United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

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

ON BRIEFS:

Scott Glabman, Senior Appellate Attorney; Charles F. James, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Arthur G. Sapper, Esq.; Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Washington, DC
For the Respondent

DECISION

Before: MACDOUGALL, Chairman; ATTWOOD and SULLIVAN, Commissioners.

BY THE COMMISSION:

Enacted by Congress in 1970, the Occupational Safety and Health Act permitted the Secretary of Labor under section 6(a) to "promulgate as an occupational safety or health standard any . . . established Federal standard," without notice-and-comment rulemaking, "during the period beginning with the effective date of this Act and ending two years" later. 29 U.S.C. § 655(a). At issue in this case is whether the Secretary had the authority under section 6(a) to adopt a "quick-drenching" standard that was originally promulgated under the Walsh-Healey Public Contracts Act of 1936 (WHA) and applied only to non-construction employers contracting with the federal government, as an Occupational Safety and Health Administration standard generally applicable to all employers, including those in the construction industry. *See* 29 C.F.R. § 1926.50(g). We conclude that section 6(a) did not authorize the Secretary to apply the quick-drenching standard to

construction employers without notice-and-comment rulemaking. Therefore, we vacate a serious citation issued by OSHA to Kiewit Power Constructors Company that alleges a violation of § 1926.50(g).[1]

STATUTORY & REGULATORY BACKGROUND

To begin, we must undertake a review of the somewhat tortured history of § 1926.50(g), which starts with Congress's passage of the OSH Act. The OSH Act authorized the Secretary to promulgate workplace safety and health standards applicable to all employers "engaged in a business affecting commerce." 29 U.S.C. §§ 651(b)(3), 655. Section 4(b)(2) of the OSH Act designated all "safety and health standards" promulgated under several existing labor laws, including the WHA, as temporary "occupational safety and health standards" under the OSH Act, so that these standards would not be repealed until they were replaced by OSHA standards promulgated under section 6. *See* 29 U.S.C. § 653(b)(2); 116 Cong. Rec. H11899 (daily ed. Dec. 17, 1970) (statement of Rep. Steiger). Section 6 provided two different procedures by which the Secretary could promulgate OSHA standards: either pursuant to section 6(a) or section 6(b). *See* 29 U.S.C. § 655.

[1] Kiewit contested the citation and filed a motion to dismiss or for summary judgment, claiming that the cited standard is invalid because it was promulgated without notice-and-comment rulemaking. Kiewit also sought a declaratory order affirming the invalidity of § 1926.50(g). Former Administrative Law Judge Stephen J. Simko, Jr., granted the motion to dismiss and vacated the citation, but he did not consider the motion for a declaratory order, finding that his granting of the motion to dismiss made such an order "unnecessary." To be clear, the Commission has discretion to issue such an order. *See* 5 U.S.C. § 554(e) ("The agency . . . in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."); 29 U.S.C. § 659(c) (permitting the Commission to direct "other appropriate relief"). Such an issuance, though, is an "extraordinary step," *Walker Towing Corp.*, 14 BNA OSHC 2072, 2074 (No. 87-1359, 1991), taken only where the practical effect of the order would be greater than that of a decision. *See Granite City Terminals Corp.*, 12 BNA OSHC 1741, 1748 (No. 83-882-S, 1986) ("[A] declaratory order stating that the company's current use of . . . safety belt protection . . . compli[es] with [§] 1918.23(b) . . . would serve no useful purpose," given the Secretary's "fail[ure] to prove . . . [a] violat[ion] of [that provision]."). Although Kiewit claims on review that issuing a declaratory order here might "coerce" the Secretary into deleting the cited provision from Part 1926, this is speculative. Accordingly, we decline to issue a declaratory order.

Under section 6(a), the Secretary was permitted to promulgate, without notice and comment, any "national consensus standard"[2] or "established Federal standard"[3] as an "occupational safety or health standard" during a two-year period beginning April 28, 1971, the effective date of the OSH Act.[4] 29 U.S.C. § 655(a). Section 6(b) provides a set of notice-and-comment procedures that mirror those of the Administrative Procedure Act (APA), 5 U.S.C. § 500, *et seq.*, for the promulgation of all other standards. 29 U.S.C. § 655(b).

As part of his implementation of section 6(a), the Secretary adopted many WHA standards as OSHA standards, including the WHA's quick-drenching provision, 41 C.F.R. § 50-204.6(c), which was initially codified at § 1910.151(c). 36 Fed. Reg. 10,465, 10,601 (May 29, 1971). As a WHA standard, this provision applied only to employers engaged in the manufacturing or furnishing of materials under contracts with the federal government—it did not apply to construction employers. 41 U.S.C. § 6502(4). The Secretary initially retained this coverage limitation by promulgating simultaneously with the quick-drenching standard a provision, 29 C.F.R. § 1910.5(e), stating that standards adopted from the WHA applied *only* to "manufacturing or supply operations which would be subject to the Walsh-Healey Act." 36 Fed. Reg. at 10,468.

---

[2] "The term 'national consensus standard' means any occupational safety and health standard or modification thereof which (1), has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies." 29 U.S.C. § 652(9).

[3] "The term 'established Federal standard' means any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on the date of enactment of this Act." 29 U.S.C. § 652(10).

[4] Section 6(a) of the OSH Act states:

> Without regard to chapter 5 of title 5, United States Code, or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this Act and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

29 U.S.C. § 655(a).

A little more than three months later, however, the Secretary revoked § 1910.5(e)—without notice and comment—to make § 1910.151(c) and all other standards adopted from the WHA applicable to *all* employers covered by the OSH Act, including construction employers. 36 Fed. Reg. 18,080, 18,081 (Sept. 9, 1971) (relying on OSH Act sections 6(a) and 8(g), and stating revocation was to "remove the limitation to the application of the [WHA] standards so that they may apply to every employment and place of employment exposed to hazards covered by the standards").

In 1979, OSHA issued a "Notice of Enforcement Policy and Republication of Standards" (Notice) listing construction-specific standards (from Part 1926) and general industry standards (from Part 1910) that the agency identified as being applicable to the construction industry, including the quick-drenching standard, § 1910.151(c). 44 Fed. Reg. 8575, 8577, 8589 (Feb. 9, 1979). The Notice stated that it was the "first step in the agency's long[-]range program to modify Part 1926 into a single comprehensive set of OSHA regulations for use on construction worksites." *Id.* at 8577. Subsequently, in 1983 and 1991, OSHA issued additional guidance identifying general industry standards it considered applicable to construction. *See* 58 Fed. Reg. 35,075, 35,076 (June 30, 1993).

In 1993, OSHA codified in Part 1926 the general industry standards it deemed applicable to construction work. *Id.* At that time, OSHA acknowledged that it had not engaged in notice-and-comment rulemaking, but it invoked the APA's "good cause" exemption, asserting that its action was merely a codification requested by the construction industry of standards that already applied to construction employers. *Id.* at 35,076-77. *See* 5 U.S.C. § 553(b)(3)(B); 29 C.F.R. § 1911.5. OSHA explained that the codification did not alter the substantive requirements of the standards or change the existing rights or obligations of regulated parties. 58 Fed. Reg. at 35,077. The text of the general industry quick-drenching provision, § 1910.151(c), which OSHA had previously identified in 1979 as being applicable to construction, was added to 29 C.F.R. § 1926.50, the construction medical services and first aid standard, as subsection (g). 58 Fed. Reg. at 35,084.

Now that we have walked down this long and winding road, we can pick up, nearly forty years after the enactment of the OSH Act, with the Secretary's issuance of a citation to Kiewit for an alleged serious violation of § 1926.50(g).

DISCUSSION

Kiewit was engaged in construction at a worksite in Rogersville, Tennessee, when its worksite was inspected by OSHA. Following the inspection, Kiewit was issued a citation alleging a violation of § 1926.50(g)—the construction "quick-drenching" provision that requires immediate onsite access to eye/body wash facilities for employees who may be exposed to "injurious corrosive materials."[5] The Secretary contends that section 6(a) of the OSH Act authorized him to adopt the WHA quick-drenching provision as an OSHA standard and expand its scope to include the construction industry without notice-and-comment rulemaking. The Secretary further maintains that his interpretation of this section of the OSH Act is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Kiewit claims that the Secretary lacked such authority because § 1926.50(g)'s original "source standard" was promulgated under the WHA and, therefore, did not apply to construction work; thus, the Secretary's adoption of it as a construction standard (without notice-and-comment rulemaking) was a substantive change, which is impermissible under section 6(a).[6] This case turns on the authority granted to the Secretary in section 6(a) to take such action.

---

[5] The cited provision states that "[w]here the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use." 29 C.F.R. § 1926.50(g). The citation alleges that Kiewit employees used an electrical insulating resin on a daily basis and that the resin packaging indicated that it was corrosive.

[6] In vacating the citation, the judge focused entirely on OSHA's 1993 codification of the cited provision in Part 1926, finding that this was a substantive change requiring notice-and-comment rulemaking because "[b]y moving the [quick-drenching] requirement into the construction standard, there becomes a presumption of applicability to construction work that otherwise does not exist for provisions contained in . . . Part 1910[.]" The judge also reasoned that "feasibility of compliance becomes more difficult or even impossible for a cited employer to challenge."

This rationale is flawed for two reasons. First, no such "presumption of applicability" exists—the Secretary always has the burden of proving that a standard applies to a particular condition in a particular case, regardless of whether that standard has been codified in Part 1926 or Part 1910. *See Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129-30 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1980). Second, codification of a standard in one part or another has no bearing on the issue of feasibility—feasibility of compliance is always presumed, as reflected in the fact that infeasibility is an affirmative defense that must be proven by the employer. *See Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1202 (No. 90-2304, 1993), *aff'd*, 26 F.3d 573 (5th Cir. 1994). In any event, the Secretary does not argue that the 1993 codification was what made the quick-drenching standard applicable here. Rather, he asserts that section 6(a) "authorized

I. Plain Language of Section 6(a)

In determining whether § 1926.50(g) was lawfully promulgated pursuant to the authority granted to the Secretary by section 6(a) of the OSH Act, "the first step in our analysis is to determine whether the [statutory] language at issue has a plain meaning with regard to the particular dispute before us, or whether it is ambiguous." *Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286, 1293 (No. 00-1402, 2010) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). The "plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Shell Oil*, 519 U.S. at 341. Although section 6(a) provides for the adoption of certain safety and health standards during a particular period of time without notice-and-comment rulemaking, it is silent as to whether the Secretary may apply "any established Federal standard" adopted "as an occupational safety or health standard" to industries beyond those the original standard covered. The OSH Act defines "occupational safety and health standard" only generally, without reference to the scope of coverage. *See* 29 U.S.C. § 652(8) ("The term 'occupational safety and health standard' means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment."). The Secretary concedes as much, stating on review that "the OSH Act is ambiguous about the scope of the authorized expanded coverage of established federal standards." In these circumstances, we find that section 6(a) is ambiguous as to the issue before us.[7]

[him in 1971] to extend the coverage of the [WHA] 'quick[-]drenching' standard . . . to construction employers without notice-and-comment rule-making." Kiewit argues, in part, that the manner by which the Secretary adopted the quick-drenching provision as an OSH Act standard—namely, revocation of § 1910.5(e)—was "unlawful" for several reasons. Regardless of the mechanism the Secretary used, though, the issue here is the Secretary's authority under section 6(a), and the 1993 codification is irrelevant in that regard.

[7] Our dissenting colleague asserts that this finding of ambiguity results from a "superficial reading" of section 6(a). Yet, neither the canons of statutory construction, nor the statutory context of section 6(a), changes the fact that the provision—even when read in context—is entirely silent as to whether the Secretary was authorized to expand the scope of WHA standards to new industries. Further, in responding to our colleague's attack on our interpretation of section 6(a), we are mindful that the Supreme Court has stated "that Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.' " *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1626-27 (2018) (quoting

II. Whether Secretary's Interpretation Is Entitled to *Chevron* Deference

"In the usual course, when an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and if the agency's interpretation is reasonable." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124 (2016) (discussing principles of *Chevron* deference). Such "deference is not warranted," however, "where the regulation is 'procedurally defective'—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation." *Id.* at 2125. As the Court noted, "where a proper challenge is raised to the agency procedures, and those procedures are defective, a court should not accord *Chevron* deference to the agency interpretation." *Id.* We find that Kiewit's challenge is not only proper but also meritorious.

A. Secretary's Interpretation Must Be Reasonable

"One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Id.* Here, the Secretary's 1971 promulgation of § 1910.5(e) shows that he initially interpreted section 6(a) as *precluding* him from expanding the scope of established federal standards to other industries. *See* 36 Fed. Reg. at 10,468 ("Whenever the source of a standard . . . is . . . an established federal standard published in 41 C.F.R. Part 50-204, the standard . . . is intended to apply to manufacturing and supply operations which would be subject to the [WHA] if there were a Federal contract . . . involved."). Then, without explanation, the Secretary reversed course and interpreted section 6(a) as *allowing* him to apply WHA-derived standards to "every employment and place of employment exposed to hazards covered by the standards."[8] 36 Fed. Reg. at 18,081. Having failed to "provide a reasoned explanation" for this

---

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)). Our colleague's conclusion that section 6(a) must be read contrary to the primacy of notice-and-comment rulemaking and as authorizing the Secretary to expand the coverage of WHA-derived standards to non-manufacturing industries falls short in light of this principle.

[8] Our dissenting colleague claims that the Secretary's adoption of § 1910.5(e) did not mean that he considered a scope expansion outside of his section 6(a) authority, because § 1910.5(c)(2) "plainly contemplates that under appropriate circumstances general standards . . . shall apply to industries that also have their own . . . standards." Section 1910.5(c)(2), however, is not, as our colleague describes it, "Part 1910's broad statement regarding the scope of Part 1910 standards." Rather, it applies only in the event of a conflict with an industry-specific standard. Thus, § 1910.5(c) is irrelevant as to the § 1910.5(e) revocation issue. Additionally, our colleague posits that the Secretary's revocation of § 1910.5(e) was not a change from agency practice. Before the

complete about-face, we find the Secretary's "interpretation [of section 6(a)] to be an arbitrary and capricious change from agency practice . . . [that] receives no *Chevron* deference."[9] *Encino Motorcars*, 136 S. Ct. at 2125-26 (citation omitted); *cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("[A]n agency changing its course by rescinding a rule

---

revocation, WHA standards had a limited scope; after the revocation, they had a sweeping scope. We fail to see how this was not such a change.

[9] We find, therefore, that Congress authorized only a *limited range of actions* under section 6(a) for the Secretary to adopt certain standards, not including the action at issue here.

Commissioner Sullivan further notes that essentially, the Secretary argues that section 6(a) gave him "free rein" to engage in promulgation, adoption, and revocation of health and safety standards for two years, without regard to the language in section 6(a), which states that these health and safety standards pertained to "specifically designated employees." In her dissent, Commissioner Attwood asserts that there is no support for reading section 6(a) as limiting the application of established federal standards to those industries to which they originally applied. The meaning of the words Congress chose to use, however, demonstrates that this reading is the only plausible interpretation of the statute—indeed, this was the Secretary's own interpretation until he chose to revoke § 1910.5(e). The word "specific" means "having a special application, bearing or reference; specifying, explicit, or definite," and "precise, or particular." *Random House Dictionary of the English Language* 1366 (1971). "Designate" means "to mark or point out; indicate; show; specify," and "to nominate or select for a duty, office, purpose, etc." *Id.* at 391. In Commissioner Sullivan's view, it is clear from these contemporaneous definitions that "specifically designated" means a "particular" employee working for a particular "purpose," which is the interpretation described above. By contrast, Commissioner Attwood's interpretation—that "specifically designated employees" means *all* additional employees in industries not under the source standards' protection—is not only completely inconsistent with the plain meaning of these terms as described above, but was part of a bill introduced by Rep. Dominick V. Daniels of New Jersey and rejected by the House before it passed the OSH Act. *See* H.R. 16785, 91st Cong. § 6 (2d. Sess. 1970) (stating that any established federal standard adopted under that bill's equivalent of section 6(a) was "not limited to its present area of application"). The term "specifically designated" was chosen for a reason, and if the drafters of section 6(a) meant "all additional employees or industries not previously covered," they would have said so. Clearly, the interpretation that Commissioner Attwood propounds today was rejected by Congress decades ago. Commissioner Attwood also states that our interpretation renders meaningless the language, "unless the promulgation of such a standard would not result in improved safety or health for specifically designated employees," because there would never be a circumstance where the adoption of a standard would *not* result in improved safety and health for specifically designated employees. The problem with this is that Congress first imposed a more significant limitation on the Secretary—he was not authorized to promulgate *new* standards covering *new* industries and employees not previously covered. This principal limitation was placed on the Secretary for good reason; the various stakeholders, including the additional employees cited by Commissioner Attwood as the "specifically designated employees," would have no input given the lack of notice-and-comment rulemaking.

is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.").[10]

The Secretary's interpretation of section 6(a) is also unreasonable in light of the language of the provision, its statutory context, and the statutory history. *See Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1570 (D.C. Cir. 1984) (assessing reasonableness of "agency interpretation" in light of "statutory language and other portions of legislative history"). The Secretary asserts that section 6(a) "expressly exempted [him] from APA rule-making requirements" so that established federal standards could be adopted as soon as practicable, and that this exemption "demonstrate[s] that [he] had authority to extend the coverage" of the quick-drenching standard to construction employers. The statute's exemption, however, bestowed no such authority—section 6(a) says nothing about expanding the scope of established federal standards. In fact, "established Federal standard" is defined as any safety or health standard established by a federal agency "and *presently* in effect," 29 U.S.C. § 652(10) (emphasis added), and the WHA standards "presently in effect" at the time did not apply to the construction industry.[11]

Furthermore, the standards that section 6(a) allowed the Secretary to adopt—"national consensus standard[s]" and "established Federal standard[s]"—were originally promulgated using some type of notice-and-comment procedure, meaning that only the affected industries had notice of the standards' development and had the opportunity to give input. *See* 29 U.S.C. § 652(9) (defining "national consensus standard" as one "adopted and promulgated . . . under procedures whereby it can be determined by the Secretary that *persons interested and affected by the scope or*

---

[10] While our dissenting colleague disparages our reliance upon *Encino Motorcars* as "hogwash," the fact remains that the Court has made clear that *Chevron* deference is not owed to an agency's interpretation "where a proper challenge is raised to the agency procedures, and those procedures are defective." 136 S. Ct. at 2125. Given the procedural defects we find here, *Chevron* deference is simply not available.

[11] Our dissenting colleague claims that "presently in effect" means only "that the standard . . . was still on the books" on the effective date of the OSH Act. The definition of "established Federal standard," however, requires that the standard be "operative," and such WHA standards were operative only as to the manufacturing industry. As such, the scope of such standards cannot be ignored. Further, Congress included the language "presently in effect" because standards under the Construction Safety Act of 1969 (CSA) were promulgated after the OSH Act was passed, but before the OSH Act's effective date—thus, Congress sought to ensure that the CSA standards would be deemed "established Federal standards." *See generally Underhill Constr. Corp. v. Sec'y of Labor*, 526 F.2d 53, 55-56 (2d Cir. 1975).

provisions of the standard have reached substantial agreement on its adoption" and "formulated in a manner which afforded an opportunity for diverse views to be considered") (emphasis added); 5 U.S.C. § 553(b)-(c) (requiring, for promulgation of federal standards, a "notice of proposed rule making [to] be published in the Federal Register," and "the agency [to] give interested persons an opportunity to participate"). Applying the Secretary's interpretation here would allow him to adopt and apply a WHA standard to an entirely different industry, one that had no reason or incentive to participate in its original promulgation because it was not affected by the rulemaking. Depriving the construction industry of its "opportunity to participate" in the rulemaking process is contrary to the OSH Act's language and intent. *See United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1237 (D.C. Cir. 2008) ("[I]f we find the statutory language ambiguous, we look beyond the text for other indicia of congressional intent."); *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986, 989 (6th Cir. 2000) ("When a statute is ambiguous, we look to its purpose and may consider the statute's policy implications in determining what Congress intended.").

Counsel for the Secretary did not dispute at oral argument that the Secretary lacks the authority under section 6(a) to make substantive changes to a source standard. At the same time, counsel argued that section 6(a)'s only limitation on expanding the coverage of established federal standards is that the Secretary could not modify the *protective terms* of such a standard—for example, the Secretary could not have specified additional requirements for a quick-drenching station that were not already set forth in the WHA standard. Accordingly, the Secretary argues that he was free to expand the scope of such standards, given the OSH Act's general protective purpose. We see no basis for such a distinction. The Secretary cannot point to an affirmative grant of authority to expand the scope of established federal standards, and it is illogical to suggest that he was authorized to do so simply because he could *not* change the terms of the standard. The Secretary also fails to adequately address the absurdities that could result from his proposed interpretation of section 6(a)—for example, that maritime or shipbuilding standards could be applied to the manufacturing industry, or construction standards could be applied to the agricultural industry. The Secretary's argument that each standard is limited only by its own "content restrictions" ignores the fact that the "scope provision" of each standard is, in itself, a "content" restricting provision—such as the scope provisions found in other standards (for example, in the agriculture or bloodborne pathogens standards, 29 C.F.R. §§ 1928.1,

1910.1030(a)). We do not believe Congress intended to permit an interpretation of section 6(a) that would produce such illogical results.[12]

B. Modification to APA Notice-and-Comment Process Not to Be Lightly Presumed

Furthermore, a modification to the notice-and-comment process is "not lightly to be presumed." *Marcello v. Bonds*, 349 U.S. 302, 310 (1955) (discussing APA section 12 requirement that any exemptions from notice-and-comment rulemaking be express); *Asiana Airlines v. F.A.A.*, 134 F.3d 393, 397 (D.C. Cir. 1998) ("[T]he import of the [APA's] instruction is that Congress's *intent to make a substantive change* [from ordinary notice-and-comment procedures] be clear," so "[t]he question . . . is whether Congress has established procedures so clearly different from those required by the APA that it must have intended to displace the norm.") (internal citation omitted). We find that Congress did not intend so extraordinary a process that would allow the Secretary to side-step both Congress and the regulated public, such that he could apply the quick-drenching standard to construction employers without notice-and-comment rulemaking.[13]

The Secretary also contends that because section 4(b)(2) of the OSH Act "required [him] to supersede the established federal standards with OSH Act standards [he] deemed to be more effective," section 6(a) must have "authorized him to extend the coverage of [WHA] standards to construction, without notice-and-comment rulemaking, where the superseding OSH Act standards provided [greater] protection from [construction-related] hazards." The Secretary, however, not only misreads section 4(b)(2), but he draws an erroneous conclusion from his misreading. Section 4(b)(2) did not direct the Secretary to supersede each established federal standard by promulgating

---

[12] There is no dispute that section 6(a) did not authorize the Secretary to promulgate a new safety and health standard. However, the actual impact of the Secretary's actions was to impose on the construction industry an entirely new standard, including its requirements.

[13] Contrary to our dissenting colleague's assertion, *Marcello v. Bonds* and its progeny are quite relevant, insofar as they uphold the primacy of notice-and-comment rulemaking. Additionally, our colleague claims that our analysis here is "contradicted" by our "concession" that WHA standards could be applied to manufacturers without federal contracts, because those manufacturers would have had no reason to participate in the promulgation of those standards. We disagree with this premise. Given that many companies have a mix of both government and private work, or at a minimum the possibility of a future federal contract, this would have given many manufacturers an interest in the promulgation of WHA standards. At the very least, *some* manufacturers had an interest in participating in the WHA standard promulgation process, whereas *no* employers in the construction industry had any such interest.

a new one under the OSH Act. Rather, section 4(b)(2) merely ensured that the OSH Act would not be construed as repealing standards promulgated under existing laws, like the WHA. Also, by making WHA standards into OSH Act standards, section 4(b)(2) made available—as the Secretary himself concedes on review—the OSH Act's "flexible enforcement scheme of citations, penalties and requests for injunctive relief," rather than the WHA's "inflexible enforcement scheme of federal contract cancellations and blacklisting." In short, section 4(b)(2) was not a grant of authority to the Secretary, and it has no bearing on whether section 6(a) authorized the Secretary to expand the scope of established federal standards to additional industries.[14]

Furthermore, we find the Secretary's interpretation of section 6(a) inconsistent with the OSH Act's legislative history. *See Superior Masonry Builders, Inc.*, 20 BNA OSHC 1182, 1184 (No. 96-1043, 2003) ("If the meaning is ambiguous, consideration should be given to any contemporaneous legislative history."); *Bradley v. Austin*, 841 F.2d 1288, 1293 (6th Cir. 1988) ("If we find that the statute is ambiguous, we then look to its legislative history."); *Estate of Farnam v. Comm'r of Internal Revenue*, 583 F.3d 581, 584 (8th Cir. 2009) ("If . . . the language of the statute is ambiguous, the court may examine legislative history and other authorities to determine legislative intent."). The legislative history confirms that Congress did not intend to allow the Secretary to apply non-construction, established federal standards to construction employers. On the contrary, Congress intended that such standards be applied only to those industries already covered by them—in other words, those industries or "interested persons," 5 U.S.C. § 553(c), that would have had reason to participate in the original rulemaking. The Report of the Senate Committee on Labor and Public Welfare, which accompanied the bill that would become the OSH Act, states that the purpose of the promulgation procedure authorized by section 6(a) was "to establish as rapidly as possible national occupational safety and health standards *with*

[14] Section 4(b)(2)'s statement that "[s]tandards issued under the laws listed in this paragraph and in effect on or after the effective date of this Act shall be deemed to be occupational safety and health standards issued under this Act, as well as under such other Acts," simply dealt with a timing issue unrelated to the issue before us here. As noted above, *see supra* note 11, the CSA was "in force on the date of enactment of [the OSH] Act," 29 U.S.C. § 652(10) (defining "established Federal standard"), but the standards promulgated pursuant to the CSA did not become effective until the day before the OSH Act became effective. *See Morrison-Knudsen Co.*, 16 BNA OSHC 1105, 1108-10 (No. 88-0572, 1993) (although certain CSA standards were not in effect on the date of the OSH Act's enactment, this did not invalidate their promulgation as OSHA standards because, in accordance with section 4(b)(2), the CSA standards were in effect by the OSH Act's effective date).

which industry is familiar." S. REP. NO. 91-1282, at 6 (2d Sess. 1970) (emphasis added). Indeed, while the Senate Report notes that "standards which have been issued under other Federal statutes . . . may be made applicable to additional employees who are not under the protection of such other Federal laws," it makes clear that "[s]uch standards have already been subjected to the procedural scrutiny mandated by the law under which they were issued." *Id.* That "procedural scrutiny" would not have involved industries unaffected by the standard, so Congress's reliance on such scrutiny having occurred would have been unavailing if section 6(a) was intended to permit the Secretary to apply such standards to other industries.

The Conference Report also shows that Congress did not intend non-construction established federal standards to be applied to the construction industry without notice-and-comment rulemaking. Specifically, the Conference Report states that "[t]he conferees intend that the Secretary develop health and safety standards for construction workers . . . pursuant to the provisions of [the Construction Safety Act of 1969] and that he use the same mechanisms . . . for the development of . . . standards for all the other construction workers newly covered by this Act." H.R. REP. NO. 91-1765, at 33 (2d Sess. 1970). The Construction Safety Act (CSA) requires that "safety and health standards the Secretary of Labor prescribes by regulation [be] based on proceedings pursuant to section 553 of title 5, provided that the proceedings include a hearing similar in nature to that authorized by [that] section." 40 U.S.C. § 3704(a)(1). Section 553 of Title 5 is the APA's "Rulemaking" provision, which requires a notice-and-comment procedure. 5 U.S.C. § 553(b)-(c) ("General notice of proposed rule making shall be published in the Federal Register, . . . [and] the agency shall give interested persons an opportunity to . . . submi[t] written data, views, or arguments . . . .").

Language included in one version of the bill, but ultimately not included in the OSH Act, stands as further proof that Congress never intended WHA standards to apply to construction employers. A bill introduced by Rep. Dominick V. Daniels of New Jersey stated that any established federal standard adopted under that bill's equivalent of section 6(a) was "not limited to its present area of application." H.R. 16785, 91st Cong. § 6 (2d. Sess. 1970). The Secretary's only response to this legislative history is to argue that: (1) because Congress did not vote on the Daniels bill, no conclusion can be drawn from its omission of this language in the statute as enacted; and (2) the omission of the language is meaningless because it would have "merely clarified" what is otherwise evident—that the Secretary has the authority under the OSH Act to

expand the scope of established federal standards. The weakness of these arguments is self-evident. The Daniels bill contained a clear expression of authority to expand the scope of established federal standards to other industries, and the OSH Act does not. The Secretary cannot reasonably claim that the decision to omit this language sheds no light on the issue at hand. Had the Daniels language been unnecessary because it would have "merely clarified" such authority in the OSH Act, we would not be here today.[15]

The Secretary, for his part, argues that the legislative history "reveals Congress's intent to require the Secretary to adopt established federal standards . . . as soon as possible, *without notice-and-comment rule-making*, to provide immediate protection to under[-]protected workers." Our dissenting colleague, in turn, picks up this mantle. One need not, however, resort to legislative history as support for this general principle—it is evident from section 6(a) itself, which plainly increased worker protections by authorizing the adoption of existing standards as OSHA standards. Unsurprisingly, there are floor statements raising concern about the large number of unprotected workers, *see* 116 Cong. Rec. S18249 (daily ed. Nov. 16, 1970) (statement of Sen. Williams) ("[M]ore than 14,500 workers . . . are killed by industrial accidents each year."); 116 Cong. Rec. H10636 (daily ed. Nov. 23, 1970) (statement of Rep. Gaydos) ("[T]his bill . . . would protect at least 11 million workers now outside Federal protection."), but none of them mentions expanding the scope of established federal standards beyond the industries to which they had originally applied. Even so, section 6(a) did allow the Secretary to expand the scope of the previous WHA standards—to all manufacturers, not just those with federal contracts—thus, reaching, as our colleague seeks, "as many employers as possible," but within the authority and limitations set by Congress.[16] Similarly, while the Senate Report states that the purpose of section 6(a) is to establish safety and health standards "as rapidly as possible," S. REP. NO. 91-1282, at 6, nothing in the Report supports the notion that the Secretary was authorized to disregard the WHA's limited coverage to those employers engaged in manufacturing. Indeed, as noted, the standards that were to be adopted "as rapidly as possible" were those "with which industry [was] familiar." *Id. See*

[15] If Congress meant to authorize expansion of the coverage of established federal standards to *all employees* that may be exposed to the particular hazards covered by those standards, it could have said just that.

[16] Such a reading is not a "wishful reading of section 6(a)" as our colleague asserts but a content-neutral and appropriate one.

also 29 C.F.R. § 1910.1(a) ("The legislative purpose of [section 6(a)] is to establish, as rapidly as possible and without regard to the rule-making provisions of the [APA] standards with which industries are generally familiar, and on whose adoption *interested and affected persons have already had an opportunity to express their views*.") (emphasis added).[17]

The Secretary relies heavily on two Commission cases, neither of which controls our decision here. In *Bechtel Power Co.*, 4 BNA OSHC 1005 (No. 5064, 1976), *aff'd*, 548 F.2d 248 (8th Cir. 1977), the Commission concluded that the Secretary was authorized by section 6(a) to apply a predecessor CSA standard "to employers other than contractors and subcontractors without further rulemaking proceedings." *Id.* at 1008. According to the Secretary, this holding supports his expansion of the scope of the quick-drenching standard, but in *Bechtel*, the Secretary did not apply an established federal standard to a new industry; rather, he applied a former CSA standard to a "construction manager at the site of a power plant under construction." *Id.* at 1006. In *American Can Co.*, 10 BNA OSHC 1305 (No. 76-5162, 1982), the Commission deemed permissible the Secretary's section 6(a) promulgation of the WHA noise standard as an OSHA standard, despite the Secretary's failure to adopt the predecessor standard's "scope and application provision." *Id.* at 1311, 1313. Again, though, the Secretary in *American Can* did not apply the WHA-derived standard to a new industry—the employer there was a manufacturer. Neither of these cases, therefore, addresses the Secretary's authority under section 6(a) to expand the scope of established federal standards to additional industries.

Finally, the Secretary relies on two circuit court cases, both of which are inapposite. The Secretary cites dictum from a footnote in *Diebold, Inc. v. Marshall*, 585 F.2d 1327 (6th Cir. 1978), stating that "the Secretary could properly extend the . . . standards [adopted under section 6(a)] to cover employees whose employers were not governed by the source standards, as long as the

[17] A similar eyewash standard—that would have applied to the construction industry—was apparently rejected by the Secretary during his notice-and-comment promulgation of the CSA standards. *Compare* 41 C.F.R. § 50-204.6 (WHA medical services and first aid standard that includes quick-drenching provision in paragraph (c)) *with* Safety and Health Regulations for Construction, 36 Fed. Reg. 7340, 7347-48 (Apr. 17, 1971) (CSA medical services and first aid standard, § 1518.50, mostly borrowed from WHA standard but excluding quick-drenching provision). Additionally, there is no evidence in the record that in 1971, employers and employees in the construction industry were aware of the WHA quick-drenching provision. This conclusion is consistent with the Secretary's original promulgation of § 1910.5(e) limiting application of these WHA standards *only* to employers engaged in manufacturing or supply operations.

extension did not operate to create a protection which had not been afforded to workers who were covered by the source." *Id.* at 1332 n.6. The issue there, however, was whether the Secretary could "impose requirements which the standard's source did not impose," namely "point of operation guarding on press brakes." *Id.* at 1331-32. *Diebold* addressed a change to the substantive, protective requirements of a WHA standard, not application of the standard to a new industry. Equally unavailing is *Lee Way Motor Freight, Inc. v. Secretary of Labo*r, 511 F.2d 864 (10th Cir. 1975). In that case, the court deemed permissible the Secretary's application of a WHA-derived standard to a truck terminal facility owned and operated by "a large interstate motor carrier." *Id.* at 866. Again, the issue was not whether a former WHA standard could be cited against an employer of an industry not covered by the source standard.

In sum, the Secretary's interpretation of section 6(a) is not entitled to deference here. Further, in light of the language of the provision, its statutory context, and the OSH Act's legislative history, the Secretary lacked authority to expand the scope of the WHA quick-drenching standard and apply the standard to the construction industry without notice-and-comment rulemaking. Accordingly, we conclude that OSHA's quick-drenching provision, § 1926.50(g), was invalidly promulgated as a construction standard, and, therefore, we vacate Citation 1, Item 1.

SO ORDERED.

/s/
Heather L. MacDougall
Chairman

/s/
James J. Sullivan, Jr.
Commissioner

Dated: September 28, 2018

ATTWOOD, Commissioner, dissenting:

For almost a half-century, OSHA has applied the WHA-derived quick-drenching standard at issue here, according to its terms, to construction and general industry employers. Today, however, my colleagues accept Kiewit's argument—that section 6(a) of the OSH Act expanded coverage of WHA-derived standards from manufacturers holding federal contracts to all manufacturers engaged in interstate commerce, and to no other employers.[1] As such, the majority decides that the standard, 29 C.F.R. § 1926.50(g), was invalidly promulgated and they vacate the instant citation. My colleagues, however, commit two fundamental errors. First, they fail to apply basic principles of statutory construction and, as a result, find that section 6(a) is ambiguous when, in fact, it is not. And second, having found the provision to be ambiguous, they erroneously conclude that the Secretary's interpretation is not entitled to *Chevron* deference. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984).

I find first that, according to the plain meaning of section 6(a), the Secretary was authorized to apply WHA-derived standards to additional industries, including construction. Second, I find that even if the meaning of section 6(a) were somehow ambiguous, the Secretary's interpretation is in accord with the provision's legislative history and longstanding Commission and circuit court precedent, and therefore is reasonable and entitled to *Chevron* deference. Finally, I conclude that

---

[1] In fact, counsel for Kiewit conceded at oral argument that this was the central premise of the company's claim (*see* Tr. at 19), the timeliness of which was raised by the Commission in its Briefing Notice but was not contested by the Secretary on review. Although the Commission has generally allowed post-citation challenges to both the procedural and substantive validity of a standard, two of the relevant circuit courts here are split on the issue. *See Advance Bronze, Inc. v. Dole*, 917 F.2d 944, 951-52 (6th Cir. 1990) (allowing only substantive challenges to section 6(a) rules); *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 582 n.2 (D.C. Cir. 1985) (allowing both procedural and substantive challenges). Here, Kiewit is challenging the procedural, not substantive, validity of § 1926.50(g). Therefore, its challenge would likely be allowed in the D.C. Circuit, but barred in the Sixth Circuit. When faced with such a "dilemma," the Commission applies its own precedent. *Bethlehem Steel Corp.*, 9 BNA OSHC 1346, 1349 n.12 (No. 76-3444, 1981) (consolidated). Accordingly, I would find Kiewit's challenge timely. However, I note that although Kiewit claims that "confusion" would result from rejecting its argument, confusion is more likely to result from the majority's decision today, given this circuit split. Indeed, my colleagues' acceptance of Kiewit's argument, if sustained, may yield a patchwork of inconsistent rulings on not only the validity of the quick-drenching standard at issue here, but on the validity of other WHA-derived standards as well. A procedural challenge to an action that was taken four decades in the past and has gone undisturbed in the intervening years would thus prove a tempting target for rejection on timeliness grounds.

the Secretary's subsequent 1993 re-codification of the WHA-derived quick-drenching provision in Part 1926 was a purely ministerial action and therefore did not require notice and comment rulemaking. Therefore, I dissent.

I. Plain Language of Section 6(a)

The principal issue before the Commission is one of statutory interpretation. Kiewit challenges the Secretary's long-held position that section 6(a) of the OSH Act authorized the extension of established federal standards to additional industries to which they did not originally apply.

"[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "[I]t should also be the ending point if the plain meaning of that language is clear." *United States v. Choice*, 201 F.3d 837, 840 (6th Cir. 2000). *See also United States v. Barnes*, 295 F.3d 1354, 1359 (D.C. Cir. 2002) ("In construing a statute, we look first for the plain meaning of the text," and "[i]f the language of the statute has a plain and unambiguous meaning, our inquiry ends . . . .") (citation omitted)." Section 6(a) provides:

> Without regard to chapter 5 of title 5, United States Code, or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this Act and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

29 U.S.C. § 655(a). This text most naturally breaks down into four parts. The first part addresses what rulemaking procedures apply—providing that section 6(a) rules are exempt from all APA requirements—and places a two-year limitation on the Secretary's section 6(a) authority. The second part of the provision contains a statutory command—not merely an authorization—that the Secretary "shall . . . promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard." The third part of the provision places a limitation on this command and provides that the Secretary shall not promulgate those standards "he determines . . . would not result in improved safety or health for specifically designated employees." And finally, the fourth part of the provision clarifies that in the event of a conflict

between standards that are required to be adopted, the Secretary "shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees."

My colleagues rightly find that none of these four parts, taken alone, answers the question before us. I disagree, however, with their conclusion that the plain meaning analysis ends there. "Whether statutory language is plain depends [in part] on . . . the specific context in which that language is used, and the broader context of the statute as a whole." *Barnes*, 295 F.3d at 1359. And courts, in determining whether "Congress had an intention on the precise question at issue" are to "employ[] traditional tools of statutory construction," *Allen v. Sec'y of Health & Human Servs.*, 837 F.2d 267, 269 (6th Cir. 1988), tools that demand far more than a superficial reading of the statutory provision. Because my colleagues fail to engage in this broader inquiry, they erroneously conclude that section 6(a) is ambiguous.

A. Tools of Statutory Construction

Section 6(a) commanded the Secretary to promulgate *any* established federal standard and *any* national consensus standard "unless he determine[d] that the promulgation of such a standard would not result in improved safety or health for specifically designated employees."[2] 29 U.S.C. § 655(a). Applying the standard tools of statutory construction, we must attempt to ascribe meaning to this limitation on promulgating *any* standard. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 100 (1992) (OSH Act must be interpreted in manner that "give[s] effect, if possible, to every clause and word" of the statute). In so doing, the text of this limitation reveals that the Secretary was commanded to apply established federal standards, according to their terms, to employees working in all industries, not just those working in the industries for which the standards were originally promulgated. One need only consider the majority's interpretation of section 6(a) to understand this. My colleagues claim that section 6(a) merely authorized the

[2] It is important to recognize the limitations of federal safety and health legislation prior to the passage of the OSH Act. Workers in some segments of the construction, manufacturing, service, shipbuilding, longshoring, and related industries were subject to federal standards. However, even in covered industries, few standards had been promulgated. For example, the WHA standards took up only thirteen pages in the 1969 Code of Federal Regulations. 41 C.F.R. Part 50-204. And at the time the OSH Act was passed, the construction industry was still not subject to *any* mandatory federal safety or health standards. Standards originally promulgated under the Contract Work Hours and Safety Standards Act (commonly referred to as the Construction Safety Act or CSA), 40 U.S.C. § 333, and then adopted under section 6(a) became effective only eleven days prior to the OSH Act's own effective date. 36 Fed. Reg. 7340 (April 17, 1971).

Secretary to expand WHA-derived standards (which previously only applied to manufacturers holding federal contracts) to all manufacturers engaged in interstate commerce. But if this is the case, then section 6(a)'s limitation is rendered meaningless because the adopted WHA standards would *always* "result in improved safety or health" for the newly covered manufacturing employees, given that those employees would not have been protected by any other mandatory safety or health standards at the time of the OSH Act's passage. In other words, if my colleagues are correct, there would have been no purpose for Congress to include this limitation because, given the lack of safety and health standards applicable to non-federal contract manufacturers at the time, it would have been impossible for a WHA-derived standard to *not* improve the safety or health of "specifically designated" manufacturing employees. Therefore, my colleagues' reading of section 6(a)'s limitation eviscerates its only possible purpose—under their reading, there would never be any "specifically designated employees" to whom it could apply.[3]

Thus, the only permissible reading of section 6(a)'s limitation is that established federal standards must be expanded to cover employees *in additional industries* unless application of the standards to the "specifically designated employees" in that industry "would not result in improved safety or health."[4] For example, employees in the ship-repairing industry who engaged in blasting

---

[3] My colleagues seem to think that I have found an elephant hiding in a mousehole. But I have simply concluded that basic principles of statutory interpretation bar them from substituting their own wishful reading of section 6(a) for the provision's actual text. *Gade*, 505 U.S. at 99-100. My colleagues' selective quotation from *Epic Systems Corp.* and *Whitman* (the two cases upon which their "mousehole" theory rests) does not concern the type of statutory interpretation issue presented here. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1626-27 (2018) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)). Those cases explain that when a reviewing court is faced with a choice between *two or more permissible* interpretations of a statutory provision, the court must refrain from choosing an interpretation that would amount to finding an "elephant hiding in a mousehole." Here, as discussed above, only one reading of the statutory text is permissible in order to give effect to every provision of section 6(a)'s statutory text—that is, the only way to preserve the effect of section 6(a)'s limitation is to read the provision as allowing for the expansion of WHA-derived standards to additional industries. Nothing in my colleagues' decision today—not even the elephant or mice—addresses this fundamental problem in their textual analysis.

[4] Commissioner Sullivan attempts to ascribe meaning to the phrase "specifically designated employees," noting that "essentially, the Secretary argues that section 6(a) gave him 'free rein' to engage in promulgation, adoption, and revocation of health and safety standards for two years, without regard to the language in section 6(a) describing that these health and safety standards pertained to 'specifically designated employees.' " It appears that my colleague has rearranged

and were already protected by a personal protective equipment standard, might not have experienced improved safety and health as a result of the application to their work of the WHA-derived personal protective standard. Or, it is possible that employees in a specific industry might be less safe as the result of the application of an established federal standard due to particular circumstances or working conditions in their industry. By including this explicit limitation in section 6(a), Congress was able to simultaneously ensure that the Secretary expanded the established federal standards to as many employees as possible while safeguarding against the possibility that application of some of the standards might result in less safe working conditions for some "specifically designated," newly covered employees.[5]

Moreover, the text of section 6(a) includes only two limitations on the Secretary's authority to promulgate established federal and national consensus standards. As noted, he could not promulgate a standard that "would not result in improved safety or health for specifically designated employees." In addition, in the event of a conflict among standards, he was required to choose the standard "which assures the greatest protection of the safety or health of the affected employees." Both limitations signal that Congress intended to grant sweeping authority to the

---

the words of the provision so that it would read: "The Secretary shall . . . *for specifically designated employees* promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health." Thus, for example, the WHA standards, which protected employees of manufacturers with federal contracts (the "specifically designated employees") would, as occupational safety and health standards under the OSH Act, apply only to those same "specifically designated employees." There is no textual support (or any other support, for that matter) for this reading of the section 6(a) limitation. Moreover, as my analysis demonstrates, Commissioner Sullivan's claim that I read "specifically designated employees" as meaning "all additional employees or industries" is wildly off the mark.

Finally, Commissioner Sullivan's recitation of the dictionary definitions of the terms "specific" and "designate" entirely misses the point—the issue here is not what those individual words mean, but only, as discussed above, the types of "specifically designated employees" the provision must be referencing, given the placement of the phrase in the statutory provision. Likewise, his resort to the legislative history (and plainly erroneous characterization of it) is entirely inappropriate given that, as discussed above, the provision is not ambiguous. *Gemsco, Inc., v. Walling*, 324 U.S. 244, 260 (1945) ("The plain words and meaning of a statute cannot be overcome by" resort to "legislative history which . . . may furnish dubious bases for inference in every direction.").

[5] The same is true for national consensus standards promulgated under section 6(a). If application of such a standard were limited to the predecessor's scope, the "specifically designated employees" language would be meaningless.

Secretary to make certain that standards adopted under section 6(a) were as protective as possible. Absent other evidence to the contrary, this general command followed by only two specific limitations calls into play the canon of statutory construction, *expressio unius est exclusio alterius*—the explicit mention of one is the exclusion of another. *Field & Assocs., Inc.*, 19 BNA OSHC 1379, 1380 (No. 97-1585, 2001) (applying canon in finding that Secretary did not intend to limit scope of cited fall protection standard to employees engaged in roofing work where such limitation was not included in standard). For both of these reasons, I conclude that the text of section 6(a) must be read as authorizing the Secretary to expand the coverage of WHA-derived standards to non-manufacturing industries.[6]

B. Statutory Context of Section 6(a)

The above plain reading of section 6(a) notwithstanding, my colleagues rely on textual arguments related to other provisions of the OSH Act in finding that the Secretary was not authorized to expand the scope of WHA-derived standards beyond the manufacturing industry. They note that "established federal standard" means, in part, one "presently in effect," 29 U.S.C. § 652(10), and claim that the WHA standards in effect at the time of the OSH Act's passage did not apply to the construction industry and thus could not be made applicable to it via section 6(a). Section 4(b)(2), however, clarifies the meaning of "presently in effect," providing that "[s]tandards issued under [the WHA, the CSA, and other listed statutes] and *in effect on or after the effective date of this Act* shall be deemed to be occupational safety and health standards issued under this Act, as well as under such other Acts." 29 U.S.C. § 653(b)(2) (emphasis added). Thus, "presently in effect" simply means that the standard must have been in effect on or after the effective date of the OSH Act—i.e., it was on the books. It has nothing to do with the scope of that source standard. *See Gen. Motors Corp.*, 9 BNA OSHC 1331, 1336 n.15 (No. 79-4478, 1981) ("We have considered also whether the words 'in effect' in the phrase 'in effect on or after the effective date of this Act' in § 4(b)(2) could be construed to mean 'valid.' We conclude, however, that 'in effect' refers simply to the effective date of the standards.")

Moreover, my colleagues' interpretation of "presently in effect" leads to an untenable conclusion. If "presently in effect" means that the scope of an established federal standard must

[6] The majority charges that I conclude that "section 6(a) must be read contrary to the primacy of notice-and-comment rulemaking . . . ." Indeed, I do; as I discuss at length, section 6(a) expressly eschews *any* application of the rulemaking requirements of the APA and section 6(b).

be maintained, the WHA standards could not be extended from federal contract manufacturers to non-federal contract manufacturers. Yet my colleagues assert that the sole purpose of section 6(a), as it related to WHA standards, was to apply those standards to manufacturers for which the standards were not, by my colleagues' definition, "presently in effect." They cannot have it both ways—their interpretation of "presently in effect" runs headlong into their propounded interpretation of section 6(a).

My colleagues also rely on the definition of "national consensus standard," which specifies, among other things, that such a standard must have been:

> adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption . . . .

29 U.S.C. § 652(9).[7] They argue that this definition is additional textual evidence that Congress intended "national consensus standards" *and* "established federal standards" adopted under section 6(a) to only be applied to employers who had a "reason or incentive to participate in its original promulgation."[8]

This analysis, however, ignores the fact that the definition of "national consensus standard" was designed to limit those standards to ones originally issued by the American National Standards Institute and National Fire Protection Association. S. REP. NO. 91-1282, at 6 (2d Sess. 1970).

---

[7] In support of its interpretation of section 6(a), Kiewit also makes a tortuous argument regarding the relationship between section 4(b)(2) and section 6(a). However, as I agree with my colleagues' finding that section 4(b)(2) "has no bearing on whether section 6(a) authorized the Secretary to expand the scope of established federal standards to additional industries," I find it unnecessary to travel down this particular rabbit hole.

[8] Kiewit makes a similar point, arguing that the OSH Act's legislative history shows Congress mandated the adoption of established federal standards on the basis that the pertinent industry would be familiar with them, and that the standards would "have already been subjected to the procedural scrutiny mandated by the law under which they were issued." S. REP. NO. 91-1282, at 6 (2d Sess. 1970). Because construction employers arguably were not familiar with the WHA standards, Kiewit argues that Congress could not have intended to apply those standards to such employers. But this argument fails to acknowledge that Congress's purpose in including section 6(a) and mandating the adoption of initial standards "as soon as practicable" was to "immediately provid[e] a nationwide minimum level of health and safety" protection to workers. S. REP. NO. 91-1282, at 6 (2d Sess. 1970); *see also Noblecraft Indus., Inc. v. Sec'y of Labor*, 614 F.2d 199, 203 (9th Cir. 1980) (section 6(a) was meant "to meet the pressing need for adoption of OSHA standards on an exceedingly broad industrial front without undue delay").

Additionally, the definition only speaks to how the standards were created by ANSI and NFPA, not to how they could be applied under section 6(a), and nothing in section 6(a) limits the application of those national consensus standards to those industries that participated in the drafting process of those standards. Moreover, although the quoted language appears in the definition of "national consensus standard," the definition of "established Federal standard" says nothing about how *those* standards had been promulgated.[9] And finally, my colleagues' assertion that Congress could not possibly have intended "so extraordinary a process" that would allow the Secretary to apply WHA standards to additional industries without notice-and-comment rulemaking is contradicted by their concession that those standards could be applied to manufacturers without federal contracts—those employers were similarly deprived of their "opportunity to participate in the rulemaking process," and yet my colleagues agree that Congress intended for those employers to be subject to the standards previously applied only to manufacturers with federal contracts.

For all these reasons, I find the plain language of section 6(a)—specifically its limitation that the Secretary must promulgate "any established federal standard . . . unless he determines that the promulgation . . . would not result in improved safety or health for specifically designated employees"—authorized the Secretary to expand the scope of established federal standards to additional industries. *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("[A] statute should be construed [to give effect] to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)); *Colautti v. Franklin*,

---

[9] The Senate Report does, however, discuss the "established Federal standard" provision of section 6(a) (which was identical to that of the final statute). It notes that it is appropriate that national consensus standards be promulgated without regard to the provisions of the Administrative Procedure Act (APA). It then discusses established federal standards:

> The bill also provides for the issuance in similar fashion of those standards which have been issued under other Federal statutes and which under this act may be made applicable to additional employees who are not under the protection of such other Federal laws. Such standards *have already been subjected to the procedural scrutiny mandated by the law under which they were issued*; such standards, moreover, in large part, represent the incorporation of voluntary industrial standards.

S. REP. NO. 91-1282, at 6 (2d Sess. 1970) (emphasis added).

439 U.S. 379, 392 (1979) (noting "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative").

II. *Chevron* Deference

Even "[i]f the intent of Congress on a matter of statutory meaning is ambiguous, however, [we are] to [consider] . . . whether the agency's interpretation is a 'permissible construction of the statute.' " *Mid-Am. Care Found. v. NLRB*, 148 F.3d 638, 642 (6th Cir. 1998) (quoting *Chevron*, 467 U.S. at 843). In other words, "we must defer to the Secretary's statutory interpretation so long as the statute in question is ambiguous and the Secretary's interpretation is reasonable." *Gentiva Healthcare Corp. v. Sebelius*, 723 F.3d 292, 295 (D.C. Cir. 2013) (citation omitted). As explained above, a *Chevron* analysis is unnecessary here because the meaning of section 6(a) in this context is plain. Nonetheless, I would conclude that, even if section 6(a) can be considered ambiguous, in light of its purpose, the Act's legislative history, and the caselaw interpreting section 6(a), the Secretary's interpretation is unquestionably reasonable and therefore entitled to deference.

A. Applicability of *Chevron* Deference

Under *Chevron*, a reviewing court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 844. The agency's interpretation need not be the most reasonable interpretation or the one the reviewing court would have adopted; the interpretation must only be reasonable. *See id.* The Supreme Court has repeatedly reaffirmed this principle, most recently in *City of Arlington v. Fed. Commc'ns Comm'n*, 569 U.S. 290 (2013), emphasizing that there is not "a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field." *Id.* at 296.

Here, there can be no serious debate that the Secretary's interpretation of section 6(a) is entitled to *Chevron* deference.[10] Section 6(a) is a "general conferral of rulemaking authority," *id.*,

[10] Kiewit advances a convoluted argument based on a provision of the APA, 5 U.S.C. § 559, which provides that a "[s]ubsequent statute may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly." Kiewit argues that this provision bars the Secretary from applying the quick-drenching standard at issue here to construction employers without notice-and-comment rulemaking, because section 6(a) did not "expressly" exempt from APA requirements an expansion of the scope of WHA standards to additional industries. Section 6(a), however, is an unambiguous, comprehensive statement mandating that all rulemaking authorized

and the "interpretation claiming deference," *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001), is reflected in regulations "that carry[] the force of law." *Chao v. OSHRC* (*Manganas Painting Co.*), 540 F.3d 519, 526 (6th Cir. 2008); 29 C.F.R. §§ 1910.5(c), 1910.11(a), 1910.151(c)(2).[11] *Compare* 540 F.3d at 525-28 (upholding Secretary's interpretation of 29 U.S.C. § 659(b), over that of the Commission, but stating that Secretary's interpretation was "entitled to only *Skidmore* deference" because she "offered her interpretation . . . only in her litigation position" and had "not pointed to any regulation or any other format that [reflects her interpretation and] carries the force of law . . . .").

---

thereunder is exempt from *all* APA requirements, including section 559. The issue, therefore, is simply whether OSHA's promulgation of the quick-drenching standard falls within the ambit of section 6(a). Kiewit cites nothing for the proposition that section 6(a)'s express renunciation of APA requirements must also have expressly addressed expansion of the scope of adopted standards. Additionally, because 5 U.S.C. § 559 only addresses the statutory language that Congress is required to use to dispense with APA rulemaking (i.e., express language), it has no bearing on the separate issue of whether the Secretary's interpretation of his authority under section 6(a) is entitled to *Chevron* deference.

My colleagues echo this argument and—citing to a line of cases beginning with *Marcello v. Bonds*, 349 U.S. 302 (1955)—assert that a modification to the notice-and-comment process is "not lightly to be presumed." But the issue in *Marcello* and its progeny was whether, in the *absence* of an express exemption, a statute should nonetheless be read as exempting APA notice-and-comment requirements—the Supreme Court has held that as long as the intent is clear, an exemption can be by necessary implication. *See Dorsey v. United States*, 567 U.S. 260, 274 (2012) ("[I]n a comparable context the Court has emphasized that the [APA]'s use of the word 'expressly' does not require Congress to use any 'magical passwords' to exempt a later statute from the provision."). Here, there can be no dispute that the text of section 6(a) contains an express exemption from APA requirements, so this line of cases relied upon by the majority is inapposite.

[11] The Secretary's interpretation of section 6(a) is embodied in multiple regulations. Most importantly, as I discuss more fully below, the Secretary's interpretation of section 6(a) is embodied in § 1910.5(c)(2), in which he provides an actual example of the application of a WHA-derived standard to a non-manufacturing employer. Likewise, in § 1910.11(a), the Secretary specifically states that section 6(a) authorized him to "adopt and extend the applicability of, established Federal standards in effect on April 28, 1971, with respect to every employer, employee, and employment covered by the Act." And finally, by adopting each WHA-derived standard without the WHA's native scope limitation (that limited the WHA standards to only manufacturers engaged in federal contracts), each WHA-derived OSHA standard, including the quick-drenching standard at issue here, constitutes the Secretary's interpretation that he may apply the WHA-derived standards to industries beyond manufacturing. Indeed, the Secretary's revocation of § 1910.5(e) confirms the Secretary's intent that each of the WHA-derived standards is also applicable to non-manufacturing employers.

Nonetheless, in their decision today my colleagues put forth a contrary legal analysis on this issue that is quite astonishing. They cite *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016), for the proposition that "*Chevron* deference is not warranted . . . where the agency errs by failing to follow the *correct procedures* in issuing the regulation." *Id.* at 2125 (emphasis added). In *Encino Motorcars*, the Supreme Court held that a final rule re-interpreting a provision of the Fair Labor Standards Act was "procedurally defective"—and therefore undeserving of *Chevron* deference—because the Secretary had failed to comply with the APA's most basic procedural requirement that the agency provide "adequate reasons" for its change in position. *Id.* The Court explained:

> In promulgating the 2011 regulation, the Department [of Labor] offered barely any explanation. A summary discussion may suffice in other circumstances, but here—in particular because of decades of industry reliance on the Department's prior policy—the explanation fell short of the agency's duty to explain why it deemed it necessary to overrule its previous position.

Id. at 2126.

My colleagues argue that the Secretary's revocation of 29 C.F.R. § 1910.5(e), the regulation that had limited application of WHA-derived standards to manufacturers, suffered the same procedural defect as discussed in *Encino Motorcars*.[12] 36 Fed. Reg. 18,081 (Sept. 9, 1971). They claim that because the Secretary failed to "provide a reasoned explanation" for his change in position, his interpretation that section 6(a) authorized application of WHA-derived standards to construction is wholly undeserving of *Chevron* deference.[13]

This, frankly, is hogwash. First, the Secretary's revocation of § 1910.5(e) was not, as my colleagues claim, without a "reasoned explanation" or prior notice. In the Federal Register notice revoking § 1910.5(e), the Secretary explained that he was doing so pursuant to his authority under section 6(a) of the Act *and* 29 C.F.R. § 1910.4. 36 Fed. Reg. 18,080. Section 1910.4 (which was promulgated at the same time the Secretary adopted the first established federal standards as OSH

---

[12] Section 1910.5(e) stated that WHA-derived standards applied only to "manufacturing or supply operations which would be subject to the Walsh-Healey Act." 36 Fed. Reg. 10465, 10468 (May 29, 1971).

[13] Kiewit similarly argues that § 1910.5(e) "could not be revoked without giving public notice and inviting public comment" pursuant to the APA, and in failing to give reasons for the revocation the Secretary acted arbitrarily and capriciously. For the same reasons discussed above, this argument is entirely without merit.

Act standards under section 6(a) in May 1971) provided that the Secretary preserved his full authority under section 6(a) for the provision's entire two-year period and expressly allowed him to modify or revoke any of the standards in Part 1910 without notice-and-comment rulemaking until April 28, 1973.[14] There can be no question that the Secretary's interpretation of section 6(a) embodied in § 1910.4 is itself reasonable and therefore entitled to *Chevron* deference.[15] Because § 1910.4 gave actual notice to employers that the Secretary might find it appropriate to modify or revoke any of the initial rules promulgated pursuant to section 6(a), the Secretary's revocation of § 1910.5(e) was not, as my colleagues claim, an "arbitrary and capricious change from agency practice," but was in full accord with the Secretary's original interpretation and implementation of section 6(a).[16]

---

[14] Section 1910.4 provides that "[t]he Assistant Secretary of Labor shall have all of the authority of the Secretary of Labor under sections 3(9) and 6(a) of the Act," and as follows:

> The Assistant Secretary of Labor may at any time before April 28, 1973, on his own motion or upon the written petition of any person, by rule promulgate as a standard any national consensus standard and any established Federal standard, pursuant to and in accordance with section 6(a) of the Act, and, in addition, may modify or revoke any standard in this part 1910. In the event of conflict among any such standards, the Assistant Secretary of Labor shall take the action necessary to eliminate the conflict, including the revocation or modification of a standard in this part, so as to assure the greatest protection of the safety or health of the affected employees.

29 C.F.R. § 1910.4(a)-(b).

[15] The Secretary's approach in this regard was eminently reasonable. By immediately promulgating established federal standards but preserving his full authority under section 6(a) to modify or revoke those adoptions for the full two years, the Secretary was able to "establish *as rapidly as possible* national occupational safety and health standards" in order to "immediately provid[e] a nationwide minimum level of health and safety" S. REP. NO. 91-1282, at 6 (2d Sess. 1970) (emphasis added), while ensuring, through § 1910.4, that there was a mechanism to quickly correct any missteps that occurred in the initial promulgation. Notably, neither Respondent nor my colleagues challenge the validity of § 1910.4.

[16] Indeed, this was not the only change in the Part 1910 standards that the Secretary effectuated during section 6(a)'s two-year limitation period. *See, e.g., Deering Milliken, Inc. v. OSHRC*, 630 F.2d 1094, 1097 (5th Cir. 1980) ("On May 29, 1971, acting pursuant to section 6(a), the Secretary of Labor promulgated 29 C.F.R. § 1910.1000 as an OSHA requirement[,] . . . dealing with permissible levels of exposure to air contaminants, including cotton dust. Subsequently, on August 13, 1971, the Secretary published a revision of 29 C.F.R. § 1910.1000, stating that "Section 1910.93 (air-contaminants) (presently designated as 29 C.F.R. § 1910.1000. See n.1 supra at 1096) has been revised in its entirety, in the interest of greater intelligibility and accuracy.").

Second, the Secretary's action was not, as my colleagues assert, "a complete about-face." The Secretary gave no explanation in the May 29, 1971, Federal Register notice for the initial inclusion of § 1910.5(e) in Part 1910. However, there is no evidence that it was originally included because he had concluded that section 6(a) did not authorize an expansion of the WHA-derived standards beyond manufacturing. In fact, as I explain below, § 1910.5(c), which was included in the same Part 1910 issuance, was in direct conflict with § 1910.5(e)'s limitation. Section 1910.5(c), which is Part 1910's broad statement regarding the scope of Part 1910 standards, demonstrates that the Secretary clearly contemplated that WHA-derived standards would, in appropriate circumstances, be applicable to employers other than just manufacturers. The full text of that subsection provides:

> (c)(1) If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process. For example, § 1915.23(c)(3) of this title prescribes personal protective equipment for certain ship repairmen working in specified areas. Such a standard shall apply, and shall not be deemed modified nor superseded by any different general standard whose provisions might otherwise be applicable, to the ship repairmen working in the areas specified in § 1915.23(c)(3).
>
> (2) *On the other hand, any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry, as in subpart B or subpart R of this part, to the extent that none of such particular standards applies. To illustrate, the general standard regarding noise exposure in § 1910.95* [a WHA-derived standard] *applies to employments and places of employment in pulp, paper, and paperboard mills covered by § 1910.261.*

29 C.F.R. § 1910.5(c) (emphasis added). Subsection (c)(2) plainly contemplates that under appropriate circumstances general standards, *including WHA-derived standards*, shall apply to industries that also have their own "particular" standards.[17] First, the reference in that subsection to "subpart B or subpart R of this part" is to the "particular" standards promulgated in Part 1910 for construction; maritime; longshoring; pulp, paper, and paperboard mills; textiles; bakery equipment; laundry machinery and operations; sawmills; pulpwood logging; and agriculture. 29

[17] Kiewit argues, in the context of its contention that the 1993 codification of construction standards was invalid, that references in § 1910.5(c) to standards that "apply" or are "applicable," must be read as excluding standards, such as the WHA standards, that are "inapplicable" to construction. But the references in the subsection clearly are to standards that *apply to a particular hazard or condition*.

C.F.R. §§ 1910.12(a)(1), 1910.13(a), 1910.14(a), 1910.15(a), 1910.16(a), 1910.261(a), 1910.262(a), 1910.263(a), 1910.264(b), 1910.265(a) (1972); 36 Fed. Reg. at 10469, 10669, 10676, 10679, 10687, 10689. The meaning of subsection (c)(2) is clear: even if an industry, such as construction, has its own standards, if those standards do not apply to a particular hazard or condition, "*any standard*" that fills that gap shall apply "according to its terms to any employment and place of employment" in that industry.[18] And, the illustration included in § 1910.5(c)(2) states that § 1910.95(a) and (b), the WHA-derived noise standard, applies to pulp, paper, and paperboard mills, which are industries in Subpart R that do not have their own noise standard. For these reasons, § 1910.5(c)(2) clearly contemplated the application of WHA-derived standards to industries other than manufacturing, and thus directly conflicted with the limitation contained in § 1910.5(e). The courts have recognized that errors such as this were present in the May 1971 Part 1910 promulgation. As the Sixth Circuit noted in *Diebold, Inc. v. Marshall*, 585 F.2d 1327 (6th Cir. 1978), it should not be surprising that anomalies occurred "[g]iven the wide variety of sources for the initial standards package and the rapidity of its promulgation." *Id.* at 1335. The Secretary's prompt revocation of subsection 1910.5(e), authorized as it was by section 6(a) and 29 C.F.R. § 1910.4, removed the anomaly created by the conflicting § 1910.5 provisions.

Moreover, the "correct procedures" at stake in *Encino Motorcars*—specifically, the APA's basic procedural requirement that the agency provide "adequate reasons"—do not apply here because, as I have explained above, section 6(a) rulemaking was expressly exempted from all of the APA's requirements. And finally, one more reason why the holding in *Encino Motorcars* is inapplicable to the Secretary's revocation of § 1910.5(e) relates to the overarching reliance interests at stake in that case—the final rule there implicated "decades of industry reliance." Such interests are simply not present here. In contrast to the rule at issue in *Encino Motorcars*, § 1910.5(e) existed for less than four months, was in effect for less than two weeks, and was never

[18] My colleagues put forth a contrary analysis of § 1910.5(c)(2) that is at odds with the regulation's plain language. I can only suggest that they reread § 1910.5(c)(2)—it does not, as they claim, only "appl[y] in the event of a conflict with an industry-specific standard." 29 C.F.R. § 1910.5(c)(2) ("On the other hand, any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry . . . .").

even published in the Code of Federal Regulations.[19] Thus, the reliance interests the Supreme Court found significant in *Encino Motorcars* are altogether absent here.[20] For all these reasons, *Encino Motorcars* provides no guidance whatsoever regarding the Secretary's revocation of § 1910.5(e) and therefore *Chevron* deference most certainly applies.

B. Reasonableness of the Secretary's Interpretation

The Secretary argues that "[s]ection 6(a) of the OSH Act, its legislative history, and the interpretive case law all demonstrate" the reasonableness of his interpretation that he "had authority to extend the coverage of the [predecessor] Walsh-Healey Act '[quick] drenching standard' to construction employers without notice-and-comment rule-making." Kiewit argues to the contrary,[21] claiming that nothing in section 6(a) "expressly" authorized the Secretary to apply WHA-derived standards to construction employers; that the legislative history shows that Congress intended WHA-derived standards to only apply to manufacturers; and that none of the previous Commission or circuit court cases supports the Secretary's interpretation. My colleagues largely accept Kiewit's arguments and conclude that the Secretary's interpretation is "unreasonable in light of the language of the provision, its statutory context, and the statutory history." On the contrary, proper analysis of the statutory text, legislative history, and interpretive case law leads to the opposite conclusion—the reasonableness of the Secretary's interpretation here cannot seriously be questioned.

1. Legislative History and Purpose of Section 6(a)

The reasonableness of the Secretary's interpretation of section 6(a) is supported by the OSH Act's legislative history and purpose, which makes clear that Congress intended the OSH Act to largely supplant rather than perpetuate regulatory schemes embodied in statutes such as the WHA.[22] 116 CONG. REC. H10623 (daily ed. Nov. 23, 1970) (statement of Rep. Daniels). Multiple

---

[19] Section 1910.5(e) was promulgated on May 29, 1971, took effect on August 27, 1971, and was revoked on September 9, 1971.

[20] Notably, neither my colleagues nor Kiewit discuss the "reliance interests" involved in overturning the Secretary's lengthy and consistent interpretation of section 6(a).

[21] As discussed *supra* note 10, Kiewit argues *Chevron* deference does not apply and therefore its arguments do not directly address the reasonableness issue.

[22] The purpose of section 6(a) was "to establish as rapidly as possible *national* occupational safety and health standards with which industry is familiar." S. REP. NO. 91-1282, at 6 (2d Sess. 1970)

representatives, both Democratic and Republican, repeatedly emphasized that a "broad, comprehensive, and fair occupational safety and health bill" was needed to redress the reactionary and "piecemeal fashion" in which safety standards had been promulgated in the past.[23] *Id.*; 116 CONG. REC. H10616-17 (daily ed. Nov. 23, 1970) (statement of Rep. Madden); 116 CONG. REC. H10618 (daily ed. Nov. 23, 1970) (statement of Rep. Steiger). And, as the Secretary points out, Congress believed this was especially true for the construction industry, which experienced "the heaviest losses of the over 7 million annual occupational injuries . . . ." *See* 116 CONG. REC. S18269 (daily ed. Nov. 16, 1970) (statement of Sen. Yarborough). Given that one of the primary purposes of the OSH Act was to address the shortcomings and limited scope of previous occupational safety and health laws, it was perfectly reasonable for the Secretary to interpret section 6(a) as allowing for the application of relevant general industry standards (such as the quick-drenching standard) to additional industries, including construction employers.

Kiewit makes several arguments to the contrary, all of which my colleagues repeat in their decision today, and none of which withstand scrutiny.[24] First, Kiewit claims that Congress's failure to include in the OSH Act a parenthetical that appeared in the bill reported out by the House Committee, referred to as the Daniels Bill, shows that Congress did not intend WHA standards to

---

(emphasis added). Considering the other legislative history on this issue, it is clear that the Report meant "industry" in the broadest sense—i.e., industry as a whole.

[23] According to Rep. Daniels, this prior legislative approach to occupational safety and health had been grossly insufficient. 116 CONG. REC. H10623 (daily ed. Nov. 23, 1970) (statement of Rep. Daniels).

[24] Kiewit also argues the legislative history of the WHA shows that WHA standards were "affirmatively inapplicable to construction." But this argument focuses on Congress's understanding of the scope of the WHA and says nothing about the reach of section 6(a). Moreover, when the OSH Act was passed, WHA regulations were understood to be cross-industry standards. *See Occupational Safety and Health Act, 1970: Hearings on S. 2193 and S. 2788 Before the Subcomm. On Labor of the Senate Comm. On Labor & Public Welfare*, 91st Cong., 1st & 2d Sess. 80 (1969-70). Former Secretary of Labor Shultz, the first witness to testify before the Senate Subcommittee on Labor, testified that the standards promulgated under the Walsh-Healey Public Contracts Act were not confined to a specific industry. And clearly, the WHA contained no impediment to Congress's ability in section 6(a) to authorize the expanded scope of the WHA-derived standards. Furthermore, the fact that construction employers were not covered by the standards under the WHA does not mean that Congress subsequently intended that those standards would not be made applicable to them pursuant to section 6(a). Indeed, my colleagues and Kiewit agree that section 6(a) expanded the class of employees protected beyond those already covered under existing safety and health statutes.

apply to construction employers. The parenthetical stated that any established federal standard adopted under the Daniels Bill's equivalent of section 6(a) was "not limited to its present area of application." H.R. 16785, 91st Cong. § 6 (2d. Sess. 1970).[25] Kiewit argues that the absence of this parenthetical from the OSH Act indicates Congress did not intend established federal standards to apply outside their "present area of application."[26] But this argument ignores that the parenthetical phrase was never present in any version of the Williams or Steiger bills, the two bills from which the OSH Act was ultimately derived. Instead, the parenthetical was present only in the Daniels bill. Moreover, the parenthetical was not even mentioned in the House debates on the two bills, and the Daniels bill was never voted on by the House and never even considered by the Senate. Thus, Kiewit's claim that "Congress rejected" the parenthetical is flatly contradicted by the OSH Act's legislative history—the House never voted on the provision and the Senate cannot be said to have "rejected" something that was never actually before it.

Second, my colleagues argue that in enacting section 6(a), Congress was merely concerned with providing the OSH Act's expanded remedies to all manufacturers engaged in interstate commerce, not in expanding the coverage of the safety and health standards incorporated by operation of that section to new industries. However, the OSH Act's legislative history contains numerous statements by members of Congress, both Democratic and Republican, describing the immediate and dire need for safety standards. *See, e.g.,* 116 CONG. REC. S18248-49 (daily ed. Nov. 16, 1970) (statement of Sen. Williams) ("[A]t a time when the Nation's concern is understandably directed at the problems of our environment, it is particularly appropriate that we

---

[25] The OSH Act was ultimately a compromise between two bills, one passed by the Senate, the Williams bill, S. 2193, 91st Cong. (2d Sess. 1970), and the other passed by the House, the Steiger bill, H.R. 19200, 91st Cong. (2d Sess. 1970). *See* H.R. REP. NO. 91-1765, at 1 (2d Sess. 1970) (Conf. Rep.). However, leading up to the House's passage of the Steiger bill, House members debated the Steiger bill and the competing Daniels bill, which itself was loosely based on the Williams bill. 116 CONG. REC. H10618 (daily ed. Nov. 23, 1970) (statement of Rep. Steiger) ("Some groups have attempted to talk about the Daniels bill and the Williams bill as if they were identical, but this is simply not the case."). The parenthetical in the APA exemption contained in section 6 of the Daniels bill (but not in either the Williams or Steiger bills) instructed the Secretary to promulgate "any established Federal standard then in effect (*not limited to its present area of application*)." H.R. 16785, 91st Cong., 2d Sess. § 6 (1970) (emphasis added).

[26] My colleagues go one step further and baldly assert that this legislative history reflects "a decision to omit" the language of the parenthetical. As I point out, the only decision the House made was to pass another bill (the Steiger bill), and the Senate never made any decision whatsoever regarding the language in the Daniels bill.

give specific attention to the crisis in the workplace environment—for this is a crisis as urgent as any confronting the Nation today."); 116 CONG. REC. H10642 (daily ed. Nov. 23, 1970) (statement of Rep. Broomfield) ("[E]very year 14,000 workers are killed on the job . . . [t]here is no room for partisanship where the health of a worker is concerned . . . there is only the self-evident need for . . . health and safety standards for all American workers."); 116 CONG. REC. H10635 (daily ed. Nov. 23, 1970) (Statement of Rep. Gaydos, quoting President Richard Nixon) ("The Federal role in occupation[al] safety and health has thus far been limited. A few specific industries have been made subject to special Federal laws and limited regulations have been applied to workers in companies who hold certain government contracts."). Thus, Congress in section 6(a) was not merely concerned with providing the OSH Act's expanded remedies to employees in previously regulated industries, it was quite specifically concerned with expanding the coverage of existing standards to additional employees, including those in industries not previously covered by existing safety and health standards.

Furthermore, as the Secretary points out, "[t]here is no indication in the legislative history that Congress expected anything more than . . . [that] industry in general would be familiar with the established federal standards, not that every specific industry, such as construction, would necessarily be familiar with every established federal standard that applied to it." Indeed, the OSH Act was passed to vastly expand occupational safety and health protection to more employees. *See* 29 U.S.C. § 651(b). Its national cross-industry jurisdiction makes it highly unlikely Congress intended section 6(a) standards to protect employees only in industries that were intimately familiar with them or had participated in the original rulemaking process.

In addition, the version of section 6(a) included in the OSH Act originated in the Williams bill as reported out of committee. S. 2193, 91st Cong. § 6(a) (1970). The Senate Report accompanying that bill explicitly stated that "established Federal standards" adopted under this version of section 6(a) "may be made applicable to additional employees who are not under the protection of such other Federal laws." S. REP. NO. 91-1282, at 6 (2d Sess. 1970). My colleagues argue that the Report was referring to the expansion of established Federal standards to the same categories of employers but including those that were not subject to government contracts under the source laws. However, the Report also noted that "the consensus and other standards issued under section 6(a) would provide a sound foundation for a national safety and health program." *Id.* And, although it noted that "a large proportion of the voluntary standards [national consensus

standards] are seriously out-of-date," that many of them "represent merely the lowest common denominator of acceptance by interested private groups," and that many occupational hazards were not covered by any standards at all, the Report gave no indication that the OSH Act was meant to carry forward the piecemeal coverage of the source legislation.

Finally, Kiewit argues that section 6(a) could not have authorized the application of WHA standards to construction employers because, it alleges, Congress intended "that all construction industry standards be developed using the mechanisms not merely of the OSH Act but also of the CSA." In support of this argument, the company points to the following language from the conference committee report:

> The conferees intend that the Secretary develop health and safety standards for construction workers covered by [the CSA,] pursuant to the provisions of that law and that he use the same mechanisms and resources for the development of health and safety standards for all the other construction workers newly covered by this Act . . . .

H.R. REP. NO. 91-1765, at 33 (2d Sess. 1970) (Conf. Rep.). Kiewit appears to be arguing that the only established federal standards that the Secretary could have adopted under section 6(a) for construction were those that had met the procedural requirements of the CSA—i.e., existing CSA standards. This argument lacks merit for several reasons.

First, the assertion is inconsistent with the plain language of section 6(a), which expressly mandates that the Secretary issue "*any* established Federal standard" as an OSHA standard. 29 U.S.C. § 655(a) (emphasis added). In addition, section 6(a) contains no such limiting language—rather, as I have discussed above, the two specified limitations on the Secretary's authority were intended to assure *improved* worker safety and health. *Id.* Second, Kiewit's argument is contrary to section 6(a)'s authorization to adopt "any national consensus standard." Although the voluntary bodies that issued national consensus standards had a comment process, their standards had not been subjected to notice-and-comment procedures (e.g., the draft rules were not published in the Federal Register), nor would the Secretary have consulted with the Advisory Committee on Construction Safety and Health, which the CSA also requires. And third, Kiewit's argument does not account for the fact that the conference report looks to future rather than past actions—it states that the Secretary is to "use" CSA mechanisms and resources "for the development" of construction standards. H.R. REP. NO. 91-1765, at 33 (2d Sess. 1970) (Conf. Rep.). The existing CSA standards had already been developed using those "mechanisms and resources." It is thus more likely that the report was referring to the development of standards under section 6(b)—like

the CSA, section 6(b) requires notice-and-comment and consultation with the applicable federal advisory committee.[27] *See* 29 U.S.C. § 655(b).

Nevertheless, my colleagues assert that the Secretary's interpretation of section 6(a) is unreasonable because it would produce "illogical results"—specifically that otherwise inapplicable "maritime or shipbuilding standards could be applied to the manufacturing industry, or construction standards could be applied to the agricultural industry." Although they frame this claim as an unassailable truism, my colleagues (and Kiewit, for that matter) are unable to point to an example of this happening, nor do they show how it could. Indeed, to the extent their assertion is that safety and health standards from one industry are necessarily inappropriate for other industries, they fail to account for the fact that a truly industry-specific requirement is self-limiting, by its own terms, to that particular industry. As for other requirements that are not so self-limiting, those would apply only where the same hazards are present in the industry to which the predecessor standard was being applied. This concept of applicability is consistent with the idea that requiring that employees exposed to the same hazards be similarly protected across all industries was one of the primary purposes of section 6(a) and the OSH Act as a whole. *See* S. REP. NO. 91-1282, at 6 (2d Sess. 1970) (Congress' purpose in including section 6(a) was to provide an immediate "nationwide minimum level of health and safety"); *Noblecraft Indus., Inc. v. Sec'y of Labor*, 614 F.2d 199, 203 (9th Cir. 1980) (section 6(a) was meant "to meet the pressing need for adoption of OSHA standards on an exceedingly broad industrial front without undue delay"). In sum, the legislative history overwhelmingly supports the Secretary's interpretation that he was authorized to apply established federal standards to additional industries, including construction.

2. *Interpretive Case Law*

The Secretary's interpretation is also supported by Commission and circuit court precedent. Although neither the Commission nor the circuit courts have directly analyzed the Secretary's authority under section 6(a) to apply WHA-derived standards to the construction industry, they

---

[27] In this regard I note that Senator Dominick apparently understood that section 6(a) would enable OSHA to apply non-CSA derived standards to construction, given that he objected to the legislation for that very reason—"we're going to have new standards which are going to be applicable to the Construction Act, and *you won't know what they are until we get through with them about two years from now*. This will be the effect if we pass the bill reported by the committee." 116 CONG. REC. S18266-67 (daily ed. Nov. 16, 1970) (statement of Sen. Dominick) (emphasis added).

have been called upon to adjudicate other aspects of the Secretary's authority under section 6(a). The analysis in those decisions provides considerable guidance here.[28]

In analyzing the validity of an established federal standard promulgated under section 6(a), the Commission and circuit courts have adopted a "substantive change" test that considers whether the Secretary's action substantively changed the established federal standard. In *American Can Co.*, 10 BNA OSHC 1305 (No. 76-5162, 1982) (consolidated), the Commission considered whether a WHA-derived general industry noise standard promulgated by the Secretary under section 6(a) included an impermissible substantive change because it did not adopt the predecessor standard's "scope and application provision."[29] *Id.* at 1305. The Commission held that the changes made by the Secretary were permitted by section 6(a), stating that the "general principle that a standard adopted under section 6(a) may not be different in substance from the established federal or national consensus standard from which it was derived . . . is only a general principle. Some changes are permissible." *Id.* at 1310-11. The Commission reasoned that the allegedly impermissible changes, even if substantive, were "the sort of changes that Congress allowed the Secretary to make" because the Secretary had merely adapted the predecessor standard to better reflect the OSH Act's purpose and structure. *Id.* at 1311-12. The Commission explained that the Secretary's non-adoption of the scope and application provision was permissible because the provision reflected "peculiar features" in the WHA that did not exist in the OSH Act. *Id.* at 1312. The Commission went on to state:

> The implication of American Can's argument is that the Secretary could not have adopted established federal standards without also adopting the statutes under which the federal standards were established. We think it highly unlikely that Congress intended to require such an odd state of affairs. As a practical matter, Congress' purpose was to supersede rather than perpetuate statutory schemes such as the [WHA]'s.

---

[28] It is worth noting that *all* of the prior Commission and court of appeals cases interpreting section 6(a) of the Act were decided prior to 1983. Thus, these cases predate the Supreme Court's holdings in *Chevron*, 467 U.S. at 842-43, and *Martin v. OSHRC* (*CF&I*), 499 U.S. 144 (1991), which together make clear that the Secretary's reasonable interpretation of provisions of the OSH Act and its standards (not the Commission's) is entitled to deference.

[29] The scope and application provision applicable to all WHA standards allowed the covered federal contractor to defend an enforcement action by challenging the "legality, fairness, or propriety of the Labor Department's reliance upon the standard." *Am. Can Co.*, 10 BNA OSHC at 1308.

Id. Although *American Can* is not controlling here, it provides an expansive view of the Secretary's authority under section 6(a) to conform WHA-derived standards to the expanded coverage of the OSH Act.

The Commission's decision in *Bechtel Power Corp.*, 4 BNA OSHC 1005 (No. 5064, 1976), *aff'd*, 548 F.2d 248 (8th Cir. 1977), is even more directly on point. In that case the Commission considered whether the Secretary had impermissibly changed the predecessor CSA standards by not adopting the CSA's native scope provision. Although the source CSA standards applied only to "contractor[s] or subcontractor[s]" that worked on federally-subsidized construction projects and employed "laborer[s] or mechanic[s]," the Secretary, when he adopted the standards pursuant to section 6(a), expanded their coverage to "every employment and place of employment of every employee engaged in construction work." *Id.* at 1007. Bechtel was the construction manager at the site of a power plant. It administered and coordinated the construction on the owner's behalf. It was not a "contractor or subcontractor" within the meaning of the CSA because it employed only engineers, timekeepers, safety inspectors, and administrative and office personnel, but not "laborer[s] or mechanic[s]." The Secretary cited Bechtel for violating several CSA-derived construction standards that had been promulgated as OSH Act standards pursuant to section 6(a). Bechtel challenged the citations on the grounds that the Secretary did not have the authority under section 6(a) to issue the CSA-derived standards as OSH Act standards without also adopting the CSA's coverage limitations and therefore was not subject to the CSA-derived standards as so limited.[30] *Id.*

The Commission held that the Secretary acted within his section 6(a) authority in adopting and extending the applicability of established federal standards to "*every* employer, employee, and employment covered by the [Occupational Safety and Health] Act," and in extending the coverage of the standards in Part 1926 to "*every* employment and place of employment to *every* employee engaged in construction work." *Id.* at 1008. The Commission relied on the OSH Act's legislative history, which it noted "makes clear that in adopting [CSA] standards as established Federal standards under OSHA, the Secretary was empowered by sections 4(b)(2) and 6(a) to extend their

[30] Bechtel conceded that it was subject to the OSHA general industry standards in 29 C.F.R. Part 1910. 4 BNA OSHC at 1006 n.2.

coverage . . . ."[31] *Id.* Finding "the Commission's application of the Occupational Safety and Health Act correct," the Eighth Circuit affirmed this holding in a per curiam opinion. 548 F.2d at 249.

The facts in *Bechtel* are the reverse of those in this case in one respect. In *Bechtel* the employer argued that it was *not* a construction contractor under the CSA and therefore *not* subject to the OSH Act construction standards; rather it *was* a general industry employer and *was* subject to the general industry standards, presumably including those derived from the WHA. Here, on the other hand, Kiewit argues that it *is* a construction employer and although it *is* subject to OSHA's construction standards, it is *not* subject to the WHA-derived general industry standards. I find Kiewit's argument is unsupportable for the same reasons expressed in the Commission's *Bechtel* decision—the plain implication there was that section 6(a) did far more than simply expand coverage to all contractors and subcontractors that employed laborers and mechanics. As interpreted in *Bechtel*, section 6(a) also authorized the extension of the CSA-derived standards to new types of employers that had never been covered under the CSA.

The appellate courts have come to similar conclusions. The Sixth Circuit, a circuit to which this decision could be appealed, *see* 29 U.S.C. § 660(a), considered a related issue in *Diebold, Inc. v. Sec'y of Labor*, 585 F.2d 1327 (6th Cir. 1977). In that case, the respondent argued that a WHA-derived standard promulgated under section 6(a) was inapplicable to press brakes because press brakes were not covered under the original WHA standard. *Id.* at 1331. In stating that "the Secretary may not enforceably construe a [section 6(a)] standard to impose requirements which the standard's source did not impose," the Sixth Circuit explained that the determining factor is not whether the scope of the standard's application had been broadened, but whether the substantive protections within the standard had been changed. *Id.* at 1332. Thus, "the Secretary could properly extend the [section 6(a)] standards to cover employees whose employers were not governed by the source standards, as long as the extension did not operate to create a protection which had not been afforded to workers who were covered by the source." *Id.* at 1332 n.6.

---

[31] The Commission quoted S. REP. NO. 91-1282, at 6 (2d Sess. 1970), which states that "[t]he bill [S. 2193, 91st Cong., 1st Sess. (May 16, 1969), subsequently enacted] also provides for the issuance in similar fashion of those standards which have been issued under other Federal statutes and which under this act may be made applicable to additional employees who are not under the protection of such other Federal laws."

And, finally, in *Lee Way Motor Freight, Inc.*, 1 BNA OSHC 1689 (No. 1105, 1974), *aff'd*, 511 F.2d 864 (10th Cir. 1974), the Commission and the Tenth Circuit, another relevant circuit here, considered a challenge to the applicability of a WHA-derived standard that required guarding of "open pits." 1 BNA OSHC at 1690; 511 F.2d at 866. Lee Way was a transportation company, not a manufacturer, and argued before the Commission that because the original WHA standard only applied to the handling and storage of materials for manufacturers, the cited OSHA requirement was inapplicable to Lee Way's pits, which were used for a non-manufacturing vehicle maintenance operation. 511 F.2d at 868-69. The Commission ultimately rejected this argument, with one Commissioner finding that "Congress specifically directed [the Secretary] to promulgate established federal standards" that "apply to industry in general," not just manufacturers, and another Commissioner determining that the issue was moot because Lee Way's pits would have also been covered under the WHA. 1 BNA OSHC at 1691, 1692.

The Tenth Circuit affirmed, stating that "there is little doubt but that it was the legislative intent that the Secretary of Labor could promulgate by rule the standard [at issue]." 511 F.2d at 869. The court reasoned that the standard was applicable because its "principal purpose" as a standard of general application was to "extend protection to many workers *who had not been covered* by previous standards." *Id.* (emphasis added). My colleagues remarkably mischaracterize this case as not determining "whether a former WHA standard could be cited against an employer of an industry not covered by the source standard." But, as discussed above, that is exactly what the Tenth Circuit did:

> Lee Way does not contend that it is totally immune from the [WHA-derived] standard of 29 C.F.R. § 1910.22(c) (1972), but rather that this standard applies only to such part of its operation [that would have been previously covered by the WHA]. *We do not agree with this line of reasoning.*
>
> The established federal standard related to the necessity for either covering or providing guardrails for open pits. There is little doubt but that it was the legislative intent that the Secretary of Labor could promulgate by rule the standard now embodied in 29 C.F.R. § 1910.22(c) (1972). Congress itself adopted the [WHA] standards a[s] occupational safety and health standards of general application. 29 U.S.C. § 653(b)(2). And in our view the standard in question is not limited in its application to areas [that would have been previously covered by the WHA], but it has applicability, as the standard itself provides, to 'Walking-Working Surfaces.' Indeed the principal purpose to be served by adopting standards established under previous federal statutes as standards of the Act was to extend protection to many workers who had not been covered by previous standards.

Id. (emphasis added).[32] Thus, the Tenth Circuit most certainly addressed whether a WHA-derived standard could be applied to a type of work—non-manufacturing vehicle maintenance operations—that was not covered under the WHA.

In any event, my colleagues miss the larger point: the analysis in all these cases plainly supports the *reasonableness* of the Secretary's interpretation, which is the only issue here. Moreover, apropos of the reasonableness of the Secretary's interpretation, OSHA has been continuously applying WHA-derived standards to non-manufacturing industries including construction for four decades—yet neither the Commission nor the courts of appeals have been called upon to rule on this or any other issue of the Secretary's authority under section 6(a) since 1983.

Finally, Kiewit attempts to twist the Commission and circuit courts' substantive change test by arguing that the Secretary's application of a WHA-derived standard to construction employers constituted an impermissible substantive change to such a standard because it altered the standard's scope provision, which Kiewit contends is as much a part of each standard's substance as its protective requirements. But the analysis in all of the Commission and circuit court cases either explicitly or implicitly holds that changes to a standard's scope provision are not substantive, or if substantive, were permissible because changes to the standards' scope were necessary to adapt the established federal standards (which were largely limited to federal contractors in specified industries based on the government's procurement authority) to the vastly expanded jurisdiction of the OSH Act (which was based on the Commerce Clause). *See also Underhill Constr. Corp. v. Sec'y of Labor*, 526 F.2d 53, 55-56 (2d. Cir. 1975) (explaining that under section 6(a) the Secretary only had the authority to adopt the substantive requirements of the established federal standards—meaning, the "practices, means, methods, operations, or

[32] Kiewit made a similar argument at oral argument, claiming that *Lee Way* is inapposite because the Tenth Circuit did not use the term "validity" in considering the issue. (Tr. at 8.) But it is obvious that the Tenth Circuit did not speak in terms of "validity" because the standard in *Lee Way* was a Part 1910 standard (as opposed to the Part 1926 standard at issue here) that would in any event remain valid with respect to those operations that would have been covered by the WHA. Thus, the Tenth Circuit's use of the word "applicability" as opposed to "validity" is meaningless in the context of this case. The only difference between *Lee Way* and this case is that the WHA-derived standard at issue here was subsequently re-codified as a construction standard, § 1926.50(g).

processes, reasonably necessary . . . to provide safe or healthful employment and places of employment"—not other aspects of the established federal standards, such as their effective dates).

For example, in *Bechtel*, the Commission permitted alteration of a CSA-derived standard's scope provision to include additional construction employers not covered under the CSA, and in *Lee Way*, the Tenth Circuit permitted expansion of a WHA-derived standard's scope provision to a transportation company that would not have been covered under the WHA. *Bechtel Power Corp.*, 4 BNA OSHC at 1006-07; *Lee Way Motor Freight*, 1 BNA OSHC at 1691, *aff'd*, 511 F.2d at 869. Moreover, because section 4(b)(2) already deemed the established federal standards as OSHA standards with their native scope provisions intact, the end result of Kiewit's argument would be the complete nullification of section 6(a)'s effect—if an established federal standard's native scope provision, which necessarily includes the limitation to federal contractors, was substantive and therefore could not be changed in a section 6(a) rulemaking, section 6(a) would accomplish nothing more than section 4(b)(2). Such an interpretation of section 6(a) would thus be nonsensical.

For all these reasons, I would find that the reasonableness of the Secretary's interpretation is supported by Commission and circuit court precedent—in applying the WHA-derived quick-drenching standard to construction employers, the Secretary did not substantively change the standard or "impose requirements" on construction employers and other non-manufacturing employers "which the standard's source did not [originally] impose" on manufacturers. *Diebold*, 585 F.2d at 1332. Therefore, even if section 6(a) is ambiguous as to the issue before us, the Secretary's interpretation is reasonable and entitled to deference.

III. The Secretary's Codification of § 1910.151(c) as § 1926.50(g)

The final issue concerning § 1926.50(g)'s validity is whether the Secretary's codification of § 1910.151(c) as § 1926.50(g) required notice and comment rulemaking. The judge vacated the citation on this basis, finding that this 1993 codification constituted an impermissible substantive change because it "less[e]ned or eliminated" the Secretary's burden "to prove [the] applicability of the standard" and made "feasibility of compliance . . . difficult or even impossible for a cited employer to challenge." For the reasons put forth by the majority in footnote 6 of their opinion, I

also reject the judge's findings and would conclude the Secretary's codification was plainly permissible for the same reasons provided by the Secretary in the accompanying Federal Register notice.

/s/
Cynthia L. Attwood
Commissioner

Dated: September 28, 2018

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

SECRETARY OF LABOR, Complainant, v. Kiewit Power Constructors, Co., Respondent.	**OSHRC Docket No.11-2395**

APPEARANCES:

Matt S. Shepherd, Esquire, U.S. Department of Labor, Office of the Solicitor
Nashville, Tennessee
For the Complainant.

Arthur G. Sapper, Esquire, McDermott, Will & Emery, LLP., Washington, D.C.
For the Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

This matter arose as a result of an inspection by the Occupational Safety and Health Administration (OSHA) of the worksite of Kiewit Power Constructors Company (Kiewit) in Rogersville, Tennessee on August 3, 2011. Respondent filed a timely notice contesting only Citation No. 1, Item 1, which alleged a violation of 29 C.F.R. § 1926.50(g).

Respondent filed a Motion to Dismiss or for Summary Judgment on the ground that 29 C.F.R. § 1926.50(g) is invalid. It also filed a Motion for Declaratory Order declaring 29 C.F.R. § 1926.50(g) is invalid. A hearing on Respondent's Motions was held in Decatur, Georgia on November 20, 2012. All arguments and submissions of both parties have been given careful consideration. For the reasons that follow, Respondent's Motion to Dismiss the alleged violation of 29 C.F.R. § 1926.50(g) is granted. It is therefore unnecessary to decide the Motion for

Summary Judgment or the Motion for Declaratory Order. Citation No. 1, Item 1 alleging a violation of 29 C.F.R. § 1926.50(g) is vacated.

The Occupational Safety and Health Act of 1970(Act) was signed into law on December 29, 1970 and became effective one hundred and twenty days later on April 28, 1971. Section 4(b)(2) of the Act provided certain established Federal Standards in effect on the effective date of the Act were deemed to be occupational safety and health standards under this Act. These included the standard at 41 C.F.R. § 50-204.6 promulgated under the Walsh-Healey Act (41 U.S.C. 35 et seq.) and 29 C.F.R. § 1518.50 promulgated pursuant to the Contract Work Hours and Safety Standards Act (40 U.S.C. 333).

The Standard at 41 C.F.R. § 50-204.6 promulgated on May 20, 1969, provides:

§ 50 – 204.6 Medical services and first aid.
(a) The employer shall ensure the ready availability of medical personnel for advice and consultation on matter of plant health.
(b) In the absence of an infirmary, clinic or hospital in near proximity to the work place which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid. First aid supplies approved by the consulting physician shall be readily available.
(c) Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

The standard at 29 C.F.R. § 1518.50 promulgated on April 17, 1971, provides:

§ 1518.50 Medical services and first aid.
(a) The employer shall ensure the availability of medical personnel for advice and consultation on matters of occupational health.
(b) In the absence of an infirmary, clinic, or hospital in proximity to the worksite which is available for the treatment of injured employees, a person or persons who have a valid certificate in first aid training from the U.S. Bureau of Mines or the American Red Cross shall be available to render first aid.
(c)(1) First aid supplies recommended by the consulting physician shall be easily accessible when required.
(2) The first aid kit shall consist of materials recommended by the consulting physician in a weatherproof container with individual sealed packages for each type of item. The contents of the first aid kit shall be checked by the employer before being sent out on each job and at least weekly on each job to ensure that the expended items are replaced.
(d) Provisions shall be made prior to commencement of the project for prompt medical attention in case of serious injury.

(e) Proper equipment for prompt transportation of the injured person to a physician or hospital, or a communication system for contacting necessary ambulance service, shall be provided.
(f) The telephone numbers of the doctors, hospital and ambulances shall be conspicuously posted.
(g) There shall be at least one person, with a valid certificate in first aid training from the U.S. Bureau of Mines or the American Red Cross, to administer emergency first aid at any isolated location, or area of difficult access, and where medical treatment is not available.

It is important to note that this standard was promulgated eleven days before the effective date of the Act, arguably in anticipation of this standard being adopted by the Act as an Established Federal Standard. It is also noteworthy that this standard was issued two years after 41 C.F.R. § 50-204.6 and that both standards were issued by the Department of Labor.

Section 6 (a) of the Act provides:

> Sec. 6. (a) Without regard to chapter 5 of title 5, United States Code, or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this Act and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

(29 U.S.C. 655)

Pursuant to the authority in sections 6 (a) and 8 (g) of the Act, on May 29, 1971, the Secretary of Labor promulgated 29 C.F.R. Part 1910, which in part, adopted and extended certain Established Federal Standards in effect on April 28, 1971. The Standards in part 1910 became effective August 27, 1971. The provisions of 41 C.F.R. § 50-204.6 were promulgated as an occupational safety and health standard and designated as 29 C.F.R. § 1910.151.

The provisions in Part 1910 relating to the applicability of Part 1910 standards, including 29 C.F.R. § 1910.151, are found in 29 C.F.R. § 1910.5. On May 29, 1971, this section included the limitation language of 29 C.F.R. § 1910.5 (e) as follows:

> (e) Whenever the source of a standard prescribed in this Part 1910 is indicated to be an established Federal standard published in 41 C.F.R. Part 50-204, the standard so prescribed is applicable only to plants, factories, buildings, or

> other places of employment where materials, supplies, articles, or equipment are manufactured or furnished. That is, the standard is intended to apply to manufacturing or supply operations which would be subject to the Walsh-Healey Public Contracts Act if there were a Federal contract (41 U.S.C. 35-45) for the procurement of the materials, supplies, articles, or equipment involved.

The Secretary revoked 29 C.F.R. § 1910.5 (e) by publication in the Federal Register at 36 Fed. Reg. 18080 on September 9, 1971. That revocation provides:

> Paragraph (a) of 29 C.F.R. 1910.5 (36 F.R. 10468) limits the application of established Federal standards derived from 41 C.F.R. Part 50-204 to plants, factories, buildings, or other places of employment where materials, supplies, articles, or equipment are manufactured or furnished. The purpose of this amendment is to remove the limitation to the application of the standards so that they may apply to every employment and place of employment exposed to the hazards covered by the standards.
>
> The provisions of 5 U.S.C. 553 concerning notice of proposed rulemaking, public participation therein, and delay in effective date are inapplicable by virtue of the exception to 5 U.S.C. Ch. 5 provided in section 6(a) of the Williams-Steiger Occupational Safety and Health Act of 1970. Accordingly pursuant to authority in sections 6(a) and 8(g) of the Williams-Steiger Occupational Safety and Health Act of 1970 (84 Stat. 1593, 1600; 29 U.S.C. 655, 657) and in 29 C.F.R. 1910.4, § 1910.5 of Title 29 of the Code of Federal Regulations is hereby amended by revoking paragraph (e). As amended, § 1910.5 reads as follows:
>
> § 1910.5 Applicability of standards.
>
> * * * *
>
> (e) [Revoked]
>
> * * * *
>
> *Effective date.* This amendment shall become effective immediately upon publication in the Federal Register (9-9-71).

On December 30, 1971, Part 1518, containing safety and health regulations for construction, was transferred from Chapter XIII to Chapter XVII of Title 29 of the Code of Federal Regulations and was designated as 29 C.F.R., Part 1926. The standard at 29 C.F.R. § 1518.50 was changed to the current designation of 29 C.F.R. § 1926.50 on that date.

All of the above actions by the Secretary of Labor on or after April 28, 1971, the effective date of the Act, were taken pursuant to Section 6(a) of the Act without regard to Chapter 5 of Title 5 of the United States Code. Specifically, the promulgation, adoption and

extension of established Federal Standards, and the revocation were all done without notice and comment. All of these promulgations, modifications and revocations were completed in accordance with Section 6(a) of the Act before April 28, 1973, two years after the effective date of the Act.

The Secretary published in the Federal Register on February 9, 1979 a Notice of Enforcement Policy and Republication of Standards (44 Fed. Reg. 8577). This notice listed the entire text of 29 C.F.R. Part 1926 plus certain general industry standards the Secretary had identified as applicable to construction work. This list included 29 C.F.R. § 1910.151(c). The Secretary characterized this notice as an effort to provide a better understanding of OSHA's enforcement policy regarding hazards in construction. This notice is merely a policy statement by OSHA. It is not a notice of proposed rulemaking allowing for comment by interested members of the public. This is not a substitute for a proposed rule under the Act or the APA.

In June, 1993, immediately prior to the Secretary's regulatory action published in the Federal Register at 58 Fed. Reg. 35075 on June 30, 1993, the standard at 29 C.F.R. § 1926.50 provided:

> **§ 1926.50 Medical services and first aid.**
> (a) The employer shall insure the availability of medical personnel for advice and consultation on matters of occupational health.
> (b) Provisions shall be made prior to commencement of the project for prompt medical attention in case of serious injury.
> (c) In the absence of an infirmary, clinic, hospital, or physician, that is reasonably accessible in terms of time and distance to the worksite, which is available for the treatment of injured employees, a person who has a valid certificate in first-aid training from the U.S. Bureau of Mines, the American Red Cross, or equivalent training that can be verified by documentary evidence, shall be available at the worksite to render first aid.
> (d)(1) First-aid supplies approved by the consulting physician shall be easily accessible when required.
> (2) The first-aid kit shall consist of materials approved by the consulting physician in a weatherproof container with individual sealed packages for each type of item. The contents of the first-aid kit shall be checked by the employer before being sent out on each job and at least weekly on each job to ensure that the expended items are replaced.
> (e) Proper equipment for prompt transportation of the injured person to a physician or hospital, or a communication system for contacting necessary ambulance service, shall be provided.

(f) The telephone numbers of the physicians, hospitals, or ambulances shall be conspicuously posted.

On July 1, 1993, immediately after the Secretary's action, 29 C.F.R. § 1926.50 provided:

§ 1926.50 Medical services and first aid.

(a) The employer shall insure the availability of medical personnel for advice and consultation on matters of occupational health.

(b) Provisions shall be made prior to commencement of the project for prompt medical attention in case of serious injury.

(c) In the absence of an infirmary, clinic, hospital, or physician, that is reasonably accessible in terms of time and distance to the worksite, which is available for the treatment of injured employees, a person who has a valid certificate in first-aid training from the U.S. Bureau of Mines, the American Red Cross, or equivalent training that can be verified by documentary evidence, shall be available at the worksite to render first aid.

(d)(1) First-aid supplies approved by the consulting physician shall be easily accessible when required.

(2) The first-aid kit shall consist of materials approved by the consulting physician in a weatherproof container with individual sealed packages for each type of item. The contents of the first-aid kit shall be checked by the employer before being sent out on each job and at least weekly on each job to ensure that the expended items are replaced.

(e) Proper equipment for prompt transportation of the injured person to a physician or hospital, or a communication system for contacting necessary ambulance service, shall be provided.

(f) The telephone numbers of the physicians, hospitals, or ambulances shall be conspicuously posted.

(g) Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

In its notice in the Federal Register at 58 Fed.Reg. 35076 on June 30, 1993, the Department of Labor, Occupational Safety and Health Administration (OSHA) published a final rule incorporating the regulatory text of Part 1910 standards that OSHA identified as applicable to construction work into various Part 1926 standards. OSHA "determined that it is not required to follow procedures for public notice and comment rulemaking under either Section 4 of the Administrative Procedure Act or under Section 6(b) of the Occupational Safety and Health Act," reasoning that, "this action does not affect the substantive requirements or coverage of the standards." In this notice, OSHA further asserted that, "incorporation does not modify or revoke existing rights or obligations nor does it establish new ones." The basis for these assertions

appears to be that OSHA was accommodating "elements of both labor and management within the construction industry" that "have requested the Agency to develop a single set of OSHA regulations for the exclusive use of that industry." (58 Fed. Reg. 35076-35077).

As part of this notice, OSHA added a new standard to 29 C.F.R. § 1926.50 as follows:

> **Subpart D-Occupational Health and Environmental Control**
>
> 6. New § 1926.50(g) is added to read as follows:
>
> § 1926.50 Medical services and first aid.
>
> * * * *
>
> (g) Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

The notice clearly adds § 1926.50(g) as a new standard. Prior to the June 30, 1993 Federal Register Final Rule publication, the standard at 29 C.F.R. § 1926.50 did not contain a Section (g). It did not provide a requirement for a quick drenching facility where the eyes or body of any person may be exposed to injurious corrosive materials. With the publication of this notice, a new section (g) was added requiring such facilities specifically in construction work.

Section 6(a) of the Act sets forth the requirements for promulgation of standards for two years after the effective date of the Act without regard to the Administrative Procedure Act. Section 6(b) of the Act sets forth specific procedures for the Secretary to promulgate, modify or revoke any standard under the Act after April 28, 1973. That section requires a proposed rule to be published in the Federal Register allowing interested persons to submit written data or comments. A final rule may be promulgated, modified or revoked only after receipt of comments under Section 6(b)(2) or the completion of a hearing under Section 6 (b) (3).

Consistent with Section 6(b) of the Act, 29 C.F.R. § 1911.10 sets forth specific mandatory procedures for commencement of rulemaking for standards applicable to construction work. An exception to this procedure is allowed by 29 C.F.R. § 1911.5 for minor changes in standards where the public is not particularly interested. In such cases, the Secretary must incorporate a finding of good cause for not providing notice and public procedure. These changes include interpretive and procedural changes to regulations and standards as allowed under the Administrative Procedure Act (APA), 5 U.S.C. § 550 et seq.

Amending 29 C.F.R. § 1926.50 to add a new standard in § 1926.50 (g) is not a minor change involving interpretation or procedure. Rather, it is clearly a substantive change requiring, at the very least, informal rulemaking in the form of notice and public comment.

OSHA recognized this was a substantive change by considering requests from elements of labor and management within the construction industry for the agency to develop a single set of OSHA regulations for the exclusive use of that industry. The Agency, in accordance with section 6(b)(2) of the Act, also considered recommendations of its Advisory Committee on Construction Safety and Health relating to consolidation of regulations applicable to construction. See 58 Fed. Reg. 35076, June 30, 1993.

To that point, OSHA followed the requirements of the Act, the regulations and the APA. These actions were consistent with informal and formal procedures for promulgation and modification of substantive rules. Rather than publishing proposed rule changes, allowing for public procedure involving comment or a hearing, however, OSHA chose to issue a final rule adding a new standard at § 1926.50 (g).

The Agency determined it was exempt from following required procedures of notice and comment, reasoning the action did not affect substantive requirements or coverage of the standard. This bare assertion is internally inconsistent with OSHA's official action in the final rule published in the same notice entitled "6. New § 1926.50 (g) is added to read as follows:" (58 Fed.Reg. 35084).

It is clear that OSHA made a substantive change to 29 C.F.R. § 1926.50 by adding a new section (g) with new requirements for quick drenching facilities for employees doing construction work that may be exposed to injurious corrosive materials. This standard had no such requirement prior to this change. No other construction standard had this requirement.

On September 9, 1971, the Secretary of Labor extended and expanded the application of Established Federal Standards promulgated under the Walsh-Healey Act. This included the standard at 41 C.F.R. § 50-204.6 which was recodified as an OSHA standard on May 29, 1971 as 29 C.F.R. § 1910.151. The standards in Part 1910 are often referred to as general industry standards which by their terms are broadly worded standards that may or may not be applicable to working conditions in various industries.

Standards in Part 1926 are vertical standards. These are detailed specific standards applicable to specific working conditions. The vertical standards in Part 1926 apply to

employment and places of employment of every employee engaged in construction work as described and defined in 29 C.F.R. § 1910.12.

While 29 C.F.R. § 1910.151(c), a general industry standard, contained this requirement for quick drenching facilities, its terms may or may not apply to specific construction work. At an enforcement hearing the burden to establish applicability of this general industry standard to working conditions on a construction jobsite rests squarely on the Secretary, By sliding the terms of § 1910.151(c) into a construction standard specifically applicable to construction work, the burden on the Secretary to prove the applicability of the standard is lessoned or even eliminated. By moving the requirement into the construction standard, there becomes a presumption of applicability to construction work that otherwise does not exist for provisions contained in general standards in Part 1910. Once these requirements are incorporated into the vertical industry specific construction standards, feasibility of compliance becomes more difficult or even impossible for a cited employer to challenge.

This alone shows that the action of OSHA was a substantive change and created a substantial impact on private parties engaged in construction activity. This substantive change required a proposed rule subject to notice and comment.

OSHA failed to follow procedures required by Section 6(b) of the Act, its own regulations in 29 C.F.R. Part 11 and the APA. The Agency's statement that these changes are minor and do not affect substantive requirements or coverage of the standards is internally inconsistent with its notice of final rule. This assertion is unconvincing and, therefore, rejected.

Conclusion

Complainant did not comply with the requirements of Section 6(b) of the Act, its own regulations at 29 C.F.R. Part 1911 or the Administrative Procedure Act in the promulgation of 29 C.F.R. §1926.50(g). This action substantively changed employer duties and obligations under 29 C.F.R. §1926.50 without notice and comment, as required for informal rulemaking, or a hearing under formal rulemaking procedures. Since this standard at 29 C.F.R. § 1926.50(g) was improperly promulgated and added as a new standard, the Secretary cannot now enforce an alleged violation of that standard. The alleged serious violation of 29 C.F.R. § 1926.50(g) in Citation No. 1, Item 1 is vacated.

Findings of Fact and Conclusions of Law

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED, Respondent's Motion to Dismiss is granted, and Item 1 of Citation No. 1 is vacated and no penalty is assessed.

/s/
STEPHEN J. SIMKO, JR.
Judge

Date: December 24, 2012
Atlanta, Georgia