ADMINISTRATIVE REVIEW BOARD
U.S. DEPARTMENT OF LABOR
WASHINGTON, DC

In the Matter of:	)	
NEVADA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL.,	)	
Petitioners,	)	
v.	)	ARB Case No. 2020-0058
WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,	)	
Respondent.	)	

ADMINISTRATOR'S RESPONSE TO PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases (continued):

Statutes:

Code of Federal Regulations:

Page

Code of Federal Regulations (continued):

Additional Authorities:

U.S. Dep't of Labor,

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ADMINISTRATOR'S RESPONSE TO PETITION FOR REVIEW

The Administrator of the Wage and Hour Division ("Administrator") hereby responds to the petition for review filed by the Nevada Chapter of the Associated General Contractors of America, Inc., the Associated Builders and Contractors, Nevada Chapter, and the Nevada Trucking Association, Inc. (collectively, "Petitioners"). They seek review by the Administrative Review Board ("Board" or "ARB") of certain prevailing rates in Nevada highway construction wage determinations issued by the Wage and Hour Division ("WHD") under the Davis-

Bacon Act ("DBA"). For all of the reasons set forth herein, the Board should reject Petitioners' various arguments and affirm the reasonableness of the challenged prevailing wage rates under the DBA.

STATEMENT OF JURISDICTION

On June 26, 2020, the Administrator issued her final ruling resolving requests for review and reconsideration of certain prevailing wage rates in Nevada highway construction wage determinations. *See* 29 C.F.R. 5.13. On July 27, 2020, Petitioners timely filed their petition for review of the Administrator's final ruling with the Board, which has jurisdiction to hear and decide appeals concerning such final decisions of the Administrator. *See* 29 C.F.R. 7.1(b), 7.4(a), 7.9(a).

STATEMENT OF THE ISSUES

1. Whether Petitioners established any duty on WHD's part to obtain, consider, and adopt as DBA prevailing wages for the truck driver classification in Carson City and Washoe and Storey counties certain wage rates determined by the state of Nevada pursuant to its own prevailing wage law.

2. Whether Petitioners demonstrated that WHD determined the prevailing wage rates for the truck driver classification in Carson City and Washoe and Storey counties in a manner inconsistent with WHD's regulations, policies, and practices under the DBA.

3. Whether Petitioners established a legal basis for the Board to distinguish or overrule its decision in *Chesapeake Housing*, which affirmed WHD's consideration of wage data from other counties when the wage data at the county level was insufficient and otherwise rejected many of the same arguments that Petitioners make here.

STATEMENT OF THE CASE

1. The DBA Survey Process

The DBA requires the Secretary of Labor ("Secretary") to determine minimum wage and fringe benefit rates for laborers and mechanics employed on Federal contracts for construction, alteration, or repair of public buildings and public works. *See* 40 U.S.C. 3142. These minimum wages are based on the wages that the Secretary "determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed." 40 U.S.C. 3142(b).[1] WHD has identified four general categories of construction (residential, building, heavy, and highway) and numerous job classifications within each category, and WHD determines the prevailing wage on a classification-by-classification basis within each construction category. *See* 29 C.F.R. 1.3(d)

[1] The Secretary has delegated his authority regarding the DBA to the Administrator. *See* Sec'y of Labor's Order 01-2014, § 5(A)(4), 79 Fed. Reg. 77527 (Dec. 24, 2014).

(identifying the four categories of construction); WHD Prevailing Wage Resource Book (2015), Tab 6, at 9-10 (citing All Agency Memorandum No. 130).[2] The DBA's implementing regulations establish that the prevailing wage "shall be the wage paid to the majority (more than 50 percent) of the [workers] in the classification on similar projects in the area during the period." 29 C.F.R. 1.2(a)(1). "If the same wage is not paid to a majority of [workers] in the classification, the prevailing wage shall be the [weighted average wage rate]." *Id*.

DBA prevailing wage rates are determined from survey information that responding contractors and other interested parties voluntarily provide. *See* 29 C.F.R. 1.3(a) ("The Administrator will encourage the voluntary submission of wage rate data by contractors, contractors' associations, labor organizations, public officials and other interested parties."); *see also generally* 29 C.F.R. 1.3. WHD conducts the prevailing wage surveys in accordance with the relevant guidelines established by the General Accountability Office for compiling wage survey data and with WHD's own internal guidance published in its Davis-Bacon Construction Wage Determinations Manual of Operations (1986) ("Manual of Operations")[3] and

[2] WHD's Prevailing Wage Resource Book is available at https://www.dol.gov/agencies/whd/government-contracts/prevailing-wage-resource-book.

[3] WHD's Manual of Operations is available at https://babel.hathitrust.org/cgi/pt?id=uiug.30112104405474;view=1up;seq=3.

its Prevailing Wage Resource Book. In conducting wage surveys, WHD solicits and accepts information from all interested parties. *See* 29 C.F.R. 1.3(a). WHD's long-standing procedures provide that "[w]hen a survey is started, national and local interested parties are notified of the survey, its boundaries, time frame, and cutoff date by letter." Prevailing Wage Resource Book, Tab 5 at 4. This survey notification letter to interested parties requests their participation in the survey briefing process and "encourage[es] contractors/members to participate in the survey . . . through the submission of wage data." *Id*. WHD also engages in follow-up requests for data, ensuring that a significant number of potential respondents have been contacted and provided an opportunity to participate in the survey process. *See id*. Because wage surveys conducted under the DBA are voluntary, WHD lacks authority to compel the submission of wage data. *See* 29 C.F.R. 1.3(a), (c). If an entity fails to respond to the survey, its wage rate information cannot be considered in determining the prevailing wage rates. *See* Prevailing Wage Resource Book, Tab 5 at 5 ("[P]revailing wage determinations based upon survey data cannot reflect wage data that is not submitted. They can only reflect the data that is actually submitted.").

WHD "may" consider "[w]age rates determined for public construction by State . . . officials pursuant to State . . . prevailing wage legislation." 29 C.F.R. 1.3(b)(3). The regulations further provide circumstances in which State highway

departments "shall be consulted" and that the Administrator "shall give due regard" to information, if any, obtained from such State highway departments. 29 C.F.R. 1.3(b)(4).

In calculating wage rates based on the survey data received, WHD follows well-established policies. First, in order for WHD to publish a wage rate for a classification, the data for that classification must generally meet certain sufficiency requirements. At the time of the Nevada highway construction survey at issue, the survey data for a classification in a geographic area met WHD's sufficiency requirement if it included wage information for at least six similarly classified employees paid by at least three contractors. *See* Administrative Record[4] ("AR") 0081-82; *see also* Manual of Operations at 62. Second, when determining the prevailing wage for a classification in a county, that county is the desired geographic area for data collection; however, data may be used from groups of counties and even statewide if necessary. Finally, data received from metropolitan and rural counties cannot be combined. *See generally* 29 C.F.R. 1.7.[5]

[4] The Administrator filed the Administrative Record contemporaneously with this Response.

[5] If a county is located in a Metropolitan Statistical Area ("MSA") as designated by the Office of Management and Budget ("OMB"), then it is classified as a metropolitan county for purposes of the DBA. OMB publishes and maintains official MSA lists, based primarily on census data.

In accordance with these principles, WHD first attempts to calculate a prevailing wage based on survey data at the county level. *See* 29 C.F.R. 1.7(a); Manual of Operations at 38. If there is insufficient survey data for a particular classification in that county, then data from surrounding counties may be used, provided that data from metropolitan and rural counties is not combined. *See* 29 C.F.R. 1.7(b); Manual of Operations at 38-39. In considering survey data from surrounding counties, WHD first expands its calculation from the county alone to a group of counties. For metropolitan counties, WHD expands its calculation from the county to the other counties located in the same MSA, as determined by OMB, and for rural counties, WHD expands its calculation from the county to other rural counties located in the state. If the wage data for an established county group is still insufficient to determine a prevailing wage rate, then WHD may expand to a "supergroup" of counties or even to the statewide level. *See Coal. for Chesapeake Housing Dev.*, No. 12-010, 2013 WL 5872049, at *6 (ARB Sept. 25, 2013) (concluding that "the use of wage data from a super group is a permissible exercise of the broad discretion granted the WHD under the statute and regulations" and that "even the use of statewide data is permissible"). WHD expands data to these levels, however, only for classifications that have been designated as "key" classifications. *See* Prevailing Wage Resource Book, Tab 5 at 6 (identifying key classifications). And if there has not been sufficient similar construction "in

surrounding counties or in the State" in the year prior to the survey, WHD may consider wage data from projects completed more than one year prior to the survey. 29 C.F.R. 1.7(c).

2. WHD's Nevada Highway Construction Survey

In 2015, pursuant to its DBA wage survey program, WHD decided to update its DBA prevailing wage rates for highway construction in Nevada. The prevailing wage rates in effect at the time were based on wage rates that had been provided by the state of Nevada. WHD was concerned that the then-existing rates were outdated because they had not been updated by WHD for several years and that the wage rates that Nevada had provided were not fully compliant with WHD's own requirements because they did not reflect separate rates for hourly wages and fringe benefits.

Before beginning the survey process, WHD contacted the Nevada Department of Transportation ("NDOT") in October 2015 to ascertain whether NDOT intended to conduct its own survey of highway construction wage rates that could possibly be used by WHD. *See* AR 0062-63. NDOT responded that it did not intend to conduct such a survey. *See id*.

WHD conducted the survey in 2017, and as part of the process, it asked NDOT to submit all relevant certified payroll forms in NDOT's possession for WHD's consideration during the survey. NDOT provided requested certified

payroll data to WHD, *see* AR 0065-67, which WHD considered with the other payroll data that it received. In addition, WHD communicated with the Nevada Office of the Labor Commissioner ("NOLC") during the survey process. WHD invited NOLC to attend pre-survey briefings that it held in Nevada in April 2017 for interested parties to learn more about the survey process, including how to submit wage data and the deadline for doing so. And in July 2017, WHD representatives spoke with NOLC about the survey, and WHD followed up by sending a letter to NOLC with specific information about submitting wage data to WHD as part of the survey, including the cut-off date for doing so. *See* AR 0069-162. The survey information that WHD provided to NOLC also: identified each Nevada county and whether it was classified as metropolitan or rural; explained how a county where there was insufficient data would be grouped with other counties; and further explained that counties could be grouped on a statewide basis (still keeping metropolitan and rural counties separate) depending on the sufficiency of the data. *See* AR 0081-86. NOLC did not attend the pre-survey briefings or submit wage data to WHD during the survey process.

In accordance with the principles and procedures described above, WHD completed the survey, considered and analyzed the wage data timely received, and

issued wage determinations for Nevada highway construction subject to the DBA's labor standards.[6]

3. Procedural History

In a May 3, 2019 letter to WHD, NOLC expressed concerns about certain wage determinations, including that the rates for some classifications in northern Nevada counties "are listed as determined" by rates paid to unionized workers in Clark County (the Las Vegas area). *See* AR 0164-166. Over the next several months, WHD and NOLC discussed these issues by email, over the phone, and in person. *See* AR 0168-182. As part of these communications, NOLC sent WHD a spreadsheet listing the prevailing wage rates that WHD had determined for various classifications performing DBA-covered work in Washoe County (a county in northern Nevada designated as metropolitan because Reno is located there) and the wage rates that Nevada had determined for those classifications in Washoe County pursuant to its own process. *See* AR 0174-175. In a September 10, 2019 letter, WHD formally responded to NOLC, corrected a clerical error in a wage rate outside of the highway construction context, and provided the underlying survey data on which the highway wage determinations were based. *See* AR 0181-182.

[6] *See* AR 0001-60 (the versions of the Nevada highway construction wage determinations identified in Petitioners' petition for review in effect as of their October 18, 2019 requests for review and reconsideration to WHD).

On October 18, 2019, Petitioner Nevada Chapter of the Associated General Contractors of America, Inc. ("Nevada AGC") submitted requests for review and reconsideration of certain classifications in most of the Nevada highway wage determinations. *See* AR 0603-661. One of Nevada AGC's primary contentions was that the prevailing wage rates determined by WHD under the DBA for the truck driver and certain other classifications in the challenged counties in northern Nevada were based on union rates paid to workers in Clark County (which is in southern Nevada) and were significantly higher than the wage rates determined by NOLC for the classifications. Nevada AGC requested that WHD adopt Nevada's own wage rates for the classifications or otherwise calculate the prevailing wage rates without using wage data from Clark County. On October 31, 2019, NOLC submitted a letter in support of Nevada AGC's request for review and reconsideration of the prevailing wage rates determined by WHD for the truck driver classification in Washoe and Storey counties in which NOLC requested that Nevada's own wage rates be used for truck driver classifications in those counties. *See* AR 0663-668.

On January 17, 2020, WHD responded to the requests for review and reconsideration in a 35-page ruling letter from the Administrator denying the requests. *See* AR 0670-704. In the letter, WHD explained that it carefully considered the arguments made and the additional information provided. WHD

further explained that its Nevada highway construction survey and the resulting wage determinations complied with all applicable legal requirements and that WHD had received during the survey process sufficient wage data from interested parties to determine prevailing wage rates in accordance with its longstanding policies and procedures. In the letter, WHD addressed each challenged wage determination and classification separately and explained point-by-point how the prevailing wage rate for each classification was determined in accordance with its policies and procedures.

On April 24, 2020, Nevada AGC requested that WHD review and reconsider its ruling letter. *See* AR 0709-711.[7] In its request, Nevada AGC asserted that WHD ignored the wage rates determined by Nevada under its own prevailing wage law. According to Nevada AGC, WHD should have relied on the Board's decision in *New Mexico Nat'l Electrical Contractors Ass'n ("New Mexico NECA")*, No. 03-020, 2004 WL 1261216 (ARB May 28, 2004), rather than its subsequent decision in *Chesapeake Housing*, when considering whether to determine certain prevailing wage rates on a statewide basis. Nevada AGC focused on the truck driver wage

[7] NOLC had earlier sent a letter to Secretary of Labor Scalia challenging the ruling letter. *See* AR 0706-707. NOLC focused on the truck driver prevailing wage rates determined by WHD for Washoe and Storey counties, complained that the rates determined by WHD pursuant to its survey were significantly higher than the rates determined by Nevada on its own, and stated that the rates determined by WHD "appeared to pull data from Clark County (Las Vegas Area) to generate a higher rate." *See* AR 0706.

rates that WHD determined for Washoe and Storey counties and Carson City and contended that WHD had "created the anomalous result that rates from Clark County (over 400 miles away) effectively have determined the prevailing wage for truck drivers in Northern Nevada." *See* AR 0710.

WHD issued a final ruling letter on June 26, 2020 addressing Nevada AGC's various contentions and denying the request to modify the wage determinations at issue. *See* AR 0713-724. In the letter, WHD affirmed that it "fully complied with applicable legal requirements in conducting the Nevada highway construction survey at issue and publishing prevailing wage rates in accordance with WHD's well-established Davis-Bacon wage determination methodology." AR 0713. WHD reiterated in detail how it applied those requirements and its methodology to determine the prevailing wage rates for truck drivers in Carson City and Washoe and Storey counties (the other metropolitan areas in Nevada besides Clark County). *See* AR 0717-719. WHD explained how it complied with those requirements by considering the certified payroll information that NDOT submitted to WHD during the survey process, and that NOLC did not submit any wage data to WHD during the survey process. *See* AR 0714, 0719. WHD further explained that, in any event, NOLC's wage rate information was lacking for purposes of the DBA's wage determination process because it did not reflect a basic hourly rate and a separate fringe benefit rate and it was not determined

exclusively for highway construction. *See* AR 0720-721. Finally, WHD described how *New Mexico NECA* was not applicable to this survey, as well as WHD's authority (including regulations, longstanding procedures, and *Chesapeake Housing*) for considering statewide wage data in appropriate circumstances when determining prevailing wage rates. *See* AR 0721-723.[8]

Petitioners, including Nevada AGC, filed a timely petition for review on July 27, 2020. Although the petition for review purports to challenge wage determinations for Nevada counties beyond Carson City and Washoe and Storey counties, *see* Petition at 1, the petition for review does not actually make any arguments regarding other Nevada counties or the wage determinations applicable to other counties. Accordingly, Petitioners have waived any arguments regarding wage determinations beyond Carson City and Washoe and Storey counties. *See* 29 C.F.R. 7.5(a)(5)-(6) (requiring a petition for review to "contain a short and plain statement of the grounds for review" and "be accompanied by supporting data,

[8] In its final ruling letter, WHD indicated a willingness to conduct a new survey of highway construction prevailing wage rates in Nevada next year in accordance with existing applicable legal requirements and its policies and procedures. *See* AR 0713-714. WHD reiterated that, depending on the level of participation, a new survey may or may not result in different prevailing wage rates. *See id.* NOLC responded in a July 10, 2020 letter that, although its concerns with the current wage determinations remained, it would welcome a new survey. *See* AR 0726-727.

views, or arguments"); *id*. at 7.9(b) (similar).[9] To the extent Petitioners intend for their arguments regarding the wage determinations for Carson City and Washoe and Storey counties to apply to any wage determinations for other Nevada counties, the Board should reject such arguments for the same reasons as it should reject them for Carson City and Washoe and Storey counties. Likewise, the petition for review makes arguments regarding only the truck driver job classification,[10] and Petitioners have waived any arguments regarding any other classifications. And to the extent Petitioners intend for their arguments regarding truck drivers to apply to any other classifications, the Board should reject such arguments for the same reasons as it should reject them for the truck driver classification.

STANDARD OF REVIEW

The Board "is an essentially appellate agency" and "will not hear matters de novo except upon a showing or extraordinary circumstances." 29 C.F.R. 7.1(e);

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[9] *See also Cerny v. Triumph Aerostructures-Vought Aircraft Div.*, No. 2019-0025, 2019 WL 5866569, at *4 n.2 (ARB Oct. 31, 2019) ("An appellant is required to develop [an] argument with citation to law and authority to avoid waiver or forfeiture."); *Xcel Solutions Corp.*, No. 12-076, 2014 WL 3886827, at *7 n.51 (ARB July 16, 2014) (party waived arguments raised in rebuttal brief and not in opening brief); *Thomas & Sons Bldg. Contractors, Inc.*, No. 98-164, 1999 WL 956535, at *1 n.1 (ARB Oct. 19, 1999) (declining to consider issues first raised in rebuttal brief).

[10] Specifically, the Truck Driver: Dump Truck classification (#1188).

see Interstate Rock Prods., Inc., No. 15-024, 2016 WL 5868562, at *6 (ARB Sept. 27, 2016) (describing 29 C.F.R. 7.1(e) as "limiting the Board's power in DBA and DBRA cases"). Regarding wage determinations, the DBA "delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing." *Bldg. & Constr. Trades' Dep't, AFL-CIO v. Donovan*, 712 F.2d 611, 616 (D.C. Cir. 1983); *see Chesapeake Housing*, 2013 WL 5872049, at *4 (same).

The Board has recognized that because it "may be very difficult to discern the wage paid to every relevant laborer in the relevant labor pool, we must read the regulations to require that the Administrator make a reasonable effort and use reasonable discretion to identify the relevant laborers and ultimately publish a realistic prevailing wage." *Road Sprinkler Fitters Local Union No. 669*, No. 10-123, 2012 WL 2673228, at *4 (ARB June 20, 2012). Accordingly, "[a]lthough subject to ARB review, the substantive correctness of wage determinations is not subject to judicial review," and courts "limit review to due process claims and claims of noncompliance with statutory directives or applicable regulations." *Id.* (internal quotation marks and citations omitted); *see Dep't of the Army*, Nos. 98-120, -121, -122, 1999 WL 1268073, at *18 (ARB Dec. 22, 1999) ("Perhaps the clearest indicator of the very great deference owed to the Secretary and the Administrator when determining prevailing wage rates is the clear body of case

law holding that the substantive correctness of wage determinations is not subject to judicial review."); *Chesapeake Housing*, 2013 WL 5872049, at *4 ("We assess the Administrator's rulings to determine whether they are consistent with the DBA and its implementing regulations and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Act.").

SUMMARY OF ARGUMENT

WHD determined the DBA prevailing wage rates for the truck driver classification in Carson City and Washoe and Storey counties in strict conformance with its applicable regulations and policies and consistent with Board precedent.

WHD invited NDOT, NOLC, and hundreds of other interested parties to participate in its voluntary 2017 Nevada highway construction wage survey. NDOT submitted wage data which WHD considered, but NOLC did not. WHD satisfied its obligations and had no duty to obtain NOLC's wage rate information even if it was available on a website. Moreover, WHD's refusal to consider NOLC's wage rate information when it was submitted two years later, after WHD had issued the wage determinations, was reasonable because the information was untimely and the Board has affirmed WHD's rejection of untimely data. In any event, because NOLC's wage rate information was unusable under WHD's established policies, it would not have affected the prevailing wage rates determined by WHD had it been considered. NOLC's wage information did not

include both the hourly rate and separate fringe benefits rate paid to workers in the classification and was compiled using wage data for additional types of construction beyond highway construction. NOLC's wage rate information thus did not meet the standards for determining prevailing wage rates through a wage survey under the DBA that WHD has established pursuant to the broad authority delegated to it. And there is no basis to summarily adopt NOLC's wage rates (determined pursuant to Nevada's own prevailing wage law) as the DBA prevailing wage rates.

WHD determined the prevailing wage rates for the truck driver classification in Carson City and Washoe and Storey counties exactly as its DBA regulations, policies, and practices provide. There was not sufficient wage data submitted during the survey for truck drivers in Carson City and Washoe and Storey counties. Accordingly, WHD expanded its scope of consideration to other metropolitan counties at both the group and supergroup levels, but the cumulative wage data still fell short of WHD's six-employee and three-contractor sufficiency standard until all metropolitan counties in Nevada (including Clark County) were considered. Once the sufficiency standard was met, WHD was required by 29 C.F.R. 1.2(a)(1) to determine the prevailing wage as the wage paid to the majority of truck drivers if there was a majority wage, which WHD did. For the truck driver classification in Carson City and Washoe and Storey counties, the challenged wage

determinations set forth the prevailing wage rates required under the applicable DBA regulations and policies even if the determined majority rate was paid to truck drivers in Clark County.

Moreover, WHD's determination of the prevailing wage rates for truck drivers in Carson City and Washoe and Storey counties was fully consistent with the Board's decision in *Chesapeake Housing*. In that case, WHD considered wage data from geographically separate metropolitan counties because the data was insufficient at the county level, and the Board affirmed this approach, agreeing that even consideration of data at the statewide level was permissible when necessary to yield sufficient data. The Board in *Chesapeake Housing* rejected many of the same arguments that Petitioners make here, and Petitioners' efforts to distinguish *Chesapeake Housing* and apply *New Mexico NECA* instead fall well short. Finally, Petitioners resort to asking the Board to overrule *Chesapeake Housing* on the assertion that it is contrary to the DBA's text (or to otherwise limit the decision). However, they provide no basis for doing so, and they generally fail to account for Congress', the D.C. Circuit's, and the Board's affirmance of WHD's decades-long practice of considering wage data from other similar counties when there is insufficient data at the county level.

ARGUMENT

1. NOLC's Wage Rate Information Was Untimely and Would Not Have Changed the DBA Prevailing Wage Rates Determined by WHD in Any Event.

Petitioners assert that WHD, in issuing the challenged wage determinations, failed to obtain, consider, and adopt specific wage rates determined by NOLC pursuant to its own policies and procedures and applicable under Nevada's prevailing wage law. However, WHD had no duty to obtain NOLC's wage rate information, the information would not have affected the prevailing wage rates determined by WHD had it been considered, and there is no basis to summarily adopt NOLC's wage rates for purposes of the DBA as Petitioners request. In sum, Petitioners' arguments in no way undermine the reasonableness of WHD's wage determinations.

As an initial matter, Petitioners identify no duty on WHD's part to obtain the specific wage rate information compiled by NOLC, even if the information was publicly available. Like all DBA surveys, *see* 29 C.F.R. 1.3(a), (c), the 2017 Nevada highway construction survey relied on voluntary participation. In conducting the survey, WHD fulfilled its obligations to encourage the voluntary submission of wage rate data by interested parties, 29 C.F.R. 1.3(a), and to consult with State highway departments, 29 C.F.R. 1.3(b)(4). Specifically with respect to the state of Nevada, WHD invited NOLC to attend pre-survey briefings that it held

in Nevada in April 2017 for interested parties to learn more about, among other things, how to submit wage data and the deadline for doing so. In July 2017, WHD spoke with NOLC about the survey and followed up by sending a letter to NOLC with information about submitting wage data to WHD as part of the survey. *See* AR 0069-162. NOLC did not attend the pre-survey briefings or submit wage data to WHD during the survey process. Moreover, in 2017, WHD asked NDOT to submit all relevant certified payroll forms in NDOT's possession, and NDOT provided requested certified payroll data to WHD. *See* AR 0065-67. Thus, WHD satisfied its obligations to encourage voluntary submission of wage data by Nevada and to consult with its highway department.

The certified payroll information from NDOT was the only wage data submitted by the state of Nevada during the survey, and WHD in fact considered the information. In addition to the general directions regarding how WHD considers and evaluates submitted wage data that are discussed below, WHD gives "due regard" to information from state highway departments such as NDOT. 29 C.F.R. 1.3(b)(4). WHD indisputably gave "due regard" to the certified payroll information submitted by NDOT by considering that payroll information with the other payroll information received during the survey when determining the Nevada highway prevailing rates.

NOLC, on the other hand, did not submit wage rate information during the survey or even prior to publication of the wage determinations. Instead, NOLC provided certain wage rate information to WHD in 2019 – long after WHD's 2017 deadline, which WHD had communicated to NOLC. *See* AR 0073. WHD does not consider wage rate information submitted after the deadline provided in the survey process. *See* Manual of Operations at 56 ("[d]ata are not to be included in the current survey if they have been submitted past the announced cut-off date"). Moreover, the Board has recognized the validity of adhering to such deadlines as part of the survey process. For example, in *Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers, Local 28*, the Board's predecessor agreed with WHD that "permit[ting] the reopening of a survey to include information submitted after the cutoff date would mean that no survey was ever truly complete" and affirmed WHD's decision to decline to include in a survey wage information that was submitted after the established cut-off date. No. 91-19, 1991 WL 494761, at *3 (WAB July 30, 1991) (internal quotation marks omitted). And in *Int'l Union of Bricklayers & Allied Craft Workers, Local Union No. 1*, the Board reaffirmed that "information submitted after the cut-off date for submission of wage data for a

wage survey is not properly allowed or considered in that survey." No. 11-007, 2012 WL 1655221, at *5 (ARB Apr. 27, 2012).[11]

In response to this authority, Petitioners argue that these cases involved "late submissions . . . by private parties" rather than data which "was publicly maintained by a state agency and should have been obtained by the WHD during the survey period." *See* Petition at 8. However, this is a distinction without a difference. WHD's regulations group both information from private parties, such as contractors and unions, and wage rates determined by states pursuant to their own prevailing wage laws in the same category, *compare* 29 C.F.R. 1.3(b)(1) & (2) *with* 29 C.F.R. 1.3(b)(3), and describe both as information that WHD "may" consider in making wage rate determinations, 29 C.F.R. 1.3(b). There is no basis for Petitioners' asserted distinction in either the regulations, WHD's Manual of Operations, or prior Board decisions, and as explained above, WHD had no duty to obtain NOLC's wage rate information during the survey. For all of these reasons, the Board should affirm WHD's decision to not consider NOLC's untimely wage rate information.

[11] In *Int'l Union of Bricklayers*, there was "sufficient proof" that the challenged wage information was "originally timely sent to, and received by, [WHD]" before the cut-off date. 2012 WL 1655221, at *5. There is no such proof or even contention here.

Even if WHD had a duty to obtain NOLC's wage rate information during the survey or consider any information submitted untimely, WHD would not have determined different prevailing wage rates for the truck driver classification in the counties at issue. Pursuant to exceedingly broad authority to determine prevailing wages under the DBA, *see Bldg. & Constr. Trades' Dep't*, 712 F.2d at 616, WHD has established the DBA prevailing wage as "the wage paid to the majority . . . of the laborers or mechanics in the classification on similar projects in the area during the period in question," or a weighted average wage rate "[i]f the same wage is not paid to a majority of those employed in the classification." 29 C.F.R. 1.2(a)(1). Accordingly, to determine the prevailing wage rates, WHD must gather the actual wages paid to workers in the relevant classification and area. As described above, WHD has a longstanding survey process to gather the necessary information. As part of the survey process, WHD has identified four general categories of construction (including highway construction) and numerous job classifications within each category for which to determine a prevailing wage if sufficient usable data is submitted. *See* Prevailing Wage Resource Book, Tab 6 at 9-10 (citing All Agency Memorandum No. 130). Moreover, the DBA defines "prevailing wages" to include both "the basic hourly rate of pay" and fringe benefits. 40 U.S.C. 3141(2).

Thus, for information to be usable by WHD when determining the prevailing wage rates for a construction classification following a survey, the information must include actual wages (hourly rate and fringe benefits) paid to workers in the classification within the specific category of construction that is being surveyed. Indeed, information gathered by WHD under 29 C.F.R. 1.3 as part of a WHD survey, whether from a State or other party, must be considered in light of the definition of "prevailing wage" and the requirements for determining prevailing wages set forth in 29 C.F.R. 1.2(a). *See* 29 C.F.R. 1.3(c) ("All information of the types described [29 C.F.R. 1.3(b)], pertinent to the determination of the wages prevailing at the time of issuance of the wage determination, will be evaluated in the light of [29 C.F.R. 1.2(a)]."); *see also* 29 C.F.R. 1.2(a)(2) ("In determining the prevailing wages at the time of issuance of a wage determination, the Administrator will be guided by [29 C.F.R. 1.2(a)(1)].").

The wage rate information from NOLC simply does not meet these standards and would not have resulted in different prevailing wages had WHD considered it. NOLC provided wage rate information compiled pursuant to its own methods for purposes of Nevada law. *See* AR 0171-175. The wage rate information provided by NOLC does not separately reflect the basic hourly rate of pay and the hourly fringe benefit rate as WHD's prevailing DBA rates do. *See Mistick Constr.*, No. 04-051, 2006 WL 861357, at *6-7 (ARB Mar. 31, 2006)

(affirming separate hourly wage and fringe benefit rates). Additionally, the wage rate information provided by NOLC was not compiled exclusively for highway construction (like WHD's prevailing DBA rates at issue), but instead also applies to other categories of construction, such as heavy construction and building construction. Petitioners' assertion that, with respect to "truck drivers in Northern Nevada, bona fide fringe benefits do not exist in this employment classification pursuant to Nevada law," *see* Petition at 5, simply does not address whether workers in the classification were actually paid fringe benefits and does not change the fact that NOLC's wage rates do not separate out the fringe benefit rates, as WHD's prevailing wage rates do. Thus, even if NOLC had timely submitted the wage rate information, it would not have been usable under the governing survey requirements and thus would not have resulted in the determination of different prevailing wage rates under the DBA for the classifications and counties at issue.

Petitioners nonetheless insist that WHD adopt certain NOLC wage rates as DBA prevailing wage rates. In addition to the reasons set forth above preventing WHD from doing so, such adoption of NOLC's wage rates would run afoul of the Board's decision in *Mistick*. In that case, the Board rejected WHD's argument that its authority to consider collective bargaining agreements under 29 C.F.R. 1.3(b)(2) when determining prevailing wages necessarily allowed WHD to adopt a CBA's wage rates. *See* 2006 WL 861357, at *5-7. Instead, information collected

by WHD under 29 C.F.R. 1.3 is filtered through the definitional standards in 29 C.F.R. 1.2. *See id.* at *6. The Board concluded accordingly that WHD could adopt a CBA's wage rates only where the actual wage information collected under the survey process reflected that the rates in the CBA were actually the prevailing wage rates as defined in 29 C.F.R. 1.2(a)(1). *See id.* at *5-7. In addition, Petitioners' attempt to rely on *Mistick* to suggest that WHD did not consider all relevant wage data here (*see* Petition at 7) is misplaced. The data from "Federal or federally assisted projects" that WHD did not consider in *Mistick* should have been considered, according to the Board, because a regulation specifically governing building and residential construction wage determinations and providing for consideration of such data in certain circumstances was triggered in that case because such data was submitted during the survey process. *See* 2006 WL 861357, at *9-10 (citing 29 C.F.R. 1.3(d)). However, in determining highway construction prevailing wages, such as the Nevada wage determinations here, WHD automatically considers data from "Federal or federally assisted projects," as required by 29 C.F.R. 1.3(d), that is submitted during the survey process. Nothing in 29 C.F.R. 1.3(d) or the Board's decision in *Mistick* requires consideration of "public project data" (Petition at 7), such as NOLC's wage rate information, that is <u>not</u> submitted to WHD during the survey process.

In sum, NOLC is welcome to determine wage rates for purposes of its own prevailing wage law and WHD may consider NOLC's rates when timely submitted, but consistent with *Mistick*, WHD could have adopted NOLC's rates for purposes of WHD's survey of DBA prevailing wage rates only if the wage information (from NOLC and/or all other survey participants) actually showed that NOLC's wage rates were the prevailing wages as WHD defines them under the DBA. As discussed herein, however, that is not what the information collected during the survey or submitted later by NOLC showed here.

2. WHD Determined the Challenged Prevailing Wage Rates in Full Compliance with Its DBA Regulations, Policies, and Practices.

WHD determined the prevailing wage rates for the Truck Driver: Dump Truck classification (#1188) in Carson City and Washoe and Storey counties exactly as required by its regulations, policies, and practices under the DBA.

With respect to truck drivers in Carson City, WHD received wage data from one contractor during the survey. *See* AR 0739-740 (identifying one contractor with 63 employees in Carson City). WHD could not determine and publish a prevailing wage rate based solely on that data because the data did not meet WHD's sufficiency standard, which requires wage data from at least three contractors. *See* AR 0081-82; *see also* Manual of Operations at 62. Accordingly, WHD expanded the geographic area and considered additional data before determining the prevailing rate. There are no other cities or counties in Carson

City's group (Group #100588), *see* AR 0729, so WHD looked at data at the supergroup level. Carson City is in a metropolitan area supergroup with Washoe and Storey counties (Supergroup #1456). *See id*. The data received during the survey at the supergroup level, however, again fell short of WHD's three-contractor sufficiency standard. *See* AR 0740-742 (identifying one contractor in Washoe and Storey counties – the same contractor as in Carson City). Because the data was insufficient at the supergroup level, WHD looked at data received during the survey from all of the metropolitan areas in Nevada, which added wage data from Clark County to the analysis. Seven contractors from Clark County reported wage data for truck drivers during the survey, *see* AR 0737-750, and considering all of the data, WHD determined the DBA prevailing wage rate consistent with 29 C.F.R. 1.2(a)(1).

WHD followed the exact same approach when determining the DBA prevailing wage rates for truck drivers in Washoe and Storey counties. It first looked at the wage data that it received during the survey on a countywide level. However, WHD received wage data from only one contractor in Washoe County and from zero contractors in Storey County. *See* AR 0740-742 (identifying one contractor in Washoe County with 72 employees). WHD could not determine and publish a prevailing rate for either county based solely on that data because the data did not meet WHD's sufficiency standard (at least three contractors) for either

county. *See* AR 0081-82; *see also* Manual of Operations at 62. Accordingly, WHD expanded the geographic area and considered the data received at the group level. Washoe and Storey counties comprise their own group (Group #100676). *See* AR 0729. The wage data received during the survey for the two counties combined (from only one contractor) did not meet WHD's sufficiency standard at the group level. Next, WHD looked at data at the supergroup level, and Washoe and Storey counties are in a metropolitan area supergroup with Carson City (Supergroup #1456). *See id*. The data received during the survey at the supergroup level, however, again fell short of WHD's three-contractor sufficiency standard. *See* AR 0739-740 (identifying one contractor in Carson City – the same contractor as in Washoe County). Because the data was insufficient at the supergroup level, WHD looked at data received during the survey from all of the metropolitan areas in Nevada, which added wage data from Clark County to the analysis. Seven contractors from Clark County reported wage data for truck drivers during the survey, *see* AR 0737-750, and considering all of the data at the statewide level, WHD determined the DBA prevailing wage rates for each county consistent with 29 C.F.R. 1.2(a)(1).

WHD's regulations at 29 C.F.R. 1.7 further affirm its consideration of wage data beyond the county level when appropriate. When determining a prevailing wage rate, the area in which to consider wage data "will normally be the county

unless sufficient current wage data . . . is unavailable to make a wage determination." 29 C.F.R. 1.7(a). "If there has not been sufficient similar construction within the area in the past year to make a wage determination, wages paid on similar construction in surrounding counties may be considered," provided that data from metropolitan and rural counties is not combined. 29 C.F.R. 1.7(b). And "[i]f there has not been sufficient similar construction in surrounding counties or in the State in the past year," WHD may consider wage data from projects completed more than one year prior to the survey. 29 C.F.R. 1.7(c) (emphasis added).

Petitioners accuse WHD of "importing inflated wage data from Clark County" and ignoring "the disparity between rates in Northern and Southern Nevada." Petition at 8. However, consistent with its well-established policies and procedures under the DBA, WHD simply progressed through surrounding counties of a metropolitan nature until its sufficiency standard was met. In the case of prevailing wage rates for truck drivers in Carson City and Washoe and Storey counties, the sufficiency standard was not met until the statewide level. Once at the statewide level, WHD was required by 29 C.F.R. 1.2(a)(1) to determine the prevailing wage as the wage paid to the majority of truck drivers if there was a majority wage, and WHD did exactly that. *See Mistick Constr.*, 2006 WL 861357, at *6 ("if any *single* wage is paid to a majority of the workers in the class, that is

deemed the prevailing wage") (citations omitted). WHD faithfully followed its regulations and policies, and although it is beside the point, there is nothing inherent in the process that will produce inflated or deflated rates. Under the DBA, its regulations, and WHD's broad discretion to determine prevailing wage rates, the prevailing wages for truck drivers in Carson City and Washoe and Storey counties set forth in the challenged wage determinations are the DBA prevailing wages even if the determined majority rate was paid to truck drivers in Clark County.

3. The Board's Decision in *Chesapeake Housing* Further Affirms the DBA Prevailing Wage Rates Here and Should Not Be Overruled.

WHD's determination of the prevailing wage rates for truck drivers in Carson City and Washoe and Storey counties was fully consistent with its determination of certain prevailing wage rates that the Board affirmed in *Chesapeake Housing*. In that case, because of insufficient data at the county and group levels, WHD determined the prevailing wage rates for certain classifications in Newport News and Chesapeake (southeastern Virginia) by using wage data from the supergroup level, which included data from other metropolitan jurisdictions such as Fairfax and Alexandria in northern Virginia. *See Chesapeake Housing*, 2013 WL 5872049, at *5. Even though WHD did not proceed to consideration of data at the statewide level, the wage data received for the classifications and

considered at the supergroup level "represented all data submitted for all metropolitan counties in Virginia." *Id*.

Similar to the arguments here, the petitioner in *Chesapeake Housing* challenged the prevailing wage rates determined for Newport News and Chesapeake on the bases that they used data from "remote" and "geographically separate" counties with dramatically different labor markets where workers had almost double the personal income and average wages of workers in Newport News and Chesapeake. *See* 2013 WL 5872049, at *5.

The Board rejected these contentions, however, explaining that "the broad discretion given to the Secretary does not prevent him from going outside the city, town, or county to find the prevailing wage" and that "even the use of statewide data is permissible." 2013 WL 5872049, at *6. Relying on the fact that there was insufficient data submitted for Newport News and Chesapeake, the Board affirmed that "[t]here is nothing in the regulations that prohibits the Administrator from using the total data in a county, a metropolitan statistical area, super groups of counties, or even statewide data to determine, in particular cases, what might yield 'sufficient' data." *Id.* (footnote omitted). The Board further rejected the argument regarding collecting data from different labor markets because neither the DBA nor its regulations prohibit such collection as long as metropolitan and rural data are

not mixed and because the argument "delves into the area where we would defer to the Administrator's methodology." *Id.* at *7. The Board added:

> Similarly, once the Administrator determines the survey "area" for Davis-Bacon purposes — whether it is composed of surrounding counties, regional super groups of MSAs, or the entire state — fluctuations in wage rates may be irrelevant. The regulations do not prohibit grouping to ascertain a prevailing wage simply because of higher income or pay in one or more of the associated counties. Many factors go into DBA and OMB groupings and those factors are not limited to general income demographics in the respective subdivisions.

Id. at *8.

Petitioners seek to distinguish *Chesapeake Housing* on two grounds. First, they argue that WHD had no state wage rate information to consider in that case and thus had to consider data beyond Chesapeake and Newport News, whereas here WHD "failed" to consider state wage rate information (i.e., information maintained by NOLC). *See* Petition at 9. For the reasons explained above, however, NOLC's wage rate information would not have affected the prevailing wage rates determined by WHD under the DBA had the information been timely submitted and considered. Second, Petitioners argue that the petitioner in *Chesapeake Housing* "failed to provide evidence of what the differences in wage rates actually were between the county covered by the wage determination and the counties whose wage rates were imported by the Administrator." *Id.* at 10. Although the Board noted in *Chesapeake Housing* that the petitioner "did not tell us what the wage rates were for [the classification] in Newport News or

Chesapeake," 2013 WL 5872049, at *7, this was merely icing on the cake. Reading the Board's decision as a whole, it is plain that the decision, consistent with Board precedent and even if it had had alternative wage rates before it, fully affirmed WHD's process of using supergroup and statewide wage data when appropriate and deferred to WHD's reasonable methodology in this regard. *See id.* at *6-8.

Petitioners' argument (*see* Petition at 11) that the Board should rely here on its decision in *New Mexico NECA* rather than *Chesapeake Housing* fares no better. In *New Mexico NECA*, the Board faulted WHD for insisting that its sufficiency standard was met for the electrician classification in a New Mexico county when most of the wage data received during the survey was from a Texas-based contractor and WHD had not followed up on the survey data as a result of the decrease in the DBA prevailing wage rate as compared to the prior DBA prevailing wage rate, had not adequately explained that decrease, and had not otherwise complied with its regulations and guidelines. *See* 2004 WL 1261216, at *5-9. In denying WHD's subsequent motion for reconsideration, the Board appeared to recognize that wage rates may change substantially between surveys as a result of the voluntary wage survey process, but reiterated that WHD "did not adequately explain the wage disparities" and could not rely on "new arguments" for purposes of reconsideration. 2004 WL 2390980, at *2-3 (ARB Oct. 19, 2004).

The circumstances in *New Mexico NECA* are vastly different from the truck driver prevailing wage rates determined here:

- The wage disparity identified by the Board in *New Mexico NECA* was apparent from wage data received by WHD during the survey, whereas the wage disparity asserted here by Petitioners is based on state wage rate information that was never submitted during the survey process;
- The wage disparity relied on by Petitioners here is between the prevailing wage rates determined by WHD pursuant to its DBA survey process and wage rates determined by NOLC pursuant to Nevada's process;
- WHD has repeatedly explained how it determined the truck driver prevailing wage rates under the DBA; therefore, to the extent that WHD has any obligation to explain disparities between its rates and state law rates, it has more than done so;
- The Board faulted WHD in *New Mexico NECA* for relying on its sufficiency standard to not expand the scope of wage rate data to consider, whereas here WHD consistently and properly applied its sufficiency standard to expand the scope of wage data to consider;[12] and

[12] In a footnote, Petitioners incorporate prior arguments against WHD's six-employee/three-contractor sufficiency standard without explaining those arguments or expanding on them. *See* Petition at 5 n.4. Even if Petitioners' footnote is enough to raise the issue, their arguments fail. WHD's sufficiency standard is communicated to all parties at the outset of the survey (including the

- Unlike the finding of the Board in *New Mexico NECA*, WHD fully complied with its regulations and guidelines when conducting the Nevada highway construction survey and determining the truck driver prevailing wage rates.

In sum, not only are the concerns identified by the Board in *New Mexico NECA* not present here, but *New Mexico NECA* was also a unique case factually – particularly given that a contractor based out-of-state was the primary source of data for the classification. The Board's subsequent decision in *Chesapeake Housing* makes clear that *New Mexico NECA* is no impediment to WHD's determination of DBA prevailing wage rates based on data from the supergroup or statewide levels when appropriate and in conformance with its applicable regulations and policies.

Petitioners' final argument is that the Board should overrule or limit its *Chesapeake Housing* decision. *See* Petition at 12. They argue that "importation of wage rates from remote and dissimilar counties, outside the county where

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2017 Nevada highway survey). *See* AR 0081-82; *see also* Manual of Operations at 62. It is a neutral standard, and it is a common-sense approach to ensure that wage data is large enough and diverse enough before WHD makes any conclusions based on the data. Moreover, the standard was consistently and properly applied by WHD when determining the Nevada highway construction prevailing wage rates. Although WHD received wage data regarding many truck drivers in each of Washoe County and Carson City, the data was from one sole contractor; it is reasonable (and consistent with the discretion afforded it) for WHD to insist on multiple employees and multiple contractors before determining prevailing wage rates.

prevailing wages are supposed to be determined," is contrary to the DBA's text. *See id.* (citing 40 U.S.C. 3142(b)). The relevant DBA provision reads in full:

> The minimum wages shall be based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there.

As an initial matter, Petitioners fail to explain why a civil subdivision of a state cannot be comprised of several counties of a state that are similar in nature (i.e., metropolitan or rural). And they further fail to explain how this provision prohibits WHD, when determining prevailing wages for a county, from using wage data from another county as long as the data from the other county is "for the corresponding classes of [workers] employed on projects of a character similar" to the work in the county.

Moreover, Congress, the D.C. Circuit, and the Board have affirmed WHD's decades-long practice of considering wage data from other similar counties when there is insufficient data at the county level. When reviewing a prior version of 40 U.S.C. 3142(b) in the 1960s, Congress recognized that the reference to a "civil subdivision" was not a limitation on determining the prevailing wage rates using data beyond the county level. *See* Report of the General Subcommittee on Labor on the Administration of the Davis-Bacon Act, at 5 (June 1963). The Subcommittee noted that:

> Many times, in order to make a proper determination, the Secretary must go beyond the individual civil subdivision of a State. In fact, he may be obligated to go beyond the borders of the State. . . . There may be isolated areas where no rate can be found for the particular kind of project in the political subdivision of the State in which the project is located. It may be that the specific civil subdivision may not contain sufficient projects to enable the Secretary to make a proper determination.

Id. (emphasis added). Thus, Congress was aware of, and did nothing to limit, WHD's practice of going beyond an "individual civil subdivision of a State" (such as a county) and perhaps using data "beyond the borders of the State" when there was insufficient data within a smaller geographic area.

Similarly, when considering a prior version of 40 U.S.C. 3142(b) and after thoroughly reviewing the legislative history, the D.C. Circuit concluded:

> Although on its face this language would appear to refer the Secretary only to projects in the same civil subdivision as the contract work, no one has interpreted it that way. Since at least 1935, the Secretary has routinely looked to nearby locales if there was insufficient prior construction in the project county to determine the prevailing wage.

Bldg. & Constr. Trades' Dep't, 712 F.2d at 617-18. The D.C. Circuit added:

> Clearly, if a prevailing wage could not be set in a given county by looking only to projects in that county, it was essential to the attainment of the general purpose of Congress—the predetermination of locally prevailing wages—that another mechanism be found. In essence, Congress anticipated that the general authorization to the Secretary to set the prevailing wage would encompass the power to find a way to do so in the interstitial areas not specifically provided for in the statute.

Id. at 618. The D.C. Circuit also circled back to the DBA's delegation "to the Secretary, in the broadest terms imaginable, the authority to determine which

wages are prevailing," and noted that "[i]n cases where there is insufficient data from a given civil subdivision to determine a prevailing wage" and data beyond the county level is considered, "the Secretary is acting pursuant to [that] same kind of delegation of authority." *Id.* (cross-referencing *id.* at 616).

Finally, the Board issued its decision in *Chesapeake Housing* just seven years ago affirming WHD's consideration of wage data from other similar counties when there is insufficient data at the county level.[13] Nothing has changed since, and Petitioners identify no intervening decision or other event. Indeed, the Administrator's response brief to the Board in *Chesapeake Housing* extensively discussed the DBA's text and legislative history as well as the applicable regulations, and the Board concluded that it "share[s] the Administrator's view that the use of wage data from a super group is a permissible exercise of the broad discretion granted the WHD under the statute and regulations." 2013 WL 5872049, at *6 (citing the Administrator's response brief). There is no basis to reach a different conclusion here.

[13] The Board had previously noted WHD's use of wage data beyond the county level. *See Mistick*, 2006 WL 861357, at *8 ("Wage data from surrounding counties may be considered for wage determination purposes if the data for a particular county is determined to be inadequate."); *New Mexico NECA*, 2004 WL 1261216, at *8 (citing 29 C.F.R. 1.7(b) for the proposition that "if construction within a county is insufficient to make a wage determination, wages paid in surrounding counties may be considered").

CONCLUSION

For the foregoing reasons, the Board should reject Petitioners' various contentions and deny their petition for review.

CERTIFICATE OF COMPLIANCE

This filing complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 9,374 words, including headings, footnotes, and quotations, but excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This filing complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface, Times New Roman, in 14-point font. This brief was prepared using Microsoft Word 2013.

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CERTIFICATE OF SERVICE

I certify that, on this 15th day of October, 2020, a copy of this Administrator's Response to Petition for Review was sent by email to:

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