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. SCIENCE APPLICATIONS INTERNATIONAL CORP., d/b/a SAIC, Respondent.	OSHRC Docket No. 14-1668

ON BRIEFS:

Jin Y. Chong, Attorney, Office of the Solicitor; Charles F. James, Counsel for Appellate Litigation; Ann Rosenthal, Associate Solicitor of Labor for Occupational Safety and Health; Katherine E. Bissell, Deputy Solicitor for Regional Enforcement; U.S. Department of Labor, Washington, DC
For the Complainant

Robert D. Peterson, Esq.; Robert D. Peterson Law Corporation, Rocklin, CA
For the Respondent

DECISION

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

BY THE COMMISSION:

Science Applications International Corporation ("SAIC") contracts with the U.S. Navy's Space and Naval Warfare Systems Command ("SPAWAR") to train marine mammals to detect trespassing swimmers in and around Navy installations. In April 2014, an SAIC employee drowned during a sea lion training exercise in San Diego Bay in Coronado, California. After an inspection, the Occupational Safety and Health Administration issued SAIC a citation alleging a serious violation of the Occupational Safety and Health Act's general duty clause, 29 U.S.C. § 654(a)(1), for exposing employees to "drowning hazards while swimming during marine mammal training operations." The Secretary proposed a $5,000 penalty for this citation item.

Following a hearing, Administrative Law Judge Patrick B. Augustine affirmed the violation and assessed the proposed penalty.[1] For the following reasons, we affirm.

BACKGROUND

SAIC's Mark 6 Sea Lion Program, which trains sea lions to detect and locate trespassing swimmers in and around Navy installations, requires the company's employees to swim in open water and scuba dive, as well as work with the animals in floating pens. The training operations at issue here were conducted in San Diego Bay, with approximately fifteen to twenty percent of them occurring at night.

On the night of April 28, 2014, SAIC supervisor Trevor Thissell and two other members of the Mark 6 team—Shelby Peters and Employee #1—conducted a sea lion training exercise near the Naval Air Station ("NAS") North Island. Thissell and Peters handled the sea lions aboard a boat while Employee #1 volunteered to act as the "enemy swimmer," a role in which he was expected to evade detection by a sea lion by, for example, holding his breath underwater. Employee #1—wearing a wetsuit, mask, fins, gloves, booties, and a weight belt—entered the water, which was about 20 feet deep, at around 8:30 or 9:00 p.m. At this time of evening, without the use of a flashlight (which SAIC swimmers typically use only in an emergency), subsurface visibility was about one foot. While some ambient light was present in the area, Thissell testified that a swimmer hiding in "nooks and crannies or . . . behind something . . . couldn't see very well."

After Employee #1 entered the water, Thissell released a sea lion tasked with attempting to find Employee #1. The SAIC team successfully completed two runs where the sea lion detected Employee #1. On the third run, however, the sea lion became distracted by a wild sea lion and did not attempt to locate Employee #1. After five minutes, the team retrieved the sea lion and then re-released him, with Employee #1 remaining in the water the entire time, apparently unaware of the operation's delay. The sea lion was unable to locate Employee #1, who was eventually found unresponsive. He was pronounced dead at a hospital, and the autopsy report stated the cause of his death as drowning. SAIC stipulated that the drowning occurred while Employee #1 was "engaged in activities in the course and scope of his employment."

[1] The citation alleged another general duty clause violation based on the "hazard of falling into water and drowning while working on or near water[']s edge surfaces." The judge vacated this citation item, and the Secretary did not file a petition for review.

DISCUSSION

The general duty clause provides that "[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. § 654(a)(1). To prove a violation, the Secretary must establish that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004). The Secretary must also show that the employer knew or, with the exercise of reasonable diligence, could have known that the hazardous condition existed at its worksite. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537 (No. 86-0469, 1992).

Here, the Secretary alleges in the citation that:

> [A]n animal trainer, engaged in training captive sea lions, was exposed to drowning hazards while swimming at night in areas containing underwater hazards including pier support pilings, where the employer failed to maintain contact with the deployed swimmer . . . .

The judge found that the Secretary established each element of the alleged violation, and that SAIC had actual—or, in the alternative, constructive—knowledge of the hazardous condition. On review, SAIC challenges the judge's findings on the elements of hazard, hazard recognition, and abatement. The parties were also asked to address the threshold question of whether the Secretary exceeded his authority in issuing the citation. We begin with this jurisdictional question before turning to the disputed elements of the Secretary's case.

I. Jurisdiction

The parties were asked to address whether "Congress intended, in enacting the OSH Act, to authorize the Secretary to regulate the cited activity via the general duty clause"—in other words, whether OSHA has statutory jurisdiction to regulate the cited hazard under the general duty clause. SAIC has not addressed this question in either its opening or reply brief on review, asserting instead that the Secretary exceeded his authority in issuing the citation because the company lacked notice that the cited activity is hazardous. The Secretary, on the other hand, briefly addresses the jurisdictional issue in his brief on review, arguing that there is no limitation in the OSH Act "on the types of recognized hazards for which the Secretary may issue citations" under the general duty clause.

The Commission's recent decision in *Integra Health Management, Inc.*, 27 BNA OSHC 1838 (No. 13-1124, 2019), squarely addresses the jurisdictional issue raised here and establishes a framework for determining whether a cited hazard falls within the scope of the general duty clause. In *Integra*, an employee of a private social services company was killed by a client during a home visit. OSHA issued the company a citation alleging a violation of the general duty clause for exposing employees to a workplace violence hazard. In response, the company argued that "certain hazards," like workplace violence, simply "cannot be the basis of a general duty clause violation" because they fall "beyond the scope of the [OSH] Act itself." *Id.* at 1841-42.

In rejecting this argument, the Commission explained that because the general duty clause references both "employment" and "place of employment," the "hazards" covered by the provision include not only risks arising out of the physical setting of the work, but also those arising out of an employee's work generally—"in a broad sense." *Id.* at 1843. The Commission therefore held that, in light of Integra requiring its employees to "meet face-to-face with [clients], many of whom have been diagnosed with mental illness and have criminal backgrounds as well as a history of violence and volatility," there was "a direct nexus between the work being performed . . . and the alleged risk of workplace violence." *Id.* at 1844. Accordingly, the Commission concluded that the "risk at issue [in *Integra*] [was] a 'hazard' that fits plainly within the text of the general duty clause." *Id.*

Applying this framework here, the hazard alleged by the Secretary also plainly fits within the broad range of "hazards" covered by the general duty clause. 29 U.S.C. § 654(a)(1). Drowning is an obvious risk of swimming, and swimming—in this case, often at night and amidst underwater obstacles—was a required work activity for SAIC's employees. Moreover, swimming was integral to SAIC's work for SPAWAR. Thus, as was the case in *Integra*, there is a "direct nexus" between the cited drowning hazard and the work being performed. Indeed, "the hazard identified by the Secretary is rooted in the very reason for [SAIC's] services." *Integra*, 27 BNA OSHC at 1844. As such, the cited hazard here is covered by the general duty clause.[2]

[2] In accordance with his concurring opinion in *Integra*, Chairman Sullivan would find that the hazard here is cognizable under the general duty clause not due to any "nexus" between it and the work being performed by SAIC's employees, but rather because a reasonable employer in the circumstances presented would have foreseen that employees were at risk of drowning during this particular night training exercise. In *Integra*, Chairman Sullivan observed that "when dealing with a broad hazard such as workplace violence, a check on the application of the general duty clause

SAIC's related assertion—that because "OSHA . . . had *not* formed an opinion that the swimming activity in question was contrary to the general duty clause . . . during the 50 years this [work] procedure was occurring," the Secretary exceeded his authority in issuing the citation by failing to provide adequate notice—is also without merit. There is no precedent, or any other support for that matter, for the notion that the Secretary's prior silence regarding a work activity prevents him from citing, under the general duty clause, a recognized hazard associated with that activity. Indeed, the general duty clause's recognition element addresses this very issue by

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is necessary" to ensure that "the constitutional requirement of fair notice" is satisfied, and to give employers "some way of evaluating whether they could be held in violation . . . in the event of a violent incident." *Integra*, 27 BNA OSHC at 1852 (Sullivan, Comm'r, concurring). That check on the general duty clause is foreseeability—indeed, in such cases, "proof of reasonable foreseeability is the only way . . . that the Secretary can prove that a hazard 'exists' or is 'cognizable' under the general duty clause." *Id.* In Chairman Sullivan's view, the risk of drowning here is a broad hazard analogous to the workplace violence hazard in *Integra*, such that reasonable foreseeability must be assessed.

Applying this framework, Chairman Sullivan would find—given that SAIC's training exercise occurred at night and among underwater obstacles—that the cited drowning hazard was reasonably foreseeable by a reasonable employer and is therefore cognizable under the general duty clause. To be sure, in Chairman Sullivan's view, the "nexus" between a cited hazard and the particular work involved is relevant, but it is simply part of the foreseeability question. For example, in this case, if the drowning hazard were not "related" to SAIC's work or workplace, foreseeability would likely not be established, as the risk of drowning would simply be the same risk presented to the general public engaged in such activity in San Diego Bay.

Commissioner Laihow agrees with Chairman Sullivan that the reasonable foreseeability of a hazard is a vital concept in general duty clause jurisprudence, as "employers cannot be left only to guess at their legal obligations." *Integra*, 27 BNA OSHC at 1852 (Sullivan, Comm'r, concurring). However, as Chairman Sullivan himself noted in *Integra*, foreseeability is already "an important consideration with regard to . . . hazard recognition." *Id.* at 1853 (quotation marks omitted). Indeed, as explained below, we conclude that SAIC recognized the drowning hazard in this case based largely on the testimony of the company's own Dive Safety Officer that "anytime a person is in the water, there's a risk for drowning." In other words, SAIC—through its supervisory employee—foresaw the drowning hazard, and so it was recognized. The "nexus" concept, by contrast, is in Commissioner Laihow's view a framework used to address a separate, jurisdictional issue.

Commissioner Attwood notes her disagreement with Chairman Sullivan's assertion that under the general duty clause a hazard is cognizable where "a reasonable employer in the circumstances presented would have foreseen that employees were at risk of drowning during . . . [the] night training exercise." In her view, the nexus test established in *Integra* is the proper framework for the inquiry at hand and, given the result of its application here, she finds it unnecessary to further address the basis for the Chairman's assertion.

ensuring that an employer will be responsible only for duties for which there is sufficient notice of the cited obligation.[3] *See, e.g., Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1873-74 (No. 92-2596, 1996) (recognition of fall hazard established by evidence that industry understood climbing formwork walls posed a fall risk, not based on evidence that industry was generally aware that falling from heights is dangerous); *see also Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2003 (No. 89-0265, 1997) ("A hazard is deemed 'recognized' when the potential danger *of a condition or activity* is either actually known to the particular employer or generally known in the industry.") (emphasis added).

Because, for the reasons discussed above, the drowning hazard cited here falls within the broad range of hazards covered by the OSH Act's general duty clause, we conclude that OSHA has jurisdiction to regulate this hazard under that provision.[4]

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[3] SAIC also argues that because OSHA had not "formulated any position regarding the ongoing activity . . . notwithstanding the lengthy nature of [it]" and lack of prior accidents, issuance of the citation "may only have been the consequence of arbitrary and capricious conduct of [OSHA]," which violated SAIC's constitutional rights. It is well-established that the Secretary has broad prosecutorial discretion and "authority to determine if a citation should be issued to an employer for unsafe working conditions." *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 6-7 (1985). As SAIC has not raised any substantive due process claims, its argument that the issuance of the citation was arbitrary and capricious fails. *See DeKalb Forge Co.*, 13 BNA OSHC 1146, 1153 (No. 83-0299, 1987) (Secretary's use of "broad prosecutorial discretion" is not a constitutional violation simply because of "the conscious exercise of some selectivity in enforcement") (citations omitted).

[4] The parties were also asked to address, regarding the hazard recognition element, the issue of whether some activities, though dangerous, are among the normal activities intrinsic to an industry such that they cannot be regulated under the general duty clause. To the extent this question bears on the jurisdictional issue, the scope of the general duty clause is limited to "hazards that arise out of (that is, have a sufficient nexus with) the work at issue." *Integra*, 27 BNA OSHC at 1845. Thus, there is "no basis for [the] implication that, beyond [this restriction], there are other, implicit jurisdictional limitations that exclude certain types of workplace hazards, particularly in light of the broad language of the general duty clause." *Id.* Indeed, the OSH Act's legislative history shows that Congress rejected the idea that dangers inherent to work must be accepted without mitigation. *See* Legislative History of the Occupational Safety & Health Act of 1970, Report of Committee on Labor and Public Welfare at 149 (June 1971) ("The committee believes that employers are equally bound by this general and common duty to bring no adverse effects to the life and health of their employees throughout the course of their employment. Employers have primary control over the work environment and should insure [sic] that it is safe and healthful."). In addition, numerous hazards regulated under established federal standards or industry consensus standards at the time the OSH Act was enacted were the result of "normal activities intrinsic to an industry," and these standards were eligible for adoption as OSHA standards under section 6(a) of

II. Existence of a Hazard

"To prove that a condition presents a hazard under the general duty clause, the Secretary is required to show that . . . employees [were exposed] to a 'significant risk' of harm." *A.H. Sturgill Roofing, Inc.*, 27 BNA OSHC 1809, 1810-11 (No. 13-0224, 2019) (quoting *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1170-72 (No. 91-3144, 2000) (consolidated)). However, "[p]roof that a cited activity actually caused harm or necessarily could have caused harm under the precise physical conditions that happened to be present at the time of the violation, or at any other specific time, is not required." *Quick Transport of Ark., LLC*, 27 BNA OSHC 1947, 1949 (No. 14-0844, 2019). Instead, the Secretary must show that harm could result "upon other than a freakish or utterly implausible concurrence of circumstances." *Titanium Metals Corp. of Am. v. Usery*, 579 F.2d 536, 541 (9th Cir. 1978).

We find that the Secretary has carried this burden here. SAIC's own Dive Safety Officer, Wayne Knorek, testified at the hearing that "anytime a person is in the water, there's a risk for drowning." Similarly, John Barron, a retired Navy captain and former Navy helicopter pilot who at the time of the hearing was deputy head of the Science and Technology Department at the U.S. Space and Naval Warfare Systems Center, testified that in his experience open-water swimming poses a drowning hazard, "particularly in an environment," such as this one, "that has other conditions such as currents, visibility issues, obstacles, and obstructions."

SAIC does not address this testimony on review but instead asserts, as it did before the judge, that "the hazard did not exist," citing its 50-year fatality-free history prior to the drowning in 2014. The judge rejected this argument, albeit as part of his hazard recognition analysis, stating that "the purpose of the [OSH] Act is to prevent the first injury, [and so] recognition of a hazard does not wait upon the occurrence of a fatal accident." We agree with the judge on this point, but reject SAIC's argument for an additional reason—the absence of prior fatalities is not dispositive as to the existence of a hazard because such an absence may be the result of SAIC "having had adequate abatement measures in place" (an element of the violation discussed below) or "simply

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the Act. *See, e.g.*, Point of Operation Guarding, 41 C.F.R. § 50-204.5 (1969), promulgated under Walsh-Healey Public Contracts Act at 34 Fed. Reg. 788, 789 (1969), and then substantially adopted by section 6(a) of the OSH Act into 29 C.F.R. § 1910.212; Safety Requirements for Transportation, Storage, Handling, and Use of Commercial Explosives and Blasting Agents in the Construction Industry, ANSI A10.7-1970, substantially adopted by section 6(a) of the OSH Act into 29 C.F.R. § 1910.109.

of luck." *See Peacock Eng'g, Inc.*, 26 BNA OSHC 1588, 1590 (No. 11-2780, 2017). Indeed, the record contains evidence of a "near-miss" in the same location as the accident here—Knorek testified that in the 1990s, while working for SAIC, he was involved in the rescue of a Navy swimmer who nearly drowned in San Diego Bay during a dolphin training exercise in the harbor entrance.[5]

SAIC also argues—citing the Commission's decision in *Pelron Corp.*, 12 BNA OSHC 1833 (No. 82-0388, 1986)—that "there is no evidence in this case that the ongoing work activity would have apprised [the company] that [it] was engaged in a procedure over which [it] could have reasonably been expected to exercise control." To the extent SAIC is arguing that a hazard may be found only where the nature of the cited activity is such that it puts the employer on notice that some action must be taken, its claim lacks merit. *Pelron* does not address a notice problem. Rather, the Commission held that hazards must be defined as, and therefore an employer may only be held responsible under the general duty clause for, "conditions or practices over which the employer can reasonably be expected to exercise control." 12 BNA OSHC at 1835 (citation omitted). Here, the citation identifies "practices" that SAIC can control (specifically, the manner in which the company conducts its swimming activities), and it proposes maintaining contact with swimmers in order to exercise such control. Therefore, *Pelron* does not support SAIC's argument that the hazard, as defined in the citation, is deficient.

For all these reasons, we conclude that the Secretary has established the existence of a hazard.

III. Hazard Recognition

Hazard recognition "may be shown by proof that 'a hazard . . . is recognized as such by the employer' or by 'general understanding in the [employer's] industry.' " *Otis Elevator Co.*, 21 BNA OSHC 2204, 2207 (No. 03-1344, 2007) (quoting *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1873 (No. 92-2596, 1996)); *see Kelly Springfield Tire Co. v. Donovan*, 729 F.2d 317, 321 (5th Cir. 1984) ("Establishing that a hazard was recognized requires proof that the employer had actual knowledge that the condition was hazardous or proof that the condition is generally known to be hazardous in the industry."). The judge concluded that SAIC recognized the hazard, citing

[5] Knorek explained that the Navy diver—who was "free-diving," that is, swimming under his own breath—"failed to surface from an observation free dive." The diver was eventually found, brought to the surface, and resuscitated.

the testimony of Knorek, who stated that he was aware that the risk of drowning was present during swimming operations.[6] The judge rejected SAIC's argument (which the company has also raised on review) that it did not recognize the hazard of drowning because it had never had an employee drown, finding that it was "of no import for purposes of this element" because "recognition of a hazard does not wait upon the occurrence of a fatal accident."[7]

We agree with the judge—it is well established that recognition of a hazard is not dependent on an accident having previously occurred "because the purpose of the [OSH] Act is to prevent the first injury." *Elliot Constr. Corp.*, 23 BNA OSHC 2110, 2119 (No. 07-1578, 2012) (invoking this "well-established principle") (citing *Lee Way Motor Freight, Inc. v. Sec'y of Labor*, 511 F.2d 864, 870 (10th Cir. 1975)); *Mineral Indus. & Heavy Constr. Grp. v. OSHRC*, 639 F.2d 1289, 1294 (5th Cir. 1981) ("The goal of the [OSH] Act is to prevent the first accident, not to serve as a source of consolation for the first victim or his survivors."). In any event, Knorek's testimony about the near-drowning incident to which SAIC responded in the 1990s shows that the company—at least as of the time Knorek became a supervisor[8]—was itself aware that there was a

[6] The judge also relied on SAIC's Diving Policy and Safety Manual, which addresses drowning hazards in diving operations. Absent proof from the Secretary, however, that the risk of drowning in *diving operations* is the same as in SAIC's *swimming operations*, the judge's reliance on the manual as support for hazard recognition is error. As the manual makes clear, diving and its related equipment pose numerous hazards that are *not* present when swimming without such equipment, like those dealing with decompression, use and storage of oxygen, use of pneumatic and power tools underwater, underwater welding and burning, jetting and water blasting, use of lift bags, and use and storage of compressed gas. The judge did not address this distinction, despite acknowledging not only that SAIC has consistently treated swimming and diving *separately*, but that three SAIC employees testified that the diving manual did not cover swimming. As such, we find the manual irrelevant to whether SAIC recognized the drowning hazard. However, because we conclude that other evidence establishes SAIC's recognition of the hazard, the judge's error in this regard is harmless.

[7] SAIC also suggests that it did not recognize the cited hazard because the Navy had not previously issued a standard operating procedure that pertained to SAIC's swimming operations. The company provides no legal support for this argument, and the claim that it can delegate OSH Act responsibilities where its own employees are exposed to a hazard is contrary to Commission precedent. *See, e.g., Acchione & Canuso, Inc.*, 7 BNA OSHC 2128, 2131 (No. 16180, 1980) ("[A]n employer remains accountable for the health and safety of its employees . . . and cannot divest itself of its obligations under the [OSH] Act by contracting the responsibility to another employer.").

[8] Knorek testified that he has worked for SAIC since 1988 and has been in the position of Dive Safety Officer since 2004.

drowning hazard, and Knorek conceded, as discussed above with respect to the hazard element, that a drowning hazard was present. *See Mo. Basin Well Serv., Inc.*, 26 BNA OSHC 2314, 2317-18 (No. 13-1817, 2018) (supervisor's recognition of hazard imputed to company).

Citing to *Alabama Power Co.*, 13 BNA OSHC 1240 (No. 84-357, 1987), SAIC claims that if "a twenty-four (24) year history of *no accidents* for truck drivers delivering truckloads of coal was *more than adequate* to support the employer's contention that the employer had taken all reasonable steps to ensure a safe workplace for its truck drivers" (emphasis in original), the same should be true with respect to SAIC's 50 year fatality-free history. This argument, however, overlooks that abatement of the hazard—not recognition of it—was the issue in *Alabama Power*. 13 BNA OSHC at 1243. Indeed, the Commission considered Alabama Power's existing work rules and its 24-year fatality-free history in finding that the Secretary had failed to show that its methods of protecting its truck drivers from the cited hazard were inadequate. *Id.* at 1244-46. *Alabama Power*, therefore, does not support SAIC's assertion that its long history without a fatality precludes finding that it recognized the hazard.[9]

In sum, we find that Knorek's direct testimony that an SAIC swimmer had nearly drowned during a previous training exercise, as well as his testimony that a drowning hazard is present whenever a swimmer is in the water, establishes the company's recognition of the cited hazard.

IV. Feasible and Effective Means of Abatement

To establish the feasibility and efficacy of a proposed abatement measure, the Secretary must "demonstrate 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." *Arcadian Corp.*, 20 BNA OSHC

[9] The other cases SAIC cites are similarly unpersuasive. Like *Alabama Power*, the issue in *National Realty & Construction Co. v. OSHRC*, was abatement, not hazard recognition. 489 F.2d 1257, 1265 (D.C. Cir. 1973). Several others, including *Austin Bridge & Road, L.P.*, No. 05-1376, 2006 WL 2781631 (OSHRC Aug. 12, 2006) (ALJ), *HWS Consulting Group, Inc.*, No. 04-1219, 2005 WL 1541106 (OSHRC June 20, 2005) (ALJ), and *Darby Creek Excavating, Inc.*, No. 03-1541, 2004 WL 2857354 (OSHRC Dec. 9, 2004) (ALJ), are not precedential, as they are unreviewed administrative law judge decisions. *See Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976) (unreviewed part of judge's decision does not constitute binding Commission precedent). And, in any event, those cases are inapposite, as unlike this one, the employers there lacked actual knowledge of the hazards. Finally, in *UXB International*, 22 BNA OSHC 1824, 1829-31 (No. 08-0137, 2009) (ALJ), and *Jesse Remodeling, LLC*, 24 BNA OSHC 2072, 2075 (No. 12-2086, 2013) (ALJ)—both unreviewed judge's decisions—the judges found hazard recognition on the part of the employers.

at 2011 (citing *Beverly Enters.*, 19 BNA OSHC at 1190). The Secretary need only show that the abatement method would materially reduce the hazard, not that it would eliminate the hazard. *Arcadian Corp.*, 20 BNA OSHC at 2011 (citing *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1122 (No. 88-572, 1993)). Where an employer has undertaken measures to address the cited hazard, the Secretary, in establishing efficacy, must also show that such measures were inadequate. *U.S. Postal Serv.*, 21 BNA OSHC 1767, 1773-74 (No. 04-0316, 2006). Here, the Secretary proposed the following means of abatement in the citation: "When a single swimmer is deployed a dedicated person must maintain contact with the swimmer at all time[s]."

Feasibility

The judge found that the Secretary's proposed abatement was capable of being put into effect because SAIC had implemented it, along with several other measures, within a month after the accident. On review, SAIC argues that it is not feasible to "maintain constant contact" with a single swimmer because it would undermine the swimmer's purpose of avoiding detection by a sea lion and "would thwart the purpose of the work and make the performance of the program moot, if not impossible, as well as negatively impact national security." The Secretary disputes this claim, asserting as the judge found that SAIC had already implemented the proposed abatement, along with several other procedures.

We agree with the judge. Following the accident and before the citation was issued, SPAWAR issued a written Standard Operating Procedure (SOP 34-14) for SAIC's training operations, which requires as follows:

> [W]hen a single swimmer is deployed a dedicated person must have visual contact with the swimmer at all times. The stand-by swimmer must be capable of entering the water within 30 seconds and the swim boat must be capable of reaching the swimmer[']s location within 30 seconds.

Captain Barron, who had a significant role in drafting SOP 34-14, specifically testified that this written procedure could have been implemented before the accident. SAIC cites no evidence in support of its claim that implementation of this procedure has thwarted the purpose of the training operations. In any event, such a claim is belied by the fact that SPAWAR itself issued the SOP. Therefore, we find that the Secretary has established that his proposed abatement measure was feasible. *See SeaWorld of Fla. v. Perez*, 748 F.3d 1201, 1214 (D.C. Cir. 2014) (proposed abatement measures feasible where cited employer "implemented many of [them] on its own").

Efficacy

To assess the efficacy of a proposed abatement measure, we first consider the adequacy of the employer's existing safety procedures. *See U.S. Postal Serv.*, 21 BNA OSHC at 1773-74. Here, the record establishes that at the time of the accident, SAIC lacked safety policies that addressed its swimming operations. As the Secretary notes, SAIC had: (1) no safety rule or guideline on how long a swimmer should stay underwater; (2) no rule requiring spotters; (3) no rule on regularly checking on a deployed swimmer; (4) no daily briefing that occurred before swimming operations; and (5) no document outlining what crews should discuss before swimming operations. In response, SAIC simply declares that "[t]o suggest [it] had no safety program for swimmers is specious" but cites no record evidence in rebuttal of the Secretary's evidence as to what its program lacked.

Testimony by SAIC's supervisors supports the conclusion that the company had no safety procedures in place for its swimmers. Knorek acknowledged that SAIC did not have a swimming plan similar to SAIC's Dive Plan:

> Q: "[W]as there, at the time of the accident, a similar plan for swimming operations in the . . . Sea Lion Program prior to this accident?"
>
> A: "No."

Also, Thissell testified that "[t]here was no specific surface swimming safety kind of . . . protocol." According to Thissell, at the time of the accident, SAIC did not use a dedicated spotter when a swimmer was in the water during an animal training operation. As the judge noted, Thissell explained that "[b]efore [the accident], we had visual spot checks where the person could be seen at different intervals. But there wasn't—especially when you're training the animal, the swimmer was—unless it was an emergency situation, has to be fairly discreet so no verbal communications." Given that SAIC had no safety rules for its swimming operations and instead conducted only ad hoc visual spot checks, we find that the Secretary has shown that SAIC's measures were inadequate to address the cited drowning hazard.

Turning to whether the Secretary established that his proposed abatement measure would materially reduce the hazard, the judge found that it would. He relied principally on testimony from Captain Barron, who stated that the new operating procedure—which, as discussed above, also required maintaining contact with the swimmer at all times—"provides a more safe environment and probably prepares the folks that aren't in the water, that aren't at risk of drowning easier access to someone that could be in trouble." The judge also relied on Thissell's testimony,

in which he explained that before the accident, SAIC relied on "visual spot checks where the person could be seen at different intervals," but under the new procedure, the boat and swimmer must communicate verbally at no longer than 5-minute intervals. In addition, the judge cited to Knorek's testimony that under the new procedure, "there has to be continuous contact with the swimmer."

We agree with the judge. Taken together, this testimony establishes that the Secretary's proposed abatement method would materially improve the safety of SAIC's swimming operations by allowing the swimmer to alert someone more quickly and easily in the event of trouble, and provide the crew with more time and opportunity to conduct a rescue if needed. As Captain Barron testified, under these new procedures, "there's some more rigor involved in the operation itself and how the boats are manned and things like that." Indeed, he explained that the purpose of adopting SOP 34-14 was "to prevent this kind of [accident] from occurring in the future" and "to kind of infuse a higher sense of safety with regard to the [training] operations."

For all these reasons, we conclude that the Secretary has shown that the use of a dedicated person to maintain constant contact with a deployed swimmer is feasible and materially reduces the cited hazard.

Reasonably Prudent Employer

Finally, the parties were asked to brief the issue of whether, as part of his burden to show feasibility of abatement, "the Secretary [was] required to establish that a reasonably prudent employer in the industry would have known that this proposed abatement was required." SAIC appears to argue that such a requirement exists, but the company cites no case law in support of this proposition. The Secretary responds that there is no such requirement, citing *Peter Cooper Corps.*, 10 BNA OSHC 1203, 1210 (No. 76-596, 1981), for the proposition that he need not show that an employer's industry recognized a proposed abatement measure as "the appropriate means of abatement."

The Secretary is correct that under Commission precedent his burden is limited to showing that a proposed abatement measure is feasible and that it would materially reduce the hazard, not that the employer's industry has recognized the proposed measure. *Chevron Oil Co., Cal. Co. Div.*, 11 BNA OSHC 1329, 1330 (No. 10799, 1983) ("The Commission has repeatedly held that the Secretary need not prove that the cited employer or his industry recognizes the abatement measures recommended by the Secretary.") (citing *Kansas City Power & Light Co.*, 10 BNA

OSHC 1417, 1422 (No. 76-5255, 1982) ("[T]he recognition element of an employer's duty under the general duty clause refers to knowledge of the hazard, not recognition of the means of abatement.")). However, the Ninth Circuit, one of two relevant circuits here,[10] has stated in response to an employer's vagueness challenge to a general duty clause citation that "problems of fair notice [posed by general duty clause citations] . . . dissipate when we read the clause as applying when a reasonably prudent employer in the industry would have known that the proposed method of abatement *was required* . . . ." *Donovan v. Royal Logging*, 645 F.2d 822, 831 (9th Cir. 1981) (emphasis added). Nevertheless, the Third Circuit, also relevant here, has not addressed this issue, so *Royal Logging* is not necessarily controlling. As such, we apply the Commission's own precedent. *See Bethlehem Steel Corp*., 9 BNA OSHC 1346, 1349 n.12 (No. 76-3444, 1981) (consolidated); *Raybestos Friction Materials Co*., 9 BNA OSHC 1141,1143 (No. 80-2793, 1980); *but see Dana Container*, 25 BNA OSHC 1776, 1780 n.10 (No. 09-1184, 2015), *aff'd*, 847 F.3d 495 (7th Cir. 2017).

In any event, even if *Royal Logging* were controlling, the Secretary has established that a reasonably prudent employer in the industry at issue here would have known that the proposed method of abatement was required. As we have already found, maintaining contact with the swimmer at all times presents an obvious way of materially reducing the recognized drowning hazard because it provides immediate notice of a swimmer in trouble and allows a rescue to occur more quickly, thereby decreasing the risk. *ACME Energy Servs.*, 23 BNA OSHC 2121, 2128 (No. 08-0088, 2012), *aff'd*, 542 F. App'x 356 (5th Cir. 2013) (unpublished) (finding that being farther away from a falling object was an obvious means of materially reducing the hazard the object posed); *compare Whirlpool Corp v. OSHRC*, 645 F.2d 1096, 1101 (D.C. Cir. 1981) (repudiating the Commission's finding of "apparent" feasibility of implementation of an abatement method, not the "apparent" utility of such a method in materially reducing a hazard). In this regard, "a

[10] This case arises in the Ninth and Third Circuits, as the worksite was in California, and SAIC is headquartered in Delaware. *See* 29 U.S.C. § 660(a) ("Any person adversely affected or aggrieved by an order of the Commission . . . may obtain . . . review . . . in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit . . . ."); s*ee Kerns Bros. Tree Serv*., 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (Commission generally applies law of the circuit where it is probable a case will be appealed).

reasonably prudent employer in the industry would have known that the proposed method of abatement was required."[11] *Royal Logging*, 645 F.2d at 831.

ORDER

We affirm Serious Citation 1, Item 1, and assess the $5,000 penalty assessed by the judge.[12]

SO ORDERED.

/s/
James J. Sullivan, Jr.
Chairman

/s/
Cynthia L. Attwood
Commissioner

/s/
Amanda Wood Laihow
Commissioner

Dated: April 16, 2020

[11] SAIC claims that the Secretary failed to make such a showing because "there was no evidence in this record that an 'industry' existed from which [SAIC] could have established that such a procedure could be viable." But SAIC offers no support for its contention that the general duty clause is inapplicable to an employer in an industry of one, and we are aware of none. Indeed, where the Secretary cites the sole employer in its industry, no inherent unfairness results because in such a situation proof of employer recognition, as a practical matter, is his only avenue of establishing the recognition element, and employer recognition is sufficient to establish this element. *See Coleco Indus., Inc.*, 14 BNA OSHC 1961, 1964 (No. 84-546, 1991) (noting that because Commission found that Secretary established employer recognition, it need not reach industry recognition).

[12] SAIC does not contest characterization or the penalty amount on review. *See KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1268 n.11 (No. 06-1416, 2008) (assessing proposed penalty where not in dispute).

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

Isabella M. Finneman, Senior Trial Attorney, U.S. Department of Labor, San Francisco, CA.

For the Complainant.

Robert D. Peterson, Esq., Robert D. Peterson Law Corporation, Rocklin, CA.

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.[13] (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, 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.

[13] 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).

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.[14]

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 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

[14] 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 ll35, 1138-1139 (8th Cir. l988) (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.)

to comply with the Act.[15] *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 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

[15] 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.

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.[16] (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

[16] 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.

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.) 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.[17] (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

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

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 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.[18]

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 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.

[18] 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.

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.[19] *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 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.

[19] 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.)

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