

**BY ELECTRONIC MAIL**

November 15, 2013

Ray H. Darling, Jr.  
Executive Secretary  
Occupational Safety and Health Review Commission  
washoshrccommission@oshrc.gov

*Re: Kiewit Power Constructors Co., No. 11-2395*

Dear Mr. Darling:

Pursuant to the Commission's November, 14, 2013 order permitting the Secretary to submit a one-sentence response to Kiewit's November 4, 2013 surreply, the Secretary submits the following response:

*City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1871 (2013), not Kiewit's cited authorities, applies here because OSH Act, section 6(a) *expressly* authorized the Secretary to promulgate established federal standards as OSH Act standards without notice-and-comment rule-making (thereby making the APA anti-implied-repeal provision, 5 U.S.C. § 559, inapplicable), but did not specify the scope of the permitted expansion of the coverage of these established federal standards (thereby making *Chevron* deference to the Secretary's interpretation of section 6(a) appropriate).

Respectfully submitted,

M. PATRICIA SMITH  
Solicitor

JOSEPH M. WOODWARD  
Associate Solicitor for  
Occupational Safety  
and Health

CHARLES F. JAMES  
Counsel for Appellate Litigation

/s/ Scott Glabman  
SCOTT GLABMAN  
Senior Appellate Attorney  
U.S. Department of Labor  
Room S-4004  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210-0001  
(202) 693-5493

Cc: Messrs. Sapper and Joseph

## "Kiewit Power Constructors Co.," No. 11-2395

Glabman, Scott - SOL [Glabman.Scott@dol.gov]

**Sent:** Friday, November 15, 2013 1:40 PM  
**To:** washshrcccommission  
**Cc:** asapper@mwe.com; ljoseph@larryjoseph.com  
**Attachments:** Kiewit-OSHRC-Secretary's R~1.pdf (12 KB)

---

Dear Mr. Darling:

I attach the Secretary's response to Kiewit's supplemental authorities surreply. I have e-mailed a copy of the response to opposing counsel and counsel for *amicus curiae* APA Watch as indicated in the above cc line.

Sincerely,

Scott Glabman  
Senior Appellate Attorney  
Office of the Solicitor  
Occupational Safety and Health Division  
U.S. Department of Labor  
(voice) (202) 693-5493  
(fax) (202) 693-5466

This message may contain information that is privileged or otherwise exempt from disclosure under applicable law. Do not disclose without consulting the Office of the Solicitor. If you believe that you have received this e-mail in error, please notify the sender immediately.