

July 6, 2016

**BY ELECTRONIC MAIL ([washoshrcommission@oshrc.gov](mailto:washoshrcommission@oshrc.gov))**

The Honorable John X. Cerveny, Executive Secretary  
Occupational Safety and Health Review Commission

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

Dear Mr. Cerveny:

By analogy to FED.R.APP.P. 28(j), KPCC respectfully cites these supplemental authorities:

1. *Encino Motorcars, LLC v. Navarro*, 579 U.S. \_\_\_\_ (2016), slip op. at 9, pertaining to KPCC Br. 10, 22 & n. 12, 28, and holding that an agency action, including a change of course, not accompanied by an explanation is “arbitrary and capricious and so cannot carry the force of law.” Although the revocation of § 1910.5(e) on September 9, 1971, stated its intended effect—that it would “remove the limitation” of Walsh-Healey-derived standards to manufacturing (36 Fed. Reg. 18080)—it did not explain why that was appropriate or authorized, including what reasons the Secretary had for changing course since the provision’s adoption three months before. For example, the Secretary did not explain why the Walsh-Healey standards, which were adopted to regulate manufacturing, and of which the construction industry lacked notice during their adoption, could feasibly or appropriately be applied to construction or would address hazards there. Inasmuch as the revocation of 1910.5(e) lacked the “force of law,” § 1910.151(c) does not apply to construction work, and its putative descendant, § 1926.50(g), is invalid.

2. David Michaels, PhD, MPH, Ass’t Sec’y of Labor for Occup. Safety and Health, *Remarks at EPA IRIS Workshop on the NRC Recommendations*, esp. pp. 7-8 (Oct. 15, 2014), pertaining to KPCC Br. at 47 and Sec. Br. at 11. The Remarks state that “the level of evidence required for hazard communication should not be as high as that required to support regulatory decisions”; and “The degree of evidence to support a hazard finding for this [hazard communication] purpose can rely on less certain evidence supported by studies of lesser quality.”

The undersigned certifies that this letter to the above point contains 277 words.

\* \* \*

In light of *Perez v. Mortgage Bankers Ass’n*, 135 S.Ct. 1199 (2015), KPCC withdraws the parenthesized sentence at the bottom of KPCC Br. 28: “(Even interpretive rules may not be revoked without notice and comment....)”.

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Respectfully submitted,

A handwritten signature in blue ink that reads "Arthur G. Sapper". The signature is written in a cursive style and is contained within a light blue rectangular box.

/s/ Arthur G. Sapper

cc: Messrs. Glabman and Joseph (electronic service certified this date)