

U.S. Department of Labor

**Office of Administrative Law Judges
525 Vine Street - Suite 900
Cincinnati, Ohio 45202**



DATE: February 17, 1988
Case No. 87-DBA-3

IN THE MATTER OF

Disputes concerning the payment
of prevailing wage rates and
overtime compensation by:

WINZELER EXCAVATING COMPANY
Prime Contractor

With respect to laborers and
mechanics employed by the
contractor on Project No.
C-390737 (Contracts 1, 2 and 4)
Wastewater Facilities and Sewer
Construction, Indiana Lake,
Sanitary Sewer District,
Logan County, Ohio

APPEARANCES:

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For the Prime Contractor

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U.S. Department of Labor
Office of the Solicitor
Cleveland, Ohio
For the Director

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER

This case arises under Reorganization Plan No. 14 of 1950 (64 Stat. 1267), the Contract Work Hours and Safety Standards Act (40 U.S.C. §327 et seq.), the Federal Water Pollution Control Act, as

amended, (33 U.S.C. §1372), and Department of Labor Regulations, 29 C.F.R. Part 5. The Director, Division of Contract Standards Operations, Employment Standards Administration, United States Department of Labor, (hereinafter Complainant or DOL), issued a Letter of Determination concluding that Winzeler Excavating Company (hereinafter Winzeler) had violated certain provisions of the above stated laws by failing to pay a number of employees the applicable prevailing wage rates and proper overtime compensation. The determination letter indicates that the parties did not appear to dispute the number of hours worked, wage rates actually paid, or the classifications of the work performed.

On October 7, 1986, an Order of Reference was issued whereby this matter was transmitted to the Office of Administrative Law Judges for a hearing on the issues involved. That hearing was held on June 23, 1987 in Bellefontaine, Ohio, where the parties had full opportunity to present evidence¹ and argument. The FINDINGS OF FACT AND CONCLUSIONS OF LAW which follow are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Any exhibit or document admitted as evidence of record has been fully considered in arriving at the Decision herein.

ISSUES

The issues to be decided are:

1. Whether twenty-four (24) truck drivers (Zone 2, Class 2), who hauled materials from various pits to the project site were entitled to be compensated at the prevailing rates called for in the contracts;
2. Whether employees performing work as power equipment operators (Zone 3, Class A and B), and laborers (Group 1, Zone 3) and who were employed at the Cummins/Winzeler Pit were entitled to receive wages at the prevailing rates called for in the contracts; and
3. Whether the Portal-to-Portal Act, 29 U.S.C. §251, provides a good faith defense to any award of back wages.

Winzeler also challenged the constitutionality of certain provisions of the applicable Acts and Regulations. The constitutionality of legislation is beyond the jurisdiction of administrative agencies. Oestereich v. Selective Service System Board No. 11, 393 U.S. 233, 242 (1968) (Harlan, J., concurring); Public Utilities Comm'n v. United States, 355 U.S. 534, 539 (1958). Thus, the validity of the Act and Regulations has been assumed by the Administrative Law Judge.

¹ In this Decision, "JX" refers to Joint Exhibits, "PX" refers to Plaintiff's Exhibits which are the exhibits of the U.S. Department of Labor, "WX" refers to the exhibits of Winzeler Excavating Company, "STIP" refers to the Stipulation of Fact, and "Tr" refers to the Transcript of the hearing.

FINDINGS OF FACT

Winzeler Excavating Company (hereinafter Winzeler) is located in Bryan, Ohio and was founded by Dennis Winzeler in 1957. (Tr. 143, 144) Winzeler has approximately seventy to eighty employees. (Tr. 144) The company is in the trenching and excavation business and installs sanitary and storm sewer lines in the states of Ohio, Indiana, Michigan, and Pennsylvania. (Tr. 143, 145) A good part of its work was funded through the United States Environmental Protection Agency (hereinafter EPA) and as of the time of the hearing, Winzeler had been involved in approximately fifty EPA funded projects and was doing from five to ten million dollars per year in this type business. (Tr. 143, 144, 145). Winzeler had been audited by the Department of Labor approximately a dozen times on contracts executed prior to the Indian Lake Project. (Tr. 198)

In March of 1982, the Indian Lake Sanitary Sewer District solicited bids on a sanitary sewer project located in Logan County, Ohio. The Indian Lake Project related to contracts for the installation of sewer line and also a sewage treatment plant. (Tr. 148) The entire project consisted of the letting of eight contracts and Winzeler bid upon seven of those contracts. These contracts were each partially funded by grants from EPA. (Tr. 148, 149) Winzeler was the low bidder on two of the contracts (Contract Nos. 1 and 2), and received a third contract (Contract No. 4) apparently due to a default by the low bidder. (Tr. 29, 149, 197) The sewer district originally solicited bids in March of 1982, but the specifications on all three of the contracts of which Winzeler was involved were revised in June of 1982 and March of 1983. (JX 1-A(1), p. 17; JX 1-A(2), p. 1; JX 1-A(3), p. 1). The contracts for the first two projects were awarded on November 28, 1983 (WX 3), and the contract for the third project was finally awarded to Winzeler sometime in 1985. (Tr. 78) The contracts won by Winzeler related only to the construction of sewer line. (Tr. 148) The process followed by Winzeler in preparing a proper bid price is complicated and detailed requiring a thorough understanding of all components associated with costs relating to the project. (Tr. 146)

In completing the contracts involved, Winzeler was required to haul stone and gravel both onto the construction sites and off of the construction sites. The contracts themselves contain the specifications as to what type of material was to be used. In completing these projects, Winzeler used approximately twelve different grades of stone and gravel. (PX J, p. 10) Winzeler obtained these materials from a variety of sources, including the National Limestone Pit, the Duff Pits, the Rneedler Pit, and the Cummins Pit. With the exception of the Cummins Pit, the other three entities were commercial operations owned by individuals who were totally unrelated to Winzeler. With respect to these three concerns, Winzeler would simply order the materials and send its own truck to be loaded and the concern would then bill Winzeler for the materials. National Limestone was located approximately twenty-two miles from the project, the Duff Pits approximately eight miles, and the Rneedler Pit approximately nine miles from the construction site. Winzeler had no equipment at any of these three pit sites. (Tr. 162) Winzeler also utilized owner-operators from an independent trucking company to haul materials, but the Complainant asserts no liability with respect to these individuals. (Tr. 135, 161)

On January 24, 1984, Winzeler entered into an agreement with a Richard Cummins and Colleen Cummins which allowed entry upon approximately thirteen acres of land containing gravel

which Winzeler thought could be used in completing the Indian Lake Contracts. (PX J, p. 16) The agreement permitted Winzeler to make bore test holes and test excavations for the purpose of determining whether there existed gravel or aggregate material that could be used in connection with the Indian Lake Sewer Project. The agreement also gave Winzeler the "exclusive right to excavate" the gravel and aggregate from the thirteen acres in whatever quantities and for whatever purpose Winzeler determined. In return, Winzeler agreed to pay fifteen cents per ton for each ton of gravel taken. Winzeler also agreed to bear the expense of the excavation, cleaning, crushing, weighing, which might be necessary to remove the aggregate or gravel. Of all of the materials used on the Indian Lake project, the 310 bank run gravel constituted 80.8 percent of the total. A full 68.9 percent of the total amount of 310 gravel used came from the Cummins Pit. (PX J, pp. 10, 11) In fact, 55.7 percent of all of the material used on the job came from the Cummins Pit. (PX J, pp. 10, 11) In other words, a very substantial portion of the materials being trucked onto the job site were obtained from the Cummins Pit.

The Cummins Pit was located approximately twelve and one-half miles from the Indian Lake Project. (Tr. 157) All of the material removed from the Cummins Pit by Winzeler was used in the Indian Lake Project. (Tr. 191, 194, 197) The Cummins Pit was characterized as being out in the "boondocks". (Tr. 41) The route from the Cummins Pit to the Indian Lake project was over two-lane state roads which cut through many miles of farmland. (WX 12) The roads did not appear to be heavily traveled. In removing the material, Winzeler used a loader to load the trucks and also an excavator to dig the material from the earth. (Tr. 64) In addition, a screen machine was used which separated the large rocks from the sand. (Tr. 65) No permanent structures were located by Winzeler at the pit site. (Tr. 65) The operators of the equipment used at the Cummins Pit for purposes of digging, screening and loading the material for trucking to the project site were all employees of Winzeler. Winzeler also utilized truck drivers from an independent trucking company to haul material. (Tr. 161, 135) The area being served by the Cummins material was basically found in Contract 2. (Tr. 158; JX 1-A(2))

During the period that Winzeler was completing its contract obligations on the Indian Lake Sewer Project, Richard Cummins was also selling materials from the Cummins Pit. (Tr. 158) Mr. Cummins apparently was selling the oversize residue from the 310 bank run gravel and other granular materials. (Tr. 158) The Cummins Pit yielded only a 310 material which is a bank run gravel. (Tr. 157) The Cummins Pit continued to operate as a commercial venture as of the date of the hearing. (Tr. 141, 142)

The Department of Labor has made detailed computations relating to the compensation paid to the truck drivers and operators of Winzeler who were working at the Indian Lake Project. Winzeler has stipulated that the computations made by the Department of Labor are accurate based upon the prevailing rate schedule as set forth in the wage determination for operators, laborers, and truck drivers in the contracts. (STIP 17) So, although Winzeler does not dispute the accuracy of the mathematics used by the Department of Labor in making its computations, it does dispute the legal validity of those adjustments. Each of the three contracts involved contain provisions relating to the payment of prevailing wages and for the payment of overtime pursuant to federal statutes. (STIP 3; JX 1) Truck drivers for tandems had a 813.52 basic hourly rate plus additional fringe benefits. (Tr. 99,

102) The specifications do not contain either an \$8.00 or \$10.00 hourly wage rate for tandem truck drivers. (Tr. 98) Materials were hauled to the job sites by both employees of Winzeler as well as two or three lease companies that were leasing their trucks and drivers to Winzeler. (Tr. 161) The leased trucks and drivers were dispatched to pick up loads of material depending upon the needs of the job. (Tr. 161) They did pick up materials at the Cummins Pit. (Tr. 161) When the employees of Winzeler would haul materials to the project site, they were paid at the rate of \$8.00 an hour. (STIP 15) However, when they hauled materials from, or off, of the project site, they were paid the rate set forth in the prevailing wage schedule of \$13.52 per hour in direct wages plus \$1.75 in fringe benefits. In addition, the operators of equipment who worked at the Cummins Pit were also paid less than the prevailing rates as set forth in the wage determination schedules. (STIP 16; Tr. 50, 107, 160, 167; WX 1) The truck drivers would spend only approximately four or five minutes per trip at the Indian Lake project site while hauling from the Cummins Pit (Tr. 199), and they would make eight to ten trips per day. (Tr. 39)

Sometime during mid-1984, Winzeler was audited by the Department of Labor. (Tr. 169) At that initial audit, the first two contracts were in full operation, the Cummins Pit was open, and materials were being hauled from that pit to the job sites. (Tr. 170, 171) The DOL made no findings with respect to the truck drivers as a result of that initial audit. (Tr. 171) The pay records for the Indian Lake Project were reviewed during this first audit. (Tr. 77) No adjustments were made with respect to wages paid as to Contracts 1 and 2 as a result of that audit. (Tr. 108) A second investigation was commenced by the DOL in July of 1985. (Tr. 78) The third contract held by Winzeler was in the bid stage at that time. (Tr. 79) As a result of the second audit, the adjustments involved in this case were asserted by the DOL. The wage adjustments made by the DOL were prepared on May 27, 1987 (Tr. 115; PX B through G). whereas the computations shown on Plaintiff's Exhibits H and I were completed on February 19, 1986. (Tr. 118) The audit work evidenced by Plaintiff's Exhibit A was completed about December 2, 1985. All three of the contract projects had been completed by Winzeler in approximately the fall of 1985. (Tr. 175)

Winzeler had similar-type contracts before the Indian Lake Project and the truck drivers on those projects were treated the same as at Indian Lake. (Tr. 185) The method of paying the drivers at Indian Lake was, therefore, not unique to that project. (Tr. 186) If the drivers on these earlier projects had worked part of the day hauling off of the site, they were paid a higher wage for that time. (Tr. 49)

Dennis Winzeler, who is the President of Winzeler Excavating, testified that the Cummins Pit was opened because it made for a more efficient completion of the contract. (Tr. 188) It was his belief that Winzeler could not operate as cheaply as a commercial producer and that if he had known the position of the DOL on Cummins, that he would not have opened the pit since it would not have been cost-effective. (Tr. 174) Winzeler paid the haul-in drivers a reasonable rate if their job classification was not contained within the specifications book. (Tr. 147, 169) The DOL contends that if Winzeler was able to locate a work classification but no wage rate, then the contractor and employees should "conform a rate" (Tr. 124), and that rate must be approved by the Secretary of Labor. (Tr. 125)

Eight witnesses testified at the time of the hearing of this case. I observed each of those witnesses very carefully and I find all of them to have given credible testimony.

CONCLUSIONS OF LAW

The Davis-Bacon Act was enacted more than fifty years ago in order to guarantee that workers who were employed on federal construction projects would receive fair compensation. The Act requires that federal contractors compensate their employees at no less than prevailing wages paid for similar work in the locality in which the contract is being performed. The Davis-Bacon Labor Standard Provisions are now included in numerous federal statutes so as to extend the prevailing wage principle to a variety of construction projects financed, in whole or in part, with federal funds. The Federal Water Pollution Control Act, as amended, 33 U.S.C. Section 1372 (hereinafter FWPCA) extends the prevailing wage rate principle. The Contract Work Hours Safety Standards Act, 40 U.S.C. Section 327 et seq., (hereinafter CWHSSA) controls the payment of overtime compensation on federal work projects. Twenty-nine C.F.R. Part 5 provides implementing regulations covering both the Davis-Bacon and Related Acts provisions and procedures so as to coordinate the administration and enforcement of the labor standards provisions of all of the related statutes.

The Determination Letter issued by the Department of Labor with respect to Contracts 1, 2, and 4 lists underpayments in the payment of wages with respect to twenty employees who performed work as either power equipment operators or laborers. The DOL also concluded that twenty-four truck drivers hauling materials from the Cummins Pit to the project site had not been paid prevailing wages, and that thirty-seven employees were either not paid overtime compensation for hours worked in excess of eight in a day or were paid overtime compensation at improper rates. Although the Determination Letter of the DOL makes reference to employees performing work at both the Cummins/Winzeler Pit and the Kneedler/Williams Pit, it was stipulated by the parties that the operators in question worked at the Cummins Pit excavating gravel for hauling by truck drivers and that the laborers in question worked at the Cummins Pit in miscellaneous non-equipment type activities. (STIP 20, 21) The truck drivers involved in this case hauled materials from various sources outside of the physical boundaries of the sewer line at Indian Lake, including the Cummins Pit. (STIP 19)

Reduced to its simplest terms, the compensation issues in this case will be disposed of upon the basis of an interpretation of the phrase "site of the work" used in the applicable regulations. The definition of terms section of the regulations provides as follows:

(j) The terms 'construction', 'prosecution', 'completion', or 'repair' mean all types of work done on a particular building or work at the site thereof (or, under the United States Housing Act of 1937 and the Housing Act of 1949), all work done in the construction or development of the project, including without limitation, altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site, painting and decorating, the transporting of materials and supplies to or from the building or work by the employees of the construction contractor or construction subcontractor, and the manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work (or, under the United States Housing Act of 1937 and the Housing Act of 1949, in the construction or development of the project), by persons employed by the contractor or subcontractor.

(1) The term 'site of the work' is defined as follows:

(1) The 'site of the work' is limited to the physical place or places where the construction called for in the contract will remain when work on it has been completed, and as discussed in paragraph (1)(2) of this section, other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the 'site.'

(2) Except as provided in paragraph (1)(3) of this section, fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., are part of the 'site of the work' provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and are so located in proximity to the actual construction location that it would be reasonable to include them.

29 C.F.R. 5.2 (j),(1) (1) (2).

These regulations have been interpreted both narrowly and broadly based upon different factual circumstances.

The Administrative Procedure Act provides that: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C.A. Section 556(d). The Department of Labor, therefore, bears the initial burden of going forward with the evidence, but once it has presented a prima facie case, the opposing party is then required to bear the ultimate burden of proof. Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals, 523 F.2d 25 (7th Cir. 1975); Environmental Defense Fund, Inc. v. EPA, 548 F.2d 998 (1976). The traditional standard of proof required in an administrative proceeding is proof by a preponderance of the evidence. Sea Island Broadcasting Corp. v. FCC, 627 F.2d 240 (D.C. Cir. 1980) cert. denied, 449 U.S. 834, 101 S.Ct. 105 (1980); Collins Securities Corp. v. SEC, 562 F.2d 820 (D.C. Cir. 1977); Bender v. Clark, 744 F.2d 1424 10th Cir. 1984).

Based upon all of the facts in this record, the DOL has proven a prima facie case by introducing evidence that prevailing wages had not been paid to the affected classes of workers. In addition, I conclude that Winzeler Excavating Company has failed to carry its ultimate burden of persuasion by introducing sufficient evidence to establish that the workers involved did not perform compensable services at the "site of the work."

The DOL argues on brief that the truck drivers clearly performed work included within the definition of terms contained within the regulations. The DOL argues that substantial case law supports their finding that the truck drivers should be considered as having been employed on site. On the other hand, Winzeler makes a variety of contentions with respect to the truck driver issue. Winzeler argues that a strict construction should be given to the statutes and regulations. Winzeler also argues the constitutionality of the regulations since they seem to provide inconsistent treatment between independent trucking contractors and the employees of Winzeler. However, as was noted above, I have no jurisdiction to consider that question. Winzeler also contends that even if the

Cummins Pit was established with the Indian Lake project in mind, that provides no basis for including the truck drivers as covered under the applicable statute. Finally, Winzeler argues that since there existed no prevailing rate of wages for employees hauling onto the project, that there could be no rate violation.

I am in agreement with DOL that the truck drivers, as a result of the transporting of materials onto the site of the Indian Lake project, fell within the protections offered by the Davis-Bacon related acts. Without once again paraphrasing the applicable regulations, references are made within the regulation to expand the definition of site by way of the use of the phrase "nearby property" which can reasonably be said to be included. Borrow pits are specifically mentioned and, therefore, must have been included by the drafters of this regulation. Concerning the Cummins Pit, it was dedicated almost exclusively to the performance of these contracts, and the proximity of Cummins to the actual work site I do not consider to be determinative of the issue.

It is the facts of this case which cause this issue to be decided against Winzeler. As was noted above, the purpose of the Davis-Bacon Act and related statutes was to guarantee that workers employed on federal construction projects are compensated fairly. The facts of this case show that the truck drivers involved were all employees of Winzeler and that they used Winzeler equipment. In addition to the installation of the sewer pipe, the contract called for considerable excavation work and also back-filling once the pipe had been installed. These drivers engaged in both hauling material off of the site, as well as onto the site and the fact that a substantial amount of time was spent either on the highways or at the Cummins Pit does not confuse the basic work activity in satisfying the contractual terms. The drivers involved were exclusively Winzeler employees and as the statistics demonstrate, a very high percentage of the total amount of Number 310 gravel used on this job came from the borrow pit. In fact, my review of the trucking activity of these drivers leads me to believe that their movement of the 310 gravel from Cummins constituted a very substantial part of the total work activity associated-with these contracts.

Both parties argue numerous cases as supporting their positions with respect to these regulations. However, my reading of those cases leads me to believe that all of them are factually distinguishable. The state of the case law in this area leads to divergent opinions concerning a proper interpretation of this regulation. From my perspective, the issue as to the truck drivers must be decided based upon the type of work that they performed at the construction site, the fact that they were exclusively employees of the contractor, and also the fact that while they were not on the road, their remaining time was spent at the Cummins Pit. These drivers are not considered independents, they were not removed by way of intervening contracts, nor were they performing any other type of work other than to render services while contributing toward the completion of the three Indian Lake contracts. I have closely viewed the video which clearly shows the route taken by these truck drivers in moving gravel from the Cummins Pit to the job site. However, I do not believe that the approximate twelve miles between the Cummins Pit and the job site exclude Cummins from coverage under the Act. The fundamental purpose of these regulations was to implement a policy of fairness in compensation. Clearly, these truck drivers were an integral part of the completion of this job and the twelve-mile distance cannot alter that fact.

Employer also argues that since there was no prevailing rate of wages existing for this class of employees who were hauling to the project only, that there could not be a wage rate violation. However, since I have determined that the truck drivers satisfied the definition of an on site worker, this argument is now moot.

In view of the above findings, I conclude that all of the truck drivers involved in this matter should have been paid the prevailing wage of \$13.52 per hour, plus benefits.

In addition to the truck drivers, I also conclude that the other operators and laborers rendering services at the Cummins Pit should also have been paid the prevailing wage rate. This record shows that all of the material removed from the Cummins Pit by the Winzeler employees was used in the completion of the Indian Lake Project. The employees of Winzeler who were located at Cummins made a very significant contribution toward the completion of these contracts. The lease agreement for the property itself indicates that Winzeler entered into that agreement for the express purpose of obtaining gravel and aggregate for use in completing the Indian Lake contracts. For the same reasons enunciated above with respect to the truck drivers and considering the overall purpose of the applicable statutes, it is my belief that these workers must be protected.

Site of the work can include rock quarries, borrow pits, pipe fabrication facilities, and badge plants which are not physically at the location where the construction job is being performed. T. L. James and Company, WAB Case No. 69-2 (Aug. 13, 1969); Ameron, Inc., WAB Case No. 3-7 (Sept. 14, 1973); Sweet Home Stone Co., WAB Case No. 75-1 (Aug. 4, 1975); Big Six, Inc., WAB Case No. 75-3 (July 21, 1975); United Construction Co., Inc., WAB Case No. 82-10 (Jan. 14, 1983). The test to apply in disposing of this issue is whether the remote facility was exclusively or substantially used in the completion of the contract, and secondly, consideration is given to the proximity of the second work site to the actual job. In the Matter of Mayfair Construction Co., WAB Case No. 81-16 1983 .

This record shows that the truck drivers, equipment operators, and laborers who were employed at the Cummins Pit were concerned exclusively with producing services associated with the completion of the Indian Lake project. Once again, although the Cummins Pit may have been approximately twelve miles removed from the actual construction site. I do not consider that distance to be determinative. The twelve miles was dictated to Winzeler not as a result of his desiring a construction facility located at Cummins, but rather it was dictated by the nature of the gravel which was located in the earth at Cummins. The pit could have just as easily been located directly adjacent to the construction site, and I am quite certain that Winzeler would have desired that that be the case. For these reasons, I have also concluded that the Cummins Pit must be considered a part of the work site and under the circumstances of this case, it is entirely reasonable to arrive at that conclusion. Therefore, the equipment operators and laborers who produced services at the Cummins Pit on behalf of Winzeler in the completion of these contracts, must also have been paid prevailing wages and overtime pursuant to these contracts.

Winzeler has also asserted what is referred to as a "good faith" defense to the back wage award. That defense is predicated upon a provision of the Portal-to-Portal Act, 25 U.S.C. Section

259, which reads in part as follows:

No employer shall be subject to any liability or punishment ... if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written administrative regulation, order, ruling, approval or interpretation ... Such defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval [or] interpretation ... is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

That statute has been interpreted to establish a three-part test for any party who successfully seeks to bar an action or proceeding. Equal Employment Opportunity Commission v. Home Insurance Co., 672 F.2d 252, 263 (2d Cir. 1982). The test includes establishing that the action taken was in reliance on the ruling of the agency; secondly, that it was in conformity with that ruling; and thirdly, that the action was taken in good faith. Winzeler cites numerous criteria as a basis for its conclusion that it had relied upon prior rulings in good faith. I do not dispute any of those contentions.

The DOL, on the other hand, argues that the good faith defense provided by the Portal-to-Portal Act does not apply to this case since this matter does not involve either the Fair Labor Standards Act, the Walsh-Healey Act, or the Davis-Bacon Act. I agree. A distinction has been drawn between the Davis-Bacon Act itself and the Davis-Bacon Related Acts. Numerous statutes incorporate by reference only the prevailing wage requirements of the Davis-Bacon Act for corresponding classes of laborers and mechanics employed on wholly or partially funded federal projects. These related acts incorporate the Davis-Bacon Act provisions only to the extent that they require similar predetermination of prevailing wage rates to be made by the Secretary of Labor. Glenn Electric Co., Inc. v. Donovan, 101 C.C.H. Lab. Cas. Paragraph 34, 571 (WD. PA. 1984) affirmed, 755 F.2d 1028 (3rd Cir. 1985). Both the Federal Water Pollution Control Act and the Contract Work Hours and Safety Standards Act are Davis-Bacon Related Acts and, therefore, the provisions of the Portal-to-Portal Act are not applicable to those statutes. No need exists to examine the facts in order to determine if Winzeler has proved the three-part test associated with the defense asserted.

Finally, Winzeler argues that the DOL improperly caused to be withheld the prevailing wage and overtime underpayments being asserted in this case. That contention is predicated upon the constitutional argument of a denial of due process of law. As was noted above, I have no jurisdiction to consider that contention. However, I do note that the regulations clearly provide for the suspension of the payment, advance or guarantee of funds until such time as the violations asserted are discontinued or until sufficient funds are withheld to compensate the employees for the wages to which they are entitled. 29 C.F.R. Section 5.9; All Phase Electric Co., WAB Case No. 85-18 (June 18, 1986); Cherry Hill Construction, Inc., WAB Case No. 85-27 (Oct. 2, 1987); Colby Cooperative Starch Co., WAB Case No. 84-21 (June 3, 1985).

ORDER

IT IS HEREBY ORDERED that the State of Ohio Environmental Protection Agency shall

release to the U. S. Department of Labor the amount of \$95,052.76 to be paid in the amounts and to the individuals identified as underpaid employees on the Summaries of Unpaid Wages found at Plaintiff Exhibits B through I.

RUDOLF L. JANSEN
Administrative Law Judge