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United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. SCIENCE APPLICATIONS INTERNATIONAL CORP, D/B/A SAIC, and its successors. Respondent.	OSHRC Docket No. 14-1668

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For the Complainant.

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For the Respondent.

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a Science Applications International Corp. ("SAIC" or "Respondent") worksite at the U.S. Space and Naval Warfare Center along San Diego Bay in Coronado, California on April 29, 2014. As a result of the inspection, a Citation and Notification of Penalty ("Citation") was issued to Respondent on October 23, 2014. The Citation contains two items alleging serious violations of § 5(a)(1) of the Act and proposes a total of $10,000 in penalties. (Stip. 4.)

Respondent filed a timely Notice of Contest ("NOC") on October 27, 2014, bringing this matter before the Commission. (Stip. 5.) A hearing was held on September 1 and 2, 2015. The

parties filed post-hearing briefs. For the reasons set forth below, Item 1 of the Citation is AFFIRMED, and Item 2 of the Citation is VACATED.

I. Jurisdiction

Section 10(c) of the Act confers jurisdiction upon the Commission over this action by Respondent filing its NOC. 29 USC § 659(c). The parties have stipulated, and the record establishes, that at all times relevant to this action, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of 29 U.S.C. § 652(5). (Stip. 1-3.) *See Slingluff v. OSHRC*, 425 F.3d 861, 866–67 (10th Cir. 2005).

II. Factual Background

SAIC contracts with the U.S. Navy's Space and Naval Warfare Systems Command to provide marine mammal training for dolphins and sea lions. (Tr. 38, 59-60, 112, 267; Stip. 2.) Its Mark VI Sea Lion Program trains sea lions to detect and locate swimmers in and around Navy installations. (Tr. 68, 71, 217.) The program includes surface swimming and scuba diving exercises in open water as well as working with the animals in floating pens. (Tr. 72, 104, 110, 141-42; Stip. 2.) The work occurs in and around San Diego Bay at the U.S. Space and Naval Warfare Systems Center in Coronado, California. (Tr. 37, 56, 68, 72; Stip. 2.)

On the night of April 28, 2014, an SAIC employee drowned (herein referred to as "decedent") while conducting animal training as part of the Mark VI Sea Lion Program. (Tr. 71; Stip. 6.) At the time of his death, decedent was working with Trevor Thissell, a supervisor and the senior ranking team member, and Shelby Peters. (Tr. 65-66, 71-72; Stip. 6.) The team was engaged in training sea lions in San Diego Bay. (Tr. 65-66, 71-72, 206-7.) As part of that training, decedent played the role of the "enemy swimmer." (Tr. 71, 73, 81, 87, 200.) He entered the water from a Sea Ark Boat near Seaplane Ramp No. 10. (Tr. 71-72, 76-77.)

Consistent with how the work was done in the past, Thissell expected the employee working as the "enemy swimmer" to hide from the sea lions in the area using whatever style of hiding that he choose, including by going below the surface of the water. (Tr. 78-82, 211, 223-24.) The water was about 20 feet deep and decedent was wearing a weight belt. (Tr. 77-78.) The sea lions were unable to locate the swimmer as part of the exercise and his body was later found beneath Seaplane Ramp 10. (Tr. 75, 174, 221.) The autopsy report indicated that the cause of death was drowning. (Tr. 141.) SAIC stipulates that the drowning occurred while the decedent was "engaged in activities in the course and scope of his employment." (Stip. 6.)

III. Applicable Law

The Secretary alleges that SAIC violated § 5(a)(1) of the Act, which is also known as the general duty clause. 29 U.S.C. § 654(a)(1). Under the general duty clause, each employer must "furnish to each of his employees a place of employment free from recognized hazards that are causing or likely to cause death or serious injury to the employees." 29 U.S.C. § 654(a)(1). In *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980), the Supreme Court held, "[a]s the legislative history of this provision reflects, it was intended itself to deter the occurrence of occupational deaths and serious injuries by placing on employers a mandatory obligation independent of the specific health and safety standards to be promulgated by the Secretary." 445 U.S. at 13. The general duty clause provides protection for "employees who are working under such *unique* circumstances that no standard has yet been enacted to cover this situation." *SeaWorld of Fla. LLC v. Perez*, 748 F.3d 1202, 1207 (D.C. Cir. 2014) (quoting H.R. Rep. No. 91-1291 at 21-22 (1970)). Employers must exclude all preventable hazardous conditions from the workplace. *Id.* at 1207, *quoting Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1266-67 (D.C. Cir. 1973). *See also Cont'l Oil Co. v. OSHRC*, 630 F.2d 446, 448 (6th Cir. 1980); *Gen.Dynamics*

Corp., Quincy Shipbuilding Div. v. OSHRC, 599 F.2d 453, 458, 464 (1st Cir. 1979); *Titanium Metals Corp. of Am. v. Usery*, 579 F.2d 536, 543–44 (9th Cir. 1978); *Getty Oil Co. v. OSHRC*, 530 F.2d 1143, 1145 (5th Cir. 1976); *Brennan v. OSHRC*, 501 F.2d 1196, 1198, 1200 (7th Cir. 1974); *Brennan v. OSHRC*, 502 F.2d 946, 951–52 (3d Cir. 1974); *REA Express, Inc. v. Brennan*, 495 F.2d 822, 826 (2d Cir. 1974).

Courts have consistently held that mandatory health and safety standards promulgated by the Secretary under the special duty clause are the preferred enforcement mechanism and the general duty clause serves only as an enforcement tool of last resort, as a "catchall provision" to cover dangerous conditions of employment not specifically covered by existing health and safety standards. *See e.g., Roberts Sand Co., LLLP v. Sec'y of Labor*, 568 F. App'x 758, 759 (11th Cir. 2014) (unpublished) (the Secretary "can only issue general duty clause citations where [he] has not promulgated a regulation covering a particular situation at an employer's worksite"). In the present case, there is no applicable special duty clause standard governing the cited hazard.

Under Commission precedent, to establish a violation of the general duty clause, the Secretary must show that: (1) the condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) there is a feasible and effective way to eliminate or materially reduce the hazard (abatement). *Arcadian Corp.*, 20 BNA OSHC 2001, 2007-8 (No. 93-0628, 2004) (affirming a § 5(a)(1) violation related to a pressurized urea reactor). In addition, the Secretary must show that the employer had actual or constructive knowledge of the hazardous condition. *Burford's Trees, Inc.*, 22 BNA OSHC 1948, 1950 (No. 07-1899, 2010).

IV. Citation 1, Item 1 – Drowning Hazards During Swimming Operations.

In Item 1, the Secretary alleges SAIC failed to furnish a place of employment free from recognized hazards that were causing or likely to cause death or serious physical harm by exposing animal trainers, engaged in training captive sea lions: "to drowning hazards while they were swimming at night in areas containing underwater hazards including pier support pilings, where the employer failed to maintain contact with the deployed swimmer." (Ex. C-2 at 6 (the Citation).) According to the Secretary, a feasible and acceptable method of abatement would be to have a dedicated person maintain contact with the swimmer at all times. *Id.* For the reasons set forth below, the Court finds the Secretary met his burden and established a violation of § 5(a)(1).

a. Hazard.

A hazard, for purposes of the general duty clause, is a worksite or condition that creates or contributes to an increased risk that an event causing death or serious bodily harm to employees will occur. *Baroid Div. of NL Indus., Inc. v. OSHA*, 660 F.2d 439, 444 (10th Cir. 1981). A hazard can be present even if the employer has no record of accidents or injuries. *Titanium Metals*, 579 F.2d at 542.

The hazard, as described by the Secretary, is that employees engaged in swimming operations were at risk of drowning. (Ex. C-2 at 6.) SAIC's operations included having employees swim in San Diego Bay. (Tr. 68, 138; Stip. 2.) On the night of April 28, 2014, operations took place in an area where the water's depth was up to twenty feet. (Tr. 77.) SAIC employees frequently worked in this location. (Tr. 74, 225.) It was an area of open water with possible undercurrents, as well as rocks and pier pilings that could cause serious injury if a swimmer ran into them. (Tr. 46, 82, 172, 179-80, 211, 224.) SAIC permitted swimmers to go

underwater and hold their breath to attempt to avoid detection by the sea lions. (Tr. 79-84, 225.) It was acceptable for employees to engage in swimming operations without wearing any particular kind of gear. (Tr. 80-81, 225.) These operations took place at night 15-20% of the time. (Tr. 85, 225.) Night operations limit the visibility of the swimmer and the rest of the team. (Tr. 76, 86-88, 207.)

There is no dispute that a swimmer is at risk for drowning. (Resp't Br. at 5-10.) John Barron is a retired Navy captain and former Navy helicopter pilot who currently heads the Science and Technology Department at the U.S. Space and Naval Warfare Systems Center. (Tr. 36-38.) Barron has engaged in water rescues in the course of his duties as a naval helicopter pilot and that he was familiar with the hazards associated with open water swimming. (Tr. 38-40.) He testified that drowning is a hazard of swimming, particularly in an environment that has other conditions such as currents, visibility issues, obstacles, and obstructions. (Tr. 45-46.) Barron also testified anytime a person goes into any body of water there is a risk of drowning. (Tr. 45-46, 57.) Likewise, Wayne Knorek, SAIC's Dive Safety Officer who had responsibility for ensuring that the Mark VI Sea Lion Program complied with OSHA regulations, testified that whenever a person is in the water there is a risk for drowning, even if the person is an experienced swimmer. (Tr. 109, 122.) Knorek had previously assisted in the rescue of an experienced swimmer who nearly drowned while engaging in free diving (or swimming under water while holding your breath). (Tr. 121.) For these reasons, the Court finds the Secretary established the hazard of drowning was present at SAIC's worksite.

b. Employer Recognition of Hazard.

To find a violation of the general duty clause, the hazard must be recognized either by the individual employer itself, or by its industry. *Wiley Organics, Inc.*, 17 BNA OSHC 1587, 1591

(No. 91-3275, 1996), *aff'd without published opinion*, 124 F.3d 201 (6th Cir. 1997). Whether a work condition poses a recognized hazard is a question of fact. *Baroid*, 660 F.2d at 446. "[W]hether or not a hazard is 'recognized' is a matter of objective determination." *Ed Taylor Const. Co. v. OSHRC*, 938 F.2d 1265, 1272 (11th Cir. 1991). A "recognized hazard" is a condition that is "known to be hazardous." *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 321 (5th Cir. 1979) (citation omitted). This element can be established by proving that the employer had actual knowledge that a condition is hazardous. *Magma Copper Co. v. Marshall*, 608 F.2d 373, 376 (9th Cir. 1979). It also can be shown by the employer's adoption of a work rule to address the hazard. *Otis Elevator Co.*, 21 BNA OSHC 2204, 2207 (No. 03-1344, 2007) (work rule establishes hazard recognition under § 5(a)(1)); *Ted Wilkerson, Inc.*, 9 BNA OSHC 2012, 2016 (No. 13390, 1981) (same). Alternatively, the "obvious and glaring nature of a hazard" may show the employer's recognition of the hazard. *Kelly Springfield Tire Co. v. Donovan*, 729 F.2d 317, 321 (5th Cir. 1984).

Knorek, an SAIC supervisor, testified he was aware the risk of drowning was present during swimming operations. (Tr. 120, 122, 141, 151.) As noted above, he had been previously involved with the rescue of a Navy swimmer who nearly drowned while free diving in San Diego Bay. (Tr. 120-21; 162.) Rescue personnel resuscitated the swimmer, but the incident highlights that even experienced swimmers can drown. (Tr. 121-22.) Knorek's actual knowledge of the hazard is sufficient to prove that SAIC recognized the hazard. *See Magma Copper*, 608 F.2d at 376 (supervisor knowledge is imputed to employer).

SAIC's recognition of the drowning hazard is also shown by how it managed and supervised its diving operations. SAIC adopted a Diving Policy and Safety Manual (the "Diving Manual") that includes specific instructions as to how to conduct diving safely and outlines the

precautions employees should take for all diving related activities. (Tr. 114-20; Ex. C-3.) The Diving Manual requires employees to complete a Dive Plan outlining every aspect of a diving operation before beginning the activity. (Tr. 117-19; Exs. C-3, C-4 (dive plan form).) This Dive Plan specifies various anticipated safety hazards employees may face when engaged in diving in San Diego Bay. (Ex. C-4 at 1-4.) These include entanglement risks and hazards related to limited visibility during nighttime operations. *Id.* The Diving Manual shows Respondent adopted policies to address drowning hazards when employees were engaged in open water diving operations. (Ex. C-3.) Adopting work rules is further evidence that SAIC recognized the hazard of drowning. *See Ted Wilkerson,*, 9 BNA OSHC at 2016 (work rule establishes hazard recognition under § 5(a)(1)); *Ulysses Irrigation Pipe Co.*, 11 BNA OSHC 1272, 1275 (No. 78-799, 1993) (finding hazard recognition when employee was advised to take the vehicle with headlights to navigate a yard); *Puffer's Hardware, Inc. v. Donovan*, 742 F.2d 12, 18 (1st Cir. 1984) (safety program showed that employer was aware of the hazards).

SAIC argues that prior to the incident that led to the Citation it never had an employee drown. (Resp't Br. at 2; Tr. 268.) This is of no import for purposes of this element. A particular accident rate, or even any accident at all, is not required to show that the employer recognized the hazard. *Ryder Truck Lines, Inc. v. Brennan,* 497 F.3d 230, 233 (5th Cir. 1974); *Signode Corp.*, 4 BNA OSHC 1078, 1079 (No. 3257, 1976) (noting, in connection with a § 5(a)(2) violation, that the likelihood of an accident relates to the degree rather than the kind of violation), *petition for review denied*, 549 F.2d 804 (7th Cir. 1977). It is "[t]he hazard, not the specific incident resulting in injury, [that] is the relevant consideration in determining the existence of a recognized hazard." *Kansas City Power & Light Co.*, 10 BNA OSHC 1417, 1422 (No. 76-5255, 1982); *see Arcadian*, 20 BNA OSHC at 2008. Thus, it is the hazard - in this case drowning - that

is relevant, not whether employees previously had died while training animals. *Id.* Further, because the purpose of the Act is to prevent the first injury, recognition of a hazard does not wait upon the occurrence of a fatal accident. *See Elliot Constr. Corp*, 23 BNA OSHC 2110, 2119 (No. 07-1578, 2012); *Mineral Indus. & Heavy Constr. Co. v. OSHRC*, 639 F.2d 1289, 1294 (5th Cir. 1981); *Lee Way Motor Freight, Inc. v. Sec'y of Labor*, 511 F.2d 864, 870 (10th Cir., 1975) ("One purpose of the Act is to prevent the first accident"); *Brennan v. Smoke-Craft, Inc.*, 530 F.2d 843, 845 (9th Cir. 1976); *Titanium Metals*, 579 F.2d at 542. The Act imposes obligations on employers to "prevent hazards before they produce disaster." *McLaughlin v. Union Oil Co. of California,* 869 F.2d 1039, 1045 (7th Cir. 1989). Accordingly, even though no SAIC employee had previously drowned, SAIC was aware of the hazard posed by having employees work in the water and took steps to address it in its diving program.[1] (Tr. 114-20, 122; Ex. C-3.)

c. Hazard is Likely to Cause Serious Injury or Death and is Serious.

Not every recognized hazard can support a § 5(a)(1) violation. *Beverly Enters.*, 19 BNA OSHC 1161, 1188 (No. 91-3144, 2000) (consol.). The hazard, if it were to occur, must be likely to cause death or serious physical harm. *Id.* A violation is classified as serious under section 17(k) of the Act if "there is substantial probability that death or serious physical harm could result" if an accident occurred. 29 U.S.C. § 666(k); *Compass Envtl., Inc.*, 23 BNA OSHC 1132,

[1] At the hearing, Respondent's counsel appeared to suggest that swimming and diving were equivalent activities. (Tr. 184.) While the two operations may have some similarities, SAIC consistently treated them separately. (Tr. 120, 276.) Even after the accident, it adopted substantially different policies for the two types of operations. (*Compare* Ex. C-3 (the dive policy) with Exs. C-7, C-8, and C-9 (swimming policies adopted after the accident).) Three SAIC employees—Thissell, Knorek, and Klappenback—all testified that the Diving Manual did not cover swimming. (Tr. 91-94, 120, 273.) Further, even if SAIC meant for its Diving Manual to address swimming operations, this would only support the Secretary's argument that SAIC had adopted work rules and thus recognized that working in open water created a risk of drowning. *See Otis Elevator*, 21 BNA OSHC at 2207 (work rule prohibiting activity recognized the hazard).

1136 (No. 06-1036, 2010), *aff'd*, 663 F.3d 1164 (10th Cir. 2011). Substantial probability "refers not to the probability that an accident will occur but to the probability that, an accident having occurred, death or serious injury could result." *Illinois Power Co. v. OSHRC*, 632 F.2d 25, 28 (7th Cir. 1980). For the following reasons, the Court finds the violation is likely to cause serious injury or as in this case death by drowning and is properly classified as a serious citation. (Tr. 141.)

While some risks are more theoretical, here, the Secretary relies on an actual drowning that resulted in the death of an employee to meet this element of his burden. (Stip. 6; Tr. 141, 151.) The fact that an employee died due to his exposure to the hazard is prima facie evidence that the hazard was serious. *W. Mass. Elec. Co.*, 9 BNA OSHC 1940, 1947 (No. 76-1174, 1981). Respondent counters that a drowning was not "likely" to occur in the course of swimming operations. (Resp't Br. at 5.) That is not the appropriate test. The Secretary does not have to establish actual injuries or even a "significant risk of the hazard coming to fruition." *Waldon Healthcare Ctr.*, 16 BNA OSHC 1052, 1060 (No. 89-2804, 1993) (consol.) (employer's claim that "disease is fatal only 1 percent of the time is self-defeating"). The test is whether there would be a significant risk to employees if the hazardous event occurred. *Id.* In other words, the Secretary does not need to prove a "significant risk" or likelihood of death occurring —his burden is to show that the likely consequence of exposure to the hazard would cause serious physical harm. *Id.*; *Kelly Springfield,* 729 F.2d at 321; *Arcadian*, 20 BNA OSHC at 2010. The CO testified that drowning can, and in this case did, result in a fatality. (Tr. 151.) By proving that drownings can be fatal, the Secretary satisfied this element.

d. Feasible and Effective Means of Abatement.

The Secretary must specify an abatement method that: (a) is capable of being implemented (i.e., is feasible), and (b) will significantly reduce the hazard (i.e., is effective). *Arcadian*, 20 BNA OSHC at 2011. The Secretary is not required to show the proposed abatement would eliminate the hazard completely. *Acme Energy Servs.*, 23 BNA OSHC 2121, 2127 (No. 10-0108, 2011). The Secretary contends that SAIC could feasibly and significantly reduce the hazard of drowning by requiring that: "[w]hen a single swimmer is deployed a dedicated person must maintain contact with the swimmer at all time." (Ex. C-2 at 7.)

As to the feasibility of the abatement, SAIC implemented the Secretary's proposed abatement, along with several other procedures, within a month of the accident. (Tr. 40-41, 95-97; Exs. C-7 at 3, C-8, C-9 at 3.1 ("The lead swimmer and the safety swimmer are to remain in continuous voice communication during the swim"), C-10.) In addition, prior to the accident, the company already had similar procedures in place for its diving operations. (Tr. 116, 133-34; Ex. C-3 at 7, 33.) Thus, it was feasible to have such abatement. *See SeaWorld*, 748 F.3d at 1215 (finding abatement feasible when the company had already implemented it in connection with certain operations and the Secretary was seeking to require it in another situation).

As to the abatement's effectiveness, Knorek explained that the new procedures require continuous contact with the swimmer. (Tr. 134.) Barron, the Deputy Head of the Navy's Science and Technology Department, testified that the procedures adopted by SAIC are intended to provide a safer environment for SAIC's employees. (Tr. 45.) And Thissell described how the new procedures allow a swimmer to alert another team member if there are any problems. (Tr.

97, 100.) The Court finds that the Secretary set forth a feasible and effective means of abatement.[2]

At the hearing, SAIC appeared to insinuate that as a subcontractor it was not free to adopt its own policy for swimming operations. (Tr. 53-54.) This position is not tenable. Barron testified SAIC could have adopted policies along the lines of what is set forth in Exhibit C-7 (Standard Operating Procedure for Swimmer Operations) prior to the accident. (Tr. 44, 47, 60-61, 181-83.) One of SAIC's supervisors, Scott Klappenback, testified that the company previously consulted with the Navy about swimmer equipment, padding, and shin guards. (Tr. 283.) Likewise, Thissell was aware that he could make safety suggestions. (Tr. 226.) There was a system in place to resolve any issues with policies or procedures SAIC wished to implement. (Tr. 226, 283-85.) In fact, after the accident, SAIC and the Navy worked together to develop

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[2] The Court notes that there is some theoretical overlap between the Secretary's burden of proving a feasible means of abatement and the affirmative defense of infeasibility (which employers typically raise in the context of violations of specific standards). SAIC did not raise infeasibility in its Answer, or in response to the Court's direct inquiry as to what affirmative defenses it was pursuing. (Tr. 9-10.) Commission Rule 34(b)(3) provides that the "answer shall include all affirmative defenses being asserted." 29 C.F.R. § 2200.34(b)(3). Further, this rule cautions litigants that "[t]he failure to raise an affirmative defense in the answer may result in the party being prohibited from raising the defense at a later stage in the proceeding." 29 C.F.R. § 2200.34(b)(4). Although the Secretary did not object to SAIC offering evidence on feasibility, this is not sufficient to find implied consent to try the issue because such evidence also related to the pled issue of a feasible means of abatement. *See McWilliams Forge. Co., Inc.*, 11 BNA OSHC 2128, 2130 (No. 80-5868, 1984) ("consent is not implied by a party's failure to object to evidence that is relevant to both pleaded and unpleaded issue"); *Consol. Data Terminals v. Applied Digital Data Sys., Inc.*, 708 F.2d 385, 396-7 (9th Cir. 1983). In any event, the Court finds that SAIC failed to show that it was not feasible to adopt the method of abatement set forth in the Citation. *See Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1226 (No. 88-821, 1991); *Brock v. Dun-Par Engineered Form Co.*, 843 F.2d 1135, 1138-1139 (8th Cir. 1988) (the employer, not the Secretary, bears burden of proof of both prongs of the infeasibility test). As discussed above, SAIC could have adopted a rule to have a dedicated person maintain contact at all times when there was only a single swimmer. (Tr. 97; Ex. C-7.) Further, because SAIC did not adopt any safety policies governing its swimming operations, it failed to show that it employed alternative means of protection, or that there were no feasible alternatives. *See Dun-Par*, 843 F.2d at 1129. (Tr. 42-43, 78, 91, 93-94, 117-20, 125, 144, 152, 273.)

new safety procedures. (Tr. 123.) Further, SAIC already had implemented its own policy for diver safety. (Ex. C-3, 92.) The Navy neither authored nor dictated SAIC diver safety policies and procedures. *Id.* By its own terms, the Diving Manual could be followed at all SAIC sites, even those without a connection to its Navy partner. (Ex. C-3 at 3 ("Document Transmittal and Acknowledgement Record").) Although the Diving Manual has a specific section concerning diving at government facilities or property, nothing in it suggests any limitation on SAIC having its own policies to govern the safety of its own workers. (Ex. C-3 at § 10-7; Tr. 181-83.) What is more, the contract between the Navy and SAIC specified SAIC was the entity responsible for the workplace safety of its own employees. (Tr. 182-83.) In any event, even if that were not the case, under long standing Commission precedent, SAIC cannot delegate or contract away its duty to comply with the Act.[3] *See e.g., IRA Holliday Logging Co., Inc.*, 1 BNA OSHC 1200 (No. 273, 1973) ("To hold that [r]espondent could delegate or contract away this duty which is clearly enjoined upon it would nullify the effectiveness of the particular safety standard and

[3] The Court notes that the record lacks sufficient evidence to support the multi-employer worksite defense. *See Grossman Steel & Alum. Corp.*, 4 BNA OSHC 1185, 1190 (No. 12775, 1976) (employer bears the burden of establishing multi-employer defense). To establish the multi-employer worksite defense, the employer must prove, by a preponderance of the evidence, that it: (1) did not create the violative condition; (2) did not control the violative condition; and (3) (a) made reasonable alternative efforts to protect its employees from the violative condition; or (b) did not have, and with the exercise of reasonable diligence could not have had, notice that the violative condition was hazardous. *Capform Inc.*, 13 BNA OSHC 2219, 2222 (No. 84-556, 1989), *aff'd*, 901 F.2d 1112 (5th Cir. 1990). SAIC does not assert that its worksite involved multiple employers or that it lacked sufficient control over the worksite. *See Union Boiler Co.*, 11 BNA OSHC 1241, 1246 (No. 79-232, 1983) (defense requires showing that the employer did not possess the expertise, personal or means to correct the hazard). Further, SAIC did not establish that it made reasonable alternative efforts to protect its employees from the hazard of drowning during swimming operations as it had not adopted any safety policy covering these operations. (Tr. 42-43, 78, 91, 93-94, 117-20, 125, 144, 152, 273.) *See Rockwell Int'l Corp.*, 17 BNA OSHC 1801, 1808 (No. 93-45, 1996) (defense fails when employer did not do everything reasonable to protect its employees). And, even if that were not the case, the Court finds that the hazard was open and obvious and could have been discovered through the exercise of reasonable diligence. *Capform*, 13 BNA OSHC at 2222.

defeat the manifest legislative intent of the Act"); *Brock v. City Oil Well Serv., Co.*, 795 F.2d 507, 512 (5th Cir. 1986) (rejecting employer's attempt to point "a finger" at the operator because "an employer may not contract out of its statutory responsibilities under the OSH Act").

e. Knowledge.

To prove a violation, the Secretary must also establish actual or constructive knowledge of the hazardous condition constituting a violation. *Burford's Trees,* 22 BNA OSHC at 1950. When an employee has delegated authority over other employees, even if it is only temporary, his or her knowledge can be imputed to the employer. *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999); *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814-15 (No. 87-692, 1992).

(i) Actual Knowledge.

At least three SAIC supervisors (Knorek, Thissell, and Williamson) were aware that the Mark VI Sea Lion Program involved having employees go beneath the surface of the water in an attempt to evade detection by the sea lions. (Tr. 65, 82-84, 113.) Three SAIC supervisors (Thissell, Knorek and Klappenback) all testified that the Diving Manual did not cover swimming. (Tr. 91-94, 120, 273). Thus, SAIC knew that its employees swam in open water without any SAIC policy covering swimming while conducting animal training operations. Thissell was specifically aware that there would be open water swimming on the night of April 28, 2014. (Tr. 227-28.) As discussed above, Knorek admitted that anytime a person is in the water, there was a risk for drowning, even if the person is an experienced swimmer. (Tr. 122, 141, 151.) The knowledge of these supervisors is imputable to SAIC. *See Access Equip.*, 18 BNA OSHC at 1726 (supervisor's knowledge is imputable to employer). The Secretary has

established that SAIC had actual knowledge that open water swimming was occurring and that there was a risk for drowning.

(ii) Constructive knowledge.

The Secretary also can establish knowledge by showing that an employer could have discovered the hazardous condition through the exercise of reasonable diligence. *Pride Oil*, 15 BNA OSHC at 1814-15. An employer's duty to exercise reasonable diligence includes the obligation to anticipate hazards and develop and implement work rules that are sufficient to prevent their occurrence in the workplace. *Id.* Thus, the Secretary may prove constructive knowledge by showing that the employer failed to establish an adequate program to promote compliance with safety standards. *PSP Monotech Indus.*, 22 BNA OSHC 1303, 1306 (No. 06-1201, 2008), *citing New York State Elec. & Gas. Corp. (NYSEG) v. Sec'y of Labor*, 88 F.3d 103, 106 (2nd Cir. 1996). In determining whether a safety program is adequate, the Court considers whether the employer "has established workrules designed to prevent the hazards from occurring, has adequately communicated the workrules to the employees, has taken steps to discover noncompliance with the rules, and has effectively enforced the rules in the event of noncompliance." *Inland Steel Co.*, 12 BNA OSHC 1968, 1976 (No. 79-3286, 1986).

Thissell, the onsite supervisor, knew that there were hazardous conditions which SAIC's swimmers were exposed to when conducting swimming operations as part of the Mark VI Sea Lion Program. Prior to the accident, Thissell swam on numerous occasions in the area around Seaplane Ramp 10 and knew that the water was about 20 feet deep. (Tr. 77, 85.) He also knew that swimmers wore weight belts and that SAIC did not provide any guidelines as to how much weight employees should put on the weight belt during swimming operations. (Tr. 78.) On the night of the accident, Thissell, consistent with company practices, did not give any instructions

to the decedent as to what maneuvers he should use to evade detection by the sea lions. (Tr. 78-79.) Thissell was relying solely on the swimmer's ability to signal him when he was in distress. Thissell knew that swimmers went underwater to challenge the sea lions and that they were required to hold their breath while holding onto a piling or rock. (Tr. 79-84.) In fact, Thissell himself had done this previously. (Tr. 79, 82.) The rocks and pilings also presented a collision risk. (Tr. 172, 179.) In addition, Thissell was aware that there was limited visibility under the water around Seaplane Ramp 10 at night. (Tr. 76, 86-87.) Although swimmers had flashlights, SAIC instructed them not to turn them on in order to train the sea lions to detect persons swimming at night in the dark. (Tr. 89-90, 227.) Besides the low visibility, the nature of the open water conditions created unpredictable currents that presented risks to employees.[4] (Tr. 46, 76, 86.)

The hazards associated with swimming operations were open and obvious, and capable of being discovered had SAIC been reasonably diligent as required. *See Schuler-Haas Elec. Corp.*, 21 BNA OSHC 1489, 1493 (No. 03-0322, 2006) (finding constructive knowledge when an employer failed to determine conditions on a second floor despite the company's knowledge that conditions were similar known hazards on another floor). Indeed, SAIC identified similar hazards swimmers faced in connection with its diving operations. (Ex. C-3.) In addition, it was able to identify and specify multiple hazards associated with its swimming operations after the accident. (Exs. C-7, C-10.)

Despite recognizing these hazards, SAIC never adopted any policies related to avoiding drownings during swimming operations. (Tr. 42-43, 78, 91, 93-94, 117-20, 125, 144, 152.)

[4] SAIC also noted these risks in its Standard Operating Procedure for Swimmer Operations. (Ex. C-7 at 3.) Although SAIC adopted this procedure after the accident, there was no indication that anything in the conditions had changed after the accident. *Id.* Thus, this SAIC policy supports the testimony regarding the hazards at the worksite.

There were no documents or standard operating procedures outlining what the swimming operation crews were supposed to discuss before they went out on the water or even how employees were to conduct the operations. (Tr. 80-81, 91, 119-20, 125-27.) There were no dedicated spotters and SAIC did not provide any training with regard to watching swimmers during operations. (Tr. 78, 91, 116-17.) SAIC did not train employees as to how long a swimmer should be underwater or provide guidelines on how much weight should be on the weight belt during swimming operations. (Tr. 78, 91, 112.) Nor did SAIC discuss hazards that might exist in the area where operations took place, such as pilings or riprap. (Tr. 172, 179, 225, 230.) It never told its employees that swimming in the area of the accident could be hazardous. (Tr. 120, 225, 230.) SAIC's failure to implement an adequate safety program for its swimming operations is sufficient to meet the Secretary's burden of proving constructive knowledge. *See Pride Oil*, 15 BNA OSHC at 1814-15 (failing to formulate and implement adequate work rules and training programs was indicative of a lack of reasonable diligence).

SAIC does not allege that Thissell, or any other supervisor, engaged in misconduct. Indeed, the company did not even have a policy covering swimming operations, so employees were not violating any policy on the night of April 28, 2014. (Tr. 42-43; 91.) *Cf. ComTran*, 722 F.3d at 1317 (declining to find knowledge when a supervisor engaged in misconduct but noting that the Secretary can show constructive knowledge if there was a failure to implement an adequate safety program); *Mountain States Tel. & Telegraph Co. v. OSHRC*, 623 F. 2d 155, 157-58 (10th Cir. 1980) (supervisory employee engaged in misconduct by violating company's safety policy); *Ocean Elec. Corp. v. Sec'y of Labor*, 594 F.2d 396 (4th Cir. 1979) (same); *W.G. Yates Constr. Co. Inc. v. OSHRC*, 459 F.3d 604 (5th Cir. 2006) (same). Therefore, the fact that operations took place without a dedicated person maintaining contact with the swimmer at all

times was foreseeable because SAIC failed to establish an adequate safety program. *NYSEG*, 88 F.3d at 105-06; *Pride Oil*, 15 BNA OSHC at 1814; *Brennan v. OSHRC,* 511 F.2d 1139, 1143 n.5 (9th Cir. 1975) (noting that proof of a failure to provide safety instructions establishes an employer's knowledge of its own acts of omission).

SAIC argues that it should not be charged with knowledge because it had no prior drownings. (Resp't Br. 4, 10.) The Court rejects this argument. While prior history is a factor to consider in connection with penalties, an accident is not a prerequisite for a violation of the general duty clause to be found. *Titanium Metals*, 579 F.2d at 542. SAIC knew that operations taking place in San Diego Bay created a risk for drowning and that the conditions around Seaplane Ramp 10 included obstacles and significant water depths. (Tr. 46, 122; Ex. C-3.) The dangers associated with the location where the swimmers worked were open and obvious and a supervisor was aware that any work in water created a risk of drowning. (Tr. 122.) SAIC may not have anticipated the exact sequence of events that led to the employee's death, but it was aware of potential dangers associated with its operations. *See Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2017 (No. 90-2668, 1992) (precise circumstances of incident might not have been foreseen but the company knew generally about the risk of flooding).

Further, as noted above, the purpose of the Act is to prevent the first accident. "There is no 'one explosion rule' in [the Act] comparable to the fabled 'one bite' rule of tort liability for injury inflicted by a house pet." *Union Oil,* 869 F.2d at 1045. The Act does not permit SAIC to allow a known hazard to persist without implementing any abatement. *Id.* (finding that even though no accidents related to the hazard had occurred before, it is unreasonable for the employer to believe that its operations were "immune to the peril").

f. Penalty.

The Court, as the final arbiter of penalties, must give due consideration to the gravity of the violation, and to the employer's size, history, and good faith. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993); 29 U.S.C. § 666(j). These factors are not necessarily accorded equal weight, and gravity is generally the most important factor. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, the duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones*, 15 BNA OSHC at 2213-14.

With respect to the gravity of the violation, as discussed above, the hazard was likely to cause death or serious injury. (Tr. 141.) Indeed, the hazard resulted in a death on April 28, 2014. *Id.* SAIC regularly exposed its employees to the hazard, as swimming operations occurred one to two times per week. (Tr. 143, 151.) Further, the likelihood of injury is increased by SAIC's failure to have a safety and health policy for swimming operations. (Tr. 143-44.) The lack of a policy also militates against awarding much credit for good faith. *See Ed Taylor Constr. Co.*, 15 BNA OSHC 1711, 1717 (No. 88-2463, 1992) (noting company-wide safety program but concluding that the factor weighed against the employer because it had not been implemented well at one worksite). As to size, SAIC is a large employer with over 250 employees and does not warrant a reduction in the penalty amount. (Tr. 143.) *See George Campbell Painting Corp.*, 18 BNA OSHC 1929, 1935 (No. 94-3121, 1999) (no penalty reduction based on size for a "substantial company" with between 200 and 250 employees). Finally, with respect to history, according to the CO, SAIC has been inspected before and has not received any willful, repeat, or "high gravity serious" violations. (Tr. 144.) The Court finds that this history

does not warrant an increase in the penalty amount. Having taken into consideration, the gravity of the violation, SAIC's size, history, and level of good faith, the Court finds that the proposed penalty of $5,000 is appropriate.

V. Citation 1, Item 2 – Drowning Hazards Around Pens and Accessing Boats.

In this Item, the Secretary alleges that SAIC failed to furnish a place of employment free from the recognized hazard of drowning when employees worked on or near "waters edge surfaces" in San Diego Bay. (Ex. C-2 at 7.) Specifically, "animal trainers engaged in training captive sea lions were exposed to drowning hazards when falling into the water." *Id.* The Secretary contends that a feasible and effective way to address the hazard would be to: (1) provide life rings to all working edge platforms; (2) provide fixed rescue ladders for working edge platforms; and (3) have fixed rescue ladders on its boats. *Id.* According to the Secretary, these failures exposed employees to the hazard of drowning. (Sec'y Br. at 21.)

As discussed above, in order to meet his burden of proof for a § 5(a)(1) violation, the Secretary must show that: (1) the condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) there is a feasible and effective way to eliminate or materially reduce the hazard (abatement). *Arcadian*, 20 BNA OSHC at 2007-8. For the reasons set forth below, the Court finds that Secretary failed to meet his burden.

a. Hazard.

The hazard cited by the Secretary in connection with Item 2 is the same as with Item 1—drowning. (Tr. 146.) The primary distinction between the two Citation items is that Item 1 involves work conducted while employees were swimming in the water and Item 2 focuses on work conducted along floating platforms above the water or from the Sea Ark Boat where

employees can accidentally fall into the water. (Ex. C-2.) The floating platforms were sometimes wet and slippery, and, occasionally, employees had fallen into the water while working from them. (Tr. 128-29, 146, 148, 166.) With respect to the Sea Ark Boats, there was no evidence of SAIC employees falling into the water from them, but Barron testified about past water rescues necessitated by boaters ending up in the water accidentally. (Tr. 39.) In addition, SAIC's Dive Safety Officer, Knorek, acknowledged that most people who work around the water will fall in at some point. (Tr. 128.) Because of this likelihood, and the fact that anytime a person is in the water, there is a risk of drowning, the Court finds that the Secretary established that there was a hazard at the worksite. (Tr. 45-46, 122.) *Cf. United Geophysical Corp.*, 9 BNA OSHC 2117 (No. 78-6265, 1981) (discussing the hazard of drowning).

b. Employer Recognition of the Hazard.

Consistent with the Court's findings in connection with Item 1, SAIC recognized that the hazard of drowning was present even when employees were not engaged in swimming or diving operations. Knorek was aware that most people who work around the water fall in at some point, and whenever this occurs, there is a risk of drowning. (Tr. 122, 128-29, 141.) "[A]ctual knowledge of a hazard is sufficient to prove that the hazard was recognized." *Magma Copper*, 608 F.2d at 376 (internal quotations omitted). SAIC's lack of prior drownings, does not preclude a finding of hazard recognition. *See Signode*, 4 BNA OSHC at 1079. SAIC adopted rules to address the hazard in connection with its diving operations but had no discernable policies or practices in place as it relates to the type of activities identified in Item 2 that was open and obvious. (Ex. C-3.) *Ted Wilkerson,* 9 BNA OSHC at 2016 (work rule shows employer recognition); *Kelly Springfield,* 729 F.2d at 321 (subjective belief that there was a hazard is not required). The Court finds SAIC recognized the hazard of drowning.

c. Hazard is Likely to Cause Serious Injury or Death.

To show that a hazard is likely to cause death or serious physical harm, the Secretary does not have to show an actual injury or even that one is likely to occur. *The Duriron Co., Inc.*, 11 BNA OSHC 1405, 1407 (No. 77-2847, 1983); *Waldon*, 16 BNA OSHC at 1060. Rather, the test is, if an accident occurred, could it result in death or serious physical harm. *Id.* According to the Secretary, if an employee fell into the water from the floating platforms or the Sea Ark Boat, they could drown if they were unable to get out of the water. (Sec'y Br. 23-24.) The Secretary's position is supported by Barron, who testified that anytime a person is in the water, even if it was a pool, there is a risk of drowning. (Tr. 46.) As the incident on April 28, 2014 shows, drownings can be fatal. (Tr. 141.) Accordingly, the Secretary met his burden of showing that the hazard is likely to cause death or serious physical harm.

d. Feasible and Effective Means of Abatement.

The Secretary must also show a feasible means to materially reduce the hazard. *Arcadian*, 20 BNA OSHC at 2011. The Secretary is not required to show that the proposed abatement would completely eliminate the hazard. *Acme Energy Servs.*, 23 BNA OSHC 2121, 2127 (No. 08-0088, 2012), *aff'd*, 542 F. App'x. 356 (5th Cir. 2013); *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1122 (No. 88-572, 1993). The Secretary must prove that a reasonably prudent employer would have protected against the hazard in the manner specified in the Secretary's citation. *Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1081 (D.C. Cir. 2007). "Feasible means of abatement are established if 'conscientious experts, familiar with the industry' would prescribe those means and methods specified in the citation to eliminate or materially reduce the hazard." *Arcadian*, 20 BNA OSHC at 2011, *quoting Nat'l*

Realty, 489 F.2d at 1266-67. A method of abatement is feasible under § 5(a)(1) if the Secretary "demonstrate[s] both that the measure[] [is] capable of being put into effect and that [it] would be effective in materially reducing the incidence of the hazard." *Beverly*, 19 BNA OSHC at 1190; *see Champlin Petroleum Co. v. OSHRC*, 593 F.2d 637, 640 (5th Cir. 1979) ("It is the Secretary's burden to show that demonstrably feasible measures would materially reduce the likelihood that such injury as that which resulted from the cited hazard would have occurred."). The Secretary's proposed abatement would be for SAIC to:

> a) Provide US Coast Guard approved life ring buoy with at least 90 feet of line to all water working edge platforms including, but not limit[ed] to Naval Base Point Loma sea lion pens. U.S. Coast Guard approved ring life buoy shall be located on each staging alongside of a floating vessel on which work is being performed.
>
> b) Provide fixed rescue ladders to all water working edge platforms including but not limited to Naval Base Point Loma sea lion pens and Sea Ark Boat 33. The ladder shall be of sufficient strength and length to assist employees to reach safety in the event they fall into the water.

(Ex. C-2 at 7.) As discussed below, the Secretary failed to establish how these steps would materially reduce the risk of drowning after falling into the water. The proposed abatement by the Secretary focuses on what should happen once an employee falls into the water. The Secretary does not address abatement methods which could be implemented to prevent employees from falling into the water in the first place. That should be the primary goal of the abatement—keep employees from falling into the water and being subjected to the hazard of drowning. This is analogous to other standards adopted by the Secretary whose goal is to prevent an accident. *See e.g. Brand Energy Solutions LLC*, 25 BNA OSHC 1386, 1389 (2015) (purpose of standard is to prevent trips and falls); *Delek Refining, LTD.*, 25 BNA OSHC 1365,

1369 (No. 08-1386, 2015) (purpose of standard is prevent chemical releases); *E. Smalis Painting Co., Inc.*, 22 BNA OSHC 1553 (No. 94-1979, 2009) (purpose of training standard is to prevent accidents); *General Elec. Co.*, 10 BNA OSHC 1144 (No. 76-2879, 1981) ("A primary purpose of the standards in Subpart D of Part 1910 is to prevent falls"). In the Court's opinion the appropriate focus of abatement would be to propose methods that can be used on the floating platforms or the Sea Ark Boat 33 to prevent the employee from falling into the water in the first place. The Secretary's proposed abatement fails to address this very critical element. In addition, for the reasons stated below, even if the employee were to fall into the water, the abatement identified by the Secretary fails to effectively and feasibly prevent the employee from drowning. Accordingly, the Secretary has failed to identify reasonable feasible and effective means of abatement.

(i) Platform Ring Buoys.

The CO testified if an employee working by the sea lion pens fell in, it could be difficult to swim back to the floating platforms. (Tr. 145.) She said that providing ring buoys would make it "easier" for the employee to get back to the platforms. (Tr. 145, 170.) The Secretary did not explain how ring buoys could materially reduce the hazard when currents in the area move an employee far enough away from the platforms. (Tr. 170.) Indeed, the CO acknowledged that "most likely" employees would fall in right next to the platforms. *Id.* In addition, a buoy cannot be used by a single employee to get out of the water—someone else needs to throw the buoy to the person in the water. (Tr. 168.) There was no evidence SAIC had multiple employees on the platforms such that there would be someone to make use of the buoys; nor does the Secretary's

proposed abatement require this.[5] (Ex. C-2 at 7.) While it is possible that a buoy could be of assistance in some circumstance, the Secretary failed to offer anything more than conjecture that the abatement method set forth in the Citation is a feasible and effective means of reducing the hazard. *See Nat'l Realty*, 489 F.2d at 1263 (vacating a citation when the "Secretary neglected to present evidence demonstrating in what manner the company's conduct fell short of the statutory standard.").

(ii) Sea Lion Pen Ladder.

The sea lion pen is a 30 x 30 enclosure in open water with floating platforms on the outside and smaller chain-link pens for individual animals inside of it. (Tr. 104, 131) There is a net on the interior side of the enclosure attached at the bottom of the pen to prevent the animals from swimming off by going under the platforms. (Tr. 104-5.) The net at the bottom of the pen is four to eight feet below the surface, and the water depth varied between eight to ten feet. (Tr. 105, 132.)

The CO testified that the floating platforms were approximately one foot above the water line. (Tr. 148.) She surmised that it would be easier for people to pull themselves out of the water using a ladder rather than their own strength. *Id.* While SAIC employees were experienced swimmers, according to the CO, it could be difficult to get out of the water if a person was wearing heavy clothing. (Tr. 145-46.)

The CO's argument only has plausibility if the employee had the good fortune to fall in near a fixed rescue ladder. Otherwise, they would have to make their way through the pen in water logged clothes, which the CO herself described as difficult, rather than pulling themselves

[5] Further, as noted above, a ring buoy on a platform does nothing to prevent a person from falling into the water.

up on the nearest platform edge. *Id.* Further, if the person fell off the platform on the outside of the enclosure, a ladder located on the interior side would be of no use.[6]

Other than the CO's unsupported assertion that it was the case, the Secretary offered no evidence of how fixed rescue ladders materially reduce the hazard. That it could make exiting the water easier in some circumstance is not sufficient—the Secretary must show that the abatement materially reduces the hazard. *Waldon,* 16 BNA OSHC at 1061. The Secretary failed to present evidence about the use or effectiveness of fixed ladders in connection with any type of open water enclosures or pools. When pressed as to how she determined that a fixed ladder would be a reasonable and feasible means of abatement, the CO indicated that she went on the internet. (Tr. 140, 158-60.) She noted that she looked for "Navy policies," but fails to describe what, if anything, she found. (Tr. 160-61.) There is no evidence as to when she conducted the search, what her specific search terms where, what websites she reviewed, what information she found, or why the Court should consider anything from her search to be reliable evidence. *Id.* While using the internet could aid the Secretary in determining appropriate abatement in the present matter, the Secretary offered no evidence as to what information the CO found, how it supports the proposed abatement, or why it is reliable. *See e.g., Estate of Fuller v. Maxfield & Oberton Holdings, LLC*, 906 F. Supp. 2d 997, 1003-4 (N.D. Cal. 2012) (taking judicial notice of a scientific article found on the internet but refusing to take judicial notice of information on a webpage when the party failed to provide sufficient information as to its reliability); *Gonzales v. Unum Life Ins. Co. of Am.*, 861 F. Supp. 2d 1099, 1104 n.4 (S.D. Cal. 2012) (declining evidence from the website Wikipedia). Therefore, the Court finds that the Secretary failed to meet his

[6] The Secretary did not propose the use of portable ladders or that there be ladders on both the interior and exterior sides of the enclosure. (Ex. C-2 at 7.) The court also notes, as referenced above, that while it is possible that a ladder could lessen the time an employee was in the water, it does nothing to prevent an employee from falling into the water in the first place.

burden of proof that a fixed ladder on the platform is a reasonable and effective means of abatement. *See Nat'l Realty*, 489 F.2d at 1263.

(iii) Sea Ark Boat Ladder.

Instead of a fixed ladder, the Sea Ark Boat had a small cut out approximately four to eight inches above the water line. (Tr. 102, 149.) The cutout was designed to facilitate a person's egress from the water into the boat. (Tr. 149, 167.) According to the CO, it would be easier for people to pull themselves into the boat after swimming or if they had fallen into the water if they could use a ladder rather than the cut out. (Tr. 149-50.) The Secretary did not identify the distance from the cut out to the top of the boat. (Tr. 167.) Further, the Secretary offered no evidence that a ladder could safely be attached to the Sea Ark Boat or why he believed it would be any easier than using the cutout.[7] *Id.* Thus, the Court finds that the Secretary failed to establish that a fixed ladder on the Sea Ark Boat would materially or effectively reduced the hazard. *See Nat'l Realty,* 489 F.2d at 1268 ("Only by requiring the Secretary, at the hearing, to formulate and defend his own theory of what a cited defendant should have done can the Commission and the courts assure evenhanded enforcement of the general duty clause.").

The Secretary failed to establish that feasible means of abatement identified by 'conscientious experts, familiar with the industry' would prescribe the methods the Secretary identified as means and methods to eliminate or materially reduce the hazard. *Arcadian*, 20 BNA OSHC at 2011, *quoting Nat'l Realty*, 489 F.2d at 1266-67. The abatement proposed by the Secretary is based on faulty conclusions, unsubstantiated testimony of the CSHO based on

[7] As with the Secretary's other proposed methods of abatement, a ladder on the boat would not prevent an employee from being in the water in the first place. It would only aid a swimmer to get back onto the boat. (Tr. 167.)

research from the internet that can neither be identified or verified as applicable or being reliable. For the foregoing reasons, the Court finds the Secretary failed to meet his burden of identifying feasible and effective means of abatements for the hazard. Accordingly, Citation 1, Item 2 is VACATED.

ORDER

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. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

Item 1 of Citation 1, alleging a serious violation of Section 5(a)(1) of the Act is AFFIRMED, and a penalty of $5,000 is assessed.

Item 2 of Citation 2, alleging a serious violation of Section 5(a)(1) of the Act is VACATED.

SO ORDERED.

/s/ Patrick B. Augustine
Patrick B. Augustine
Judge, OSHRC

Dated: May 17, 2016
Denver, CO