



STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
*Prevailing Wage*  
PO Box 44540 • Olympia, Washington 98504-4540  
360/902-5335 Fax 360/902-5300

August 28, 2012

Lawrence Gregory, President & CEO  
Gregory Drilling, Inc.  
17609 NE 70<sup>th</sup> Street  
Redmond, WA 98052

Re: Prevailing Rate of Wage for Closed Loop Geothermal Drilling

Dear Mr. Gregory:

Thank you for your August 3, 2012 letter to Prevailing Wage Industrial Relations Agent Beatriz Hart indicating you disagree with the guidance provided in my May 26, 2011 letter to Cascade Drilling NW, Inc. (Cascade Drilling) on public work to drill for closed loop geothermal projects. There is also an August 11, 2011 letter responding to the June 20, 2011 letter from Cascade Drilling's attorney, Robert A. Beattley (copies enclosed). My response letters applied the prevailing rates of pay for the Power Equipment Operator ([WAC 296-127-01354](#) (copy enclosed) to such drilling for a public work. You object to that guidance and provided some reasons for your perception that the determinations are incorrect and a violation of law.

Determinations of the prevailing rate of wage are made by the industrial statistician of the Department of Labor & Industries (L&I). See [RCW 39.12.015](#) and the enclosed "*Prevailing Wage Determination Request and Review Process*." As part of a reconsideration of the prior guidance, I have reviewed the issues you identify and your conclusions.

I understand that you disagree with our application of chapter 39.12 RCW, the Prevailing Wages on Public Works Act. The issues you raise seem to fall into three major groups reviewed below: (1) factual findings, (2) interpretations of scope of work descriptions, and (3) relationships or conflicts with other laws and regulations.

**Factual Findings** - You disagree with L&I's characterization of wells for the purposes of WAC 296-127-01391:

- You disagree that the closed loop geothermal systems are not a water well.
- You disagree that the closed loop geothermal systems are not drilling of an exploration well.

The scope of work description, [WAC 296-127-01391](#) (copy enclosed), identifies when the prevailing rate of pay for that trade and occupation may be used on public work. That scope

includes well drilling for certain types of water “supplies,” “dewatering,” and includes hole or core drilling for “geologic or hydrologic information.” The drilling performed for installing a closed loop geothermal system is not for any of those stated functions. Instead, the closed loop system circulates the enclosed coolant solution through the closed loop and to a heat exchanger for heating and cooling of structures. The closed loop geothermal system is not the type and nature of work performed at the prevailing rate of pay for the Water Well Drillers, Exploration Drillers, Water Well Pump Installers, and Equipment Oilers, WAC 296-127-01391.

**Interpretations of Scope of Work Descriptions** - You further disagree with L&I’s interpretation of the language of the scope of work for the Water Well Drillers, Exploration Drillers, Water Well Pump Installers, and Equipment Oilers, WAC 296-127-01391:

- Your disagreement interprets the language of the scope, “water supplies for any other purpose” to include thermal conductivity of the water that may or may not come into contact with the underground geothermal closed loop piping as a “water supply.”
- You state that the “includes but is not limited to” language in the scope of work allows the ground source heat pump drilling at this prevailing rate of pay.

Although I respect your opinion, absent some extractive action or function to remove and utilize the water at another location (actions not present in these facts), I do not agree that this is a “water supply.”

The “includes but is not limited to” language is used in over forty (40) different scope of work descriptions (scopes). Each of those scopes is used to identify a unique trade and occupation for purposes of the applicable prevailing rate of pay. Such language allows some minor flexibility in correctly reading and applying the scope but does not amount to a carte blanche that expands the scope to include all other actions or activities. I believe the correct application of WAC 296-127-01391 for well drilling will be within the two major categories actually identified in the scope: (1) well drilling for water supplies, and (2) well drilling for geologic or hydrologic information. The drilling to install closed loop geothermal piping systems has a distinct purpose of exchanging heat to or from the ground not within the well drilling in WAC 296-127-01391.

**Relationships or Conflicts with Other Laws and Regulations** - Many of the remaining points you make can be grouped together in that they all suggest that other, unrelated standards and regulations either preclude L&I’s decisions regulating the prevailing rate of wage or mandate a different conclusion for the applicable prevailing rate of wage. These points claim that:

- A prior prevailing wage determination letter fails to recognize the need for certain technical expertise required by other areas of statute.
- The well driller licensing requirements control the interpretation and application of prevailing wage laws that pertain to well drilling.
- The Department of Ecology rules on the environment determine prevailing wage outcomes.
- U.S. Census Bureau definitions of occupations are controlling on prevailing wage scope of work descriptions.
- The prevailing wage determination authorizes people to circumvent licensing requirements of [chapter 18.104 RCW](#).

- The wage determination is in conflict with federal and state safe drinking water standards.
- The scope of work for Power Equipment Operators does not protect against cross contamination of aquifers by ground water.
- There is no exemption for L&I from the groundwater protections in chapter 18.104 RCW or [chapter 173-160 WAC](#).
- The determinations and the scope for Well Drillers (WAC 296-127-01391) violate the statute for well drilling.

There are many activities that must meet certain environmental laws and standards, may require certifications of knowledge and ability, and may require certain permits or licensing. In some instances, the Washington State Prevailing Wage on Public works Act, chapter 39.12 RCW, may also apply to the same activity. In fact, the probability that a prevailing wage requirement would be the only applicable regulation on some specific work is not likely. Almost always, there will be some permits required, perhaps some environmental regulations, possibly some contractor or worker certifications or licenses required, etc. None of these layers of regulations, requirements, or laws will set aside other valid standards. Rather, the standards will all need to be satisfied.

Simply stated, if the Department of Ecology has a law and rules on drilling wells, and L&I has a law and rules on wages for public work, both standards may apply to the same work. Neither body of laws will negate or control the other. Both laws have standards that must be independently met to comply with the respective laws. Requiring a particular prevailing rate of wage on public work will not provide any exemption from or make any modification to other standards that may be present from other regulations or laws. You describe parallel regulations. If two applicable laws did happen to regulate the very same detail, compliance with both laws can be achieved by meeting the higher or more stringent standard.

L&I draws on a range of resources when it drafts and develops scope of work descriptions and then works through the public administrative process to adopt the descriptions as Washington Administrative Code (WAC). The language developed during this process generally draws on numerous authoritative resources with definitions of occupations but the final outcome of the rule making is not controlled by any such individual source.

While I appreciate your reference to the Occupational Classification System manual created by the U.S. Bureau of Labor Statistics, those provisions are not dispositive of this issue. All references within the Water Well Drilling scope of work are with respect to water wells, and drilling for geologic or hydrologic "information." The plain meaning of the rule is with respect to those specific types of drilling relating to the drilling for a "water supply" or obtaining geologic or hydrologic "information."

For the reasons identified above, I affirm my prior determination that the public works drilling that occurred for closed loop geothermal piping on the Valley View Middle School in Snohomish County is outside the scope of WAC 296-127-01391 and, by its type and nature, falls within the provisions of WAC 296-127-01354, Power Equipment Operators. Please note that the work of placing the pipe into the bores or shafts requires payment of the Plumber, Pipefitters, and Steamfitters, [WAC 296-127-01364](#) (copy enclosed) prevailing rate of wage, and filling the

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bores or shafts with concrete slurry or grout requires payment at the Laborers, [WAC 296-127-01344](#) (copy enclosed) prevailing rate of wage.

Nothing in the regulation of the prevailing rate of wage will modify or circumvent applicable environmental regulations, worker or contractor certifications or licensing requirements, or other state or federal laws that may apply to such work.

I believe I have sufficiently addressed the points raised in your August 3, 2012 letter. I previously provided you with the letters from Mr. Gosling and Robert A. Beattey, Mr. Gosling's attorney which were requests for my May 26, 2011 and August 11, 2011 determinations, respectively. Unless the work your company performed that is the subject of Ms. Hart's investigation is distinctly different from the work addressed in those letters, for prevailing wage purposes the May 26, 2011 and August 11, 2011 determinations also apply to your situation.

If you have further questions, please let me know.

Sincerely,



L. Ann Selover  
Industrial Statistician  
Program Manager  
360-902-5330  
[Sela235@Lni.wa.gov](mailto:Sela235@Lni.wa.gov)

Enclosures

cc: Governor Christine Gregoire  
Senator Rodney Tom  
Representative Ross Hunter  
Representative Deb Eddy  
Gary Smith, Independent Business Association  
Judy Schurke, Director  
Ernie LaPalm, Deputy Director for Field Operations  
José A. Rodríguez, Assistant Director for Specialty Compliance  
Bea Hart, Industrial Relations Agent  
Robert A. Beatty, Spencer Law Firm, LLC.



August 3, 2012

Ms. Hart  
Industrial Relations Agent  
Department of Labor and Industries  
616 120<sup>th</sup> Ave NE Suite C 201  
Bellevue, Washington 98005-3800

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Response To Your Letter July 26, 2012 – Prevailing Wage Complaints

Sent by: Certified Mail

Dear Ms. Hart:

We are in receipt of your letter dated July 26, 2012 regarding complaints received by the Department of Labor and Industries regarding alleged violations of the Washington State Public Works Act (RCW 39.12). The complaints allege that workers performing work, and employed by our firm on two projects, did not receive the correct prevailing wage as required by RCW 39.12.020. Those two projects are:

- Early Site Package Public Works Project, contract 2007-142H(2), Tacoma Community College
- Rainer Beach Community Center Redevelopment, contract PW # 2011-005, City of Seattle

You included with your letter two letters of determination issued by the Acting Industrial Statistician, Program Manager Ann Selover, dated May 26, 2011, on the matter of drilling geothermal projects, and August 11, 2011 for our review. These letters stated that geothermal well drilling falls under the Equipment Operators scope of work rather than the Well Drillers & Irrigation Pump Installers classification.

You requested our firm to send you a written response by August 8, 2012 and any documents that we have that will help you understand our side of this dispute, including:

- Certified Payroll Records for the above stated projects.
- Copies of the employee's time records showing hours worked per day and per week for the time they have worked on these projects.
- Earning statements showing the pay basis, rate or rates of pay, gross wages and all deductions for each pay period for the duration of the projects.
- Copy of your contracts.
- Agreements to work four ten-hour days are required to be in writing and submitted with the requested certified payroll records.
- Other documents you believe may be appropriate for this investigation.

17609 NE 70th Street  
Redmond, WA 98052  
425.869.2372  
fax 425.882.2284

Per your e-mail message of August 1, 2012, enclosed are:

- Certified Payroll Records for the above stated projects.
- A copy of Department of Ecology Publication Number: 09-11-010
- A copy of RCW 18.104
- A copy of WAC 296-127-13
- A copy of WAC 296-127-01391
- A copy of WAC 296-127-01354
- A copy of your e-mail dated 8/1/2012 stating provide copies of certified payroll records for both projects and a written response regarding the scope of work to use by 8/8/12. The rest of the requested documentation can be submitted at a later time.

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We do not have a copy of Mr. Gosling's original letter to you regarding the work he did at Valleyview Middle School and thus cannot determine if the work we have done on the above named projects which are the subject of this complaint is similar to that done by Mr. Gosling at the Valleyview Middle School. We understand that you and the Department are claiming that the Department of Labor and Industries scope of work determination dated May 26, 2011 should also apply to our firm on the above named projects for the work we have done.

**Therefore we request a copy of Mr. Gosling's original letter to you that describes the work he did at Valleyview Middle School which was the basis of the Department of Labor and Industries scope of work determination dated May 26, 2011**

Also, we do not have a copy of Mr. Beattey's original letter to you requesting the Reconsideration of Determination in the Cascade Drilling NW, Inc. case and thus cannot determine if the work we have done on the above named projects which are the subject of this complaint is similar to that described by Mr. Beattey. We understand that you and the Department are claiming that the Department of Labor and Industries scope of work determination dated May 26, 2011 and August 11, 2011 should also apply to our firm on the above named projects for the work we have done. **Therefore we request a copy of Mr. Beattey's original letter to you that describes the work done by the Cascade Drilling NW, Inc. which was the basis of the Department of Labor and Industries scope of work determination reconsideration dated August 11, 2011**

Gregory Drilling is responding to the complaints and rejecting/disputing both of them for the following reasons,

- As stated above, we do not have copies of the original letters from Mr. Gosling and Mr. Beattey that describe the work which was the basis of the May 26, 2011 scope of work letter of determination and the August 11, 2011 reconsideration of the May 26, 2011 scope of work letter of determination. We are requesting copies of those original letters from the Department of Labor and Industries as soon as possible.
- The letters of determination issued by Acting Industrial Statistician, Program Manager Ann Selover and dated May 26, 2011 and August 11, 2011 are incorrect on their face and are a violation of both state and federal law for the following reasons:
  - The letter of determination "May 26, 2011" states, "*The work you described is not the drilling of a well for water and is not drilling of an exploration well, thus it does not fit into any of the descriptions within the rule.*" This conclusion by the Department is patently incorrect as can be plainly seen by the items below.
  - WAC 296-127-01391 states "*The work of water well drillers, exploration drillers, water well pump installers, and equipment oilers includes, but is not limited to:* (underlined emphasis added ours) The phrase "*but is not limited to*" clearly allows work activities done by water well drillers which are also applied in ground source heat pump well drilling as being included in the water well drillers and irrigation pump installers scope of work (WAC 296-127-01391).
  - The letter of determination "May 26, 2011" is in error. Most ground source heat pump wells do access ground water. WAC 296-127-01391 states in part, "(c) *water supplies for any other purpose.*" The groundwater is commonly used as a thermal conductor in ground

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- source heat pump heating and cooling systems. This fact clearly meets the definition of WAC 296.127-0139(1)(c) "water supplies for any other purpose." Clearly the use of water for thermal conductivity is included in the phrase "water supplies for any other purpose" and includes ground source heat pump well drilling in the scope of work in WAC 296-127-01391.
- All of the activities included in the scope of work in WAC 296-127-01391 require the well driller to be licensed and comply with all of the applicable regulations for water well drilling as established by the Washington State Department of Ecology as required by RCW 18.104 and WAC 173-160.
- The work of drilling a well is much more than operating the equipment as the letter of determination of May 26, 2011 implies:
  - The well driller must be licensed before doing any well drilling by completing required training, gain the required experience under the direction of a licensed well driller, pass an examination and have passed a well inspection by the Department of Ecology. Licensed well drillers must also complete continuing education to maintain their license.
  - The licensed well driller must notify state officials of his/her intent to drill a well before starting to drill the well.
  - The licensed well driller must provide exact location of that well so that it can be located on a well map kept by the WA Department of Ecology.
  - The licensed well driller must keep a written log of the soils from that boring and provide that log to the Department of Ecology when the well has been finished.
- The letter of determination "May 26, 2011" is in error when it states: "*Our scopes of work are rules, and in each instance, we must look to the language of those rules in rendering a determination such as you request here, Department of Ecology requirements that apply to drilling of geothermal wells, although interesting, and even critical for your licensing requirements, do not operate to dictate what prevailing wage scope of work applies to any given task.*" The Department of Labor and Industries' statement is incorrect because the Department of Labor and Industries' rules are out-of-date and the Department must comply with all applicable state laws, regardless of what the Department's WACs may state. In this case, ground source heat pump wells are considered water wells by the state agency designated to make that decision, the WA Department of Ecology.
- In making a determination of a scope of work, the Department is directed by WAC 296-127-013(2) to consider "*The scope of work descriptions shall be created using authoritative sources available to the department.*" and, "*Recognized labor and management industry practice.*" The U.S. Census Bureau which defines occupations and industries through the internationally recognized NAICS classification system has defined water well drilling as including geothermal well drilling since 1997. NAICS 235810 states: "*Water Well Drilling Contractors This U.S. industry comprises establishments primarily engaged in drilling, tapping, and capping of water wells, and geothermal drilling. The water well drilling work performed includes new work, servicing, and maintenance and repairs.*" Clearly, geothermal well drilling is included in the definition of water well drilling by the U.S. Census Bureau.
- The critical issue in this case is the fact that any worker operating well drilling equipment that may come in contract with an underground aquifer must also have the required license to operate that equipment under state law RCW 18.104 and also must comply with all applicable regulations issued under RCW 18.104. It is illegal and a violation of state law for the Department of Labor and Industries to, in any way, authorize any person not properly licensed to engage in such well drilling operations. Only those workers doing the work of a Well Drillers & Irrigation Pump Installers are likely to have that license and meet the other state law requirements for drilling ground source heat pump wells. Thus the scope of work

- for Operating Engineers is totally inappropriate for ground source heat pump well drilling as the Department has stated in its determinations of May 26, 2011 and August 11, 2011.
- The federal Safe Drinking Water Act (40 CFR Parts 141 – 149) clearly regulates water well drilling and the Washington State Department of Ecology has been delegated by the U.S. EPA to implement the federal Safe Drinking Water Act in Washington State. The Department of Labor and Industries' letter of determination May 26, 2011 is in direct violation of the federal Safe Drinking Water Act as it fails to recognize the well driller licensing requirements required by that Act.
- The letter of determination "May 26, 2011" is incorrect as it fails to recognize the critical issues that Well Drillers and Irrigation Pump Installers must deal with. Drilling a well for any purpose usually results in penetrating one or more groundwater aquifers. Federal and state laws require that the well driller take actions to protect against the cross contamination of groundwater from one groundwater aquifer to another that may be penetrated by one well, and protect groundwater from contamination from surface water. Those actions include grouting the well with special materials as defined by the Department of Ecology to protect against cross contamination between all groundwater aquifers penetrated by that well, plus placing a well cap at the surface of the well to avoid contamination of groundwater from any surface water. None of these activities are included in the scope of work definition for operating engineers WAC 296-127-01354.
- The Legislature and the Governor have clearly set state public policy with respect to well drilling they stated in RCW 18.104.010, "*The legislature declares that the drilling, making or constructing of wells within the state is a business and activity of vital interest to the public. In order to protect the public health, welfare, and safety of the people it is necessary that provision be made for the regulation and licensing of well contractors and operators and for the regulation of well design and construction.*" Those regulations and licensing requirements are contained in state statutes RCW 18.104 and WAC 173-160. RCW 18.104 and WAC 173-160 provide no exemption for the Department of Labor and Industries or for RCW 39.12, from the requirements of this state law to protect groundwater.
- RCW 18.104 specifically applies to ground source heat pump wells to protect groundwater, water quality. The Department of Ecology is the designated agency by state law that is responsible for well drilling including well drilling for ground source heat pump wells. See Department of Ecology Publication Number: 09-11-010 which states in part: "*A ground source heat pump boring is considered both a water well and a resource protection well...*" While the Department of Labor and Industries' letter of determination of May 26, 2011 states "*the work you described is not for the drilling of a well for water ....*" The Department of Labor and Industries' letter is clearly in error as the state agency that state law has designated as defining water wells and that is responsible for implementing state laws for water well drilling emphatically and categorically states that based on state law, that drilling ground source heat pump wells is water well drilling which directly refutes the position stated in the Department of Labor and Industries' May 26, 2011 letter of determination.
- The fact that the Department of Labor and Industries' WAC rules with respect to water well drilling have failed to keep up with the rest of state law is no justification for the Department to issue an incorrect scope of work determination, based on an out-of date administrative rule – (WAC 296-127-01391 has not been revised since 2000 while state laws dealing with water well drilling (RCW 18.1040 has been amended in 2000, 2002, 2005 and 2011 and WAC 173-160 has been amended in 2006 and 2008). The Department of Labor and Industries' current scope of work for Well Drillers and Irrigation pump installers (WAC 296-127-01391 is in direct violation with state law with respect to well drilling that involves water and so are its scope of work determinations dated May 26, 2011 and August 11, 2011.
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- The letter of determination dated May 26, 2011 fails to recognize the need for technical expertise to perform the scope of work in WAC 296-127-01391. For example, plumbers and inside wiremen (electricians) commonly do similar activities. Both install pipes and use similar tools but each requires unique and different technical expertise and proficiency. Plumbers and inside wiremen (electricians) have different scopes of work in WAC 296-127 as do Well Drillers and Irrigation Pump Installers and Operating Engineers because of their differences. Those scopes of work do not allow inside wiremen (electricians) to install pipes for plumbing and vice versa as must be the case for Well Drillers & Irrigation Pump
- Installers, and Power Equipment Operators.

Sincerely



Beverly Gregory for Lawrence Gregory, President and CEO  
Secretary, Treasurer

cc: Governor Christine Gregoire  
Director Judy Schurke  
Senator Rodney Tom  
Representative Ross Hunter  
Representative Deb Eddy  
Gary Smith, Independent Business Association

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