

65729-1

65729-1

NO. 65729-1

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

MORRISON KNUDSEN CONSTRUCTION,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON,

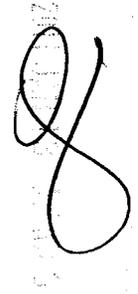
Respondent.

BRIEF OF RESPONDENT

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I. PRELIMINARY MATTERS

This matter is before this Court for a second time for review of the Board of Industrial Insurance Appeals' (Board) decision on remand. As before, the Board found in favor of Morrison Knudsen and the superior court overturned the Board's decision. The Department once again asks this Court to affirm the Superior Court's decision and reverse the decision of the Board.

II. INTRODUCTION

When Morrison Knudsen bid on the \$110 million contract to clean and redevelop the Harbor Island Superfund site, it promised to follow Washington's safety rules for hazardous waste remediation activities. Once it was awarded the contract, however, it ignored those rules. When cited under the Washington Industrial Safety and Health Act (WISHA) for this failure, Morrison Knudsen disavowed its earlier promises and pretended instead that Harbor Island was not a hazardous waste site at all. Eight years ago, the Board accepted this revisionist history and vacated the citation.

In 2004 the King County Superior Court reversed the Board's decision, determining as a matter of law that "Morrison Knudsen's work site on Harbor Island was an 'uncontrolled hazardous waste site'" and that "Morrison Knudsen was performing a 'clean-up operation'" at Harbor

Island. CP 170-172. This Court affirmed the Superior Court in 2005 and the Supreme Court denied review. *Dep't of Labor & Indus. v. Morrison Knudsen*, 130 Wn. App. 27, 29 n.1, 121 P.3d 726 (2005) (*Morrison Knudsen I*), review denied, 156 Wn.2d 1037 (2006). The matter then returned to the Board for further proceedings as required under *Morrison Knudsen I*.

On remand, the Board used different words to achieve the same result that it reached the first time. In so doing, the Board ignored or rewrote: (1) the Superior Court's and this Court's decisions; (2) the rules that exist to protect workers such as Morrison Knudsen's employees; and (3) the record. Further, the Board's decision on remand effectively ruled that those who assert in a private action that their jobsite was dangerous cannot be truthful when describing hazards before the Board.

The Board's decision on remand is not simply wrong, it conflicts with this Court's prior ruling and ignores the very workers whose complaints brought Morrison Knudsen's WISHA violations to light. The Department, again, asks this Court to apply the law as it is written to the record as it exists, and, as the Superior Court has already done, reverse the Board's decision.¹

¹ The record in this case includes both the record created by the Board during Morrison Knudsen's first appeal and the supplemental record that the Board assembled following the remand. Given the volume of the record, the Department has attached key

III. COUNTERSTATEMENT OF THE ISSUES

The citation remanded to the Board alleged that Morrison Knudsen had violated 34 different WISHA standards. *See* BR 149-174.² Among other things, the citation alleged Morrison Knudsen: 1) failed to disclose jobsite hazard information to its employees and subcontractors of the nature, level and degree of exposure likely to occur during the hazardous waste operations (Item 1-4a, CP 46-47); 2) failed to ensure employees were provided and used appropriate Personal Protective Equipment (PPE) (Item 1-3b, CP 44-45); 3) failed to identify inhalation or skin absorption hazards prior to allowing entry (Item 1-3a, CP 43-44); 4) develop, communicate, and implement site control and decontamination procedures (Items 1-2b, 1-2c and 1-2d, CP 41-44); 5) failed to monitor employees for exposure to hazardous substances (Item 1-6a, CP 49-51); and 6) failed to provide medical assistance to a worker who complained of symptoms indicating possible overexposure to hazardous substances (Item 2-3,

documents to this brief as appendices. Citations to documents in the Board's record are indicated by "BR" followed by the numbers stamped in the lower right-hand corner. Citations to testimony given before the Board include the testifying witness's name, the date of testimony, and the page number of the transcript of proceedings.

² A copy of the citation is attached as Appendix (App.) B. While the citation originally identified 35 violations, the Department has not disputed the Board's decision to vacate Item 1-10, a violation that was not based on the provisions of former WAC 296-62-300 through 296-62-3195, known as "Part P." Definitions of "Part P" and a number of other terms and acronyms referred to in this Brief of Respondent are provided in a glossary as App. A.

CP 59-60). Of the 34 alleged violations, the Board vacated 31, and recharacterized the remaining three from “serious” to “general” violations.

Although the Department agrees with the Superior Court that every one of the Board’s determinations on the 34 disputed items is incorrect, this brief will focus on 21 of the disputed items, based on the nature and magnitude of the Board’s errors.³ These items can generally be grouped by the following issues that run throughout the Board’s decision:

- A. This Court and the Superior Court previously held that Morrison Knudsen engaged in a “clean-up operation” at the Harbor Island Superfund site, and that the jobsite was an “uncontrolled hazardous waste site.” On remand, the Board repudiated these decisions and held that the vast majority of the Harbor Island Superfund site posed no threat to human health while Morrison Knudsen’s employees were cleaning it up. Is the Board’s determination not only inconsistent with this Court’s controlling ruling in *Morrison Knudsen I*, but also unsupported by substantial evidence?

- B. Under the Law of the Case, Morrison Knudsen’s Harbor Island project was a “clean-up operation” at an “uncontrolled hazardous waste site.” On remand, the Board determined that Part P applied only to a small portion of Morrison Knudsen’s Harbor Island jobsite. Is the Board’s determination not only inconsistent with this

³ The Department specifically assigns error to the Board’s: 1) Finding of Fact (FOF) 1 because it is an incomplete recitation of this case’s procedural history; 2) failure to include FOF 4 from its original decision; 3) FOF 35 because it does not include FOF 7 from the original decision; and 4) Findings of Fact 6-34 and 36-40 and the Board’s Conclusions of Law 5-33 and 35-40 because (a) they disregard and are contrary to this Court’s decision; (b) they ignore, incorrectly interpret, and erroneously apply the law; (c) they misread and misstate the record; and (d) they are not supported by substantial evidence in the record. The Superior Court correctly held that the Board’s determinations on the 34 items are wrong, and the Department asks this Court to reach the same result.

Court's controlling ruling in *Morrison Knudsen I*, but also unsupported by substantial evidence?

- C. The record establishes that Morrison Knudsen's jobsite at Harbor Island was heavily contaminated with arsenic; that the arsenic constituted a hazard for Morrison Knudsen's employees; and that Morrison Knudsen was aware of this hazard. On remand, the Board relied exclusively on the opinion of one of Morrison Knudsen's witnesses in order to decide, in effect, that all of the prior documents and studies of Harbor Island were wrong and that there was actually no health risk whatsoever from arsenic at the site. Is the Board's determination not only inconsistent with this Court's controlling ruling in *Morrison Knudsen I*, but also unsupported by substantial evidence?
- D. Washington law protects workers who make complaints regarding safety and health issues at their jobsites or who testify in proceedings concerning WISHA violations from all forms of discrimination. On remand, the Board determined that despite these protections, the sworn testimony of three former Morrison Knudsen employees was not truthful solely because these employees had filed suit against Morrison Knudsen based on the conditions at the Harbor Island jobsite. Did the Board err in completely rejecting the testimony from these witnesses?
- E. Under RCW 49.17.180(6), a "serious" WISHA violation exists where there is a substantial probability that an injury resulting from the violation—regardless of the likelihood that the injury will occur—would be "death or serious bodily harm." The Board held that the three violations it affirmed, violations that created a risk of cancer and other serious diseases, were not "serious." Is the Board's determination supported by substantial evidence?
- F. WAC 296-62-30510(1)(d) requires employers to make medical assistance available "as soon as possible upon notification by an employee that the employee has developed signs or symptoms indicating possible overexposure to hazardous substances or health hazards."

Did Morrison Knudsen violate this rule when it received notification of medical complaints from an employee but failed to refer him to a doctor or otherwise aid him in obtaining medical assistance?

IV. COUNTERSTATEMENT OF THE CASE

A. Background Facts Regarding Harbor Island

1. Pollution On The Island, Government Studies, And The National Priorities List

Since its creation, Harbor Island has never served as anything other than a site for industrial and other commercial activities. BR Exhibit (Ex.) 32, ROD at 4. These activities have included fuel storage and transfer, lead smelting and fabrication, shipbuilding, and metal plating. *Id.*

By the 1970s, concerns had arisen over the air lead levels from the smelter at Harbor Island. *Id.* Air quality and soil contamination studies revealed that airborne lead concentrations exceeded the federal standards 95% of the time as well as “a significant volume of lead contaminated soil at the lead smelter facility.” *Id.* As a result, Harbor Island was placed on the federal Environmental Protection Agency’s (EPA) National Priorities List (NPL) in 1983. *Id.* Additional studies revealed elevated levels of lead, cadmium and sulfate. *Id.* Washington State’s Department of Ecology (DOE) also found other contaminants, including chromium, arsenic, mercury and polycyclic aromatic hydrocarbons (PAHs). *Id.*

The EPA performed a Remedial Investigation (RI) of the site, which was completed in 1990. *Id.* The EPA separated Harbor Island into several operable units: the tank farms; Lockheed Shipyards; marine sediments; and soil and groundwater. BR Ex. 32, ROD at 6. The soil and groundwater unit, also referred to as the “island-wide” unit, comprises all parts of Harbor Island not included in the other three units. BR Ex. 32, ROD at 9, Figure 3. At the time the ROD was being developed, sources of contamination at the Island included Nonferrous Metals, Inc. (the secondary lead smelter), Seattle Iron & Metals, Former Leckenby Company (Port of Seattle), and Todd Shipyards. BR Ex. 32, ROD at 6-8.

As part of its RI, the EPA took soil samples from over 300 locations on the Harbor Island operable unit (the soil and groundwater unit within which Morrison Knudsen’s employees worked, hereinafter referred to as “Harbor Island.”). BR Ex. 32, ROD at 7. The EPA also installed 49 ground wells for water sampling. *Id.* Analyses from these samples showed that surface and sub-surface soils were contaminated with dangerously elevated levels of organic and inorganic contaminants over a majority of Harbor Island. BR Ex. 32, ROD at 12-14. These contaminants included total petroleum hydrocarbons (TPHs, including diesel and gasoline), polychlorinated byphenyl (PCBs), PAHs, lead, arsenic, cadmium, and chromium. *Id.*

2. The EPA Record Of Decision For Clean-Up And Hot Spot Selection

Having completed the investigation and study portions of its task, the EPA, in September 1993, issued its “Record of Decision, *Declaration, Decision Summary, and Responsiveness Summary for Harbor Island Soil and Groundwater, Seattle, Washington.*” BR Ex. 32. The Record of Decision (ROD) contains a detailed description of Harbor Island’s soil and groundwater pollution and how it was to be remediated. On its very first page, the ROD emphasizes the need for prompt clean-up of the site:

Actual or threatened releases of hazardous substances from this site, if not addressed by implementing the response action selected in this Record of Decision (ROD), may present an imminent and substantial endangerment to public health, welfare or the environment.

BR Ex. 32, ROD, *Declaration* at 1.

The EPA presented in the ROD a “summary of site risks” relevant to the excavation and other soil-related work that Morrison Knudsen’s employees eventually performed and which was the object of the Citation:

People who may incidentally ingest soil through hand-to-mouth contact and absorb contaminants through dermal contact with contaminated soil were identified as the population most at risk of adverse health effects. . . .

BR Ex. 32, ROD at 16.

Contaminants found in high enough concentrations were considered for the risk assessment. BR Ex. 32, ROD at 17. Based on this, more than 40 contaminants were identified for evaluation. *Id.* Of these,

lead, arsenic, antimony, PAHs and PCBs were considered contaminants of concern due to their high concentrations and toxicity compared to the other contaminants. *Id.*, Table 2. The hazardous substances covered the 200 acres of Harbor Island. BR Ex. 32, ROD, 26.

Following contaminant identification, potential hot spots were selected by first identifying the five “contaminants presenting the greatest risk to human health and the environment”—lead, mercury, arsenic, TPH, and PCBs. BR Ex. 32, ROD at 42. Arsenic was eliminated from hot spot consideration due to its widespread contamination across the entire island, and PCBs were eliminated based on the treatment level set by the EPA. BR Ex. 32, ROD at 57.⁴

This left lead, mercury, and TPH as potential hot spots. *Id.* The Harbor Island remediation ultimately selected limited clean-up of hot spots to “organic pollutants,” excluding areas contaminated with non-organic materials such as arsenic, lead, and mercury. BR Ex. 32, ROD at 57. Thus, prior to capping, only known TPH hot spots (surface soil with TPH contamination exceeding 10,000 parts per million) would be

⁴ It is not clear how PCBs were ultimately handled at the site, as App. B to the Record of Decision states that this contaminant was removed from hot spot consideration while elsewhere the ROD includes PCBs within the definition of hot spots. *See* BR Ex. 32 at 23. Whether PCB hot spots were removed or not is immaterial, however, as Morrison Knudsen’s employees were exposed to abundant other pollutants.

removed. BR Ex. 32, ROD at 43, 54-58 (Alternative 8A, incorporated into Selected Alternative (11B) via Alternative 11A). All other contaminants, as well as TPH below the 10,000 parts per million (ppm) hot spot level and TPH hot spots not already identified would remain on-site and would be capped where they exceeded clean-up goal levels. *Id.* Figure 5 of the ROD (BR Ex. 32, at 44) shows the locations of *known* organic, inorganic, and combined organic/inorganic hot spots. The shaded portions of Figure 6 (BR Ex. 32, ROD at 74) show the areas that, at the time the ROD was prepared, were not already covered with an asphalt cap and were expected to be capped.

3. Clean-Up Occurring Before And Contamination Remaining When Morrison Knudsen Began Work

The ROD describes a two-step process for cleaning Harbor Island. First, known “hot spots” would be removed; second, the remaining contaminated areas would be capped. BR Ex. 32, ROD at 57.⁵ Both the Board and Morrison Knudsen erroneously contend that clean-up goals selected in the ROD were met prior to Morrison Knudsen beginning work at Harbor Island. *See, e.g.*, AB 14-15; Clerk’s Papers (CP) 1681-1683.

⁵ The ROD limits capping to “areas not currently covered by an impermeable barrier of asphalt or concrete.” BR Ex. 32, ROD at 16, 72.

The clean-up goal for TPH (gasoline) was 400 ppm, while the goal for TPH (diesel) was 600 ppm. BR Ex. 32, ROD, Appendix (App.) A at 4. However, TPH contamination did not reach the hot spot threshold until it reached *10,000 ppm*. BR Ex. 32, ROD, App. B. Therefore, any soil with contamination above the 400 and 600 ppm goals but below 10,000 ppm was not treated as a hot spot, was still above clean-up goals, *and was not removed prior to Morrison Knudsen beginning work at Harbor Island*. See e.g., BR Ex. 32, ROD at 45 (“[a]reas where the soil exceeds the clean-up goals for TPH, lead, arsenic, mercury, PCBs, and PAHs would still exist after hot spot removal.”).

Further, apart from TPH contamination, the record shows that the “areas not shaded in Figure 6” of the ROD were saturated with other pollutants that *far* exceeded clean-up goals. See, e.g., ROD, Figure 4 at 27. Arsenic and lead contamination, for example, exceeded clean-up goals in a host of locations outside the small shaded areas in Figure 6 of the ROD, a fact demonstrated by comparing maps of those pollutants’ concentrations with Figure 6. See BR Ex. 32, ROD at 25 (clean-up goals); compare BR Ex. 75 (map of lead concentrations) and BR Ex. 76 (map of arsenic concentrations) with BR Ex. 32, ROD at 74 (areas to be capped).⁶

⁶ Figure 4 of the ROD, “Surface Soil Exceeding 1.0E-5 Risk or MTCA Criteria,” shows the extensive areas over Harbor Island where contamination exceeded clean-up levels for all contaminants (dark shaded portions). BR Ex. 32, ROD at 27.

Finally, Figure 6 of the ROD became irrelevant after Morrison Knudsen started work because Morrison Knudsen removed virtually all the asphalt, concrete and buildings at the site and in that area. Indeed, the only minimal relevance Figure 6 of the ROD has is to establish areas that, prior to Morrison Knudsen's arrival, were not already capped by asphalt and would have needed capping to satisfy the clean-up goals. BR Ex. 32, ROD at 27; *compare* BR Ex. 56 (Harbor Island before Morrison Knudsen started work) *with* BR Ex. 57 (Harbor Island following demolition of buildings and removal of asphalt and concrete).

B. Morrison Knudsen Worked In Areas Known To Be Contaminated With Hazardous Materials

As noted above, the Board and Morrison Knudsen incorrectly contend that the shaded areas of Figure 6 of the ROD were the only areas on Harbor Island with contamination.⁷ To the contrary, the evidence establishes that Morrison Knudsen's employees performed work within the shaded areas of Figure 6 of the ROD.

The shaded areas of Figure 6 of the ROD include the SeaFab or CEM site, Seattle Iron and Metals, and Fisher Mills. BR Ex. 72. Michael Shoup, Morrison Knudsen's site superintendent, stated they performed "excavation in the Fisher Mills' parking lot" and brought the

⁷ *See generally*, Appellant's Brief (AB) 15-16, 22; BR 1682-1683.

CEM site down to sub grade. Michael Shoup, TR 12/11/01, 97, 99, 106-107. Eugene Vos, a former employee, described building demolition work at the SeaFab site and stockpiling and soil grading of soil at Seattle Iron and Metals. Eugene Vos, TR 12/7/01, 50, 52, 61-62, 81. Morrison Knudsen's environmental consultant acknowledged work was done at contaminated properties resulting in employee overexposure to contaminants. *See*, Robert Gilmore, TR 2/5/02, 197 (explaining a laborer doing excavation and trenching work at the SeaFab site); 40 (explaining that six out of nine air monitoring samples taken at the SeaFab site exceeded action level for lead). Darrell Dodson, Morrison Knudsen's earthwork superintendent, described excavation work at the Fisher Mills property (Darrell Dodson, TR 2/7/02, 23) and Jason Sousa, another consultant, described demolition work at Seattle Iron & Metals (Jason Sousa, TR 2/7/02, 44-45).

Ron Slater's daily diaries also confirm that employees routinely worked in the shaded areas of Figure 6 of the ROD. BR Ex. 43 at 1-5 (describing work at Fisher Mills); 8 (fill work and "waste" removal work at Fisher Mills); 14-15 (describing demolition at the CEM site). Extensive work at these locations included: earth work with dirt that was "black" and "smelled like gasoline" (Rocky Brock, TR 12/10/01, 65, 66, 71-73); digging trenches (George Harvey, TR 2/4/02, 47); removal of sod, mud,

and soil (Rocky Brock, TR 12/10/01, 68; *see also*, George Harvey, TR 2/4/02, 64; Ronald Slater, TR 12/5/01, 117); providing assistance in removing underground storage tanks (George Harvey, TR 2/4/02, 153-155); and identifying and stockpiling potentially contaminated soils (William Kulas, TR 12/11/01, 29, 34, 52-53).

C. The Citation

On October 20, 2000, the Department issued a citation based on its inspection of Morrison Knudsen's Harbor Island jobsite. The citation alleged violations of 34 different WISHA standards. These standards, then codified at former WAC 296-62-300 through 296-62-3195, are commonly referred to as "Part P."⁸ Pertinent details of the individual violations are discussed below in conjunction with the arguments related to those violations.

D. Procedural History

1. Morrison Knudsen I

In Morrison Knudsen's first appeal, the Board vacated every single one of the violations based on its determinations that (a) Harbor Island was not an "uncontrolled hazardous waste site," and (b) Morrison

⁸ Part P was repealed and recodified in 2004 in chapter 296-843 WAC, but the former provisions govern the appeals involving Morrison Knudsen's citation. *See Morrison Knudsen I*, 130 Wn. App. at 29 n.1. For simplicity, this brief will therefore refer to Part P's requirements in former chapter 296-62 WAC in the present tense and will not use the word "former." Part P appears at BR 527-598.

Knudsen was not engaged in a “clean-up operation” at the site. BR 650-653, 655 and 657-658. The Board reached these conclusions despite recognizing that Morrison Knudsen personnel stockpiled contaminated soils and had engaged in remediation work mandated by the Superfund consent decree. BR 650. The Board even found as a fact that Morrison Knudsen’s work included “contaminated soil handling.” *Id.* at 657; CP 150-152. Nevertheless, the Board reasoned, this was not “enough” to bring the project within the scope of Part P. BR 650.

The Department appealed the Board’s decision, and the Superior Court reversed.⁹ The Superior Court rejected the Board’s Part P analysis in its entirety, holding that Morrison Knudsen’s Harbor Island jobsite was an “uncontrolled hazardous waste site” and that Morrison Knudsen was performing a “clean-up operation” at the site. CP 166-170. The Superior Court also instructed the Board “to find and conclude that Morrison Knudsen’s activities at Harbor Island were covered by Part P, and that Morrison Knudsen was required to comply with the standards contained therein.” *Id.* at 172. This Court affirmed the Superior Court’s decision, and the matter returned to the Board. *Morrison Knudsen I*, 130 Wn. App. 27.

⁹ A copy of the Superior Court’s decision in *Morrison Knudsen I*, entered on August 9, 2004, is attached as App. C.

2. Morrison Knudsen II

On remand, the Board made the findings and conclusions regarding applicability of Part P that it was ordered to make under this Court's decision in *Morrison Knudsen I*, and then proceeded to reach a result virtually identical to its first decision. The Board accomplished this by finding that Morrison Knudsen's workers were not exposed to any hazards—despite the fact that they were conducting clean-up work on a hazardous waste site that encompassed the entire jobsite. *Compare Morrison Knudsen I*, 130 Wn. App. at 37 with BR 1664-1717.¹⁰

In direct conflict with this Court's prior holding, the Board concluded that Part P applied to only small portions of Morrison Knudsen's work and, even then, only to the extent that the work was performed within a very small portion of the Harbor Island jobsite. *Compare, e.g.*, BR 1676, 1681-1683, with *Morrison Knudsen I*, 130 Wn. App. at 29-30. The Board also vacated numerous violations because of a claim that the firm's employees had not actually been exposed to hazardous substances despite the fact that they performed hazardous waste clean-up. BR 1686, 1693-1694, 1700-1702.

And, once again, the Board's decision accepts and incorporates Morrison Knudsen's after-the-fact excuses for not following the standards

¹⁰ A copy of the Board's decision on remand is attached as App. D.

in Part P, claiming that these standards have limited, if any, applicability because Morrison Knudsen's work at the Harbor Island Superfund site was more "construction" than "clean-up." *See, e.g.*, BR 1676, 1681-1683, 1686, 1693-1694, 1700-1702. This is precisely the argument that the Superior Court and this Court have already rejected. *See, e.g., Morrison Knudsen I*, 130 Wn. App. at 37.

The Department appealed the Board's decision on remand to King County Superior Court. The Superior Court once again rejected the Board's strained construction and application of Part P.¹¹ First, the Superior Court ruled that the Board's decision was contrary to the previous determination that "Morrison Knudsen's work on Harbor Island was an 'uncontrolled hazardous waste site,'" that "Morrison Knudsen was performing a 'clean-up operation'" on Harbor Island, and that "[t]he ultimate goal' of Morrison Knudsen's processing and handling of hazardous substances at the Harbor Island work site was making the site safer for people or the environment." CP 475-476 (FOF 20).¹² The Superior Court therefore concluded that the Board "erred when it ignored the law of the case . . . that Part P applied to Morrison Knudsen's entire

¹¹ A copy of the Superior Court's June 25, 2010 decision is attached as App. E.

¹² Findings of fact and conclusions of law should be reviewed based on what they are, regardless of the label. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

Harbor Island jobsite and to all of Morrison Knudsen's work at that site." CP 477 (FOF 23).

Second, the Superior Court determined that the Board erred when it concluded on remand that clean-up goals for all contaminants at Harbor Island had been met before Morrison Knudsen began work at the site. CP 477-478 (FOF 26) ("[T]he record establishes that removal of organic hot spots did not result in the removal of all types of contaminants The record is clear that the clean-up goals . . . were not met"). For these and other reasons, the Superior Court concluded that the Board's decision was wrong as a matter of law and was not supported by substantial evidence in the record, and reversed.

Morrison Knudsen now appeals the Superior Court's decision to this Court.

V. SUMMARY OF ARGUMENT

Morrison Knudsen contends substantial evidence supports the Board's determination that Morrison Knudsen's employees were not exposed to any contaminated soils or to any serious hazard. AB 30-46. Morrison Knudsen also asserts that the Board complied with the Superior Court's order to apply Part P and that the Board's resulting decision on remand, that Part P had virtually no application to Morrison Knudsen's employees, was correct. AB 33-34. Finally, Morrison Knudsen contends

that determining witness credibility is a function within the sole purview of the Board regardless of the reason the Board may give for rejecting the testimony. AB 42.

Woven throughout Morrison Knudsen's arguments in its most recent appeal are the very positions and assertions this Court expressly rejected in *Morrison Knudsen I*: 1) that the firm's work at Harbor Island was construction and not hazardous waste clean-up because "the primary scope and magnitude of this project . . . was to design and build a port expansion facility . . ." (AB 11-13); and 2) that Harbor Island was not contaminated when the firm began work there because "all known and identified 'hot spots' of hazardous waste . . . were removed . . ." (AB 14).

Morrison Knudsen's contentions and the Board's decision on the exposure question are incorrect for several reasons. First, under the law of the case doctrine, it is established that Morrison Knudsen engaged in a clean-up operation at a hazardous waste site. It is also the law of this case that Part P applied to all of Morrison Knudsen's work at Harbor Island. Second, it is indisputable that clean-up at Harbor Island was not complete before Morrison Knudsen began work. Indeed, remediation of Harbor Island is precisely what Morrison Knudsen was hired to perform, as this Court recognized in 2005. Third, it is indisputable that Morrison Knudsen's employees had access to and were exposed to hazardous

substances including arsenic, lead, TPHs and PAHs. Finally, Morrison Knudsen’s arguments and the Board’s decision misinterpret the applicable WISHA statute and rules, and are otherwise contrary to law.

Morrison Knudsen also argues that the Board correctly recharacterized certain safety violations from “serious” to “general,” and that the Board correctly vacated a citation charging that Morrison Knudsen unlawfully failed to make medical assistance available to a worker. These arguments and the Board’s rulings likewise misinterpret the applicable WISHA statute, rules and cases arising under these provisions, and are otherwise contrary to law.

VI. ARGUMENT

A. Standard Of Review

Morrison Knudsen contends that this Court need only decide whether substantial evidence supports the Board’s determination. Morrison Knudsen is wrong.¹³ Rather, this case requires review of the Board’s interpretation of WISHA and Part P. The standard of review of such interpretations is *de novo*. *E.g., Prezant Assocs., Inc. v. Dep’t of Labor & Indus.*, 141 Wn. App. 1, 7, 165 P.3d 12 (2007). This standard entitles the Court to “substitute its interpretation for that of an agency” if

¹³ Morrison Knudsen wrongly argues that the applicable standard of review is that found in the Administrative Procedure Act, ch. 34.05 RCW. AB at 28-30. That standard is similar—but not identical—to RCW 49.17.150(1). *See* RCW 34.05.570(3).

warranted. *Jenkins v. Dep't of Social & Health Svcs.*, 160 Wn.2d 287, 308, 157 P.3d 388 (2007).

To protect workers, Washington courts have established a guiding principle of liberal construction for interpreting WISHA and its rules:

The purpose of WISHA is to “assure, insofar as may be reasonably possible, safe and healthful working conditions for every man and woman working in the state of Washington” RCW 49.17.010. As a remedial statute, WISHA and its regulations are liberally construed to carry out its purpose. *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 146, 750 P.2d 1257 (1988).

Prezant Assocs., 141 Wn. App. at 7-8.

Morrison Knudsen argues that this Court should defer to the Board’s interpretation of the applicable safety statutes and rules. AB 29-31. But it is the Department’s interpretation, not the Board’s that is entitled to deference.

Washington courts have granted substantial deference to the Department’s interpretation of WISHA and the rules promulgated under it. *E.g., Lee Cook Trucking & Logging v. Dep’t of Labor & Indus.*, 109 Wn. App. 471, 477, 36 P.3d 558 (2001). Such deference is given to the Department’s interpretation because the Department is the exclusive, first-line, policy-making agency that the Legislature has tasked with administering WISHA. *See generally Port of Seattle v. Pollution Control Hr’gs Bd*, 151 Wn.2d 568, 593-94, 90 P.3d 659 (2004); *Martin v.*

Occupational Safety & Health Rev. Com'n, 499 U.S. 144, 111 S. Ct. 1171, 1175-1180, 113 L. Ed. 2d 117 (1991). This Court should defer to the Department's interpretation of WISHA statutes and rules, not to the quasi-judicial Board's interpretation.

To the extent there is any question about whether the Board's determination is supported by substantial evidence, it is not. The Board's decision is not supported by "evidence in sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise." *Morrison Knudsen I*, 130 Wn. App. at 34 (footnote omitted); RCW 49.17.150(1).

B. The Law Of The Case

When the Superior Court reversed the Board's decision in *Morrison Knudsen I*, it established as a matter of law that: 1) Morrison Knudsen's employees handled and stockpiled contaminated soils from Harbor Island (CP 168-170); 2) Morrison Knudsen's work site at Harbor Island was an "uncontrolled hazardous waste site" (CP 168-170); 3) Morrison Knudsen's work at Harbor Island was a "clean-up operation" as defined by Part P (CP 168-170); 4) Morrison Knudsen cleaned up hazardous substances at Harbor Island (CP 169-170); and 5) Morrison Knudsen's work at Harbor Island was covered by Part P (CP 169-171).

This Court affirmed the Superior Court's decision, holding that Morrison Knudsen had engaged in clean-up operations at Harbor Island.

Morrison Knudsen I, 130 Wn. App. at 29-30. This Court also ruled as a matter of law that: 1) “work activity may be covered by Part P based on any part of the activity itself that pertains to clean-up actions . . . not on non-clean-up activity that might follow clean-up. . . .” (*Id.* at 36); 2) contaminated soils were found and stockpiled by Morrison Knudsen’s employees (*Id.*); 3) Harbor Island contains an accumulation of hazardous substances that “creates a threat to the health and safety of individuals” (*Id.* at 38); 4) the evidence in the record establishes that Harbor Island “continue[s] to be a specific threat to the health and safety of individuals” (*Id.*); and 5) the “ultimate goal” of Morrison Knudsen’s work at Harbor Island was not construction (*Id.* at 37).

Under the law of the case doctrine, “an appellate court’s decision is binding on further proceedings in the trial court on remand.” *State v. Stein*, 140 Wn. App. 43, 55, 165 P.3d 16 (2007), *review denied*, 163 Wn.2d 1045 (2008).

The doctrine serves to “promote[] the finality and efficiency of the judicial process by ‘protecting against the agitation of settled issues.’” The courts apply the doctrine in order “to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts.”

State v. Harrison, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003) (citations omitted).

In an appeal from a Board decision regarding a WISHA citation, the superior and appellate courts sit in an appellate capacity. RCW 49.17.150; see *Dep't of Labor & Indus. v. City of Kennewick*, 99 Wn.2d 225, 226, 229, 661 P.2d 133 (1983). The Board was thus bound by the Superior Court's first decision and this Court's opinion when it considered Morrison Knudsen's appeal on remand.

C. The Board Disregarded This Court's Decision, Incorrectly Interpreted And Applied The Law, And Ignored Undisputed Evidence When It Held That Part P Only Applies To A Small Portion Of Morrison Knudsen's Harbor Island Jobsite

In its brief, Morrison Knudsen contends that the Board correctly determined that only a small part of Harbor Island might have been contaminated during Morrison Knudsen's work and, as a result, that the Board's limited application of Part P was correct. AB 33-36. In this regard, Morrison Knudsen's assertions and the Board's decision on remand are incorrect for at least two reasons. First, without any support in the record, the Board decided that clean-up goals over the *entire* Harbor Island site were met before Morrison Knudsen began work. BR 1680-1683. Second, the Board determined that, to the extent portions of Harbor

Island continued to have contamination, those portions were limited to the small shaded areas in Figure 6 of the ROD. BR 1682-1683.

Simply put, the Board's determinations and Morrison Knudsen's attempt to defend those determinations are contrary to the decision this Court made five years ago, contrary to the law, and contrary to the record.¹⁴

1. The ROD's Clean-Up Goals Were Not Met Before Morrison Knudsen Started Work

Despite Morrison Knudsen's arguments and the Board's decision to the contrary, no evidence in the record establishes that clean-up goals at Harbor Island were met before Morrison Knudsen started work. In fact, the opposite is true.

As is discussed at length above, under the selected remedy for clean-up at Harbor Island, only known TPH hot spots would be removed prior to Morrison Knudsen's work. BR Ex. 32, ROD at 43, 54-58. Thus, surface soil known to have TPH contamination exceeding 10,000 ppm was removed. *Id., see also* ROD at 44 (Figure 5). All other contaminants, as well as TPH hot spots not already identified, would remain on-site to be

¹⁴ Morrison Knudsen's Brief of Appellant attempts to defend each of the categorical determinations of the Board's decision on remand addressed in Sections C and D of the Department's argument in this Brief of Respondent. Because Morrison Knudsen's defense of the Board consists almost entirely of repetition and paraphrasing of the Board's decision, the Department's refutation of the Board decision is also its refutation of Morrison Knudsen's defenses of that decision.

capped by Morrison Knudsen where they exceeded clean-up goal levels. BR Ex. 32, ROD at 43-44, 54-58. Furthermore, any soil with contamination above the 400 and 600 TPH ppm levels, but below 10,000 ppm, was not treated as a hot spot, was still above clean-up levels, and was not removed prior to Morrison Knudsen beginning work at Harbor Island. *Id.*¹⁵

2. Contamination At Harbor Island Was Not Limited To The Shaded Areas Of Figure 6 Of The ROD

Despite undisputed evidence in the record, the Board somehow concluded that Part P applied only to the tiny shaded areas on Figure 6 of the ROD, absent specific evidence that specific other areas were contaminated:

[O]nly the shaded areas in Figure 6 of the ROD would pose a known threat to human health. . . . [T]he standards under Part P would apply to the operations by Morrison Knudsen in these shaded areas of Figure 6 at least until the area was remediated. All other areas, that is, the areas not shaded in Figure 6 of the ROD, presumptively meet the clean-up goals under the ROD, absent facts to show otherwise. Part P would only apply to work in these areas if facts establish the existence of hazardous substances.

BR 1683. This analysis is simply wrong.

¹⁵ Again, it is important to note that TPH was one of the five identified in the ROD for clean-up. BR Ex. 32, ROD at 46-47, 57. Numerous areas throughout Harbor Island were identified to have TPH contamination over the clean-up goals and under the hot spot treatment level which remained after TPH hot spots were remediated. BR Ex. 32, ROD, Figure 4.

First, as noted above, clean-up goals for organic compounds throughout the Island were *not* met before Morrison Knudsen began work. Rather, only known TPH hot spots were removed, leaving behind unknown hot spots as well as extensive areas above clean-up goals including, but not limited to, arsenic and lead contamination.

Second, apart from TPH contamination, the record shows beyond dispute that the “areas not shaded in Figure 6” of the ROD were saturated with other pollutants that *far* exceeded clean-up goals. *Id.* Arsenic and lead contamination, for example, exceeded clean-up goals in a host of locations outside of the small shaded areas in Figure 6 of the ROD. *See, e.g.,* BR Exs. 75 and 76. Regardless of where Morrison Knudsen’s employees worked on Harbor Island, they were exposed to toxic substances and the associated hazards.

3. Morrison Knudsen Employees Worked In Contaminated Areas

The Board’s decision on remand vacates eight violations on the rationale that there is insufficient evidence that Morrison Knudsen’s employees worked in “the shaded areas” shown in Figure 6 of the ROD.¹⁶ *E.g.,* BR 1695 (vacating violation because “[t]he Department has failed to prove that workers were working in areas of contaminated soil. . .”).

¹⁶ These are items 1-1g, 1-2b, 1-2c, 1-3a, 1-3c, 1-4b and 1-5a.

Again, the opposite is true: the record is replete with evidence showing that Morrison Knudsen's employees worked in areas that Figure 6 of the ROD identified for capping. There is no evidence to the contrary.

The shaded areas of Figure 6 of the ROD include the SeaFab or CEM site, Seattle Iron and Metals, and Fisher Mills. BR Ex. 72. Work performed by Morrison Knudsen in the areas of Figure 6 included: excavation and grading at the Fisher Mills' site (Michael Shoup, TR 12/11/01, 97, 99, 106-107); removal and stockpiling of safety fences and concrete footings at the CEM site (Donald Fleming, TR 12/5/01, 141); building demolition at the SeaFab site and soil grading and stockpiling at the Seattle Iron and Metals property (Eugene Vos, TR 12/7/01, 50, 52, 61-62, 81); fill work and "waste" removal work at Fisher Mills and demolition at the CEM site (BR Ex. 43 at 8, 14-15).

Morrison Knudsen's own progress reports show extensive work at these sites. BR Ex. 109, at 1-14 (reports describing work at Fisher Mills, CEM, and other locations). This work included: digging to remove concrete footings and earth work with dirt that was "black," "wet," and "smelled like gasoline" (Rocky Brock, TR 12/10/01, 65, 66, 71-73); digging trenches and climbing down into them (George Harvey, TR 2/4/02, 47); removal of sod, mud, soil, and grass (Rocky Brock, TR 12/10/01, 68; *see also*, George Harvey, TR 2/4/02, 64; Ronald Slater,

TR 12/5/01, 117); providing assistance in removing underground storage tanks (George Harvey, TR 2/4/02, 153-155); and identifying and stockpiling potentially contaminated soils (William Kulas, TR 12/11/01, 29, 34, 52-53).

The fact that Morrison Knudsen employees worked in the shaded areas of Figure 6 of the ROD is established by comparing the aerial photos of the site before Morrison Knudsen began work (BR Ex. 56) and after Morrison Knudsen had been on site for several months (BR Ex. 57). These photos show that Morrison Knudsen's workers removed nearly every bit of the paving that covered the shaded areas of Figure 6. Indeed, Morrison Knudsen itself acknowledges the extent of work it performed at Harbor Island, including the shaded areas of Figure 6 of the ROD. This work included "demolition of approximately 130 existing buildings" (AB 12), installation of underground utilities throughout Harbor Island (AB 13), and asphalt capping (AB 13). Morrison Knudsen points to Board Ex. 99 as proof of the extent of work it performed. AB 12. Taken together with Board Exs. 56 and 57, the three exhibits establish beyond dispute that Morrison Knudsen performed work in contaminated areas throughout Harbor Island including, but not limited to, the shaded areas of Figure 6 of the ROD.

Further, the Board's insistence that the Department "failed to prove that workers were working in areas of contaminated soils," (BR 1695), did not "offer any clear evidence of when and where work was performed which would expose the workers to hazardous substances," (BR 1691), failed to show that "specific work on specific days was done in specific areas containing hazardous substances," (BR 1692), and did not "identify with any reasonable degree of certainty the location of the work being done in order to establish that it was done within an area containing hazardous substances," (BR 1697), collapses in the face of its own prior decision in this matter: in 2002, the Industrial Appeals Judge who heard Morrison Knudsen's appeal wrote that "[t]here is no question that certain soils were found to be contaminated and were stockpiled by Morrison Knudsen personnel to be removed from the Island by employees of the Port." BR 650 (emphasis added). The Board cannot have rationally determined that there was no proof Morrison Knudsen's employees worked in areas containing hazardous substances.

D. The Board Erred When It Determined That WISHA Coverage At Harbor Island Was Restricted To Areas Where Morrison Knudsen's Employees Had Actual Exposure To Areas With Known Hazards

Morrison Knudsen also argues, and the Board concluded, contrary to the indisputable evidence, that the record did not establish that

employees worked in “the shaded areas” shown in Figure 6 of the ROD or that they worked in any areas of contaminated soils. BR 1683-84. Morrison Knudsen further contends that the Board correctly determined that, in the small area where Part P might apply, there was no proof that Morrison Knudsen employees were exposed to contaminated soil and that they therefore were not exposed to any serious hazards. AB 36-42.

E. Morrison Knudsen Employees Had Access To The Contamination Hazards At Harbor Island

Contrary to the law of this case, the underlying regulations, controlling case law, and the record, the Board limited application of Part P to areas of Harbor Island where Morrison Knudsen’s employees had actual exposure to hazardous substances. Even if this reasoning were correct, the Board’s decision would be wrong: the record establishes that workers at Harbor Island had unrestricted access to every area of the Island before the Department’s inspection. *See, e.g.*, McClelland Davis, TR 12/17/01, 148, 155; TR 12/18/01, 4-5. Given the widespread and dangerous contamination at Harbor Island, and the fact that clean-up goals were not met before Morrison Knudsen began work, Morrison Knudsen’s employees had access to the hazards. Kathy Bahnick, TR 12/11/01, 134, 137-138. Indeed, their ignorance of where all contaminants might be made the jobsite *more* hazardous, not less, as the Board appears to believe.

Furthermore, proof of actual exposure to a hazard is not necessary to establish a violation of WISHA standards. Instead, the Department must show that a worker:

[H]ad access to the violative conditions. To establish employee access, the Department must show by “reasonable predictability that, in the course of [the workers’] duties, employees will be, are, or have been in the zone of danger.”

Mid Mountain Contractors, Inc. v. Dep’t of Labor & Indus., 136 Wn. App. 1, 5, 146 P.3d 1212 (2006), quoting *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 147, 750 P.2d 142 (1988) (emphasis omitted). The Board has acknowledged this standard for more than 20 years. See *In re R C Construction*, No. 87 W039 (Wash. Bd. of Indus. Ins. Appeals Nov. 7, 1989), WL 164626 at *4-5; see also *In re Erection Co., Inc.*, Dckt. No. 07 W0068 (August 27, 2008), 2008 WL 4850901 at *2.

It is impossible to know where every square inch of contamination is at a Superfund site. The fact that contaminant locations at hazardous waste clean-ups are not known is precisely why Part P applies to “sites” rather than to specific locations within those sites. See, e.g., WAC 296-62-30001(1)(a) (Part P applies to “uncontrolled hazardous waste sites (including, but not limited to, EPA’s National Priority Site List . . .”) and WAC 296-62-30003 (defining “hazardous waste site” and “site” as “any

facility or location within the scope of this standard at which hazardous waste operations take place”).

1. The Board Erred When It Determined Only Areas With Known Hazards Were Covered By Part P

The Board’s decision on remand attempts to limit applicability of Part P to areas that “would pose a *known* threat to human health.” *See, e.g.*, BR 1683 (emphasis added). This too is wrong.

This Court held that Morrison Knudsen’s Harbor Island jobsite was an “uncontrolled hazardous waste site.” It is Harbor Island, and not small slices of Harbor Island, to which Part P applies. *See generally Consolidated Companies, Inc. v. Union Pacific Railroad Co.*, 499 F.3d 382, 387 (5th Cir. 2007) (CERCLA provision defining “facility” as “any site or area where a hazardous substance has been deposited, stored, disposed of, or placed,” leaves “no room for doubt’ that an entire development, rather than individual parcels of property owned by private citizens, constituted a ‘facility’”) (citation omitted).

Because Harbor Island is an uncontrolled hazardous waste site, the entire island is subject to Part P. The plain language of Part P supports this conclusion, and a liberal construction of its provisions mandates it. The Board erred when it disregarded this Court’s prior decision and limited Part P’s applicability to those few locations where contamination

had been conclusively established before Morrison Knudsen began its clean-up work.

Further, every substantive document in the record recognizes that Morrison Knudsen's employees would likely find additional contaminants during their work at Harbor Island. BR Ex. 32, ROD, App. A at 12. The ROD itself affirms that it was not the final word on contamination at the site, observing that "[a]dditional soil sampling will be required during the Remedial Design phase to more accurately determine the areas and volumes which will require excavation and treatment." *Id.*

As shown without question during the Board hearings in *Morrison Knudsen I*, the Port of Seattle's Request for Proposal, the official discussions regarding the Request for Proposal, Morrison Knudsen's bid, and Morrison Knudsen's safety plan all explicitly acknowledge that workers at the site would almost certainly encounter contaminated soils because contaminant locations were unknown. *See generally* BR Ex. 102 § 5.1.2 – 5.1.3; BR Ex. 103. The Board therefore erred when it limited application of Part P to only known areas of contamination.

F. The Board Ignored The Evidence That Morrison Knudsen's Jobsite Was Contaminated With Arsenic And That This Arsenic Posed A Hazard To The Firm's Employees

As set out above, Morrison Knudsen was required to comply with Part P during its clean-up operations at the Harbor Island Superfund site,

and the Board erred when it held otherwise. Nevertheless, Morrison Knudsen contends the Board was correct, arguing that the Board did not “accept the Department’s argument because there was substantial evidence that the conditions of Harbor Island had changed since 1993 [and the development of the ROD].” AB 36. Both the Board and Morrison Knudsen ignore substantial evidence in the record (and fail to cite any support for their contentions that “conditions had changed”) that Harbor Island was contaminated at the time of Morrison Knudsen’s work.

A specific example of the Board’s erroneous analysis concerns the arsenic contamination that pervaded the jobsite. Reasoning that arsenic did not pose a health hazard to Morrison Knudsen’s employees at Harbor Island, *see, e.g.*, BR 1671-1672, the Board vacated three items that it should have affirmed.¹⁷

The Board’s decision on remand advances two reasons for its proposition that Morrison Knudsen was not required to protect its employees from exposure to arsenic. First, the decision relies on testimony from Robert Gilmore, that monitoring for *airborne levels of lead* established the *soil* was not contaminated with *arsenic*. *See, e.g.*, BR 1668-1669. Second, the Board relies on a complete misunderstanding of App. B of the ROD in determining that arsenic was not a hazard at

¹⁷ These include items 1-1a, 1-3b, and 1-4a.

Harbor Island. BR 1693-1694. The Board's reasoning is misplaced and not supported by substantial evidence in the record.

Arsenic is an established health hazard, known to cause cancer and other serious health problems through inhalation, accidental ingestion, and contact with the skin. *See generally* 29 C.F.R. 1910.1018, App. C; WAC 296-848-60010. Simply stated, “[t]he health hazard of inorganic arsenic is high.” 29 C.F.R. 1910.1018, App. A; *see also McClain v. Metabolife Int’l, Inc.*, 401 F.3d 1233, 1239 n.5 (11th Cir. 2005) (“[t]here is rarely a reason for a court to consider opinions that medical doctors routinely and widely recognize as true. . . . and that *the ingestion of sufficient amounts of arsenic causes death*”) (emphasis added).

The presence of arsenic at Harbor Island and the risk it posed are reflected throughout the record. *E.g.*, BR Ex. 32, ROD at 6-8. The ROD establishes the arsenic clean-up goal for surface soil at 3.6 to 32.6 ppm. BR Ex. 32, ROD at 10. Out of 316 samples taken during 1993 testing, at least 31 revealed concentrations that exceeded 32.6 ppm—including one testing at 1,830 ppm—and virtually all exceeded 3.6 ppm. *See* BR Ex. 76.

Morrison Knudsen was well aware that its workers would be exposed to arsenic at the jobsite. When the firm approached the Department of Revenue to request tax benefits available for environmental remediation, it noted that “[t]he site is contaminated by lead, petroleum,

arsenic, cadmium, chromium, and other hazardous substances, and must be remediated under order of the EPA.” BR Ex. 66 at 3 (“Project Description”). The firm’s site safety and health program stated under the heading “Contaminant Characteristics” that “[l]ead and arsenic contamination has been determined to be likely due to air emissions from an off-site smelter that once operated on the island.” BR Ex. 2 at 4.¹⁸

From this record it is obvious that arsenic contamination posed a serious hazard at this jobsite, a hazard of which Morrison Knudsen was well aware. The Board, however, decided that the opposite was true, in part by relying on the testimony of Robert Gilmore from AGRA. The heart of Mr. Gilmore’s testimony was the Marlowe model:

Mr. Gilmore used what is known as the Marlow [*sic*] analysis, which is a tool for predicting levels of *airborne* contaminants

Based on this analysis, Mr. Gilmore determined that if there is no visible dust there would be no credible probability of exposure to hazardous material. . . for any of the substances noted in the studies. . . . He testified that [lead] was the only metal on site that, based on historical data, would result in levels of *airborne* samples that could exceed permissible exposure limits. Lead was used as the test species indicator, instead or arsenic, because if lead

¹⁸ The language quoted above is the only mention of arsenic in Morrison Knudsen’s site safety and health program. It is impossible to know why the firm identified arsenic as a “likely” contaminant but failed to identify it as a hazard, failed to identify it for air sampling, failed to provide monitoring for it, and failed to provide any rules or procedures for its remediation. These absences, as well as the absence of any other arsenic-related information in any of the firm’s safety materials, form the basis of the violations the Board vacated.

was identified *in the air sample* and adequately controlled. .
. there would be adequate control of all other soil
contaminants *in the air*.

BR 1668-1669 (emphasis added).

The Marlowe model may well be a useful tool for predicting *airborne* levels of contaminants. That, however, has no bearing on the ingestion and dermal absorption hazards that Harbor Island's arsenic-contaminated soils actually presented. In fact, it was these pathways that the ROD considered most dangerous when it declared arsenic to be a contaminant of concern for cancer and non-cancer health effects. *See* BR Ex. 32, ROD at 8. The Board erred when it held that the absence of an inhalation hazard somehow proves the absence of *any* hazard—particularly where Morrison Knudsen's employees routinely worked in Harbor Island's soil.

The second reason the Board offers in support of its assertion that arsenic was not a hazard at Harbor Island is a misunderstanding of App. B of the ROD. BR 1693-1694. The Board focuses on this sentence in particular:

Arsenic was eliminated at this point because the distribution of its concentration shows that it was widely distributed across the island. . . and was not highly concentrated in any particular area.

BR Ex. 32, ROD at 44.

The Board's decision reads this language as demonstrating there was no risk of exposure to arsenic at the Harbor Island Superfund site. *See*, BR 1671-1672. Put in context, however, the sentence upon which the decision relies gives a rather different perspective on arsenic contamination:

The objective of selecting hot spot treatment levels . . . was to identify areas containing high concentrations of contaminants in relatively small volumes which could be excavated and treated, providing an optimal cost-benefit. . . The first step in the process was to identify the contaminants *presenting the greatest risk to human health and the environment*. . . This process identified lead, mercury, *arsenic*, TPH, and PCBs. Arsenic was eliminated at this point because the distribution of its concentration shows that it was widely distributed across the island. . . and was not highly concentrated in any particular area.

BR Ex. 32, ROD at 44.

Thus, the *first* decision made regarding hot spot treatment was that arsenic was one of five contaminants that “present[ed] *the greatest risk* to human health and the environment.” *Id.* (emphasis added). Arsenic was not selected for hot spot treatment, however, because it was “widely distributed,” rather than “highly concentrated in any particular area.” *Id.*

The Board's construction of the ROD—that arsenic must not have been a hazard because it was removed from consideration for hot spot treatment—is the exact opposite of what the document actually states. Arsenic was not eliminated as a candidate for hot spot removal because it

was *nowhere*; it was eliminated because it was *everywhere*. In other words, arsenic was “hot,” but was not in “spots.” *See also* BR Ex. 76 (showing arsenic contamination above clean-up goals spread across entire jobsite).

In sum, the Board’s determination that the extensive arsenic contamination in Harbor Island’s soil presents no hazard is based on (a) modeling for air exposure, and (b) a single sentence from the ROD that actually proves the Board is wrong. The Board’s conclusion also ignores *all* of the evidence in the record regarding arsenic, including Morrison Knudsen’s own documents. The items the Board vacated based on its misunderstanding of the arsenic hazard at Harbor Island should be reinstated.

G. The Board’s Determination That Uncontroverted Testimony From Three Different Witnesses Regarding Their Exposure To Hazardous Materials In Unmarked Drums Must Be Untrue Because The Witnesses Also Alleged That Morrison Knudsen Had Discriminated Against Them Is Contrary To Law And Public Policy

In its decision on remand, the Board rejected testimony from three former Morrison Knudsen employees as not credible because the workers had filed complaints or other actions against Morrison Knudsen as a result of their experiences at Harbor Island. In its opening brief, Morrison Knudsen contends credibility of witnesses is within “the sole purview” of

the Board. AB 42. The Board's bases for making this "credibility" determination, however, are contrary to law and are in error.¹⁹

Three witnesses described two specific incidents, the first of which involved workers moving unlabeled, unsealed 55-gallon drums and being splashed with an unknown liquid during the process. See Donald Fleming, TR 12/5/01, 129-131; Eugene Vos, TR 12/7/01, 40-43; Ronald Slater, TR 12/6/01, 42-48. The second event involved moving leaking, unlabeled drums into a containment area. See, Donald Fleming, TR 12/5/01, 134 (describing leaking fluid as "a colored liquid, definitely different than the color of the rain"); Eugene Vos, TR 12/7/01, 43-48 (describing leakage as "blue and red"). These incidents form the basis of five of the citation's violations.²⁰

¹⁹ While appellate courts generally defer to credibility determinations by fact-finders, credibility is nonetheless a factual question reviewed for substantial evidence. *State v. Osman*, 168 Wn.2d 632, 639, 229 P.3d 729 (2010). However, whether evidence on any point of fact is substantial is a question of law. *Sommer v. Dep't of Social & Health Services*, 104 Wn. App. 160, 172, 15 P.3d 664 (2001) ("substantial evidence" is distinguished from a "mere scintilla" of evidence; it is evidence sufficient to "convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.") (internal citation omitted).

Mere speculation or conjecture will not sustain a factual determination, including credibility determinations. *Johnson v. Aluminum Precision Prods., Inc.*, 135 Wn. App. 204, 208-09, 143 P.3d 876 (2006); *Reyes v. INS*, 79 F.3d 908, 912 (9th Cir. 1996) (credibility determination rejected because grounded in speculation); *Sarchet v. Chater*, 78 F.3d 305, 308 (7th Cir. 1996)(same). The Board here based its credibility determination of the three workers on the grounds that they had independent actions against Morrison Knudsen. It is pure speculation or conjecture by the Board that the workers were not credible due to these independent actions.

²⁰ These are citation items 1-6a, 1-6b, 1-6c, 1-7a, and 1-7b.

Not one witness suggested that the drum-moving incidents that Morrison Knudsen's former employees described did not occur. There was thus undisputed evidence that the site contained drums that were leaking and unlabeled; that Morrison Knudsen's employees moved drums of this type; and that at least two employees were splashed with waste in the process. Despite this uncontroverted evidence, the Board vacated the citations by simply deciding that the witnesses who testified about moving the drums were not telling the truth. *See*, BR 1687-1689, 1698-1701.

The Board reached this determination by focusing on the three witnesses' private lawsuits against Morrison Knudsen.²¹ BR 1689, 1699. According to the Board, because Messrs. Vos, Fleming, and Slater could conceivably benefit if the citation against Morrison Knudsen were affirmed, their testimony about moving drums could not possibly have been true. *Id.* at 1699.²²

²¹ Morrison Knudsen also suggests that testimony from Don Frizzell purportedly contradicted testimony from these three witnesses. AB 45-46 (“[H]e. . . was the one who moved a large number of 55-gallon drums. . . .” which were all properly marked and labeled as shown by BR Ex. 123.) While Mr. Frizzell may have also moved drums that may have been properly marked, this does not refute testimony of drum moving incidents on separate occasions by separate workers.

²² Ron Slater, Eugene Vos, and Don Fleming all alleged the existence of unsafe conditions at Harbor Island, and all three testified to their experiences before the Board. These are precisely the activities that RCW 49.17.160(1) protects. Instead of defending these workers, however, the Board dismisses their testimony. The Board thus creates a Catch-22 for workers who report safety hazards and are discriminated against as a result: they can pursue their legal remedies under RCW 49.17.160(1), but if they do, they will not be believed in a WISHA enforcement proceeding based on the same hazards.

As a threshold matter, *every* litigant has an interest in the outcome of *every* case. Obviously such an “interest” does not categorically disqualify a witness from testifying—if it did, the Board would have had to dismiss as untrue the testimony of Morrison Knudsen’s witnesses.²³

Certainly evidence of a financial interest in the outcome of a lawsuit is admissible to show potential bias. *E.g.*, *Alston v. Blythe*, 88 Wn. App. 26, 41, 943 P.2d 692 (1997). It is not, however, a basis to ignore the testimony of three different witnesses who testify to the same events—especially when there is *no* evidence suggesting that the events did not occur as described.

The Board attempts to bolster its determination that Morrison Knudsen’s employees never moved leaking drums with what appears to be a version of the “missing witness” rule:

[W]e note that the testimony of Slater, Voss [*sic*], and Fleming refers to a fourth employee who was present when the drum-handling event allegedly occurred. That employee is identified as a Theresa Smith. Ms. Smith was not called as a witness. As every trier of fact is entitled, we are entitled to consider the evidence presented, as well as the lack of evidence . . . This failure to either call Ms. Smith or explain her absence further erodes the testimony of Slater, Voss [*sic*], and Fleming.

BR 1699.

²³ The Board would also have to disbelieve every injured worker that testifies before it in numerous workers’ compensation appeals each year.

The missing witness doctrine arises primarily in criminal cases. It allows a trier of fact to infer under certain circumstances that an absent witness's testimony would have been unfavorable. *State v. Blair*, 117 Wn.2d 479, 491, 816 P.2d 718 (1991) (the "state may point out the absence of a 'natural witness' when it appears reasonable that the witness is under the defendant's control or peculiarly available to the defendant and the defendant would not have failed to produce the witness unless the testimony were unfavorable."). Application of the rule is limited, however: the "missing" testimony must be "material and not cumulative;" the missing witness must be "particularly under the control of the defendant rather than being equally available to both parties"; and "the doctrine only applies if the witness's absence is not satisfactorily explained." *State v. Montgomery*, 163 Wn.2d 577, 597-98, 183 P.3d 267 (2008).

To the extent Theresa Smith might have testified that she moved unlabeled, leaking drums with three other witnesses who had already said the same thing, her testimony would have been cumulative. The fact that Ms. Smith did not testify, therefore, is immaterial, and the Board's use of inferences from the absence of testimony as a means to ignore testimony that *was* presented—without contradiction—is wrong. Further, if the Board believed Ms. Smith's testimony was vital, the Board could itself

have subpoenaed her testimony. *See* WAC 263-12-120 (allowing industrial appeals judge to introduce evidence “as deemed necessary to decide the appeal fairly and equitably.”).

In sum, the Board vacated the drum-related violations by discarding the testimony of these violations as not credible. The Board reached that conclusion by (a) ruling that workers who assert their rights in civil suits cannot be believed in related WISHA proceedings, and (b) deciding that if only three of the four witnesses to an event testify, the fourth surely would have said something different. These reasons are not defensible. The Court should therefore affirm the drum-related violations.

H. A “Serious” WISHA Violation Exists Where There Is A Substantial Probability That Any Injury Resulting From The Violation Would Be “Death Or Serious Bodily Harm.” The Board Erred When It Held That The Three Violations It Affirmed, Violations That Created A Risk Of Cancer And Other Diseases, Were Not “Serious”

Despite the errors discussed above, the Board did affirm three of the violations in the citation. It then proceeded to re-characterize each from “serious” to “general” violations, reducing the penalties to zero.²⁴

²⁴ These violations are citation items 1-1c, 1-8, and 1-9. The Department is unable to determine from its review of Morrison Knudsen’s discussion at AB 31-33 what argument the firm is presenting in defense of the Board’s recharacterization of the “serious” violations. Therefore, the Department is unable to respond directly to that part of Morrison Knudsen’s brief other than to explain how the Board erred on this legal issue.

“[A] serious violation shall be deemed to exist in a work place if there is a substantial probability that death or serious physical harm could result” RCW 49.17.180(6). “[T]he statute’s ‘substantial probability’ language refers to the likelihood that, should harm result from the violation, that harm could be death or serious physical harm.” *Lee Cook Trucking & Logging*, 109 Wn. App. at 482. In other words, a serious violation does not require a “substantial probability” that an injury will occur, but instead exists if the injury that a violation could cause would be “death or serious physical harm.” *Id.*

The violations that the Board converted from serious to general involved Morrison Knudsen’s failure to identify methods for calibrating and maintaining its workers’ personal air sampling pumps (BR 1673); its failure to provide hazardous waste training to its workers until after they began work on the site (BR 1702); and its failure to properly train its onsite management (BR 1702-1703).

The first set created a risk that Morrison Knudsen’s employees would be overexposed to air contamination based on inaccurate readings from their monitors. The second and third created a risk that Morrison Knudsen’s employees would perform work without adequate training and supervision, thereby potentially becoming exposed to the myriad of toxins at Harbor Island. The Board recognizes these risks, noting that “all of the

Morrison Knudsen workers on the Harbor Island work site were engaged in activities which ‘potentially’ could expose the worker to hazardous substances,” and that Harbor Island “presented the potential for employees to encounter and engage in remediation of hazardous material.” BR 1702.

The decision on remand thus determines that Morrison Knudsen violated the cited standards, and recognizes that the firm’s work at Harbor Island “potentially” exposed its workers to hazardous substances. The risks of such exposure include cancer, *see* WAC 296-848-60010, 60020, and “acute encephalopathy which may arise precipitously with the onset of intractable seizures, coma, cardio respiratory arrest, and death within 48 hours.” WAC 296-62-07521(17)(c)(iii)(B)(II). These effects obviously meet the definition of “serious.” Thus, the Board erred when it determined these violations were not “serious” in nature.

I. The Board Erred When It Held That Morrison Knudsen Was Not Required To Refer A Worker To A Doctor

The Board’s final error is that it concluded that even though a worker reported significant medical problems that he attributed to exposure to hazardous substances, and even though the firm did nothing in response, the firm did not violate WAC 296-62-30510(1)(d).²⁵ That rule requires employers to make medical assistance available as soon as

²⁵ This determination concerns item 2-3.

possible upon notification of medical problems from possible overexposure. BR 1706-1707.

Morrison Knudsen attempts to defend the Board's determination by asserting that, since *other* operators allegedly did not report symptoms, Mr. Eger's testimony that he suffered symptoms and reported these symptoms to Morrison Knudsen was properly ignored. AB 48-49. Morrison Knudsen further contends that, since the *air* monitoring samples taken did not show exposures over the permissible exposure limit, the Board correctly concluded Mr. Eger's symptoms could not have resulted from exposures as a result of his work at Harbor Island. AB 49.

Henry Eger testified, while working at Harbor Island, he experienced symptoms including "[n]osebleeds, headaches, blurry vision, slight nausea, dizziness, [and] fatigue." Henry Eger, TR 12/7/01, 192. He reported these symptoms to Morrison Knudsen's safety officer, Bob Johnson. *Id.* at 195-196.²⁶

The symptoms that Mr. Eger reported are consistent with overexposure to both lead and arsenic. *See* WAC 296-62-07521(17)(a)(ii)(B); WAC 296-848-60010; WAC 296-62-30510(1)(d) requires employers to make medical assistance available "as soon as

²⁶ This is no evidence in the record, and Morrison Knudsen cites none, to establish that Mr. Egger did not report his symptoms.

possible upon notification by an employee that the employee has developed signs or symptoms indicating possible overexposure to hazardous substances or health hazards.” *Id.* Morrison Knudsen failed to do so, thereby violating the standard.

The Board, however, vacated this violation as well. The Board’s reasoning was that the record purportedly didn’t establish the symptoms resulted from overexposure to hazardous substances. BR 1702.

The Board’s analysis is incorrect. The cited standard exists for a reason: it ensures that workers who show symptoms of overexposure receive medical assistance to *find out why they are ill*. Under the Board’s reasoning, a worker has no right to find out why he is ill unless he already knows why he is ill. And, by extension, the Department cannot prove that an employer violated the rule requiring medical referrals unless it can provide the information that could *only* have been ascertained through the very referral that the employer failed to provide.²⁷

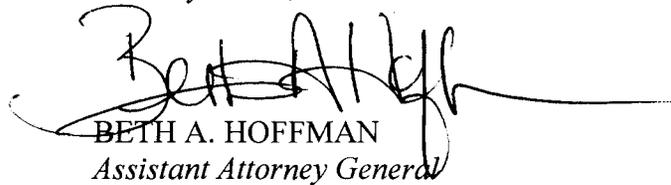
²⁷ The Board’s discussion of the possible cause of Mr. Eger’s complaints is also irrelevant and wrong. The issue is not the Board’s after-the-fact attempt to diagnose Mr. Eger’s condition, but whether Morrison Knudsen should have provided medical assistance to Mr. Eger at the time he reported his symptoms. As discussed above, the symptoms that Mr. Eger reported are consistent with overexposure to arsenic and lead, two of the most prevalent—and dangerous—contaminants at Mr. Eger’s jobsite.

VII. CONCLUSION

For the foregoing reasons, this Court should follow the reasoning of the Superior Court and reverse the decision of the Board.

RESPECTFULLY SUBMITTED this 12th day of January, 2011.

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APPENDIX A

Appendix A

Glossary of Terms and Acronyms

AGRA = AGRA Earth and Environmental, Inc.

Board = Board of Industrial Insurance Appeals

CERLA = Comprehensive Environmental Response, Compensation, and Liability Act

DOE = Washington State Department of Ecology

EPA = Federal Environmental Protection Agency

MTCA = Model Toxics Clean-up Act

NPL = National Priorities List

PAHs = polycyclic aromatic hydrocarbons

PCBs = polychlorinated biphenyl

PEL= permissible exposure limit

PPE = personal protective equipment

ppm = parts per million

PRP = potentially responsible parties

Part P = provisions of former WAC 296-62-300 through 296-62-3195

RI = remedial investigation; after a site is listed on the NPL, a remedial investigation/feasibility study (RI/FS) are performed concurrently. The remedial investigation is the mechanism for collecting data to: 1) characterize site conditions; 2) determine the nature of waste; 3) assess risks to human health and the environment; and 3) conduct treatability testing to evaluate the potential performance and cost of the treatment technologies that are being considered. Data collected during the remedial investigation influences the development of remedial alternatives in the feasibility study.

ROD = Record of Decision

TPHs = total petroleum hydrocarbons

WISHA = Washington Industrial Safety and Health Act

APPENDIX B

Department of Labor & Industries
WISHA SERVICES DIVISION
Management Services / Accounting
P.O. Box 44835
Olympia, WA 98504-4835



To:
Washington Group International dba Morrison Knudse
3411 11th Ave SW
Seattle, WA 98134

Inspection Date(s): 04/21/2000-10/03/2000
Issuance Date: 10/20/2000
Optional Report #: h79076006
Reporting I.D.: 1055320
U.B.I. #: 601175669
CSHO: D0427

Inspection Site:
3411 11th Ave SW
Seattle, WA 98134

INVOICE

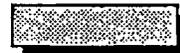
Summary of Penalties for Inspection Number 303604540

Citation 1, Serious	= \$ 48500.00
Citation 2, General	= \$ 0.00
TOTAL PROPOSED PENALTIES	= \$ 48500.00

This is an invoice for penalties owed the Department of Labor and Industries. Payment is due within 15 days unless appealed. See appeal rights on "Notice of Rights and Duties Regarding This Citation" enclosed with the Citation and Notification.

To ensure proper credit, please return a copy of this invoice with your payment. Make checks payable to the Department of Labor and Industries and mail to the above address.

Please indicate amount paid:



Department of Labor & Industries
WISHA SERVICES DIVISION
3 Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000 - 10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for illness and/or injury resulting from an exposure and/or accident.

Citation 1 Item 1a Type of Violation: **Serious**

62-30135(2)(b)

The employer failed to include a complete safety and health risk or hazard analysis for each site task and operation found in the work plan. Missing issues include dealing with arsenic, mercury, and antimony contaminated soils, handling drums of unknown materials, and bloodborne pathogens (needles in demolished trailer).

Date By Which Violation Must be Abated:	11/02/2000
Proposed Penalty:	\$ 4500.00

Department of Labor & Industries
WISHA SERVICES DIVISION
O Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000 - 10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

Citation 1 Item 1b Type of Violation: **Serious**

62-30135(2)(d)

The employer failed to include information about personal protective equipment needed to be used by employees for each of the site tasks and operations being conducted as required by the personal protective equipment program in WAC 296-62-30615. Clearing and grubbing work with contaminated materials was not addressed.

Date By Which Violation Must be Abated: 11/02/2000

Citation 1 Item 1c Type of Violation: **Serious**

62-30135(2)(f)

The employer failed to include frequency and types of air monitoring, personnel monitoring, and environmental sampling techniques and instrumentation to be used, including methods of maintenance and calibration of monitoring and sampling equipment to be used. Missing issues include not including arsenic in sampling plan, no information on frequency of sampling, type of sampling equipment used and methods of maintenance and calibration.

Date By Which Violation Must be Abated: 11/02/2000

Department of Labor & Industries
WISHA SERVICES DIVISION
O Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000-10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

Citation 1 Item 1d Type of Violation: **Serious**

62-30135(2)(g)

The employer failed to include site control measures in WAC 296-62-3030 through WAC 296-62-30315. Missing are the standard operating policies for safe work practices, such as drum handling, and demolishing contaminated buildings.

Date By Which Violation Must be Abated: 11/02/2000

Citation 1 Item 1e Type of Violation: **Serious**

62-30135(2)(h)

The employer failed to include decontamination procedures in WAC 296-62-3100 through WAC 296-62-31015. Missing issue is the truck wash.

Date By Which Violation Must be Abated: 11/02/2000

Department of Labor & Industries
WISHA SERVICES DIVISION
3 Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000 - 10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

Citation 1 Item 1f Type of Violation: **Serious**

62-30135(2)(i)

The employer failed to include an emergency response plan meeting the requirements of WAC Chapter 296-62-410, Part R, for safe and effective responses to emergencies, including the necessary PPE and other equipment. Missing issues include hazardous material releases, safe distances and places of refuge, evacuation routes and procedures, emergency alerting and response procedures, critique of response and follow-up, PPE and emergency equipment.

Date By Which Violation Must be Abated: 11/02/2000

Citation 1 Item 1g Type of Violation: **Serious**

62-30310

The site control program must, as a minimum, include: A site map, site work zones, the use of a "buddy system", site communications including alerting means for emergencies, the standard operating procedures or safe work practices, and, identification of nearest medical assistance. Where these requirements are covered elsewhere they need not be repeated. No work site zones, means for alerting during emergencies, and standard operating procedures or safe work practices were included in the written site control program.

Date By Which Violation Must be Abated: 11/02/2000

Department of Labor & Industries
WISHA SERVICES DIVISION
P.O. Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000 - 10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

Citation 1 Item 1h Type of Violation: **Serious**

62-30615(1)

A written personal protective equipment program, which is part of the employer's safety and health program required in WAC 296-62-3010 or WAC 296-62-31405 and which must be part of the site-specific safety and health plan was not established. The PPE program failed to address the elements listed below.

PPE selection based on site hazards: When working near/over water deep enough to drown in, employees were not issued life vests. Additionally employees were not initially issued protective clothing to avoid contaminated soil contact with their street clothes.

Date By Which Violation Must be Abated: 11/02/2000

Citation 1 Item 1i Type of Violation: **Serious**

62-30615(5)

A written personal protective equipment program, which is part of the employer's safety and health program required in WAC 296-62-3010 or WAC 296-62-31405 and which must be part of the site-specific safety and health plan was not established. The PPE program must address the elements listed below.

PPE decontamination and disposal: Initially employees did not have instructions or directions on handling contaminated PPE. Only after the inspection opened did the employer develop policies to deal with these issues.

Date By Which Violation Must be Abated: 11/02/2000

Department of Labor & Industries
WISHA SERVICES DIVISION
O Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000 - 10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for illness and/or injury resulting from an exposure and/or accident.

Citation 1 Item 2a Type of Violation: **Serious**

The department recognizes the violation below no longer exists, therefore proof of correction is not required at this time. However, if this violation is identified again during future inspections, "repeat", or "failure to abate" violations may result which may include additional monetary penalties.

62-30145

Inspections, which must be conducted by the site safety and health supervisor or in the absence of that individual, another individual who is knowledgeable in occupational safety and health and acting on behalf of the employer as necessary, failed to determine the effectiveness of the site safety and health plan. The many deficiencies in the effectiveness of the site safety and health plan were not corrected by the employer before this inspection opened; and the safety officer on site failed to address the failure of implementation of the effective parts of the HASP. The safety officer failed to recognize deficiencies in the written plan and was not properly trained to recognize that problems existed.

Date By Which Violation Must be Abated:	10/03/2000
Proposed Penalty:	\$ 4500.00

Department of Labor & Industries
WISHA SERVICES DIVISION
J Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000 - 10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

Citation 1 Item 2b Type of Violation: **Serious**

The department recognizes the violation below no longer exists, therefore proof of correction is not required at this time. However, if this violation is identified again during future inspections, "repeat", or "failure to abate" violations may result which may include additional monetary penalties.

62-3100(2)(a)

The employer failed in that a decontamination procedure was not communicated to employees and implemented before any employees or equipment entered areas on the site where potential for exposure to hazardous substances existed. Before the inspection opened, no decontamination was being used on site.

Date By Which Violation Must be Abated: 10/03/2000

Citation 1 Item 2c Type of Violation: **Serious**

The department recognizes the violation below no longer exists, therefore proof of correction is not required at this time. However, if this violation is identified again during future inspections, "repeat", or "failure to abate" violations may result which may include additional monetary penalties.

62-3100(2)(d)

The employer failed in that decontamination procedures were not monitored by the site safety and health supervisor to determine their effectiveness. The safety supervisor failed to discover that such procedures were ineffective, and did not take appropriate steps to correct any deficiencies.

Date By Which Violation Must be Abated: 10/03/2000

Department of Labor & Industries
WISHA SERVICES DIVISION
Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000 - 10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

Citation 1 Item 2d Type of Violation: **Serious**

The department recognizes the violation below no longer exists, therefore proof of correction is not required at this time. However, if this violation is identified again during future inspections, "repeat", or "failure to abate" violations may result which may include additional monetary penalties.

62-3030

Appropriate site control procedures were not implemented to control employee exposure to hazardous substances before the clean-up work began.

Date By Which Violation Must be Abated: 10/03/2000

Department of Labor & Industries
WISHA SERVICES DIVISION
O Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000-10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for illness and/or injury resulting from an exposure and/or accident.

Citation 1 Item 3a Type of Violation: **Serious**

The department recognizes the violation below no longer exists, therefore proof of correction is not required at this time. However, if this violation is identified again during future inspections, "repeat", or "failure to abate" violations may result which may include additional monetary penalties.

62-30205

The employer failed to make a complete preliminary evaluation of a site's characteristics, which must be performed prior to site entry, by a qualified person in order to aid in the selection of appropriate employee protection methods prior to site entry. Immediately after initial site entry, a more detailed evaluation of the site's specific characteristics must be performed by a qualified person in order to further identify existing site hazards and to further aid in the selection of the appropriate engineering controls and personal protective equipment for the tasks to be performed.

No complete preliminary evaluation was made for all the known contaminants on site, by the employer. Further, no PPE was planned for the clearing and grubbing operations even though it involved the handling of lead contaminated soils, concrete and debris. Decontamination and safe work practices were not planned for the initial phase of the remediation process, clearing and demolishing contaminated buildings. No ionizing radiation hazards were addressed at all. This being an industrial site with metal recycling operations going on, such iron and metals, the possibility of buried radioactive metals was not addressed in a preliminary evaluation.

Other toxic chemicals listed in the remedial action objectives and cleanup goals were not included in the preliminary evaluation and not in a more detailed evaluation after work began. Toxic chemicals such as arsenic, benzene, cadmium, chromium, ethylbenzene, and PAH's were not evaluated in more detail to determine employee exposures.

Date By Which Violation Must be Abated:	10/03/2000
Proposed Penalty:	\$ 4500.00

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000 - 10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

Citation 1 Item 3b Type of Violation: **Serious**

The department recognizes the violation below no longer exists, therefore proof of correction is not required at this time. However, if this violation is identified again during future inspections, "repeat", or "failure to abate" violations may result which may include additional monetary penalties.

62-30210

The employer failed to include in the written site-specific safety and health plan, all suspected conditions that may pose inhalation or skin absorption hazards that are immediately dangerous to life or health (IDLH), or other conditions that may cause death or serious harm, that must be identified during preliminary survey and evaluated during the detailed survey. Examples of such hazards include, but are not limited to; confined space entry, potentially explosive or flammable situations, visible vapor clouds, or areas where biological indicators such as dead animals or vegetation are located.

The arsenic and cadmium, found in the soils on site, were not included in a initial evaluation of the site's specific characteristics. No ionizing radiation hazards were addressed either. Bloodborne pathogens, related to drug users (used syringes were found site in a to-be demolished trailer) were not identified either.

Date By Which Violation Must be Abated: 10/03/2000

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000 - 10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

Citation 1 Item 3c Type of Violation: **Serious**

The department recognizes the violation below no longer exists, therefore proof of correction is not required at this time. However, if this violation is identified again during future inspections, "repeat", or "failure to abate" violations may result which may include additional monetary penalties.

62-30220(4)

The employer failed to select the appropriate PPE for initial site entry for the hazard identified, and failed to insure that the appropriate PPE be used in accordance with WAC 296-62-3060 through 296-62-30615. No protective clothing was provided to employees who worked with contaminated soils, in the first month of work on site.

Date By Which Violation Must be Abated: 10/03/2000

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000-10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for illness and/or injury resulting from an exposure and/or accident.

Citation 1 Item 4a Type of Violation: **Serious**

62-30235

The employer failed to disclose any information concerning the chemical, physical and toxicological properties of each substance known or expected to be present on site that is available to the employer and relevant to the duties an employee is expected to perform. The employer failed to make such information available to all employees prior to the commencement of their work activities. The employer may use information developed for the hazard communication standard, Chapter 296-62 WAC , Part C, for this purpose.

Date By Which Violation Must be Abated:	11/02/2000
Proposed Penalty:	\$ 4500.00

Citation 1 Item 4b Type of Violation: **Serious**

62-3080

The employer failed to develop and implement a program which is part of the employer's safety and health program required in WAC 296-62-3010 through 296-62-30145 to inform employees, contractors, subcontractors (or their representative) actually engaged in hazardous waste operations of the nature, level, and degree of exposure likely as a result of participation in such hazardous waste operations. Employees, contractors, and subcontractors working outside of the operations part of a site are not covered by this standard.

Date By Which Violation Must be Abated:	11/02/2000
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Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000 - 10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for illness and/or injury resulting from an exposure and/or accident.

Citation 1 Item 5a Type of Violation: **Serious**

The department recognizes the violation below no longer exists, therefore proof of correction is not required at this time. However, if this violation is identified again during future inspections, "repeat", or "failure to abate" violations may result which may include additional monetary penalties.

62-30705

Upon initial entry of the hazardous waste site, during the cleaning and grubbing portion of the remediation work, the employee failed to conduct representative air monitoring. Representative air monitoring must be conducted to identify any IDLH condition, exposure over permissible exposure limits or published exposures levels, exposures over a radioactive material's dose limits, or other dangerous condition, such as the presence of flammable atmospheres or oxygen-deficient environments. No ionizing radiation, lead, arsenic or cadmium was conducted initially. The air monitoring was not representative of all different jobs and employees on site, during the initial four months of the hazardous waste operation.

Date By Which Violation Must be Abated:	10/03/2000
Proposed Penalty:	\$ 4500.00

Department of Labor & Industries
WISHA SERVICES DIVISION
O Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000 - 10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

Citation 1 Item 5b Type of Violation: Serious

The department recognizes the violation below no longer exists, therefore proof of correction is not required at this time. However, if this violation is identified again during future inspections, "repeat", or "failure to abate" violations may result which may include additional monetary penalties.

62-30710(1)

The employer failed to do periodic monitoring, which must be conducted when the possibility of an IDLH condition or flammable atmosphere has developed or when there is indication that exposures may have risen over permissible exposure limits or published exposure levels since prior monitoring. Situations where it must be considered whether the possibility that exposures have risen are as follows: when work begins on a different portion of the site.

Date By Which Violation Must be Abated: 10/03/2000

Citation 1 Item 5c Type of Violation: Serious

The department recognizes the violation below no longer exists, therefore proof of correction is not required at this time. However, if this violation is identified again during future inspections, "repeat", or "failure to abate" violations may result which may include additional monetary penalties.

62-30710(2)

The employer failed to do periodic monitoring, which must be conducted when the possibility of an IDLH condition or flammable atmosphere has developed or when there is indication that exposures may have risen over permissible exposure limits or published exposure levels since prior monitoring. Situations where it must be considered whether the possibility that exposures have risen are as follows: when contamination other than those previously identified are being handled.

Date By Which Violation Must be Abated: 10/03/2000

Department of Labor & Industries
WISHA SERVICES DIVISION
Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000 - 10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for illness and/or injury resulting from an exposure and/or accident.

Citation 1 Item 6a Type of Violation: **Serious**

The department recognizes the violation below no longer exists, therefore proof of correction is not required at this time. However, if this violation is identified again during future inspections, "repeat", or "failure to abate" violations may result which may include additional monetary penalties.

62-30715

After the actual clean-up phase of any hazardous waste operation commences: for example, when soil, surface water, or containers are moved or disturbed; the employer failed to monitor those employees likely to have the highest exposures to hazardous substances and health hazards likely to be present above permissible exposure limits or published exposure levels by using personal sampling frequently enough to characterize employee exposures. If the employees likely to have the highest exposure are over permissible exposure limits or published exposure levels, then monitoring must continue to determine all employees likely to be above those limits. The employer may use a representative sampling approach by documenting that the employees and chemicals chosen for monitoring are based on the criteria stated in this subsection. Examples include handling drums of unknown materials and working in spill ponds around leaky drums of unknown materials.

Date By Which Violation Must be Abated:	10/03/2000
Proposed Penalty:	\$ 4500.00

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000 - 10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

Citation 1 Item 6b Type of Violation: Serious

The department recognizes the violation below no longer exists, therefore proof of correction is not required at this time. However, if this violation is identified again during future inspections, "repeat", or "failure to abate" violations may result which may include additional monetary penalties.

62-3090(4)

The employer failed in that several unlabeled drums and containers were not considered to contain hazardous substances and handled accordingly until the contents had been positively identified and labeled.

Date By Which Violation Must be Abated: 10/03/2000

Citation 1 Item 6c Type of Violation: Serious

The department recognizes the violation below no longer exists, therefore proof of correction is not required at this time. However, if this violation is identified again during future inspections, "repeat", or "failure to abate" violations may result which may include additional monetary penalties.

62-3090(6)

The employer failed in that prior to movement of drums or containers, all employees exposed to the transfer operation were not warned of the potential hazards associated with the contents of the drums or containers.

Date By Which Violation Must be Abated: 10/03/2000

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000-10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

Citation 1 Item 6d Type of Violation: **Serious**

The department recognizes the violation below no longer exists, therefore proof of correction is not required at this time. However, if this violation is identified again during future inspections, "repeat", or "failure to abate" violations may result which may include additional monetary penalties.

62-3090(9)

The employer failed in that drums and containers that cannot be moved without rupture, leakage, or spillage were not emptied into a sound container using a device classified for the material being transferred.

Date By Which Violation Must be Abated: 10/03/2000

Department of Labor & Industries
WISHA SERVICES DIVISION
O Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000 - 10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for illness and/or injury resulting from an exposure and/or accident.

Citation 1 Item 7a Type of Violation: Serious

The department recognizes the below violation no longer exists, therefore proof of correction is not required at this time. However, if this violation is identified again during future inspections, "repeat", or "failure to abate" violations may result which may include additional monetary penalties.

62-31015(2)

The employer who had an employee whose permeable clothing became wetted with hazardous substances failed to have that employee immediately remove that clothing and proceed to shower. The clothing was not disposed of or decontaminated before he wore them home.

Date By Which Violation Must be Abated:	10/03/2000
Proposed Penalty:	\$ 4500.00

Department of Labor & Industries
WISHA SERVICES DIVISION
Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000 - 10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

Citation 1 Item 7b Type of Violation: **Serious**

The department recognizes the below violation no longer exists, therefore proof of correction is not required at this time. However, if this violation is identified again during future inspections, "repeat", or "failure to abate" violations may result which may include additional monetary penalties.

62-31020

Where the decontamination procedure indicates a need for regular showers and change rooms outside of a contaminated area, they must be provided and meet the requirements of Part B-1 of Chapter 296-24 WAC. If temperature conditions prevent the effective use of water, then other effective means for cleansing must be provided and used.

Date By Which Violation Must be Abated: 10/03/2000

Citation 1 Item 8 Type of Violation: **Serious**

62-30410(2)

The employer failed to have a general site workers (such as equipment operators, general laborers, and supervisory personnel) engaged in hazardous substances removal or other activities which expose or potentially expose workers to hazardous substances and health hazards receive the following required training prior to exposure:

- 1) General site workers required to wear Level C or D personal protective equipment, equipment operators or transport vehicle operators, were required to have 40 hours of training and a minimum of three days actual field experience under the direct supervision of a trained, experienced supervisor.

Date By Which Violation Must be Abated: 11/02/2000
Proposed Penalty: \$ 4500.00

Department of Labor & Industries
WISHA SERVICES DIVISION
Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000 - 10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

Citation 1 Item 9 Type of Violation: **Serious**

62-30415

The employer failed to have on-site management and supervisors directly responsible for, or who supervise employees engaged in, hazardous waste operations receive at least eight additional hours of specialized training at the time of job assignment on such topics as, by not limited to, the employer's safety and health program and the associated employee training program, personal protective equipment program, spill containment program, and health hazard monitoring procedures and techniques.

Date By Which Violation Must be Abated:	11/02/2000
Proposed Penalty:	\$ 4500.00

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000 - 10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

Citation 1 Item 10 Type of Violation: **Serious**

62-07111

The employer failed to include the following required elements of the written respiratory protection plan:

- 1) Procedures for selecting respirators for use in the workplace and a list identifying the proper type of respirator for each respiratory hazard (see WAC 296-62-07130 through 296-62-07133);
- 2) Procedures for proper use of respirators in routine tasks, nonroutine tasks, reasonably foreseeable emergency and rescue situations (WAC 296-62-07170 through 296-62-07172);
- 3) Procedures for issuing the proper type of respirator based on the respiratory hazards for each employee;
- 4) Procedures and schedules for cleaning, disinfecting, storing, inspecting, repairing, discarding, and otherwise maintaining respirators (see WAC 296-62-07175 through 296-62-07253);
- 5) Training of employees in the respiratory hazards to which they are potentially exposed during routine, nonroutine, and unforeseeable emergency and rescue situations (see WAC 296-62-07188);
- 6) Training of employees in the proper use of respirators, including putting on and removing them, any limitations on their use, and their maintenance (see WAC 296-62-07188); and
- 7) Procedures for regularly evaluating the effectiveness of the program (see WAC 296-62-07192).

[Statutory Authority: RCW 49.17.040, 49.17.050 and 49.17.240. 81-16-016 (order 81-19)]

Date By Which Violation Must be Abated:	11/02/2000
Proposed Penalty:	\$ 3000.00

Department of Labor & Industries
WISHA SERVICES DIVISION
PO Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000 - 10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

Citation 1 Item 11 Type of Violation: **Serious**

The department recognizes the below violation no longer exists, therefore proof of correction is not required at this time. However, if this violation is identified again during future inspections, "repeat", or "failure to abate" violations may result which may include additional monetary penalties.

62-3060(1)(a)

Engineering controls, work practices, personal protective equipment, or a combination of these must be implemented in accordance with this section to protect employees from exposure to hazardous substances and health hazards. Regarding engineering controls, work practices, and PPE for substances in Chapter 296-62 WAC. Employees were overexposed to lead without the use of proper personal protective equipment.

Date By Which Violation Must be Abated:	10/03/2000
Proposed Penalty:	\$ 5000.00

Department of Labor & Industries
WISHA SERVICES DIVISION
Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000 - 10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for illness and/or injury resulting from an exposure and/or accident.

Citation 2 Item 1a Type of Violation: General

The department recognizes the below violation no longer exists, therefore proof of correction is not required at this time. However, if this violation is identified again during future inspections, "repeat", or "failure to abate" violations may result which may include monetary penalties.

62-30225(1)

The employer failed to do the following monitoring that must be conducted during initial site entry when the site evaluation produces information that shows the potential for ionizing radiation of IDLH conditions, or when the site information is not sufficient to rule out these possible conditions:

- 1) Monitoring with direct reading instruments for hazardous levels of ionizing radiation.

Date By Which Violation Must be Abated	10/03/2000
Proposed Penalty	\$ 0.00

Department of Labor & Industries
WISHA SERVICES DIVISION
O Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000 - 10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

Citation 2 Item 1b Type of Violation: General

The department recognizes the below violation no longer exists, therefore proof of correction is not required at this time. However, if this violation is identified again during future inspections, "repeat", or "failure to abate" violations may result which may include monetary penalties.

62-30225(4)

The employer failed to do the following monitoring that must be conducted during initial site entry when the site evaluation procedures information that shows the potential for ionizing radiation or IDLH conditions, or when the site information is not sufficient to rule out these possible conditions:

- 1) An ongoing air monitoring program in accordance with WAC 296-62-30710 and 296-62-30715 must be implemented after site characterization has determined the site is safe for the start-up of operations.

Date By Which Violation Must be Abated: 10/03/2000

Citation 2 Item 2 Type of Violation: General

62-3110(1)

An emergency response plan must be developed and implemented by all employers within the scope of WAC 296-62-30001(1)(a) and (b) to handle anticipated emergencies prior to the commencement of hazardous waste operations. The plan must be in writing and available for inspection and copying by employees, their representatives, WISHA personnel, and other governmental agencies with relevant responsibilities. The employer failed to include hazardous chemical releases.

Date By Which Violation Must be Abated: 11/22/2000
Proposed Penalty: \$ 0.00

Department of Labor & Industries
WISHA SERVICES DIVISION
P.O. Box 44604
Olympia, WA 98504-4604

Inspection Number: 303604540
Inspection Dates: 04/21/2000 - 10/03/2000
Issuance Date: 10/20/2000
CSHO ID: D0427
Optional Inspection Nbr: h79076006



Citation and Notification of Penalty

Company Name: Washington Group International dba Morrison Knudse
Inspection Site: 3411 11th Ave SW, Seattle, WA 98134

Citation 2 Item 3 Type of Violation: General

62-30510(1)(d)

Medical examinations and consultations shall be made available by the employer to each employee covered under WAC 296-62-3050 on the following schedules:

- 1) As soon as possible upon notification by an employee that the employee has developed signs or symptoms indicating possible overexposure to hazardous substances or health hazards, or that the employee has been injured or exposed above the permissible exposure limits, or published exposure levels in an emergency situations.

UBI Number: 601175669
Mgmt. Official Contacted: BOB JOHNSON, SAFETY SUP
Employee Rep. Contacted: HANK RAE, UNION REP
Employer Walkaround Rep.: BOB JOHNSON, SAFETY SUP
Closing Conf. Employer Rep.: BOB JOHNSON, SAFETY SUP

ATTENTION EMPLOYER, IF YOU HAVE ANY QUESTIONS OR ARE IN NEED OF CLARIFICATION IN REFERENCE TO THIS CITATION. PLEASE CALL THE COMPLIANCE SUPERVISOR AT (206) 281-5470.

Date By Which Violation Must be Abated:	11/22/2000
Proposed Penalty:	\$ 0.00

Michael A. Silverstein
Assistant Director, WISHA SERVICES

APPENDIX C

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AUG 10 2004

ATTORNEY GENERAL'S OFFICE
LABOR & INDUSTRIES DIVISION
OLYMPIA, WASHINGTON

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

DEPARTMENT OF LABOR AND
INDUSTRIES,

Plaintiff,

v.

MORRISON KNUDSEN,

Defendant.

NO. 03-2-14468-1KNT

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND JUDGMENT

Clerk's Action Required

JUDGMENT SUMMARY (RCW 4.64.030)

- | | |
|--|---|
| 1. Judgment Creditor: | Department of Labor and Industries of the State of Washington |
| 2. Judgment Debtor: | Morrison Knudsen |
| 3. Principal Amounts of Judgment: | \$-0.00- |
| 4. Interest to Date of Judgment: | \$-0.00- |
| 5. Attorney Fees: | \$125.00 |
| 6. Costs: | \$110.00 |
| 7. Other Recovery Amounts: | \$-0.00- |
| 8. Principal Judgment Amount shall bear interest at N/A% per annum. | |
| 9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum. | |

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LABOR & INDUSTRIES DIVISION
OLYMPIA, WASHINGTON

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AUG 16 2004

AGO L&I DIVISION
SEATTLE

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND JUDGMENT

John P. Erlick, Judge
King County Superior Court
516 Third Avenue
Seattle WA 98104
(206) 296-9345

1 10. Attorneys for Judgment Creditor:

Christine O. Gregoire
Attorney General
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Assistant Attorney General
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6 11. Attorney for Judgment Debtor:

Aaron K. Owada
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Northcraft, Bigby & Owada, P.C.
720 Olive Way / Suite 1905
Seattle, WA 98101-1871
(206) 623-0234

9 THIS MATTER came on regularly for argument on September 11, 2003 and April 16,
10 2004, and for presentation of judgment on April 16, 2004, and the Court having considered the
11 arguments presented by the parties and the records and files herein, including:

- 12 1. Certified Appeal Board Record provided by the Washington State Board of Industrial
- 13 Insurance Appeals;
- 14 2. Department of Labor and Industries' Trial Brief;
- 15 3. Morrison Knudsen's Response to Department's Trial Brief; and
- 16 4. Department of Labor and Industries' Reply Brief,

17 and the pleadings on file in this case, and otherwise being fully advised on the matter, the
18 Court now makes the following

19 **FINDINGS OF FACT:**

- 20 1. On October 20, 2000, following an inspection of work being performed on Harbor
- 21 Island, the Department of Labor and Industries (the "Department") issued Citation and Notice
- 22 No. 303604540 (the "Citation") to Washington Group International dba Morrison Knudsen
- 23 ("Morrison Knudsen").
- 24 2. The Citation alleged the following violations of regulations contained in Chapter
- 25 296-62 of the Washington Administrative code:

- 1 • Citation 1 Item 1a Type of Violation: Serious
- 2 62-30135(2)(b)
- 3 The employer failed to include a complete safety and health risk or hazard analysis for
- 4 each site task and operation found in the work plan. Missing issues include dealing with
- 5 arsenic, mercury, and antimony contaminated soils, handling drums of unknown materials, and
- 6 bloodborne pathogens (needles in demolished trailer).
- 7 • Citation 1 Item 1b Type of Violation: Serious
- 8 62-30135(2)(d)
- 9 The employer failed to include information about personal protective equipment needed
- 10 to be used by employees for each of the site tasks and operations being conducted as required
- 11 by the personal protective equipment program in WAC 296-62-30615. Clearing and grubbing
- 12 work with contaminated materials was not addressed.
- 13 • Citation 1 Item 1c Type of Violation: Serious
- 14 62-30135(2)(f)
- 15 The employer failed to include frequency and types of air monitoring, personnel
- 16 monitoring, and environmental sampling techniques and instrumentation to be used, including
- 17 methods of maintenance and calibration of monitoring and sampling equipment to be used.
- 18 Missing issues include not including arsenic in sampling plan, no information on frequency of
- 19 sampling, type of sampling equipment used and methods of maintenance and calibration.
- 20 • Citation 1 Item 1d Type of Violation: Serious
- 21 62-30135(2)(g)
- 22 The employer failed to include site control measures in WAC 296-62-3030 through
- 23 WAC 296-62-30315. Missing are the standard operating policies for safe work practices, such
- 24 as drum handling, and demolishing contaminated buildings.
- 25 • Citation 1 Item 1e Type of Violation: Serious
- 26 62-30135(2)(h)
- The employer failed to include decontamination procedures in WAC 296-62-3100
- through WAC 296-62-31015. Missing issue is the truck wash.
- Citation 1 Item 1f Type of Violation: Serious
- 62-30135(2)(i)
- The employer failed to include an emergency response plan meeting the requirements
- of WAC Chapter 296-62-410, Part R, for safe and effective responses to emergencies,
- including the necessary PPE and other equipment. Missing issues include hazardous material

1 releases, safe distances and places of refuge, evacuation routes and procedures, emergency
2 alerting and response procedures, critique of response and follow-up, PPE and emergency
equipment.

3 • Citation 1 Item 1g Type of Violation: Serious

4 62-30310

5 The site control program must, as a minimum, include: A site map, site work zones, the
6 use of a "buddy system", site communications including alerting means for emergencies, the
7 standard operating procedures or safe work practices, and, identification of nearest medical
8 assistance. Where these requirements are covered elsewhere they need not be repeated. No
work site zones, means for alerting during emergencies, and standard operating procedures or
safe work practices were included in the written site control program.

9 • Citation 1 Item 1h Type of Violation: Serious

10 62-30615(1)

11 A written personal protective equipment program, which is part of the employer's
12 safety and health program required in WAC 296-62-3010 or WAC 296-62-31405 and which
13 must be part of the site-specific safety and health plan was not established. The PPE program
failed to address the elements listed below.

14 PPE selection based on site hazards: When working near/over water deep enough to
15 drown in, employees were not issued life vests. Additionally employees were not initially
issued protective clothing to avoid contaminated soil contact with their street clothes.

16 • Citation 1 Item 1i Type of Violation: Serious

17 62-30615(5)

18 A written personal protective equipment program, which is part of the employer's
19 safety and health program required in WAC 296-62-3010 or WAC 296-62-31405 and which
20 must be part of the site-specific safety and health plan was not established. The PPE program
must address the elements listed below.

21 PPE decontamination and disposal: Initially employees did not have instructions or
22 directions on handling contaminated PPE. Only after the inspection opened did the employer
develop policies to deal with these issues.

23 • Citation 1 Item 2a Type of Violation: Serious

24 62-30145

25 Inspections, which must be conducted by the site safety and health supervisor or in the
26 absence of that individual, another individual who is knowledgeable in occupational safety and
health and acting on behalf of the employer as necessary, failed to determine the effectiveness

1 of the site safety and health plan. The many deficiencies in the effectiveness of the site safety
2 and health plan were not corrected by the employer before this inspection opened; and the
3 safety officer on site failed to address the failure of implementation of the effective parts of the
4 HASP. The safety officer failed to recognize deficiencies in the written plan and was not
5 properly trained to recognize that problems existed.

6 • Citation 1 Item 2b Type of Violation: Serious

7 62-3100(2)(a)

8 The employer failed in that a decontamination procedure was not communicated to
9 employees and implemented before any employees or equipment entered areas on the site
10 where potential for exposure to hazardous substances existed. Before the inspection opened, no
11 decontamination was being used on site.

12 • Citation 1 Item 2c Type of Violation: Serious

13 62-3100(2)(d)

14 The employer failed in that decontamination procedures were not monitored by the site
15 safety and health supervisor to determine their effectiveness. The safety supervisor failed to
16 discover that such procedures were ineffective, and did not take appropriate steps to correct
17 any deficiencies.

18 • Citation 1 Item 2d Type of Violation: Serious

19 62-3030

20 Appropriate site control procedures were not implemented to control employee
21 exposure to hazardous substances before the clean-up work began.

22 • Citation 1 Item 3a type of Violation: Serious

23 62-30205

24 The employer failed to make a complete preliminary evaluation of a site's
25 characteristics, which must be performed prior to site entry, by a qualified person in order to
26 aid in the selection of appropriate employee protection methods prior to site entry. Immediately
after initial site entry, a more detailed evaluation of the site's specific characteristics must be
performed by a qualified person in order to further identify existing site hazards and to further
aid in the selection of the appropriate engineering controls and personal protective equipment
for the tasks to be performed.

No complete preliminary evaluation was made for all the known contaminants on site,
by the employer. Further, no PPE was planned for the clearing and grubbing operations even
though it involved the handling of lead contaminated soils, concrete and debris.
Decontamination and safe work practices were not planned for the initial phase of the
remediation process, clearing and demolishing contaminated buildings. No ionizing radiation

1 hazards were addressed at all. This being an industrial site with metal recycling operations
2 going on, such iron and metals, the possibility of buried radioactive metals was not addressed
in a preliminary evaluation.

3 Other toxic chemicals listed in the remedial action objectives and cleanup goals were
4 not included in the preliminary evaluation and not in a more detailed evaluation after work
5 began. Toxic chemicals such as arsenic, benzene, cadmium, chromium, ethylbenzene, and
PAH's were not evaluated in more detail to determine employee exposures.

6 • Citation 1 Item 3b Type of Violation: Serious

7 62-30210

8 The employer failed to include in the written site-specific safety and health plan, all
9 suspected conditions that may pose inhalation or skin absorption hazards that are immediately
10 dangerous to life or health (IDLH), or other conditions that may cause death or serious harm,
11 that must be identified during preliminary survey and evaluated during the detailed survey.
Examples of such hazards include, but are not limited to; confined space entry, potentially
12 explosive or flammable situations, visible vapor clouds, or areas where biological indicators
such as dead animals or vegetation are located.

13 The arsenic and cadmium, found in the soils on site, were not included in a initial
14 evaluation of the site's specific characteristics. No ionizing radiation hazards were addressed
either. Bloodborne pathogens, related to drug users (used syringes were found site in a to-be
15 demolished trailer) were not identified either.

16 • Citation 1 Item 3c Type of Violation: Serious

17 62-30220(4)

18 The employer failed to select the appropriate PPE for initial site entry for the hazard
19 identified, and failed to insure that the appropriate PPE be used in accordance with WAC 296-
62-3060 through 296-62-30615. No protective clothing was provided to employees who
worked with contaminated soils, in the first month of work on site.

20 • Citation 1 Item 4a Type of Violation: Serious

21 62-30235

22 The employer failed to disclose any information concerning the chemical, physical and
23 toxicological properties of each substance known or expected to be present on site that is
24 available to the employer and relevant to the duties an employee is expected to perform. The
25 employer failed to make such information available to all employees prior to the
26 commencement of their work activities. The employer may use information developed for the
hazard communication standard, Chapter 296-62 WAC, Part C, for this purpose.

1 • Citation 1 Item 4b Type of Violation: Serious

2 62-3080

3 The employer failed to develop and implement a program which is part of the
4 employer's safety and health program required in WAC 296-62-3010 through 296-62-30145 to
5 inform employees, contractors, subcontractors (or their representative) actually engaged in
6 hazardous waste operations of the nature, level, and degree of exposure likely as a result of
7 participation in such hazardous waste operations. Employees, contractors, and subcontractors
8 working outside of the operations part of a site are not covered by this standard.

7 • Citation 1 Item 5a Type of Violation: Serious

8 62-30705

9 Upon initial entry of the hazardous waste site, during the cleaning and grubbing portion
10 of the remediation work, the employee [sic] failed to conduct representative air monitoring.
11 Representative air monitoring must be conducted to identify any IDLH condition, exposure
12 over permissible exposure limits or published exposures levels, exposures over a radioactive
13 material's dose limits, or other dangerous condition, such as the presence of flammable
14 atmospheres or oxygen-deficient environments. No ionizing radiation, lead, arsenic or
15 cadmium was conducted initially. The air monitoring was not representative of all different
16 jobs and employees on site, during the initial four months of the hazardous waste operation.

14 • Citation 1 Item 5b Type of Violation: Serious

15 62-30710(1)

16 The employer failed to do periodic monitoring, which must be conducted when the
17 possibility of an IDLH condition or flammable atmosphere has developed or when there is
18 indication that exposures may have risen over permissible exposures limits or published
19 exposure levels since prior monitoring. Situations where it must be considered whether the
20 possibility that exposures have risen are as follows: when work begins on a different portion of
21 the site.

20 • Citation 1 Item 5c Type of Violation: Serious

21 62-30710(2)

22 The employer failed to do periodic monitoring, which must be conducted when the
23 possibility of an IDLH condition or flammable atmosphere has developed or when there is
24 indication that exposures may have risen over permissible exposure limits or published
25 exposure levels since prior monitoring. Situations where it must be considered whether the
26 possibility that exposures have risen are as follows: when contamination other than those
previously identified are being handled.

1 • Citation I Item 6a Type of Violation: Serious

2 62-30715

3 After the actual clean-up phase of any hazardous waste operation commences; for
4 example, when soil, surface water, or containers are moved or disturbed; the employer failed to
5 monitor those employees likely to have the highest exposures to hazardous substances and
6 health hazards likely to be present above permissible exposure limits or published exposure
7 levels by using personal sampling frequently enough to characterize employee exposures. If
8 the employees likely to have the highest exposure are over permissible exposure limits or
9 published exposure levels, then monitoring must continue to determine all employees likely to
be above those limits. The employer may use a representative sampling approach by
documenting that the employees and chemicals chosen for monitoring are based on the criteria
stated in this subsection. Examples include handling drums of unknown materials and working
in spill ponds around leaky drums of unknown materials.

10 • Citation 1 Item 6b Type of Violation: Serious

11 62-3090(4)

12 The employer failed in that several unlabeled drums and containers were not considered
13 to contain hazardous substances and handled accordingly until the contents had been positively
14 identified and labeled.

14 • Citation I Item 6c Type of Violation: Serious

15 62-3090(6)

16 The employer failed in that prior to movement of drums or containers, all employees
17 exposed to the transfer operation were not warned of the potential hazards associated with the
18 contents of the drums or containers.

18 • Citation 1 Item 6d Type of Violation: Serious

19 62-3090(9)

20 The employer failed in that drums and containers that cannot be moved without rupture,
21 leakage, or spillage were not emptied into a sound container using a device classified for the
22 material being transferred.

22 • Citation 1 Item 7a Type of Violation: Serious

23 62-31015(2)

24 The employer who had an employee whose permeable clothing became wetted with
25 hazardous substances failed to have that employee immediately remove that clothing and
26 proceed to shower. The clothing was not disposed of or decontaminated before he wore them
home.

1 • Citation 1 Item 7b Type of Violation: Serious

2 62-31020

3 Where the decontamination procedure indicates a need for regular showers and change
4 rooms outside of a contaminated area, they must be provided and meet the requirements of Part
5 B-1 of Chapter 296-24 WAC. If temperature conditions prevent the effective use of water, then
6 other effective means for cleansing must be provided and used.

6 • Citation 1 Item 8 Type of Violation: Serious

7 62-30410(2)

8 The employer failed to have a general site workers (such as equipment operators,
9 general laborers, and supervisory personnel) engaged in hazardous substances removal or other
10 activities which expose or potentially expose workers to hazardous substances and health
11 hazards receive the following required training prior to exposure:

- 12 1) General site workers required to wear Level C or D personal protective
13 equipment, equipment operators or transport vehicle operators, were required to
14 have 40 hours of training and a minimum of three days actual field experience
15 under the direct supervision of a trained, experienced supervisor.

13 • Citation 1 Item 9 Type of Violation: Serious

14 62-30415

15 The employer failed to have on-site management and supervisors directly responsible
16 for, or who supervise employees engaged in, hazardous waste operations receive at least eight
17 additional hours of specialized training at the time of job assignment on such topics as, by [sic]
18 not limited to, the employer's safety and health program and the associated employee training
19 program, personal protective equipment program, spill containment program, and health
20 hazard monitoring procedures and techniques.

19 • Citation 1 Item 10 Type of Violation: Serious

20 62-07111

21 The employer failed to include the following required elements of the written
22 respiratory protection plan:

- 23 1) Procedures for selecting respirators for use in the workplace and a list
24 identifying the proper type of respirator for each respiratory hazard (see WAC
25 296-62-07130 through 296-62-07133);
26 2) Procedures for proper use of respirators in routine tasks, nonroutine tasks,
reasonably foreseeable emergency and rescue situations (WAC 296-62-07170
through 296-62-07172);

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- 3) Procedures for issuing the proper type of respirator based on the respirator based on the respiratory hazards for each employee;
- 4) Procedures and schedules for cleaning, disinfecting, storing, inspecting, repairing, discarding, and otherwise maintaining respirators (see WAC 296-62-07175 through 296-62-07253);
- 5) Training of employees in the respiratory hazards to which they are potentially exposed during routine, nonroutine, and unforeseeable emergency and rescue situations (see WAC 296-62-07188);
- 6) Training of employees in the proper use of respirators, including putting on and removing them, any limitations on their use, and their maintenance (see WAC 296-62-07188); and
- 7) Procedures for regularly evaluating the effectiveness of the program (see WAC 296-62-07192).

- Citation 1 Item 11 Type of Violation: Serious
62-3060(1)(a)
Engineering controls, work practices, personal protective equipment, or a combination of these must be implemented in accordance with this section to protect employees from exposure to hazardous substances and health hazards. Regarding engineering controls, work practices, and PPE for substances in Chapter 296-62 WAC. Employees were overexposed to lead without the use of proper personal protective equipment.

- Citation 2 Item 1a Type of Violation: General
62-30225(1)
The employer failed to do the following monitoring that must be conducted during initial site entry when the site evaluation produces information that shows the potential for ionizing radiation of IDLH conditions, or when the site information is not sufficient to rule out these possible conditions:
1) Monitoring with direct reading instruments for hazardous levels of ionizing radiation.

- Citation 2 Item 1b Type of Violation: General
62-30225(4)
The employer failed to do the following monitoring that must be conducted during initial site entry when the site evaluation produces information that shows the potential for

1 ionizing radiation or IDLH conditions, or when the site information is not sufficient to rule out
2 these possible conditions:

- 3 1) An ongoing air monitoring program in accordance with WAC 296-62-30710
4 and 296-62-30715 must be implemented after site characterization has
determined the site is safe for the start-up of operations.

5 • Citation 2 Item 2 Type of Violation: General

6 62-3110(1)

7 An emergency response plan must be developed and implemented by all employers
8 within the scope of WAC 296-62-30001(1)(a) and (b) to handle anticipated emergencies prior
9 to the commencement of hazardous waste operations. The plan must be in writing and
10 available for inspection and copying by employees, their representatives, WISHA personnel,
and other governmental agencies with relevant responsibilities. The employer failed to include
hazardous chemical releases.

11 • Citation 2 Item 3 Type of Violation: General

12 62-30510(1)(d)

13 Medical examinations and consultations shall be made available by the employer to
each employee covered under WAC 296-62-3050 on the following schedules:

- 14 1) As soon as possible upon notification by an employee that the employee has
15 developed signs or symptoms indicating possible overexposure to hazardous
16 substances or health hazards, or that the employee has been injured or exposed
17 above the permissible exposure limits, or published exposure levels in an
emergency situations.

18 3. With the exception of Citation 1 Item 10, all violations alleged in the Citation
19 were of standards contained within "Part P" of the Washington Administrative Code's Safety
20 and Health Standards, "Part P" includes WAC 296-62-300 - WAC 296-62-3195 and is entitled
21 "Hazardous Waste Operations and Treatment, Storage, and Disposal Facilities."

22 4. The Citation assessed penalties totaling \$48,500.00. The penalties and their
23 associated violations were as follows:

- 24 • \$4,500.00 for Citation 1 Items 1a - 1i;
25 • \$4,500.00 for Citation 1 Items 2a - 2d;
26 • \$4,500.00 for Citation 1 Items 3a - 3c;

- 1 • \$4,500.00 for Citation 1 Items 4a – 4b;
 - 2 • \$4,500.00 for Citation 1 Items 5a – 5c;
 - 3 • \$4,500.00 for Citation 1 Items 6a – 6d;
 - 4 • \$4,500.00 for Citation 1 Items 7a – 7b;
 - 5 • \$4,500.00 for Citation 1 Item 8;
 - 6 • \$4,500.00 for Citation 1 Item 9;
 - 7 • \$3,000.00 for Citation 1 Item 10; and
 - 8 • \$5,000.00 for Citation 1 Item 11.
- 9 5. On November 6, 2000 Morrison Knudsen filed an appeal from the Citation with
10 the Board of Industrial Insurance Appeals (the "Board").
- 11 6. Hearings on Morrison Knudsen's appeal were held before a Board-appointed
12 Industrial Appeals Judge (the "IAJ").
- 13 7. The Board-level proceedings, including pre-hearing motions, the hearings
14 themselves, and post-hearing briefing, provided Morrison Knudsen with a full opportunity to
15 present all legal and factual challenges that it had against the Citation, and Morrison Knudsen
16 did so. The Board's record thus contains all facts and argument necessary to address the merits
17 of each alleged violation.
- 18 8. During the Board hearings Morrison Knudsen presented evidence with respect
19 to Citation 1 Item 10 of the Citation that it had not provided to the Department during the
20 inspection.
- 21 9. The IAJ issued a Proposed Decision and Order (the "PD&O") dated June 19,
22 2002 which vacated the Citation in its entirety. The IAJ determined that Morrison Knudsen's
23 Harbor Island activities were not subject to Part P and that the new evidence provided by
24 Morrison Knudsen during the hearing warranted the vacation of Item 1-10 of the Citation. The
25 PD&O contained findings of fact and conclusions of law consistent with these determinations.
26

1 10. On September 17, 2002 the Department filed a petition for review from the
2 PD&O.

3 11. The Board issued a Decision and Order (the "D&O") dated December 3, 2002
4 which determined that the PD&O had reached the correct result.

5 12. The D&O contained the following findings of fact:

6 (1). The Department of Labor and Industries received an oral complaint against a
7 Morrison Knudsen work site on Harbor Island in Seattle, Washington, on
8 April 18, 2000. The Department began its investigation, inspection and/or
9 survey that revealed alleged violations on April 21, 2000, the date McClelland
10 Davis held an opening conference with Morrison Knudsen at 3411 11th Avenue
11 S.W., Seattle, Washington, on Harbor Island.

12 The Department issued Citation and Notice of Assessment No. 303604540 on
13 October 20, 2000, alleging 34 violations of WAC 296-62 and assessing a total
14 penalty of \$48,500. The employer filed a Notice of Appeal with the Department
15 of Labor and Industries Safety Division on November 6, 2000. The Department
16 issued a Notice of Reassumption of Jurisdiction on November 16, 2000. The
17 parties agreed to an extension of the reassumption period and that the Corrective
18 Notice of Redetermination would be issued no later than January 12, 2001.

19 On December 21, 2000, the Department issued a Notice of Decision canceling
20 the reassumption hearing set for December 6, 2000. The Department transmitted
21 the appeal to the Board as a direct appeal on February 21, 2001. A Notice of
22 Filing the Appeal was issued on February 21, 2001.

23 (2). Morrison Knudsen received the notice to begin work on the Terminal 18
24 Redevelopment Project on November 1, 1999. The work that Morrison Knudsen
25 contracted to perform was the redevelopment of selected portions of Harbor
26 Island. This work included building demolition, roadway demolition, railway
demolition, installation of new roadways and railways, erection of new
buildings, removal and replacement of underground utilities, above ground
hazardous material abatement, which was done by subcontractors, contaminated
soil handling for the Port of Seattle, and underground storage tank removal. The
contaminated soil handling was contractual support for the Port of Seattle soil
remediation activities.

(3). Harbor Island was placed on the National Priorities List by the Environmental
Protection Agency in 1983. A Record of Decision was issued by the agency in
1993, listing the remedial actions that were required to be taken on Harbor
Island. A Consent Decree was later issued by the U.S. District Court
incorporating the Record of Decision and its supplement. Prior to the beginning
of work at Terminal 18, the Port had all known "hot spots" removed. These "hot
spots" consisted of total petroleum hydrocarbons (TPH), PCBs, and soil mixed
with carcinogens.

- 1 (4). One of the remedies in the Record of Decision was the capping of exposed
- 2 contaminated soil exceeding inorganic or organic cleanup goals.
- 3 (5). The work site was characterized as early as 1993 (a determination had been
- 4 made of the potential hazardous materials present on the project site), was
- 5 controlled, and was not an uncontrolled hazardous waste site.
- 6 (6). The ultimate goal of the redevelopment project at Terminal 18 was to provide
- 7 the Port of Seattle and Stevedoring Services of America with a facility that
- 8 worked for them and that met their performance specifications. The ultimate
- 9 goal of the project was not to make the work site safer for people or the
- 10 environment. Morrison Knudsen would have performed the capping work on
- 11 this job even if the Record of Decision did not require it.
- 12 (7). Morrison Knudsen had a written respiratory protection program on site and in
- 13 effect as of November 1, 1999, that contained procedures for selecting
- 14 respirators for use on site and a list identifying the proper type of respirator for
- 15 each respiratory hazard; medical evaluations of employees required to use
- 16 respirators; fit testing procedures for tight-fitting respirators; procedures for
- 17 proper use of respirators in routine tasks, nonroutine tasks, reasonably
- 18 foreseeable emergency and rescue situations; procedures for issuing the proper
- 19 type of respirator based on the respiratory hazards for each employee;
- 20 procedures and schedules for cleaning, disinfecting, storing, inspecting,
- 21 repairing, discarding and otherwise maintaining respirators; procedures to make
- 22 sure adequate air quality, quantity, and flow of breathing air for atmosphere-
- 23 supplying respirators; training of employees in the respiratory hazards to which
- 24 they are potentially exposed during routine, nonroutine, and unforeseeable
- 25 emergency and rescue situations; training of employees in the proper use of
- 26 respirators, including putting on and removing them, any limitations on their
- use, and their maintenance and procedures for regularly evaluating the
- effectiveness of the program.
- 13. The D&O contained the following conclusions of law:
- (1). The Department of Labor and Industries issued Citation and Notice of
- Assessment No. 303604540 within the requirements of RCW 49.17.120(4).
- (2). The Board of Industrial Insurance Appeals has jurisdiction over the parties and
- subject matter of this appeal.
- (3). The work performed by Morrison Knudsen on the Terminal 18 Redevelopment
- Project at Harbor Island in Seattle, Washington, was not a clean-up operation as
- defined in WAC 296-62-30003.
- (4). The Morrison Knudsen work site at Harbor Island in Seattle, Washington, was
- not an uncontrolled hazardous waste site as defined by WAC 296-62-30003.
- (5). The work performed by Morrison Knudsen on the Terminal 18 Redevelopment
- Project at Harbor Island in Seattle, Washington, was not within the scope and
- application of WAC 296-62-300, et seq., as set out in WAC 296-62-30001.

1 (6). Morrison Knudsen's written respiratory protection program did not violate
2 WAC 296-62-07111.

3 (7). Citation and Notice of Assessment No. 303604540 is incorrect and is vacated in
4 its entirety.

5 14. On January 3, 2003 the Department filed a timely notice of appeal from the
6 D&O to the King County Superior Court. The parties fully briefed and argued their positions
7 in the Superior Court proceedings.

8 15. The Board's Findings of Fact Nos. 1, 2, 3, 4 and 7 are supported by substantial
9 evidence in the record.

10 16. The Board's Finding of Fact No. 7 is based upon evidence that Morrison
11 Knudsen introduced during the hearing that had not been provided to the Department's
12 inspector prior to issuance of the Citation.

13 17. The Board's Findings of Fact Nos. 5 and 6 are not supported by substantial
14 evidence in the record and should be set aside.

15 18. Morrison Knudsen's work site on Harbor Island was an "uncontrolled
16 hazardous waste site," as that term is defined in Part P, at the time of the inspection. Harbor
17 Island, including the Terminal 18 project, was on the National Priority List and also had been
18 designated as a "Superfund" site, at the time of Morrison Knudsen's successful bid and
19 subsequent work on the project. As noted by IAJ Jaffe, in his PD&O, "There is no question
20 that certain soils were found to be contaminated and were stockpiled by Morrison Knudsen
21 personnel to be removed from the Island by employees of the Port. It is also not disputed that
22 part of the project involved capping of soil, a remediation activity ordered by the consent
23 decree." PD&O, at 9.

24 19. Morrison Knudsen was performing a "clean-up operation," as that term is
25 defined in Part P, at the time of the Harbor Island inspection.
26

1 Port." Thus, this included an operation where hazardous substances were "removed, contained
2 incinerated, neutralized, stabilized, cleared up, or in any other manner processed or handled
3 with the ultimate goal of making the site safer for people or the environment."

4 6. The words "ultimate goal" as they appear in the definition of "clean-up
5 operation" do not refer to all work of any kind that is being performed on a jobsite. They refer
6 instead to the "process[ing] or handl[ing]" of hazardous substances as that phrase appears in
7 the definition of "clean-up operation."

8 7. The Board's and IAJ's findings and conclusions are incorrect that "The ultimate
9 goal of the project was not to make the worksite safer for people or the environment. Morrison
10 Knudsen would have performed the capping work on this job even if the Record of Decision
11 did not require it." The obverse is true. Regardless of the Terminal 18 redevelopment project,
12 pursuant to the consent decree, the Port was obligated to abate the presence of hazardous
13 material, including the remedial action of capping exposed contaminated soil. It is
14 incongruous and illogical that Part P should be interpreted such that two employees, engaging
15 in the precise same work, exposed to the precise same hazards, mandated by the precise same
16 consent decree, should have different protection under the statute and regulations promulgated
17 by the Department. The fact that additional responsibilities and goals were added to the
18 mandated cleanup requirements should not obliterate responsibility for compliance with Part P.
19 The "ultimate goal" of Morrison Knudsen's processing and handling of hazardous substances
20 at the Harbor Island work site was making the site safer for people or the environment.

21 8. Whether Morrison Knudsen's work site on Harbor Island was characterized at
22 the time of the inspection does not affect coverage under Part P.

23 9. Regardless, Morrison Knudsen's work site on Harbor Island was not
24 characterized at the time of the inspection.

25 10. Morrison Knudsen's work on Harbor Island was covered by Part P.
26

1 11. The Board's Conclusions of Law Nos. 1, 2 and 6 flow from the Board's
2 Findings of Fact.

3 12. The Board's Conclusion of Law No. 6 is based upon evidence that Morrison
4 Knudsen introduced during the hearing that had not been provided to the Department's
5 inspector prior to issuance of the Citation.

6 13. The Board's Conclusions of Law Nos. 3, 4, 5 and 7 are based upon findings of
7 fact that are not supported by substantial evidence in the record and otherwise do not flow from
8 the Board's findings of fact. Conclusions of Law Nos. 3, 4, 5 and 7 also reflect an incorrect
9 interpretation of the standards defining the scope and applicability of Part P, including an
10 incorrect interpretation of the words "ultimate goal" as they appear in the definition of "clean-
11 up operation."

12 14. Because the parties fully litigated the merits of the alleged violations before the
13 IAJ, there is no need for the Board to conduct further hearings in this matter or to supplement
14 the record in any other way.

15 Based on the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, it is
16 hereby

17 **ORDERED, ADJUDGED AND DECREED THAT**

18 1. The D&O is incorrect and is hereby reversed and set aside.

19 2. This matter is remanded to the Board with instructions to issue a new decision
20 and order consistent with the findings of fact and conclusions of law contained herein.

21 3. The Board is instructed to base the new decision and order on the existing
22 record. No further hearings are to be held and the record is not to be supplemented in any
23 other way.

24 4. The Board is further instructed to include findings and conclusions in the new
25 decision and order that substantially incorporate Findings of Fact Nos. 1, 2, 3, 4 and 7 and
26 Conclusions of Law Nos. 1, 2 and 6 as these findings and conclusions appear in the D&O.

APPENDIX D

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: MORRISON KNUDSEN) DOCKET NO. 01 W0158
2 CITATION & NOTICE NO. 303604540) DECISION AND ORDER ON REMAND
3 FROM SUPERIOR COURT

4 APPEARANCES:

5 Employer, Morrison Knudsen, by
6 AMS Consulting, per
7 Aaron K. Owada

8 Employees of Morrison Knudsen, by
9 Laborers Local No. 440, per
10 Kim Williams

11 Employees of Morrison Knudsen, by
12 Hod Carriers & General Laborers Local No. 242

13 Employees of Morrison Knudsen, by
14 Operating Engineers Local No. 302, per
15 Tom Kennedy

16 Employees of Morrison Knudsen, by
17 Teamsters Local No. 174

18 Employees of Morrison Knudsen, by
19 Carpenters Local No. 131

20 Employees of Morrison Knudsen, by
21 Cement Masons Local No. 528, per
22 Roger Betterman

23 Department of Labor and Industries, by
24 The Office of the Attorney General, per
25 James M. Hawk and Michael K. Hall, Assistants

26 The employer, Morrison Knudsen, filed an appeal with the Department of Labor and
27 Industries on November 6, 2000, from Citation and Notice No. 303604540, issued on October 20,
28 2000. The appeal was transmitted to the Board of Industrial Insurance Appeals on February 21,
29 2001. In this Citation and Notice, the Department alleged that the employer violated 34 sections of
30 WAC 296-62. The Department order is **AFFIRMED AS MODIFIED**.

1 Harbor Island has been the location of various industrial activities for many years. As a result of the
2 industrial activities, Harbor Island became contaminated with various industrial residue, which
3 presented a potential risk of harm to people and the environment. In 1983, Harbor Island was listed
4 as a Super Fund clean-up site by the U.S. Environmental Protection Agency. In 1993, a Record of
5 Decision (ROD), setting forth the final action for soil and groundwater remediation at Harbor Island,
6 was signed by the acting regional administrator for the U.S. Environmental Protection Agency
7 (Exhibit No. 32). This ROD is 86 pages long, with three appendices. This document addresses the
8 remedial actions to alleviate the risks to human health in the environment on Harbor Island. Exhibit
9 No. 33 is an amendment to the ROD, which was issued in 1995.

10 On August 1, 1996, a Consent Decree was entered in U.S. district court (Exhibit No. 34).
11 The Consent Decree was entered into between the U.S. government as plaintiff and the Port of
12 Seattle and other defendants, following a complaint filed by the U.S. government to recover costs
13 and enforce performance of studies and response work required under federal law on Harbor
14 Island. The Consent Decree recites that the remedial action to be implemented on Harbor Island is
15 embodied in the ROD issued in September 1993, with amendments.

16 The ROD and Consent Decree detail the type of contamination present in 1993 and the
17 requirements of the clean-up of the contamination in 1996. This record indicates that some of the
18 clean-up work, referred to in the ROD and Consent Decree, was completed prior to Morrison
19 Knudsen beginning its activity on Harbor Island.

20 Morrison Knudsen entered into a contract with the Port of Seattle for work to be performed
21 on Harbor Island and began work on Harbor Island in the first part of November 1999. Morrison
22 Knudsen's work on Harbor Island included road demolition, excavation, and site grading for
23 roadways, railways, and buildings, and excavation for sewer, storm water, and electrical utilities, as
24 well as bridge construction. In the course of performing these activities, Morrison Knudsen
25 anticipated that the various activities presented the potential for encountering hazardous materials.
26 Because there was a potential for encountering hazardous materials, Morrison Knudsen contracted
27 with AGRA, an environmental consulting firm, to provide technical support in two areas:
28 (1) industrial hygiene and (2) quality assurance, which involves testing of conventional construction
29 materials to assure materials meet specifications; and providing document control for the project to
30 assure that proper records were kept. In the course of performing the contract for Morrison
31 Knudsen, AGRA developed a site-specific safety and health plan for Harbor Island. The plan is
32 titled "Terminal 18 Redevelopment Project—Occupational Safety and Health Policies and

1 Procedures." A portion of this document is Exhibit No. 106. Appendix A to the plan is titled
2 "Environmental Hazardous Waste Operations" and is Exhibit No. 2 to this record. As part of its
3 contract with Morrison Knudsen, AGRA provided on-site industrial hygienists to monitor conditions
4 and advise Morrison Knudsen regarding the safety and health issues encountered during the work
5 activity on Harbor Island.

6 In April 2000, the Department of Labor and Industries received a complaint regarding
7 Morrison Knudsen's work site activities on Harbor Island. On April 21, 2000, McClelland Davis, a
8 safety inspector for the Department of Labor and Industries, went to Morrison Knudsen's work site
9 on Harbor Island and conducted an opening conference. Mr. Davis visited the Morrison Knudsen
10 site on Harbor Island on several occasions through the summer of 2000. On October 20, 2000, the
11 Citation and Notice that is the subject of this appeal was issued by the Department of Labor and
12 Industries.

13 DECISION

14 The Superior Court order requires that we find that Morrison Knudsen's activities at Harbor
15 Island were covered by Part P, WAC 296-62-300, et seq., and that Morrison Knudsen was required
16 to comply with the standards contained therein. We are also instructed to make specific findings
17 and conclusions on the merits of each violation contained in the Citation and Notice, except that
18 Citation 1, Item 10 is to remain vacated, pursuant to the findings of the Superior Court. We turn
19 now to the violations in the Citation and Notice.

20 In Citation 1, Items 1a through 1i, the Department alleges that Morrison Knudsen's written
21 safety program failed to comply with specific provisions of the Washington Administrative Code.
22 The Department also alleges that all of these violations are serious violations. Morrison Knudsen
23 argues that the safety plan meets the requirements of the cited WAC provisions and that all of the
24 violations alleged in Citation 1, Items 1a through 1i, should be vacated.

25 Citation 1, Items 1a through 1f, allege violations of WAC 296-62-30135, which is titled
26 "Overview of Site-Specific Safety and Health Plan." The controversy surrounding these alleged
27 violations focuses on the sufficiency of the written site-specific safety plan, Exhibit No. 2 and Exhibit
28 No. 106.

29 Citation 1, Item 1a, cites a violation of WAC 296-62-30135(2)(b). This section of the WAC
30 provides that the site-specific safety and health plan must include a safety and health risk or hazard
31 analysis for each site task and operation found in the work plan. The Department specifically
32 alleges that the plan is deficient because there are missing issues, including dealing with

1 arsenic-, mercury-, and antimony-contaminated soils, handling drums of unknown materials, and
2 blood-borne pathogens.

3 The Department presented the testimony of McClelland Davis in support of the violations.
4 Mr. Davis is the Department inspector who conducted the investigation and recommended the
5 issuance of the Citation and Notice. Mr. Davis relies heavily on information contained in the ROD
6 and Consent Decree in reaching his decision that the site-specific safety plan is deficient.
7 Mr. Davis believes that because the ROD and Consent Decree note the existence of arsenic,
8 mercury, and antimony, the site-specific safety plan is deficient on its face for failing to include
9 those substances in the plan.

10 Mr. Davis relies on information obtained from witnesses, employees of Morrison Knudsen,
11 and determines that drums of unknown material were present on the site and handled, and that
12 syringe needles were present on the site, but that neither the drum-handling nor syringe needle risk
13 was addressed in the site-specific safety plan. The blood-borne pathogens are associated with
14 hypodermic needles that were apparently located in some demolished trailers on the site.

15 Morrison Knudsen presented the testimony of Robert Gilmore, a certified industrial hygienist
16 who works for AGRA and who participated in the development of the site-specific safety plan for
17 Harbor Island. Mr. Gilmore testified that the site-specific safety and health plan for Harbor Island
18 was based on a review of the historical data obtained from what was referred to as the Weston
19 Study, and many other studies assembled prior to the writing of the plan. He testified that all of this
20 information was gathered long before November 1, 1999, when Morrison Knudsen began working
21 on the site. Mr. Gilmore, having reviewed the data for the site, knew of potential contamination in
22 the soil and anticipated disturbance of those materials in the course of the construction project. He
23 also noted that the airborne emission of lead from what is described as the Sea Fab site had
24 diminished over the last 15 years to the point that the Puget Sound Air Pollution Control Authority
25 had stopped on-site air monitoring. Mr. Gilmore testified that when the site-specific safety and
26 health plan for Harbor Island was developed, AGRA considered every credible work craft activity
27 and did a risk assessment. He testified that the tables appended to Appendix A of the plan (Exhibit
28 No. 2) identify potential contaminants which present a credible exposure risk, and that this is
29 valuable information for personnel on the site. Mr. Gilmore used what is known as the Marlow
30 analysis, which is a tool for predicting levels of airborne contaminants from contaminated soils in
31 preparing the plan. He testified that this is a commonly used model. The model gives technicians
32 on the site guidance to determine when there was a potential exposure risk to a hazard.

1 Based on this analysis, Mr. Gilmore determined that if there is no visible dust there would be
2 no credible probability of exposure to hazardous material above permissible exposure limits for any
3 of the substances noted in the studies. Mr. Gilmore testified that lead was considered the most
4 ubiquitous contaminant on the Harbor Island site that would be encountered by workers for
5 Morrison Knudsen. He testified that it was the only metal on site that, based on historical data,
6 would result in levels in airborne samples that could exceed permissible exposure limits. Lead was
7 used as the test species indicator, instead of arsenic, because if lead was identified in an air
8 sample and adequately controlled from soil disturbance activities, there would be adequate control
9 of all other soil contaminants in the air.

10 Mr. Gilmore also testified that blood-borne pathogens were not included in the plan because
11 encountering hypodermic needles or other blood-borne pathogens was not considered to be a
12 credible risk associated with normal work activities. It was not envisioned that there would be
13 encounters with blood-borne pathogens on the Harbor Island site.

14 We are persuaded by the testimony of Mr. Gilmore, as well as our review of Exhibit No. 2,
15 Appendix A to the site-specific safety and health plan for Harbor Island, that the safety plan meets
16 the requirements of WAC 296-62-30135(2)(b). Mr. Gilmore has clearly indicated the information
17 used by AGRA and Morrison Knudsen in developing the plan. The decision by AGRA and Morrison
18 Knudsen for dealing with the arsenic-, mercury-, and antimony-contaminated soils is logical and
19 persuasive.

20 We are also persuaded by the testimony of Mr. Gilmore regarding the necessity of including
21 blood-borne pathogens in the plan. We agree with Mr. Gilmore that it was not a credible risk given
22 the nature of the site. The failure to include the blood-borne pathogens as a potential risk in the
23 plan is not a violation of WAC 296-62-30135(2)(b). The remaining allegation in Citation 1, Item 1a,
24 regards the handling of drums of unknown materials. The allegation is that the plan failed to
25 address this issue. We have reviewed Exhibit No. 2, which is Appendix A to the site-specific safety
26 and health plan. Page 24 contains section 11.4, which is titled "Drum, Container, and Tank
27 Handling and Moving Procedures." This provision details how drums of unknown materials should
28 be handled.

29 We are not persuaded by the testimony of McClelland Davis, the Department inspector.
30 First, Mr. Davis relied on the ROD and the Consent Decree in reaching his conclusion that failure to
31 mention arsenic, mercury, and antimony in the plan would constitute a violation of WAC 296-62-
32 30135(2)(b). However, he admits that he did not read these documents in their entirety. Second,

1 Mr. Davis admits he lacks expertise in EPA remediation criteria and was unaware of the extent to
2 which the clean-up operations were completed on Harbor Island, as set forth in the ROD and
3 Consent Decree. In essence, Mr. Davis assumes that because certain hazardous substances are
4 contained in the ROD and Consent Decree, they must necessarily be set forth in the site-specific
5 safety and health plan. This assumption is rebutted by the persuasive testimony of Mr. Gilmore.

6 In summary, we find that the Department has failed to present persuasive evidence to
7 establish that Morrison Knudsen's safety plan failed to meet the requirements of WAC 296-62-
8 30135(2)(b), and Citation 1, Item 1a is vacated.

9 Citation 1, Item 1b cites a violation of WAC 296-62-30135(2)(d). This section of the WAC
10 provides that the site-specific safety and health plan must include personal protective equipment to
11 be used by employees for each site task and operation being conducted. The Department
12 specifically alleges that the plan is deficient because "clearing and grubbing work" was not
13 addressed in the plan.

14 We have reviewed Exhibit No. 2, Appendix A to the site-specific safety and health plan. The
15 plan addresses the use of personal protective equipment (PPE) in section 6, page 11. In addition,
16 there are two tables appended to the plan that address the issue of PPE. Table 3 of the plan lists
17 the type of PPE required by each level of protection. The levels of protection are listed as: level D,
18 modified level D, level C, and level B. Table 4 of the plan is titled "Minimum Personal Protective
19 Equipment Requirements by Task." Table 4 shows which level of PPE is appropriate and required
20 as a minimum for the site-specific task. The tasks listed in Table 4 are the same tasks identified in
21 section 2.2 of the plan. Section 2.2 is titled "Site-Specific Work Activities That Will Involve
22 Hazardous Waste Operations."

23 By looking at Table 4 and identifying the site-specific task, the appropriate level of PPE can
24 be identified. Once the appropriate level of PPE is identified, Table 3 identifies the appropriate PPE
25 to be used for that level. Clearly, Morrison Knudsen has included information about PPE to be
26 used with each site-specific work task or operation. The controversy focuses on whether the work
27 activity described as "clearing and grubbing" falls within the site-specific work set out in section 2.2
28 of the plan or whether "clearing and grubbing" should be set out as a separate site-specific work
29 task or operation under section 2.2 of the plan. Review of the nature of the work referred to as
30 "clearing and grubbing" is necessary to determine if it is addressed in the plan.

31 McClelland Davis defined "clearing and grubbing" as removing vegetation from the site. In
32 his discussion with employees of Morrison Knudsen, he understood that "clearing and grubbing"

1 was done in the first few months of work activities by Morrison Knudsen employees on Harbor
2 Island. Mr. Johnie Wilkins, an employee of Morrison Knudsen, testified regarding the initial work on
3 the site. He was hired to do clean-up on the site, removing blackberry bushes and fence. He
4 testified that he used a vehicle-mounted blade set at ground level to cut the plant so as not to
5 disturb the soil.

6 The written plan focuses on the tasks and operations that will disturb contaminated soils.
7 The record persuades us that "clearing and grubbing" is a subspecies of work activity that is part of
8 the initial stage of one or more of the site-specific work tasks or operations listed in section 2.2 of
9 Appendix A to the site-specific safety and health plan, Exhibit No. 2. As a component of one of the
10 listed tasks or operations in section 2.2 of the plan, the appropriate PPE for "clearing and grubbing"
11 can be determined by looking at Table 3 and 4 of the plan. If the "clearing and grubbing" is
12 associated with road demolition, the appropriate PPE would be level D, modified where necessary,
13 from Table 4. The specific PPE to be used would then be found on Table 3. We find that it is
14 sufficient for Morrison Knudsen to list the PPE for the site task or operation without listing each
15 subspecies of activity associated with the task or operation so long as the appropriate PPE can be
16 obtained from the plan. All activities associated with the listed site-specific tasks and operations in
17 section 2.2 of the plan would be covered by section 6 of the plan and Tables 3 and 4.

18 In summary, we find that the Department has failed to present persuasive evidence to
19 establish that Morrison Knudsen's safety plan failed to meet the requirements of WAC 296-62-
20 30135(2)(d) and Citation 1, Item 1b is vacated.

21 Citation 1, Item 1c cites a violation of WAC 296-62-30135(2)(f). This section of the WAC
22 provides that the site-specific safety and health plan must include frequency and types of air
23 monitoring and environmental sampling techniques and instrumentation to be used, including
24 methods of maintenance and calibration of monitoring and sampling equipment to be used. The
25 Department specifically alleges that the plan is deficient (1) because it does not include arsenic in
26 the sampling plan; (2) because there is no information on the frequency of sampling; and (3) that
27 there is no information regarding the type of sampling equipment to be used and the methods of
28 maintaining and calibrating the equipment.

29 We previously discussed whether arsenic should be included in the plan in deciding Citation
30 1, Item 1a. We apply the same analysis to this violation. The testimony of Robert Gilmore
31 convinces us that the plan adequately addresses the risks associated with arsenic through the
32 monitoring for levels of lead. Additionally, Mr. Gilmore testified that all air samples were tested for

1 arsenic. The Department relies on McClelland Davis's belief that arsenic should be specifically
2 included in the plan. However, the Department has offered no factual basis why it should be
3 included. McClelland Davis again relies only on his belief that because arsenic is mentioned in the
4 ROD and Consent Decree, neither of which he fully read, arsenic must be addressed in the
5 Morrison Knudsen site-specific safety and health plan. If Mr. Davis had reviewed Appendix B of the
6 ROD he would have discovered that arsenic was eliminated from the hot spot treatment because
7 the distribution of the concentration of arsenic showed that it was widely distributed across the
8 island at levels not significantly above background and was not highly concentrated in any
9 particular areas. We are not persuaded by the Department's position.

10 The Department also alleges that the plan has no information on frequency of air sampling.
11 McClelland Davis testified that he reviewed Morrison Knudsen's site-specific safety and health plan,
12 and based on his review, he concluded that the plan did not have information on frequency of air
13 sampling. We have reviewed Exhibit No. 2 Appendix A to the plan. Section 7 of the plan is titled
14 "Air Monitoring and Sampling." Section 7.2 of the plan is titled "Air Sampling." Section 7.2.1, which
15 is titled "Organic Compounds," sets forth when sampling will occur. Table 5, which is referred to in
16 Section 7 of the plan, is titled "Airborne Contaminant Response Criteria." This table lists the
17 various contaminants and the level at which action needs to be taken regarding the contaminant,
18 along with the PPE that is appropriate and what monitoring requirement and what work action
19 should follow. For the contaminant volatile organic compounds, the work action indicates that
20 personal sampling for organics would be done. This would occur if there was greater than 50 ppm
21 above background, if benzene was detected greater than 0.5 ppm, or if the action level was
22 exceeded for any organic.

23 Table 6 of the plan, which is also referred to in Section 7, is titled "Air Monitoring and
24 Sampling Requirements." This table shows the various activities that will be conducted and
25 indicates whether monitoring or sampling needs to be done with respect to various conditions.

26 Clearly, Section 7, together with Table 5 and Table 6 of Appendix A of Morrison Knudsen's
27 site-specific safety and health plan, contains information regarding frequency of sampling. The
28 allegation by the Department regarding this violation is that the safety plan does not contain **any**
29 **information**. The violation is not whether the information contained in the plan is sufficient
30 information, but whether it exists at all. We find that the plan contains information on frequency of
31 sampling.

1 The Department also alleges that the type of sampling equipment used and methods of
2 maintaining and calibrating the equipment are missing from the plan. Our review of Exhibit No. 2,
3 Section 7.2, indicates that the plan specifies that personal air sampling pumps will be used for air
4 sampling. We find this sufficient to meet the requirements of the WAC. However, we agree with
5 the Department that the plan lacks information on the methods of maintaining and calibrating the
6 equipment. We have reviewed Exhibit No. 2 in detail and can find no reference to the method of
7 maintaining and calibrating the personal air sampling pumps.

8 Citation 1, Item 1c is affirmed with respect to the allegation of failing to include information on
9 maintaining and calibration of the sampling equipment. The Department alleges that the violation is
10 a serious violation. A serious violation is defined by RCW 49.17.180. A violation is serious if there
11 is a substantial probability that death or serious physical harm could result from a condition which
12 exists, or from one or more practices, means, methods, operations, or processes which have been
13 adopted or are in use in such workplace, unless the employer did not, and could not with the
14 exercise of reasonable diligence, know of the presence of the violation. The Department has
15 offered no factual basis that would allow us to determine that failing to include the maintenance and
16 calibration methods for air sampling equipment would create a substantial probability that death or
17 serious physical harm could result. Citation 1, Item 1c is best characterized on this record as a
18 general violation with no penalty.

19 Citation 1, Item 1d cites a violation of WAC 296-62-30135(2)(g). This section of the WAC
20 provides that site control measures in WAC 296-62-3030 through WAC 296-62-30315 must be
21 included in the site-specific safety and health plan. The Department specifically alleges that the
22 plan is deficient because the plan lacks standard operating policies for safe work practices such as
23 drum handling and demolishing contaminated buildings.

24 WAC 296-62-3030 through WAC 296-62-30315 set forth the requirements of a site control
25 program. WAC 296-62-30310 provides:

26 The site control program must, at a minimum, include: a site map; site work zone; the
27 use of a "buddy system"; site communications including alerting means for
28 emergencies; the standard operating procedures for safe work practices; and,
29 identification of nearest medical assistance. Where these requirements are covered
elsewhere they need not be repeated. (Emphasis added.)

30 Exhibit No. 2, Appendix A to Morrison.Knudsen's site-specific safety and health plan, Section
31 9, is titled "Site Control Measures." While Section 9 of the plan does not address the safe work
32 practices regarding drum handling and demolishing contaminated buildings, these issues are

1 addressed in other sections of the plan. Section 2.2 of the plan specifically addresses demolition of
2 contaminated buildings. Section 11.4 of the plan addresses the handling of drums. The
3 Department's allegation that Morrison Knudsen's site-specific safety and health plan is missing
4 elements associated with demolishing contaminated buildings and drum handling is not supported
5 by a simple reading of the plan. The elements are present in the plan and WAC 296-62-30310
6 specifically provides that the standard operating procedures for safe work practices need not be
7 repeated in the site control program if they are covered elsewhere. Citation 1, Item 1d is vacated.

8 Citation 1, Item 1e cites a violation of WAC 296-62-30135(2)(h). This section of the WAC
9 provides that decontamination procedures in WAC 296-62-3100 through WAC 296-62-31015 must
10 be included in the site-specific safety and health plan. WAC 296-62-3100 through WAC 296-62-
11 31015 set forth the requirements of decontamination procedures. The Department specifically
12 alleges that the Morrison Knudsen site-specific safety and health plan fails to provide for a "truck
13 wash."

14 WAC 296-62-3100(2) specifically requires that all equipment leaving a contaminated area
15 must be decontaminated. Section 10 of Appendix A to the Morrison Knudsen site-specific safety
16 and health plan (Exhibit No. 2) is titled "Decontamination and Hygiene Procedures." Section 10.2 is
17 titled "Equipment Decontamination." This section specifically sets forth when and how all
18 equipment will be decontaminated. We find that a truck would fit within the definition of equipment
19 and that a simple reading of the plan demonstrates that the Department's allegation is without
20 merit. Citation 1, Item 1e is vacated.

21 Citation 1, Item 1f cites a violation of WAC 296-62-30135(2)(i). This section of the WAC
22 provides that the site-specific safety and health plan must include an emergency response plan
23 meeting the requirements of Chapter 296-62 WAC Part R for safe and effective responses to
24 emergencies, including the necessary PPE and other equipment. WAC 296-62-401 through
25 WAC 296-62-41086 constitute part R of WAC Chapter 296-62. The Department specifically alleges
26 that the Morrison Knudsen site-specific safety and health plan is deficient because the plan does
27 not provide information on (1) hazardous material releases; (2) safe distance and place of refuge;
28 (3) evacuation routes and procedures; (4) emergency alerting and response procedures; (5) critique
29 of response follow-up; and (6) PPE and emergency equipment.

30 We have reviewed Exhibit No. 2, which is Appendix A to the Morrison Knudsen site-specific
31 safety and health plan. Section 13 is titled "Emergency Response Procedures." This section refers
32 to Section 4 of the main site-safety and health plan. Section 13 of Appendix A provides:

1 Emergency responses to injuries, vehicular accidents, fires and other incidents are
2 detailed in Section 4 of the main SSHP. This section also includes telephone
3 numbers and points of contact.

4 If Section 13 is an accurate statement of the information contained in Section 4 of the main
5 site-specific safety and health plan, then detailed information regarding emergency response
6 procedures can be found in Section 4 of the main plan. Unfortunately, this record only contains
7 pages 1, 2, 3, 5, 6, 7, and 8 of the main site-specific safety and health plan. (See Exhibit No. 106).
8 None of the pages in Exhibit No. 106 contain Section 4 of the main site-specific safety and health
9 plan. However, page 3 of the main site-specific safety and health plan from Exhibit No. 106
10 provides an index to Section 4 of the main plan. This indicates that Section 4 is indeed associated
11 with the emergency response plan.

12 Without the ability to review the provisions of Section 4 of the main site-specific safety and
13 health plan, we cannot determine if the Department's allegations regarding its deficiencies are
14 meritorious. If the Department challenges a written safety plan for deficiencies, it is a part of the
15 Department's burden of proof to present evidence of the plan so that the trier of fact can assess the
16 merits of the alleged deficiencies in the plan. The Department has failed to make a prima facie
17 case that the Morrison Knudsen site-specific safety and health plan fails to meet the requirements
18 of WAC 296-62-30135(2)(i). Citation 1, Item 1f is vacated.

19 Citation 1, Item 1g cites a violation of WAC 296-62-30310. This section of the WAC sets
20 forth the minimum requirements of a site control program. The Department specifically alleges that
21 the site-specific safety and health plan is deficient for failing to include (1) work zone sites;
22 (2) means for alerting during emergencies; and (3) standard procedures or safe work practices.

23 In order to understand how WAC 296-62-30310 applies to Morrison Knudsen's work activity
24 on Harbor Island, it is necessary to understand what work was being done by Morrison Knudsen.
25 Morrison Knudsen contracted with the Port of Seattle as part of the redevelopment plan for Harbor
26 Island. Morrison Knudsen's contract called for it to demolish buildings, roadways, and railways;
27 install new roadways and railways; erect new buildings; remove and replace underground utilities;
28 abate hazardous materials; and remove contaminated soils. Most of these activities do not
29 necessarily involve encountering hazardous materials. Most of these activities are not "clean-up
30 work," as that term is used in WAC 296-62-3030. "Clean-up operation" is defined in WAC 296-62-
31 30003. A "clean-up operation" is an operation where hazardous substances are removed,
32 contained, incinerated, neutralized, stabilized, cleared up, or in any other manner processed or
handled with the ultimate goal of making the site safer for people or the environment.

1 The Superior Court and Court of Appeals have determined that Part P, WAC 296-62-300 et
2 seq. applies to Morrison Knudsen's work activity on Harbor Island. How the requirements of Part P,
3 as they relate to site control measures, apply within the context of the work performed by Morrison
4 Knudsen, remains to be determined. The elements of a site control program, as required by
5 WAC 296-62-30310, can only be applied to a situation in which the persons performing the
6 "clean-up work" have knowledge of the existence, location, and concentration of the hazardous
7 materials which are to be cleaned up. This record establishes that Morrison Knudsen did not and
8 could not have prior knowledge of the location or concentration of all of the hazardous materials
9 which would be cleaned up and would require the use of a site control program. This is because
10 the majority of the work Morrison Knudsen was contracted to perform was construction work; not
11 clean-up work of hazardous materials. Morrison Knudsen's work was primarily construction, with
12 the anticipation that in the course of the construction work, hazardous materials would probably be
13 encountered, and that when this occurred, site control measures would take effect.

14 Morrison Knudsen's site control program for Harbor Island, set forth in Section 9 of Appendix
15 A of Morrison Knudsen's site-specific safety and health plan (Exhibit No. 2), addresses this
16 problem. Section 9 is titled "Site Control Measures." It provides, as follows:

17 Where a potential exists for worker exposure to potentially hazardous substances or
18 physical hazards, work zones will be established and the flow of personnel and
19 equipment will be controlled. Establishing work zones ensures that personnel are
20 properly protected against hazards present in the work area, that work activities and
21 contamination are confined to the appropriate areas, and that personnel can be
22 located and evacuated in an emergency.

23 Before commencing field work, the WSS (work site supervisor) shall establish work
24 zones, as necessary, to meet operational and safety objectives.

25 Morrison Knudsen's site control program provides for the establishment of work zones "as
26 necessary" and before "commencing" work. We find this sufficient to meet the requirements of
27 WAC 296-62-30310, given the nature of the work being performed by Morrison Knudsen on Harbor
28 Island.

29 The Department further contends that Morrison Knudsen's plan failed to include "means for
30 alerting during emergencies and standard operating procedures or safe work practices" in the
31 written site control program, as required by WAC 296-62-30310. WAC 296-62-30310 provides:

32 The site control program must as a minimum, include: a site map; site work zones; the
use of a "buddy system"; site communications including alerting means for
emergencies; a standard operating procedures or safe work practices; and

1 "identification of nearest medical assistance." Where these requirements are covered
2 elsewhere they need not be repeated.

3 The last sentence of WAC 296-62-30310 provides that if elements of the plan required by
4 WAC 296-62-30310 are set forth in some other portion of Morrison Knudsen's site-specific safety
5 and health plan, they need not be set forth in Section 9 of the plan. The emergency alerting
6 provisions of Appendix A to Morrison Knudsen's site-specific safety and health plan are set forth in
7 Section 13 of that document. Section 13 refers to Section 4 of the main site-specific safety and
8 health plan. As we indicated earlier, Morrison Knudsen's main site-specific safety and health plan
9 is not part of this record. Again, if the Department wishes to prove that a written plan is deficient, it
10 is the Department's burden of proof to present evidence of the written plan so that the trier of fact
11 can assess the adequacy of the written plan with respect to the alleged deficiencies. The
12 Department has not made a prima facie case regarding the plan's alleged deficiencies for failing to
13 include "means for alerting during emergencies."

14 Finally, we have reviewed Exhibit No. 2 in detail. Exhibit No. 2, which is Appendix A to
15 Morrison Knudsen's site-specific safety and health plan, contains substantial information regarding
16 standard operating procedures and safe work practices. Among the operating procedures and safe
17 work practices set forth in Appendix A to the plan are Section 2, "Site Hazard Summary," which
18 includes information and operating procedures on safe work practices for each site-specific work
19 activity and identifies potential hazards. Section 4, "Training and Safety Meeting Requirements
20 Summary," addresses the required training for dealing with hazardous materials. Section 5,
21 "Medical Surveillance Program Requirements," sets forth when medical surveillance will be used.
22 Section 6, "Personal Protective Equipment," sets forth guidelines and refers to Tables 3 and 4,
23 which determine the level of protection for each activity and the type of PPE to be used. Section 7,
24 "Air Monitoring and Sampling," sets forth when and how air monitoring and sampling will be done.
25 Section 8, "General Safety Rules and Procedures," sets forth general safety rules to be followed.

26 The Department does not allege that any specific standard operating procedure or safe work
27 practice is missing from the site control program. Instead, the Department alleges these elements
28 generally are not part of the plan. Clearly, Section 2 through 8 of Appendix A (Exhibit No. 2)
29 contain standard operating procedures and safe work practices to be used during the work on
30 Harbor Island. Because these are contained in the plan, they need not be set forth separately in
31 Section 9 regarding site control measures, pursuant to the provisions of WAC 296-62-30310.

1 The Department has failed to present persuasive evidence to establish a violation of WAC
2 296-62-30310, and Citation 1, Item 1g is vacated.

3 Citation 1, Item 1h cites a violation of WAC 296-62-30615(1). This section of the WAC
4 requires that the employer include a written personal protective equipment program (PPE) as part
5 of the site-specific safety and health plan. Sections 1 through 10 of WAC 296-62-30615 set out the
6 required elements of the PPE program. The Department alleges that the written plan is deficient
7 because it fails to include PPE selection based on site hazard, as required by WAC 296-62-
8 30615(1). The Department specifically alleges that Morrison Knudsen failed to (1) address the
9 issue of life vests when employees were to work over or near water deep enough to drown; and
10 (2) employees were not issued protective clothing to avoid contaminated soil contact with their
11 street clothes.

12 The PPE written program requires PPE selection based on site hazards. The Department
13 alleges that the work activity by employees of Morrison Knudsen on Harbor Island exposed the
14 employees to the hazard of water deep enough to drown. In order to determine when an exposure
15 to water would require a personal flotation device or a life vest, we have reviewed the requirements
16 of the use of personal flotation devices set out in WAC 296-56-60115. This section of the WAC is
17 part of the safety standard regarding "waterfront operations." The provisions of the WAC are
18 specifically addressed to the safety standards for longshore, stevedore, and related waterfront
19 operations. While WAC 296-56-60115 is not specifically addressed to the work activities of
20 Morrison Knudsen on Harbor Island, it gives us guidance on when exposure to a water hazard
21 would require the use of a personal flotation device.

22 WAC 296-56-60115(2) requires the use of personal flotation devices or life vests only under
23 certain circumstances. The flotation device is required only when (1) the worker is engaged in work
24 that could cause the worker to be pulled into the water; or (2) where the worker is working in
25 isolation; or (3) where limitation of available work space creates a hazard of falling into the water; or
26 (4) where the work area is obstructed so as to prevent the employees from obtaining safe footing
27 for their work. Additionally, the WAC provides that employees are not considered exposed to the
28 danger of drowning where the water depth is known to be less than chest deep on the exposed
29 individual.

30 The evidence in this record regarding the violation consists of the testimony of the
31 Department inspector, McClelland Davis, and of a former employee of Morrison Knudsen, Ronald
32 Slater. McClelland Davis testified that he interviewed employees of Morrison Knudsen and they

1 informed him that workers were working near the Duwamish waterway in December 1999. He was
2 told that the employees were operating a ditch witch, digging a trench along the waterway.
3 Mr. Davis went to the site of the work as a part of his inspection, which began in April 2000. He
4 observed the area and believed that the work activity that took place in December 1999 was close
5 enough to the river to require personal flotation devices or life vests. Obviously, Mr. Davis did not
6 observe the actual work being performed since he was first present on the site in April 2000 and the
7 work was done in December 1999.

8 Ronald Slater, a former employee of Morrison Knudsen, also testified regarding the work
9 along the Duwamish waterway. He testified that he supervised a work crew installing a fabric filter
10 fence along the waterline at the Duwamish River to protect the river from residue from the
11 construction activity. In addition, he had employees operating a ditch witch and other equipment.
12 This work was done in early December 1999.

13 Mr. Slater also testified that in November 1999 he and several other men were at a work
14 location described as the "Lockheed Dock," patching holes on the dock. There were no life jackets
15 available for the work crew and the dock had a vertical drop of 25 to 30 feet. Mr. Slater was
16 concerned that both of these work activities subjected him and his crew to a hazard of drowning in
17 the Duwamish River. He requested life jackets from the safety officer for Morrison Knudsen. He
18 was told that the life jackets would be available when they arrived on site.

19 The allegation, as set forth in Citation 1, Item 1h, is that the written PPE program did not
20 address the site hazard of drowning and the selection of a personal flotation device or life vest. The
21 controversy is whether the Duwamish River constituted a known site hazard so as to require the
22 written PPE plan to address the hazard and the selection of PPE.

23 We note that not all waterfront work would constitute a drowning hazard. WAC 296-56-
24 60115. The drowning hazard, and thus the requirement for a personal flotation device or life vest
25 for waterfront operations for longshore and stevedore work, only exist where (1) the worker was
26 engaged in work that could cause the worker to be pulled into the water; (2) where the worker is
27 working in isolation; (3) where the limitations of available work space creates a hazard of falling into
28 the water; or (4) where the work area is obstructed so as to prevent the employee from obtaining
29 safe footing. We find the definition of the drowning hazard and the requirements for a personal
30 flotation device or life vest, as set forth in WAC 296-56-60115, persuasive.

1 The only facts presented regarding the work done by Morrison Knudsen employees near the
2 Duwamish River are presented through the testimony of Ronald Slater. However, Mr. Slater gives
3 no details on the proximity of the work to the water, or any description of the nature of the work that
4 would establish a drowning hazard. All this record contains is Mr. Slater's belief that a hazard of
5 drowning existed and that life vests were required. This alone is insufficient to establish the
6 existence of the hazard or the need of the PPE program of a life vest within the written program.
7 The Department has failed to establish that a site hazard of drowning existed that required that the
8 written plan provide for a PPE program of life vests or personal flotation devices.

9 The second allegation in Citation 1, Item 1h relates to Morrison Knudsen employees not
10 being issued protective clothing to avoid contaminated soil contact with their street clothes. This
11 allegation, as written, states that Morrison Knudsen did not comply with the written plan for personal
12 protective equipment. The Department's allegation that the employees were not provided
13 protective clothing does not establish that the PPE written plan is defective. Although the allegation
14 does not directly challenge the contents of the written PPE plan, we have nevertheless reviewed
15 the plan to see if it provides for issuance of protective clothing to avoid contaminating street clothes.

16 Section 6 of the site-specific safety and health plan sets forth the PPE requirements.
17 Section 6 refers to Table 3, which lists the selection of personal protective equipment. Listed PPE
18 includes reference to coveralls, which are chemically resistant and disposable, if necessary.
19 Table 3 also includes reference to disposable boot covers. Table 3 also refers to gloves that are
20 chemical resistant. Our review of the written PPE plan convinces us that Morrison Knudsen
21 provided for PPE selection based on site hazards, including protective clothing to avoid
22 contaminated soil contact with street clothes. The Department has failed to establish a violation of
23 WAC 296-62-30615(1). Citation 1, Item 1h is vacated.

24 Citation 1, Item 1i cites a violation of WAC 296-62-30615(5). This section of the WAC
25 requires that the written PPE program contain information regarding PPE decontamination and
26 disposal procedures. The Department specifically alleges that the instructions or directions on
27 handling contaminated PPE were initially missing from the plan and that Morrison Knudsen only
28 developed policies on PPE decontamination and disposal after the inspection opened.

29 We have reviewed Exhibit No. 2, which is Appendix A to the site-specific safety and health
30 plan. Section 10 is titled "Decontamination and Hygiene Procedures." Section 10 contains the
31 information which the Department alleges is missing. Under the heading, "General," in the second
32 paragraph, the plan provides:

1 All personnel, clothing, and equipment leaving the exclusion zone (contaminated or
2 potentially contaminated area) shall be inspected and, if necessary, decontaminated
3 to remove any potentially harmful substances that may have adhered to them. Some
4 equipment/clothing may be disposed of rather than decontaminated. In this case, the
5 used PPE and/or equipment (e.g., disposable sampling equipment) will be stored in
6 properly marked, plastic-lined 55-gallon drums in the contamination reduction zone.

7 Section 10.1, 10.2, and 10.3 of the plan set forth the requirements for personal
8 decontamination and equipment decontamination. On this record, we find that Morrison Knudsen's
9 site-specific safety and health plan meets the requirements of WAC 296-62-30615(5) regarding
10 PPE decontamination and disposal. Citation 1, Item 1i is vacated.

11 At the heart of many of the remaining cited violations is a belief on the part of McClelland
12 Davis, the Department inspector, that all of the work activity conducted by Morrison Knudsen on all
13 areas of Harbor Island involved contact with hazardous material. Armed with this belief, Mr. Davis
14 found that Morrison Knudsen was not conducting the work activity as required by the safety
15 standards set forth in Part P. This record, however, establishes that the central work performed by
16 Morrison Knudsen was not clean-up of hazardous material, but was in fact construction work.
17 Additionally, this record establishes that not all areas within the Terminal 18 project on Harbor
18 Island were contaminated with hazardous material. While the Superior Court and the Court of
19 Appeals have determined that Part P applies to the work Morrison Knudsen was performing on
20 Harbor Island, that determination alone does not mandate the application of any specific safety
21 standard set forth in Part P, unless there is a factual basis for the application of the standard.

22 Critical to a determination of the application of any specific standard to the work activity
23 performed by Morrison Knudsen on the Terminal 18 project on Harbor Island is an understanding of
24 the risks to human health associated with the site. McClelland Davis relied on a review of the ROD
25 (Exhibit No. 32) and the Consent Decree (Exhibit No. 34) in reaching his belief that all of the
26 Terminal 18 project site on Harbor Island presented a serious health risk to Morrison Knudsen
27 employees, thus mandating the application of specific safety standards set out in Part P to the
28 entire site. However, as we have stated, the application of any specific standard must be based on
29 specific facts establishing the underlying risk that forms the basis for the standard.

30 The ROD contains information regarding the various hazards that exist on Harbor Island in
31 what is known as the Soil and Groundwater Operable Unit. There are three other operable units for
32 potential clean-up on Harbor Island. The ROD addresses the soil and ground water remediation on
only a portion of Harbor Island. The Terminal 18 project is covered by the ROD. Mr. Davis admits
he did not fully read the ROD or Consent Decree. We have read both documents.

1 The ROD sets out the maximum contaminant concentrations in the soil that were discovered
2 on Harbor Island. This information is contained in Table 2 on page 17 of the ROD. The ROD also
3 set "Remedial Action Objectives" for the clean-up. This information is found on page 24, and on
4 page 25 in Table 7. As we understand the information contained in the ROD, if these objectives for
5 clean-up are established, the result will be levels of contamination not harmful to human health.

6 The ROD on page 72 sets out the selected remedy for the clean-up. This remedy includes
7 treating soil for certain contaminants, primarily organics, and capping areas that pose a threat to
8 human health for inorganic contaminants such as lead. Figure 6, which follows page 73 in the
9 ROD, shows a map of Harbor Island. The shaded portions of Figure 6 show the areas to be
10 capped as part of the remediation project. These areas contain concentration levels which exceed
11 the clean-up goals. The Terminal 18 redevelopment project can be clearly determined by looking at
12 Figure 6. Some of the areas to be capped are in the Terminal 18 redevelopment project. As we
13 understand the information in the ROD, if the remedial action objective and clean-up goals are met,
14 then the threat to human health would be alleviated.

15 Kathy Bahnik is an environmental management specialist with the Port of Seattle. As a part
16 of her job with the Port of Seattle, she is responsible for environmental work done on Harbor Island
17 for the Port. Approximately 30 percent of her work time is spent dealing with Harbor Island
18 environmental issues for the Port of Seattle. Ms. Bahnik testified that the **organic** "hot spots" on
19 the Terminal 18 project were cleaned up pursuant to the requirements of the ROD prior to Morrison
20 Knudsen beginning its work activity in November 1999. However, she testified that the capping of
21 the non-organic areas that contained lead above the clean-up goal had not been done prior to
22 Morrison Knudsen beginning work. Her testimony is un rebutted.

23 While the hot spots had been cleaned up regarding the **organic** materials found on the
24 Terminal 18 project site, the Port anticipated that there was a probability that additional
25 concentrations of organic contaminated soil would be found once the construction project began.
26 Morrison Knudsen was aware of this information, and as part of the contract with the Port of
27 Seattle, Morrison Knudsen employees would attempt to identify suspect soil that might need
28 clean-up. Once the soil was identified, appropriate tests would be taken to determine what
29 contaminants might exist in the suspect soil. It is here that "work zones" contemplated by the
30 written plan would be defined. The suspect soil would then be removed or treated by the Port of
31 Seattle.

1 The record persuades us that the clean-up goals and objectives set out in the ROD for
2 organic compounds were met prior to Morrison Knudsen commencing its work activities on Harbor
3 Island in November 1999. However, this record convinces us that the capping of areas that
4 contained non-organic material such as lead was not done prior to Morrison Knudsen beginning
5 work. Thus, only the areas shaded in Figure 6 of the ROD would pose a known threat to human
6 health. The shaded areas in Figure 6 of the ROD represent only a relatively small part of the area
7 within which Morrison Knudsen performed the work, pursuant to the contract with the Port of
8 Seattle. The application of the standards under Part P would apply to the operations by Morrison
9 Knudsen in these shaded areas of Figure 6 at least until the area was remediated. All other areas,
10 that is, the areas not shaded in Figure 6 of the ROD, presumptively meet the clean-up goals under
11 the ROD, absent facts to show otherwise. Part P would only apply to work in these areas if facts
12 establish the existence of hazardous substances.

13 To the extent that the Department establishes work activity within the areas shown on
14 Figure 6, which are the areas to be remediated by capping, prior to the remediation of the area, or
15 where the Department establishes facts to show that other areas contain hazardous material, there
16 exists a basis for applying the standards set out in Part P. Absent such facts, the Department's
17 allegations of the violations will lack the essential foundation for the application of Part P. We will
18 use this as a basis of our analysis to determine whether Morrison Knudsen has violated the safety
19 standards as set out in the Citation and Notice. With this analysis established, we turn now to the
20 evidence in this record that establishes where the work was being performed and the conditions
21 under which the work was performed.

22 A number of present and past Morrison Knudsen employees testified at the hearing. Some
23 of these witnesses were called by the Department of Labor and Industries and some were called by
24 Morrison Knudsen. We have reviewed the testimony of the following workers in detail to ascertain
25 where the work was being performed, under what conditions the work was being performed, and to
26 evaluate the credibility of the witnesses. We have reviewed the testimony in detail of Eugene Voss,
27 Lawrence Rogers, Henry Eger, Nate Willis, Rocky Brock, Danny Becker, Richard Kelly, Glenn
28 Westphalen, Douglas Frizzell, Johnie Wilkins, and Don Fleming.

29 The testimony of the former employees, presented by the Department as part of its case-in-
30 chief, is not helpful in determining the location of much of the work activity on the Terminal 18
31 project on Harbor Island. Although these employees were asked where certain work activity was
32 performed on Harbor Island, the Assistant Attorney General failed to elicit meaningful answers to

1 these questions. Throughout the examination of these witnesses by the Assistant Attorney
2 General, these witnesses were asked to point to a demonstrative aid to locate where work activity
3 was being performed. Unfortunately, the demonstrative aid, which appears to have been a photo or
4 a map of Harbor Island, was never identified as an exhibit. We have reviewed each demonstrative
5 exhibit in this record. However, none bear any identifying marks or information that would
6 correspond to the testimony of the Department witnesses in attempting to locate the various work
7 activities on Harbor Island. Additionally, we have tried to use the testimony of the witnesses to
8 locate the work activity by using Exhibit Nos. 56 and 57, which are aerial photos of Harbor Island,
9 as well as Exhibit Nos. 111a-f, which show the street location on Harbor Island, and Exhibit No. 96,
10 which is a schematic drawing of Harbor Island that shows the buildings on the island. However, we
11 are unable to locate with any degree of certainty the work sites alluded to by these witnesses.

12 An example of the problems presented by the questioning of the witnesses is found in the
13 testimony of Glenn Westphalen. The following exchange typifies the information contained in this
14 record regarding the location of the work activity by the employees of Morrison Knudsen.

15 Q. (By Assistant Attorney General) Do you recognize the photo that's here
16 in the hearing room, which I will represent is a DOT photo from
17 November of 1999, do you recognize that as the Harbor Island site?

18 A. Yes.

19 Q. And is it your understanding of the general boundaries of Morrison
20 Knudsen project site during that time?

21 A. Do I know where the boundaries were? Yes.

22 They were here (indicating), here (indicating), and back down this street
23 (indicating). And we went . . . they went over and tore this down too
24 (indicating). We came in we didn't mess with this (indicating). We did
25 all over here (indicating).

26 JUDGE JAFFE: Are you familiar with the name of Lockheed, a former
27 Lockheed site?

28 A. Right there.

JUDGE JAFFE: So that's the area you are pointing to now?

29 A. Yes.

JUDGE JAFFE: Okay.

30 A. Fisher Mills is here (indicating). They had to tear these buildings down.

31 MR. OWADA: I am sorry. I didn't here [sic] the witness' statement.
32

- 1 A. I helped tear those buildings down. We went in there and moved out a
2 lot of stuff before they tore them down. This is Seattle Irons and Metals
3 (indicating). And right here (indicating) was the mechanics yard. This
4 building (indicating) was torn down. This building (indicating) when we
5 first came in was where we parked the grease truck and mechanic's
6 truck. They then tore that building down and left the pad. And we
7 moved in under cover of this (indicating). This was just a cover. There
8 were no walls, but that's where the mechanic's area was all the time that
9 I was there and offices were here (indicating).
- 10 Q. Were you pointing to a white square north and west of the office site?
- 11 A. Yeah. Office site is right here (indicating). Our mechanics area was
12 right there (indicating.)
- 13 Q. What was the month you left the project site?
- 14 A. June.
- 15 Q. By that time were most of the buildings located between –
- 16 A. All of them were.
- 17 Q. 16th and 13th moved or demolished?
- 18 A. Demolished, and this battery shop they painted, and the guys there had
19 paper coveralls and hats, and I believe they had respirators, but only in
20 that building. I know that this was . . . everybody around here was really
21 worried that this area was a real hot spot, but I never did find out what
22 was in there?
- 23 MR. OWADA: Objection, Your Honor, as to the speculation state of
24 mind of other individuals and hearsay; move to strike.
- 25 JUDGE JAFFE: Overruled.
- 26 Q. (By Mr. Hawk) This area that you just drew a box with your index finger
27 is that south of . . . do you know what street this is?
- 28 A. I know this is 13th (indicating), and I just knew where it was.
- 29 Q. Okay. Did you ever service vehicles in this area?
- 30 A. Over here (indicating), and couple times I had to drive in here
31 (indicating), because they had equipment back here (indicating.)
- 32 Q. Are you pointing to an area on this photograph where there appears to
be a large body of water?
- A. Yes.

1 Q. Did you do vehicle servicing in the vicinity of that?

2 A. Correct.

3 Q. Was this the area that you had some understanding that there was
4 potential contamination?

5 A. Yeah. I was extremely worried about that, because I knew there was a
6 lot of lead there. There was a battery shop here.

7
8 12/10/01 Tr. at 161-164.

9 This type of questioning, which produces no clear understanding of the location of the work
10 activity, is repeated in the testimony of the other witnesses presented by the Department. Without
11 identifying the photo or map used by the witness, and without marking the location on the photo or
12 map, the testimony regarding the location is vague and uncertain. The reference to the location as
13 being along a street or between streets alone is insufficient to locate the work activity with the
14 degree of accuracy necessary to support a violation. We find these references to location vague
15 and illusory.

16 There are two locations on the Harbor Island site which are discussed frequently in the
17 testimony. One is the Seattle Iron and Metal site. The other is referred to as the CEM or the
18 Sea Fab site. We are able to locate these two sites by use of Exhibit Nos. 111a through f and
19 Exhibit Nos. 56 and 57. Additionally, we are able to determine the location of these sites on
20 Figure 6 from the ROD. Work activity at both of these sites requires careful review because both
21 sites have areas of known contamination that require remediation under the ROD. The remediation
22 required under the ROD is capping of these known areas of lead concentration that exceed the
23 clean-up goal.

24 A number of witnesses testified regarding working conditions and activities in both of these
25 sites. Darrell Dodson began work for Morrison Knudsen in October 1999, prior to work
26 commencing on the project. He testified that the Seattle Iron and Metal site was still operating as a
27 business and after the business shut down, the area was fenced off and locked to prevent entry.
28 Jason Sousa, an AGRA employee, testified that work at the Seattle Iron and Metal site in
29 January 2000 was done with an exclusion zone in effect and workers wearing tyvek suits. Donald
30 Woolery, an AGRA employee, observed Morrison Knudsen employees decontaminating equipment
31 at the Seattle Iron and Metal site in January 2000. Mr. Woolery also testified that on February 28,
32 2000, he observed workers operating a grader, moving metal at the Seattle Iron and Metal site,

1 without appropriate PPE. He brought this to the attention of a Morrison Knudsen supervisor,
2 Mr. Accornero. Mr. Accornero disagreed with Mr. Woolery regarding the required PPE for the job.
3 Eugene Voss testified that he worked for Morrison Knudsen at the Seattle Iron and Metal site. He
4 testified that he wore a tyvek suit at the time.

5 This record establishes that some of the work activity at the Seattle Iron and Metal site was
6 done with the use of exclusion zones, PPE, and decontamination of equipment. Other work was
7 done after or during the capping of the area with imported fill. The record, however, fails to
8 establish with any degree of certainty that the work activity at the Seattle Iron and Metal site was
9 done in violation of any provision of Part P, WAC 296-60-300, et seq.

10 The remaining site referred to as the CEM or Sea Fab site was also a site that required
11 remediation in the form of capping pursuant to the ROD. This record establishes that AGRA was
12 involved in monitoring this site and conducting air and soil sampling. In fact, the monitoring that
13 AGRA was performing resulted in the work activities being shut down for a period of time because
14 of a high reading for lead. As a result of this high lead reading, the workers were given additional
15 instruction regarding exposure to lead, blood tests were taken of the individuals with a suspect
16 exposure, and additional measures were incorporated into the work activity to reduce the exposure.
17 The blood test indicated no employees were overexposed to lead. This record fails to establish
18 with any degree of certainty that any of the work activity done at the Sea Fab site was done in
19 violation of Part P, WAC 296-60-300, et seq.

20 We have also looked closely at the conditions of work presented in the testimony. In doing
21 so we have reviewed the testimony of Ronald Slater in detail. Mr. Slater was a supervisor for
22 Morrison Knudsen. He and his crew were some of the first employees to begin work on the Harbor
23 Island project. Mr. Slater and his crew began work by doing general clean-up of the area, which
24 included picking up trash, removing fencing, and securing buildings. Mr. Slater kept daily diaries of
25 his work activity. These daily diary pages were a requirement of his job. These diary entries have
26 been admitted into evidence in this record as Exhibit No. 43. These entries began on November 1,
27 1999, and ended on March 23, 2000. It appears from this record that Mr. Slater ended his
28 employment with Morrison Knudsen on or about March 23, 2000.

29 We have reviewed Mr. Slater's daily diaries for information that Mr. Slater entered regarding
30 his concerns about safety issues on the Morrison Knudsen site. We have found the following
31 entries:

32 12-6-99 A reference to the need for life jackets.
12-16-99 A reference to "buckle up in truck."

1	1-6-00	A reference to "CEM-lead too high 51 ppm."
2	1-10-00	A reference to "lead at CEM-shut down 1-7-99-ten men blood test - 1-10-99."
3	1-11-99 [sic]	A reference to "laborer got dirty water in mouth. Got shots."
4		

5 These are the only entries Mr. Slater made on his daily diary that referred to safety-related
6 concerns. These entries are in sharp contrast to Mr. Slater's testimony regarding safety issues at
7 Harbor Island. Mr. Slater testified that he raised safety issues with his supervisor on a number of
8 occasions. Mr. Slater testified that he and his crew were ordered to move 55-gallon barrels of
9 unknown liquid in December 2000. When he objected, his supervisor, Mr. Accornero, "exploded"
10 on him and told him to move the "fn barrels." Mr. Slater testified that the drums were splashing
11 liquid, leaking liquid, and were not labeled, and that his crew was not wearing appropriate PPE.
12 Mr. Slater testified that on another occasion he confronted Mr. Accornero regarding the lack of a
13 truck wash. Mr. Slater was told that the truck wash would not be on site and that they would use a
14 different means to clean the trucks. Mr. Slater also testified regarding fuel spills and a failure to
15 follow correct safety procedures.

16 While Mr. Slater paints a picture in his testimony of an overriding concern for safety
17 procedures, he documented only a few of these concerns in his daily diary. The more serious
18 concerns expressed in his sworn testimony are absent in his daily diaries. Additionally, Mr. Slater
19 testified that he had no contact with AGRA, the environmental consulting firm, during the first two
20 months of work. However, his diary indicates that he was supporting AGRA for five hours on
21 December 8, 1999, approximately one month after beginning work.

22 There is a substantial disconnect between the contemporaneous entries in Mr. Slater's daily
23 diaries and his sworn testimony many months later. While Mr. Slater's sworn testimony seems
24 intent on leading us to believe that the reason he left employment with Morrison Knudsen was
25 because of his unresolved concerns for safety, the record convinces us that Mr. Slater left his
26 employment for reasons unrelated to his concerns that Morrison Knudsen workplace was unsafe.
27 The record establishes that Mr. Slater's overriding concern while employed with Morrison Knudsen
28 was his pay, not safety. Mr. Slater was hired as a supervisor, paid a salary, and given a pickup
29 truck to drive. He was unhappy with this arrangement and tried several times to convince his
30 employer to pay him a union hourly wage instead of his supervisor salary. This arrangement would
31 increase his compensation and allow him to obtain union benefits such as health care. Mr. Slater's
32 employer, Morrison Knudsen, refused to make the wage adjustment. When it became clear to

1 Mr. Slater that his employer would not agree to the change in the compensation, Mr. Slater abruptly
2 quit, cleaned out his desk, and walked off the work site.

3 The record indicates that Mr. Slater left work in the last part of March 2000. By
4 mid-April 2000 the Department of Labor and Industries received a complaint regarding the safety
5 program at Morrison Knudsen's worksite on Harbor Island. McClelland Davis, the Department
6 inspector, opened his investigation on April 21, 2000. By April 24, 2000, Mr. Davis was discussing
7 allegations that Mr. Slater had made regarding the removal of fuel tanks. Mr. Davis spoke with
8 Mr. Slater on May 2, 2000. Mr. Davis was uncertain how Mr. Slater's name was given to him.

9 Finally, Mr. Slater candidly testified that he is the plaintiff in a lawsuit against Morrison
10 Knudsen seeking monetary compensation for lost wages, and that he stands to benefit in his
11 lawsuit against Morrison Knudsen if the violations in this Citation and Notice are affirmed by this
12 Board.

13 Mr. Slater is not a credible witness. His testimony is inconsistent with his written daily
14 diaries; he appears to have been a primary source of information which prompted the Department
15 of Labor and Industries to investigate the Morrison Knudsen site; and by his own admission, he has
16 a monetary interest in the outcome of this case. We are not persuaded by Mr. Slater's testimony
17 regarding the working conditions on Harbor Island.

18 We have also reviewed the testimony of AGRA employees Robert Gilmore, Donald Woolery,
19 Jason Sousa, and Vivian Mead. AGRA contracted with Morrison Knudsen to provide technical
20 support involving industrial hygiene. Robert Gilmore is a senior professional with AGRA and is a
21 certified industrial hygienist with prior experience involving hazardous waste sites. He was AGRA's
22 primary contact with Morrison Knudsen under the contract. Jason Sousa, Donald Woolery, and
23 Vivian Mead are field technicians with AGRA. Their job was to monitor working conditions and
24 determine the safety protocol to be used each day. They were responsible for air monitoring, soil
25 sampling, and determination of the appropriate PPE to be used each day on each job.

26 The testimony of these employees is consistent and establishes that Morrison Knudsen
27 utilized AGRA technicians to establish the appropriate safety procedures, including appropriate
28 PPE, on a daily basis. The AGRA personnel would meet with Morrison Knudsen supervisors,
29 receive a written description of the work and work area, and would then determine the safety
30 parameters to put in place each day. Exhibit No. 120 is selected pages of AGRA's daily field
31 reports. These pages support the testimony of the AGRA employees that there was an active and
32 effective safety program on the Morrison Knudsen work site at Harbor Island.

1 The AGRA employees are credible witnesses regarding the working conditions on the
2 Morrison Knudsen Harbor Island site. Their testimony is consistent that appropriate testing of soil
3 was done prior to work commencing on a daily basis and that appropriate site control measures
4 and PPE were utilized. Additionally, their testimony is consistent with the daily field reports that are
5 Exhibit No. 120. We now turn to the remaining alleged violations.

6 Citation 1, Item 2a cites a violation of WAC 296-62-30145. This section of the WAC requires
7 that the employer conduct inspections to determine the effectiveness of the site-specific safety and
8 health plan. It further requires that any deficiencies in the plan be corrected by the employer. The
9 Department believes the site-specific safety and health plan was ineffective in practice. The
0 Department specifically alleges that the safety officer did not inspect properly and did not correct
1 deficiencies that existed in the plan. The Department also alleges that the safety officer was not
2 properly trained.

3 In support of this violation, the Department relies on the testimony of McClelland Davis and
4 the existence of "the many deficiencies" in the written plan. Mr. Davis testified that he made a
5 request for inspection notes from Mr. Bob Johnson. Mr. Johnson was the site safety and health
6 officer for Morrison Knudsen on the Harbor Island project. It was Mr. Davis's understanding that
7 Mr. Johnson did not take inspection notes. Mr. Davis further testified that,

8 [I]f he had, it would have been really, really obvious to him that what they had in their
9 written program was not being implemented in the field. It was clear – I mean, the –
10 the mere fact of where are the exclusion zones described in the written plan, where
11 are the decontamination reduction zones, where are the access entry points, where
12 are the list of people entering these exclusion zones – those issues were in their
13 written plan; and they weren't being used out there. By the time I got there, people
14 had the run of the place without any control at all.

15 12/19/01 Tr. at 41.

16 The Department's allegations fail on two grounds. First, as we have previously noted,
17 Mr. Davis's belief that the entire work site on Harbor Island was subject to Part P is not supported
18 by this record. Therefore, his belief that exclusion zones, decontamination reduction zones, and
19 other site control requirements were required for the entire work site at all times is not based on any
20 facts in this record. Second, Mr. Davis was aware of AGRA and AGRA's responsibility for the site-
21 safety program for Morrison Knudsen. Yet Mr. Davis focuses on Bob Johnson's failure to make
22 inspection notes and does not consider the daily field reports filed by AGRA. See Exhibit No. 120.
23 As we previously indicated, this record supports a finding that daily inspections to determine the
24 effectiveness of the site safety plan were conducted by a person "knowledgeable in occupational
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1 safety and health acting on behalf of the employer," as required by WAC 296-62-30145.
2 Additionally, the daily field reports (Exhibit No. 120) and the testimony of the AGRA employees
3 indicate that as deficiencies were discovered, corrective actions were taken by Morrison Knudsen.
4 In summary, we find that the Department has failed to present persuasive evidence to establish that
5 Morrison Knudsen violated the provisions of WAC 296-62-30145, and Citation 1, Item 2a is
6 vacated.

7 Citation 1, Item 2b cites a violation of WAC 296-62-3100(2)(a) and Citation 1, Item 2c cites a
8 violation of WAC 296-62-3100(2)(d). WAC 296-62-3100 sets forth procedures for decontamination.

9 Citation 1, Item 2 alleges that Morrison Knudsen failed to communicate and implement
10 decontamination procedures before employees entered areas on the site where a potential for
11 exposure to hazardous substances existed. The Department specifically alleges that prior to the
12 inspection by the Department, no decontamination was being used on site. WAC 296-62-
13 3100(2)(a) provides:

14 A decontamination procedure must be developed, communicated to employees, and
15 implemented before any employees or equipment may enter areas on site where
16 potential for exposure to hazardous substances exists. (Emphasis added.)

17 The operative language of this section is the provision that the decontamination procedure
18 be communicated, developed, and implemented before any employees or equipment "enter areas
19 on site where potential for exposure to hazardous substances exists." As we have stated earlier,
20 Mr. Davis's belief that the entire work site exposed workers to hazardous substances is not
21 supported by the facts in this record. The Department did not test any of the areas on Harbor
22 Island for hazardous substances. Nor did the Department offer any clear evidence of when and
23 where work was performed which would expose the workers to hazardous substances requiring
24 decontamination procedures to be implemented. Citation 1, Item 2b is vacated.

25 The Department alleges in Citation 1, Item 2c that the safety supervisor failed to monitor the
26 decontamination procedures to determine their effectiveness. The Department has failed to prove
27 the requirement of the decontamination procedure, as set forth in Citation 1, Item 2b. We have
28 vacated Citation 1, Item 2b. We vacate Citation 1, Item 2c because absent a showing of a need for
29 a decontamination procedure, no monitoring of the procedure would be required. Citation 1,
30 Item 2c is vacated.

31 Citation 1, Item 2d cites a violation of WAC 296-62-3030. This section of the WAC requires
32 that the employer implement appropriate site control procedures to control employee exposure to
hazardous substances before clean-up work begins.

1 McClelland Davis, the Department inspector, testified that on "two different visits that I saw
2 that – during the time I was there, I saw a lack of site control." 12/19/01 Tr. at 48. Critical to a
3 finding that WAC 296-62-3030 is applicable in any given situation is evidence of an exposure to
4 hazardous substances. Mr. Davis relied on the ROD and Consent Decree, which he did not fully
5 read, in reaching his belief that the entire work site was contaminated with hazardous wastes that
6 required clean-up. As we previously stated, our review of this record, including a complete review
7 of the ROD and Consent Decree, convinces us that only a small portion of the work site was
8 contaminated with hazardous substances that needed to be cleaned up when Morrison Knudsen
9 began work at Harbor Island. The record establishes that the majority of the work done by Morrison
10 Knudsen on Harbor Island was construction work in areas not contaminated with hazardous
11 substances. Absent a showing by the Department that specific work on specific days was done in
12 specific areas containing hazardous substances, there is no basis for implementing site control
13 procedures under WAC 296-62-3030.

14 As we have previously discussed, the testimony of the workers called by the Department
15 fails to identify any work area with a sufficient degree of specificity for us to find that work was done
16 in an area containing hazardous substances. Nor do we find that level of certainty in the testimony
17 of McClelland Davis or Karen Johnson, the two Department inspectors who visited the site. The
18 Department has failed to establish a violation of WAC 296-62-3030 and Citation 1, Item 2d is
19 vacated.

20 Citation 1, Item 3a cites a violation of WAC 296-62-30205. This WAC section requires the
21 employer to perform a preliminary evaluation of the site characteristics prior to site entry, and a
22 detailed evaluation immediately after site entry. The evaluation must be done by a qualified person,
23 and the evaluation is done to identify site hazards and to select appropriate employee protection
24 methods. The Department specifically alleges that: (1) the preliminary evaluation was incomplete;
25 (2) no PPE was planned for clearing and grubbing operations, which involved handling of
26 lead-contaminated soils; (3) there was no plan for decontamination in the initial phase of the
27 remediation process involving the demolition of contaminated buildings; (4) the evaluation did not
28 address the hazard of ionizing radiation; and (5) the evaluation did not include toxic chemicals such
29 as arsenic, benzene, cadmium, chromium, ethyl benzene, and PAHs.

30 The Department alleges that the site evaluation by Morrison Knudsen was incomplete in that
31 there was no evaluation of all known contaminants on site. This record persuades us that Morrison
32 Knudsen, through its contract with AGRA, conducted a complete preliminary evaluation of the work

1 site on Harbor Island. AGRA, through its employees, participated in the development of
2 Appendix A, the Site Safety and Health Plan (Exhibit No. 2). Robert Gilmore testified that AGRA
3 conducted a survey of the buildings on the Island that were to be demolished under the contract.
4 Exhibit Nos. 125 and 128 are examples of the surveys conducted by AGRA. These surveys,
5 together with the ROD and Consent Decree, as well as the provisions of Exhibit No. 2, Appendix A
6 to the Site Safety and Health Plan, demonstrate that Morrison Knudsen had a clear understanding
7 of the hazardous substances on the work site.

8 We also find that Morrison Knudsen provided the appropriate PPE for all work activity. As
9 we have previously noted, the "clearing and grubbing" work is covered within the Site Safety and
10 Health Plan as a subspecies of work activity associated with the work activity set out in the plan.
11 See our discussion regarding Citation 1, Item 1b at page 7-8 of this decision.

12 Exhibit Nos. 125 and 128, the building surveys done by AGRA, together with Exhibit No. 2,
13 Appendix A to the Site Safety and Health Plan, contained information regarding the hazards
14 associated with the demolition of the contaminated buildings and the appropriate decontamination
15 practices.

16 The allegation by the Department that Morrison Knudsen failed to address ionizing radiation
17 hazards in the preliminary evaluation of the site is not supported by facts in this record. McClelland
18 Davis was asked why he included ionizing radiation as a hazard that should have been addressed
19 in the preliminary site evaluation. His answer was stricken by our industrial appeals judge as
20 hearsay. 12/19/01 Tr. at 58-59. Mr. Davis formed his belief that ionizing radiation was a hazard on
21 Harbor Island based on hearsay information and assumed facts that are not a part of this record.
22 We find no facts in this record to support this allegation by the Department.

23 Finally, the Department alleges, "other toxic chemicals listed in the Remedial Action
24 Clean-up Goals were not included in the preliminary evaluation, and in a more detailed evaluation
25 after work began." We have noted throughout this decision that Morrison Knudsen was primarily
26 engaged in construction activity, not hazardous waste clean-up. Additionally, the testimony of
27 Kathy Bahnik, the port employee, which we discussed earlier, convinces us that all of the clean-up
28 of known organic hazardous substances was completed prior to Morrison Knudsen beginning work
29 activity on Harbor Island. Therefore, the Remedial Action Goals, set out in Table 7 of the ROD,
30 presumably had been met with respect to the organic hazards at the time Morrison Knudsen began
31 work. We see no reason why Morrison Knudsen would have been required to address all of the
32 toxic chemicals listed in Table 7 of the ROD if the remedial action and clean-up goals were met

1 prior to Morrison Knudsen beginning work. If the remedial action and clean-up goals were met, as
2 indicated by Kathy Bahnik, then there would be no danger to human health or environment.

3 The Department has offered no explanation why the listed toxic chemicals in Citation 1,
4 Item 3a should have been made a part of the preliminary plan, other than the fact that they are
5 listed in Table 7 of the ROD. This alone is insufficient to persuade us that Morrison Knudsen
6 violated WAC 296-62-30205, given the facts in this record that establish that the clean-up was
7 complete regarding those listed chemicals. In summary, we find that Morrison Knudsen satisfied
8 the requirements of WAC 296-62-30205 by making a complete preliminary evaluation of the site
9 characteristics by qualified personnel. Citation 1, Item 3a is vacated.

10 Citation 1, Item 3b cites a violation of WAC 296-62-30210. This WAC section requires the
11 employer to identify all suspected conditions that may pose inhalation or skin absorption hazards
12 that are immediately dangerous to life or health, or conditions which may cause death or serious
13 harm. These conditions must be identified during the preliminary survey, and evaluated in the
14 detailed survey. The Department specifically alleges that the written site-specific Safety and Health
15 Plan failed to include the hazard of (1) arsenic and cadmium; (2) ionizing radiation; and
16 (3) blood-borne pathogens related to syringes.

17 We previously addressed the need to include arsenic and other metals, as well as
18 blood-borne pathogens, in the safety plan when we decided Citation 1, Item 1a. See pages 4-7 of
19 this decision. The same reason we set forth in our decision regarding Citation 1, Item 1a applies to
20 this citation. Morrison Knudsen determined that lead was the most ubiquitous metal in the island,
21 and that in controlling lead within permissible levels, all other metals were controlled. Blood-borne
22 pathogens associated with syringes were not a credible risk that needed to be addressed in the
23 evaluation of the safety plan. Finally, as we indicated in our decision in Citation 1, Item 3a, there
24 are no facts in this record to show that ionizing radiation existed on Harbor Island. The Department
25 has failed to establish that Morrison Knudsen violated WAC 296-62-30210. Citation 1, Item 3b is
26 vacated.

27 Citation 1, Item 3c cites a violation of WAC 296-62-30220(4). This WAC section requires the
28 employer to provide and require the use of appropriate PPE. The Department specifically alleges
29 that Morrison Knudsen failed to require protective clothing for employees who worked with
30 contaminated soil in the first month of work on site.

31 In order to determine if Morrison Knudsen employees were working in contaminated soil
32 during the first month of work on the site, the Department must prove with a reasonable degree of

1 certainty where the work was performed. As we have indicated, the testimony of the employees of
2 Morrison Knudsen regarding location of the work is vague and lacks the degree of accuracy
3 necessary to make a finding that work was done in an area containing hazardous substances. As
4 we noted earlier in our discussion, only a portion of the work site was contaminated with hazardous
5 substances. The requirement of Part P would not apply to the construction activity in areas not
6 contaminated and not subject to remediation. Here again, McClelland Davis has substituted his
7 assumption that the contamination existed throughout the work site for the facts in this record,
8 which establish that only a relatively small portion of the work site contained hazardous material.
9 The Department has failed to prove that workers were working in areas of contaminated soil without
10 proper PPE. Citation 1, Item 3c is vacated.

11 Citation 1, Item 4a cites a violation of WAC 296-62-30235. This WAC section requires the
12 employer to make information concerning chemical, physical, and toxicological properties of each
13 substance known or expected to be present on the site to the employees prior to beginning work on
14 the site. The Department does not cite any specific facts to support the violation. Instead, the
15 Department merely alleges that Morrison Knudsen has "failed to provide any information
16 concerning the chemical, physical, and toxicological properties of each substance."

17 McClelland Davis, the Department inspector, testified that he based the citation on his review
18 of the site-specific Safety and Health Plan and his belief that arsenic and cadmium were required to
19 be in the plan. He also believed that the plan should have included handling of drug paraphernalia
20 and handling of drums of unknown content.

21 We have previously decided that the site Safety and Health Plan, Appendix A, is not deficient
22 for failing to mention arsenic and cadmium or drug paraphernalia, such as syringes. We have also
23 determined that the plan adequately provides for safety procedures associated with drum handling.
24 See section 11.4 of Exhibit No. 2. We also find that Morrison Knudsen communicated information
25 concerning chemical, physical, and toxicological properties of the substances expected to be
26 encountered on Morrison Knudsen work activity on the Harbor Island work site. Bob Johnson, the
27 safety and health officer for Morrison Knudsen on the Harbor Island work site, testified that
28 pre-entry briefings were conducted by foremen every day. The briefing was to inform workers what
29 the work would entail and what potential exposure would be expected, and how the exposure would
30 be mitigated. This is confirmed by the testimony of the AGRA employees responsible for
31 monitoring the site, as well as their daily field reports, Exhibit No. 120. This record persuades us
32 that Morrison Knudsen effectively communicated information about the chemical, physical, and

1 toxicological properties of substances on the work site to the workers on Harbor Island. Citation 1,
2 Item 4a is vacated.

3 Citation 1, Item 4b cites a violation of WAC 296-62-3080. This WAC section requires the
4 employer to develop and implement a program to inform employees, contractors, and
5 subcontractors actually engaged in hazardous waste operations of the nature, level, and degree of
6 exposure likely as a result of participating in such hazardous waste operation. However,
7 employees, contractors, and subcontractors working outside the operations part of a site are not
8 covered by WAC 296-62-3080.

9 Again, the Department cites no specific facts to support the violation, alleging merely that
10 Morrison Knudsen failed to meet the requirements of the WAC section. McClelland Davis, the
11 Department inspector, testified that he cited this violation because "mainly, this was because that
12 there —there was the subcontractors who were, in my opinion, left out of the loop, that there wasn't
13 a way of reaching out to them and giving them the required information that I thought was needed
14 to help them protect himself and their employees while working on site." 12/19/01 Tr. at 71.

15 It appears from Mr. Davis's testimony that his belief that the entire Morrison Knudsen work
16 site on Harbor Island was contaminated with hazardous material which required clean-up is the
17 underlying basis for his decision to issue this violation. As we stated earlier in this decision, if
18 Mr. Davis had fully read and understood the ROD, Exhibit No. 32, and the Consent Decree,
19 Exhibit No. 34, he would understand that only a portion of the work site remained to be remediated
20 when Morrison Knudsen began work in November 1999. Therefore, unless there is evidence in the
21 record to show that the subcontractor or contractors working on the site for Morrison Knudsen were
22 "actually engaged in hazardous waste operations," WAC 296-62-3080 does not apply. The
23 Department has failed to allege or present evidence in this record to show that any subcontractor or
24 contractor was actually engaged in hazardous waste operation, requiring the application of
25 WAC 296-62-3080. Citation 1, Item 4b is vacated.

26 Citation 1, Item 5a cites a violation of WAC 296-62-30705. This WAC section requires the
27 employer to conduct air monitoring upon initial entry to the hazardous material site. The
28 Department specifically alleges that no air monitoring was done during the clearing and grubbing
29 portion of the remediation work, and that air monitoring was not representative of all different jobs
30 and employees on site during the first four months of the hazardous waste operation.

31 McClelland Davis, the Department inspector, testified that air monitoring was required for the
32 clearing and grubbing work performed by Ron Slater and his crew at the beginning of the work in

1 November 1999, as well as other work, including grading work and most of the other jobs
2 performed on the work site. His investigation indicated that no monitoring was done until
3 January 2000. Once again, Mr. Davis's belief that the entire Harbor Island work site was a
4 hazardous waste site forms the basis for his decision to issue this citation. As we have previously
5 noted, the Harbor Island Terminal 18 Redevelopment Project spanned a large portion of Harbor
6 Island. The testimony of Kathy Bahnik persuades us that the organic clean-up under the ROD was
7 completed prior to Morrison Knudsen beginning work in November 1999. Additionally, Figure 6
8 from the ROD shows the remaining areas to be remediated. This area covers only a portion of the
9 Morrison Knudsen work site on Harbor Island. If work activity was performed outside the area
10 subject to remediation under the ROD, or if work was done in an area of known contamination after
11 the area was remediated, the requirements of WAC 296-62-30705 would not apply. The
12 Department has failed to identify with any reasonable degree of certainty the location of the work
13 being done in order to establish that it was done within an area containing hazardous substances.
14 Citation 1, Item 5a is vacated.

15 Citation 1, Item 5b cites a violation of WAC 296-62-30710(1). Citation 1, Item 5c cites a
16 violation of WAC 296-62-30710(2). This WAC section sets forth a situation where the employer
17 must conduct periodic monitoring for exposures over the permissible limits. Section (1) of the WAC
18 requires monitoring when work begins on a different portion of the work site. Section (2) requires
19 monitoring when contaminants other than those previously identified are being handled. The
20 Department again cites no specific facts to support the violation, alleging merely that Morrison
21 Knudsen failed to meet the requirements of the WAC sections. McClelland Davis, the Department
22 inspector, testified that he cited the violation of WAC 296-62-30710(1):

23 (B)ecause, primarily, that the first initial work wasn't on some of the highest places –
24 well, I'm – I'm not one hundred percent sure if it was or not. In my mind, I knew there
25 were these four sites that I considered had potentially more risk than others; and they
should have – when they went into those areas, have done some more sampling.

26 12/19/01 Tr. at 81.

27 Mr. Davis cited the violation of WAC 296-62-30710(2):

28 I found that there had been no air monitoring for arsenic and cadmium, and the – this
29 also was a part of the initial, and the need to do these types of sampling – sampling
30 for these kind of contaminants areas where these were purportedly in the soil and at
concentrations that would have been potential for airborne exposure.

31 12/19/01 Tr. at 82-83.
32

1 The testimony of Bob Johnson, Morrison Knudsen Safety and Health Officer, and Donald
2 Woolery and Vivian Mead, AGRA employees, demonstrates once again that McClelland Davis's
3 assumptions regarding safety activities on Harbor Island are unsupported by the facts.
4 Mr. Johnson testified that pre-entry briefings were conducted daily by foremen on site. The
5 purpose of the briefing was to determine the nature of any exposure and also determine how the
6 exposure would be mitigated. Mr. Woolery testified that he would meet with Morrison Knudsen
7 employees and contractors daily. He would receive a written "work release request" for work to be
8 done the next day and he would return the previous day's request with a discussion of special
9 conditions that existed on site. Vivian Mead testified that she made daily observations of work
10 activities to determine if the proper personnel were present, and if proper PPE was being used.
11 She also used direct reading instruments to test or screen for volatile organic compounds.

12 Mr. Davis, by his own testimony, was not sure where the initial work was being done.
13 Additionally, his belief that there was no periodic monitoring when work began on different portions
14 of the site is not supported by any facts and is contrary to the testimony of Bob Johnson, Donald
15 Woolery, and Vivian Mead. Additionally, Exhibit No. 120, AGRA's daily field reports, contains
16 information indicating that testing for lead was conducted as needed. The Department has failed to
17 establish that Morrison Knudsen violated WAC 296-62-30710(1). Citation 1, Item 5b is vacated.

18 Mr. Davis's reason for citing a violation of subsection (2) of WAC 296-62-30710 focuses
19 again on his belief that there was no air monitoring for arsenic and cadmium. We have addressed
20 Mr. Davis's lack of understanding of this issue in our discussion in previous alleged violations. This
21 record establishes that Morrison Knudsen was conducting sufficient testing to monitor the metals in
22 the environment on Harbor Island. All samples were monitored for lead, as well as arsenic, and by
23 monitoring the lead, Morrison Knudsen was able to keep exposure for other metals below the PEL.
24 The Department has failed to establish a violation of WAC 296-62-30710(2). Citation 1, Item 5c is
25 vacated.

26 Citation 1, Item 6a, 6b, 6c, and 6d are all related to the same factual allegation. The
27 Department alleges that employees of Morrison Knudsen handled drums of unknown contents.

28 Citation 1, Item 6a cites a violation of WAC 296-62-30715. This WAC section requires the
29 employer to monitor employees likely to have the highest exposure to hazardous substances after
30 the actual clean-up of hazardous waste begins. The Department specifically alleges that there was
31 no monitoring of employees who were handling drums of unknown materials and working in spill
32 ponds around leaky drums of unknown material. McClelland Davis, the Department inspector,

1 testified that he based this allegation on employee interviews, and that the activity was done prior to
2 the beginning of his inspection.

3 This record contains the testimony of three former employees of Morrison Knudsen detailing
4 the facts on which Mr. Davis based this violation. Ron Slater, Eugene Voss, and Don Fleming all
5 testified that as part of their initial work clearing the area, they encountered 55-gallon drums of
6 unknown liquid. They all testified that although they objected to moving the unlabeled drums, they
7 were ordered to do so. They also stated that the unknown liquid splashed on their clothing and that
8 they were not wearing the proper PPE. We have already found that Mr. Slater is not a credible
9 witness, given his potential monetary gain if these violations are affirmed. The testimony of
10 Mr. Voss and Mr. Fleming is equally tainted. Both Mr. Voss and Mr. Fleming testified that they are
11 seeking damages from Morrison Knudsen for lost wages in a lawsuit. They too have a potential for
12 monetary gain if the violations are affirmed by this Board. Additionally, we note that the testimony
13 of Slater, Voss, and Fleming refers to a fourth employee who was present when the drum-handling
14 event allegedly occurred. That employee is identified as a Theresa Smith. Ms. Smith was not
15 called as a witness. As every trier of fact is entitled, we are entitled to consider the evidence
16 presented, as well as the lack of evidence. The Department offered no explanation why Ms. Smith
17 was not called. This failure to either call Ms. Smith or explain her absence further erodes the
18 testimony of Slater, Voss, and Fleming. Finally, we note the testimony of Donald Frizzell.
19 Mr. Frizzell testified that he worked for Morrison Knudsen on Harbor Island and was the individual
20 who moved a large number of 55-gallon drums. All of these drums were sealed and labeled.
21 Exhibit No. 123 is a photograph showing the drums that Mr. Frizzell moved. The photo confirms his
22 testimony. The drums are covered and bear labels. Exhibit Nos. 41 and 127 are photos apparently
23 taken by AGRA employees as a part of AGRA's survey of the buildings on the site. These exhibits
24 were identified by Jason Sousa, an AGRA employee who conducted several of the building
25 surveys. Exhibit Nos. 41 and 127 depict barrels that are uncovered and spilling their content.
26 However, Mr. Sousa did not know if the barrels in the photos, which were taken as part of the initial
27 site survey, were present when Morrison Knudsen began work on Harbor Island.

28 In summary, the only evidence submitted by the Department to establish that there were
29 employees handling drums of unknown content is the testimony of Slater, Voss, and Fleming. We
30 find that their testimony is not credible given the other evidence, or lack of evidence, in this record.
31 The Department has failed to establish that Morrison Knudsen violated WAC 296-62-30715.
32 Citation 1, Item 6a is vacated.

1 Citation 1, Item 6b cites a violation of WAC 296-62-3090(4). This WAC section requires that
2 unlabeled drums must be considered to contain hazardous substances and handled accordingly
3 until the contents are positively identified. Citation 1, Item 6c cites a violation of WAC 296-62-
4 3090(6). This WAC section requires that the employer notify employees of the hazards prior to the
5 transfer of drums. Citation 1, Item 6d cites a violation of WAC 296-62-3090(9). This WAC section
6 requires that drums which cannot be moved without rupture, leakage, or spillage be emptied into a
7 sound container.

8 All three of these alleged violations were cited by McClelland Davis based on employee
9 interviews which indicated that employees of Morrison Knudsen handled unlabeled drums, that the
10 employees were not notified of the hazard, and that the drums were moved and employees were
11 splashed with the contents. The information in this record regarding handling of drums of unknown
12 content is limited to the testimony of Ron Slater, Eugene Voss, and Don Fleming. The testimony of
13 these witnesses is not credible. There is no credible evidence in this record that drums were
14 handled as alleged in these alleged violations. The Department has failed to establish that
15 Morrison Knudsen violated WAC 296-62-3090(4), (6), and (9). Citation 1, Items 6b, 6c, and 6d are
16 vacated.

17 Citation 1, Item 7a cites a violation of WAC 296-62-31015(2). This WAC section requires
18 employees to immediately remove permeable clothing that becomes wetted with hazardous
19 substances, and shower. The clothing must be disposed of or decontaminated before it is removed
20 from the work zone. Again, the Department fails to allege any specific facts to support the violation.
21 McClelland Davis, the Department inspector, testified that he based this alleged violation on
22 interviews he had with employees. Mr. Davis believed Mr. Slater's crew had workers who were
23 contaminated with hazardous liquid and soil from the Harbor Island site, and that they did not
24 decontaminate before leaving the site. There is no evidence in this record to establish that any
25 employee left the work site with contaminated clothing. The Department conducted no test on the
26 soil on Harbor Island. As we have stated earlier in this decision, this record is clear that not all of
27 the soil on Harbor Island was contaminated so as to require remediation under the ROD. The
28 Department has neither alleged any specific incident involving soil contaminated clothing leaving
29 the work site, nor has the Department offered any specific evidence of such an event. The
30 Department, instead, relies on Mr. Davis's "understanding" that the violations occurred. Dirt on
31 clothing leaving the work site does not equate with contaminated soil on clothing leaving the work
32

1 site. What is missing from the Department's proof is that the soil that left the work site was, indeed,
2 contaminated.

3 The only evidence in this record regarding employees being splashed with liquid is the
4 testimony of Ron Slater, Eugene Voss, and Don Fleming. As we have previously stated in this
5 decision, they are not credible witnesses regarding activity on Harbor Island. The Department has
6 offered no credible evidence that Morrison Knudsen violated WAC 296-62-31015(2). Citation 1,
7 Item 7a is vacated.

8 Citation 1, Item 7b sets out the language of WAC 296-62-31020. This WAC section requires
9 the employer to provide regular showers and changing rooms when the decontamination procedure
10 indicates such a need. The Department does not allege that Morrison Knudsen violated the
11 provisions of WAC 296-62-31020. Citation 1, Item 7b recites the language of the WAC section, but
12 does not contain any language to suggest that Morrison Knudsen violated the WAC. Absent any
13 allegation by the Department that Morrison Knudsen violated the provisions of WAC 296-62-31020,
14 we will not consider that such a violation occurred. Additionally, McClelland Davis, the Department
15 inspector, testified that the reason the citation item was included was because of the employee
16 interviews regarding the splashing of liquid when the drums were moved by Ron Slater and his
17 crew. This is not credible evidence that such an event occurred. The Department has neither
18 alleged nor proven that Morrison Knudsen violated WAC 296-62-31020. Citation 1, Item 7b is
19 vacated.

20 Citation 1, Item 8 cites a violation of WAC 296-62-30410(2). The WAC section requires
21 general site workers engaged in activities that expose or potentially expose them to hazardous
22 substances, and who are required to wear level C or D PPE, to have 40 hours of training and a
23 minimum of three days actual field experience under the direct supervision of a trained experienced
24 supervisor. The Department cites no specific facts to support the violation, alleging merely that
25 Morrison Knudsen failed to meet the requirements of the WAC section. McClelland Davis, the
26 Department inspector, testified that this alleged violation was based on a number of Morrison
27 Knudsen supervisors and workers who were not being properly trained.

28 This record establishes that Ron Slater and his crew worked on the Harbor Island site
29 beginning November 1, 1999. We base this finding on the daily diaries kept by Mr. Slater, which
30 are admitted into the record as Exhibit No. 43. These diary entries indicate that Mr. Slater and his
31 crew worked without the 40-hour training until November 9, 1999. On that date, Mr. Slater and his
32

1 crew attended the required training, and did so through November 12, 1999. The entry in the diary
2 dated November 12, 1999, indicates that the class was completed by five personnel.

3 While the entire Harbor Island work site was not subject to remediation, pursuant to the
4 ROD, the site had the "potential" to expose workers to hazardous substances. One of the reasons
5 AGRA was on the site was to identify hazards and determine the appropriate PPE and other safety
6 measures for employees. On this record, we are persuaded that all of the Morrison Knudsen
7 workers on the Harbor Island work site were engaged in activities which "potentially" could expose
8 the worker to hazardous substances. The Department has established that Morrison Knudsen did
9 not have all personnel trained as required by WAC 296-62-30410(2). Citation 1, Item 8 is affirmed.
10 The Department cited this violation as a serious violation. A serious violation is defined by
11 RCW 49.17.180. A violation is serious if there is a substantial probability that death or serious
12 physical harm could result from a condition which exists, or from one or more practices, means,
13 methods, operations, or processes which have been adopted or are in use in such workplace,
14 unless the employer did not, and could not with the exercise of reasonable diligence, know of the
15 presence of the violation. The Department has offered no factual basis that would allow us to
16 determine that failure to provide the necessary training would create a substantial probability that
17 death or serious physical harm could result. All the Department has provided is the testimony of
18 McClelland Davis, the Department inspector, that in his opinion, failure to comply with the WAC
19 results in a serious violation. This is a conclusory statement and, as such, insufficient. Citation 1,
20 Item 8 is best characterized on this record as a general violation with no penalty.

21 Citation 1, Item 9 cites a violation of WAC 296-62-30415. This WAC section requires the
22 employer to have on-site management and supervisors who supervise employees engaged in
23 hazardous waste operation receive at least eight additional hours of training above the 40-hour
24 training required by WAC 296-62-30410. Again, the Department fails to cite any specific facts to
25 support the violation, alleging merely that the employer failed to meet the requirements of the WAC
26 section. McClelland Davis, the Department inspector, testified that he based this citation, in part,
27 on the fact that Bob Johnson, Morrison Knudsen Site Safety and Health Officer, did not have the
28 eight-hour additional training required by WAC 296-62-30415. Mr. Johnson admitted that he did not
29 have the required eight-hour additional training. Clearly, the Harbor Island work site presented the
30 potential for employees to encounter and engage in remediation of hazardous material. We find the
31 provisions of WAC 296-62-30415 apply, and that Morrison Knudsen failed to ensure that the
32 required training was given to all management and supervisors. The Department has established a

1 violation of WAC 296-62-30415. Citation 1, Item 9 is affirmed. The Department cited this violation
2 as a serious violation. A serious violation is defined by RCW 49.17.180. As in Citation 1, Item 8,
3 the Department has offered no facts in this record to support the required elements of a serious
4 violation. Citation 1, Item 9 is best characterized on this record as a general violation with no
5 penalty.

6 Citation 1, Item 10 cites a violation of WAC 296-62-07111. This violation was vacated
7 pursuant to the Superior Court decision.

8 Citation 1, Item 11 cites a violation of WAC 296-62-3060(1)(a). This WAC section requires
9 the employer to implement engineering controls, work practices, PPE, or a combination of these to
10 protect employees from exposure to hazardous substances. These efforts must be instituted to
11 reduce and maintain employee exposure at or below the permissible exposure limits for the
12 substances. The Department specifically alleges that the Morrison Knudsen employees were
13 overexposed to lead without proper PPE.

14 McClelland Davis, the Department's inspector, testified that he based this allegation on work
15 performed by Ron Slater's crew on January 5, 2000, at the Sea Fab site on Harbor Island.
16 Mr. Davis believed that Richard Kelly, a Morrison Knudsen employee, was overexposed to lead
17 while working on the Sea Fab site. Mr. Davis based this belief on an air sample taken by AGRA
18 and a copy of a letter to Mr. Kelly dated January 11, 2000, signed by Bob Johnson. Mr. Johnson is
19 Morrison Knudsen's safety and health officer. The January 11, 2000 letter apparently referenced
20 an overexposure to lead Mr. Kelly may have encountered in his work at Harbor Island.

21 The question presented by this alleged violation is whether Morrison Knudsen had in place
22 engineering controls and work practices and PPE so as to reduce and maintain employee exposure
23 at or below the permissible exposure limits. Robert Gilmore, the AGRA supervisor on the Morrison
24 Knudsen worksite in Harbor Island, testified regarding the steps taken to reduce the employee
25 exposure to lead. Mr. Gilmore identified Exhibit No. 98a through 98e as a chart that shows the air
26 monitoring results taken by AGRA at the Morrison Knudsen site on Harbor Island from
27 December 1999 to December 2001. Exhibit No. 98a through 98e shows a distribution of air
28 samples and reference to the PEL for lead. Only three of the 910 samples taken by AGRA during
29 the period exceed the PEL for lead. Mr. Gilmore interpreted the three high samples as statistical
30 outliers and did not believe that these samples reflected actual levels when considered with the
31 other 900 samples.

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1 Richard Kelly testified that he worked for Morrison Knudsen and was working at the Sea Fab
2 site in January 2000, and that on his second day of working on the site, an AGRA employee asked
3 him to wear an air monitor. This monitor apparently registered a reading of 51 micrograms per
4 cubic meter of lead. This is 1 microgram over the PEL of lead of 50 micrograms per cubic meter.
5 Based on this sample, work was halted at the Sea Fab site and Mr. Kelly and other workers were
6 told by Bob Johnson, the Morrison Knudsen safety and health officer, that based on the air sample,
7 Mr. Kelly, as well as other workers, should have a blood test for lead. Mr. Kelly testified that he had
8 the blood test and that the results were within normal limits.

9 Phillip M. Peters, the director of the industrial hygiene laboratory with the Department of
10 Labor and Industries, testified that an air sample of 51 micrograms per cubic meter for lead was:

11 an area of non-determination. It's not a potential violation. In compliance testing it's
12 called non-determination, where the sample exceeds the standard, but the lower
13 confidence limit does not, and so you can't tell whether the sample is in or out of
14 compliance, and they call it non-determination.

14 12/13/01 Tr. at 77.

15 Mr. Peters also testified that no samples of soil or air from the Harbor Island Terminal 18
16 project were submitted to his laboratory as a part of this investigation. Mr. Peters also was of the
17 opinion that the 900 air samples would comprise an adequate representational sampling to
18 characterize an exposure.

19 Finally, Peter H. Wohl, a medical doctor who is board certified in internal medicine,
20 occupational medicine, and toxicology, testified that he reviewed 53 blood test results for
21 employees of Morrison Knudsen on the Harbor Island project. In Dr. Wohl's opinion, these blood
22 tests, together with the air monitoring results, indicate that Morrison Knudsen employees were not
23 significantly exposed to lead or arsenic on the site.

24 The facts in this record do not support Mr. Davis's belief that there was an overexposure to
25 lead. On the contrary, the facts in the record establish just the opposite. It is apparent from the
26 record that Morrison Knudsen had in place the required controls, practices, and PPE to reduce and
27 maintain exposure at or below the PEL. Additionally, there is no credible evidence in this record of
28 any overexposure of lead to any Morrison Knudsen employee. The Department has failed to
29 establish that Morrison Knudsen violated WAC 296-62-3060(1)(a). Citation 1, Item 11 is vacated.

30 Citation 2, Item 1a cites a violation of WAC 296-62-30225(1). This WAC requires the
31 employer to conduct monitoring for ionizing radiation during initial site entry when the site
32 evaluation produces information that shows the potential for ionizing radiation or where the site

1 information is not sufficient to rule out the possibility of the condition. The required monitoring must
2 be done with a direct reading instrument.

3 McClelland Davis, the Department inspector, testified that he based this alleged violation on
4 his belief that "there may have been a company or an employer that used radioactive material in
5 some way" on Harbor Island in the past and "it's a possibility that, in my mind, existed and needed
6 to be ruled out." 12/19/01 Tr. at 124. Mr. Davis's belief is the only basis in this record for
7 concluding that ionizing radiation posed a risk on Harbor Island. There is no evidence in this record
8 to suggest that ionizing radiation ever existed on Harbor Island. Mr. Davis's speculation alone is
9 insufficient to form a basis for the violation. The Department has failed to present evidence to
10 establish that Morrison Knudsen violated WAC 296-62-30225(1). Citation 2, Item 1a is vacated.

11 Citation 2, Item 1b cites a violation of WAC 296-62-30225(4). This WAC section requires the
12 employer to establish an ongoing air monitoring program which must be implemented after site
13 characterization has determined that the site is safe for the startup of operations. The Department
14 alleges generally that Morrison Knudsen failed to conduct the required monitoring. McClelland
15 Davis testified that he based this allegation on the failure of Morrison Knudsen to conduct air
16 monitoring prior to January 5, 2000, and for Morrison Knudsen's failure to monitor for ionizing
17 radiation.

18 WAC 296-62-30225(4) requires an air monitoring program in accordance with WAC 296-62-
19 30710 and WAC 296-62-30715. The Department previously cited violations of these WAC
20 provisions in Citation 1, Items 5b, 5c, and 6a. We vacated all of these alleged violations. We
21 vacate Citation 2, Item 1b for the same reasons set forth in our discussions regarding Citation 1,
22 Items 5b and 5c, as well as Item 6a. Additionally, we find that the air monitoring done by AGRA,
23 which consisted of over 900 samples, was sufficient to satisfy the requirements of WAC 296-62-
24 30710. AGRA performed periodic monitoring. The monitoring was done based on daily review of
25 the work to be performed and the location of the work. This was part of the standard procedure
26 used on the Harbor Island site. Although McClelland Davis believes additional monitoring was
27 required, the Department has offered no facts to indicate that the monitoring done by AGRA fails to
28 meet the requirements of WAC 296-62-30710 or WAC 296-62-30715. Finally, we once again find
29 that there is no evidence to support Mr. Davis's belief that monitoring for ionizing radiation was
30 required on the Harbor Island worksite. The Department has failed to establish that Morrison
31 Knudsen violated WAC 296-62-30225(4). Citation 2, Item 1b is vacated.

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1 Citation 2, Item 2 cites a violation of WAC 296-62-3110(1). This WAC section requires the
2 employer to develop and implement an emergency response plan to handle anticipated
3 emergencies prior to the commencement of hazardous waste operations. The Department
4 specifically alleges that Morrison Knudsen failed to include provisions for hazardous chemical
5 releases in the plan. McClelland Davis testified that he based this allegation on his review of
6 Morrison Knudsen's safety and health program and "did not see anything for hazardous chemical
7 releases." He further testified that he was concerned about hazardous chemical releases from
8 drums of unknown content, hazardous materials left in buildings, underground storage tanks, and a
9 field truck that had a punctured tank. Mr. Davis referred to one specific incident involving a diesel
10 fuel spill.

11 We have reviewed Exhibit No. 2, which is Appendix A to Morrison Knudsen's site safety and
12 health plan, to determine if the plan meets the requirements of WAC 296-62-3110(1). We find that
13 it does. Section 11 of Appendix A is titled "Spill Containment Plan." Section 11 states, in part, that
14 "spill and release accident during remediation could occur, involving residue process material and
15 rinsates from decontamination activities." Section 11 then details the response to be taken.
16 Section 11.1 is titled "Preplanning for Spill Control;" Section 11.2 is titled "Spill and Fire Control
17 Materials and Equipment;" Section 11.3 is titled "Spill Control Measures;" Section 11.4 is titled
18 "Drum, Container, and Tank Handling and Moving Procedures;" Section 11.5 is titled "Initial
19 Reporting and Management of Incidents;" and Section 11.6 is titled "Response Actions."

20 We have read all of Section 11 of Appendix A to Morrison Knudsen's site safety and health
21 plan. Section 11 is clearly an emergency response plan for hazardous releases. Section 11 of
22 Appendix A meets the requirements of WAC 296-62-3110(1). Citation 2, Item 2 is vacated.

23 Citation 2, Item 3 cites a violation of WAC 296-62-30510(1)(d). This WAC section requires
24 the employer to make medical examinations and consultations available to each employee as soon
25 as possible upon notification by an employee that the employee has developed signs or symptoms
26 indicating possible overexposure to hazardous substances or that the employee has been exposed
27 above the permissible exposure limits. Citation 2, Item 3 is merely a recitation of the provisions of
28 WAC 296-62-30510(1)(d). The Department fails to allege that Morrison Knudsen violated this WAC
29 provision. McClelland Davis, the Department inspector, testified that "I found there was an
30 employee who told his supervisor, who told Mr. Johnson and this Mr. Johnson did not refer this
31 employee for medical examination as required." 12/19/00 Tr. at 129. This is apparently the basis
32

1 for Mr. Davis's decision to include the language of WAC 296-62-30510(1)(d) as a part of this
2 citation.

3 Although the Department has failed to allege that Morrison Knudsen violated the provisions
4 of WAC 296-62-30510(1)(d), we have reviewed this record to determine if we could find evidence
5 that would support Mr. Davis's belief that an employee notified Morrison Knudsen of symptoms
6 associated with possible overexposure to hazardous substances. We have reviewed the testimony
7 of Rocky Brock, Danny Becker, Richard Kelly, Glenn Westphalen, Lawrence Rogers, Henry Eger,
8 Eugene Voss, Ron Slater, Don Fleming, Douglas Frizzell, and Johnie Wilkins, who were all
9 employees of Morrison Knudsen on the Harbor Island worksite. Of these workers, only Henry Eger
10 testified that he reported nosebleeds, headaches, blurry vision, and slight nausea to Morrison
11 Knudsen's site safety officer, Bob Johnson. Rocky Brock, Richard Kelly, and Glenn Westphalen
12 testified that they experienced headaches and dizziness while working at the Harbor Island site,
13 however, they did not report it to their employer. Don Frizzell testified that he worked for Morrison
14 Knudsen at the Harbor Island site and was the shop steward for 23 to 25 operators. None of these
15 workers ever reported illnesses associated with their work on Harbor Island.

16 This record establishes that four workers experienced symptoms of headaches, dizziness, or
17 nosebleeds. There is no evidence in the record to establish any specific exposure that could have
18 caused these symptoms. Mr. Davis apparently believes that the symptoms experienced by these
19 four workers are related to exposure to hazardous substances. However, there are no facts in this
20 record to establish an exposure to hazardous substances or to relate the symptoms to any specific
21 hazardous substance. Based on this record, we are unable to determine the cause of these
22 workers' symptoms. The Department has neither alleged nor offered any proof that Morrison
23 Knudsen violated WAC 296-62-30510(1)(d). Citation 2, Item 3 is vacated.

24 FINDINGS OF FACT

- 25 1. The Department of Labor and Industries received an oral complaint
26 against a Morrison Knudsen worksite on Harbor Island in Seattle,
27 Washington on April 18, 2000. The Department began its investigation,
28 inspection, and/or survey that revealed alleged violations on April 21,
29 2000, the date McClelland Davis held an opening conference with
Morrison Knudsen at 3411 11th Ave. S.W., Seattle, Washington, on
Harbor Island.

30 The Department issued Citation and Notice No. 303604540 on
31 October 20, 2000, in which it alleged 34 violations of WAC 296-62 and
32 assessed a total penalty of \$48,500. The employer filed a Notice of
Appeal with the Department of Labor and Industries Safety Division on

1 November 6, 2000. The Department issued a Notice of Reassumption
2 of Jurisdiction on November 16, 2000. The parties agreed to an
3 extension of the reassumption period and that the Corrective Notice of
4 Redetermination would be issued no later than January 12, 2001.

5 On December 21, 2000, the Department issued a Notice of Decision in
6 which it canceled the reassumption hearing set for December 6, 2000.
7 The Department transmitted the appeal to the Board as a direct appeal
8 on February 21, 2001. A Notice of Filing of Appeal was issued on
9 February 21, 2001.

- 10 2. Morrison Knudsen received the notice to begin work on the Terminal 18
11 Redevelopment Project on November 1, 1999. The work that Morrison
12 Knudsen contracted to perform was the redevelopment of selected
13 portions of Harbor Island. This work included building demolition,
14 roadway demolition, railway demolition, installation of new roadways
15 and railways, erection of new buildings, removal and replacement of
16 underground utilities, above ground hazardous material abatement that
17 was done by subcontractors, contaminated soil handling for the Port of
18 Seattle, and underground storage tank removal. The contaminated soil
19 handling was contractual support for the Port of Seattle soil remediation
20 activities.
- 21 3. Harbor Island was placed on the National Priorities List by the
22 Environmental Protection Agency in 1983. A Record of Decision was
23 issued by the agency in 1993, listing the remedial actions that were
24 required to be taken on Harbor Island. A Consent Decree was later
25 issued by the U.S. District Court, incorporating the Record of Decision
26 and its supplement. Prior to the beginning of work at Terminal 18, the
27 Port had all known "hot spots" removed. These "hot spots" consisted of
28 total petroleum hydrocarbons (TPH), PCBs, and soil mixed with
29 carcinogens.
- 30 4. The Department's pleadings in this matter were not frivolous and were
31 based on reasonable investigation into the law and the facts. Morrison
32 Knudsen is to receive no relief pursuant to its Motion for Sanctions.
5. Morrison Knudsen's activities at Harbor Island were covered by Part P,
WAC 296-62-300, et seq., and Morrison Knudsen was required to
comply with the standards contained therein.
6. Citation 1, Item 1a: Morrison Knudsen had a written site-specific safety
and health plan for its activities on Harbor Island. The elements of the
site-specific safety and health plan included a safety and health risk or
hazard analysis for each site task and operation found in the work plan.

- 1 7. Citation 1, Item 1b: Morrison Knudsen had a written site-specific safety
2 and health plan for its activities on Harbor Island. The elements of the
3 Harbor Island site-specific safety and health plan included a provision
4 for personal protective equipment to be used by employees for each of
5 the site tasks and operations being conducted, as required by the
6 personal protective equipment (PPE) program in WAC 296-62-30615.
- 7 8. Citation 1, Item 1c: Morrison Knudsen had a written site-specific safety
8 and health plan for its activities on Harbor Island. The elements of the
9 site-specific safety and health plan failed to include information on
10 maintenance and calibration of sampling equipment. The Department
11 has offered no factual basis to establish that failing to include the
12 maintenance and calibration methods for air sampling equipment would
13 create a substantial probability that death or serious physical harm could
14 result. This violation is best characterized as a general violation with no
15 penalty.
- 16 9. Citation 1, Item 1d: Morrison Knudsen had a written site-specific safety
17 and health plan for its activities on Harbor Island. The elements of the
18 site-specific safety and health plan included site control measures as set
19 forth in WAC 296-62-3030 through WAC 296-62-30315.
- 20 10. Citation 1, Item 1e: Morrison Knudsen had a written site-specific safety
21 and health plan for its activities on Harbor Island. The elements of the
22 site-specific safety and health plan included decontamination
23 procedures as set forth in WAC 296-62-3100 through WAC 296-62-
24 31015.
- 25 11. Citation 1, Item 1f: The Department has failed to make a prima facie
26 case that Morrison Knudsen's site-specific safety and health plan for
27 Harbor Island failed to include an emergency response plan that meets
28 the requirements of WAC 296-62, Part R, for safe and effective
29 responses to emergencies, including necessary PPE and other
30 equipment.
- 31 12. Citation 1, Item 1g: The Department has failed to present a prima facie
32 case that Morrison Knudsen's site control program failed to include a
 site map; site work zone; the use of a buddy system; site
 communications including alerting means for emergencies; the standard
 operating procedures or safe work practices; and identification of the
 nearest medical assistance.
13. Citation 1, Item 1h: Morrison Knudsen had a written site-specific safety
 and health program for its activities on Harbor Island. This program
 addressed PPE selection based on site hazards.

- 1 14. Citation 1, Item 1i: Morrison Knudsen had a written PPE program that
2 was part of the site-specific safety and health program for Harbor Island,
3 which addressed the issue of PPE decontamination and disposal.
- 4 15. Citation 1, Item 2a: Morrison Knudsen's site safety and health
5 supervisor, or another individual who was knowledgeable in
6 occupational safety and health and who was acting on behalf of the
7 employer, conducted inspections as necessary to determine the
8 effectiveness of the site safety and health plan. Deficiencies in the
9 effectiveness of the site safety and health plan were corrected as
10 necessary by Morrison Knudsen.
- 11 16. Citation 1, Item 2b: The Department has failed to make a prima facie
12 case that Morrison Knudsen failed to develop and communicate a
13 decontamination procedure to employees and implement the
14 decontamination procedure before the employees or equipment entered
15 areas on site where potential for exposure to hazard substances exists:
- 16 17. Citation 1, Item 2c: The Department has failed to make a prima facie
17 case that Morrison Knudsen's site safety and health supervisor failed to
18 monitor decontamination procedures to determine their effectiveness.
- 19 18. Citation 1, Item 2d: The Department has failed to make a prima facie
20 case that Morrison Knudsen failed to implement appropriate site control
21 procedures to control employee exposure to hazardous substances
22 before clean-up work began.
- 23 19. Citation 1, Item 3a: Morrison Knudsen performed a preliminary
24 evaluation of the Harbor Island site to determine its characteristics prior
25 to site entry. The preliminary evaluation was done by qualified
26 personnel and was done in order to aid in the selection of appropriate
27 employee protection methods prior to site entry. A more detailed
28 evaluation of the site-specific characteristics was performed daily by
29 qualified persons in order to further identify existing site hazards and to
30 further aid in the selection of appropriate engineering controls and
31 personal protective equipment for the tasks to be performed.
- 32 20. Citation 1, Item 3b: During the preliminary survey, Morrison Knudsen
identified all suspected conditions that could pose inhalation or skin
absorption hazards that are immediately dangerous to life or health and
all other conditions that may cause death or serious harm. These
conditions were evaluated during the detailed survey.
21. Citation 1, Item 3c: The Department has failed to make a prima facie
case that Morrison Knudsen failed to select appropriate PPE during
initial site entry for the identified hazards or that Morrison Knudsen failed
to ensure that the appropriate PPE was being used in accordance with
WAC 296-62-3060 through WAC 296-62-30615.

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22. Citation 1, Item 4a: Morrison Knudsen made information available to employees concerning the chemical, physical, and toxicological properties of each substance known or expected to be present on site that was available to Morrison Knudsen and relevant to the duties an employee was expected to perform prior to the commencement to work activities.
 23. Citation 1, Item 4b: The Department has failed to make a prima facie case that Morrison Knudsen failed to develop and implement a program, as a part of its safety and health program, to inform employees, contractors, and subcontractors who are actually engaged in hazardous waste operations of the nature, level, and degree of exposure likely as a result of participation in such hazardous waste operations.
 24. Citation 1, Item 5a: The Department has failed to make a prima facie case that Morrison Knudsen failed to conduct representative air monitoring upon initial entry to an area containing hazardous waste contamination in order to identify any IDLH condition, exposure over permissible exposure limits or published exposure levels, exposure over radioactive materials dose limits, or other dangerous condition, such as the presence of flammable atmospheres or oxygen deficient environments.
 25. Citation 1, Item 5b: Morrison Knudsen conducted periodic monitoring when the possibility of an immediate danger to life and health condition developed or when there was an indication that exposures may have risen over permissible exposure limits or published exposure levels since prior monitoring. This periodic monitoring was done when work began on different portions of the worksite on Harbor Island.
 26. Citation 1, Item 5c: Morrison Knudsen conducted periodic monitoring when the possibility of an immediate danger to life and health condition developed or when there was an indication that exposures may have risen over permissible exposure limits or published exposure levels since prior monitoring. This periodic monitoring was done when contaminants other than those previously identified were being handled.
 27. Citation 1, Item 6a: Morrison Knudsen monitored employees likely to have the highest exposure to hazardous substances and health hazards likely to be present above permissible exposure limits or published exposure levels by using personal sampling frequently enough to characterize employee exposures. The Department has failed to establish that any employees of Morrison Knudsen handled drums of unknown materials or worked in spill ponds around leaky drums of unknown materials.

- 1 28. Citation 1, Item 6b: The Department has failed to make a prima facie
2 case that employees of Morrison Knudsen handled unlabeled drums
3 and containers without considering the containers and drums to contain
4 hazardous substances.
- 5 29. Citation 1, Item 6c: The Department has failed to make a prima facie
6 case that employees of Morrison Knudsen who were exposed to the
7 transfer operation were not warned of the potential hazards associated
8 with the contents of the drums or containers prior to the movement of
9 the drums or containers.
- 10 30. Citation 1, Item 6d: The Department has failed to make a prima facie
11 case that employees of Morrison Knudsen moved drums and containers
12 that could not be moved without rupture, leakage, or spillage, and did
13 not first empty the drum or container into a sound container using a
14 device classified for the material being transferred.
- 15 31. Citation 1, Item 7a: The Department has failed to make a prima facie
16 case that an employee of Morrison Knudsen, who was wearing
17 permeable clothing that became wetted with hazardous substances, did
18 not immediately remove the clothing and proceed to shower, and the
19 clothing was not disposed of or decontaminated before worn home.
- 20 32. Citation 1, Item 7b: The Department has failed to allege that Morrison
21 Knudsen violated the provisions of WAC 296-62-31020. Additionally,
22 the Department has failed to make a prima facie case that there were
23 decontamination procedures which indicated a need for regular showers
24 and change rooms outside of a contaminated area.
- 25 33. Citation 1, Item 8: Morrison Knudsen failed to provide 40 hours of
26 training and a minimum of three days actual field experience, under the
27 direct supervision of a trained, experienced supervisor, for general site
28 workers required to wear Level C or Level D personal protective
29 equipment, equipment operators, or transport field operators who were
30 engaged in activities which had the potential to expose the workers to
31 hazardous substances and health hazards. The Department has
32 offered no factual basis to determine that failure to provide the
necessary training would create a substantial probability that death or
serious physical harm could result. This violation is best characterized
as a general violation with no penalty.
34. Citation 1, Item 9: Morrison Knudsen failed to provide on-site
management and supervisors directly responsible for or who supervised
employees engaged in hazardous waste operations with the initial
training listed in WAC 296-62-30410, and additional three days of
supervised field experience and at least eight additional hours of
specialized training at the time of job assignment. The Department has
offered no factual basis to determine that failure to provide this

1 necessary training would create a substantial probability that death or
2 serious physical harm could result. This citation is best characterized as
3 a general violation with no penalty.

4 35. Citation 1, Item 10: Morrison Knudsen had a written respiratory
5 protection program on site and in effect as of November 1, 1999, that
6 contained procedures for selecting respirators for use on site, and a list
7 identifying the proper type of respirator for each respiratory hazard;
8 medical evaluations of employees required to use respirators; fit testing
9 procedures for tight-fitting respirators; procedures for proper use of
10 respirators in routine tasks, non-routine tasks, reasonably foreseeable
11 emergency and rescue situations; procedures for issuing the proper type
12 of respirator based on the respiratory hazard for each employee;
13 procedures and schedules for cleaning, disinfecting, storing, inspecting,
14 repairing, discarding, and otherwise maintaining respirators; procedures
15 to make sure adequate air quality, quantity, and flow of breathing air for
16 atmosphere-supplying respirators; training of employees in the
17 respiratory hazards to which they are potentially exposed during routine,
18 non-routine, and unforeseeable emergency and rescue situations;
19 training of employees in the proper use of respirators, including putting
20 on and removing them, any limitations on their use, and their
21 maintenance and procedures for regularly evaluating the effectiveness
22 of the program. Morrison Knudsen implemented engineering controls,
23 work practices, personal protective equipment, or a combination of
24 these, to protect employees from exposures to hazardous substances
25 and health hazards. These engineering controls, work practices, and
26 PPE were directed to substances regulated in chapter 296-62 WAC.
27 These engineering controls and work practices were instituted to reduce
28 and maintain employee exposure at or below the permissible exposure
29 limit for substances regulated by WAC 296-62. Morrison Knudsen
30 employees were not overexposed to lead without the use of proper
31 personal protective equipment.
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36. Citation 1, Item 11: Morrison Knudsen instituted engineering controls
and work practices to reduce and maintain employee exposure at or
below the permissible exposure limits for substances regulated by
WAC 296-62. Morrison Knudsen employees were not overexposed to
lead while working on the Harbor Island site.

37. Citation 2, Item 1a: The Department has failed to make a prima facie
case that Morrison Knudsen was required to monitor with direct reading
instruments for hazardous levels of ionizing radiation.

38. Citation 2, Item 1b: Morrison Knudsen had an ongoing air monitoring
program in accordance with WAC 296-62-30710 and WAC 296-62-
30715. The air monitoring program was implemented after the site had
been characterized and it was determined that the site was safe for the
start of operations.

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2 39. Citation 2, Item 2: Morrison Knudsen developed and implemented an
3 emergency response plan within the scope of WAC 296-62-30001(1)(a)
4 and (b) to handle anticipated emergencies prior to the commencement
5 of hazardous waste operations. The plan was in writing and available
6 for inspection and copying by employees and their representatives,
7 WISHA personnel, and other governmental agencies with relevant
8 responsibilities. The plan included provisions for hazardous chemical
9 releases.

10 40. Citation 2, Item 3: The Department has not alleged that Morrison
11 Knudsen violated the provisions of WAC 296-62-30510(1)(d). The
12 Department has failed to make a prima facie case that Morrison
13 Knudsen failed to provide medical examinations and consultations to
14 employees after being notified by an employee that the employee had
15 developed signs or symptoms indicating possible overexposure to
16 hazardous substances or health hazards, or that the employee had
17 been injured or exposed above the permissible exposure limits or
18 published exposure levels in an emergency situation.

19 CONCLUSIONS OF LAW

- 20 1. The Department of Labor and Industries issued Citation and Notice
21 No. 303604540 within the requirements of RCW 49.17.120(4).
- 22 2. The Board of Industrial Insurance Appeals has jurisdiction over the
23 parties to and the subject matter of this appeal.
- 24 3. Morrison Knudsen's activities at Harbor Island were covered by Part P,
25 WAC 296-62-300, et seq., and Morrison Knudsen was required to
26 comply with the standards contained therein.
- 27 4. The Department's pleadings in this matter were not frivolous and were
28 based on reasonable investigation into the law and the facts. Morrison
29 Knudsen is to receive no relief pursuant to its Motion for Sanctions.
- 30 5. Citation 1, Item 1a: No violation of WAC 296-62-30135(2)(b) has been
31 established, and Citation 1, Item 1a is vacated.
- 32 6. Citation 1, Item 1b: No violation of WAC 296-62-30135(2)(d) has been
established, and Citation 1, Item 1b is vacated.
7. Citation 1, Item 1c: Morrison Knudsen violated the provisions of
WAC 296-62-30135(2)(f) by failing to include information in its site
safety and health plan on maintenance and calibration of sampling
equipment. This is a general violation with no penalty.
8. Citation 1, Item 1d: No violation of WAC 296-62-30135(2)(g) has been
established, and Citation 1, Item 1d is vacated.

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- 9. Citation 1, Item 1e: No violation of WAC 296-62-30135(2)(h) has been established, and Citation 1, Item 1e is vacated.
- 10. Citation 1, Item 1f: No violation of WAC 296-62-30135(2)(i) has been established, and Citation 1, Item 1f is vacated.
- 11. Citation 1, Item 1g: No violation of WAC 296-62-30310 has been established, and Citation 1, Item 1g is vacated.
- 12. Citation 1, Item 1h: No violation of WAC 296-62-30615(1) has been established, and Citation 1, Item 1h is vacated.
- 13. Citation 1, Item 1i: No violation of WAC 296-62-30615(5) has been established, and Citation 1, Item 1i is vacated.
- 14. Citation 1, Item 2a: No violation of WAC 296-62-30145 has been established, and Citation 1, Item 2a is vacated.
- 15. Citation 1, Item 2b: No violation of WAC 296-62-3100(2)(a) has been established, and Citation 1, Item 2b is vacated.
- 16. Citation 1, Item 2c: No violation of WAC 296-62-3100(2)(d) has been established, and Citation 1, Item 2c is vacated.
- 17. Citation 1, Item 2d: No violation of WAC 296-62-3030 has been established, and Citation 1, Item 2d is vacated.
- 18. Citation 1, Item 3a: No violation of WAC 296-62-30205 has been established, and Citation 1, Item 3a is vacated.
- 19. Citation 1, Item 3b: No violation of WAC 296-62-30210 has been established, and Citation 1, Item 3b is vacated.
- 20. Citation 1, Item 3c: No violation of WAC 296-62-30220(4) has been established, and Citation 1, Item 3c is vacated.
- 21. Citation 1, Item 4a: No violation of WAC 296-62-30235 has been established, and Citation 1, Item 4a is vacated.
- 22. Citation 1, Item 4b: No violation of WAC 296-62-3080 has been established, and Citation 1, Item 4b is vacated.
- 23. Citation 1, Item 5a: No violation of WAC 296-62-30705 has been established, and Citation 1, Item 5a is vacated.
- 24. Citation 1, Item 5b: No violation of WAC 296-62-30710(1) has been established, and Citation 1, Item 5b is vacated.

- 1 25. Citation 1, Item 5c: No violation of WAC 296-62-30710(2) has been
2 established, and Citation 1, Item 5c is vacated.
- 3 26. Citation 1, Item 6a: No violation of WAC 296-62-30715 has been
4 established, and Citation 1, Item 6a is vacated.
- 5 27. Citation 1, Item 6b: No violation of WAC 296-62-3090(4) has been
6 established, and Citation 1, Item 6b is vacated.
- 7 28. Citation 1, Item 6c: No violation of WAC 296-62-3090(6) has been
8 established, and Citation 1, Item 6c is vacated.
- 9 29. Citation 1, Item 6d: No violation of WAC 296-62-3090(9) has been
10 established, and Citation 1, Item 6d is vacated.
- 11 30. Citation 1, Item 7a: No violation of WAC 296-62-31015(2) has been
12 established, and Citation 1, Item 7a is vacated.
- 13 31. Citation 1, Item 7b: No violation of WAC 296-62-31020 has been
14 established, and Citation 1, Item 7b is vacated.
- 15 32. Citation 1, Item 8: Morrison Knudsen violated the provisions of
16 WAC 296-62-30410(2) by failing to provide the required 40 hours of
17 training and a minimum three days actual field experience under the
18 direct supervision of a trained, experienced supervisor for general site
19 workers required to wear Level C or Level D personal protective
20 equipment, equipment operators, or transport field operators who were
21 engaged in activities that had the potential to expose the workers to
22 hazardous substances and health hazards. This violation is a general
23 violation with no penalty.
- 24 33. Citation 1, Item 9: Morrison Knudsen violated the provisions of
25 WAC 296-62-30415 by failing to provide on-site management and
26 supervisors directly responsible for or who supervised employees
27 engaged in hazardous waste operations with the initial training listed in
28 WAC 296-62-30410, and additional three days of supervised field
29 experience and at least eight additional hours of specialized training at
30 the time of job assignment. This citation is a general violation with no
31 penalty.
- 32 34. Citation 1, Item 10: Morrison Knudsen's written respiratory protection
program did not violate WAC 296-62-07111. Citation 1, Item 10 is
vacated.
35. Citation 1, Item 11: No violation of WAC 296-62-3060(1)(a) has been
established, and Citation 1, Item 11 is vacated.

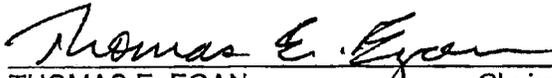
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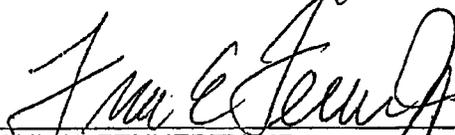
- 36. Citation 2, Item 1a: No violation of WAC 296-62-30225(1) has been established, and Citation 2, Item 1a is vacated.
- 37. Citation 2, Item 1b: No violation of WAC 296-62-30225(4) has been established, and Citation 2, Item 1b is vacated.
- 38. Citation 2, Item 2: No violation of WAC 296-62-3110(1) has been established, and Citation 2, Item 2 is vacated.
- 39. Citation 2, Item 3: No violation of WAC 296-62-30510(1)(d) has been established, and Citation 2, Item 3 is vacated.
- 40. Citation and Notice No. 303604540 is affirmed as modified.

It is **ORDERED**.

Dated: November 20, 2007.

BOARD OF INDUSTRIAL INSURANCE APPEALS


THOMAS E. EGAN Chairperson


FRANK E. FENNERTY, JR. Member


CALHOUN DICKINSON Member

APPENDIX E

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STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

DEPARTMENT OF LABOR AND
INDUSTRIES,

Plaintiff,

v.

MORRISON KNUDSEN,

Defendant.

NO. 03-2-14468-1 KNT

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
JUDGMENT

[PROPOSED]

I. JUDGMENT SUMMARY (RCW 4.64.030)

- 1. Industries of the State Judgment Creditor: Department of Labor and
of Washington
- 2. Judgment Debtor: Morrison Knudsen
- 3. Principal Amounts of Judgment: \$-0.00-
- 4. Interest to Date of Judgment: \$-0.00-
- 5. Attorney Fees: \$200.00
- 6. Costs: \$110.00
- 7. Other Recovery Amounts: \$-0.00-
- 8. Principal Judgment Amount shall bear interest at N/A% per annum.
- 9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per
annum.

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- 10. Attorneys for Judgment Creditor: Robert M. McKenna
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(360) 586-7731

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(360) 459-0751

THIS MATTER came on regularly for argument on November 12, 2009, and the court having considered the arguments presented by the parties and the records and files herein, including:

- 1. Certified Appeal Board Record provided by the Washington State Board of Industrial Insurance Appeals (Board) on or about February 25, 2003;
- 2. Supplemental Certified Appeal Board Record provided by the Board on or about January 31, 2008;
- 3. Department of Labor and Industries' Trial Brief;
- 4. Morrison Knudsen's Response to Department's Trial Brief;
- 5. Department of Labor and Industries' Reply Brief; and

the pleadings on file in this case and otherwise being fully advised on the matter, the court now makes the following:

II. FINDINGS OF FACT

- 1. On October 20, 2000, following an inspection of work being performed on Harbor Island, the Department of Labor and Industries (Department) issued Citation and Notice No. 303604540 (Citation) to Washington Group International d/b/a Morrison Knudsen

1 (Morrison Knudsen). A copy of the Citation is attached hereto and incorporated by this
2 reference.

3 2. The Citation alleged violations of 35 different safety and health standards contained in
4 the Washington Administrative Code (WAC), and assessed a total penalty of \$48,500.00.
5 With the exception of Citation 1, Item 10, all violations alleged in the Citation were of
6 regulations contained within "Part P" of these standards. At the time the Citation was issued,
7 "Part P" included WAC 296-62-300 - WAC 296-62-3195 and was entitled "Hazardous Waste
8 Operations and Treatment, Storage, and Disposal Facilities." Part P has since been repealed
9 and re-codified with amendments, but this matter is governed by Part P as it existed at the time
10 the Citation was issued.

11 3. Morrison Knudsen filed a timely appeal from the Citation with the Board. Hearings on
12 Morrison Knudsen's appeal were held before a Board appointed Industrial Appeals Judge
13 (IAJ).

14 4. The original Board-level proceedings, including pre-hearing motions, the hearings
15 themselves, and post-hearing briefing, provided Morrison Knudsen with a full opportunity to
16 present all legal and factual challenges that it had against the Citation, and Morrison Knudsen
17 did so. The Board's record from those proceedings thus contains all facts and arguments
18 necessary to address the merits of each alleged violation.

19 5. The IAJ issued a Proposed Decision and Order (PD&O) dated June 19, 2002, which
20 vacated the Citation in its entirety. The IAJ determined that Morrison Knudsen's
21 Harbor Island activities were not subject to Part P. The PD&O contained Findings of Fact and
22 Conclusions of Law consistent with this determination.

23 6. On September 17, 2002 the Department filed a Petition for Review from the PD&O.

24 7. The Board issued its first Decision and Order (First D&O) on December 3, 2002, which
25 determined that the PD&O had reached the correct result. A copy of the First D&O is attached
26 hereto and incorporated by this reference.

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1 8. On January 3, 2003, the Department filed a timely Notice of Appeal from the First
2 D&O to this Court. The parties fully briefed and argued their positions before this Court and
3 on August 9, 2004, this Court issued a Judgment and Order that reversed the First D&O.

4 9. In its August 9, 2004 Judgment and Order, this Court found as fact and concluded as a
5 matter of law that "Morrison Knudsen's work site on Harbor Island was an 'uncontrolled
6 hazardous waste site' and that 'Morrison Knudsen was performing a 'clean-up operation' at
7 Harbor Island". Having determined that the Board erred in its determination that Part P did not
8 apply to Morrison Knudsen's work and worksite at Harbor Island, this Court set aside the
9 Board's findings and conclusions to the contrary and remanded the Citation to the Board with
10 instructions to consider the individual violations on their merits.

11 10. In its August 9, 2004 Judgment and Order, this Court also specifically ordered the
12 Board to "find and conclude that Morrison Knudsen's activities at Harbor Island were covered
13 by Part P...and that Morrison Knudsen was required to comply with the standards contained
14 therein." A copy of this Court's August 9, 2004 Judgment and Order is attached hereto and
15 incorporated by this reference.

16 11. Morrison Knudsen appealed this Court's August 9, 2004 Judgment and Order to the
17 Court of Appeals. In a decision issued on August 15, 2005 and ordered published on
18 October 13, 2005, the Court of Appeals affirmed this Court's August 9, 2004 Judgment and
19 Order. Specifically, the Court of Appeals decided, as had this Court, that Morrison Knudsen
20 was performing a "clean-up operation" at Harbor Island, and that Harbor Island was an
21 "uncontrolled hazardous waste site" during Morrison Knudsen's clean-up activities. The Court
22 of Appeals determined that Harbor Island contained an accumulation of hazardous substances
23 that created a threat to the health and safety of individuals. The Court of Appeals thus held
24 that Morrison Knudsen's Harbor Island work and worksite were subject to Part P, and that
25 Morrison Knudsen was required to comply with Part P's standards during its work at
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1 Harbor Island. A copy of the August 15, 2005 Court of Appeals decision is attached hereto
2 and incorporated by this reference.

3 12. Morrison Knudsen petitioned the Supreme Court for review of the Court of Appeals'
4 August 15, 2004 decision. The Supreme Court denied review and the matter returned to the
5 Board.

6 13. On November 20, 2007, the Board issued a Decision and Order on Remand from
7 Superior Court (D&O on Remand). The D&O on Remand addressed 34 violations; of these,
8 the Board vacated 31, including:

- 9 a. Item 1-1a, Serious Violation of WAC 296-62-30135(2)(b). (Board Finding of Fact
10 (FOF) 6, Conclusion of Law (COL) 5.)
- 11 b. Item 1-1b, Serious Violation of WAC 296-62-30615. (Board FOF 7, COL 6.)
- 12 c. Item 1-1d, Serious Violation of WAC 296-62-30135(2)(g). (Board FOF 9, COL 8.)
- 13 d. Item 1-1e, Serious Violation of WAC 296-62-30135(2)(h). (Board FOF 10, COL 9.)
- 14 e. Item 1-1f, Serious Violation of WAC 296-62-30135(2)(i). (Board FOF 11, COL 10.)
- 15 f. Item 1-1g, Serious Violation of WAC 296-62-30310. (Board FOF 12, COL 11.)
- 16 g. Item 1-1h, Serious Violation of WAC 296-62-30615(1). (Board FOF 13, COL 12.)
- 17 h. Item 1-1i, Serious Violation of WAC 296-62-30615(5). (Board FOF 14, COL 13.)
- 18 i. Item 1-2a, Serious Violation of WAC 296-62-30145. (Board FOF 15, COL 14.)
- 19 j. Item 1-2b, Serious Violation of WAC 296-62-3100(2)(a). (Board FOF 16, COL 15.)
- 20 k. Item 1-2c, Serious Violation of WAC 296-62-3100(2)(d). (Board FOF 17, COL 16.)
- 21 l. Item 1-2d, Serious Violation of WAC 296-62-3030. (Board FOF 18, COL 17.)
- 22 m. Item 1-3a, Serious Violation of WAC 296-62-30205. (Board FOF 19, COL 18.)
- 23 n. Item 1-3b, Serious Violation of WAC 296-62-30210. (Board FOF 20, COL 19.)
- 24 o. Item 1-3c, Serious Violation of WAC 296-62-30220(4). (Board FOF 21, COL 20.)
- 25 p. Item 1-4a, Serious Violation of WAC 296-62-30235. (Board FOF 22, COL 21.)
- 26 q. Item 1-4b, Serious Violation of WAC 296-62-3080. (Board FOF 23, COL 22.)

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- 1 r. Item 1-5a, Serious Violation of WAC 296-62-30705. (Board FOF 24, COL 23.)
- 2 s. Item 1-5b, Serious Violation of WAC 296-62-30710(1). (Board FOF 25, COL 24.)
- 3 t. Item 1-5c, Serious Violation of WAC 296-62-30710(2). (Board FOF 26, COL 25.)
- 4 u. Item 1-6a, Serious Violation of WAC 296-62-30715. (Board FOF 27, COL 26.)
- 5 v. Item 1-6b, Serious Violation of WAC 296-62-3090(4). (Board FOF 28, COL 27.)
- 6 w. Item 1-6c, Serious Violation of WAC 296-62-3090(6). (Board FOF 29, COL 28.)
- 7 x. Item 1-6d, Serious Violation of WAC 296-62-3090(9). (Board FOF 30, COL 29.)
- 8 y. Item 1-7a, Serious Violation of WAC 296-62-31015(2). (Board FOF 31, COL 30.)
- 9 z. Item 1-7b, Serious Violation of WAC 296-62-31020. (Board FOF 32, COL 31.)
- 10 aa. Item 1-11, Serious Violation of WAC 296-62-3060(1)(a). (Board FOF 36, COL 35.)
- 11 bb. Item 2-1a, General Violation of WAC 296-62-30225(1). (Board FOF 37, COL 36.)
- 12 cc. Item 2-1b, General Violation of WAC 296-62-30225(4). (Board FOF 38, COL 37.)
- 13 dd. Item 2-2, General Violation of WAC 296-62-3110(1). (Board FOF 39, COL 38.)
- 14 ee. Item 2-3, General Violation of WAC 296-62-30510(1)(d). (Board FOF 40, COL 39.)
- 15 14. The D&O on Remand reclassified the three remaining violations it considered from
- 16 "serious" to "general" and reduced their associated penalties to \$0. These included:
- 17 a. Item 1-1c, Serious Violation of WAC 296-62-30135(2)(f). (Board FOF 8, COL 7.)
- 18 b. Item 1-8, Serious Violation of WAC 296-62-30410(2). (Board FOF 33, COL 32.)
- 19 c. Item 1-9, Serious Violation of WAC 296-62-30415. (Board FOF 34, COL 33.)
- 20 A copy of the Board's D&O on Remand is attached hereto and incorporated by this reference.
- 21 Unless otherwise indicated, further references in this Judgment to Findings of Fact and
- 22 Conclusions of Law are to those contained in the D&O on Remand.
- 23 15. The Board's Finding of Fact No. 1, is an incomplete recitation of the procedural
- 24 history. It omits reference to any proceedings that occurred after February 21, 2001, including:
- 25 (a) this Court's August 9, 2004 Judgment and Order; (b) the Court of Appeals' August 15,
- 26 2005 decision; and (c) the Supreme Court's denial of review of the Court of Appeals'

1 August 15, 2005 decision. Finding of Fact 1 should be corrected to include references to and
2 summaries of the above proceedings, as well as to: (d) The Board's D&O on Remand; (e) this
3 Judgment and its Findings of Fact and Conclusions of Law; and (f) any appellate
4 determinations made after this Judgment is entered.

5 16. The Board's Findings of Fact Nos. 2, 3, 4, 5 and 37 are supported by substantial
6 evidence in the record.

7 17. To the extent that it contains language in addition to that which appeared in Finding of
8 Fact No. 7 in the First D&O, the Board's Finding of Fact No. 35 is contrary to this Court's
9 August 9, 2004 Judgment and Order, contrary to the Court of Appeals' August 15, 2005
10 decision, and is not supported by substantial evidence in the record. Accordingly, it should be
11 set aside.

12 18. The Board's Findings of Fact Nos. 6 through 34, 36, and 38 through 40 are contrary to
13 this Court's August 9, 2004 Judgment and Order; contrary to the Court of Appeals' August 15,
14 2005 decision and are not supported by substantial evidence in the record. Accordingly, they
15 should be set aside.

16 19. Contrary to this Court's August 9, 2004 Judgment and Order, the D&O on Remand
17 fails to include Finding of Fact No. 4 from the First D&O. The Board's Findings of Fact
18 should be amended to include Finding of Fact No. 4 from the First D&O.

19 20. This Court's August 9, 2004 Judgment and Order, which was affirmed by the Court of
20 Appeals, included, among others, the following Findings:

- 21 a. Morrison Knudsen's work site on Harbor Island was an "uncontrolled hazardous waste
22 site," as that term was defined in Part P, at the time of the inspection. Harbor Island,
23 including the Terminal 18 project, was on the National Priority List and also had been
24 designated as a "Superfund" site, at the time of Morrison Knudsen's successful bid and
25 subsequent work on the project. As noted in the Board's PD&O, "There is no question
26 that certain soils were found to be contaminated and were stockpiled by

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1 Morrison Knudsen personnel to be removed from the island by employees of the Port.
2 It is also not disputed that part of the project involved capping of soil, a remediation
3 activity ordered by the Consent Decree." PD&O at 9.

4 b. Morrison Knudsen was performing a "clean-up operation," as that term is defined in
5 Part P, at the time of the Harbor Island inspection.

6 c. The "ultimate goal" of Morrison Knudsen's processing and handling of hazardous
7 substances at the Harbor Island work site was making the site safer for people or the
8 environment.

9 d. Morrison Knudsen removed and/or cleaned up hazardous substances on the Harbor
10 Island site.

11 21. In its August 15, 2005 decision affirming this Court's August 9, 2004 judgment, the
12 Court of Appeals held, among other things, that:

13 a. The decision of the IAJ in the [Board's] record shows that contaminated soils were
14 found and stockpiled by Morrison Knudsen personnel. The contract included an
15 operation where hazardous substances were "removed, contained, incinerated,
16 neutralized, stabilized, cleared up, or in any other manner processed or handled
17 with the ultimate goal of making the site safer for people or the environment."

18 b. It is also undisputed that the project involved the capping of or paving over soil, a
19 remediation activity ordered in the Consent Decree. The work as encountered by
20 Morrison Knudsen obligates it to be part of a "clean-up operation" subject to Part P
21 of the WAC;

22 c. There is no evidence in the record to support a conclusion that Harbor Island does
23 not continue to be a specific threat to the health and safety of individuals or the
24 environment.

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1 22. The Board erred when it reasoned that the central work performed by
2 Morrison Knudsen was not clean up of hazardous materials but was in fact construction work
3 and used that reasoning as a basis to limit the applicability of Part P at Harbor Island.

4 23. In the D&O on Remand, the Board erred when it ignored the law of the case
5 established by this Court and affirmed by the Court of Appeals that Part P applied to
6 Morrison Knudsen's entire Harbor Island job-site and to all of Morrison Knudsen's work at
7 that site. The Board ignored the law of the case that Harbor Island was an uncontrolled
8 hazardous waste site and that Morrison Knudsen was performing a clean-up operation.

9 24. The Board, in the D&O on Remand, also ignored the law of the case regarding the risks
10 to human health associated with the site. Both this Court and the Court of Appeals found that
11 the record established that the site created a risk to the health and safety of individuals. There
12 is no evidence in the record that Harbor Island does not continue to be a specific threat to the
13 health and safety of individuals.

14 25. The Board erred in relying on the AGRA study, due to the following facts:

- 15 a. AGRA did not conduct personal air monitoring for representative individual job
16 tasks and duties in compliance with Part P;
- 17 b. The AGRA air monitoring did not take into account contaminated soil handling by
18 Morrison Knudsen employees; and
- 19 c. AGRA tested for lead levels but did not test for nor take into consideration the
20 known presence of other hazardous materials at the jobsite, including but not
21 limited to arsenic.

22 Because the Board erred in relying on the AGRA study, its Findings of Fact and Conclusions
23 of Law that relate to that study are not supported by substantial evidence and should be set
24 aside.

25 26. The Board, in the D&O on Remand, erred when it determined that the clean-up levels
26 and goals for all contaminants at Harbor Island were met prior to Morrison Knudsen

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1 commencing work at Harbor Island. The Board further erred when it determined that only the
2 areas shaded in Figure 6 of the Record of Decision (ROD) posed a known threat to human
3 health. Substantial evidence in the record establishes that removal of organic hot spots did not
4 result in the removal of all types of contaminants both known and unknown. The record is
5 clear that the clean-up goals for organic compounds were not met before Morrison Knudsen
6 began its work at Harbor Island. Further, the record establishes that there were hazardous
7 levels of inorganic compounds at Harbor Island and that no clean-up of those compounds
8 occurred prior to Morrison Knudsen beginning work at Harbor Island. The Board therefore
9 erred when it found that levels of inorganics, including arsenic, that remained after organic hot
10 spot removal did not and could not pose a threat to the health and safety of individuals.

11 27. At the time Morrison Knudsen was working at Harbor Island, that jobsite was
12 contaminated with dozens of different hazardous substances, including but not limited to, lead,
13 arsenic, mercury, total petroleum hydrocarbons (TPHs), polychlorinated biphenyls (PCBs), and
14 polycyclic aromatic hydrocarbons (PAHs). Most of these substances were present at levels
15 exceeding clean-up goals. Morrison Knudsen's employees were exposed to the hazards
16 created by these substances during any work they performed at any part of Harbor Island. All
17 of Morrison Knudsen's activities at Harbor Island, including but not limited to, its sampling,
18 testing, and monitoring; its safety and health plans; its personal protective equipment and
19 worker notification programs; its job assignments, demolition, construction, clearing and
20 grubbing, road paving, and equipment operations; and its hygienic facilities and medical
21 assistance were required to take into account the actual and potential hazards created by all of
22 these substances.

23 28. The areas of Harbor Island not shaded as shown in Figure 6 of the ROD, cannot be
24 presumed to meet the clean-up goals and were, in fact, known to contain hazardous substances,
25 most of which were present at levels that exceeded clean-up goals. Moreover, the areas not
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1 shaded in Figure 6 of the ROD that exceeded the clean-up goals for TPHs, lead, arsenic,
2 mercury, PCBs, and PAHs, among others, still existed after hot spot removal.

3 29. The Harbor Island site where Morrison Knudsen's employees worked contained an
4 accumulation of hazardous substances that created a threat to their health and safety and to the
5 environment.

6 30. All of Morrison Knudsen's employees, at all times they were at the Harbor Island
7 jobsite, were entitled to the protections afforded them by Part P. The Board's determination
8 that whether a worker was entitled to these protections depended on the worker's particular job
9 activities and where on the jobsite the worker was situated was error.

10 31. In Citation Item 2-3, the Department cited a violation of WAC 296-62-30510(1)(d)
11 which requires an employer to make medical examinations and consultations available to
12 employees upon notification by an employee that the employee has developed signs or
13 symptoms indicating possible overexposure to hazardous substances or that the employee has
14 been exposed above the permissible exposure limits. Henry Egger testified in these
15 proceedings that he had nose bleeds, head aches, blurry vision and slight nausea and that he
16 reported these symptoms to Robert Johnson. The symptoms that Mr. Egger reported to
17 Mr. Johnson indicated a possible overexposure to hazardous substances or that Mr. Egger had
18 been exposed above the permissible exposure limits. However, in violation of
19 WAC 296-62-60510(1)(d), neither Mr. Johnson nor anyone else associated with
20 Morrison Knudsen made a medical examination or consultation available to Mr. Egger. The
21 Board erred when it found that the Department did not establish a violation of WAC 296-62-
22 30510(1)(d).

23 To the extent any Finding should be more properly characterized as a Conclusion of Law, or
24 vice versa, they shall be re-characterized as such.

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1 Based on the foregoing FINDINGS OF FACT, the court hereby makes the following:

2 **III. CONCLUSIONS OF LAW**

3 1. This Court has jurisdiction over these proceedings and venue is proper in King County.

4 2. This Court's August 9, 2004 Judgment and the Court of Appeals' decision affirming
5 that Judgment is the law of this case. Accordingly, it is the law of this case that:

6 a. Morrison Knudsen engaged in a "clean-up operation" at the Harbor Island Superfund
7 site;

8 b. Morrison Knudsen's Harbor Island Superfund site was an "uncontrolled hazardous
9 waste site." This included, as acknowledged by the IAJ, that "certain soils were found
10 to be contaminated and were stockpiled by Morrison Knudsen personnel to be removed
11 from the Island by employees of the Port." Thus, this included an operation where
12 hazardous substances were "removed, contained incinerated, neutralized, stabilized,
13 cleared up, or in any other manner processed or handled with the ultimate goal of
14 making the site safer for people or the environment."

15 c. Part P regulations applied to all activities performed by all of Morrison Knudsen's
16 employees at the entire Harbor Island site.

17 3. To demonstrate a WISHA violation, the Department is required to show exposure of
18 one or more employees to the hazard. "Exposure" includes both actual exposure to the hazard
19 and access to the hazard.

20 4. A "serious" violation exists where there is substantial probability that death or serious
21 bodily injury could result.

22 5. The Harbor Island site where Morrison Knudsen's employees worked contained an
23 accumulation of hazardous substances that created a threat to their health and safety and to the
24 environment.

25 6. Application of Part P in this matter does not depend on the specific activities performed
26 by individual workers and the specific location where those activities were performed. All of

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1 Morrison Knudsen's work on all of Harbor Island was covered by Part P. The Board acted
2 contrary to this Court's prior decision, as well as the Court of Appeals' decision, when it made
3 multiple determinations inconsistent with this conclusion.

4 7. The Board's Finding of Fact No. 1 is not supported by substantial evidence in the
5 record because it is an incomplete recitation of the procedural history in this case. It must be
6 supplemented as set out in Finding of Fact 15 above.

7 8. The Board's Findings of Fact Nos. 2, 3, 4, 5 and 37 are supported by substantial
8 evidence in the record and are affirmed.

9 9. The Board erred when it failed to include Finding of Fact No. 4 from its First D&O in
10 its D&O on Remand. That finding must be included in the Board's next decision in this
11 matter.

12 10. The Board's Finding of Fact No. 35 is not supported by substantial evidence in the
13 record because it contains language that is both incorrect and irrelevant to the citation item that
14 it purports to address. It must, therefore, be corrected by substituting language from Finding of
15 Fact No. 7 in the Board's First D&O for the current Finding of Fact No. 35 verbatim and
16 without the addition of other language.

17 11. The Board's Findings of Fact Nos. 6 through 34, 36, and 38 through 40 are not
18 supported by substantial evidence in the record, are contrary to law, are contrary to the law of
19 the case, and are set aside.

20 12. The Board's Conclusions of Law Nos. 1, 2, 3, 4 and 36 flow from the Board's Findings
21 of Fact and are affirmed.

22 13. The Board's Conclusion of Law No. 34 will flow from its Findings of Fact provided
23 that Finding of Fact No. 35 is corrected as set out above. With Finding of Fact No. 35
24 corrected, the Board's Conclusion of Law No. 34 flows from its Finding of Fact and will be
25 affirmed.

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1 14. The Board's Conclusions of Law Nos. 5 through 33, 35, and 37 through 40 are based
2 upon findings of fact that are not supported by substantial evidence in the record, are contrary
3 to law, are contrary to the law of the case, and otherwise do not flow from the Board's
4 Findings of Fact. They are therefore set aside.

5 15. Because the parties fully litigated the merits of the alleged violations before the IAJ,
6 there is no need for the Board to conduct further hearings in this matter or to supplement the
7 record in any other way.

8 IV. ORDER

9 Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby
10 Ordered, Adjudged and Decreed that:

11 1. The November 20, 2007 D&O on Remand is incorrect and is hereby reversed and set
12 aside.

13 2. This matter is remanded to the Board with instructions to issue a new decision and
14 order consistent with the Findings of Fact and Conclusions of Law contained herein and
15 consistent with this Court's August 9, 2004 Judgment and Order and the Court of Appeals'
16 August 15, 2005 decision.

17 3. The Board is instructed to base the new decision and order on the existing record. No
18 further hearings are to be held and the record is not to be supplemented in any other way.

19 4. The Board is further instructed to revise its Finding of Fact No. 1 to include a complete
20 procedural history of this matter.

21 5. The Board is further instructed to include findings and conclusions in the new decision
22 and order that incorporate Findings of Fact Nos. 2, 3, 4, 5 and 37 and Conclusions of Law
23 Nos. 1, 2, 3, 4 and 36 as these findings and conclusions appear in the November 20, 2007
24 D&O.

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- 1 6. This Court specifically reverses, vacates and sets aside Findings of Fact Nos. 6 through
2 34, 36, 38 and 39 and Conclusions of Law Nos. 5 through 33, 35, 37, 38 and 40 as they appear
3 in the November 20, 2007 D&O.
- 4 7. This Court reverses, vacates and sets aside Finding of Fact No. 40 and Conclusion of
5 Law No. 39. The Department established a violation of WAC 296-62-30510(1)(d) and the
6 court hereby affirms Citation Item 2-3.
- 7 8. The Board is further instructed to correct its Finding of Fact No. 35 so that it is
8 consistent with this Court's August 9, 2004 Judgment and Order, i.e., to be identical to Finding
9 of Fact No. 7 from the Board's First D&O without the addition of any other language. Once
10 this correction is made, the Board's order on remand shall also incorporate its Conclusion of
11 Law No. 34 from the D&O on Remand.
- 12 9. The Board is instructed to find and conclude that Morrison Knudsen engaged in a
13 "clean-up operation" at the Harbor Island Superfund site and that the entire Harbor Island
14 Superfund site was an "uncontrolled hazardous waste site" at the time of Morrison Knudsen's
15 work.
- 16 10. The Board is instructed to find and conclude specifically that all of Morrison Knudsen's
17 work at the entire Harbor Island worksite was covered by Part P, and that Morrison Knudsen
18 was required to comply with the standards contained therein at all times and for all employees,
19 regardless of the specific activities in which those employees were engaged and regardless of
20 where on the jobsite those employees were located.
- 21 11. The Board is instructed to find and conclude that Morrison Knudsen's Harbor Island
22 Superfund worksite was heavily contaminated with hazardous materials, including arsenic,
23 lead, mercury, TPHs, PCBs, and PAHs; that these hazardous materials constituted a hazard for
24 Morrison Knudsen's employees; and that Morrison Knudsen was aware of this hazard.
- 25 12. The Board is instructed to find and conclude that employees at Morrison Knudsen's
26 Harbor Island worksite were exposed to and/or had access to hazardous materials, including

1 arsenic, lead, mercury, TPHs, PCBs, and PAHs between November 1, 1999 and October 20,
2 2000. The Board is further instructed to find and conclude that this hazard and this exposure
3 was present at the entire jobsite at all times, and that the workers' exposure to this hazard did
4 not depend on the specific activities the workers were performing or where on the jobsite they
5 were performing them.

6 13. The Board is instructed to determine whether the violations found above constituted
7 "serious" or "general" violations. However, in making this determination the Board is
8 instructed to adhere to this Court's finding and conclusion that the Harbor Island site where
9 Morrison Knudsen's employees worked contained an accumulation of hazardous substances
10 that created a threat to their health and safety and to the environment.

11 14. The Board is further instructed to include in the new decision and order specific
12 findings and conclusions on the merits of each alleged violations. Based on the evidence
13 submitted by Morrison Knudsen during the hearing, Citation 1, Item 10 is to remain vacated.
14 Based on this Court's decision, Citation 2, Item 3 shall be affirmed.

15 15. Pursuant to RCW 4.84.010(1), Morrison Knudsen is ordered to pay to the Department
16 filing fees of \$110.00.

17 16. Pursuant to RCW 4.84.010(6) and RCW 4.84.080, Morrison Knudsen is ordered to pay
18 to the Department attorney fees totaling \$200.00.

19 17. This Court retains jurisdiction over this matter.
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21 DATED this 25th day of June, 2010.

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25 JOHN ERLICK, JUDGE
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