

October 24, 2013

BY ELECTRONIC MAIL (washoshrccommission@oshrc.gov)

The Honorable Ray H. Darling, Jr., Executive Secretary
Occupational Safety and Health Review Commission

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

Dear Mr. Darling:

By analogy to FED.R.APP.P. 28(j), KPCC respectfully cites the following additional authorities for the proposition that *Chevron* is inapplicable if a matter must be “clear”: *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (because retroactivity must be “clear” (*id.* at 316), “there is, for *Chevron* purposes, no ambiguity ... to resolve”); *Zivkovic v. Holder*, 724 F.3d 894, 898-900 (7th Cir. 2013) (under *St. Cyr*, requirement that retroactivity be clear “eliminates ambiguity from the picture”; *Chevron* and *FCC v. Arlington*, 133 S.Ct. 1863 (2013), inapplicable); *Zuluaga Martinez v. INS*, 523 F.3d 365, 372 (2d Cir. 2008) (because retroactivity must be “clear,” “statutory silence” does not “trigger *Chevron* deference,” citing *St. Cyr*), *cert. denied*, 555 U.S. 1170 (2009); *Ledezma-Galicia v. Holder*, 636 F.3d 1059, 1067, 1075 (9th Cir. 2010) (implied repeal; “*Chevron* deference has no role to play” because “clear” showing required, citing *St. Cyr*), *cert. denied*, 555 U.S. 1170 (2009).

The additional authorities pertain to the argument made at KPCC Br. 17; KPCC Reply Br. 2-3; Sec. Br. 16; and Sec. Reply Br. 2-4.

Please distribute this letter to the Commission and the General Counsel, and electronically acknowledge receipt to asapper@mwe.com.

Respectfully submitted,



/s/ Arthur G. Sapper

cc: Messrs. Glabman and Joseph

Stansbury, Terrell D.

From: washshrccommission
Sent: Thursday, October 24, 2013 4:31 PM
To: Darling, Jr., Ray H.; Acree, Stella K.; Besera, Eden; Stansbury, Terrell D.
Subject: FW: Kiewit Power Constructors, Inc., OSHRC Docket No. 11-2395
Attachments: 10_24_13 KPCC Rule 28(j) Letter.pdf

Importance: High

From: Sapper, Arthur G. [asapper@mwe.com]
Sent: Thursday, October 24, 2013 4:23 PM
To: washshrccommission
Cc: 'Glabman.Scott@DOL.GOV'; 'LJoseph@LarryJoseph.com'
Subject: Kiewit Power Constructors, Inc., OSHRC Docket No. 11-2395

Dear Mr. Darling:

Attached is a letter from KPCC in the above-entitled case.

Respectfully submitted,

Arthur G. Sapper, attorney for Kiewit Power

Constructors Co.

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