UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>KIEWIT POWER CONSTRUCTORS CO.,<br>Respondent. | OSHRC Docket No. 11-2395 |

**REPLY BRIEF ON REVIEW OF**

**KIEWIT POWER CONSTRUCTORS CO.**

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## I. Reply to Statement of Statutory and Regulatory Background[1]

On p. 2, the Secretary states that OSHA "adopted" 41 C.F.R. § 50-204.6(c) as an OSH Act standard "under," *inter alia*, § 4(b)(2). This is incorrect. When the Secretary adopted § 50-204.6(c) under the OSH Act, he cited as authority only OSH Act § 6(a)—never § 4(b)(2). 36 Fed. Reg. at 10466, 10467 ("Authority," citing only § 6(a)), *id.* (setting out § 1910.1, citing only § 6(a)). Similarly, the only statutory authority OSHA cited for the revocation of § 1910.5(e) was OSH Act § 6(a). 36 Fed. Reg. 18080. (On p. 5, the Secretary correctly states the matter.)

On p. 6, the Secretary states that § 1910.11(a) "adopt[ed] and extend[ed] the applicability of" the WHA standards. This is incorrect. Section 1910.11 states that provisions of "Subpart B" adopted and extended the applicability of certain established Federal standards. The WHA standards were not among them, for no provision in Subpart B concerns the WHA standards. See Subpart B, § 1910.12 *et seq.*, set out at 36 Fed. Reg. at 10469. The WHA standards were instead addressed in Subpart A, in § 1910.1(b), which stated only that Part 1910 "contains" established Federal and national consensus standards.

On p. 6, the Secretary cites § 1910.11(a) for the "general application" proposition just stated. The implication is that § 1910.11(a) gave § 1910.151(c) "general application" such that it "may be applied to employers in construction." The statement is incorrect for both the reason stated in the previous paragraph, and for the additional reason that without the revocation of § 1910.5(e), § 1910.151(c) would have been expressly confined to manufacturing. KPCC Br. at 9-10. (The Secretary makes a similarly incorrect statement in his argument on p. 21.)

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[1] Not all errors in the Secretary's statement of the case are noted here; some are noted in our argument.

On p. 6, the Secretary asserts that "Adopted established federal standards, such as § 1910.151(c), have general application and may be applied to employers in construction…." The assertion assumes the answer to the question under consideration.

## II. Argument

### A. The Secretary's Brief Suggests An Erroneous Scope of Review

The Secretary several times suggests (Br. 16, 18), without outright stating so, that the proper scope of review in this case is that set out in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). This is an invitation to error.

OSH Act § 6(a) authorized OSHA to "without regard to [the APA]" adopt "established Federal standard[s]." This exemption from the APA applied, however, only to the extent that a standard was an "established Federal standard." Beyond that point, summary adoption was not authorized and the APA was not superseded.

APA § 559 (cited in our Motion at 42 *et seq.* but not mentioned by the Secretary) directly addresses how courts are to construe the OSH Act when determining the extent to which the APA has been superseded. That provision states that a "[s]ubsequent statute may not be held to supersede or modify this [act]…, *except to the extent* that it does so *expressly*." (Emphasis added.) The Secretary does not dispute that this provision—including the word "expressly"—must be construed *de novo*, *i.e.*, without *Chevron* deference. *Prof. Reactor Operator Soc'y v. NRC*, 939 F.2d 1047, 1051 (D.C. Cir. 1991); Motion at 15. Thus, when the Secretary claims that the OSH Act makes APA rulemaking unnecessary, he must show that it does so—in the Commission's *de novo* view—"to the extent" claimed and "expressly."

The word "expressly," together with the principle that no deference is given regarding APA provisions, necessarily displace *Chevron. Chevron* deference applies only if an OSH Act provision is ambiguous. *E.g., AKM LLC v. Secretary of Labor*, 675 F.3d 752, 754 (D.C. Cir. 2012). But if an OSH Act provision is ambiguous, it is not clear and thus

has failed to indicate something "expressly" (*Dickinson v. Zurko*, 527 U.S. 150, 155 (1999) (equating "clear" with "expressly")), a word in the APA that must be applied *de novo*. Thus, in determining the extent to which the APA has been displaced, the APA supplies a rule different from *Chevron*.

In any event, inasmuch as the Secretary never claims or shows that any statutory provision here is ambiguous, *Chevron* is inapposite.

**B. The Secretary Failed to Show that Work-Defining Scope Provisions Are "Expressly" Not Part of the "Established Federal Standards."**

**1. The Secretary Failed to Show Statutory Language Authorizing His Actions**

**a. The Secretary Failed to Show That § 6(a) Authorized His Actions**

We begin with the text of the statute. Despite repeated challenges by KPCC, the Secretary again fails to point to words in the OSH Act that authorized the application of WHA-derived standards to construction. He never points to words in OSH Act § 6(a) that authorized him to strip out work-defining scope provisions. He never points to words in OSH Act § 3(10) that even suggested that such provisions were not part of the "established Federal standards." He never shows that the OSH Act "expressly" authorized him to adopt WHA standards "to the extent" claimed—*i.e.*, without their work-limiting scope provisions.

The Secretary does state at pp. 10-11 that OSH Act § 6(a) "expressly exempted" OSHA from APA rule-making requirements so that OSHA could "adopt established [F]ederal standards…." But § 6(a) did so only to the extent that standards were "established Federal standards," and, according to APA § 559, were expressly so. The definition of "established Federal standard" in § 3(10), together with the incorporated definition of "occupational safety and health standard" in § 3(8), state that the "established Federal standards" included their work-defining scope provisions—*i.e.*, those that stated, *inter alia*, the "employment" and "places of employment" to which their requirements applied. The Secretary nowhere points to contrary evidence, such as

words in § 6(a) or § 3(10), or elsewhere in the OSH Act, that indicate—let alone "expressly"—that the term "established Federal standards" did not include their work-defining scope provisions. In sum, the text of the Act indicates that the Secretary's position has no merit, even aside from whether it does so expressly.

On p. 15, the Secretary seems to promise to address the textual issue but he again fails to point to any supporting words in the statute. Instead, he argues the inapplicability of the WHA source standard to construction is "irrelevant" because "the OSH Act was enacted to *extend* worker protections in response to inadequate existing remedies" (emphasis by the Secretary), citing *Atlas Roofing v. OSHRC*, 430 U.S. 442, 444-45 (1977). Although the Secretary italicizes the word "extend," *Atlas Roofing* neither uses the word nor has any language pertinent here. Moreover, the Secretary does not deny that, by omitting federal contract restrictions from § 1910.12 and § 1910.5(e) respectively, he did extend the CSA standards to all construction employees and the WHA standards to all manufacturing employees. He points to nothing in *Atlas Roofing* or the Act's words to show that Congress went further—that it authorized the application of WHA manufacturing standards to construction, and CSA construction standards to manufacturing—and did so expressly.

On p. 16, the Secretary states that his "interpretation" that OSH Act § 6(a) authorized him to summarily apply the WHA standards to construction is "reasonable" and "entitled to deference," citing *Chevron*. He never tells us, however, which word in § 6(a) or § 3(10) he is "interpreting," or is ambiguous and thus triggers *Chevron* deference. Moreover, the Secretary's invocation of the ambiguity-dependent *Chevron* doctrine amounts to a confession that neither § 6(a) nor § 3(10) provides the express evidence demanded by APA § 559.

In sum, there is nothing to the Secretary's position. No language in the statute supports his position, let alone "expressly." Inasmuch as § 1910.151(c) may not validly be applied to construction, § 1926.50(g) is invalid.

**b. The Secretary Failed to Show That § 4(b)(2) Authorized His Actions**

Although the Secretary in several places relies on § 4(b)(2), he never addresses any part of KPCC's detailed showing (Motion at 56-60) that § 4(b)(2) is inapposite.

First, the Secretary's reliance on § 4(b)(2) is improper, for none of his rulemaking actions relied on it. Under the pre-APA rule of *SEC v. Chenery*, 318 U.S. 80, 95 (1943), "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *See also N. Air Cargo v. Postal Service*, 674 F.3d 852, 860 (D.C. Cir. 2012) (agency action may be upheld only on the basis of the agency's own contemporaneous justification, not *post hoc* argument of counsel).

Second, § 4(b)(2) grants no rulemaking authority to the Secretary, and the Secretary never shows how it does. The first sentence of § 4(b)(2) (quoted by Sec.Br. at 15) does not grant any such authority. Indeed, it does not even govern OSH Act standards but standards under the predecessor statutes. It says that, once the Secretary adopts more effective standards under the OSH Act, predecessor standards are superseded under the *predecessor* statutes. That grants no rulemaking authority under the OSH Act.

Third, § 4(b)(2) neither confers nor implies authority to strip out or ignore the scope provisions in the standards referenced there, and the Secretary never shows how it does. Section 4(b)(2)'s words nowhere suggest that OSHA had authority to summarily change the standards' coverage, such as by applying WHA standards to construction, and the brief never once points to words that do. Section 4(b)(2) refers to those standards as "promulgated" and as "issued," *i.e.*, with their scope provisions intact. The Secretary also offers no answer to our showing that, unless § 4(b)(2) is applied according to its literal words, § 6(a) would be redundant. He has no answer to our showing that Congress specifically and expressly intended that § 4(b)(2) be applied so as to not make § 6(a) "meaningless or a mere redundancy." Leg. Hist. at 1217.

* * *

KPCC also provides, by analogy to FED.R.APP.P. 28(j),[2] the following citation to authority in support of the argument at KPCC Br. at 31-32 that § 4(b)(2)'s second sentence authorized only the use of OSH Act enforcement provisions to prosecute only government contractors—not OSH Act employers—for violations of WHA standards: S. Rep. at 22, Leg. Hist. at 162, which states:

> Section 4(b) also provides that standards issued under such other statutes shall be deemed to be standards issued under this act. This provision is included in order to make applicable the provisions of this act in administering the ***other*** health and safety statutes under the jurisdiction of the Secretary of Labor. [Emphasis added.]

**2. The Secretary Failed to Show That The Legislative History Authorized His Actions**

The Secretary's failure to point to words in the OSH Act that authorized him to change work-defining scope provisions is not remedied by the legislative history—even if it could be so remedied.

On p. 11, the Secretary points to a remark by Senator Yarborough that construction workers suffered the heaviest losses among the over 7 million injuries annually. That remark might suggest that Congress would authorize the summary extension of CSA standards to all construction. How it shows that Congress authorized the summary extension of WHA manufacturing standards to construction is never explained.

**a. The Secretary Failed to Show That the Senate Report Authorized His Actions**

On pp. 11 and 17, the Secretary relies heavily on the Senate committee report's statement that the established Federal standards "may be made applicable to additional employees who are not under the protection of such other Federal laws." The Secretary never denies that, in the case of construction workers, the removal of the restriction in

[2] We acknowledge that, by further analogy, the Secretary would be entitled to briefly respond to this additional citation.

the CSA standards to federal contracts did just that, *i.e.,* "made applicable" the CSA standards to construction workers who were "not under the protection" of the CSA. The Secretary never points to anything in the legislative history indicating that Congress went further—*i.e.,* authorized him to summarily extend WHA standards or other established Federal standards to work different than that to which their scope provisions indicated that they applied. Moreover, he points to nothing that indicates that Congress went that far expressly—*i.e.,* clearly. *Dickinson v. Zurko*, 527 U.S. 150, 155 (1999) ("departure from the [APA] norm must be clear"). There is also contrary evidence. The Senate report observed that "there are many occupational hazards…which are not covered by any standards at all" and that "precise standards to cover every conceivable situation will not always exist." S. Rep. at 8, 9, Leg. Hist. at 148, 149. If the Secretary were correct, the report would next have stated that, to fill such gaps, established Federal standards from another industry could be applied. But it did not. Instead, it spoke of new standards adopted under § 6(b) and of § 5(a)(1). *Id.*

On p. 18, the Secretary tries to explain away the statements in the Senate report that the established Federal standards would be those "with which industry is familiar" and that "have already been subjected to the procedural scrutiny mandated by the law under which they were issued." He does not deny that the construction industry had never scrutinized and was unfamiliar with the WHA manufacturing standards. Instead, he argues that there is "no indication" in the legislative history that Congress expected anything more than that "industry in general" would have scrutinized and been familiar with the established Federal standards.

First, the argument is insufficient on its face. The *absence* of legislative history ("no indication," as the Secretary states) cannot logically constitute the "express" evidence demanded by APA § 559.

Second, the assertion is wrong. As the Ninth Circuit has observed, the "theory" of § 6(a) underlying the Senate report is that "the federal standards would already have

been subjected to substantial public scrutiny and comment *by the parties concerned*." *Irvington Moore, Div. of U.S. Natural Res., Inc. v. OSHRC*, 556 F.2d 431, 434, 5 BNA OSHC 1585, 1587 (9th Cir. 1977) (citing the Senate report) (emphasis added). This is demonstrably correct. The Senate report reasoned that the established Federal standards could be summarily adopted because they had been "subjected to the procedural scrutiny mandated *by the law under which they were issued* ...." (Emphasis added.) Under each such law, standards were proposed to apply to only the particular industry they would regulate, not all industries. For example, in 1968 the Secretary proposed under WHA § 1(e) (which applied only to "manufactur[ing]") standards that would apply to "Federal Supply Contracts" "for the manufacture or furnishing of materials, supplies." 33 Fed. Reg. 14258, 14270 (1968). The Secretary never denies that only those in manufacturing, not construction, would have been interested in the WHA standards proposed there. Moreover, under 5 U.S.C. § 553(c), the only persons entitled to an "opportunity to participate in the rule making" were "interested persons"—the "persons to be affected by the regulations." *Nat'l Soft Drink Ass'n v. Block*, 721 F.2d 1348, 1353 (D.C. Cir. 1983); *Dismas Charities, Inc. v. U.S. Dept. of Justice*, 401 F.3d 666, 678 (6th Cir. 2005). And the Senate committee was keenly so aware, for it nearly exactly quoted that provision on the same page of its report.[3] All this explains why the phrase "industry in general" never appears in the Senate report; it is the Secretary's invention.

Third, the argument is built on an untruth—that "industry in general" *had* scrutinized or been familiar with the WHA standards. Only the manufacturing industry had—not the construction industry, not the maritime industry, not the agricultural

[3] The only difference is that the Senate report rendered "rule making" as one word. S. Rep. at 6, Leg. Hist. 146 ("afford interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments").

industry, not the transportation industry, not the deep-sea diving industry—just manufacturers. See KPCC Br. 3-5. This "industry in general" idea has no truth to it.

Fourth, the argument serves none—and disserves all—of the reasons why Congress placed such a high value on the established Federal standards having undergone such "scrutiny," and on "industry" being so "familiar" with the standards, as to justify dispensing with notice-and-comment rulemaking, the purpose of which is "to assure fairness and mature consideration" of regulations. *NLRB v. Wyman Gordon Co.*, 394 U.S. 759, 764 (1969). When an industry scrutinizes a proposed standard, it examines, and brings its expertise and knowledge to bear on, how the standard would operate within its proposed setting. It does not waste time, money or the agency's patience by scrutinizing or discussing how it would operate outside its proposed setting. That narrow focus is crucial because, as the Secretary testified here, facts relating to risk and feasibility differ by industry, so a provision may be feasible or address a significant risk in manufacturing but not in construction. Bolon Tr. 36-37.[4] Hence, OSHA has many

[4] *See also* 61 Fed. Reg. 41738 (1996); Letter from G. Reidy (OSHA) to G. Kennedy (NUCA) (1990) (SJ Attach. G). The Secretary admitted the following at Bolon Tr. 36-37:

> Q Standards in Parts 1910 and 1926 might address the same hazard differently, right?
> A Yes.
> Q Because of feasibility concerns, right?
> A They could just present different hazards and require different solutions.
> Q They might require different solutions also because of feasibility concerns, right?
> A Yes.
> Q …Or a hazard might present a significant risk in one setting but not in the other, right?
> A Yes.
> Q So a standard in Part 1910 could be feasible as applied to general industry work, but not feasible as applied to construction work, right?
> A Could be.

times made clear that scrutiny by one industry does not suffice for other industries. *E.g.*, Letter from Sec'y of Labor L. Martin to R. Georgine, "Constr. Activities and Operations and the Bloodborne Pathogens Standard" (1992) (SJ Attach. H), prominently mentioned in KPCC's Motion at 38 but unmentioned by the Secretary; *see also* KPCC Br. at 36, 41 (regarding OSHA's remarks in the Federal Register concerning the lead and cadmium standards). That is apparently why the Secretary decided to not apply the WHA eyewash standard to construction, and why the chairman of the ACCSH task force remarked when considering the WHA-derived eyewash provision, "This is going to be a difficult one, gentlemen." RR:31, Tr. 83. (Many more examples could be cited.) And industries to which standards are not proposed to apply do not scrutinize them at all, and will not be familiar with them or their final versions. The agency's narrow focus is what made possible the statement that the WHA standards applied only to "certain particular" working conditions (§ 50-204.1(a)) and were based on "evaluation" and "[c]ausative analysis of injury frequency rates" in "industrial" establishments. 25 Fed. Reg. 13809 (Dec. 29, 1960); *see also* KPCC Br. 4, 5. In sum, the benefits of scrutiny and familiarity accrued only to the extent the standard was proposed to apply and its final version did apply. There is therefore nothing to the Secretary's position.

**b. The Secretary Failed to Explain Away Congress's Rejection of Scope-Expanding Language in the Daniels Bill**

The Secretary (Br. 19) argues that Congress's rejection of a bill (the Daniels bill, H.R. 16785) with the phrase "not limited to its present area of application" means nothing, for we cannot tell whether to attribute the House's rejection of the bill to that feature or other features. The argument ignores the Act's legislative history and the realities of the legislative process.

As the Act's legislative history shows, Congressmen, Senators, and their staffers commonly copy, and here did copy, provisions from a competing bill into their own. To take an example at hand, the language of § 4(b)(2) in both houses originated in minority

(Republican) bills, but in both houses was copied into majority (Democratic) committee bills. Thus:

- In the House, *compare* H.R. 13373, 91st Cong., 1st Sess. § 21(c), p. 40 (Aug. 6, 1969) (as introduced by Rep. Ayres (Rep.[5])) (close ancestor of OSH § 4(b)(2)), Leg. Hist. at 679, 718, *with* H.R. 16785, 91st Cong., 2d Sess. (April 7, 1970) (as introduced by Rep. Daniels (Dem.)) (no provision), Leg. Hist. at 721, *and* H.R. 16785, 91st Cong., 2d Sess. § 4(b)(2), p. 46 (July 9, 1970) (as reported) (close ancestor), Leg. Hist. 893, 938.
- In the Senate, *compare* S. 2193, 91st Cong., 1st Sess. § 13, pp. 21-22 (May 16, 1969) (as introduced by Sen. Williams (Dem.)) (remote ancestor of OSH § 4(b)(2)), Leg. Hist. at 1, 21-22, *with* S. 2788, 91st Cong., 1st Sess. § 21(c), p. 40 (Aug. 6, 1969) (as introduced by Sen. Javits (Rep.)) (close ancestor of OSH § 4(b)(2)), Leg. Hist. at 31, 70, *and* S. 2193, 91st Cong., 2d Sess. § 4(b)(2), pp. 34 (Oct. 6, 1970) (as reported) (close ancestor, if not identical), Leg. Hist. 204, 237.

Had anyone thought enough of the phrase "not limited to its present area of application" in the Daniels bill to copy it, it would have been copied into competing bills. But no one did so. No one thought it appropriate to insert the phrase into a bill that, unlike the Daniels bill, provided for mandatory ("shall") adoption of start-up standards *without* the opportunity for public notice and comment. Its omission from the substitute bill was thus "[o]f particular significance." *Chamber of Commerce v. NLRB*, No. 12-1757 (4th Cir., June 14, 2013) (slip op. at 30-31) (absence of language from substitute bill has "particular significance").

[5] Biographical Directory of the United States Congress 1774-Present, http://bioguide.congress.gov/scripts/biodisplay.pl?index=A000229.

### 3. The Secretary's Various Other Arguments Fail to Show Authority For His Actions

The Secretary's entire discussion on p. 16 is based on a misstatement about § 1910.11(a). See p. 1 above and KPCC Br. at 35. The same is true of its reliance on § 1910.5(c)(2). See Motion at 33-39 (to which the Secretary offers no response) and KPCC Br. at 35-40. The discussion also ignores former § 1910.5(e) and current regulations such as § 1910.12, which make clear that, when § 1910.11(a) and § 1910.5(c)(2) were adopted, neither of them would have extended any established Federal standard beyond their native work. And the entire discussion is beside the point anyway, for the Secretary's rules cannot alone support a good cause finding.

At pp. 16-17 n. 6, the Secretary consigns to a footnote his failure to show in the 1971 and 1993 Federal Register announcements that he had statutory authority to summarily apply § 1910.151(c) to construction, a *sine qua non* for good cause. The Secretary does not deny the failure. Instead, his brief attempts to fill the void with a footnoted (and meritless) argument about § 6(a) and case law. But argument years later by counsel in a brief cannot supply the good cause that the APA expressly requires to have been stated contemporaneously, in the Federal Register, and by the agency. For the same reasons, the Secretary cannot expect the Commission to make his good cause finding for him.

#### a. The Omission of the WHA Eyewash Provision from the CSA Standards Was Not Shown to Be Accidental

The Secretary at p. 20 tries to explain away the stark absence of the WHA eyewash provision from the original version of § 1926.50, the CSA analogue of the WHA medical services/first aid standard (§ 50-204.6(c)). The Secretary does not deny that the Labor Department used the WHA standard as a drafting model for the CSA standard. He does not deny that, if the omission stemmed from a decision it made in a notice-and-comment rulemaking, his current position would undo that decision without a notice-and-comment rulemaking. Instead, he argues that "nothing" shows that the Department made any such decision. He suggests "accidental omission."

The assertion is not credible. The pattern of inclusion, amendment and exclusion from the CSA analogue of the WHA drafting model is powerful evidence of deliberate choice, not "nothing." The presumption of regularity,[6] often invoked by the Secretary but unrebutted here, also tells us that such an omission must be presumed to have resulted from deliberation, not accident. Furthermore, the Commissioners need not ignore as adjudicators what they know as people,[7] and especially people experienced in federal regulation. The "accidental" omission of an entire paragraph from a rule is far too rare to merely assume. Rulemaking is not a one-person job; Labor Department policy makers, project officers and lawyers draft standards collaboratively and review each others' work. Given the pattern of inclusion, amendment and exclusion when the Labor Department crafted the CSA medical services/first aid standard from its WHA analogue, the only realistic inference is that a decision was made in the CSA rulemaking to not apply the WHA eyewash provision to construction—a decision that the Secretary's current position would undo without rulemaking.

In a more realistic vein, the Secretary acknowledges that the WHA provision might have been omitted "for many reasons" other than "accident." Sec. Br. 20. But whatever those non-accidental reasons were, they underlay a policy decision made in a notice-and-comment rulemaking—a decision that the Secretary would summarily undo.

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[6] *E.g.*, *Clarence M. Jones*, 11 BNA OSHC 1529, 1532 (No. 77-3676, 1983). The "presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 174 (2004).

[7] "Court[s] should not be ignorant as judges of what [they] know as men and women." *ACLU v. CIA*, 2013 WL 1003688, at *6 (D.C. Cir. Mar. 15, 2013) (No. 11-5320) (per Garland, J.) (interior quotation marks omitted), quoting *Watts v. Indiana*, 338 U.S. 49, 52 (1949) (per Frankfurter, J.); *State v. Vick*, 213 N.C. 235, 238, 195 S.E. 779, 781 (1938) ("Justice does not require that courts profess to be more ignorant than the rest of mankind.").

The Secretary then argues that, even if the Labor Department *had* decided to omit the WHA eyewash standard from the CSA standards, that is not "relevant" because "Congress determined … that established federal standards, like the [WHA] and the [CSA] standards, provided inadequate coverage of workers, and ordered the Secretary to supersede these standards as soon as possible with more effective OSH Act standards that covered more workers, especially construction workers." Sec.Br. 20. He then states: "Kiewit's argument that the required extension of these necessary protections under the OSH Act should be barred by the restrictions of ineffective predecessor standards would thwart the statutory purpose of providing immediate coverage for unprotected workers." *Id.* This Gordian knot-like argument tightly packs together much illogic and error.

- The argument provides no textual support, let alone express textual support, for its exceedingly odd conclusion—that the same established Federal standards (here, the WHA standards) would, under § 4(b)(2), be predecessor standards for one industry (manufacturing) and superseding standards for another (construction). Instead, the argument jumbles together cherry-picked phrases from § 4(b)(2) and from § 6(a)'s legislative history without regard to what the provisions actually say. It fails to point to words in any OSH Act provision indicating that predecessor standards were to be applied to work for which they were not adopted, *i.e.*, without regard to their native scope provisions.

- The argument is illogical. Its premise is that predecessor standards such as the CSA standards were "ineffective" and "inadequate" in their sphere (construction). But the WHA standards were also predecessor standards and, by the Secretary's reasoning, must likewise have been "ineffective" and "inadequate" in their sphere (manufacturing). It thus borders on the bizarre to assert, and the Secretary points to nothing to suggest, that Congress expected the "ineffective" WHA standards to be more effective than—and summarily supplement—the CSA standards in construction, which

the WHA manufacturing standards were not designed to regulate. This is especially so as to the WHA eyewash standard, which, by the Secretary's own assumption, he had already decided should not be applied to construction.

- The argument's premise—that Congress "determined" the CSA standards to be "ineffective" and "inadequate"—cannot possibly be correct, for the CSA standards did not yet exist. The Act was passed on December 29, 1970; the CSA standards were proposed on February 2 and adopted on April 17, 1971. 36 Fed. Reg. 1802 (1971); 36 Fed. Reg. 7340 (1971). There is also no evidence that Congress "determined" that all predecessor standards were *ipso facto* "ineffective" and "inadequate." The Secretary's argument that the predecessor standards "provided inadequate coverage of workers" (Sec.Br. 20) confuses the predecessor standards with the predecessor statutes, which were limited in their *scope*. See S. Rep. at 6, Leg. Hist. at 146 (speaking of employees "not under the protection of such other Federal laws"). The legislative history contains no adverse comments about the then-recently expanded WHA standards or the LHWCA standards[8]—only the statutes' limited scope, their enforcement mechanisms and the vigor of enforcement. And that Congress in § 4(b)(2) expected a superseding OSH Act standard adopted under § 6(b) would be *more* effective does not mean that Congress thought that all predecessor standards were necessarily *in*effective; there is a difference between more and none.

- Section 4(b)(2)—upon which the argument rests—is inapposite. It does not regulate or even concern rulemaking under the OSH Act. It gives the Secretary no rulemaking authority under any statute, let alone authority to summarily change or delete scope provisions. It does not affect standards adopted under the OSH Act but only under predecessor statutes. See p. 5 above.

[8] KPCC searched an electronic version of the legislative history, which had evidently been created by optical character recognition, an imperfect technology.

- The Secretary's argument that "Congress ordered the Secretary to supersede" predecessor standards "as soon as possible" with "more effective" OSH Act standards confuses § 6(a) with § 4(b)(2). Congress required the Secretary to act quickly under § 6(a), not § 4(b)(2). *Compare* § 6(a) ("as soon as practicable") *and* S. Rep. at 6, Leg. Hist. 146 ("as rapidly as possible") *with* § 4(b)(2) (no language) *and* S. Rep. at 22, Leg. Hist. at 162 (predecessor standards "superseded ***if*** corresponding standards are promulgated under this act") (emphasis added). That makes sense, for § 6(a) extended coverage to employees not previously covered by *any* standards, while § 4(b)(2)'s first sentence assumes an already-existing predecessor standard and speaks of the effect of the adoption of a corresponding, more effective OSH Act standard—"if" and when such a standard is adopted.

- The superseding standards contemplated by § 4(b)(2) could not have been other established Federal standards adopted under § 6(a) but only certain[9] national consensus standards and the permanent standards adopted under § 6(b)—the provision that Congress expected the Secretary to use to improve the start-up standards. As the Commission stated in *CBI Services, Inc.*, 19 BNA OSHC 1591, 1598-99 (No. 95-0489, 2001):

> While mandating the adoption and extension of [the] … "established Federal" standards, Congress fully acknowledged that they "may not be as effective or as up-to-date as is desirable." … [Citation omitted.] Nevertheless, it clearly pointed the Secretary … to the institution of formal rulemaking proceedings under section 6(b) as the appropriate procedure for "improv[ing]" or "replac[ing]" such ineffective or outdated 6(a) standards. See S. Rep. No. 91-1282 at 6-7… (concluding discussions of 6(a) and 6(b) rulemaking procedures with observation that "[s]ection 6(b) sets

[9] Section 6(a)'s second sentence states: "In the event of conflict among any such [established Federal and national consensus] standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees."

forth the procedures by which the promulgation of new standards, and *the revision and revocation of adopted standards*, are to be accomplished" (emphasis added)).

- The Secretary's assertion that KPCC's position would "thwart the statutory purpose of providing immediate coverage for unprotected workers" is wrong. The CSA standards would have been immediately extended to previously unprotected construction workers, the WHA standards to previously unprotected manufacturing workers, and the LHWCA standards to previously unprotected maritime workers. There is no textual or other evidence, let alone express evidence, that Congress's purpose went further, to include summarily applying established Federal standards to work for which they were not written. As noted on p. 7 above, there is only contrary evidence.

The Secretary's broader "statutory purpose" argument "manifests an interpretative error of long standing, one that apparently will never die: to treat a statute's primary or precipitating object as its sole object." *Albany Eng'g Corp. v. FERC*, 548 F.3d 1071, 1077 (D.C. Cir. 2008). "[I]t frustrates, rather than effectuates, legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Id.*, quoting *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (emphasis in the original). "Every statute purposes, not only to achieve certain ends, but also to achieve them by particular means." *Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995). "The withholding of agency authority is as significant as the granting of it, and we have no right to play favorites between the two." *Id.*

**b. The Secretary Failed to Refute the Absurdity of Applying Standards to Completely Unrelated Industries.**

On p. 24, the Secretary promises to deal with KPCC's observation that his position "would lead to the absurd consequence that standards for one industry could be applied, without notice-and-comment rule-making, to completely unrelated industries,

such as manufacturing standards to construction, construction standards to agriculture, and maritime standards to manufacturing." The Secretary does not deny the consequence. Instead, he denies the absurdity. He states that "standards have content restrictions imposed by their terms" (such as "may be exposed to injurious corrosive materials" in § 1910.151(c)).

We call to the Commission's attention a subtle assumption in the argument's wording—that § 1910.151(c) or § 50-204.6(c), considered alone, is "the standard" while its scope provision is not part of the "standard." Our analysis will use neutral wording. We also observe that the term "content restrictions" is another invention of the Secretary's; neither the Act nor the APA uses it.

There is no merit to the argument. As we showed in our opening brief at 18, OSH Act § 3(8) and the APA refute it, for they make clear that a "standard" (including its "content restrictions") resides in *both* its scope provision *and* the provisions it controls, considered *together*.

The Secretary's argument also fails on its own terms, for it assumes that only provisions controlled by scope provisions have "content restrictions." That is untrue. Scope provisions just as much have "content restrictions," and just as much reflect policy decisions about risk and feasibility, as the provisions they control. For example, when the Secretary finalized the confined spaces standard (§ 1910.146), he declined to widen its proposed scope provision to include agriculture, construction and maritime work because conditions "unique to these industries" require provisions "specifically appropriate for" them. 58 Fed. Reg. 4462, 4469-4470 (1993). Inasmuch as the resulting scope provision (§ 1910.146(a)) restricted the content of the provisions it controlled, it was itself a content restriction. Scope provisions thus permit drafters to place "content restrictions" common to all provisions in one place, permitting controlled provisions to be shorter (hence, deliberately incomplete), more easily drafted and more easily understood. Otherwise, every provision in Part 1926 would have to state "in

construction" and every provision in Part 50-204 would have to state "in manufacturing." The Secretary could not seriously contend that scope provisions such as § 1910.261(a)(1) (paper mills), § 1910.106(j) (flammable liquids), § 1926.602(a) (earthmovers), § 1910.1030(a) (bloodborne pathogens) or § 1928.1 (agriculture) lack "content restrictions"—and thus that he may summarily delete or ignore them. Yet, this absurd proposition is what the Secretary's argument implies.

Perhaps more important is that the "content restrictions" in a provision controlled by a scope provision necessarily reflect the scope provisions. Scope provisions answer a "key" question—"To whom or what does it apply?" Office of Legis. Counsel, U.S. House of Reps., *Quick Guide to Legislative Drafting* (rev. Nov. 9, 2012) ("What is the scope of the policy—To whom or what does it apply?" among "key" questions for drafting legislation). Once that key question is determined, controlled provisions (including their "content restrictions") are drafted to feasibly regulate significant risks *only* within the ambit defined by the scope provisions—not the entire universe. *E.g.*, § 50-204.1(a) (WHA standards apply to "certain particular" working conditions"; 25 Fed. Reg. 13809 (Dec. 29, 1960) (based on "evaluation" and "[c]ausative analysis of injury frequency rates" in "industrial establishments"); Bolon Tr. 36-37 (n. 4 above) (standards can address feasibility, risk, differently in manufacturing, construction); pp. 9-10 & n.4 above; KPCC Br. 4, 5. That is why the existence of "content restrictions" in the WHA eyewash provision did not prevent either its omission from the CSA standards, or the ACCSH taskforce chairman from remarking that a proposal to apply it to construction was "a difficult one." RR:31, Tr. 83.

In sum, "content restrictions" are not universal truisms, and controlled provisions are not fungible. They can be appropriate in some settings but not other settings—settings that are determined in rulemaking by their scope provisions.

**4. The Secretary Failed to Show Good Cause for the 1993 Verticalization**

Beginning on p. 21, the Secretary tries to address KPCC's alternative argument that the 1993 publication of § 1926.50(g) was invalid because it was not a "purely ministerial action" and thus lacked good cause under the APA. Our opening brief at pp. 40-45 and our discussion at p. 12 above adequately dispose of this assertion and, except for the limited remarks below, we respectfully refer the Commission to them.

The effort begins with a misstatement. On p. 21, the Secretary states that "§ 50-204.6(c)…was adopted as an OSHA standard under § 6(a) of the Act and codified at...§ 1910.151(c)," citing 36 Fed. Reg. 10466, 10601 (May 29, 1971). The Secretary then states, "As a result," § 1910.151(c) became applicable "with respect to every employer, employee, and employment covered by the Act," citing § 1910.11(a) (emphasis removed). The words "as a result" and the reliance on 36 Fed. Reg. 10466, 10601 (May 29, 1971) are misleading. The only reason the Secretary can argue that § 1910.151(c) applies (validly or not) to every employer is that § 1910.5(e), which was adopted in the same publication as § 1910.11(a) and § 1910.151(c), and which restricted § 1910.151(c) to manufacturing, was later revoked.

The effort ends with a subtle irrelevancy: The Secretary implies that § 1910.5(e) was revoked before its effective date. The Secretary does not state the import of this. It has none. It does not mean that § 1910.151(c) may be validly applied to construction. It does not mean that the revocation of § 1910.5(e), or what the Secretary argues is the ensuing wider scope of § 1910.151(c), was authorized by the Act. It does not mean that § 1910.5(e) was not a substantive rule, or could be summarily revoked. It does not mean that § 1910.5(e) did not represent the Secretary's earliest interpretation of § 6(a).

On p. 22, the Secretary states that, "The 1993 notice simply consolidated in a single volume all of the regulations…that OSHA had previously determined were applicable to construction," citing 58 Fed. Reg. 35076-77 (1993). The Secretary thus implies that, after the 1979 notice, he did not further consider the appropriateness of the

verticalization of Part 1910 standards into Part 1926. This is untrue. For example, § 1910.132(a) was not verticalized in 1979 but rather in 1993. *Compare* 44 Fed. Reg. 8577, 8587 (1979) *with* 58 Fed. Reg. at 35152 (adopting § 1926.95(a)). Furthermore, the Secretary formally stated here that he made feasibility and significant risk findings in 1993. Sec'y's Supp. Responses to KPCC's First Set of Req. for Admissions at 3 (filed June 26, 2012) (OSHA in 1993 found that § 1926.50(g) in construction is "feasible," "reasonably necessary or appropriate," and "addresses a significant risk"); Bolon Tr. 57 (feasibility findings made in 1993).

**5. The Secretary Failed to Show That Case Law Addresses This Question**

KPCC's opening brief showed that whether WHA manufacturing standards could have been summarily applied to construction is a question of first impression. Inasmuch as it anticipated nearly all of the Secretary's arguments about case law, KPCC will avoid repeating its points unnecessarily.

As to *American Can Co.*, 10 BNA OSHC 1305 (No. 76-5162, 1982), the Secretary asserts a myth—that "the Commission ruled that the Secretary had not impermissibly omitted the scope and application provisions of the Walsh-Healey Act … standard[s] at 41 C.F.R. § 50.204.1(a) and (c)." This is incorrect; the Commission's very carefully drafted opinion avoided such a broad ruling. It discussed only the two omissions protested by the employer—that of the "legality, fairness or propriety" provision of § 50-204.1(c) and of the quotation from WHA § 1(e)'s state-law provision in § 50-204.1(a). 10 OSHC at 1308 col. 2 (summarizing arguments). It never mentioned § 50-204.1(a)'s restriction to "manufacturing" or "supply," or any form of those words, or their omission from Subpart A of Part 1910, or the revocation of § 1910.5(e). It even elided the words "manufacturing" and "supply" from its background description of the WHA. 10 OSHC at 1306 col. 2. It left them unmentioned because the case involved application of the WHA manufacturing standards to manufacturing, not different work. And while the Commission ruled that Congress implicitly permitted the provisions that

were involved to not be applied under the OSH Act, it did so only because they were so "anomalous" under the Act as to be "inconsistent" with "congressional intent"—a claim that has not been made and could not be made with regard to the words "manufacturing" or "supply." In sum, *American Can* is not authority for the role of words it deliberately left unmentioned.

The discussion of *Bechtel Power Corp.*, 4 BNA OSHC 1005 (No. 5064, 1976), *aff'd*, 548 F.2d 248 (8th Cir. 1977), in our opening brief adequately disposes of the Secretary's reliance on it. We add only that its brief citation to § 4(b)(2) did not reflect the text or legislative history of the provision and that, as noted above, the Secretary has no answer to our demonstration that § 4(b)(2) is not authority here.

KPCC agrees with the Tenth Circuit's statement, much touted by the Secretary, that the principal purpose of the Act was to "extend protection to many workers who had not been covered by previous standards." *Lee Way Motor Freight, Inc. v. Secretary*, 511 F.2d 864, 869 (10th Cir. 1975), *aff'g* 1 BNA OSHC 1689, 1691 (No. 1105, 1974). But that does not address whether that extension was to be made only by removing restrictions to federal contracts—as § 1910.5(e) provided and as the Secretary himself first thought—or by removing restrictions to particular types of work. Although *Lee Way* is adequately discussed in our opening brief, we add that the Secretary's brief reflects another myth—that the lead Commission opinion expresses the majority rationale. Commissioner Cleary concurred only "in the disposition" and on a much narrower ground—that, because the WHA standard there applied to hauling supply contracts incidental to Federal supply contracts, it *did* apply to transportation and thus that there was no substantive change: "It is clear, therefore, that the coverage of vehicle maintenance pits…would be covered by the Walsh-Healey Act and the standard involved." 1 BNA OSHC at 1692 (Cleary, Commissioner, concurring). See also the Secretary's testimony at Bolon Tr. 76 (manufacturers could have vehicle repair pits). As to the lead opinion's brief citation to § 4(b)(2), we reiterate our observation above.

*Brown & Root Inc.*, 9 OSHC 1407 (No. 77-805, 1981), involved the application of maritime standards to maritime work, not to different work, and to more employees involved in ship repair than were covered by the LHWCA. That is consistent with our position.

*Coughlan Constr. Co.*, 3 OSHC 1636, 1637-38 (Nos. 5303, 5304, 1975) (scope of CSA standard validly expanded under § 6(a) from federally-supported construction to all construction), is entirely consistent with our position. The lead, non-majority, opinion in *Underhill Constr. Corp.*, 2 BNA OSHC 1556, 1557-58 (No. 1307, 1975), *aff'd*, 526 F.2d 53 (2d Cir. 1975), is not even close to being apposite.

**C. A Declaratory Order Would Be Appropriate**

The Secretary argues that declaratory relief is not appropriate here because KPCC "has been unable to identify a single useful purpose that would be served by a declaratory order … that would not be achieved if the Commission finds the standard invalid." Br. 25. He claims that every purpose that KPCC claims would be served by a declaratory order would be achieved by a "judgment" of invalidity. Br. 25, 26.

The argument is wrong as a matter of law, for the adequacy of other remedy does *not* make declaratory relief inappropriate. "The existence of another *adequate* remedy does not preclude a declaratory judgment that is otherwise appropriate." FED.R.CIV.P. 57 (emphasis added) (unmentioned by the Secretary). "[T]hat another remedy would be *equally* effective affords no ground for declining declaratory relief." Notes of Advisory Committee on Rules, 1937 (emphasis added). *See also* 28 U.S.C. § 2201(a) (declaratory judgment may issue "whether or not further relief is or could be sought"). *See also* authorities cited in KPCC PDR at 3-4. Thus, KPCC does not need to show that a declaratory order would accomplish *more* than a holding or finding of invalidity. KPCC

need only show that it is "*otherwise* appropriate"—*i.e.,* appropriate for reasons *other than* the inadequacy or adequacy of another remedy.[10]

A declaratory order is appropriate here because it would provide useful coercion (and, if relevant, a "find[ing]" of invalidity would not). Contrary to the Secretary's brief, a "find[ing]" of invalidity is *not* a "judgment"—a word that the Secretary inaccurately uses twice. Br. 25, 26. A "finding" or holding of invalidity is a *reason for* a judgment (an "order," in APA terms), but it is not a judgment or order, and thus lacks their coerciveness. *See* APA § 557(c)(3) (distinguishing between them);[11] 29 C.F.R. § 2200.90(a) (same).

By contrast, a declaratory order *is* an "order." It re-orders relations between the parties and requires the party against whom it is issued to conduct itself with the opposing party accordingly. 28 U.S.C. § 2201(a) (declaratory judgment declares "rights and other legal relations"; "Any such declaration shall have the force and effect of a final judgment or decree…."); 5 U.S.C. § 552b(h)(1) (courts may "enforce" certain requirements "by declaratory judgment, injunctive relief, or other relief as may be appropriate."). For example, KPCC does not wish to face other citations under this standard, incurring avoidable fees and costs, only to have its protest to an area director or the Solicitor dismissed as resting on a holding to which the Secretary has not yet acquiesced. The added coercion of an order would be an appropriate way to remove this uncertainty and avoid such costs, especially since the issue can recur.

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[10] The Secretary's other arguments do not require further discussion. For example, *Gruntal & Co. v. Steinberg*, 837 F. Supp. 85, 89 (D.N.J. 1993), is inapposite because KPCC seeks to order future conduct and relations among the parties, not merely to make findings about the past.

[11] APA § 557(c)(3) states in part that, "All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—(A) findings and conclusions, and the reasons or basis therefore…; and (B) the appropriate … order, sanction, relief, or denial thereof."

Another purpose—one that a declaratory order would especially serve in invalidity cases—is exemplified by *L.E. Myers Co.*, 12 BNA OSHC 1609, 1611-14 (No. 82-1137, 1986), *rev'd on other grounds*, 818 F.2d 1270, 13 BNA OSHC 1289 (6th Cir.), *cert. denied*, 484 U.S. 989 (1987). There the Commission, after detailed consideration, held invalid an amendment to § 1926.28(a) made without notice-and-comment rulemaking—the change of "and" to "or." The Secretary "expressly declined to challenge that ruling on appeal." *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1275 (6th Cir. 1987).

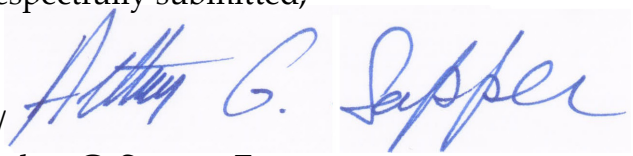
But the Secretary never revised § 1926.28(a). Over a quarter of a century later, the invalid text is still in Part 1926, misleading employers, imposing unnecessary costs, and impairing the reliability of the Code of Federal Regulations. See 44 U.S.C. § 1510(a) (C.F.R. to be "complete codification[]"), (e) ("*prima facie* evidence of the text"). The formality and coerciveness of a declaratory order are much more likely than a holding to impel the Secretary to correct his standards, which would reduce uncertainty and better serve the rule of law.

In sum, a declaratory order would be appropriate.

## III. Conclusion

The order of Judge Simko 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.

Respectfully submitted,

/s/ 

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**Certificate of Service**

I HEREBY CERTIFY that on this 24th day of June 2013, I caused to be sent a copy of the foregoing (labeled "11-2395 Respondent's Reply Brief.pdf") by, as ordered by the Commission, electronic mail to the attorney for the Secretary at Glabman.Scott@dol.gov, and to the attorney for the *amicus curiae* at ljoseph@larryjoseph.com.

/s/ 
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