

CRS Report for Congress

Davis-Bacon Act Coverage and the State Revolving Fund Program Under the Clean Water Act

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**Prepared for Members and
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Summary

The Davis-Bacon Act (DBA) requires, among other things, that not less than the locally prevailing wage be paid to workers employed, under contract, on federal construction work “to which the United States or the District of Columbia is a party.” Congress has added DBA prevailing wage provisions to more than 50 separate program statutes. In 1961, a DBA prevailing wage requirement was added to the Federal Water Pollution Control Act (P.L. 87-88), now known as the Clean Water Act (CWA), which assists in construction of municipal wastewater treatment works.

In 1987, Congress moved from a program of federal grants for municipal pollution abatement facilities to a state revolving loan fund (SRF) arrangement in which states would be expected to contribute an amount equal to at least 20% of SRF capitalization funding. The SRFs were expected to remain as a continuing and stable source of funds for construction of treatment facilities. Congress specified that certain administrative and policy requirements (including a Davis-Bacon prevailing wage requirement), annexed from the core statute, would apply to treatment works “constructed in whole or in part before fiscal year 1995” under the SRFs. By October 1994, under the 1987 amendments, it was expected that federal appropriations for the SRFs would end.

After 1987, Congress variously reconsidered the CWA and the SRF program but made no further authorizations. It did, however, contrary to expectation when the 1987 legislation was adopted, continue to appropriate funds for SRF pollution abatement projects. Thus, a conflict arose. Did the administrative and policy requirements associated with federal funding (*inter alia*, the prevailing wage requirement) continue to apply? If so (or if not), upon what legal foundation? In 1995, the Environmental Protection Agency (EPA) ruled that prevailing wage rates (Davis-Bacon) would no longer be required on SRF projects. The Building and Construction Trades Department (BCTD), AFL-CIO, protested.

What happened after 1994 is not entirely clear: i.e., whether prevailing rates were actually paid. In the spring of 2000, EPA reversed its position and came to conclude that Davis-Bacon did indeed apply. Following notice in the *Federal Register* (and review of submissions from interested parties), EPA entered into a “settlement agreement” with the BCTD. It would enforce DBA rates on CWA projects effective July 1, 2001. But then EPA moved the effective date back, to late summer — and, then, to October. Thereafter, it seems, EPA was silent.

During recent years, Congress has increasingly considered funding mechanisms other than direct appropriations for public construction: e.g., joint federal and state revolving funds, loan guarantees, tax credits, etc. This report is a case study of the application of DBA requirements to one such mechanism, the CWA SRFs. The question of DBA application to the SRFs continues in the 110th Congress.

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Introduction

In 1987, Congress amended the Clean Water Act (CWA) to provide for establishment of a program of *state revolving loan funds* (SRFs) through which to finance local water pollution abatement projects (P.L. 100-4). The SRFs were to be jointly funded by the federal government and the states with loans to be made (and repaid) in cyclical fashion. The legislation included a provision mandating that construction work performed with SRF assistance would be covered by the prevailing wage requirements of the Davis-Bacon Act (DBA) — a 1931 statute requiring payment of *not less than* the locally prevailing wage on certain federal (and, later, federally assisted) construction work.

By the mid-1990s, the system was expected to change. Once the SRFs were in place, federal funding for these waste water treatment facilities would pass through the SRFs on a revolving basis. It was assumed that by the mid-1990s, the transition would be complete and that no further federal appropriations would be needed. However, a federal presence would continue through the SRFs as funds were recycled through loans and repayment.

In practice, matters evolved somewhat differently. Although no additional authorizing legislation was adopted after 1987, Clean Water Act appropriations, *contrary to stated expectations*, continued. Given continuing federal funding, some have argued, federal requirements governing administration of the program (including labor standards) should remain in place. Others have sought to set aside the various federal requirements — including the CWA Davis-Bacon provision.

Debate over Davis-Bacon coverage under the CWA SRF program is ongoing and has been the subject of several policy shifts on the part of the Environmental Protection Agency (EPA). *First*. In 1995, EPA ruled that Davis-Bacon no longer applied to CWA SRF projects. *Second*. In the spring of 2000, EPA reversed itself and, entering into a settlement agreement with the Building and Construction Trades Department, AFL-CIO, affirmed that the act *would* be applied to such projects — effective July 1, 2001. *Third*. EPA then set back the effective date for Davis-Bacon coverage to the fall of 2001, perhaps reversing itself once more. Thereafter, EPA seems to have remained silent on the issue.

This report deals neither with environmental/water quality issues nor with the Davis-Bacon Act, *per se*, but, rather, with the intersection of two statutes and the regulatory complexities that have resulted. It suggests the evolution of the Davis-

Bacon provision of the Clean Water Act and traces the conflict (1994-2007) as to whether DBA wage standards should/do still apply to CWA SRF projects. Finally, it poses questions of policy: How did the dispute develop, how has it been resolved (if, indeed, it has been), and how might similar conflicts be avoided? With more than 50 program statutes now covered by Davis-Bacon prevailing wage provisions (and with Congress exploring a variety of innovative funding mechanisms for public works), how this issue is ultimately resolved could have wider implications.

Background

In 1948, Congress enacted the Federal Water Pollution Control Act setting in motion a continuing initiative for restoring the health of America's water resources. The act, which would evolve into the Clean Water Act, started modestly mandating a series of studies and limited projects. Gradually, on an *ad hoc* basis, the pollution abatement program became more ambitious with federal aid to states and local governments. In 1972, the various initiatives and requirements were drawn together in a more coherent manner. Other amendments followed. In 1987, the most recent amendments, Congress made changes both with respect to policy and funding.¹

The Davis-Bacon Act (1931) had a two-fold thrust: to promote stability within the construction industry and to protect construction workers from a downward spiral in wages and working conditions. In 1935, Congress broadly restructured the Davis-Bacon Act, reducing the coverage threshold from \$5,000 to \$2,000 and extending the scope of the act to "construction, alteration, and/or repair, including painting and decorating, of public buildings or public works" to which "the United States or the District of Columbia is a party."² Gradually (and with increasing frequency after the mid-1950s), Davis-Bacon provisions were added to statutes in which the work was made possible through federal grants, loans, and other financial arrangements.³

Linking Davis-Bacon to the Clean Water Act

Conflict developed early on between federal and state responsibilities. In 1956, Congress adopted legislation (P.L. 84-660) to provide for grants of "up to \$50 million a year" through a 10-year period to be used for "matching grants to states and localities for construction of community sewage-treatment plants." President Eisenhower reluctantly signed the legislation but, later, urged that the grant program be abolished. When Congress, instead, nearly doubled the size of the program, the

¹ Concerning water quality issues, see CRS Report RL33800, *Water Quality Issues in the 110th Congress: Oversight and Implementation*, by Claudia Copeland.

² P.L. 74-403.

³ For an historical sketch of the Davis-Bacon Act, see CRS Report 94-408, *The Davis-Bacon Act: Institutional Evolution and Public Policy*, by William G. Whittaker.

President vetoed the legislation and his veto was sustained.⁴ Observing that “water pollution is a uniquely local blight,” the President stated that “primary responsibility for solving the problem lies not with the Federal Government but rather must be assumed and exercised, as it has been, by State and local governments.”⁵

The 1961 Amendments and Their Aftermath

In early 1961, President Kennedy reversed the Eisenhower policy on water pollution abatement and called for increased “Federal assistance “to municipalities for construction of waste treatment facilities.”⁶ When new CWA legislation was reported in the House in April 1961, it provided, *inter alia*, that “all laborers and mechanics employed by contractors or subcontractors on projects” for which construction grants were to be made were to be paid wages “as determined by the Secretary of Labor, in accordance with the Act of March 3, 1931, as amended, known as the Davis-Bacon Act....”⁷

The Davis-Bacon provision was explained to Members of the House. Representative John Blatnik (D-MN), chair of the Subcommittee on Rivers and Harbors, stated that this was not an unusual practice since similar provisions already applied “to contracts for school, hospital, housing and airport projects constructed with Federal-aid funds.”⁸ The municipal wastewater pollution abatement program, it was explained, would be a *partnership* between the federal government and state or local entities. Davis-Bacon coverage does not appear to have been contentious. Representative James Wright (D-TX) observed: “If we were to oppose the payment of prevailing standard wages, then would this not mean that we favored the payment of substandard wages? Surely,” he added, “the Congress does not wish to take that position.”⁹ Though other aspects of the legislation were subject to extended debate, no one seemed seriously to dispute the requirement for DBA coverage.¹⁰

Senate consideration of the 1961 legislation appears to have been no more controversial where Davis-Bacon coverage was concerned. The concept was

⁴ *Congressional Quarterly Almanac*, 1960. Washington, Congressional Quarterly Inc., 1960, pp. 250-251. (Hereafter cited as *CQ Almanac*).

⁵ Veto of Bill To Amend the Federal Water Pollution Control Act. Feb. 23, 1960. *Public Papers of the Presidents of the United States: Dwight D. Eisenhower, 1960-1961*. Washington, U.S. Govt. Print. Off., 1961. pp. 208-209.

⁶ President Kennedy’s Special Message on Natural Resources, Feb. 23, 1961, reprinted in *CQ Almanac*, 1961, p. 877.

⁷ U.S. Congress. House. Committee on Public Works. *Federal Water Pollution Control Act Amendments of 1961*. Report to Accompany H.R. 6441. H.Rept. 87-306, 87th Cong., 1st Sess. Washington, U.S. Govt. Print. Off., 1961. pp. 8, 15, and 37.

⁸ *Congressional Record*, May 3, 1961, p. 7144.

⁹ *Ibid.*, p. 7161-7162.

¹⁰ *Ibid.*, p. 7196.

endorsed by Labor Secretary Arthur Goldberg and by organized labor.¹¹ Although it was opposed by the Chamber of Commerce, the provision seemed uncontroversial, as debate shifted largely to technical and fiscal aspects of pollution control.¹²

With the House and Senate in agreement, Davis-Bacon was not an issue in the conference report.¹³ Congress appeared to accept the premise that federal funding for pollution abatement projects, even when made available through assistance to states and local entities on a matching basis, should include, as a corollary, Davis-Bacon coverage. (See P.L. 87-88.)

Through the next few years, Congress variously modified the Federal Water Pollution Control Act (FWPCA). Though Davis-Bacon had high visibility during the 1960s, it does not appear to have been an issue in the context of pollution abatement legislation. FWPCA amendments in 1965 retained the DBA requirement and added “anti-kickback” provisions.¹⁴ During Senate hearings on the program in 1971, Davis-Bacon was mentioned only in passing;¹⁵ and when, the following year, Congress restructured the act with passage of P.L. 92-500, the Davis-Bacon and “anti-kickback” provisions remained in place. Notwithstanding authorization of substantial expenditures for construction of state and local wastewater treatment facilities under the 1972 legislation,¹⁶ stable and adequate funding would continue to be an issue through the next decade. Davis-Bacon, however, does not appear to have been a serious issue for any of the parties at this juncture.

Emergence of the State Revolving Fund Concept

Through the 1980s and beyond, Congress would continue to wrestle with issues of policy raised under the early statutes. In 1981, the federal contribution to assist states and local government with pollution abatement was reduced. Thus, the burden

¹¹ Letter from Secretary Goldberg to Chairman Chavez, May 8, 1961, reprinted in U.S. Congress. Senate. Committee on Public Works. *Water Pollution Control*. Hearings before a Subcommittee of the Committee on Public Works, 87th Cong., 1st Sess., May 8 and 9, 1961. Washington, Govt. Print. Off., 1961. Pp. 67-68, 186. (Hereafter cited as Senate Public Works, *Water Pollution Control*).

¹² *Ibid.*, p. 105.

¹³ U.S. Congress. House. *Federal Water Pollution Control Act Amendments of 1961*. Conference Report to Accompany H.R. 6441. H.Rept. 87-675, 87th Congress, 1st Sess. Washington, Govt. Print. Off., July 6, 1961. See also *Congressional Record*, July 13, 1961, pp. 12471-12496, and July 14, 1961, pp. 12565-12567.

¹⁴ P.L. 89-234, Section 4(g). The Copeland Act requires employers to file payroll records to show that the appropriate wages, without unauthorized deductions, have been paid.

¹⁵ U.S. Congress. Senate. Committee on Public Works, Subcommittee on Air and Water Pollution. *Water Pollution Control Legislation*. Hearings on S. 75 (and other bills), 92nd Cong., 1st Sess., Mar. 18, 19, 22, 23, and 24, 1971. p. 662.

¹⁶ See *CQ Almanac*, 1972. p. 708.

could be expected to fall more heavily on non-federal entities. Program and policy, here, reflected sharply differing approaches to governance.¹⁷

Restructuring the CWA Program. During hearings in March 1985, Jack Ravan, Assistant EPA Administrator in the Reagan Administration, called for a total phasing-out of the federal construction grants program by the end of FY1989. Ravan argued that “Federal funding has simply substituted for, not supplemented, State and local financing.” Devolution, he suggested, would be a wiser course.¹⁸

In the context of a projected shift from federal to state (or non-federal) funding of treatment facilities, creation of state revolving funds (SRFs) surfaced as one option. However, questions arose concerning management of such a program: how much (or how little) local control ought to be allowed.¹⁹ Ravan suggested a gradual phasing out of existing requirements. He opined that “*the first use* of the money out of the revolving fund might very well carry with it the requirements” of the existing program. (Italics added.) He continued, “I believe there also must come a day, hopefully, as quickly as possible, when the States would be given absolute flexibility for utilization of these funds”²⁰ Robert Perry of the Water Pollution Control Federation was more expansive. “Treat moneys that have been used and then paid back to a fund as State revenues,” he urged. “Remove the requirement that they be treated as Federal funds ad infinitum.”²¹

Different versions of the CWA amendments were passed by the House and Senate during the summer of 1985, but in neither body did labor standards appear to be an issue.²² For nearly a year, the legislation laid dormant until, during the spring of 1986, conferees met and began what became a protracted process of negotiation. The thrust of the pending proposals (S. 1128, H.R. 8) seemed clear: i.e., that at some point in the near future, federal appropriations (and authorizations) would cease and construction of treatment facilities would rest on the SRFs.

¹⁷ U.S. Congress. House. Committee on Public Works and Transportation, Subcommittee on Water Resources. *Possible Amendments to the Federal Water Pollution Control Act*. Hearings. 99th Cong., 1st Sess., Apr. 25, 30, 1985. p. 311.

¹⁸ U.S. Congress. Senate. Committee on Environment and Public Works, Subcommittee on Environmental Pollution. *Amending the Clean Water Act*. Hearings on S. 53 and S. 652, 99th Cong., 1st Sess., Mar. 26, 1985, p. 5. (Hereafter cited as Senate Environmental Pollution Subcommittee, *Amending the Clean Water Act*).

¹⁹ U.S. Congress. House. Committee on Public Works and Transportation, Subcommittee on Water Resources. *Possible Amendments To the Federal Water Pollution Control Act*. Hearings. 99th Cong., 1st Sess., April 25, 30, 1985. p. 312. (Hereafter cited as House Water Resources Subcommittee, *Possible Amendments to the Federal WPCA*).

²⁰ Senate Environmental Pollution Subcommittee, *Amending the Clean Water Act*, pp. 24-25.

²¹ House Water Resources Subcommittee, *Possible Amendments to the Federal WPCA*, p. 312.

²² *Congressional Record*, June 12, 1985, p. 15301-15326; June 13, 1985, p. 15616-15678; July 22, 1985, p. 19846-19865; and July 23, 1985, p. 19993-20112. See also: *CQ Almanac*, 1985, pp. 204-208; and *CQ Almanac*, 1986, pp. 136-137.

The conference report, filed in October 1986, included (as part of the legislation) a 10-paragraph section titled “SPECIFIC REQUIREMENTS” that laid out the continuing administrative practices that would apply to “treatment works ... which will be constructed in whole or in part before fiscal year 1995 with funds directly made available by capitalization grants.” Among those requirements, it was specified that Section 513 of the CWA (the Davis-Bacon provision) would continue to be applied “in the same manner as [it had been applied to] treatment works constructed with assistance under title II” — i.e., the former direct federal grants program.²³ The House approved the report (408 yeas to 0 nays), as did the Senate (yeas 96 to 0). There appears to have been no other discussion of the Davis-Bacon prevailing wage language.²⁴ However, despite strong support for the legislation, it was subjected to a pocket veto (Congress having adjourned) by President Reagan — for reasons other than Davis-Bacon.²⁵

Early in the 100th Congress, consideration of the issue resumed with new (essentially identical) legislation being introduced. Members spoke of a “transition from Federal to State funding” and of “phasing out the Federal program ... without abandoning the needs of States and municipalities.” It is not clear whether Members viewed devolution as absolute.²⁶ What requirements, if any, would remain in place?

In fact, the federal *phase-out* would not be total for the SRFs rested upon federal “seed money.”²⁷ Had there been no federal funding (no seed money), there would have been no state revolving funds. But, there were ambiguities. Representative Arlan Stangeland (R-MN), for example, observed:

Federal moneys made available for these funds would be subject to certain restrictions on their use, as are moneys provided through the Construction Grant Program. As these moneys are repaid into the fund, the restriction on how the funds can be used would be eliminated, thereby allowing the States greater flexibility and freedom

Mr. Stangeland did not specify the “restrictions” he had in mind. Was this flexibility with respect to the types of projects and the priorities to be assigned? Or, did it imply that the states would be free to utilize the SRFs without restraint? It *was* clear that the SRFs would serve federally specified purposes and in a federally specified manner.²⁸ Congress quickly approved the legislation.

In late January 1987, consistent in his opposition, President Reagan vetoed the measure. While endorsing pollution abatement, he focused upon “the Federal deficit

²³ *Congressional Record*, Oct. 15, 1986, p. 31582. H.Rept. 99-1004, *Conference Report on S. 1128, Water Quality Act of 1986*, is reprinted here in full, pp. 31577-31630.

²⁴ *Congressional Record*, Oct. 15, 1986, pp. 31954-31975. See also *Congressional Record*, Oct. 15, 1986, pp. 31608-31609; and Oct. 16, 1986, pp. 32390 and 32407.

²⁵ *CQ Almanac*, 1986, pp. 136-137.

²⁶ *Congressional Record*, Jan. 8, 1987, pp. 976, 985 and 990.

²⁷ *Ibid.*, pp. 991, 994, and 1005.

²⁸ *Ibid.*, p. 991, and Jan. 14, 1987, p. 1269.

— and the pork-barrel and spending boondoggles that increase it.” Local sewage treatment facilities, he affirmed, were “historically and properly ... the responsibility of State and local governments.” He raised no objection to Davis-Bacon, *per se*.²⁹

On February 3 and 4, 1987, the House and Senate voted to override the President’s veto. H.R. 1 became P.L. 100-4.³⁰ The old Title II direct federal grants program would be phased-out and replaced with the Title VI SRF loan program.

Questions of Interpretation and Intent. In P.L. 100-4, Congress appeared to assume (from debate and public documentation, did assume) that no federal appropriations for SRFs would be made after 1994. *However*, even were that assumption to have held true (in fact, it would not), the federal presence would not have ended. The SRFs were a direct federal creation, largely capitalized by the federal government.

Under P.L. 100-4, at least two elements need to be considered. *First*, there is the language of S. 1128 of the 99th Congress (the vetoed bill) and of the conference report that accompanied it. *Second*, there is the actual language of the new statute (P.L. 100-4). With respect to DBA coverage, they differ in critical aspects.

When reporting S. 1128 in the House in the 99th Congress, the conference report explained that the 16 administrative requirements of Section 602(b)(6) — including the Davis-Bacon requirement (Section 513 of the CWA) — were not to apply “to funds contributed by the State” or to “monies repaid to the fund.”³¹ Senator George Mitchell (D-ME) explained the measure in the Senate in almost identical language.³² But, that language was not incorporated within the proposed legislation — which, in any event, did not become law.

Public Law 100-4 (like S. 1128 of the 99th Congress) states that “treatment works” to be “constructed in whole or in part before fiscal year 1995 with funds directly made available by capitalization grants under this title” must “meet the requirements” set forth in Section 602(b)(6): the 16 “Specific Requirements” which included the Section 513 Davis-Bacon provision. The statute did not say that Davis-Bacon coverage would cease after 1995 (when authorization would have terminated) nor did it specify that Section 513 (Davis-Bacon) and the other enumerated requirements would not apply to recycled (repaid) funds. It carried the program up to FY1995 and then was silent, making no reference to the *first use* concept where the Davis-Bacon Act was concerned.

²⁹ *Public Papers of the President of the United States. Ronald Reagan, 1987.* Washington, Govt. Print. Off., 1989. Pp. 95-96.

³⁰ *Congressional Record*, Feb. 3, 1987, pp. 2505-2516; and Feb. 4, 1987, pp. 2795-282. See also *CQ Almanac*, 1987, pp. 291-296.

³¹ *Congressional Record*, Oct. 15, 1986, pp. 31608.

³² *Congressional Record*, Oct. 16, 1986, pp. 32390.

The issue of continuing DBA coverage for the SRF program appears to have sparked concern neither during the closing days of the 99th Congress nor early in the 100th Congress. But, there may have been continuing ambiguities.

The legislation projected a direct federal role in the SRFs (continuing appropriations) until FY1995. Thereafter, the program was still expected to continue on a foundation of federal funding. Did Congress intend to drop the Davis-Bacon requirement (with others) once the SRFs were in place — resting as they were on federal funding? And was Congress willing to acquiesce in the payment of wages *lower than those prevailing in a locality* after FY1994?³³

There may also have been the matter of disaggregation of SRF funding. An abatement project, commenced prior to 1995 with an SRF loan, would clearly be DBA-covered. What if work were to continue beyond 1995 through supplemental SRF loans? The entire project could be *grandfathered-in* and wholly subject to Davis-Bacon; or, once 1994 had been reached, coverage could cease. Or coverage might be associated with each contract or sub-contract, depending upon the date on which a contract was entered into *or* on which the work commenced. Could a worksite be fragmented, part covered and part exempt?

How were the various agencies to distinguish between covered and non-covered funding? Construction grants under Title II had always required DBA coverage; but with federal funds now going first to SRFs (capitalization grants) and then being loaned out to local entities, would DBA still apply in the absence of a specific policy from the Congress. And what about the *first use* doctrine?

Given the very high visibility of Davis-Bacon during this period, some may wonder that the act was not a major subject of debate where the CWA was concerned. Documents to this point (1987) are remarkable silent.³⁴

Charting a New Federal Role, 1987-1995

Through the late 1980s, Members of Congress continued to speak in terms of a terminating program and shifting responsibility. P.L. 100-4 “brings the [Title II federal grant] program to an end,” observed Senator Daniel Moynihan (D-NY). The

³³ The 100th Congress may, arguably, have seen no need to reaffirm prevailing wage coverage, taking coverage for granted. Or, conversely, it might have added specific language stating that, after 1994, the DBA would not apply to SRF-funded construction; but it did not do so. The target date was, after all, nearly seven years off — and, surely, there would be time to revisit the act. How much weight should be given *the absence* of language overturning long-established public policy?

³⁴ An issue at least since the later 1950s, a major controversy erupted with the 1979 GAO report, *The Davis-Bacon Act Should Be Repealed*. (U.S. Government Accounting Office, HDR-79-18. Washington, U.S. Govt. Print. Off., Apr. 27, 1979.) The report led to hearings by three separate committees of Congress. Projected administrative reform (and litigation) then continued, in some degree, into the Clinton Administration.

program “... will end in 1994. The end. After that there is a revolving loan fund to sustain the program.”³⁵ But, federal financial involvement didn’t end.

By 1991, the beginnings of a policy shift were evident. Senators Max Baucus (D-MT) and John Chafee (R-RI) introduced legislation (S. 1081) that became, in effect, a vehicle for oversight. Senator Chafee asserted that the “States have actually lost ground as the construction grants program is [being] phased out,” and affirmed that “the States are starved for resources to carry out the act.” *Inter alia*, the Baucus/Chafee proposal would have set back the target date for termination of the federal role in the SRFs from 1995 to 1998 and, it appears, would have extended through that period applicability of the existing *specific requirements* under Section 602(b)(6) — including Davis-Bacon coverage (Section 513).³⁶

Hearings commenced on the Baucus/Chafee legislation in the spring of 1991. But, by that point, a number of things had changed. Concern with *wetlands* and *combined sewer overflows* (CSOs) and *non-point source pollution* had become the key issues — especially, the former. The Reagan Administration had given way to the Bush Administration and EPA Administrator William Reilly now acknowledged a municipal pollution abatement need “into the indefinite future.” He stated that the costs of abatement were rising and that the states and municipalities “are very often not in a position to meet the many federal requirements we are imposing.”³⁷ These problems may have overshadowed concern about prevailing wage standards — except, perhaps, from the standpoint of keeping costs down.

Though specific proposals were avoided for the moment, it became increasingly clear that the federal government would not be able to make a clean break from federal funding — and to independent and self-sustaining SRFs. Interest groups, associated with pollution abatement, began to call for more federal funding. Such calls for federal dollars were accompanied with appeals for enhanced flexibility: i.e., fewer strings, less federal control. States, it was argued, “should be allowed to maintain the flexibility to establish priorities ... and to deploy available funds for the most pressing problem on a timely basis.” Continued capitalization by the federal government “through FY1994 *and beyond*,” it was asserted, “is essential.”³⁸ Appeals for “increased Federal funding” were coupled with pleas for relief from the “administrative burdens and regulatory roadblocks” of the 1987 legislation — including the Section 602(b)(6) *specific requirements*.³⁹

In early 1992, Senator Chafee reminded his colleagues that “[u]nder current law, there is to be no Federal role, no additional Federal dollars, after 1994.” “That date is now in sight,” he pointed out, and “... it is time to reconsider that decision. I have

³⁵ *Congressional Record*, July 12, 1988, pp. 17658.

³⁶ *Congressional Record*, May 15, 1991, pp. 11034 and 11032. See Section 28 of S. 1081.

³⁷ U.S. Congress. Senate. Committee on Environment and Public Works. Subcommittee on Environmental Protection. *Water Pollution Prevention and Control Act of 1991*. Hearings, 102nd Cong., 1st Sess., May 21, June 13, July 9, 17, and 18, 1991. Pp. 31 and 62.

³⁸ *Ibid.*, pp. 267, 275, and 336. Italics added.

³⁹ *Ibid.*, pp. 917-918.

come to the floor of the Senate today to urge that Federal support for the State revolving loan funds be continued at current levels *for the foreseeable future*.”⁴⁰ (Italics added.)

The nature of a continuing federal presence was now at issue. The Baucus/Chafee bill would not have terminated the federal role in construction of treatment plants. Rather, it would have created a series of new categorical grant programs to be placed under the SRF umbrella. But this, it seems, was opposed by certain state authorities hostile to the idea of “a proliferation of new Federal categorical grants.” Instead, they wanted “the flexibility already available to them” in the SRFs “to effectively address their highest priorities as they see them.”⁴¹

Since the Bush Administration had not yet announced a firm policy with respect to SRF funding, EPA Administrator Reilly was not then able to address the issue definitively. The Baucus/Chafee bill was not marked-up. Reauthorization to provide for sustained and comprehensive CWA SRF funding did not move forward.⁴²

The End Draws Near?

Until FY1995, the SRF structure would remain in place. What would or what ought to happen thereafter remained in question. Meanwhile, Congress continued to review a variety of CWA-related proposals.

Interim Assessment. In March 1991 and in January 1992, GAO released assessments of the initial operation of the CWA/SRF program, stating that the wage requirement was the “most controversial” of the old Title II (now Title VI) administrative requirements. But, it also found opinion mixed: some arguing that DBA “could increase project costs significantly” while others suggested that, “except for small or disadvantaged communities, the increased costs associated with the Title II ... requirements may not be as substantial” as critics aver.⁴³ In short, its findings seem to have been ambiguous with little hard evidence upon which to rest.

In October 1991, EPA had presented its own evaluation. Like GAO, it noted that some found the *specific requirements* onerous: that the “most frequently mentioned” of these was the Davis-Bacon provision. The states, it said, “would prefer ... to be exempted entirely” from the *strings* Congress had imposed, arguing that they “reduce the program’s attractiveness to communities” to whom SRF loans would be made. The EPA study paralleled the March GAO report, suggesting that payment of the locally prevailing wage could increase the cost of public construction.

⁴⁰ *Congressional Record*, Feb. 7, 1992, pp. 2129-2130.

⁴¹ *Ibid.*

⁴² *CQ Almanac*, 1991, pp. 212-213.

⁴³ U.S. General Accounting Office. *Water Pollution: States’ Progress in Developing State Revolving Loan Fund Programs*. GAO/RCED-91-87. Washington, U.S. Govt. Print. Off., Mar. 1991. Pp. 3 and 8; and U.S. General Accounting Office. *Water Pollution: State Revolving Funds Insufficient to Meet Wastewater Treatment Needs*. GAO/RCED-92-35. Washington, U.S. Govt. Print. Off., Jan. 1992. Pp. 12, 15, and 20.

But, EPA also pointed out that the DBA requirement “varies considerably based on local socioeconomic and market conditions and State prevailing wage rate laws.”⁴⁴

In each of these reports, DBA was merely touched upon. Assessments of the prevailing wage statute were more reportorial than analytical, and rendered as the views of persons interviewed. No new evidence or impact analysis was presented.

New Legislative Proposals. With the 1987 authorization set to expire in October 1994, reauthorization of the CWA SRF program assumed a “high priority.”⁴⁵ On June 15, 1993, Senators Chafee and Baucus introduced S. 1114, which proposed to extend the SRF program, to increase federal funding, and to permit the states greater flexibility. The DBA requirement would have remained in effect.⁴⁶

Hearings before the Senate Clean Water Subcommittee commenced the following day, continuing intermittently through three months. A general consensus became apparent concerning the SRF program. Senator Bob Graham (D-Fla.), chair of the subcommittee, explained: “The justification for this change in policy [extending the program through 2000] seems to be grounded in the continued need for federal support.”⁴⁷

Witnesses offered mixed responses. In an exchange with Senator Chafee, Ronald Marino of the investment firm of Smith Barney raised the issue of *first use* and recycled funding, suggesting that “when the loan is recycled and repaid,” mandates such as Davis-Bacon might be eliminated.⁴⁸ Several witnesses appeared to reflect GAO assertions: i.e., that small communities might benefit through exemption from *specific requirements* “including the Davis-Bacon Act.” Generally, through the 1700 pages of testimony, labor standards were not at issue.⁴⁹

⁴⁴ U.S. Environmental Protection Agency. *State Revolving Fund (SRF): Final Report To Congress*. Washington, Govt. Print. Off., Oct. 1991. pp. 1-7 and 11-12. See also: Fraundorf, Martha Norby, John P. Farrell, and Robert Mason, *Effect of the Davis-Bacon Act on Construction Costs in Non-Metropolitan Areas of the United States*. Corvallis: Department of Economics, Oregon State University, Jan. 1982. 41 p.

⁴⁵ *Congressional Record*, June 15, 1993, p. 12754.

⁴⁶ In introductory remarks, neither Senators Chafee nor Baucus made reference to Davis-Bacon. See *Congressional Record*, June 15, 1993, pp. 12726-12757.

⁴⁷ U.S. Congress. Senate. Committee on Environment and Public Works, Subcommittee on Clean Water, Fisheries, and Wildlife. *Reauthorization of the Clean Water Act*. Hearings, 103rd Cong., 1st Sess., June 16, 23; July 1, 14, 27; Aug. 4, 5; and Sept. 15, 1993. p. 312.

⁴⁸ *Ibid.*, p. 348. Marino, here, was presenting options.

⁴⁹ *Ibid.*, pp. 332, 344, 348-349, 360, 407, 412, and 415-417. One witness suggested that dispensing with the administrative regulations (presumably, including the DBA), would allow communities to get “more bang for the bucks.” The inference was clear: paying lower wages would stretch tax dollars a bit further. The stated purpose of the Davis-Bacon Act, however, was *to maintain at least* the locally prevailing wage structure.

The Committee Reports. In May 1994, Senator Baucus introduced a clean bill (S. 2093) which was soon reported from the Committee on Environment and Public Works.

In S. 2093, transfer from federal to state responsibility for full financing of municipal pollution abatement was deferred. The committee noted that early policy had “contemplated a transition to full State and local financing by fiscal year 1995, when the capitalization grants were to end and the funds were to be sustained by repayments of loans made from the fund.” However, confronted with a 20-year agenda of treatment projects (estimated to cost \$130 billion), past assumptions seemed no longer appropriate. The new bill would authorize “continued funding for the successful SRF program through the year 2000.” The committee’s position was made clear. Were the legislation to be adopted, the federal role in the SRF program would not end; rather, it would be extended at least until 2000 — and possibly into the indefinite future.⁵⁰

But, what about the various administrative requirements of the 1987 legislation? Existing law would be modified “to increase State flexibility in managing loan funds;” but, for the most part, these changes would affect utilization and financial management of the SRFs.⁵¹ During mark-up, Senator Robert Smith (R-NH) proposed repeal of the existing Davis-Bacon requirement under the CWA. The Smith amendment was defeated by a vote of 6-11. Thereupon, Senator Harris Wofford (D-PA) offered an amendment confirming that the Davis-Bacon Act would apply “to all State loans” under the SRF. The Wofford amendment was approved by a vote of 11 to 6. The committee voted to report the bill by a vote of 14 to 3.⁵²

With respect to Davis-Bacon and its applicability under the SRFs, the bill *as reported* was clear. The relevant part of the new Section 513 was to have read:

The Administrator shall take such action as may be necessary to ensure that each laborer or mechanic employed by a contractor or subcontractor of a project *that is financed in whole or in part by a grant, loan, loan guarantee, refinancing, or any other form of financial assistance* provided under this Act (*including assistance provided by a State from a water pollution revolving loan fund* established by a State pursuant to Title VI) shall be paid wages at rates that are not less than the prevailing rates for projects of a similar character in the locality of the project that is financed under this Act, as determined by the Secretary of Labor in accordance with the Act of March 3, 1931 (commonly known as the “Davis-Bacon Act”) (40 U.S.C. 276a *et seq.*). (Italics added.)

No exception was made for small, financially strapped, jurisdictions. The concept of *first use* (with repaid funds exempt from federal wage requirements) was not

⁵⁰ U.S. Congress. Senate. Committee on Environment and Public Works. *Water Pollution Prevention and Control Act of 1994*. Report to accompany S. 2093. S.Rept. 103-257, 103rd Cong., 2nd Sess. Washington, U.S. Govt. Print. Off., May 10, 1994. p. 11.

⁵¹ *Ibid.*, pp. 13-20.

⁵² *Ibid.*, pp. 164-165. Senators Smith, Dirk Kempthorne (R-ID), and Lauch Faircloth (R-NC) voted in opposition.

raised as an issue — but was *implicitly* rejected. Clearly, the committee’s majority intended that CWA projects funded through SRFs should be Davis-Bacon covered.⁵³

Stalemate. Numerous contentious issues were associated with the proposed environmental legislation during the 103rd Congress, but *wetlands* preservation may well have been the most difficult to resolve. With time running out, reauthorization legislation stalled both in the House and Senate. Through the remainder of the 20th century an into the 21st century, no further reauthorization for the Clean Water Act would be adopted.⁵⁴

The SRFs and mandated water quality objectives remained in place. Congress continued *to appropriate funds* for CWA projects and for SRFs. Construction of abatement facilities continued, the absence of reauthorization notwithstanding. Under the circumstances, it may have seemed reasonable that normal administrative requirements of the CWA would similarly remain in place; but, not all agreed with that conclusion.

Consideration in the House, 1995

In 1995, party control shifted in the House. Bud Shuster (R-PA) became chair of the Committee on Transportation and Infrastructure; Sherwood Boehlert (R-NY), chair of the Subcommittee on Water Resources and Environment. Quickly, extended hearings (February 9 to March 11, 1995) commenced on CWA reauthorization and new legislation was introduced (H.R. 961) by Shuster in mid-February 1995.

The DBA requirement was, here, more openly in dispute. Paul Marchetti (Council of Infrastructure Financing Authorities, CIFA) urged “some elimination of the costly Title II requirements that have been held over from the construction grant programs ... that increase the cost of projects...”⁵⁵ He argued that requirements, “like Davis-Bacon ... significantly increase the construction costs in many areas.” In short,

⁵³ *Ibid.*, p. 453. During the spring of 1994, the Senate had under consideration amendments to the Safe Drinking Water Act (S. 2019, 103rd Congress) which included a provision for Davis-Bacon coverage of loans from state revolving funds. When confronted with floor amendments to strike DBA coverage from that program, the Senate three times rejected that option, leaving DBA coverage in the legislation. See *Congressional Record*, May 17, 1994, pp. S5806-S5811; May 18, 1994, pp. S5897-S5899, S5900-S5901, and S5909-S5910; and U.S. Congress. Senate. Committee on Environment and Public Works. *Safe Drinking Water Act Amendments of 1994*. Report to accompany S. 2019. S.Rept. 103-250, 103rd Cong., 2nd Sess., Washington, U.S. Govt. Print. Off., Apr. 14, 1994. pp. 11 and 71-72. Although approved by the Senate, S. 2019 died at the close of the 103rd Congress.

⁵⁴ *CQ Almanac*, 1994, pp. 241-243.

⁵⁵ U.S. Congress. House. Committee on Transportation and Infrastructure. Subcommittee on Water Resources and Environment. *Reauthorization of the Federal Water Pollution Control Act*. Hearings. 104th Cong., 2nd Sess. [sic.], February 9, 16, 21, and 25, 1995, March 7, 9, and 11, 1995. Pp. 62. (Hereafter cited House Transportation and Infrastructure Subcommittee, *Reauthorization of Federal Water Pollution Control Act*).

CIFA pressed for support of federal funding but elimination of federally-imposed administrative requirements.⁵⁶

Scott McElwee of the Associated Builders and Contractors (ABC) expressed similar concerns. “We believe,” he stated, “that with full funding and repeal of the Davis-Bacon Act, our water infrastructure needs will begin to diminish and our Nation’s water quality will dramatically improve.”⁵⁷ Questioned by Representative Stephen Horn (R-Calif.), William Rogers of the Associated General Contractors (AGC) affirmed general support for repeal of Davis-Bacon. The discussion, however, was brief and focused on DBA generally — not on the Davis-Bacon/CWA connection.⁵⁸ Further, Kermit Prime, speaking for the National Society of Professional Engineers (NSPE), urged Congress to eliminate Section 602(b)(6) of the CWA: the administrative requirements. “We are particularly interested,” he concluded, “in repealing the applicability of the Davis-Bacon Act to SRF-financed projects, also required under Section 602(b)(6).”⁵⁹

Section 602 of H.R. 961 would have deleted the phrase “before fiscal year 1995” and would have removed “administrative requirements previously imposed on Title II grant recipients and currently extended to applicants who receive SRF capitalization grant loans.”⁶⁰ Specifically, H.R. 961 amended the statute by striking from CWA Section 602(b)(6) “‘201(b)’ and all that follows through ‘218’ and inserting ‘211.’” Thus, the reference to Section 513 (Davis-Bacon) was retained but

⁵⁶ *Ibid.*, p. 152. Marchetti provided no documentation for his claim nor did he attempt to disaggregate impacts: i.e., to separate any Davis-Bacon costs from those associated with other administrative requirements.

⁵⁷ House Transportation and Infrastructure Subcommittee. *Reauthorization of Federal Water Pollution Control Act*, p. 256. In a statement for the record, p. 316, McElwee affirmed:

The Davis-Bacon Act unnecessarily raises *the cost of federal construction* by an average of 5-15% with cost in rural areas being inflated by **as much as 25-38%**. ... even worse, these figures do not take into account the burden that Davis-Bacon requirements impose on states and localities.” (Italics and bolding added.)

McElwee seems to mean *total project costs*, not just *labor costs*. No source was offered for this assertion nor were supporting data provided.

⁵⁸ House Transportation and Infrastructure Subcommittee. *Reauthorization of Federal Water Pollution Control Act*, pp. 259-261.

⁵⁹ *Ibid.*, pp. 267, and 343-344. Prime also endorsed legislation (H.R. 500 of the 104th Congress) that would have repealed the Davis-Bacon and Copeland Acts.

⁶⁰ U.S. Congress. House. Committee on Transportation and Infrastructure. *Clean Water Amendments of 1995*. Report on H.R. 961. H.Rept. 104-112, 104th Cong., 1st Sess. Washington, U.S. Govt. Print. Off., May 3, 1995. Pp. 164.

without the limitation of “before fiscal year 1995.”⁶¹ Davis-Bacon does not appear to have been mentioned, specifically, in the committee’s report.

As reported and on the floor, the legislation proved contentious, but concern was with environmental issues — not with Davis-Bacon. On May 16, 1995, H.R. 961 was passed by the House: yeas 240, nays 185 — 9 not voting.⁶² It died in the Senate at the close of the 104th Congress.

Moving On: 1995 and Beyond

After 1994, there appears to have been some ambiguity with respect to CWA’s Davis-Bacon provision. Each side sought to have their interpretation prevail.

Davis-Bacon is not self-enforcing. If an agency determines not to apply the statute, someone must take exception, move through the appeals process — and, potentially, through the courts. It’s not a simple procedure, nor is it quick. Few individuals would be in a position to take such action — nor might they be inclined to do so where wages and conditions of employment are reasonably good.

Organized labor (the Building and Construction Trades Department, AFL-CIO — the BCTD) will normally support a prevailing wage requirement. Conversely, some employers (often *open shop* firms) may be hostile to Davis-Bacon and seek to avoid its applicability or enforcement. Federal agencies, contracting for various types of construction (and operating on tight budgets), may find themselves the natural allies of the contractor/employer as they seek to reduce wages (labor costs). Even within an Administration, there may be different perspectives among agencies on a prevailing wage requirement.

In the case of DBA and SRF projects, various factors come into play. Congress might have spoken with greater clarity if stalemate had not occurred with non-DBA issues blocking further authorizing legislative. But stalemate did occur: Congress made no immediate CWA authorizations beyond 1994. Similarly, changes within the Congress and at the White House may have brought a shift of philosophies. This could (and, likely, would) result in new policies both at DOL and in EPA.

⁶¹ The implications of the changes proposed in H.R. 961 may not be entirely clear. In a letter to EPA Administrator Carol Browner, August 3, 2000, Representative Shuster would recall: “... H.R. 961 — which I was the lead sponsor of and which passed the House in 1995 — included specific provisions which had the effect of reapplying Davis-Bacon to the Clean Water SRF.” He added: “No one — including the Administration — commented that EPA already had sufficient legal authority to effectuate this policy change thereby making these provisions unnecessary.” It is possible others thought there was no need for comment if the amended statute merely extended the Davis-Bacon requirement, as it stood, while deleting certain other administrative requirements — and deleting a consideration of time (“before fiscal year 1995”) which was no longer relevant.

⁶² *Congressional Record*, May 16, 1995, p. 13094.

The Davis-Bacon/CWA Issue Begins to Form

In a memorandum of August 8, 1995, Michael Cook of EPA called the attention of his staff to confusion about applicability to the SRFs of the “equivalency requirements” (including the DBA provision).⁶³ Noting the language of the statute and making no allowance for the altered circumstance, Cook stated:

Section 602(b)(6) of the Clean Water Act requires section 212 publicly-owned treatment works projects to comply with these statutory requirements if they are constructed in whole or in part before October 1, 1994, with funds “directly made available by” capitalization grants. Consequently, projects that began construction on or after that date do not have to comply with the requirements. (Underscoring in the original.)

Cook explained various complexities. For example, with “a binding commitment for the project” made prior to October 1, 1994, or an on-going project being “incrementally funded,” the “equivalency requirements” could be expected to apply. But, where a commitment or initiation of construction “occurred on or after October 1, 1994, the equivalency requirements do not attach to the project.” This would be true “even though the project was funded with funds ‘directly made available by’ capitalization grants (equivalency funds).”⁶⁴ There would be no DBA coverage.

The Cook memorandum did not resolve all confusion about DBA applicability. From public documents, it is not clear how widely it was circulated nor how it was treated by CWA/SRF managers. What advice was given to potential contractors in this respect? Did DBA provisions continue to be written into CWA/SRF contracts? If not, was there objection from the workers — or from the several unions involved?

In January 1997, EPA’s Region III (Philadelphia) sought advice from DOL in Philadelphia concerning DBA coverage for CWA projects. On the assumption that Davis-Bacon no longer applied, EPA’s regional office was ready to remind the states within its jurisdiction that coverage had ceased and that DOL would no longer enforce compliance. It sent DOL a copy of its proposed policy statement, asking: “Please let us know if we are misstating the Department of Labor’s role in this particular situation.” *The EPA draft* commenced: “It has come to our attention that some states are continuing to apply the Davis-Bacon Act” to CWA SRF projects. And, later, the draft advised: “... since the DBA is a federal statute, it is inappropriate to use the threat of federal enforcement in cases where compliance is not federally mandated in the first place.”⁶⁵

⁶³ The Section 602(b)(6) requirements, including the Davis-Bacon provision, are variously referred to in the literature as the “specific requirements” or the “equivalency requirements.”

⁶⁴ Memorandum from Michael B. Cook, Director, Office of Wastewater Management, U.S. Environmental Protection Agency, to Water Management Division Directors, August 8, 1995.

⁶⁵ Denise Harris, Assistant Counsel, EPA Region 3, to Susan Jordan, Staff Attorney, U.S. Department of Labor, January 28, 1997 (with enclosure). The Region III (EPA) directive, quoted here, was simple *draft language* but, presumably, represented the perspective of the
(continued...)

The exchange between EPA and DOL sparked renewed interest in Davis-Bacon and CWA/SRF projects. Word of EPA's position filtered back to Washington and in April 1997 Robert Georgine, president of the Building and Construction Trades Department, AFL-CIO, laid the matter before John Fraser, Acting Administrator, Wage and Hour Division, DOL. Georgine reviewed the history of the labor standards provisions of the CWA, pointing to two separate sections of that statute: Section 513 which, he stated, applies Davis-Bacon wage standards, generally, to CWA-funded projects and, Section 602(b)(6), the segment of the 1987 CWA amendments that requires Davis-Bacon coverage through FY1994 under the SRF program.

... even if Congress intended to repeal application of the Davis-Bacon requirements in the Clean Water Act to construction of treatment works began [sic.] after the beginning of fiscal year 1995, Section 602(b)(6) simply failed to give effect to that intention. Congress left in place and did not qualify the scope of the applicability of Section 513 to all construction of treatment works for which grants are made under the Act. When construing legislation of this type, the plain statutory language should control and that [sic.] EPA cannot perform linguistic gymnastics in order to upset the plain language of the Clean Water Act as it exists today.⁶⁶

A copy of Georgine's letter was dispatched to EPA Administrator Carol Browner as well as to the member unions of the BCTD.

DOL referred the Georgine letter to EPA for review. In October 1998, EPA's Michael Cook responded with a six-page analysis. He began with the assertion that "Title VI limits application of the CWA Davis-Bacon Act provision to SRF-funded projects 'constructed in whole or in part before fiscal year 1995.'" He stated:

Contracts to which the United States is not a party, but which are awarded under a Federal assistance program, must also comply with Davis-Bacon Act requirements if the statute authorizing the assistance so requires. (Italics added.)

Cook stated further: "Federal grant-making agencies recognize that the Davis-Bacon Act applies to federally assisted construction projects only if it is required by the legislation authorizing the assistance."

He again pointed to the time limitation: i.e., to "projects 'constructed in whole or in part *before fiscal year 1995*.'" (Italics in the original.) Having taken that initial stand, Cook then reviewed each of the arguments made (or implied) in the Georgine letter and concluded that the interim period of Davis-Bacon coverage had "ended by fiscal year 1995." He added: "For these reasons, we are confident that the position reflected in the EPA memorandum [Cook's own earlier memorandum] is the proper

⁶⁵ (...continued)
regional office at that juncture.

⁶⁶ Robert A. Georgine to John R. Fraser, Administrator, Wage and Hour Division, U.S. Department of Labor, Apr. 30, 1997.

one, and we urge the Department [of Labor] to respond to the [Building and Construction Trades] Council accordingly.”⁶⁷

A Gradual Change of Policy at EPA

From the perspective of EPA, the matter was closed: Davis-Bacon should not apply (did not apply — as EPA interpreted the 1987 statute) to CWA SRF projects begun after October 1994. But, the issue was not entirely resolved.

Tentative Compromise Is Reached. During the late 1990s, the BCTD variously conferred both with DOL and with EPA seeking a ruling that would affirm DBA coverage for CWA SRF projects. By early 2000, there seems to have been some shift of policy on the part of the latter agency.

On May 22, 2000, EPA wrote to BCTD Counsel Terry Yellig (with copies to various EPA, DOL and AFL-CIO officials) noting an “interest in settling the Labor Department proceeding between EPA and the Building Trades.” EPA stated:

Under the proposed settlement agreement we have drafted, the Agency would again require states to ensure that treatment works projects receiving CWSRF assistance directly made available by capitalization grants comply with the Clean Water Act’s Davis-Bacon provisions for as long as grants are awarded to the states under this program. In exchange for the Agency’s agreement, the Building Trades would withdraw its pending Labor Department challenge and refrain from challenging the Agency on this issue in the future.

Once BCTD had agreed to the settlement, EPA would commence the administrative process to give it effect. Depending upon the results of “consultations with state and local officials” and public comment through *Federal Register* notice, EPA reserved the right to “withdraw from or withhold agreeing to the proposed settlement.” Assuming the settlement were to proceed, then EPA would direct that a provision be added to grant agreements “entered into with the states on or after January 1, 2001” requiring them to “comply with section 513” of the CWA with respect to projects “receiving CWSRF assistance directly made available by capitalization grants.”⁶⁸

EPA published the notice in the *Federal Register* (June 22, 2000), outlining the projected agreement and calling for comment. It was explained that EPA would “prospectively apply the Davis-Bacon Act’s prevailing wage rate requirements in the Clean Water State Revolving Fund ... in the same manner as they applied before October 1, 1994.” The notice reviewed the dispute and concluded:

⁶⁷ Michael B. Cook, Director, Office of Wastewater Management, EPA, to Ethel P. Miller, Office of Enforcement Policy, Government Contracts Team, DOL, October 29, 1998. While Title VI affirms that DBA *does apply* prior to FY1995, it *does not state* that it will not apply to subsequent work. Arguably, it awaits further action by Congress.

⁶⁸ Geoff Cooper, Finance & Operations Law Office, U.S. EPA, to Yellig, May 22, 2000. Where an interested party believes that the DBA has been mis-applied, a formal appeals procedure exists within the Department of Labor: a process that has, on occasion, led to judicial redress.

EPA has closely considered the relationship of CWA section 513 and CWA section 602(b)(6) While the Agency's position to date rests on a reasonable legal interpretation, EPA is now persuaded of the appropriateness of the view that CWA section 513 imposes a continuing, independent obligation on the Agency to ensure that Davis-Bacon Act requirements apply to any grants made under the CWA for treatment works, including capitalization grants made under title VI of the CWA. The language of CWA section 602(b)(6) does not relieve the Agency of this obligation. Furthermore, as a matter of policy, the Agency has determined that prevailing wage rate requirements applicable to federally-assisted construction projects should continue to apply to federally-assisted treatment works construction in the CWSRF program.

In the "Proposed Settlement Agreement," *per se*, it was added that, while the requirements of Section 513 (DBA) would hereafter apply to SRF projects, "no other requirements identified in section 602(b)(6) of the CWA, will apply"⁶⁹

The proposed settlement raised a number of questions. How did the parties distinguish between the initial Section 513 requirement, standing on its own, and Section 602(b)(6) into which Section 513 had been incorporated? If Section 513 continued to have independent applicability, then why was it necessary to include it within Section 602(b)(6) at all? What was the intent, as used in the agreement, of such phrasing as *capitalization grants* and *directly made available* — which, given the history of the statute, could become a focus of litigation even were the settlement affirmed? Why had EPA acquiesced to enforcement of the Davis-Bacon requirements while specifically rejecting enforcement of the other provisions of Section 602(b)(6)? And, were EPA's actions, here, in compliance with the Administrative Procedure Act?

More broadly, a provision allowed EPA to opt out of the agreement should testimony and comment warrant. In that event, the BCTD's "sole remedy will be to reinstitute its request for ruling before the DOL." EPA also stated: "In exchange for EPA's commitment, Building Trades would agree not to pursue any further action on this matter before DOL or any other Federal administrative agency, or in litigation."

Cook's conclusions and the settlement seem at odds. Cook had held that DBA did not apply to SRF programs after October 1, 1994 — neither through Section 513 nor Section 602(b)(6).⁷⁰ But EPA, having "closely considered the relationship" of the two sections, had now come to conclude that DBA *does apply* and, further, that "[t]he language of CWA section 602(b)(6) does not relieve the Agency of this

⁶⁹ *Federal Register*, June 22, 2000, p. 38828-38830.

⁷⁰ Cook's argument is lengthy, but he observes in part: "...the application of section 513 is limited. It applies the Davis-Bacon Act only to treatment works receiving grants from the Agency. Section 602(b)(6) merely extends this otherwise limited application to certain SRF-funded projects for a certain period of time. EPA's construction of the clear direction in section 602(b)(6) did nothing to disturb the application of section 513. It continues to apply to 'treatment works for which grants are made under (the CWA)' but not to grants for capitalizing State funds." See Cook to Miller, October 29, 1998, cited above.

obligation.” What was the true meaning of the law — and what *was* the intent of the Congress? Was Cook right — or were the authors of the settlement right?

Finally, EPA’s *Federal Register* explanation noted: “... *as a matter of policy*, the Agency has determined that prevailing wage rate requirements applicable to federally-assisted construction projects *should continue to apply* to federally-assisted treatment works construction in the CWSRF program.” (Italics added.) One may query: Did the proposed settlement rest on law or upon *policy* as enunciated by the spokesman for an administrative agency?

A Call for Public Comment. During the summer of 2000, EPA took public comment on its proposed *notice of settlement*. Two statements supported the settlement; 23 opposed it. Testimony fell into three general categories: the BCTD, contractor associations, and state agencies responsible for dealing with the CWA. Several Members of Congress presented their views. A few statements focused on legal issues. Others argued for or against the Davis-Bacon Act *per se* — which, though interesting, added little insight with respect to the actual settlement.⁷¹

Views from Members of Congress. Representative Shuster raised legal concerns. He questioned “whether an Executive Branch agency can make the decision to reapply a statutory requirement that expired after September 30, 1994.” The act, “as currently written,” he suggested, “does not allow EPA to take such action.” New legislation, he stated, would be needed to reinstate the DBA. He said that EPA had “failed to provide ... a credible legal analysis of the Agency’s purported authority to implement this proposal.”⁷²

William Goodling, Education and the Workforce chair (with 10 other Republican committee members), called upon EPA to “reverse its plan to apply the Davis-Bacon Act to clean water infrastructure projects funded” through the SRFs. They stated that the proposed settlement “violates the clear intent of Congress.” The Members suggested that, procedure aside, applying DBA to such work would be bad public policy that “needlessly adds to the cost of clean water projects, thus harming taxpayers, consumers and communities in need of affordable clean water solutions.”⁷³

Industry and Local Government Comment. Industry and state agencies assumed that the DBA requirement had expired — (which both EPA and the BCTD would now dispute).⁷⁴ Their subsequent comments were based on that premise.

⁷¹ Reaction was not so one-sided as the numbers might suggest. The BCTD presented a single statement on behalf of “the fifteen national and international labor organizations” affiliated with it. The Association of State and Interstate Water Pollution Control Administrators presented testimony in its own behalf — but a number of individual state agencies presented testimony independently.

⁷² Honorable Bud Shuster to Carol Browner, Administrator, U.S. EPA, Aug. 3, 2000.

⁷³ Honorable William Goodling, *et al.*, to Carol Browner, July 31, 2000.

⁷⁴ The Heavy Highway Contractors Association supported the EPA/AFL-CIO settlement and the “independent obligation” under Section 513 “to apply DBA to SRF funded wastewater (continued...) ”

The Associated General Contractors (AGC) urged EPA “to withdraw” the settlement. William Isokait, for AGC, argued that the settlement “is a policy judgment beyond the authority of the agency” for which “EPA offers no explanation.” Desire for a settlement, he chided, “does not grant it the authority to originate prevailing wage policy or to administer its programs in ways that contradict the laws that establish and fund those programs.” He termed the EPA proposal “inappropriate, improper and inconsistent.” As a technical matter, Isokait stated that Section 602(b)(6) had contained 16 administrative requirements inherited from the Title II program. Although the other 15 requirements had been allowed to expire in 1994, EPA had selected one (dealing with DBA) to retain. “Why this obligation does not exist with respect to these [other] conditions is not explained.”⁷⁵

Charles Maresca, Jr., for the Associated Builders and Contractors (ABC), also accused EPA of acting “beyond its statutory authority” in “attempting to legislate via executive fiat.” The “plain language of Section 513,” he stated, “... authorizes the application of Davis-Bacon to projects funded by grants under the Act. It does not authorize Davis-Bacon application to projects funded by revolving funds to which EPA has made a grant.” In any case, it would have been nullified by “the sunset provision” of Section 602(b)(6). Like several others, he charged that EPA had proposed “no legal argument to support its new position,” adding: “The agency merely announces that it ‘is now *persuaded* of the appropriateness’ of imposing Davis-Bacon, and that ‘as a matter of policy’ the application of Davis-Bacon requirements to treatment works begun after FY1994 should resume.” The Administration, he concluded, “is overstepping its bounds.”⁷⁶

The Association of State and Interstate Water Pollution Control Administrators expressed dismay that the settlement had been “developed without input from this Association” or the various state agencies.⁷⁷ That view was echoed by a number of witnesses for the states.⁷⁸ Some questioned why EPA would act at all. “It has been known to Congress since the deadline passed that the Davis-Bacon Act was not being applied” and Congress had taken “no action ... to reinstate” the requirement.⁷⁹ Besides, several commenters argued, there would be little purpose in imposing DBA

⁷⁴ (...continued)

projects.” James Piazza, Jr., Legislative Liaison, Heavy Highway Contractors Association, to Geoff Cooper, Office of General Counsel, U.S. EPA, Aug. 4, 2000.

⁷⁵ William Isokait, Counsel, Labor & Employment Law, AGC, to Cooper, Aug. 4, 2000.

⁷⁶ Charles Maresca, Jr., Director, Legal and Regulatory Affairs, ABC, to Cooper, Aug. 7, 2000. Albert Miller, President, National Society of Professional Engineers, Aug. 15, 2000, to Cooper, mused: “... NSPE can only conclude that the decision is not a matter of policy but politics, this being an election year.”

⁷⁷ Robbi Savage, Association of State and Interstate Water Pollution Control Administrators, to Cooper, Aug. 8, 2000.

⁷⁸ Mike Linder, Director, State of Nebraska Department of Environmental Quality, to Cooper, undated; Russell Harding, Director, State of Michigan Department of Environmental Quality, to Cooper, July 14, 2000; and Daniel Law, Executive Director, Colorado Water Resources & Power Development Authority, to Cooper, July 21, 2000.

⁷⁹ Chris Matthews, Chris Matthews Construction, Inc., to Cooper, July 20, 2000.

requirements since local “construction tradespeople are receiving wages that often exceed those published as Davis-Bacon Prevailing Rates.”⁸⁰

Several submissions focused upon a procedural issue. Were federal funds being made (1) to fund construction of treatment works or (2) to provide capital for the SRFs — which would then make loans for specific projects? The importance of the distinction (*direct* and *indirect* funding), however, was not spelled out with total clarity in the submissions. Nor was it developed clearly in the legislative history — or, for that matter, in the comments of EPA associated with the agreement.⁸¹

Were the settlement to be approved, several commenters urged, the effective date should be set back to allow time “to notify future loan recipients ... and to re-train personnel for implementation.”⁸²

Perspectives of the BCTD, AFL-CIO. As a potential party to the settlement, the BCTD was presumably privy to the reasoning upon which the compromise was based. Thus, its testimony, transmitted to EPA by BCTD President Edward Sullivan, could be regarded as an *inside* assessment.

The BCTD stated its understanding that “EPA would prospectively apply Davis-Bacon prevailing wage requirements to construction of treatment works projects assisted by State Water Pollution Control Revolving Funds with funds made directly available by capitalization grants under Title VI of the Clean Water Act”⁸³ The BCTD explained: “.... in order to receive a capitalization grant” for its SRF, the states had been required to “enter into a capitalization grant agreement with the EPA that imposes an assortment of conditions” — one of which was the Section 602(b)(6) DBA requirement. Included in Section 602(b)(6), by reference, Section 513 provided that “all laborers and mechanics employed by contractors or subcontractors on treatment works **for which grants are made under this Act** shall be paid wages” at least equal to DBA rates.⁸⁴

⁸⁰ S. W. Daignault, P.E., City Manager, City of Cape Coral, Florida, to Cooper, Aug. 4, 2000. Chris Matthews, *op. cit.*, observed in the same spirit: “Since most of the wage determinations used [for Davis-Bacon purposes] are several years old, and the construction skilled labor market has been tightening, ma[n]y of the wage determinations prescribe wages which are lower than those current to the market.”

⁸¹ Don Ostler, Director Division of Water Quality, Utah Department of Environmental Quality, to Cooper, July 12, 2000; and J. Dale Givens, Secretary State of Louisiana Department of Environmental Quality, to Cooper, July 31, 2000.

⁸² Douglas Benevento, Director, Environmental Programs, Colorado Department of Public Health and Environment, to Cooper, July 18, 2000.

⁸³ Edward C. Sullivan, President, Building and Construction Trades Department, AFL-CIO, to Cooper, Aug. 4, 2000, transmitting the BCTD statement. Cite is to p. 1 of the BCTD statement. The phrases, “assisted by,” “made directly available by,” and “capitalization grants under Title VI,” may benefit from amplification.

⁸⁴ *Ibid.*, p. 7. Bolding in the original.

The effect and standing of Section 513 (originally applicable to Title II) and of Section 602(b)(6) of the new Title VI remained in dispute, raising the question as to whether the federal funding in question came from EPA or from the CWA SRFs. Section 513, the BCTD stated, “applies to ‘all laborers and mechanics employed by contractors or subcontractors on treatment works for which grants are made under this Act,’ not ‘all laborers and mechanics employed by contractors or subcontractors on treatment work by which grants are made **by EPA** under this Act.’ That is,” it concluded, “the plain language of Section 513 is not as limited as EPA claimed.”⁸⁵ The BCTD then turned to congressional intent: “... there is no question that in 1987, Congress intended to discontinue providing capitalization grants” to the SRFs after FY1994. However, “... federal funding of capitalization grants to the States has continued unabated since FY1995 ...”⁸⁶

Why would EPA, having taken a very public stand that the DBA did not apply to SRF work, suddenly reverse itself? If the BCTD interpretation of the law is correct, the statement speculated, “there is a potentially substantial amount of back pay liability arising from failure to pay prevailing wages and benefits” on CWA projects. “EPA has wisely decided” that — although its prior position “rests on a reasonable legal interpretation” — it “is now persuaded of the appropriateness of the view that CWA section 513 imposes a continuing, independent obligation on [EPA] to insure that Davis-Bacon Act requirements apply to any grants made under the [Clean Water Act] for treatment works, including capitalization grants under title VI of the CWA.”⁸⁷

A New EPA Policy Enunciated

EPA’s “final settlement agreement” with the BCTD appeared in the *Federal Register* of January 25, 2001.⁸⁸ **First.** EPA explained that, under the settlement, it would “prospectively apply the Davis-Bacon Act’s prevailing wage rate requirements in the Clean Water State Revolving Fund ... program established in title VI ... in the same manner as they applied before October 1, 1994.” **Second.** “In exchange for EPA’s commitment, Building Trades has agreed not to pursue any further action on this matter before DOL or any other Federal administrative agency, or in litigation.” **Third.** The settlement would become effective on July 1, 2001 (delayed from the original target date of January 1, 2001 to accommodate the states). Thereafter, Davis-Bacon requirements were to be in effect.

The *Federal Register* notice reviewed the controversy, summarized the submissions, and explained the position of the agency. *Inter alia*:

... the legal basis for reimposing the Davis-Bacon Act requirement is sound and, as a matter of policy, it is proper for prevailing wage rates to apply to

⁸⁵ *Ibid.*, p. 9. Bolding in the original.

⁸⁶ *Ibid.*, p. 10.

⁸⁷ *Ibid.*, p. 10-11.

⁸⁸ The settlement agreement was signed by Gary S. Guzy, General Counsel, EPA, on Jan. 11, 2001, and by Edward C. Sullivan of the BCTD on Jan. 17, 2001.

construction projects that are, *for all intents and purposes, federally-assisted*. (Italics added.)

Reimposing the Davis-Bacon Act requirements may increase construction costs for many CWSRF recipients, but the levels of those cost increases vary widely and are often insignificant.

Although EPA is interested in streamlining administrative requirements and reducing implementation costs, state prevailing wage rate laws cannot substitute for the requirements of CWA section 513.

The settlement, however, still contained the provision that were EPA, after the signing and publication of the settlement, to fail to meet its obligations under the settlement's terms, the "sole remedy" of the Building and Construction Trades Department would be "to reinstitute its request for ruling before the DOL."⁸⁹

Another Reversal at EPA?

Interest groups had aligned on each side of the EPA/BCTD settlement. If the trade union movement could applaud the decision as simply consistent with statute (and with sound policy), industry would dissent. The Associated Builders and Contractors (ABC) protested that the settlement "essentially repeals a statutorily mandated sunset date of October 1, 1994" and charged that it was "a violation of the Clean Water Act."⁹⁰ Nevertheless, both sides agreed to work for reauthorization of the CWA: in the case of the ABC, without Davis-Bacon coverage. For Associated General Contractors, "expansion of federal drinking water and wastewater revolving funds" was a top legislative priority for the 107th Congress.⁹¹ For EPA, "wastewater infrastructure" was reportedly a top budget concern.⁹²

As noted above, the final settlement had been modified in one area: i.e., moving the effective date back to July 1, 2001, in order to accommodate the needs of the states. At that point, it was agreed, EPA would begin mandating Davis-Bacon coverage on all SRF-assisted projects.⁹³ But, EPA subsequently moved the effective

⁸⁹ *Federal Register*, January 25, 2001, p. 7761-7763. The settlement does not contain a *definition* section. Both the settlement and EPA explanation of it contain phrasing that may need more careful legal analysis than given to it here. Given the long history of litigation with respect to the Davis-Bacon Act, one might be excused for questioning the meaning of even the most simple and direct language and the intent of its authors.

⁹⁰ Statement, *Davis-Bacon and the EPA*, website of the Associated Builders and Contractors [<http://www.abc.org>], Oct. 26, 2001.

⁹¹ Associated General Contractors. *News & Views*, Oct. 19, 2001. p. 2. See also: The Growing Water Crisis in America. *Constructor*, Aug. 2001. p. 42-46.

⁹² *Engineering New Record*, May 21, 2001. p. 13.

⁹³ Bureau of National Affairs. *Daily Labor Report*, Jan. 25, 2001. p. A4.

date back to September 1, 2001. Then, “[w]ith no elaboration,” EPA moved it back again, this time to October 1, 2001.⁹⁴ Thereafter, there was silence.

Davis-Bacon Act and the CWA/SRFs in the 110th Congress

Through more than a decade, authorization for funding of the CWA/SRFs has been a matter of contention with the authorizing committees of both the House and the Senate. Each time a bill has been brought up for consideration, various other factors were raised — among them, coverage under the Davis-Bacon Act — and, ultimately, the several bills died.⁹⁵

In the 110th Congress, there is once again consideration of clean water bills. Almost immediately after the Congress convened, the process commenced in the House — but with the issue of Davis-Bacon hanging over the proceedings.⁹⁶

Preliminaries and an Early Hearing

On January 19, 2007, the House Subcommittee on Water Resources conducted an oversight hearing on investment in clean water infrastructures.

J. Kevin Ward, speaking for the Council of Infrastructure Financing Authorities (CIFA), did not refer to the Davis-Bacon Act in his prepared testimony but he did urge that “more operating flexibility” be allowed for the states (a concept sometimes associated with an anti-Davis-Bacon stance). Ward continued:

“Certainly States must be fully accountable for their use of federal dollars but an excessive overlay of mandates and set asides and operation requirements will only serve to stifle innovation and interfere with the ability of States to best respond to local needs. The success of this program derives from the flexibility of the SRF model....”

With a view to prospective legislation in the 110th Congress, Ward affirmed that there are “a number of specific program changes that we would want to see included in CWSRF reauthorization....”⁹⁷

Jim Stutler, representing the National Utility Contractors Association (NUCA), noted that there “are several policy issues that will no doubt be debated during the legislative process” but urged the committee “to focus on the big picture.” Stutler

⁹⁴ Bureau of National Affairs. *Daily Labor Report*, Sept. 14, 2001. p. A14.

⁹⁵ For general background on the recent period, see CRS Report RL33800, *Water Quality Issues in the 110 Congress: Oversight and Implementation*, by Claudia Copeland.

⁹⁶ Bureau of National Affairs, *Daily Labor Report*, Jan. 10, 2007, p. A8.

⁹⁷ Testimony of J. Kevin Ward, on behalf of the Council of Infrastructure Financing Authorities, before the House Subcommittee on Water Resources and the Environment, Jan. 19, 2007, pp. 2 and 7. .

continued: "... the impasse over prevailing wage requirements under the Davis-Bacon Act has stymied this legislation for too long." He continued: "... NUCA represents both union and non-union contractors" and "Davis-Bacon is not an issue of contention for our members."⁹⁸

A New Bill Introduced

On January 30, 2007, Representative James Oberstar (D-MN) introduced H.R. 720, the "Water Quality Financing Act of 2007."⁹⁹ The bill was referred to the Subcommittee on Water Resources and Environment, marked up and promptly forwarded to the full Committee on Transportation and Infrastructure.

Subcommittee and Committee Action. In the subcommittee (January 31), Davis-Bacon again became an issue. Representative Richard Baker (R-LA), in an amendment proposed by Representative Thelma Drake (R-VA), urged that the Davis-Bacon language be stricken. On a voice vote, the Baker/Drake amendment was rejected and the Davis-Bacon provision was retained.¹⁰⁰

On February 7, the House Committee on Transportation and Infrastructure took up the sewage and wastewater measure. In each case (in the subcommittee and in the committee), there had been controversy; but, in each case, it had been overcome. The bill was approved in the full committee by a vote of 55 yeas to 13 nays. Again, the Davis-Bacon provision remained in tact. The bill was ordered reported.¹⁰¹

Report from the Subcommittee: H.Rept. 110-030. As reported, two provisions deal with Davis-Bacon. *Section 513*, which had applied the act broadly to treatment construction, was retained. It required that "all laborers and mechanics employed by contractors or subcontractors on treatment works for which grants are made under this Act shall be paid wages at rates not less than those prevailing for the same type of work on similar construction in the immediate locality."

That authority (Section 513) had long been in place. However, a new provision was added: *Section 602(b)(17)*. The committee report explained:

"New Section 602(b)(17) requires the application of the Davis-Bacon requirements for the construction of treatment works carried out in whole or in part with assistance made available from state revolving loan funds under Title VI, funds from section 205(m) of the Act, or both. This amendment authorizes the application of the prevailing wage requirements to construction projects carried out with any financial assistance from the state revolving fund, whether the source of assistance originates from Federal capitalization grant funds, state

⁹⁸ Testimony of Jim Stutler, President, National Utility Contractors Association, before the Subcommittee on Water Resources and Environment, Jan. 19, 2007, p. 5.

⁹⁹ *Congressional Record*, Jan. 30, 2007, p. E220.

¹⁰⁰ Terry Kivlan, *Subpanel, OKs \$20 Billion Waste Water Construction*, see http://nationaljournal.com/members/markups/2007/01/mr_20070131_3.htm, Feb. 28, 2007. See also Bureau of National Affairs, *Daily Labor Report*, Feb. 2, 2007, p. A3.

¹⁰¹ Bureau of National Affairs, *Daily Labor Report*, Feb. 9, 2007, p. A2.

matching funds, repayments to the fund, interest payments, or other sources of income to the state revolving fund, and whether the character of the assistance is through loans, loan guarantees, or other types of assistance authorized by section 603(d).”

The report continued: “By establishing the Davis-Bacon prevailing wage requirement for the construction of treatment works, the Committee continues its long-standing practice of ensuring the application of Davis-Bacon where Federal funds are provided for construction...” It adds: “For the Clean Water SRFs, the most significant source of revenue in the state revolving funds is the Federal capitalization grant. As Congress has done in 63 separate instances for Federally-funded construction, the Davis-Bacon Act should apply to the reauthorization of the Clean Water SRFs.”

The committee went on to discuss the varied rationale for support of the Davis-Bacon Act: to “attract more experienced and better trained workers,” workers who “are often more productive than workers with less training and experience,” that Davis-Bacon work results often “in the completion of construction projects ahead of schedule,” “reducing the overall cost of the project, and “offsetting any increased costs due to higher hourly wage rates.”¹⁰²

Conversely, Representative John Mica (R-FL), together with several others, suggested a strong opposition. Mr. Mica stated that the bill “represents an important step forward for clean water” but “it also takes a significant step backwards by mandating and expanding upon the past application of Davis-Bacon Act prevailing wage requirements in the SRF program.” Davis-Bacon, he stated, would add “to the cost of public construction” and have a disproportionate impact on “small, rural, and disadvantaged communities, which can least afford to pay the higher cost of projects.” He stated that the act was “discriminatory” in that “[f]ew small and minority-owned firms can afford to pay the higher wages that the Davis-Bacon Act requires. As a result,” he observed, “they are rarely awarded Davis-Bacon contracts, and many of them stop applying for those contracts.” He concluded: “There is no precedent here for applying the Davis-Bacon Act to state funds....”¹⁰³

On March 5, H.R. 720 was placed on the Union Calendar as Calendar No. 11.

¹⁰² U.S. Congress. House. Committee on Transportation and Infrastructure. H.Rept. 110-030, Water Quality Financing Act of 2007: Report to Accompany H.R. 720. Pre-published: [[http://www.congress.gov/cgi-lis/cpquery/R?cp110:FLD010:@1\(hr030\)](http://www.congress.gov/cgi-lis/cpquery/R?cp110:FLD010:@1(hr030))]: p. 24. (Cited hereafter as H.Rept. No. 110-030, 2007.)

¹⁰³ H.Rept. No. 110-030, 2007, pp. 56-57.

Some Considerations of Policy

Conceived prior to the Depression, the Davis-Bacon Act was passed at the urging of the Hoover Administration (1931) with at least two purposes in mind. *First*, the act was intended to assist in bringing stability to the construction industry. *Second*, it was projected as a device for protecting construction wage rates from the downward spiral that was a part of the general Depression-era decline. The DBA applies to construction work “to which the United States or the District of Columbia is a party.” Refined and expanded in 1935, subsequent amendment has been largely technical. However, Congress has included Davis-Bacon provisions in more than 50 program statutes — not always in quite the same manner.

Almost from the beginning, there was debate concerning the impact of the statute; but, impact aside, the act became symbolic. Organized labor supported it — as did many from industry. However, for others in industry and elsewhere, the act seems to have become a target and support for or opposition to the act something of a political litmus test. Arguments, pro and con, have, through the years, blossomed through various levels with multiple layers of counter argument. The act (with the related program provisions) has been litigated extensively with individual words, phrases and concepts becoming grist for the contending parties on each side.¹⁰⁴

In policy terms, Davis-Bacon issues might well be divided into two categories. On the one hand, how ought Congress to treat the act itself? Then, however that question might be resolved, there is the matter of its applicability to the various program statutes — in this instance, to the Clean Water Act.

Review of the Statute

While congressional oversight and debate concerning Davis-Bacon has been intermittent at least since the 1950s, it has been more-or-less on-going since the 1970s. Not infrequently, it has surfaced as a subject of consideration several times during a single session of the Congress. Given what some may perceive to be the ambiguity of the statute and its difficulty of implementation, one may reasonably expect that it will continue to be on the agenda both of the Congress and the courts.

Concerning the act, *per se*, Congress would seem to have several options. *First*. It could find that the act is being applied as it intended. In that case, it could take no action at all, leaving matters to the several agencies (and to labor and employers) for adjustment. *Second*. It could continue to legislate on a case-by-case basis. While that may have the advantage of flexibility (allowing Congress to evaluate the particular context and circumstances of each program and, then, to decide upon the appropriateness of mandating specific labor protections), it could also invite litigation as the parties at interest attempt to define themselves either as covered or exempt. *Third*. It could determine that the act remains important, both in economic and in

¹⁰⁴ See, for example: CRS Report 85-887, “Major Repairs” or “Non-Routine Maintenance:” *Defining Davis-Bacon Coverage Under the Comprehensive Improvement Assistance Program (CIAP)*, and CRS Report 94-431, *Davis-Bacon Coverage: Facilities Built for Lease to the Federal Government*, both by William G. Whittaker.

policy terms, and ought to be preserved and strengthened. In that case, Congress could amend the act to broaden its application — and to define in statute and with precision the terms and concepts that have become a part of Davis-Bacon administration.¹⁰⁵ **Fourth.** It could decide, based upon whatever data or arguments it may deem sufficient, that the act is no longer necessary or useful and that it ought to be repealed, together with the Davis-Bacon provisions of the related program statutes.¹⁰⁶

Davis-Bacon and the Clean Water Act

Davis-Bacon prevailing wage coverage was added to what would become the Clean Water Act in 1961. It remains a part of that statute. Through 40 years, the Davis-Bacon prevailing wage requirement has been associated with the CWA and, the controversial nature of the Davis-Bacon Act notwithstanding, there does not appear to have been serious consideration of repealing that provision.

As part of the CWA, Davis-Bacon had applied to the Title II sewage treatment construction grants program. When Congress created the CWA SRF loan program in 1987, the DBA (with other administrative requirements) was made a part of that program. As this report makes clear, what happened after the 1987 authorization for the SRF program ended in October 1994 remains in dispute.

Federal Funding and Administrative Requirements? In 1987, Congress decided to end authorization of new appropriations for the SRFs after FY1994. Almost immediately, however, there was a recognition, within the committees of jurisdiction and among the stakeholders, that further federal funding for SRFs would be needed “for the foreseeable future.” Several proposals to that effect were considered at the committee level but, possibly because of more contentious issues (*wetlands*, for example), they were not enacted. No further authorizations were approved. *But*, without authorizing legislation, Congress continued to fund the SRF program through the appropriations process. The program is on-going.

So long as the CWA SRF program was receiving federal funding (i.e., through FY1994), Congress specifically provided that DBA coverage would continue through that period. Given a literal interpretation of the 1987 authorization (that DBA and other administrative requirements would apply to treatment works “constructed in whole or in part before 1995 ”), one could argue that any project constructed after that time would not be covered by the prevailing wage requirement. However, the

¹⁰⁵ During 1981 and 1982, the Reagan Administration developed a package of administrative reforms (definitions, processes, etc.) which touched off litigation and public policy debate that, in various forms, has continued through 2 decades. See *Federal Register*, Aug. 14, 1981, pp. 41428 ff., and May 28, 1982, pp. 23644 ff. Concerning general revision of the act, see proposals (not adopted) in the 104th Congress: S. 1183 (Mark Hatfield, R-Ore.) and H.R. 2472 (Curt Weldon, R-Pa.). The Reagan and Hatfield/Weldon proposals had quite different thrusts.

¹⁰⁶ Repeal proposals have variously been before the Congress: most recently, for example, in the 106th Congress. See H.R. 736 (Ron Paul, R-Texas) and S. 1157 (Bob Smith, R-N.H.).

absence of authorizing legislation notwithstanding, it could be argued that Congress decided to continue with the initial SRF program and confirmed that determination through the appropriations process. Since appropriations have continued to be made and the federal program is, in effect, still in place, it could be further argued that the administrative requirements associated with the program should also remain in place and applicable. From this perspective, there would have been no change in the long-standing policy of DBA coverage of CWA and CWA SRF projects — and no need for a new statement of intent by Congress.

The Concept: “to which the United States ... is a party”. Speaking generally, Davis-Bacon coverage has taken two forms. The act itself requires that an agreement to pay not less than the locally prevailing wage rate be included in every contract “in excess of \$2,000, to which the United States or the District of Columbia *is a party*, for construction ...” (Italics added.) In the case of the Clean Water Act, as discussed above, a DBA prevailing wage requirement has been added to the statute with Section 513 (of the core act) and with Section 602(b)(6) with respect to the SRF program. Determination of what constitutes a locally prevailing wage is left to the Secretary of Labor while, under Section 513, the EPA Administrator is directed to insure that all laborers and mechanics employed on covered work are “paid wages at rates not less than those” found by the Secretary of Labor (under the Davis-Bacon Act) to be prevailing.

In a narrow legal sense, the concept of “is a party” may be interpreted as requiring that the United States, through its authorized agent, be an actual signatory to a contract for construction. More broadly in the case of federally assisted programs, some may argue that the recipient of federal funds (a loan, grant, tax incentive), by virtue of the receipt of such assistance, becomes the *de facto* agent of the federal government and, thereby, takes on a variety of federally imposed responsibilities.

The Clean Water Act SRFs is, by and large, a federal program — even if the federal government is not, immediately, a signatory to a construction project under itsegis. The SRFs were established at the initiative of the federal government and have been funded largely by the federal government. If there are administrative and/or social requirements associated with federal funding (normal fiduciary practices; non-discrimination; etc.), some might argue, they should continue in place while the program continues. Further, in this case, the SRFs were *designed* to be ongoing. And, one might argue, the concept of being “a party” to a program (with the requirements and responsibilities that may entail) does not end simply because no *new* federal funding is forthcoming while the program continues to operate by virtue of the *old* funding.¹⁰⁷

¹⁰⁷ In this context, one might consider the concept of *first use*. Some have argued that federal funds, loaned out and then repaid, lose their federal character and take on the character of the party administering the loan program. In this manner, it is argued, the federal government ceases to be “a party” to programs which it has initiated and funded and which would not exist in the absence of that federal role or presence. The concept, sometimes advanced by critics of Davis-Bacon as a way to circumvent that Act’s prevailing wage requirements, would suggest an number of questions of policy.

Thus, the CWA/SRF, programmatic peculiarities notwithstanding, remains basically federal. *Even had there been* no further appropriations after 1994, congressionally imposed restraints would still remain in place. For example, the states, having accepted federal grants to capitalize the SRFs, are not free to convert these funds to an unrelated purpose of their own choice: e.g., highway construction, public welfare, support for the arts, etc. There are restraints upon how the funds might be used that flow, arguably, from the original character of the funding mechanism — which, in this instance, includes (or, some may argue, did include) a Davis-Bacon requirement.

But, *there have been continuing federal appropriations*. The program (even without new authorizations) is on-going and it might be argued that the federal government continues to be “a party” to it. That would seem, on the surface, to be implicit in the EPA agreement to enforce the DBA requirements “prospectively” and “in the same manner as they applied before October 1, 1994.”¹⁰⁸ Such assumptions, of course, lay at the heart of the continuing dispute.

Establishment of state revolving loan funds, in effect, creates an intermediary between the source of the funding (largely, the federal government) and the loan recipient. To what extent is the continuing *federal presence* in the CWA SRF program modified by the mechanism through which funding is made available for local abatement projects? Does the existence of the SRFs render the federal government other than “a party” to the construction?¹⁰⁹ The issue is legal, philosophical — and disputable.

The Complexities of Regulatory Enforcement. Both Davis-Bacon and the CWA SRF initiative have had high visibility. The conflict about prevailing wage

¹⁰⁸ In its January 2001 “settlement agreement,” EPA seemed to concede a continuing federal presence in the instance at hand with its observation: “However, the legal basis for reimposing the Davis-Bacon Act requirements is sound and, as a matter of policy, it is proper for prevailing wage rates to apply to construction projects *that are, for all intents and purposes, federally-assisted.*” (Italics added.) *Federal Register*, January 25, 2001, p. 7762.

¹⁰⁹ Legislation introduced by Senator Mark Hatfield and Representative Curt Weldon in the 104th Congress (S. 1183 and H.R. 2472) attempted to address these issues. This legislation would have added language to the Davis-Bacon Act specifying:

“(3) **FEDERALLY ASSISTED.** — The requirements of this Act ... shall apply to any project for the construction, rehabilitation, reconstruction, alteration or repair, including painting and decorating, of buildings or works that are financed in whole or in part by loans, grants, revolving funds, or other assistance from the United States pursuant to a statute that —

“(A) is enacted after the effective date of this Act unless exempt or otherwise limited by Federal law; or

“(B) contains a provision requiring the payment of prevailing wages as determined by the Secretary of Labor pursuant to this Act.”

The authors would seem to suggest, here, that Davis-Bacon would apply to federally assisted construction even where there is no specific programmatic requirement. Congress, of course, would still have been free to exempt or to exclude programs from coverage where deemed expedient. The Hatfield/Weldon legislation was not adopted.

treatment of SRF-funded projects has been an issue through more than a decade — through several presidential administrations. The policy fluctuations suggest a number of questions, *among which* might be the following.

Was EPA correct, beginning in 1995, that the Davis-Bacon requirements did not apply to SRF projects? Or, was it correct in its new position, 2000-2001, that Davis-Bacon did apply? If the EPA were correct (in either position), upon what legal foundation does it rest? Is it free to take yet another position — and, if so, based upon what specific justification?

Since, over time, the CWA SRF initiative has (and will) involve multiple billions of dollars, it is a major undertaking. At what level have the EPA determinations been made? Did they rest simply upon staff discretion? Were they made at the Administrator's level? Are there in place procedural restraints through which to handle conflicts of this sort?

What was the role of the Department of Labor through this period? Assuming that it had required application of federal prevailing wage (DBA) standards prior to 1994, did it stop doing so in 1995? If so, on what ground?¹¹⁰

crsphpgw

¹¹⁰ While publicly available documentation suggests a general history of events, the pattern of decision-making and the factors that entered into that process are more ambiguous. To develop that information, a more formal and systematic investigation may be necessary.