UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	)	
	)	
Complainant,	)	
	)	
	)	OSHRC Docket No. 11-2395
v.	)	
	)	
	)	
KIEWIT POWER CONSTRUCTORS, INC.,	)	
	)	
Respondent;	)	
	)	
	)	
APA WATCH CONSTRUCTION TASK FORCE,	)	
	)	
Amicus Curiae.	)	

AMICUS CURIAE BRIEF OF APA WATCH IN SUPPORT OF RESPONDENT IN SUPPORT OF AFFIRMANCE IN PART AND REVERSAL IN PART

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CORPORATE DISCLOSURE STATEMENT

Pursuant to §2200.2(b) and §2200.35 of the Commission's Rules of Procedure and to FED. R. CIV. P. 7.1, *amicus curiae* APA Watch is a nonprofit membership organization formed under Virginia law with no parents, subsidiaries, or affiliates. Because APA Watch does not issue stock, no publicly held corporation owns 10% or more of its stock.

Dated May 28, 2013

Respectfully submitted,

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae APA Watch is a nonprofit membership organization formed under Virginia law. On its own and through its membership, APA Watch devotes significant effort to combating federal agencies' exceeding their authority under the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"), and to seeking the legislatively and constitutionally intended balance for judicial review under the APA, its equity predecessors, and their state-law equivalents. APA Watch has participated as *amicus curiae* before various federal courts on APA-related issues and justiciability. *Stormans Inc. v. Selecky*, No. 07-36039 (9th Cir.); *Metropolitan Taxicab Board of Trade v. City of New York*, No. 09-2901-cv (2d Cir.); *Envtl. Defense v. Duke Energy Corp.*, No. 05-848 (U.S.); *Astra USA, Inc. v. Santa Clara County, Cal.*, No. 09-1273 (U.S.); *Douglas v. Independent Living Ctr. of S. California, Inc.*, Nos. 09-958, 09-1158 & 10-283 (U.S.). In addition, APA Watch has filed rulemaking comments with federal and state agencies.

STATEMENT OF THE CASE AND FACTS

This dispute focuses on the issue of whether and how administrative agencies may promulgate regulations with the force of law, notwithstanding that those regulations violate not only the APA rulemaking requirements and the agency's organic act – here the Occupational Safety & Health Act, 29 U.S.C. §§651-678 (the "OSH Act") – but also the Constitution vesting "[a]ll legislative Powers in a Congress." U.S. CONST. art. I, §1.

Complainant Secretary heads the Occupational Safety and Health Administration ("OSHA"), which cited respondent Kiewit Power Constructors, Inc. ("Kiewit") for violating 29 C.F.R. §1926.50(g). *Amicus* APA Watch adopts the Kiewit's statement of

facts, Kiewit Br. at 1-15, reiterating them here only for completeness and emphasis.

OSHA originally adopted §1926.50(g)'s earliest predecessor under the Walsh-Healey Act ("WHA") as a work standard for manufacturing performed under federal contract. 25 Fed. Reg. 13,809, 13,823 (1960). The standard requires work areas to provide "suitable facilities for quick drenching or flushing of the eyes and body" in situations "[w]here the eyes or body of any person may be exposed to injurious corrosive materials." 29 C.F.R. §1926.50(g). As applied to the construction industry, OSHA promulgated §1926.50(g) and related final rules in a series of agency actions going back to 1971,[1] all without engaging in the APA's notice-and-comment procedures. In promulgating these rules without notice-and-comment rulemaking, OSHA relied on the claimed authority of the APA's "good-cause" exemption, 5 U.S.C. §553(b)(B), and the two-year start-up period provided by §6(a) of the OSH Act, 29 U.S.C. §655(a). Kiewit defends against the citation in part by challenging §1926.50(g)'s validity, given OSHA's failure to comply with rulemaking requirements of both the APA and the OSH Act. In the proceedings below, the Judge ruled for Kiewit on §1926.50(g)'s procedural invalidity, but declined to provide the declaratory relief that Kiewit requested.

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[1] The key actions are: (a) adopt the predecessor WHA standard for manufacturing via notice-and-comment rulemaking, 25 Fed. Reg. at 13,823; 34 Fed. Reg. 788, 789-90 (1969); (b) promulgate the general industry standards – including §1910.151(c) – in Part 1910, 36 Fed. Reg. 10,466, 10,469 (1971); (c) revoke 29 C.F.R. §1910.5(c) (quoted in note 3, *infra*) from that general industry standard, 36 Fed. Reg. 18,080 (1971); and (d) promulgate §1926.50(g) into the construction industry standards, based on §1910.151(c) from the general industry standards, 58 Fed. Reg. 35076, 35,084 (1993).

SUMMARY OF ARGUMENT

OSHA cannot fit its challenged actions here within the APA's good-cause exemption on which OSHA seeks to rely, and the APA's anti-supersession clause precludes OSHA's relying on §6(a)'s temporary exemption from APA requirements. 5 U.S.C. §§553(b)(B), 559; Sections I.C-I.D, *infra*. Moreover, OSHA cannot claim deference under the APA, which delegates no special authority to OSHA. Section I.A, *infra;* even under the OSH Act, OSHA's positions lack a proper statutory basis and thus do not warrant deference. *Id.* Further, even if the APA did somehow exempt OSHA's actions from the APA requirements for notice-and-comment rulemaking, §6(b) of the OSH Act still would require notice, comment, and the opportunity for a hearing. Section I.E, *infra*. Finally, the prior decisions on which the Secretary relies – such as the *American Can* decision cited in the Commission's Briefing Notice – did not consider Kiewit's arguments under the APA's anti-supersession clause and thus could not – consistent with Due Process – have disposed of those arguments *sub silentio*. Section I.F, *infra*.

The provisions of OSHA's general industry standards in Part 1910 do not save the enforcement action here because the relevant Part 1910 requirements could no more be validly applied to construction than the challenged §1926.50(g). Section II, *infra*. Because Kiewit timely raised its challenge to OSHA's standards in an enforcement action, the challenge is timely, even if Kiewit could not now timely seek pre-enforcement review in federal court. Section III, *infra*. On declaratory relief, the Commission's rules allow declaratory relief by virtue of incorporating FED. R. CIV. P. 57, and the few obscure

decisions that the Secretary cites against declaratory relief hinge on Article III's limiting *federal courts'* jurisdiction to actual cases or controversies, which is simply inapposite to this Commission's granting declaratory relief. Section IV, *infra*.

ARGUMENT

I. THE OSH ACT DID NOT AUTHORIZE EXTENDING WHA STANDARDS TO NON-WHA CONSTRUCTION ACTIVITIES WITHOUT NOTICE-AND-COMMENT RULEMAKING

In its Briefing Notice, the Commission requested briefing on four issues, the first of which is whether §6(a) of the OSH Act authorized OSHA to extend 41 C.F.R. §50-204.6(c) – a WHA standard that did not originally apply to construction – as an occupational safety or health standard applicable to employers engaged in construction. *Amicus* APA Watch respectfully submits that the answer to that core question is "no." To build to that ultimate answer, *amicus* APA Watch first addresses the deference due to OSHA's interpretations at issue here and the legal criteria for exempting federal rulemakings from the APA.

A. The Secretary's *Ultra Vires* Regulations Warrant No *Chevron* Deference

Before discussing the application of OSHA's regulations here, *amicus* APA Watch first addresses the deference that the Commission should afford OSHA's regulations. The Secretary argues that OSHA's regulations are entitled to deference under *Chevron U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837, 843-44 (1984). OSHA Br. at 16. To the contrary, the regulations are *ultra vires* the Secretary's authority and thus warrant no *Chevron* deference. Under *Chevron*, reviewing courts owe deference to an agency's plausible construction of an interstitial gap in a statute under that agency's administration

(*Chevron* prong two), unless the court can interpret the statute's requirements using tools of traditional statutory construction (*Chevron* prong one). *Chevron*, 467 U.S. at 842-44, 865-66. Here, the Secretary does not identify any ambiguity that would justify the Commission's getting to prong two.

At the outset, a federal agency warrants no deference under statutes — such as the APA — that Congress has not uniquely delegated to that agency:

> Interior is not charged with administering the APA; its conclusions of law regarding whether its policy change is a "rule" for APA purposes are not given deference and are also reviewed *de novo*.

Shell Offshore Inc. v. Babbitt, 238 F.3d 622, 627 (5th Cir. 2001); *Citizens Awareness Network, Inc. v. U.S.*, 391 F.3d 338, 349 (1st Cir. 2004) ("[w]e exercise plenary review over the Commission's compliance with the APA"); *Prof'l Reactor Operator Soc. v. U.S. Nuclear Regulatory Comm'n*, 939 F.2d 1047, 1051 (D.C. Cir. 1990) ("courts do not owe the same deference to an agency's interpretation of statutes that, like the APA, are outside the agency's particular expertise and special charge to administer"); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990). Thus, on the critical question of 5 U.S.C. §559's application here, the Secretary cannot credibly claim deference.

But even to the extent that *Chevron* would apply, this dispute falls under *Chevron* prong one because a reviewing court can resolve the matter with traditional tools of statutory construction. *Chevron*, 467 U.S. at 842-44. *Chevron* deference comes into play only if the statute is ambiguous at prong one. *Id.*; *Midi v. Holder*, 566 F.3d 132, 136-37 (4th Cir. 2009). Because the Commission can resolve this case at prong one, *see* Sections I.B-I.F, *infra*, that would render *Chevron* deference inapposite, even if *Chevron* applied.

B. The APA Requires Notice-and-Comment Rulemaking to Extend WHA Standards to Non-WHA Construction Activities

The "history of liberty has largely been the history of observance of procedural safeguards." *Dart v. U.S.*, 848 F.2d 217, 218 (D.C. Cir. 1988) (*quoting McNabb v. U.S.*, 318 U.S. 332, 347 (1943)). Procedures "protect the [public] from arbitrary action on the part of [agencies], however unintended." *Oceanair of Florida, Inc. v. N.T.S.B.*, 888 F.2d 767, 770 (11th Cir. 1989) (*citing McNabb*). The APA's procedural protections take on an even greater importance in the constitutional context of an unelected agency making "law," when the Constitution vests "[a]ll legislative Powers in a Congress." U.S. CONST. art. I, §1; *Loving v. U.S.*, 517 U.S. 748, 771 (1996). Because "an agency literally has no power to act... unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986), agency actions that violate the APA are *ultra vires* and thus void. *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979); *North Am. Coal Corp. v. Director, Office of Workers' Comp. Programs, U.S. Dept. of Labor*, 854 F.2d 386, 388 (10th Cir. 1988); *U.S. v. Gavrilovic*, 551 F.2d 1099, 1106 (8th Cir. 1977).

The APA notice-and-comment requirements apply only to so-called "legislative" rules, not to interpretative rules. 5 U.S.C. §553(b)(A). In determining whether agency action qualifies as "legislative rules" that require notice-and-comment procedures, courts have noted at least some stable guideposts in an area otherwise "enshrouded in considerable smog": "if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule." *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (*en banc*) (interior quotations omitted); *State of Ohio Dep't of Human Serv. v. U.S. Dept. of Health & Human Serv.*,

Health Care Financing Admin., 862 F.2d 1228, 1234 (6th Cir. 1988). Another useful test poses four criteria that independently require notice-and-comment rulemaking: (1) whether, absent the rule, the agency would lack adequate authority to confer benefits or require performance; (2) whether the agency promulgated the rule into the C.F.R.; (3) whether the agency invoked its general legislative authority; and (4) whether the rule effectively amends prior legislative rules. *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). OSHA's revisions to its standards trigger these tests because the enforcement against Kiewit could not have gone forward without the revised standards. Thus, unless §6(a) indeed exempted OSHA from the APA's notice-and-comment requirements, OSHA's actions were *ultra vires* the APA and thus void.

C. Agencies and Courts Must Construe APA Exemptions Narrowly, and Post-APA Exemptions from the APA Must Be Express

Kiewit's arguments centers on the scope of two APA provisions that govern the applicability of the notice-and-comment requirements to OSHA's rules: (1) the good-cause exemption in 5 U.S.C. §553(b)(B) and the anti-supersession clause in 5 U.S.C. §559. Neither provision exempts OSHA's actions from APA rulemaking requirements.

The "good-cause" provision exempts agency rulemakings from APA notice-and-comment requirements "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are *impracticable, unnecessary, or contrary to the public interest.*" 5 U.S.C. §553(b)(B) (emphasis added). The APA's legislative history shows just how narrow the emphasized terms are:

> "*'Impracticable'* means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings. *'Unnecessary'* means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. *'Public interest'* supplements the terms 'impracticable' or 'unnecessary;' it requires that public rule-making procedures shall not prevent an agency from operating, and that, on the other hand, lack of public interest in rule making warrants an agency to dispense with public procedure."

Northern Arapahoe Tribe v. Hodel, 808 F.2d 741, 751 (10th Cir. 1987) (*quoting* S. Rep. No. 752, 79th Cong., 1st Sess. 14 (1945) (emphasis in *Hodel*).

An agency's good-cause finding is, of course, reviewable. *U.S. v. Cain*, 583 F.3d 408, 420-21 (6th Cir. 2009); *Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1320-21 (8th Cir. 1981). Moreover, "it should be clear beyond contradiction or cavil that Congress expected, and the courts have held, that the various exceptions to the notice-and-comment provisions of section 553 will be narrowly construed and only reluctantly countenanced." *State of N.J., Dept. of Environmental Protection v. U.S. Environmental Protection Agency*, 626 F.2d 1038, 1045-46 (D.C. Cir. 1980); *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 94 (D.C. Cir. 2012) (same); *U.S. Steel Corp. v. E.P.A.*, 649 F.2d 572, 575-76 (8th Cir. 1981) (same); *Cain*, 583 F.3d at 420-21 (same); *U.S. v. Picciotto*, 875 F.2d 345, 346-49 (D.C. Cir. 1989) (APA exceptions "must be narrowly construed"). In summary, the good-cause exemption is exceedingly narrow.

Working from the other direction, the anti-supersession clause narrows the instances in which *other statutes* can justify an APA exemption:

> This subchapter [and] chapter 7 … do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. … *Subsequent statute may not be held to supersede or modify this subchapter [or] chapter 7 … except to the extent that it does so expressly.*

5 U.S.C. §559 (emphasis added). Thus, post-APA statutes like the OSH Act do not narrow or exempt post-APA statutes from APA requirements, except to the extent that they do so expressly. *Marcello v. Bonds*, 349 U.S. 302, 310 (1955); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 50 (1955); *Dickinson v. Zurko*, 527 U.S. 150, 154-55 (1999).

Although repeals by implication have long been "disfavored," the Supreme Court only recently required clear and manifest congressional intent: "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (interior quotations omitted, alteration in original). When it requires that level of specificity – as with preemption[2] – federal courts apply the requirement not only to the *existence* of legislative displacement but also its *scope*. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Under *Medtronic*, even if a statute clearly and manifestly displaces *some* law, the *extent* of that displacement remains open to the clear-and-manifest requirement. *Id.* Thus, "[w]hen the text of an express pre-emption clause is

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[2] Although preemption disputes typical involve a federal law's displacing state or local law, the same principles can lead one federal law to displace inconsistent federal laws. *See, e.g., Chamber of Commerce v. Reich*, 74 F.3d 1322, 1334 (D.C. Cir. 1996). Although the default rule in the absence of statutory specific would have latter-enacted statutes displace prior statutes, Congress can reverse that order with provisions such as 5 U.S.C. §559.

susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (*quoting Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)). In the context of latter-day statutes that narrow the APA's application, the APA's text expressly supports construing those statutes narrowly: "Subsequent statute may not be held to supersede or modify this subchapter ... except *to the extent* that it does so expressly." 5 U.S.C. §559 (emphasis added). Thus, post-APA federal statutes supersede APA requirements only if they do so *expressly* and, even then, only *to the extent* that they do so expressly.

D. §6(a) Did Not Exempt the Challenged Rulemakings from the APA's Notice-and-Comment Requirements

With the background on APA exemptions in Section I.C, *supra*, *amicus* APA Watch now applies that background to the OSH Act issues presented here. At the outset, because it seeks to operate under §6(a)'s APA exemption, OSHA bears the burden of establishing that its actions fall within that exemption. *See* Kiewit Br. at 33. While OSHA "is entitled to some promulgative leeway in setting standards," that "leeway ... is narrow where [OSHA] bypasses rule-making" under §6(a). *Marshall v. Pittsburgh-Des Moines Steel Co.*, 584 F.2d 638, 644 (3d Cir. 1978). This narrow-leeway argument does not rely expressly on 5 U.S.C. §559, but it derives from a similar (albeit more general) concern.

In §6(a), Congress enacted a two-year window – beginning with the OSH Act's effective date – during which OSHA could "by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard," "[w]ithout regard to chapter 5 of Title 5 or to the other subsections of this section." 29 U.S.C. §655(a). The question presented here is whether this OSH Act

exemption from APA requirements allowed OSHA to extend WHA standards to the construction industry without notice-and-comment rulemaking as an "established Federal standard."

The OSH Act defines a "established Federal standard" as "any operative occupational safety and health standard established by any [federal] agency ... and *presently in effect*, or contained in any Act of Congress *in force on December 29, 1970*." 29 U.S.C. §652(10) (emphasis added). There are at least five textual and contextual reasons to construe the term "established Federal standard" to include the scope of the underlying federal standard.

1. Under the OSH Act's express text, established Federal standards are "occupational safety and health standards," which by definition include the very types of limits that make up the scope provisions that OSHA seeks to sidestep here. *See* Kiewit Br. at 18. Significantly, Kiewit answers the Secretary's charge that Kiewit's interpretation would not increase the standards' application by noting that the OSH Act's purpose was to extend standards triggered by federal contracts under the Spending Clause to reach all employers by the wider authority under the Commerce Power. *Id.* at 22-23 (*e.g.*, all manufacturers, rather than only manufacturers under federal contract) . Finally, the definition emphasizes that the standards must have been "presently in effect," 29 U.S.C. §652(10), which obviously is not true for a revised-scope standard (*i.e.*, the new standard with the revised scope was not previously in effect).

2. To impose civil and penal sanctions, courts require OSHA to provide employers fair notice of standards' coverage, which requires interpreting industry-

specific or location-specific standards as applying only to their original industry or location. *Diamond Roofing Co., Inc. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976); *Dravo Corp. v. Occupational Safety & Health Review Comm'n*, 613 F.2d 1227, 1232 (3d Cir. 1980).

3. The version of §6(a) reported by the House committee would have expressly allowed OSHA to "promulgate ... any established Federal standard then in effect ... *not limited to its present area of application*." Kiewit Br. at 21 (*quoting* H.R. 16785, 91st Cong., at 7 (April 7, 1970)) (Kiewit's emphasis), but the enacted bill struck that language. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted).

4. Under the legislative history, reported cases, and sound public policy, Congress based §6(a) on the fact that the affected industries would have familiarity with any standards imposed without notice-and-comment rulemaking. Kiewit Br. at 19 (*quoting* S. Rep. No. 91-1282, at 6 (1970)); *accord Irvington Moore, Div. of U.S. Natural Res., Inc. v. Occupational Safety & Health Review Comm'n*, 556 F.2d 431, 434 (9th Cir. 1977) ("purpose of this rulemaking-by-reference approach was to establish national safety standards as rapidly as possible ... on the theory that ... the federal standards would already have been subjected to substantial public scrutiny and comment by the parties concerned"). Obviously, the construction industry did not have familiarity with WHA standards for manufacturing.

5. Under 5 U.S.C. §559, OSHA needs to – but fails to – come up with express statutory language in the OSH Act that compels extending §6(a)'s exemption "to the extent" to which OSHA seeks to push it. OSHA's failure is fatal to its interpretation.

Under 5 U.S.C. §559, *Medtronic* and *Altria*, these textual and contextual arguments need not *compel* the conclusion that Congress precluded OSHA's APA avoidance here. Instead, it is enough under 5 U.S.C. §559 that the OSH Act is "susceptible" to that reading. The converse is even more fatal to OSHA's case. While neither Kiewit nor *amicus* APA Watch concedes that the Secretary's alternate interpretation *is* viable, that is not the test. The burden is on the Secretary to demonstrate that Kiewit's interpretation *is not* viable.

E. §6(b) Does Not Include a Good-Cause Exemption from the OSH Act's Rulemaking Requirements

Kiewit cites §6(b) of the OSH Act as requiring notice-and-comment rulemaking even when the APA's good-cause exemption otherwise would exempt an OSHA rule from the *APA*'s rulemaking requirements. Kiewit Br. at 45-46. Specifically, §6(b)(2) provides that OSHA "shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments." 29 U.S.C. §655(b)(2). In addition, §6(b)(3) entitles "any interested person [to] file … written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections." *Id.* §655(b)(3).

In response, the Secretary argues that 29 C.F.R. §1911.5 authorizes bypassing §6(b)'s rulemaking and hearing requirements under the APA's good-cause exemptions.

OSHA Br. at 8. By way of background, §1911.5 provides as follows:

> Section 6(b), when construed in light of the rulemaking provisions of the Administrative Procedure Act, is read as permitting the making of minor rules or amendments in which the public is not particularly interested without the notice and public procedure which is otherwise required. Whenever such a minor rule or amendment is adopted, it shall incorporate a finding of good cause to this effect for not providing notice and public procedure.

29 C.F.R. §1911.5 (citation omitted). This argument suffers from three independently fatal problems. First, as argued in the prior subsections, OSHA did not comply with the APA's good-cause exceptions, so it hardly matters whether §6(b) somehow includes the same good-cause exemption. *See* Sections I.C-I.D, *supra;* Kiewit Br. at 34-40. Second, §6(b) does not contain a good-cause exception, 29 U.S.C. §655(b), and OSHA cannot invent one by rulemaking. Third, applying the WHA standards to construction does not qualify as a "minor rule" under §1911.5's own terms, Kiewit Br. at 11-13, 21-22, which renders §1911.5 inapposite by its terms.

Only the second issue requires further elaboration, and it does not require much. The OSH Act provides absolutely no basis for OSHA to rule these procedural protections inapplicable to any OSHA rulemaking, particularly not to ones of the magnitude at issue here. An agency cannot "replace the statutory scheme with a rule-making procedure of its own invention." *Texaco, Inc. v. F.P.C.*, 412 F.2d 740, 744 (3d Cir. 1969). The Commission should reject §1911.5's power grab.

F. The Commission's *American Can* Decision Does Not Preclude Kiewit's Prevailing Against the Challenged Rulemakings

The Commission's Briefing Notice cites its *American Can* decision as relevant to

the questions presented here. *Amicus* APA Watch respectively submits that *American Can* is irrelevant for four reasons. Before outlining those reasons, however, *amicus* APA Watch emphasizes that the Due Process Clause plainly applies to administrative proceedings. *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 598 (1950); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). As explained, the Due Process Clause precludes saddling Kiewit with decisions like *American Can* that do not and cannot apply here.

First, as Kiewit demonstrates, the situation in *American Can* and the related cases cited by the Secretary are distinguishable from the situation here. Kiewit Br. at 24-27. *Amicus* APA Watch has nothing to add on that issue.

Second, none of the cases cited by the Secretary in the *American Can* line of cases applies 5 U.S.C. §559 to the procedural validity of OSHA's rulemaking actions: "cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994). Because they did not address Kiewit's arguments, *American Can* and its progeny plainly could not decide those issues:

> "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

Cooper Indus., Inc. v. Aviall Serv., Inc., 543 U.S. 157, 170 (2004) (*quoting Webster v. Fall*, 266 U.S. 507, 511 (1925)). As such, the *American Can* line of cases is irrelevant to the issues that Kiewit presents.

Third, issue preclusion cannot bind those who did not participate in the prior litigation: "[i]n no event... can issue preclusion be invoked against one who did not participate in the prior adjudication" *Baker v. Gen'l Motors Corp.*, 522 U.S. 222, 237-38

& n.11 (1998). As such, the Commission cannot hold Kiewit to the results reached in cases – such as *American Can* – in which Kiewit did not participate.

Fourth, even *stare decisis* should not – and lawfully cannot – apply so conclusively that it violates due process. *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167-68 (1999). As such, the Commission cannot hold Kiewit to the results reached in cases – such as *American Can* – in which Kiewit did not participate and where the non-prevailing parties failed to raise the arguments that Kiewit presses here.

II. OSHA'S GENERAL INDUSTRY STANDARDS IN PART 1910 DO NOT SAVE OSHA'S CONSTRUCTION INDUSTRY STANDARDS HERE

The Commission's second line of requested briefing goes to whether the Judge erred in finding §1926.50(g) invalid "[i]n light of 29 C.F.R. §§ 1910.5, 1910.11(a) and 1910.151(c)." At the outset, it is unclear to *amicus* APA Watch whether the Commission intended this question as substantive or jurisdictional. For example, the question might mean that these provisions from OSHA's General Industry Standards supply or help establish §1926.50(g)'s substantive validity. Alternatively, the question might ask on jurisdictional or procedural grounds whether a successful challenge to §1926.50(g) would nonetheless fail to protect Kiewit from an in-the-alternative citation for violating the parallel General Industry Standard, §1910.151(c). As explained in this section, however, the cited provisions from OSHA's General Industry Standards do not save §1926.50(g).

As Kiewit explains, 29 C.F.R. §1910.5(c) expressly precluded applying manufacturer-based WHA standards to construction, and OSHA's summary revocation of

that provision was itself unlawful. Kiewit Br. at 8-10, 15-23, 28-30.[3] *Amicus* APA Watch concurs with Kiewit that "[§1910.5(e)] should be treated as if it were still in effect," *id.* at 28, although the proposition should be stated more forcefully: because OSHA did not lawfully revoke it, §1910.5(e) remains in effect. The unlawfulness of OSHA's attempt to revoke §1910.5(e) follows the same analysis set forth for §1926.50(g), *see* Section I, *supra*, and that analysis does not require restating here. OSHA lacked the authority under §6(a) of the OSH Act to strip work-limiting language from WHA measures and thereby to apply those WHA measures to the construction industry.

III. KIEWIT'S CHALLENGE IS TIMELY

The Commission's third line of requested briefing goes to the timeliness of Kiewit's challenge to OSHA rulemakings that occurred twenty or thirty years ago. Even if an applicable statute of limitations prevented Kiewit's challenge in federal court (and none does), *amicus* APA Watch would respectfully submit that the Commission should ignore timeliness because nothing compels the Commission to consider it. In the event that the Commission reaches the question of timeliness, however, the Commission should find Kiewit's action timely.

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[3] Under §1910.5(e), "[w]henever the source of a standard prescribed in this Part 1910 is indicated to be an established Federal standard published in 41 C.F.R. Part 50-204, the standard so prescribed is applicable only to plants, factories, buildings, or other places of employment where materials, supplies, articles, or equipment are manufactured or furnished. That is, the standard is intended to apply to manufacturing or supply operations which would be subject to the Walsh-Healey Public Contracts Act if there were a Federal contract for the procurement of the materials, supplies, articles, or equipment involved." 36 Fed. Reg. 10,466, 10,468 (1971) (citations omitted).

The Secretary does not contest the timeliness of Kiewit's challenge, OSHA Br. at 1 n.1, presumably because Kiewit's challenge is timely. *See, e.g., Noblecraft Indus., Inc. v. Secretary of Labor*, 614 F.2d 199, 201 (9th Cir. 1980). *Noblecraft* distinguishes 29 U.S.C. §655(f) as limited to pre-enforcement review by the legislative history:

> "While [Section 655(f)] would be the exclusive method for obtaining *pre-enforcement judicial review* of a standard, the provision does not foreclose an employer from challenging the validity of a standard *during an enforcement proceeding*."

Id. (*quoting* S.Rep.No.91-1282, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.C.C.A.N. 5177, 5184) (alteration in *Noblecraft*, emphasis added); *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975) ("'repeals by implication are disfavored,' and this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available"). If it reaches the issue, the Commission should hold that Kiewit's challenge is timely.

IV. DECLARATORY RELIEF TO KIEWIT IS BOTH AVAILABLE AND APPROPRIATE

The Commission's fourth line of requested briefing goes to both the availability and the appropriateness of Kiewit's requested declaratory relief. Under §2200.2(b) of the Commission's rules, "procedure shall be in accordance with the Federal Rules of Civil Procedure" "[i]n the absence of a specific provision" under the Commission's own rules. Although the Commission's rules are silent on declaratory relief, Rule 57 of the Federal Rules of Civil Procedure provides for "appropriate" declaratory relief: "The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate." FED. R. CIV. P. 57. The combination of Rules 57 and §2200.2(b) therefore

answers the first prong of the fourth question. Declaratory relief is always "available." The more substantive question is whether declaratory relief is "appropriate" here.

A. Sovereign Immunity Poses No Barrier to Declaratory Relief

Generally, in any matter initiated by the United States or one of its agencies as a plaintiff or complainant, the federal party theoretically could enjoy sovereign immunity from any counterclaims by the defendant. *U.S. v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 513-14 (1940) ("suability of the United States..., whether directly or by cross-action, depends upon affirmative statutory authority"). For purely prospective equitable or declaratory relief, however, the United States has waived its sovereign immunity and thus consented to counterclaims in situations like this.

As amended in 1976, 5 U.S.C. §702 of the APA waives sovereign immunity for equitable and declaratory relief: "[t]he United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States." 5 U.S.C. §702. This waiver "*eliminat[ed]* the sovereign immunity defense in *all equitable actions* for specific relief against a Federal agency or officer acting in an official capacity." *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1982) (*quoting* S. Rep. No. 94-996, 8 (1976)) (emphasis added). Significantly, APA's "waiver of sovereign immunity applies to any suit *whether under the APA or not*." *Reich*, 74 F.3d at 1328 (emphasis added). Because no statute *precludes* it, Kiewit may seek – and the Commission may provide – declaratory relief against the Secretary.

B. The Commission Has "Jurisdiction" for Declaratory Relief

Similarly, Article III's limitations against advisory opinions in federal court do

not apply to federal agencies:

> The adjudication in the Commission ... was not an Article III proceeding to which either the 'case or controversy' or prudential standing requirements apply. Within their legislative mandates, agencies are free to hear actions brought by parties who might be without party standing if the same issues happened to be before a federal court. The agencies' responsibility for implementation of statutory purposes justifies a wider discretion, in determining what actions to entertain, than is allowed to the courts by either the constitution or the common law.

Gardner v. F.C.C., 530 F.2d 1086, 1090 (D.C. Cir. 1976).[4] Consequently, the jurisdictional limitations on what relief a federal court might provide do not carry through to what relief a federal agency may provide. *Pittsburgh & W.V. R. Co. v. U.S.*, 281 U.S. 479, 486 (1930) (right to appear before agencies is greater than right to litigation in federal court). On the flip side, however, unless expressly prohibited by statute, federal agencies plainly have jurisdiction for whatever declaratory relief a federal court could provide. *Cf. Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 858 (1986) (holding that federal agencies can hear *state-law* claims by analogy to federal courts' supplemental jurisdiction to do so). As explained in Section IV.C, *infra*, a federal court would have jurisdiction to issue a declaratory judgment here.

C. Declaratory Relief Is "Appropriate" Here

In arguing against declaratory relief, the Secretary cites obscure decisions from

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[4] Article III, §2, limits the federal judiciary's jurisdiction to adjudicating actual "cases" and "controversies," *Allen v. Wright*, 468 U.S. 737, 750 (1984), which precludes "advisory opinions." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998).

the Second Circuit and the U.S. District Court for the District of New Jersey. OSHA Br. at 25. *Amicus* APA Watch respectfully submits that the Secretary's narrow proposed tests for declaratory relief understate the availability of that relief for two reasons.

First, declaratory relief can be appropriate, notwithstanding the availability of alternate relief. Although federal courts require irreparable harm and the inadequacy of legal remedies for *injunctive* relief, *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959), those prerequisites simply do not apply to requests for declaratory relief. To the contrary, the availability of an equally effective alternate remedy affords no ground for declining declaratory relief. 28 U.S.C. §2201; *Hurley v. Reed*, 288 F.2d 844, 848 (D.C. Cir. 1961); *Tierney v. Schweiker*, 718 F.2d 449, 457 (D.C. Cir. 1983). Thus, showing "irreparable injury … is not necessary for the issuance of a declaratory judgment." *Tierney*, 718 F.2d at 457 (*citing Steffel v. Thompson*, 415 U.S. 452, 471-72 (1974)); 10B WRIGHT & MILLER, FED. PRAC. & PROC. Civ.3d §2766 ("[i]f the normal requirements of federal jurisdiction are present …, the court has jurisdiction" for declaratory relief). The availability of other relief that the Commission can provide Kiewit does not weigh against also providing Kiewit's requested declaratory relief.

Second, the Secretary's proposed narrow readings derive from limitations placed on federal courts by Article III, which simply does not apply to the Commission. *See* Section IV.B, *supra*; *see also Pub. Serv. Comm'n of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, 241-42 (1952) (discussing federal courts' initial reticence to declaratory judgments and the eventual resolution of declaratory relief with Article III's case-or-controversy requirement); *Powell v. McCormack*, 395 U.S. 486, 518 (1969) ("availability of

declaratory relief depends on whether there is a live dispute between the parties, and a request for declaratory relief may be considered independently of whether other forms of relief are appropriate") (citations omitted). As such, "federal declaratory relief is not precluded when no ... prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute." *Steffel*, 415 U.S. at 475. All that is required is a "live dispute," regardless of the "other forms of relief" available. *Powell*, 395 U.S. at 518. The current dispute suffices for declaratory relief.

CONCLUSION

For the foregoing reasons, *amicus* APA Watch respectfully submits that the order vacating Item 1 of Citation 1 should be affirmed, and a declaratory order issued declaring that paragraph (g) of 29 C.F.R. §1926.50 is invalid.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that all parties have consented that all papers required to be served may be served and filed electronically. I further certify that on this 28th day of May, 2013, I caused a copy of the foregoing *amicus curiae* brief – in conjunction with the motion for leave to file the brief – to be sent by electronic submission to:

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