on minorities and women prior to issuance of the proposed rule. The APWC stated that it is inappropriate for the Department, in analyzing the merits of the helper regulations, to express a preference for formal training, such as provided under union-sponsored apprenticeship plans, over the informal training methods utilized in the non-union sector.

The Department continues to believe that formal structured training programs are more effective than informal on-the-job training alone. The Department's encouragement of formal training is reflected in the provisions of the Secretary's DBRA regulations that currently allow laborers and mechanics classified as ''apprentices'' or ''trainees'' to be paid less than the prevailing wage rate on Davis-Bacon covered projects only if they are enrolled in a bona fide apprenticeship program registered with the Department's Office of Apprenticeship, Training Employer and Labor Services (ATELS) (formerly, Bureau of Apprenticeship and Training (BAT)) or a State Apprenticeship Agency recognized by ATELS, or a bona fide training program approved by the Department's Employment and Training Administration.

The Department views any increases in funding and participation in formal training programs in the open-shop construction community as a positive development, but this does not address the concerns expressed by several of the commenters that the implementation of the suspended rule would discourage the growth of such programs and result in the replacement on DBRA-covered projects of apprentices and trainees enrolled in formal programs, by helpers who could perform the same work as apprentices and trainees at a lower cost to the construction contractor and without any restrictions as to how helpers are used. The Department shares this concern, along with the additional concern that workers employed as helpers—and particularly, young, minority and female workers—will not receive the type of training necessary to become higher skilled, better paid workers. The Department notes that the Congressional Budget Office (CBO) has also recognized that the suspended rule might have a negative impact on apprenticeship and training programs.[14]

Although not the paramount concern in this rulemaking, the Department is of the view that the increased use of helpers under the suspended rule poses a significant risk that formal apprenticeship and training programs on DBRA-covered projects would be undermined.

*Discussion of Other Alternatives Considered*

Except for TxDOT, which appears to favor a combination of the proposed alternatives, none of the commenters urged the Department to adopt any of the alternatives set forth below. The ABC stated that, while it believes that the Department should reinstate the suspended rule, it would support further study of any of the proposed alternatives. The ABC commented that each of the proposed alternatives is preferable to adoption of the proposed rule, and that the Department has not given sufficient study to the alternative approaches. On the other hand, both the Building Trades and LIUNA indicated their belief that none of the alternative approaches considered by the Department is viable.

The Mercatus Center commented that the Department has not properly assessed the quantitative benefits of the alternatives presented in the NPRM. The Mercatus Center stated that, without better information on the costs and benefits of the alternatives, the Department places inordinate weight on such factors as ease of administration and enforcement, rather than on net social benefits. As explained in the NPRM, ''[e]ach alternative would likely result in greater use of helpers than under the proposed rule, but less than under the suspended rule,'' and therefore, ''the economic impact would presumably yield some portion but not all, of the savings anticipated under the suspended rule.'' 64 FR 17455. The Department also stated that it would not be possible to provide detailed estimates of the economic impacts of the alternatives because ''each alternative encompassed many possible variations and outcomes'' and ''there is no data source that would provide appropriate information on these variations and outcomes.'' *Id.*

1. Add a Ratio Requirement to the Suspended Helper Definition

The Department stated in the NPRM that it believed that implementation of a ratio provision would be essential if the suspended rule were implemented, in order to reduce the potential for abuse. The Department recognized, however, that adoption of a ratio provision would not address or resolve the suspended rule's definitional problems that make it extremely difficult for contractors, as well as Wage and Hour and contracting agencies, to identify and distinguish helpers from other workers for DBRA enforcement and wage determination purposes. The Department also questioned whether, as a practical matter, an appropriate nationwide or local ratio standard could be determined, and expressed concern for the substantial resources that would be required to determine appropriate ratios based on local practices.

The Building Trades expressed the view that any fixed nationwide ratio, like the ratio that was struck down in Federal court, would be arbitrary and capricious because it would be inconsistent with the underlying principle of DBRA that labor standards reflect local prevailing practices. LIUNA stated that the addition of a ratio requirement under the suspended rule

[14] The CBO stated in its Study: ''Modifying the Davis-Bacon Act: Implications for the Labor Market and the Federal Budget,'' July 1983 at page 42: ''Contractors who would have been induced to provide approved training and apprenticeship programs, because doing so was the only way of paying less than journeymen's wages on federal projects, might now reduce the number of apprentices in favor of helpers and informal trainees. To the extent that this adjustment occurred, less-skilled workers might receive less training of the type that would qualify them for entry into the skilled crafts—possibly reducing minority access to these crafts and limiting the supply of skilled labor in the future.''

would not address or resolve the definitional problems inherent in the suspended rule, and that it would be extremely difficult to develop an appropriate ratio standard that would reflect local practices.

Noting that the D.C. Circuit Court of Appeals allowed the Department to reinstate a ratio requirement provided that the Department can support such ratio with an administrative record, the ABC commented that the Department failed to develop such a record and did not attempt to set local ratios through the wage survey process.

The Mercatus Center stated that the Department should re-evaluate the original rationale for including a ratio in the suspended rule. The Mercatus Center noted that ratios appropriate for productive construction efforts are subject to change with changes in production methods, materials, technology, and population, and that due to regulatory time lag, any binding ratio might be obsolete in a few years. The Center suggested that if a rationale for the type of abuse a ratio is intended to prevent could be articulated, then a ceiling that is non-binding, but that would prevent any feared abuse of the helper category, might be workable.

TxDOT recommended that the Department adopt a combination of measures, including the addition of a ratio requirement to the suspended definition to prevent abuse of the helper classification. TxDOT suggested that varying the ratio requirement, depending on the type of work performed, might be a way of validating the ratio provision.

None of the commenters has provided the Department with specific guidance as to how an appropriate nationwide or local ratio standard could be determined. As noted in the NPRM, a nationwide ratio would not accord with local practices, whereas locally developed ratios would present significant administrative and enforcement concerns and would require substantial resources for implementation.

The difficulty with determining locally prevailing ratios begins with deciding how that ratio should be calculated. The easiest method would be to compare the total number of helpers to the total number of journeyworkers reported for the classification. This methodology, however, does not measure the typical ratio of helpers to journeyworkers on any particular job. For example, four hypothetical data submissions might report carpenters and carpenter helpers as follows:

| Project | Number of carpenter helpers | Number of carpenters |
|---|---|---|
| A | 1 | 2 |
| B | 1 | 2 |
| C | 6 | 1 |
| D | 1 | 2 |
| Totals | 9 | 7 |

In this example, the prevailing jobsite ratio of carpenter helpers to carpenters is clearly 1:2 (*i.e.*, on three of the four projects, contractors used one helper for every two carpenters). However, if the ratios are averaged, the resulting ratio would be almost 2:1 (1.875), and a ratio derived by dividing the total number of helpers by the number of carpenters would be greater than 1:1 (*i.e.*, 9:7 or 1.286). Therefore, either of these approaches could frequently yield a distorted picture of the true prevailing ratio.

Collecting and verifying data on the ratio of helpers to journeyworkers for each jobsite is likewise a difficult task. Currently, Wage and Hour collects data for each classification based on the ''peak week'' of employment on the project. This ''peak week'' may differ for each classification. Since one may find that the peak week of employment for carpenters is a different week than that for the carpenters' helpers, the ratio would vary as well. It is not clear how the peak week concept should be applied in this situation. Any solution to this question could be administratively costly and time-consuming for Wage and Hour and for contractors, thereby impacting the Department's ability to obtain the cooperation of contractors to collect accurate data.

The Department remains of the view that adding a ratio requirement would be essential to reduce the potential for abuse from the excessive use and misclassification of helpers if the suspended rule were implemented. The D.C. Circuit Court of Appeals also recognized the importance of a ratio provision to the effective administration and enforcement of the suspended helper rule when it stated that ''the Secretary has increased the likelihood that gross violations will be caught, or at least that evasion will not get too far out of line, by putting the forty-percent cap on the use of helpers. * * * [T]he existence of some cap at least increases our confidence that the Secretary has considered the enforcement problems of the new definition and responded to them.'' Donovan, 712 F.2d at 630.

More importantly, the Department continues to believe the addition of a ratio provision to the suspended helper rule—although it might curb the worst abuses—would not address or resolve the problems inherent in the suspended rule's definition, which, as discussed above, make it extremely difficult to identify helpers for DBRA enforcement and wage determination purposes.

2. Change the Suspended ''Helper'' Definition To Emphasize the Semi-Skilled Nature of the Classification

In the NPRM, the Department stated that it believed that amending the ''helper'' definition to emphasize its semi-skilled nature would help assure that the helper classification would be a true ''semi-skilled'' classification rather than a broad catch-all classification that could perform everything from laborer duties to an undefined and potentially unlimited assortment of skilled tasks overlapping the work of journeyworkers. The Department suggested that this approach would aid in distinguishing helpers from laborers by emphasizing the ''semi-skilled'' nature of helpers, as distinguished from the unskilled duties in the definition in the suspended rule. Under this approach the definition would elaborate on the supervisory relationship between the helper and the journeyworker and the craft-specific assistance provided, and expressly limit the unskilled work the helper could perform. The Department noted, however, that this alternative would not resolve the administrative and enforcement problems that stem from the overlap of duties between journeyworkers and helpers, and that it might result in helper classifications being used to replace, rather than supplement, the use of apprentices and trainees registered in bona fide training programs.

The Building Trades commented that, even under this modified definition of a helper, it would not be possible to distinguish a helper from a laborer because laborers also assist craft workers and many use tools of the trade to perform certain duties. The Building Trades also noted that a laborer working under the supervision of a journeylevel worker could be classified as a lower-paid helper under this definition, simply by adding to his or her duties a few relatively low-skilled tasks using tools of the trade.

LIUNA stated that this alternative would not prevent the substitution of helpers for laborers, because laborers perform not only unskilled duties, but a wide array of semi-skilled duties as well. LIUNA further stated that, because laborers generally earn higher wages than helpers, this alternative would result in misclassification of laborers just as would the suspended rule.

The ABC stated that the Department's rejection of this alternative on the grounds that helpers would continue to have overlapping duties with journeymen is inappropriate. The ABC stated that, if the prevailing practice is to employ helpers to perform duties overlapping with those of journeylevel workers, it is the Department's statutory obligation to recognize that practice.

The Department continues to believe that this alternative would not resolve the administrative and enforcement problems that would stem from the overlap of duties between journeyworkers and helpers. The Department remains of the view that the emphasis on semi-skilled duties under this approach might result in helper classifications being used to replace, rather than supplement, the use of apprentices and trainees registered in bona fide training programs. Furthermore, it appears that this alternative might not even resolve the problems of overlap of duties between helpers and laborers.

3. Define ''Helpers'' Based on the Bureau of Labor Statistics, Occupational Employment Statistics (OES) Dictionary of Occupations, Which Focuses on Unskilled Duties and the Worker's Interaction With Journeylevel Craft Workers [15]

The Department noted in the NPRM that this approach, by focusing on the role of the helper in assisting the journeyworker and eliminating the ''semi-skilled'' characterization from the definition of helpers, could provide a more practical basis for distinguishing helpers from journeyworkers. However, the Department expressed its concern that laborers may often perform the same work encompassed within the OES helper definition, thereby causing significant problems for Wage and Hour in conducting wage and area practice surveys and in enforcement because of the lack of clear differentiation between the classifications. The Department also stated that it might be difficult under this approach for contractors to determine whether workers performing similar or identical duties are ''laborers'' or ''helpers'' when submitting DBRA survey data and in classifying workers on DBRA-covered projects.

Both the Building Trades and LIUNA commented that this alternative would present the same problem as that presented by the suspended rule, viz., helpers and laborers both perform the work as described in the operative definition. The Building Trades and LIUNA state that it would be difficult for contractors to determine whether workers performing similar or identical duties are laborers or helpers when submitting Davis-Bacon survey data and in classifying workers on DBRA projects.

The AGC commented that the OES definition of a helper is consistent with the definition in the suspended regulation, and can be used by contractors to effectively distinguish helpers from laborers and other craft workers. The ABC objected to the Department's characterization of the OES definition as ''eliminating the semi-skilled characterization'' from the definition of helpers. The ABC further stated that any such elimination would deny an essential component of helpers and would defeat the statutory mandate of recognizing prevailing practices.

None of the commenters has demonstrated how helpers can be effectively distinguished from laborers under this approach for both enforcement and wage determination purposes, given that laborers would often perform the same work as that described in the OES helper definition. Moreover, the Department does not believe that focusing on the role of the helper in assisting the journeyworker is an effective means for distinguishing helpers from laborers. None of the commenters disputes that laborers, too, are frequently called upon in the performance of their regular duties to assist journeymen.

4. Explicitly Delineate the Semi-Skilled Tasks Performed by Each Helper Classification

As this so-called ''job family'' approach was described in the NPRM, an employee who performs only lower level duties that are associated with a particular craft may be classified and paid at the lower level helper rate; however, an employee who performs some lower level duties and some higher level duties must be paid the higher journeylevel rate for all of the employee's work time. The Department stated that this approach, in effect, would allow for the expanded use of helpers, with differentiation based on the skill and knowledge required to perform particular duties. The Department theorized that once the duties or tasks that the helpers could perform were clearly defined, wage data could be collected on that basis, and contractors could reasonably be expected to comply with the wage requirements for the various classifications employed on their contracts, thereby facilitating administration and enforcement. The Department stated, however, that developing clear definitions of the duties or tasks that helpers to each journeylevel craft worker would be allowed to perform would be very difficult, requiring extensive occupational analyses and further rulemaking to promulgate helpers' duties descriptions. The Department further questioned whether this approach, which presumably would result in uniform, nationwide definitions, would be consistent with the underlying principle that DBRA classifications are determined based on local area practices.

The Building Trades and LIUNA stated that developing clear definitions of the duties or tasks that helpers would be allowed to perform would be very difficult, requiring extensive occupational analyses to develop accurate and specific descriptions of helpers' duties. They also commented that the uniform, nationwide definitions that would result from application of this alternative would not necessarily reflect locally prevailing practices, as DBRA requires.

TxDOT appears to favor this or a similar approach, in that it recommended (in conjunction with other recommendations) the use of standardized definitions for both journeylevel and helper classifications, stating that each level of classification should require a specific level of skill, and for those classifications where a specific skill is not required, the common laborer classification should be utilized in lieu of a helper classification. TxDOT stated that, under this approach, the need for a semi-skilled worker classification would be eliminated. The AGC of Texas provided a copy of its ''Standard Job Classifications'' booklet to demonstrate the use of standard, uniform job definitions for job classifications, including several helper classifications, in connection with highway, heavy, utility, and industrial construction projects in the State of Texas.

TxDOT also proposed that the Department expand and define the role of training programs with regard to such helper classifications, thus allowing helpers to progress to a status of ''journeyman trainee'' and then

[15] The OES Dictionary of Occupations classification scheme includes a broad category titled ''Helpers, Laborers, and Material Movers, Hand, Exclud[ing] Agricultural and Forestry Laborers.'' The work of helpers in the construction industry is described as follows: ''Help workers in the construction trades, such as Bricklayers, Carpenters, Electricians, Painters, Plumbers and Surveyors. Perform duties such as furnishing tools, materials, and supplies to other workers; cleaning work areas, machines, and tools; and holding materials or tools for other workers.''

journeyman. However, though the Department has concern for the impact its helper regulations may have on apprenticeship and training programs, it is not within the Department's purview in the context of this Davis-Bacon Act rulemaking to expand and define the role of training programs with respect to helpers.

The Department believes that adoption of this approach is simply not practicable because of the expenditure of time and resources that would be necessary to develop job descriptions for all the construction crafts. The Department also believes that this approach is inadvisable because it would amount to recognizing sub-classifications within each craft, a practice that has never been permitted under DBRA.

Furthermore, close examination reveals that the helper definitions created by the AGC of Texas suffer from the same infirmities as the helper definition in the suspended rule. For example, the AGC of Texas booklet provides the following job description for a ''Carpenter Helper, Rough'' classification: [16]

> A learner or worker semi-skilled in this craft who assists a rough carpenter by expediting materials, keeping work area clean, sawing lumber to size specified, and assisting in constructing wooden structures, under the direction of a Rough Carpenter. Performs other related duties.

Like the suspended helper definition, this definition uses the undefined term ''semi-skilled'' to describe the carpenters' helper classification without explaining what it means to be ''semi-skilled.'' Additionally, this definition is internally inconsistent in that it defines the carpenters' helper as ''semi-skilled,'' but specifically lists duties that might commonly be performed by unskilled laborers. The definition not only allows the duties of a helper to overlap with those of a journeyworker, but also provides no limitation on the duties a carpenter's helper can perform by including the open-ended phrase ''[p]erforms other related duties.'' Lastly, this definition, by referring to a carpenter helper as a ''learner,'' poses perhaps an even greater risk than the suspended helper definition that helpers will be substituted for apprentices and trainees participating in formal programs that lead to workers achieving journeylevel status.

*The Proposed Rule—Helpers as a Distinct Class With Clearly Defined Duties Which Do Not Overlap With Laborer or Journeyman Classifications*

Congressional Representatives Norwood, Goodling, Ballenger, Boehner, Hoekstra, McKeon, and Paul opposed the Department's proposed helper regulations, stating that they would tend to discourage rather than facilitate the use of helpers on DBRA projects. They commented that the proposed regulations are deficient because they do not reflect current industry practice and are not responsive to the needs and practices of the vast majority of the construction industry. These congressmen also stated that the proposed helper rule, in contrast to the suspended rule, will not encourage access by low-skilled workers to valuable entry-level jobs. They further stated that opening more helper jobs under the suspended rule would attract workers to the construction industry, which suffers from a serious shortage of skilled workers.

Representatives Clay, Owens, and Clyburn supported the proposed rule on the basis that it not only better reflects the current practices of Davis-Bacon contractors, but also ensures that minority workers will be paid locally prevailing wages and fringe benefits. They further commented that the proposed rule will ensure that the Federal government, through its procurement practices, will not act to undermine the living standards of workers, and will promote continued access to the kinds of apprenticeship programs that are essential if new workers in the construction industry are to better themselves.

Representatives Schakowsky and Weiner also urged the Department to adopt as final the proposed rule because it recognizes the need for a clear delineation and limitation on the use of helpers on DBRA-covered projects. They stated that the proposed rule will encourage proper training for young, minority and female workers by promoting formal and effective apprenticeship programs. They also commented that the proposed rule will enhance the presence of more skilled and productive workers on Davis-Bacon projects, thus reducing the costs resulting from job-related injuries and improving the economic situation of the entire community.

The AGC, the ABC, Dr. Thieblot, and the SBSC all opposed the Department's proposed rule and advocated implementation of the suspended rule. These commenters, as well as the APWC, stated that where the use of helpers prevails, they should be recognized by the Department in accordance with its statutory mandate to reflect prevailing practices. For example, the ABC commented that, if it is the prevailing practice to employ helpers in a given locality to perform overlapping duties with journeymen, the Department of Labor has an obligation to recognize that practice. The AGC echoed this point, stating that even if helpers prevail in only 3.9 percent or 2.7 percent of surveyed job classifications, as surmised by the Department in its NPRM, helper classifications should nonetheless be recognized in those instances where they are found to prevail. The ABC also urged the Department to delay issuance of the proposed rule until the upgrade of the Department's survey and data collection processes has been completed and a fair and objective study of the helper issue is conducted.

The AGC of Texas supported restoring the increased use of helpers under the suspended rule, stating that for more than 35 years helper classifications have been recognized in Texas and are still being used on projects that have no Federal funds. The Mercatus Center generally opposed adoption of the proposed rule, primarily based on economic considerations. Elcon specifically objected to the Department's refusal under its current policy to approve the elevator helper classification negotiated by the International Union of Elevator Constructors. Elcon stated that the Davis-Bacon Act should not be used to make new rules that would reduce competition, unnecessarily inflate costs on Federal construction projects, provide unfair advantages for nonunion organizations, and create separate job definitions for Federal projects.

The Building Trades and LIUNA both urged the Department to adopt the proposed rule. They favored the proposed rule because it reestablishes the duties-based classification approach, provides an objective basis for administration and enforcement, including clear criteria that facilitate contractor compliance, and is consistent with the statutory intent to assure that workers employed on DBRA projects receive the prevailing wages paid to workers performing similar work on similar construction in the same area. They also stated that the proposed rule's lack of overlapping duties will discourage contractor misclassification and abuse and that the requirement that helpers be separate and distinct from

[16] The definition for a ''Carpenter Helper, Rough'' is fairly representative of all of the helper definitions contained in the AGC of Texas booklet. They generally all begin with the phrase, ''A learner or worker semi-skilled in this craft''; require supervision by the journeyworker; provide a list of specific duties; and conclude with the phrase, ''Performs other related duties.'' Though the specific duties vary from craft to craft with respect to each helper classification, they are basically unskilled duties that a laborer could perform.

journeylevel workers and laborers will facilitate collection of wage data used to establish prevailing wage rates on DBRA work. Finally, they stated that the proposed rule will provide strong incentives to contractors and subcontractors to establish and participate in formal apprenticeship and training programs.

MESMA opposed the use of helpers without stringent enforcement by the Department as part of a comprehensive Davis-Bacon reform effort. MESMA expressed concern that the overuse of helpers could lead to a reduction in workforce skills, diminishing quality of construction, and an increase in industrial accidents. The NJATC opposed the helper concept in general based on its belief that the institution of helpers will have a negative impact on apprenticeship and training programs. The IBEW opposed adoption of the Department's proposed rule based on its general opposition to use of helper classifications, under any definition, on DBRA projects. The IBEW suggested that the creation of helper classifications may bring down wage scales, put more people in poverty, and force construction workers to work more than one job in order to survive economically. MESMA and the IBEW both questioned whether the helper criteria under the proposed regulation can be effectively administered and enforced.

Based on careful review of the comments and further consideration of the alternatives, the Department has decided to adopt as a final rule an amendment to the regulations that will incorporate the longstanding policy of recognizing helpers as a distinct classification on DBRA-covered work only where Wage and Hour determines that (1) the duties of the helper are clearly defined and distinct from those of the craft worker and laborer, *i.e.,* the duties of the helper are not routinely performed by any other classifications in a given area; (2) the use of such helpers is the prevailing practice in the area; and (3) the helper is not used as a ''trainee'' in an informal training program.

The Department favors this approach because it incorporates the duties-based methodology for distinguishing classifications that the Department utilizes in identifying other classifications under the DBRA. By providing for the recognition of helpers based on the duties they perform, rather than on the worker's skill level and the existence of supervision, the proposed rule provides an objective basis for Wage and Hour to administer and enforce the statute's prevailing wage requirements with respect to the employment of helpers. This duties-based approach also facilitates compliance by providing clearer criteria to be followed by contractors who wish to employ helpers on DBRA-covered projects.

The Department also believes that, by recognizing helpers only where their duties are distinct and do not overlap with those routinely performed by other classifications, the proposed rule will discourage contractor misclassification and/or abuse that could result from contractors reclassifying journeyworkers and laborers as helpers at lesser rates of pay on DBRA jobs.

The Department believes that the proposed rule provides the only approach that is administratively feasible. Unlike some of the other alternatives considered, the policy under the proposed rule does not require Wage and Hour, in its enforcement, to make a fact-bound inquiry of each worker to assess his or her skill level and the nature of the worksite supervision he or she receives to determine whether the worker will be recognized as a ''helper'' for Davis-Bacon purposes. The requirement that helpers have distinct duties from those of other classifications on the wage determination also facilitates the collection of wage data that more reliably reflect the prevailing wage rates paid for work performed by helpers on DBRA-covered construction work.

Under the regulations, helpers—whatever their job title—will be recognized, as they are today, whenever their duties are separate and distinct from duties routinely performed by other classifications. For example, tender classifications are common on Davis-Bacon wage determinations. On the other hand, where helpers are just lesser skilled workers of a particular craft, they will be included in the surveys under the craft classification, and their rates averaged together with the journeylevel workers (where there is no rate paid to a majority of the workers in the classification).[17]

Additionally, this approach maintains the current incentive to contractors to establish and participate in structured apprenticeship and training programs that facilitate the advancement of lesser skilled workers to journeylevel status.

The chief objection to the proposed rule expressed by commenters in this rulemaking is that it disregards local area practices in those instances where there may be a prevailing practice of employing helpers who do not meet the three-part regulatory test as set forth above. The gravamen of this objection is that the proposed rule does not accord with the Department's statutory obligation to provide classifications and wage rates that mirror locally prevailing practices.

The Department believes that the proposed rule is fully consistent with the DBRA's underlying prevailing wage goals and requirements. The Davis-Bacon Act provides little guidance concerning the methodology the Secretary is to use in determining ''classes'' of laborers and mechanics and their respective prevailing wage. Consequently, the Secretary has a substantial amount of flexibility and discretion in devising a methodology to fulfill the Department's statutory obligations and responsibilities under the Act. *Donovan,* 712 F.2d at 616, 629–630; *Miami Elevator Company and Mid-American Elevator Company, Inc.,* ARB Case Nos. 98–086 and 97–145 (April 25, 2000), slip op. at 35.

The Davis-Bacon Act directs the Secretary to determine the prevailing wage for ''corresponding classes'' of laborers and mechanics. It has been the longstanding practice of the Department—with the exception of the short period during which the suspended rule was implemented—to utilize a duties-based approach to identifying classes of laborer and mechanics.[18] Under this practice, the duties that a particular class of worker performs may vary somewhat from one area to another; and a classification may be recognized in one area and be subsumed under another classification in another area, in accordance with prevailing area practice. Thus, in one area a helper may be a separate class, while, in another area, it may be subsumed under another classification in accordance with prevailing area practice. Although this duties-based distinction is not mandated by the statute, the Department believes it is

[17] Employers who use helpers that meet the definition under this final rule should report the use of helpers in response to Davis-Bacon prevailing wage surveys, along with a description of the duties or other characteristics that distinguish helpers from other workers. Where ''helpers'' perform the duties of another classification on the wage determination, the employer should report the ''helper'' under that classification. If helpers are listed on a WD–10 survey form, the Department will determine whether they are a separate classification, meeting the criteria of the regulations; if not, the Department will determine the appropriate classification for the work performed and include the ''helpers'' and their wage rates under that classification—laborer, craft worker, or otherwise.

[18] The Department has created a regulatory exception for apprentices and trainees in approved programs.

fully consistent with the legislative history and statutory intent.

Furthermore, the Department believes it simply is not feasible to graft onto a duties-based system of classifications, one class defined on the basis of skill and supervision. Since the craft worker is not defined on the basis of skill and supervision, and the prevailing wage of the craft worker is based on rates paid to workers with a range of skills and supervision, it does not make sense to carve out certain workers who may have less skill and receive more supervision.

In addition, the Department has been unable to determine how the suspended helper rule can be administered and enforced in accordance with the DBRA's prevailing wage requirement. A review of the comments reveals no consensus as to how helpers are used in the construction industry, and the commenters provided no information to aid the Department in identifying a generally accepted definition of a helper that corresponds to industry practices. Nor is there a practicable, reasonable way to identify helpers, when the manner in which they are used varies so in each and every area where DBRA-covered construction is taking place.

The Department's Administrative Review Board in its recent decision in the case of *Miami Elevator Company and Mid-American Elevator Company, Inc.,* ARB Case Nos. 98–086 and 97–145 (April 25, 2000), explained the Department's position. In response to an argument that the Department's refusal to approve an elevator helper classification because it did not meet the current three-part test resulted in ''a staffing pattern that is inconsistent with locally prevailing practice,'' the Board stated as follows:

''[W]e note that the oft-repeated declaration that the purpose of the Davis-Bacon Act is to 'hold * * * a mirror up to local prevailing wage conditions and reflect * * * them' on federal construction projects is a simplistic and inaccurate characterization of the statute. [Citation omitted]

* * * * *

''[I]t is virtually inevitable that some laborers and mechanics who work in a given jurisdiction are paid less than the prevailing wage rates determined by the Secretary, yet the congressionally-mandated prevailing wage scheme requires that all construction workers be paid not-less-than the prevailing rate when employed on a federal construction contract—even those workers who might otherwise be employed on non-Federal projects in the local construction industry at lower pay scales. The goal of the Act is not merely to replicate (or ''mirror'') the full range of local pay scales, but to require that workers be paid at least the prevailing rate.

* * * * *

''In sum, the prevailing wage mechanism chosen by Congress always has included the possibility that some construction workers in a locality who normally earn less than the prevailing wage might earn more when employed on a project subject to the Act; similarly, the Secretary and the Administrator have a long history of limiting the circumstances under which workers in a training mode would be allowed to work on federally-funded projects, generally insisting that such workers be enrolled in government-approved training programs designed to promote quality training and prevent abuse. The fact that these forces combine to produce a staffing pattern that may not 'mirror' local practice does not mean that the Administrator's decisions are incorrect, either under the law or regulations.'' *Miami Elevator Company, supra,* slip op. at 33–34.

Accordingly, the Department concludes that the proposed rule, by requiring that the duties of a helper be distinct from those of other classifications employed on the jobsite, best fulfills the fundamental purpose of the Davis-Bacon Act to assure that workers employed on federal and federally-assisted construction work be paid at least the wages paid to corresponding classes of workers on similar construction in the area.

The Department points out that it is not its intention that a helper classification would never be issued simply because some workers in another classification occasionally perform the work in question. As discussed above, the Department intends to issue helper classifications where the duties in question are not routinely performed by another classification on the wage determination and it is the prevailing practice in the area for helpers/tenders to perform the work in question, *provided* the other criteria of the regulation are met. In other words, although roofers may occasionally tear off roofing or carry roofing materials, the Department will issue a roofer's helper classification in a wage determination if more roofer's helpers perform these tasks than roofers on the projects surveyed, *provided* that the helpers tasks are clearly defined and do not include duties that prevail for other classifications in the area (*e.g.,* application of roofing where it is prevailing practice that roofers perform this work), and that the helper is not an informal trainee. Consistent with the Department's practice on approval of additional classifications under the conformance procedures at section 5.5(a)(1)(ii)(A), moreover, the Department will not approve an additional classification of helper if the helper performs any tasks that are ever performed by other classifications on the wage determination. Thus, in the example given, the Department would not approve the roofer's helper as an additional classification because tearing off of roof and carrying of roofing materials are sometimes done by roofers.

Consistent with the above discussion, the regulations have been amended to delete the suspended provision at section 1.7(d), defining the circumstances in which use of helpers would be found to prevail. The Department will apply its longstanding policies in determining prevailing practices. Section 5.2(n)(4) has been revised to set forth the circumstances in which helpers will be recognized on wage determinations and in additional classification (conformance) requests. Finally, the conformance provisions at section 5.5(a)(1)(ii) have been revised to delete the special references to helpers from the suspended paragraphs, and the second conformance provision at section 5.5(a)(1)(v), which was in effect during the period of the suspended regulation, has been deleted.

*Additional Modifications*

The regulations are further amended to reflect the organizational change in the title of the Bureau of Apprenticeship and Training (BAT) to the Office of Apprenticeship, Training Employer and Labor Services (ATELS).

## IV. Executive Order 12866; § 202 of the Unfunded Mandates Reform Act of 1995; Small Business Regulatory Enforcement Fairness Act

*Summary*

The Department determined that the proposed rule should be treated as ''economically significant'' within the meaning of Executive Order 12866 and as a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act because the various alternatives to the proposed rule, including reinstatement of the suspended rule, could result in potential savings in excess of $100 million per year. Therefore, a full economic impact analysis was prepared and presented for comment.[19] The principal finding of this analysis was that any impact resulting from the increased use of helpers under the suspended rule, or any of the other alternatives considered, would be relatively modest. The Department estimated potential savings under the suspended rule to be from $72.8 million

[19] The Department also determined, for the reasons explained in the NPRM, that the provisions of the Unfunded Mandates Reform Act of 1995 do not apply to this rulemaking. None of the commenters disputed this determination.

(utilizing Current Population Survey (CPS) data) to $296.0 million (utilizing Occupational Employment Statistics (OES) data). The Department also devised an alternative methodology that is OES-based, but utilizes CPS data to compensate for the likelihood that OES data overestimate the number of helpers and underestimate the number of laborers. This ''adjusted-OES data'' provided an estimate of $108.6 million in possible savings. As discussed in the NPRM, the Department believes that the potential savings are likely to be closer to $72.8 million than $296.0 million.

*Discussion of Comments*

The AGC does not believe that the surveys and data sources used by the Department support the conclusion that the employment of helpers is not as widespread as previously believed. Specifically, the AGC pointed out that, although the OES survey used does combine laborers, helpers and other categories, the survey is being revised to separate the helpers and laborers, making it more useful in the future. The AGC states that independent contractors rarely bid on Federal construction contracts, but rather are frequently hired by the contractors that are awarded the contracts. It therefore disagreed with the Department's view that inclusion of self-employed workers in the CPS is a strength of the survey. Furthermore, the AGC disagreed with the Department's statement that the OES definition of helpers is very similar to laborers who assist journeymen. Finally, the AGC disagreed with the Department's conclusion that the OES survey likely includes laborer employment with helper employment, thereby overstating the number of helpers and stated that the Department offers no support for its view that contractors cannot distinguish between helpers and laborers.

The ABC believes that the Department's economic impact and flexibility analysis greatly understates the economic costs of the proposed rule. Raising similar concerns to those raised by the AGC, the ABC stated that the Department's analysis is flawed by: (1) A lack of evidence that helpers would replace laborers and apprentices in proportion to the number of workers in each of those occupations; (2) the absence of a basis for assuming that OES statistics include large numbers of laborers in the estimates of helpers; (3) improper inclusion of self-employed workers in the universe of ''relevant'' construction employment; and (4) the use of flawed and distorted 1992–1993 wage surveys to estimate the number of classifications in which helpers would prevail. The ABC estimates that the proposed rule will cost hundreds of millions of dollars each year.

Turning first to the CPS survey, the Department continues to believe that it is appropriate to include independent contractors in construction workforce data. As the AGC said, independent contractors (performing as journeylevel workers) are frequently hired by contractors on Davis-Bacon contracts. Furthermore, independent contractors performing the work of laborers or mechanics are covered by the Act. No other concerns have been raised regarding the appropriateness of the data in the CPS. Therefore, as stated in the NPRM (*see* 64 FR 17561), based principally on the fact at this time the OES has not published data with a separate classification for laborer, together with the fact that OES does not collect data on self-employed individuals, Wage and Hour continues to believe that the CPS data are more likely than the OES data to be representative of the distribution of employment in construction by occupation for helpers and laborers.

The assumption that helpers would replace laborers, apprentices, and journeyworkers in proportion to the number of workers in each of these occupations is addressed in the NPRM at 64 FR 17499. The Department explained that the 1989 helper impact analysis assumed that helpers would replace only journeyworkers, and measured the wage differentials based only on this replacement effect. The Department now believes this assumption was incorrect because helpers frequently perform laborers' duties and laborers' wage rates would sometimes be higher than helpers' rates on the wage determination. The Department observed that comments received from some contractors surveyed in the processing of helper conformance requests during the period the suspended regulations were in effect indicated that they used the job title ''laborer'' for workers meeting the definition of ''helper'' under the suspended regulation. The Department took a ''middle ground'' in its impact analysis by assuming that helpers would replace laborers, apprentices, and journeyworkers in the same proportion as their relative occupational employment.[20] The comments do not undermine the reasonableness of this assumption or provide a reasonable, alternative approach.

The assumption that large numbers of laborers are included in the OES helper data is based on the absence of a separate OES laborer classification, and the fact that the duties described in the OES helper definition are similar to those performed by laborers.[21] Furthermore, other available surveys, such as the CPS, the Decennial Census, and the four NCS pilot surveys conducted by BLS show a much greater incidence of laborer employment than could be gleaned from the OES survey data. As AGC pointed out, a separate construction laborer classification is included in the new Standard Occupational Classification definitions and will be used in future OES surveys.

The ABC's contention that the 1992–1993 wage surveys were distorted has been discussed above. In addition, these survey results were used only for the assumption that helpers would be likely to ''prevail'' for a limited number of classes in areas representing about half the construction employment covered by the Davis-Bacon and Related Acts.[22]

Representative Norwood and the congressmen who joined in his comments stated that the proposed rule is based on an unrealistic economic impact analysis, noting that the Congressional Budget Office (CBO) has estimated that legislation allowing the increased use of helpers could save the Federal government $1.4 billion over five years and $3.5 billion over 10 years. The CBO's precise methodology for estimating the reduction in discretionary outlays over five and ten year periods has not been provided. It is the Department's understanding that the CBO estimates are based on the methodology used by the Department to estimate savings in its original impact analysis conducted in 1982, with estimated percentages of savings modified (from 1.6 percent of federal construction costs to .8 percent) to account for changes to certain assumptions made in the 1982 analysis.[23] For the reasons set forth in the NPRM, the Department now believes, based on more current information and data sources that were

[20] With its ''middle ground'' approach, the Department calculated that the great majority of helpers would replace higher-paid journeyworkers, thus enhancing the potential savings computed under the suspended definition.

[21] Helpers, as defined by OES, ''perform duties such as furnishing tools, materials and supplies to other workers; cleaning work areas, machines, and tools; and holding materials or tools for other workers.''

[22] One or more classifications of helper (union and open shop) were found to prevail in 35 of 78 surveys. Open shop helpers were found to prevail in only 20 of 78 surveys.

[23] A 1994 GAO report, ''Changes to the Davis-Bacon Act Regulations and Administration,'' (GAO/HEHS–94–95R, February 7, 1994), noted that, as of September 1993, the use of helpers was found to be a prevailing practice in 23 of 73 surveys (32 percent) completed since the surveys were started in April 1992.

not then available, that many of those assumptions were wrong. The Department also points out that the CBO savings estimates are consistent with the high end of the savings estimates set forth in the Department's latest economic impact analysis, based on the OES data.

The Building Trades and LIUNA both state that the Department's economic impact analysis overstates any possible cost savings under the suspended rule and that consideration of certain other factors would eliminate the ''modest'' savings predicted by the Department in its analysis. The other factors that the Building Trades and LIUNA believe would offset any potential savings under the suspended rule include: (1) Lowered productivity of construction workers as contractors employ more low-wage, lesser-skilled workers; (2) lowered income and sales tax revenues resulting from lowered worker income; (3) negative impact on apprenticeship programs with reduced training levels and lower skill levels among construction workers; (4) increased incidences of accidents and increased workers' compensation premiums due to the increase in the number of new, entry-level workers who are untrained or inadequately trained; and (5) the negative impact on the quality of public construction resulting from the increased use of lower-paid, lesser-skilled workers. Finally, the Building Trades and LIUNA believe that the suspended rule, in and of itself, would probably have no effect on Federal budgetary outlays, as it is unlikely that there would be a reduction in congressional appropriations for Federal and federally-assisted public building and public works projects to reflect the anticipated cost savings from the increased use of helpers.

While the factors mentioned by the Building Trades and LIUNA could have some bearing on impact analysis estimates (the NPRM did, for example, note the possibility of reduced savings as a result of fewer apprenticeships and higher journeyworker wage rates), adequate data simply are not available to allow detailed consideration of these factors. Of the many studies cited, none provides the framework or data necessary for integration into an economic impact analysis. Furthermore, there may be offsetting factors which could neutralize the effects of the factors cited.

Of the many studies cited by these commenters, none provides the framework or data necessary for integration into an economic impact analysis. For the most part, the studies cited in the union comments do not focus directly on the comparative costs of the two helper rules, but rather on the more general cost differentials associated with union versus open shop construction. Moreover, the Department has determined that comparisons would be made using only primary, direct costs for the following reasons: (1) Generally accepted databases maintained by Federal agencies should be relied upon in the comparative cost study; and (2) the impact of such factors as productivity, social costs/benefits, and construction quality are not definitive, and therefore, consideration of these factors would invite considerable debate from those who have reached opposite conclusions based on their research.

The Department therefore concludes that the belief expressed by the Building Trades and LIUNA that adoption of the suspended rule would probably have no effect on Federal budgetary outlays is too speculative to form an appropriate basis for their integration into a cost-impact analysis.

*Final Regulatory Impact Analysis*

After review of the comments, the Department has concluded that there is no reason to change its estimates of the potential savings under the suspended rule and the other alternatives considered, in comparison to the proposed rule, as set forth in the preliminary regulatory impact analysis.

**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 Act**

Under the Regulatory Flexibility Act, Public Law 96–354 (94 Stat. 1164; 5 U.S.C. 601 *et seq.*), Federal agencies are required to prepare and make available for public comment an initial regulatory flexibility analysis that describes the anticipated impact of proposed rules that would have a significant economic impact on small entities. Though the Department determined that a regulatory flexibility analysis was not necessary for the proposed rule because it would not have a significant economic impact on a substantial number of small entities, it nonetheless published for comment such an analysis because of the interest in the rule.[24] After review of the comments and consideration of the various alternatives, the Department has prepared the following regulatory flexibility analysis regarding this rule:

*(1) The Need for and Objectives of the Rule*

In 1982, Wage and Hour published final regulations which, among other things, would have allowed contractors to use ''semi-skilled'' helpers on Davis-Bacon covered projects at wages lower than those paid to skilled journeyworkers. These rules represented a sharp departure from Wage and Hour's longstanding practice of not allowing overlap of duties between job classifications. To protect against possible abuse, a provision was included limiting the number of helpers which could be used on a covered project to a maximum of two helpers for every three journeyworkers. This ratio provision was subsequently invalidated by the U.S. Court of Appeals for the District of Columbia.

As discussed in greater detail above, during its existence, the helper rule has been the subject of considerable litigation and Congressional attention. The rule has been enjoined by the district court and modified on two occasions as a result of court of appeals decisions. It has twice been implemented for short periods of time. It has also been suspended on two occasions as the result of Congressional action prohibiting Wage and Hour from spending any funds to implement or administer the helper rule. On December 30, 1996, the Department's suspension of the 1982 rule was continued pending completion of this rulemaking.

The helper rule was originally proposed and adopted because it was believed that it would result in a construction workforce on Federal construction projects that more closely reflected private construction's ''widespread'' use of helpers to perform certain craft tasks and, at the same time, effect significant cost savings in federal construction costs. It was also believed

[24] The Department believed that a Regulatory Flexibility Analysis was not necessary because (1) the proposed regulation would not result in any changes in requirements for small businesses; (2) if Wage and Hour were to propose implementing the suspended rule or any of the alternatives considered, it would not be more costly than current regulatory requirements, and therefore, would not have a significant economic impact on a substantial number of small entities; and (3) neither the suspended rule nor any of the alternatives considered could be implemented in a manner that would accomplish the objectives of the statute.

that the expanded definition would provide additional job and training opportunities for unskilled workers, in particular women and minorities. The Department's subsequent efforts to develop enforcement guidelines led it to conclude that administration and enforcement of the revised helper rule would be much more difficult than anticipated, especially in light of the court's invalidation of the ratio provision. Moreover, new data has led the Department to conclude that the use of helpers is not as widespread as previously thought. The Department is also concerned about the possible negative effect of the helper regulations on formal apprenticeship and training programs. These factors led the Department to conclude that the suspended helper rule should not be implemented and that new regulations were needed to govern employment of helpers on DBRA-covered projects. The objective of these regulations is to establish the most appropriate approach to governing employment of helpers on DBRA-covered projects.

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

The Department received a number of comments regarding the economic impact analysis prepared pursuant to Executive Order 12866. Those comments were discussed in the previous section containing the Department's economic impact analysis. The Department received no separate comments concerning its initial regulatory flexibility analysis.

*(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.

As explained above, however, the final rule would cause no impact on small entities since it does not propose to make any changes in requirements applicable to small businesses. Implementation of the suspended rule or any of the alternatives considered would expand the use of helpers and could result in some savings to the Federal government and to recipients of Federal assistance. The impact would depend upon the specifications of the alternative relative to current practice. Even relative to unlimited use, however, possible savings would be very modest, ranging from 0.239 percent of the value of Davis-Bacon annual construction starts (CPS), to 0.359 (adjusted OES), and 0.958 (unadjusted OES) percent and, as discussed in the Department's economic impact analysis in the NPRM, may very well be short-termed.

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

There are no reporting or recording requirements for contractors under the final rule. Nor would there be any such requirements under the suspended rule or any of the alternatives considered. The compliance requirements under any rule regarding helpers would merely require contractors who use helpers to do so in accordance with a chosen regulatory framework and pay helpers at least the prevailing wages for the helper classification as set by the Department.

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

The Department carefully analyzed the suspended rule, as well as a number of alternative approaches, to determine whether they could be enforced and administered in a manner consistent with the objectives of the Davis-Bacon and Related Acts. Based on this analysis, the Department concluded that the final rule, which adopts the Department's current policy governing employment of helpers, is the only alternative considered that is both consistent with the purposes of the Davis-Bacon and Related Acts and capable of practical and efficient administration, enforcement, and compliance.

The Department also performed an economic impact analysis wherein the Department estimated the relative economic costs under the suspended rule, the various alternatives considered, and the final rule, respectively. As detailed above, the Department concluded from this analysis that any economic cost savings to the Federal government and recipients of Federal assistance, resulting from the increased use of lower-paid helpers under the suspended rule or any of the other alternatives considered, would be relatively modest. The Department therefore determined that implementation of the final rule, which preserves the status quo concerning employment of helpers on DBRA-covered projects, would not have a significant economic impact on a substantial number of small entities.

*Document Preparation*

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

**List of Subjects**

*29 CFR Part 1*

Administrative practice and procedure, Construction industry, Government contracts, Minimum wages.

*29 CFR Part 5*

Administrative practice and procedure, Construction industry, Employee benefit plans, Government contracts, Minimum wages, Reporting and recordkeeping requirements.

Accordingly, for the reasons set forth in the preamble, 29 CFR Part 1 and Part 5 are amended as set forth below:

## PART 1—PROCEDURES FOR PREDETERMINATION OF WAGE RATES

1. The authority citation for Part 1 continues to read as follows:

**Authority:** 5 U.S.C. 301; R.S. 161, 64 Stat. 1267; Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix; 29 U.S.C. 259; 40 U.S.C. 276a–276a–7; 40 U.S.C. 276c; and the laws listed in appendix A of this part.

2. Section 1.7(d) is revised to read as follows:

### § 1.7 Scope of consideration.

* * * * *

(d) The use of *helpers, apprentices* and *trainees* is permitted in accordance with part 5 of this subtitle.

## 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)

3. The authority citation for Part 5 continues 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; 108 Stat. 4104(c); and the statutes listed in section 5.1(a) of this part.

4. In § 5.2, paragraph (n)(1) is amended by removing ''Bureau of Apprenticeship and Training'' each place it appears in the paragraph and inserting in its place ''Office of Apprenticeship Training, Employer and Labor Services'', and paragraph (n)(4) is revised to read as follows:

**§ 5.2 Definitions.**

* * * * *

(n) * * *

(4) A distinct classification of ''helper'' will be issued in wage determinations applicable to work performed on construction projects covered by the labor standards provisions of the Davis-Bacon and Related Acts only where:

(i) The duties of the helper are clearly defined and distinct from those of any other classification on the wage determination;

(ii) The use of such helpers is an established prevailing practice in the area; and

(iii) The helper is not employed as a trainee in an informal training program. A ''helper'' classification will be added to wage determinations pursuant to § 5.5(a)(1)(ii)(A) only where, in addition, the work to be performed by the helper is not performed by a classification in the wage determination.

* * * * *

5. Section 5.5 is amended by removing paragraphs (a)(1)(ii)(A)(4) and (a)(1)(v); by removing ''; and'' from the end of paragraph (a)(1)(ii)(A)(3) and inserting in its place a period; by revising paragraph (a)(1)(ii)(A)(1) to read as set forth below; and by removing the phrase ''Bureau of Apprenticeship and Training'' each place it appears in paragraph (a)(4) and inserting in its place ''Office of Apprenticeship Training, Employer and Labor Services'' and removing ''Bureau'' each time it appears in paragraph (a)(4) and inserting in its place ''Office''.

**§ 5.5 Contract provisions and related matters.**

* * * * *

(a) * * *

(1) * * *

(ii)(A) * * *

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

* * * * *

Signed at Washington, D.C., on this 14th day of November, 2000.

**Bernard E. Anderson,**

*Assistant Secretary for Employment Standards.*

[FR Doc. 00–29533 Filed 11–17–00; 8:45 am]

BILLING CODE 4510–27–U

## FEDERAL COMMUNICATIONS COMMISSION

## 47 CFR Part 73

**[DA 00–2483; MM Docket No. 99–282; RM–9710]**

## Radio Broadcasting Services; Littlefield, AZ

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; petition for reconsideration.

**SUMMARY:** This document dismisses a Petition for Reconsideration filed on behalf of Mountain West Broadcasting directed to the *Report and Order* in this proceeding, which denied the requested allotment of Channel 265C to Littlefield, Arizona, for failure to demonstrate that Littlefield qualifies as a community for allotment purposes. *See* 65 FR 25463, May 2, 2000. The petition for reconsideration is dismissed as it does not meet the limited provisions set forth in the Commission's Rules under which a rule making action will be reconsidered. With this action, this docketed proceeding is terminated.

**FOR FURTHER INFORMATION CONTACT:** Nancy Joyner, Mass Media Bureau, (202) 418–2180.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Memorandum Opinion and Order*, in MM Docket No. 99–282, adopted October 25, 2000, and released November 3, 2000. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY–A257), 445 Twelfth Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, NW., Washington, DC 20036, (202) 857–3800.

Federal Communications Commission.

**John A. Karousos,**

*Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.*

[FR Doc. 00–29625 Filed 11–17–00; 8:45 am]

BILLING CODE 6712–01–U

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 17

**RIN 1018–AF73**

## Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Tidewater Goby

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for the tidewater goby (*Eucyclogobius newberryi*), pursuant to the Endangered Species Act of 1973, as amended (Act). The designation includes 10 coastal stream segments in Orange and San Diego Counties, California, totaling approximately 9 linear miles of streams. Critical habitat includes the stream channels and their associated wetlands, flood plains, and estuaries. These habitat areas provide for the primary biological needs of foraging, sheltering, reproduction, and dispersal, which are essential for the conservation of the tidewater goby.

Section 7 of the Act requires Federal agencies to ensure that actions they authorize, fund, or carry out are not likely to destroy or adversely modify designated critical habitat. As required by section 4 of the Act, we considered economic and other relevant impacts prior to making a final decision on what areas to designate as critical habitat.

**DATES:** The effective date of this rule is December 20, 2000.

**ADDRESSES:** You may inspect the complete file for this rule at the Carlsbad Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2730 Loker Avenue West, Carlsbad, California 92008, by appointment during normal business hours.

**FOR FURTHER INFORMATION CONTACT:** Ken Berg, Field Supervisor, Carlsbad Fish and Wildlife Office, at the above address; telephone 760/431–9440, facsimile 760/431–5902.

**SUPPLEMENTARY INFORMATION:**