



STATE OF WASHINGTON  
**DEPARTMENT OF LABOR AND INDUSTRIES**

P.O. Box 44000 • Olympia, Washington 98504-4000

February 22, 2013

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

RE: Request for Redetermination, Prevailing Rate of Wage for Closed Loop Geothermal Drilling

Dear Mr. Gregory:

Thank you for your email request for reconsideration of the determination for the prevailing rate of wage for closed loop geothermal drilling. On August 28, 2012 you received a determination on this topic from L. Ann Selover, Department of Labor & Industries (L&I), Industrial Statistician and Prevailing Wage Program Manager. You are requesting that I review that determination.

The answer below is limited to the facts of these particular projects and the information you provided, as well as my review of a number of documents related to this issue. The documents I reviewed include, but are not limited to:

- Your email request for redetermination, received on November 30, 2012
- L. Ann Selover's August 28, 2012 determination
- Affidavit of Wages Paid, Gregory Drilling Inc., #393082
- Affidavit of Wages Paid, Earthheat Inc., #396351
- Scope of work descriptions in WAC 296-833-20005, WAC 296-127-01391, WAC 296-127-01354 and WAC 173-160
- RCW 39.12.010 and RCW 18.104.020
- Telephone conversations with Gerard Maloney, Earthheat, and Bill Lum, Hydrologist, Department of Ecology
- Various geothermal heat pumps systems and drilling equipment websites

Unlike the L&I determination, Gregory Drilling believes that the phrase in [WAC 296-127-01391](#) that states, "water supplies for any other purpose" includes thermal conductivity of the water that may come into contact with the underground geothermal closed loop piping as a "water supply." Your opinion is that the term "*water supply for any other purpose*" is legally unlimited and effectively means any water supply. And, you believe that phrase in the scope makes any water in the ground a "water supply" without any limitation. Following is a summary of the statements you offer in support of your position:

- Water in the ground is a water supply.
- Nothing requires that water from a water supply must be transported and utilized at another location to qualify the water as a "water supply."
- Groundwater is a "water supply" that may potentially be used for future purposes.
- [WAC 296-833-20005](#) states in part "Don't endanger any domestic or public water supply with their drainage." Clearly no extraction or removal function is required by L&I to define this water as a "water supply."
- The phrase "water supplies for any other purpose" in [WAC 296-127-01391](#) is infinitely broad and does not allow L&I to limit its application.
- The phrase "includes, but is not limited to" that is used in 40 distinct scope of work descriptions allows an expanded application of the Water Well Driller worker classification to include other related actions or activities.
- The list of topics following the words "includes but is not limited to" in the Power Equipment Operators ([WAC 296-127-01354](#)) scope of work description is a specific list and is properly used to narrow and limit the application of that worker classification.
- "Self-propelled" is the key word in the scope of work for Power Equipment Operators and you disregard other terms such as "remote controlled."
- The Legislature and the Governor have specifically defined ground source heat pump borings to be "water wells" and you cite "chapter 196, 2011 laws" for that definition.

Based on your thoughts as summarized above, you provide conclusions different from those that the Industrial Statistician supplied to you. Gregory Drilling contends that the scope of work description for the Power Equipment Operators ([WAC 296-127-01354](#)) does not apply to drilling for a ground source, closed loop, geothermal heat pump.

For purposes of the prevailing wage scope of work descriptions and their corresponding rates of wage, the question at issue can be stated as follows: Does closed loop geothermal drilling for the purposes of constructing a geothermal heat pump system constitute drilling for a "water well" as that term is used in [WAC 296-127-01391](#); or is such drilling actually the operation of equipment on a construction project performed under [WAC 296-127-01354](#)?

First, I should clarify that Power Equipment Operators do operate many types of equipment that may be quite stationary while in their actual use. This includes mobile cranes that, when in use on a construction project for lifting and moving items are stationary on their outriggers, tower cranes that are set up in place and operated remotely from the operator's cab, etc. For example, a truck mounted drilling outfit (just like a mobile crane), is self-propelled and might be remotely operated even though it would be stationary in position while actually performing drilling.

It is vitally important in interpreting regulations to note that context matters. The same or similar terms may be used in other regulations and may even be assigned specific definitions for the purposes of such other regulations. Those facts from other contextual situations are not controlling on the prevailing wage context. In the same manner, the prevailing wage interpretations are not controlling for other regulations that are on topics other than the required rate of wage on public works.

Certainly, nothing in the regulation of the prevailing rate of wage will modify or circumvent applicable environmental regulations, worker or contractor licensing requirements, or other federal or state laws that may apply to such work. Those standards stay in effect. The required prevailing rate of wage is just that, a rate of wage and not a regulation of these other matters. Similarly, such other regulations, on issues that are not wage regulations, are not controlling for the correct way to interpret, regulate, or mandate an outcome for the required prevailing rate of wage under [chapter 39.12 RCW](#).

The assertion that any language in a prevailing wage scope of work is "infinitely broad" and cannot be limited in its use is incompatible with the definition of the "prevailing rate of wage" in statute which requires wages by "trade or occupation." See [RCW 39.12.010\(1\)](#). Finite limits are necessary to have such a distinction by trade or occupation.

Limits related to context may be present in other examples such as your reference to chapter 196, 2011 laws. SHB 1467 passed the 2011 legislature and was signed into law by the Governor. This bill added some exclusions from the definition of "well" to [RCW 18.104.020](#). That area of the statute already contained definitions of various types of wells including the one you reference for "ground source heat pump boring." That particular definition reads:

"Ground source heat pump boring" means a vertical boring constructed for the purpose of installing a closed loop heat exchange system for a ground source heat pump.

RCW 18.104.020(9).

Later in that same statute there is a definition of “water well:”

"Water well" means any excavation that is constructed when the intended use of the well is for the location, diversion, artificial recharge, observation, monitoring, dewatering, or withdrawal of groundwater. "Water wells" include ground source heat pump borings and grounding wells.

RCW 18.104.020(21).

The application of the definitions above is addressed in that statute:

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

RCW 18.104.020.

The “chapter” to which those definitions for “water well” and for "ground source heat pump boring" apply is chapter 18.104 RCW. Noting again that context matters, the prevailing wage law is chapter 39.12 RCW, and not a chapter to which those definitions will apply. Those definitions are interesting, but in no way are they controlling for any answer to prevailing wage questions.

The Industrial Statistician noted that all references within the Water Well Drillers scope of work description are with respect to the specific types of drilling related to drilling for a “water supply” or obtaining geologic or hydrologic “information.”

A comparison of the scope of work description for the Water Well Drillers and the work in question is appropriate.

**Water well drillers, exploration drillers, water well pump installers, and equipment oilers.**

For the purpose of the Washington state public works law, chapter 39.12 RCW, the work of water well drillers, exploration drillers, water well pump installers, and equipment oilers includes, but is not limited to:

(1) Water well drillers. The drilling of wells for:

- (a) Commercial water supplies.
  - (b) Irrigation water supplies.
  - (c) Water supplies for any other purpose.
  - (d) Dewatering, or similar purposes.
- (2) Exploration drillers.
- (a) Hole drilling for geologic or hydrologic information.
  - (b) Core drilling for geologic information.
- (3) Water well pump installers. The installation of water well pumps for all purposes, except commercial water supplies.
- (4) Equipment oilers. Assist the drillers and pump installers in the performance of the tasks described above.

[WAC 296-127-01391.](#)

There are no arguments presented that this work to drill for a closed loop geothermal system falls into the work of the equipment oiler, water well pump installer, or the exploration driller. Rather the focus is on the portion of the scope of work description related to the “water well driller” and only one of the possible components of that work: the “water supplies for any other purpose.” Some common definitions may be helpful in that analysis.

The definition of “water” as usually being a liquid and H<sub>2</sub>O seems pretty straight forward. Then we need to look at what is a “supply” in the “water supplies for any other purpose.”

Looking in the dictionary, I find some useful definitions for “supply” and “supplies” including “materials or provisions stored and dispensed when needed.” This is consistent with the Industrial Statistician’s statement that “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.” See *Webster’s II New Riverside University Dictionary* (1984). I agree that the drilling for the closed loop thermal system that may, or may not, contact any groundwater but does not move, remove, add to, or extract any water from the hole that is drilled is not a “water supply” for purposes of [chapter 39.12 RCW.](#)

You mention a court case, *Lockheed Shipyard v. L&I*, 56 Wn.App. 421 (1989). There the type and nature of the work was important for the correct prevailing wage scope of work description. [See *Lockheed* at 424 and at 429.] The facts considered by the court involved shipyard boilermakers working in the shipyard, using tools that boilermakers normally use in the shipyard. However, the Director, trial court and appellate court all found that pipefitter construction rate was

correct and the shipyard boilermaker rate was incorrect. [See *Lockheed* at 422.] In *Lockheed*, the construction pipefitter rates were correct for the type and nature of work to perform welding on pipe that would become an outfall pipe for a waste water treatment plant. *Lockheed* at 424.

The *Lockheed* case supports the Industrial Statistician's determination where this work is for installation of a closed loop geothermal pipe as part of a heat pump system. If the *Lockheed* case had the opposite outcome, it would be useful for your arguments.

In her August 28, 2012 determination on this topic, the Industrial Statistician addressed the points raised in your August 3, 2012 letter. She previously provided you with the letters from Mr. Gosling and Robert A. Beattey, Mr. Gosling's attorney, which were requests for her May 26, 2011 and August 11, 2011 determinations on this topic, respectively. Unless 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 the work your company performed.

Although I understand your concerns, I must conclude the Industrial Statistician made a carefully considered analysis that provides correct guidance to you on how to comply with [chapter 39.12 RCW](#), the prevailing wage law.

If, as indicated in your request for redetermination, you feel that the department's rules "do not appropriately reflect changes and additions to the work done by workers in various classifications," and you wish to pursue such change with respect to the work discussed here, there is a process for that. Please see [RCW 34.05.330](#) and chapter [32-05 WAC](#) for assistance in that regard. Additionally, Washington's Office of Fiscal Management has a form they created as a convenience for petitioning a state agency to adopt, amend, or repeal an administrative rule which you might find helpful. The link for the form is: <http://www.ofm.wa.gov/reports/petition.pdf>. Petitions to the Department of Labor & Industries for rule adoption, amendment or repeal should be directed to: Department of Labor & Industries; Legislative and Government Affairs; PO Box 44001; Olympia, WA 98504-4001.

Sincerely,



José A. Rodriguez, Assistant Director  
Specialty Compliance Services

cc: Governor Jay Inslee  
Joel Sacks, Director  
Ernie LaPalm, Deputy Director, Field Operations