UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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

RESPONSE BY KIEWIT POWER CONSTRUCTORS CO. TO CERTAIN ARGUMENTS IN SECRETARY'S REPLY BRIEF

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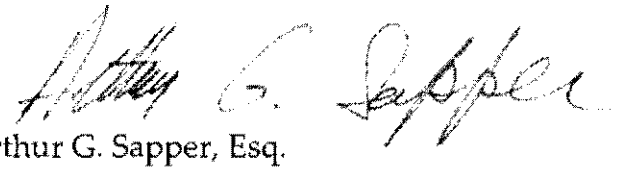
The Secretary argues that "[t]he most natural reading of [APA § 559] is that a subsequent statute does not override the APA unless the statute does so explicitly, which section 6(a)...does." But this "reading" omits the phrases "to the extent" in § 559 and "established Federal standard" in § 6(a). Section 6(a) is not an in-for-an-inch, in-for-a-mile provision. It overrode the APA only to the extent a provision was an "established Federal standard." Yet, the Secretary never disputes our showing (Br. 18, citing §§ 3(10) & (8) and APA § 551(4)) that that term includes work-defining scope provisions.

As to the claim that KPCC reads § 559 as imposing an "additional" requirement—that a subsequent statute "expressly specif[y] the extent of its supersession"—the Secretary never quotes any such language in KPCC's brief, for there is none. KPCC instead observed that the "extent" question here logically reduces to whether the Secretary showed that work-defining scope provisions are not part of an "established Federal standard" under § 3(10), and "expressly" so. That adds nothing to either statute.

Relying on § 6(a)'s "unless" clause, the Secretary claims that § 1910.5(e)'s revocation "obeyed" its "command to promulgate a standard only if [he] determined that it would improve the safety and health of workers." He ignores the clause's words, which required a standard's adoption "unless he determine[d] that [its] promulgation...would not result in improved safety or health...." That permitted him to refrain from adopting a standard, not to summarily alter it. And inasmuch as § 1910.5(e)'s revocation did not mention the "unless" clause, the argument raises an insoluble *Chenery* problem.

Respectfully submitted,

/s/ 

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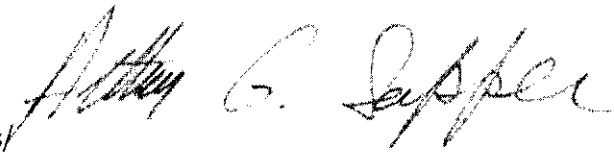
Certificate of Service

I HEREBY CERTIFY that on this 15th day of August 2013, I caused to be sent a copy of the foregoing (labeled "11-2395 Respondent's Response to Arguments in Secretary'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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