

No. 41765-1-II

COURT OF APPEALS, DIVISION TWO,  
OF THE STATE OF WASHINGTON

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IGNACIO CANO-GARCIA and MARIBEL CANO,

Appellants,

v.

KING COUNTY, WASHINGTON and JACOBS CIVIL INC.

Respondents.

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BRIEF OF APPELLANTS

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STATE OF WASHINGTON  
BY [Signature] DEPUTY  
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## I. INTRODUCTION

This action arises from construction site injuries to Plaintiff / Appellant Ignacio Cano-Garcia. Mr. Cano sustained severe chemical burns to both legs as a result of exposure to concrete while working on Defendant / Respondent King County's Brightwater Treatment System Project, which Defendant / Respondent Jacobs Civil Incorporated was hired to manage. Plaintiff / Appellant Maribel Cano brings her claims including loss of spousal consortium and expenses for her own mental health care as a result of her husband's injuries. The primary issue in this case is whether genuine issues of fact exist as to whether King County and Jacobs Civil retained sufficient supervisory authority or the right to control the work on the jobsite such that their authority is analogous to that of a general contractor. If so, summary judgment in favor of King County and Jacobs is inappropriate.

On December 5, 2008, Mr. Cano was working as a laborer on the Brightwater project. He was transferred to a concrete pour on the project that ultimately involved wading in a mixture of concrete and water that was over 15 inches deep. He was denied hip waders that would have kept the concrete away from his skin. Instead, he was told to use duct tape to tape his rain pants to his boots, which he did. As he worked in the concrete, the duct tape arrangement failed and allowed concrete to seep

into his boots and pants, but he did not notice the seepage or the damage until it was too late. Ultimately the concrete exposure burned the flesh from his legs, requiring skin graft surgery and resulting in permanent injury.

Mr. and Mrs. Cano bring their claims against King County and Jacobs Civil Incorporated (“Jacobs”) alleging breaches of three duties. The first is the statutory duty to protect Mr. Cano from violations of safety regulations promulgated under the Washington Industrial Safety and Health Act of 1973 (“WISHA”) as explained in Stute v. P.B.M.C., 114 Wn.2d 454, 788 P.2d 545 (1990) and applied under Weinert v. Bronco Nat. Co., 58 Wn. App. 692, 795 P.2d 1167 (Div. 1, 1990) to jobsite owners who retain the right to control the work. The second is the common law duty to provide a safe workplace under the retained control doctrine under described in Kelley v. Howard S. Wright Const. Co., 90 Wn.2d 323, 582 P.2d 500 (1978). In the background is the third duty, which is the common law duty owed by a possessor of land to an invitee. Division One of the Washington Court of Appeals recently affirmed and applied these three duties in Afoa v. Port of Seattle, \_\_\_ Wn. App \_\_\_, \_\_\_ P.3d \_\_\_, 2011 WL 612716, Div. 1 No. 64545-5-I (Feb. 22, 2011).<sup>1</sup>

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<sup>1</sup> The Port of Seattle filed a petition for review with the Supreme Court of Washington on March 23, 2011, which is currently pending.

Mr. and Mrs. Cano allege King County and Jacobs breached common law duties under the retained control doctrine by failing to provide Mr. Cano with a safe workplace. They allege that Mr. Cano was injured as a result of violations of specific WISHA regulations, including failure to provide him with adequate personal protective equipment (“PPE”), which constitutes a breach of King County’s and Jacobs’ statutory duties. They also allege that King County breached duties owed to an invitee by a possessor of land.

King County and Jacobs argue there is no evidence to show that they retained sufficient supervisory authority or the right to control the work for the duties to apply. Mr. and Mrs. Cano contend they have presented sufficient evidence to show genuine issues of fact that King County and Jacobs retained such authority and control to preclude summary judgment.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of error**

1. The trial court erred in its Order entered February 4, 2011 granting Defendant / Respondent King County Washington’s Motion for Summary Judgment dismissing Plaintiffs’ claims against Defendant King County.

2. The trial court erred in its Order entered February 4, 2011 granting Defendant / Respondent Jacobs Civil Incorporated's Motion for Summary Judgment dismissing Plaintiffs' claims against Defendant Jacobs Civil Incorporated.

**B. Issues pertaining to assignments of error**

1. Whether genuine issues of fact exist as to whether King County and Jacobs retained sufficient supervisory authority or the right to control the work on the jobsite such that their authority is analogous to that of a general contractor.

2. Whether King County and Jacobs owed Mr. Cano statutory duties under the specific duty clause of RCW 49.17.060 as interpreted in case law including Stute and Wienert to protect Mr. Cano from violations of WISHA safety regulations.

3. Whether King County and Jacobs owed Mr. Cano common law duties as described in Kelley and Afoa to provide a safe workplace under the retained control doctrine.

4. Whether genuine issues of fact exist as to whether King County and Jacobs breached duties owed by a possessor of land to a "business visitor" invitee.

### III. STATEMENT OF THE CASE

#### A. Facts related to Mr. Cano's Injuries

Ignacio Cano-Garcia was seriously injured on December 5, 2008 by exposure to hazardous materials on a concrete pour on the East Tunnel Conveyance of the Brightwater Treatment System Project at or near Woodinville, Washington.<sup>2</sup> The purpose of the concrete pour was to install a "mud mat," which is a temporary floor installed to facilitate further construction tasks over the following year, including recovery of the tunnel boring machine after tunneling operations.<sup>3</sup>

At the time, Mr. Cano was wearing 15 inch boots and rain pants, which were provided by his employer, joint venture Kenny / Shea / Traylor ("KST").<sup>4</sup> On that morning, Mr. Cano was initially tasked to work on the project at another location that did not involve pouring concrete.<sup>5</sup> He was transferred to the concrete pour, where he began work around noon.<sup>6</sup> King County and Jacobs allege that KST held a safety meeting that morning, but it is acknowledged Mr. Cano did not attend

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<sup>2</sup> CP 56-58 (Plaintiffs' First Amended Complaint, ¶ 3); See CP 205 (Brightwater Treatment System Map as discussed in the Oct. 29, 2010 Deposition of Leon Maday, CP 317-18, page 131:13 – 133:24).

<sup>3</sup> CP 301-302 (Deposition of Leon Maday, Oct. 29, 2010, page 55:60).

<sup>4</sup> CP 374-377 (Deposition of Ignacio Cano-Garcia, Dec. 20, 2010, pages 37:11 - 42:14 and 46:14 - 50-11.).

<sup>5</sup> CP 374-375 (Id. at 40:19 – 43:14).

<sup>6</sup> Id.

because he was still at the other location.<sup>7</sup> When they arrived, Mr. Cano and his co-worker, Marc Pointer, asked for hip waders from Joe Romo, the KST supervisor.<sup>8</sup> Mr. Romo did not provide the requested waders, and he instead instructed them to tie their rain pants to their boots using duct-tape, which they did.<sup>9</sup>

While working on the concrete pour, Mr. Cano's work required him to wade in a mixture of concrete and water for several hours.<sup>10</sup> The depth of this concrete exceeded the 15 inch height of his boots, although he had been told it would not before he started his work.<sup>11</sup> During this time, the concrete entered his boots and burned him.<sup>12</sup> But he did not realize the concrete was inside his pants and boots until he took them off at the end of his shift.<sup>13</sup>

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<sup>7</sup> CP 100 (Defendant Jacobs Civil's Motion for Summary Judgment, Page 3, lines 3-6.); CP 122-124 (KST Incident Report) This report includes allegations that a second meeting was held prior to the beginning of the concrete pour around noon that was "not written," but does not contain any specific allegations that Mr. Cano was present for this second meeting. Mr. Cano denies that he was included in any safety meetings that may have been held at the job site before the pour began. Mr. and Mrs. Cano do not concede that the KST Incident Report is admissible. *See also* CP 262-63 (December 23, 2008 "safety accident" e-mail from Devin Harmia and description of the incident as provided by Defendant Jacobs Civil in response to Plaintiffs' discovery requests and Bates marked JCI 01078 and JCI 01077).

<sup>8</sup> CP 374-377 (Deposition of Ignacio Cano-Garcia, page 37:11 - 42:14 and 46:14 - 50-11).

<sup>9</sup> *Id.*

<sup>10</sup> CP 382-383 (*Id.* at 83:7 - 87:1 describing work performed and authenticating photographs of the jobsite); 197-199 (Photographs of the jobsite.).

<sup>11</sup> *Id.*; CP 122-124 (The KST Incident Report lists the depth as approximately 18 inches.).

<sup>12</sup> CP 382-383 (*Id.* at 83:7 - 87:1 describing work performed and authenticating photographs of the jobsite); 197-199 (Photographs of the jobsite.).

<sup>13</sup> *Id.*

Mr. Cano reported the incident to KST safety manager Mark Sarlitto.<sup>14</sup> On his advice, Mr. Cano washed the concrete off, and applied vinegar and a chemical neutralizer.<sup>15</sup> His burn symptoms worsened overnight.<sup>16</sup> The next day he returned to the jobsite, from which Mr. Sarlitto took him to the Lakeshore clinic, where he was prescribed with topical cream and told to come back on the following Monday.<sup>17</sup> When he returned to the Lakeshore clinic on Monday, he was referred to Harborview Medical Center.<sup>18</sup> He was admitted at Harborview, where he stayed for over a week for treatment including skin graft surgery.<sup>19</sup>

Mr. Cano alleges he suffered permanent injuries as a result of this incident, as well as past and future medical expenses, wage loss, general damages, and other expenses.<sup>20</sup> Maribel Cano alleges she suffered loss of spousal consortium for her husband's injuries, expenses for her own mental health treatment, as well as general damages and other expenses as a result of this incident.<sup>21</sup>

Jacobs's safety manager, Connie Krier, who was assistant safety manager at the time, testifies that she does not believe rain pants tied to

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<sup>14</sup> CP 377-380 (Id. at 52 – 64); *See* CP 195 (Photographs of Mr. Cano's injuries).

<sup>15</sup> CP 377-380 (Id. at 52 – 64).

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> CP 63-64 (Plaintiffs' First Amended Complaint, ¶ 7).

<sup>21</sup> CP 64-65 (Plaintiffs' First Amended Complaint, ¶ 8).

boots with duct tape was the proper personal protective equipment (“PPE”) in that situation; at least she said she would never put her employees in that situation.<sup>22</sup> Her belief that this is inadequate is consistent with safety observation reports she made on December 9, 2008 and June 23, 2010.<sup>23</sup> Likewise, the safety observation reports of Clifford Feurtado dated December 9, 2008 and December 10, 2008 indicate his belief that Mr. Cano was injured as a result of improper PPE.<sup>24</sup>

**B. Facts related to the Brightwater Treatment System Project and control and management of the jobsite by King County and Jacobs**

King County’s website states that “King County is constructing a new regional wastewater treatment plant, called Brightwater.”<sup>25</sup> This project includes three major tunnel conveyance projects, plus three facilities contracts,<sup>26</sup> with a total budget currently estimated at about \$1.8 billion.<sup>27</sup> King County Project Representative Leon Maday, in his individual capacity and as King County’s CR 30 (b)(6) designee, testifies that approximately eight “main entities” contracted directly with King County to get the work done on the Brightwater project, including six

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<sup>22</sup> CP 345-349 (Deposition of Connie Krier, Dec. 7, 2010, Page 61:24 – 77:9).

<sup>23</sup> Id.; CP 279-280 (Safety Observation Reports of Connie Krier dated December 9, 2008 and June 23, 2010).

<sup>24</sup> CP 276-277 (Safety Observation Reports of Clifford Feurtado dated December 9, 2008 and December 10, 2008).

<sup>25</sup> CP 201 (<http://www.kingcounty.gov/environment/wtd/construction/north/brightwater.aspx> (last visited Jan. 17, 2011)).

<sup>26</sup> CP 294 (Deposition of Leon Maday, page 9:5-9).

<sup>27</sup> CP 299 (Id. at 42:11-14).

companies working on the conveyances.<sup>28</sup> Construction on the project began in 2006 and was scheduled for completion in 2011.<sup>29</sup> The conveyance system is planned “to include 13 miles of pipeline built in underground tunnels 40 to 440 feet below the surface.”<sup>30</sup> King County develops numerous projects in the Puget Sound region, including treatment plants and conveyance systems.<sup>31</sup>

Jacobs prepared a “Construction Management Organization” chart that shows the interaction between King County and Jacobs on the project, as well as interactions with other consultants and sub-consultants on the project.<sup>32</sup> This chart was prepared by Ven-Hung Tseng, Jacobs’ “project control manager” and scheduler.<sup>33</sup> Mr. Tseng also prepared a detailed “Project Master Schedule” that describes and tracks the tasks performed on the entire project.<sup>34</sup> Leon Maday for King County testified that this schedule was an “overall project management tool for the county.”<sup>35</sup> On this schedule, Mr. Maday circled the task that Mr. Cano was working on at

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<sup>28</sup> CP 298 (Id. at 38:4 – 40:15).

<sup>29</sup> CP 148-149 (Declaration of Leon Maday in Support of King County’s Motion for Summary Judgment, ¶ 2.).

<sup>30</sup> Id.

<sup>31</sup> CP 203 (Map labeled “System Investments”); CP 317 (Deposition of Leon Maday, pages 130:3 – 131:12).

<sup>32</sup> CP 207 (Construction Management Organization Chart); CP 318-319 (Deposition of Leon Maday, pages 136:20 – 140:1).

<sup>33</sup> CP 319 (Deposition of Leon Maday, pages 140:22 – 141:11).

<sup>34</sup> CP 247 (Project Master Schedule); CP 320-324 (Deposition of Leon Maday, Oct. 29, 2010, pages 141:12 – 147:17 and 154:9 – 157:8).

<sup>35</sup> CP 320 (Deposition of Leon Maday, pages 141:24-142:5).

the time of the incident, which ultimately was for the removal of a tunnel boring machine from the treatment plant portal at the end of the east conveyance tunnel.<sup>36</sup> Mr. Maday also testifies that schedule is only a summary and that the specifications required KST to provide and update a more detailed chart of activities and tasks, which ran approximately 16 pages.<sup>37</sup>

Leon Maday was King County's Project Representative for the East Tunnel Contract.<sup>38</sup> At the time of the incident, Mr. Maday reported to King County Project Manager Judy Cochran.<sup>39</sup> The chart includes yellow arrows labeled "project-wide coordination" between King County personnel and that of Jacobs and its "sub-consultants" including CH2M Hill and KBA.<sup>40</sup> It is undisputed that these "sub-consultants" are agents of Jacobs, and that Jacobs was hired by King County.<sup>41</sup> In describing this "project wide coordination," Mr. Maday explained, "we work together and collaborate together to get the job done, which is to manage the KST contract and get the work completed per the contract."<sup>42</sup>

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<sup>36</sup> CP 321 (Id. at 146:5 – 147:7).

<sup>37</sup> CP 320- 321 (Id. at 144:18 – 145:6).

<sup>38</sup> CP 318-319 (Id. at 136:20 – 140:1).

<sup>39</sup> Id.

<sup>40</sup> Id.; CP 338 (Deposition of Connie Krier, Page 30:9 – 31:5).

<sup>41</sup> CP 318-319 (Deposition of Leon Maday, pages 136:20 – 140:1); CP 356 (Deposition of John Critchfield, Dec. 7, 2010, pages 22:24 – 23:25).

<sup>42</sup> CP 319 (Deposition of Leon Maday, page 138:11-13).

**C. Facts related to control retained by King County and Jacobs under King County’s contract with Jacobs**

King County contracted with Jacobs to provide “Construction Management Services” for the Brightwater Conveyance Project.<sup>43</sup> John Critchfield, testifying as Jacobs’ CR 30 (b)(6) designee, stated that Jacobs was “essentially an extension staff for King County.”<sup>44</sup> He explained that Jacobs’ construction management services involved a number of tasks including project management, project controls (scheduling), cost control and estimating, information management, contract administration, resident engineering and inspection, and unplanned work.<sup>45</sup> Jacobs was not an architect or design engineer on the project.<sup>46</sup>

The contract required not only that Jacobs provide its own written health and safety program, but that it also make recommendations to King County for its review and approval of KST’s safety program submittals.<sup>47</sup> The contract also describes “Team Building Workshops” to be held by Jacobs that includes “King County staff directly involved in construction

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<sup>43</sup> CP 225-237 (Amendment No. 1 to “Construction Management Services Agreement” between King County and Jacobs); CP 239-245 (Amendment No. 2 to “Construction Management Services Agreement” between King County and Jacobs); CP 327-331 (Deposition of Leon Maday, pages 170:19 – 188:1).

<sup>44</sup> CP 355 (Deposition of John Critchfield, page 10:11-23).

<sup>45</sup> CP 335 (Id. at 10:24 – 11:19); CP 366-371 (Detailed discussion of Jacobs’ contract with King County in John Critchfield’s deposition).

<sup>46</sup> CP 300 (Deposition of Leon Maday, page 46:7- 48:15) Defendant Jacobs Civil is not to be confused with Jacobs Associates, a completely separate and unrelated company that was involved as a design engineer on the project.

<sup>47</sup> CP 229; CP 328 (Deposition of Leon Maday, pages 173:24 – 175:23).

management activities.”<sup>48</sup> Mr. Maday reports that he attended some of these workshops, which also included KST personnel.<sup>49</sup> Jacobs brought in an outside “facilitator” to work with issues involving scheduling, costs, environmental issues, organizational issues, “all in support of trying to get the job done more efficiently.”<sup>50</sup> Mr. Maday agreed that “the goal of these meetings [was] to get all parties to function together as a team.”<sup>51</sup>

**D. Facts related to control retained by King County and Jacobs under King County’s contract with KST**

King County’s contract with Mr. Cano’s employer, KST, includes a section on health and safety<sup>52</sup> and a safety incentive program.<sup>53</sup> The “Health and Safety” section requires that KST comply with various safety requirements, including those established by law including WISHA regulations.<sup>54</sup> Under this section, the King County Project Representative “reserves the right to audit” KST’s Accident Prevention Program (“APP”) and its “implementation” of its Health and Safety Plan (“HASP”).<sup>55</sup>

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<sup>48</sup> CP 234; CP 329 (Deposition of Leon Maday, pages 177:2 – 179:14).

<sup>49</sup> CP 329 (Deposition of Leon Maday, pages 177:2 – 179:14).

<sup>50</sup> CP 329 (Id. at 178:18 – 179:4).

<sup>51</sup> CP 329 (Id. at 179:12-14).

<sup>52</sup> CP 209-217 (Section 01063 of the Contract between King County and KST titled “Health and Safety,” Bates marked KC000487 – KC 000495); CP 324-327 (Deposition of Leon Maday, pages 157:9 – 169:15).

<sup>53</sup> CP 219-223 (Section 01064 of the Contract between King County and KST titled “Safety Incentive Program,” Bates marked KC000497 – KC 000501); CP 327 (Deposition of Leon Maday, pages 169:16 – 170:18).

<sup>54</sup> CP 209-217; CP 324 (Deposition of Leon Maday, pages 157:9 – 160:1).

<sup>55</sup> CP 209-217, KC 000493-494; CP 324 (Deposition of Leon Maday, pages 159:10 – 160:24).

Leon Maday testified that he was the King County Project Representative for the East Contract.<sup>56</sup> The contract provided him with the authority to stop KST's work if it is "determined to be an imminent or immediate threat to worker health or safety."<sup>57</sup> It also provides that KST immediately correct ongoing work and hazardous situations "that are considered a safety or health risk by the Project Representative."<sup>58</sup> Mr. Maday also testified that "the authority has been given to me to do these things" and that he could "delegate this authority" to Jacobs.<sup>59</sup>

The contract also provides that if King County's Project representatives determine that KST's safety programs or safety plans are "inadequate," KST is required to modify its plans.<sup>60</sup> Mr. Maday agreed that under this provision, if King County or Jacobs determines KST's safety plans to be inadequate, they could require KST to modify its safety plans.<sup>61</sup> Further, KST's modifications to its safety plans must be accepted by King County, through its Project Representative, prior to changing work practices.<sup>62</sup>

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<sup>56</sup> Id.

<sup>57</sup> CP 215, KC 000493, §3.01 B.

<sup>58</sup> CP 216, KC 000494, §3.01 C.

<sup>59</sup> CP 324-325 (Deposition of Leon Maday, pages 160:16 – 161:1).

<sup>60</sup> CP 216, KC 000494, §3.02.

<sup>61</sup> CP 326 (Deposition of Leon Maday, pages 165:11 – 167:1).

<sup>62</sup> Id.

The health and safety section of the contract also includes enforcement provisions that provide King County with the authority to stop KST's work for failure to comply with the health and safety section as well as for imminent hazards.<sup>63</sup> Once stopped for such reasons, KST can only resume work "only after the hazard concerns have been corrected to the satisfaction of [King County's] Project Representative."<sup>64</sup> Mr. Maday confirmed that King County had this authority over KST and that Jacobs also had this authority as delegated by King County.<sup>65</sup>

**E. Facts relating to the exercise of authority by King County and Jacobs through King County's Safety Incentive Program and Safety Evaluation Reports**

King County's Contract with KST also included a safety incentive program, under which KST could earn up to \$500,000.00 in incentives or lose up to \$300,000.00 in incentives related to safety.<sup>66</sup> KST's incentives were determined by the number of "recordable" injury incidents on the job and by the results of Safety Evaluation Reports ("SER").<sup>67</sup> The contract establishes the "SER Process," under which a safety evaluation team is

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<sup>63</sup> CP 217, KC 000495, §3.07.

<sup>64</sup> Id.

<sup>65</sup> CP 326 (Deposition of Leon Maday, pages 165:11 – 169:15).

<sup>66</sup> CP 219-223 (Section 01064 of the Contract between King County and KST titled "Health and Safety," Bates marked KC000497 – KC 000501); CP 327 (Deposition of Leon Maday, pages 169:16 – 170:18).

<sup>67</sup> Id.; See CP 311 (Deposition of Leon Maday, pages 93:16 – 107:11 discussing "recordable" incidents and SER's); See CP 358-360 (Deposition of John Critchfield, pages 33:8 – 34:21 discussing "recordable" incidents and 34:21-40:8 discussing SER's); See CP 339-340 (Deposition of Connie Krier, pages 34:21 – 40:8 discussing SER's); See also WAC 296-27-01107, General Recording Criteria.

established, and detailed “performance based evaluation of all work” is conducted every six months until substantial completion of the work.<sup>68</sup>

The SER inspection team included two representatives from KST, two from King County, and one from Jacobs.<sup>69</sup> The scope of these inspections included “about 23 category items of all kinds of different things from maintenance to some paperwork to housekeeping to electrical items, fire protection items, all kinds of things like that.”<sup>70</sup> These items specifically included personal protective equipment (“PPE”) and hazardous materials, including those involved in the concrete with which Mr. Cano was working.<sup>71</sup>

The SER results were produced from a collaborative inspection process by the inspection team. The team would meet before the inspection to discuss administrative issues, then they would inspect the site. During the inspection, each team member would look for various safety issues and interview people on the site. The team members may split up or they may stay together. At the end of the inspection they would meet to reach an agreement on one number for each score. The team’s

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<sup>68</sup> CP 220, KC 000498, §1.06 E. KST also had separate incentives for early completion of the tunnel which may have been \$11,000.00 per day. KST missed its January 13, 2008 target date by three days, though this and / or the reasons for this are subjects of a pending dispute. CP 322-323 (Deposition of Leon Maday, pages 150:4 – 154:7).

<sup>69</sup> Id.; CP 312-313 (Deposition of Leon Maday, pages 99:8 – 104:9).

<sup>70</sup> CP 312 (Deposition of Leon Maday, pages 98:3-8).

<sup>71</sup> CP 313-314 (Id. at 102:10 –108:9).

findings would be consolidated in Constructware, the project management collaboration software used on the job, and KST would have additional opportunities to comment before the report was finalized.<sup>72</sup>

Jacobs provided a detailed “Safety Evaluation Scoring Form” in response to Plaintiffs’ discovery requests.<sup>73</sup> Although this particular form is described as having been prepared for Jacobs’ internal use, it is substantially similar to those prepared in SER inspections.

**F. Facts related to the exercise of authority by King County and Jacobs through Constructware and the Submittal Review process**

King County hired Jacobs to set up the project management information system. Jacobs implemented Autodesk Constructware, which is believed to have been purchased by King County, stored on Autodesk’s servers, and accessed through the Internet.<sup>74</sup> This system was used to store and access documents relating to the project, and all official communications on the project went through Constructware, including those involving King County, Jacobs, and KST.<sup>75</sup> Mr. Maday describes the installation and use of Constructware by King County, Jacobs and

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<sup>72</sup> CP 361-365 (Deposition of John Critchfield, pages 45:20 – 58:20).

<sup>73</sup> CP 249-260 (“Safety Evaluation Scoring Form” as cropped for printing).

<sup>74</sup> CP 295 (Deposition of Leon Maday, pages 28:24 – 29:11); CP 306-308 (Id. at 73:15 – 81:6); *See also* CP 287-290 (Autodesk Constructware Brochure from [http://images.autodesk.com/adsk/files/constructware\\_overview\\_fy08.pdf](http://images.autodesk.com/adsk/files/constructware_overview_fy08.pdf) (last visited Jan. 23, 2011)).

<sup>75</sup> Id.

KST personnel. He also reports that Intellect software was also used on some parts of the Brightwater project, but not on the east tunnel conveyance.<sup>76</sup>

As described above, King County's contract with KST required that KST implement certain safety standards including an Accident Prevention Program ("APP"). King County hired Jacobs to manage the contract and enforce contract provisions, including safety requirements of the contract.<sup>77</sup> Under these provisions, KST was required to submit its proposed APP, and King County could comment on KST's submittal and had the ultimate authority to reject it. Jacobs would review KST's submittal, make any comments it deemed appropriate, and make recommendations to King County as to whether it be rejected. This was all done through Constructware and was known as the "submittal review" or "submittal requirements" process.<sup>78</sup>

Under this submittal review process, KST is required to submit its plans to Jacobs and King County for them to review "prior to doing the work."<sup>79</sup> These submission requirements are not limited to KST's safety programs, but include "all the technical submittals, all the method

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<sup>76</sup> Id.

<sup>77</sup> CP 302-303 (Deposition of Leon Maday, pages 60:11 – 61:10).

<sup>78</sup> CP 303-306 (Id. at 63:2 – 73:13).

<sup>79</sup> CP 304 (Id. at 67:12 – 19).

statements, [and] all the products they're going to use.”<sup>80</sup> Once a submission is made, there are five possible dispositions.<sup>81</sup> The first one is “no exceptions taken” and the work can proceed.<sup>82</sup> The second includes “Note Markings” or comments, and KST may “begin to implement the work covered in the submittal in accordance with the markings noted.”<sup>83</sup> Dispositions three, four, and five all require KST to revise and resubmit its submittal, in which case KST cannot proceed with the work until King County returns it with a disposition of one or two.<sup>84</sup>

**G. Facts related to the exercise of authority by King County and Jacobs through safety meetings, progress meetings, and Safety Observation Reports by Jacobs inspectors**

Periodic progress meetings and safety meetings were held on the project that included personnel from King County, Jacobs, and KST. Progress meetings involved discussing the work, scheduling, and going through everything to be done, while safety meetings addressed safety issues.<sup>85</sup>

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<sup>80</sup> Id.

<sup>81</sup> CP 303-306 (Id. at 63:2 – 73:13); CP 282-285 (Section 01300 of the Contract between King County and KST titled “Health and Safety,” Bates marked KC000536 – KC 000539).

<sup>82</sup> CP 303-306 (Deposition of Leon Maday, pages 63:2 – 73:13); CP 284-285 (KC 00538 – KC 000539).

<sup>83</sup> Id.

<sup>84</sup> Id.; See also CP 357-358 (Deposition of John Critchfield, pages 27:2 – 31:23).

<sup>85</sup> CP 315-316 (Deposition of Leon Maday, pages 111:10 – 115:4 discussing progress meetings); CP 310 89:2 – 90:22 (Id. discussing safety meetings); CP 336 (Deposition of Connie Krier, pages 22 – 23).

John Critchfield reports that Jacobs' inspectors were constantly on site to observe and report KST's activities and to note discrepancies between the activity and contract requirements, and that they "track the activities of each shift in terms of what is occurring, more or less minute by minute."<sup>86</sup> In addition to preparing daily inspection reports ("DIRs"), these inspectors would prepare a safety observation report ("SOR") if they noted that KST was doing something that did not comply with its safety responsibilities under the contract.<sup>87</sup> Jacobs admits its inspectors had the authority to conduct safety inspections within that scope, and they had the authority to discuss their findings with KST employees.<sup>88</sup> Mr. Critchfield states that under the SOR process, "an issue is identified and a resolution is achieved" and that "[s]omehow or another, the issue is resolved if it needs action."<sup>89</sup> He explained this would happen once the Jacobs inspector brought the safety issue to the attention of KST.<sup>90</sup> Mr. and Mrs. Cano submitted examples of these SORs, including "observation details," "immediate corrective action" and "action to prevent recurrence" as filed

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<sup>86</sup> CP 356 (Deposition of John Critchfield, page 24:1-25).

<sup>87</sup> CP 358 (Id. at 31:24 – 32:24).

<sup>88</sup> CP 360 (Id. at 38:14-24).

<sup>89</sup> CP 360 (Id. at 41:16 – 19).

<sup>90</sup> CP 360-361 (Id. at 40:25 –42:12).

by inspector Noah Brenner on a variety of issues, which illustrate the level of involvement of these inspectors on the project.<sup>91</sup>

#### **H. Procedural history**

Mr. and Mrs. Cano filed suit against King County on February 10, 2010 in Pierce County Superior Court.<sup>92</sup> The case was initially assigned to Judge Lisa Worswick, but was reassigned by the Court to Judge Elizabeth Martin on May 19, 2010.<sup>93</sup> King County filed its Answer to Mr. and Mrs. Cano's initial Complaint on March 8, 2010.<sup>94</sup> After some initial discovery, Mr. and Mrs. Cano moved to amend their complaint to join Jacobs as a defendant.<sup>95</sup> King County denied the Canos' allegations, but agreed to allow them to amend their Complaint.<sup>96</sup> The Court granted Leave to Amend, and the Amended Complaint was filed on July 2, 2010.<sup>97</sup> Jacobs and King County filed Answers to the Canos' First Amended Complaint on July 27, 2010 and July 29, 2010, respectively.<sup>98</sup>

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<sup>91</sup> CP 265-274 (Safety Observation Reports of Noah Brenner).

<sup>92</sup> CP 1-9 (Plaintiffs' Complaint).

<sup>93</sup> CP 19 (Reassignment Letter).

<sup>94</sup> CP 1-9 (Plaintiffs' Complaint).

<sup>95</sup> CP 20-50 (Plaintiffs' Motion for Leave to Amend Complaint).

<sup>96</sup> See CP 51-53 (King County's Response to Plaintiffs' Motion for Leave to Amend Complaint). The parties had previously submitted a stipulation and proposed order granting leave to Amend. The Court requested a motion be filed and noted with oral argument to discuss case scheduling.

<sup>97</sup> See CP 66-73 (Orders granting leave to amend and amending case schedule, with minute entry); CP 54-65 (Plaintiffs' First Amended Complaint).

<sup>98</sup> CP 74-85 (Jacobs' Answer to Plaintiffs' First Amended Complaint); CP 86-97 (King County's Answer to Plaintiffs' First Amended Complaint).

On October 1, 2010, Jacobs and King County both filed motions for summary judgment dismissing Mr. and Mrs. Cano's case.<sup>99</sup> The Court granted both motions on February 4, 2011.<sup>100</sup> Mr. and Mrs. Cano appealed.

#### IV. ARGUMENT

Mr. and Mrs. Cano have presented sufficient evidence to raise genuine issues of material fact as to whether King County and its agent, Jacobs, had innate supervisory authority over the jobsite and retained the right to control the manner of Mr. Cano's work such that this authority is analogous to that of a general contractor. If King County and Jacobs Civil had this authority, then it owed Mr. Cano duties under WISHA to protect him from violations of WISHA regulations and duties to provide him with a safe workplace under the retained control doctrine. Mr. Cano has also presented sufficient evidence to show genuine issues of material fact that he was injured as a result of specific violations of WISHA regulations including failure to provide him with adequate PPE, as a result of failure

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<sup>99</sup> CP 98-108 (Jacobs' Motion for Summary Judgment); CP 127-139 (King County's Motion for Summary Judgment). Initially noted for November 19, 2010, King County and Jacobs agreed to re-note their motions for February 4, 2011 to allow for the depositions of Leon Maday, Connie Krier, and the CR 30 (b) (6) designees of King County and Jacobs. Leon Maday also testified as King County's designee; John Critchfield testified as Jacobs' designee.

<sup>100</sup> CP 478-479; CP 480-482

to provide him with a safe workplace, and as a result of breaches of duties owed to a business visitor invitee by a possessor of land.

Whether King County and Jacobs owed duties under WISHA and the retained control doctrine is a fact-based determination for which summary judgment is inappropriate. These duties are concurrently held by all entities who retain the right to control the work. A showing of actual control is not required. It is also inappropriate to consider any payments made by the Washington Department of Labor and Industries as a result of the accident or to apportion liability to Mr. Cano's employer, KST, which is immune under Title 51 RCW.

**A. Standard of review and elements of negligence**

On a motion for summary judgment, the moving party has the burden of showing the absence of a genuine issue of material fact and an entitlement to judgment as a matter of law. CR 56. Summary judgment is appropriate only if, from all the evidence, reasonable persons could reach but one conclusion. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). In an action for negligence a plaintiff must prove four basic elements: (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994). While the existence of a legal duty is generally a question of law, Degel v. Majestic Mobile

Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996), where duty depends on proof of certain facts that may be disputed, summary judgment is inappropriate. Sjogren v. Props. of Pacific N.W., LLC, 118 Wn. App. 144, 148, 75 P.3d 592 (Div. 2, 2003). “A duty can arise either from common law principles or from a statute or regulation. A duty can also arise contractually.” Kennedy v. Sea-Land Service, Inc., 62 Wn. App. 839, 816 P.2d 75 (Div. 1, 1991). The facts and reasonable inferences from those facts are considered in a light most favorable to the nonmoving party. Babcock v. Mason County Fire Dist. No. 6, 144 Wn.2d 774, 784, 30 P.3d 1261 (2001).

“It is well settled under Washington law that [the appellate court] reviews a summary judgment de novo.” Fell v. Spokane Transit Auth., 128 Wn.2d 618, 625, 911 P.2d 1319 (1996). When reviewing a motion for summary judgment, the appellate court engages in the same inquiry as the trial court. Marks v. Wash. Guar. Ass'n, 123 Wn. App. 274, 277, 94 P.3d 352 (Div. 2, 2004). “Like the trial court[s], [appellate courts] consider facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party.” Id. The trial court's findings and its reasoning are entitled to no deference on appeal. Chelan County Deputy Sheriffs Ass'n v. Chelan County, 109 Wn.2d 282, 294 n.6, 745 P.2d 1 (1987). Statutory construction is also a question of law to be

reviewed de novo. Pacheco v. Ames, 149 Wn.2d 431, 436, 69 P.3d 324 (2003).

**B. It is undisputed that Jacobs was an agent of King County and evidence shows King County, Jacobs, and KST were acting in concert.**

It is undisputed that King County hired Jacobs to provide construction management services on the Brightwater project, and that Jacobs and its personnel were acting within the scope of its agency. It is also undisputed that Jacobs' "sub-consultants," including CH2M Hill and KBA and their personnel, including their inspectors, were acting within the course and scope of their agency with Jacobs. A business entity can act only through its agents, and when its agents act within the scope of their actual or apparent authority, their actions are the actions of the entity. Mauch v. Kissling, 56 Wn. App. 312, 316, 783 P.2d 601 (1989); American Seamount Corp. v. Science and Engineering Associates, Inc., 61 Wn.App. 793, 796–97, 812 P.2d 505 (1991)); WPI 50.18. Therefore King County is liable for the acts and omissions of its agent, Jacobs, who in turn is liable for the acts and omissions of its agents.

There is also evidence to show that King County and Jacobs were "acting in concert" under RCW 4.22.070 (a), which provides for joint

liability of defendants who were acting in concert.<sup>101</sup> Yong Tao v. Heng Bin Li, 140 Wn. App. 825, 166 P.3d 1263 (Div. 3, 2007), *review denied*, 163 Wn.2d 1045, 187 P.3d 271 (2008). To be liable for “acting in concert” they must be consciously acting together in an unlawful or negligent manner which was a proximate cause of the plaintiff’s injuries; intent to harm the plaintiff is not required. RCW 4.22.070(1)(a); Yong Tao v. Heng Bin Li, 140 Wn. App. 825, 166 P.3d 1263 (Div. 3, 2007), *review denied*, 163 Wn.2d 1045, 187 P.3d 271 (2008); Kottler v. State, 136 Wn.2d 437, 448, 963 P.2d 834 (1998); Gilbert H. Moen Co. v. Island Steel Erectors, Inc., 75 Wn. App. 480, 487-88, 878 P.2d 1246 (1994), *rev’d on other grounds*, 128 Wn.2d 745, 912 P.2d 472 (1996).

A party acting in concert in a negligent manner with an immune entity, such as Mr. Cano’s direct employer under Title 51 RCW, may also be liable to the injured plaintiff for the immune entity’s share of negligence. *See* 16 Wash. Prac., Tort Law And Practice § 12.22 (3d ed.).

Evidence showing action in concert includes the degree of collaboration between King County, Jacobs, and KST. This is shown by their regular progress and safety meetings, the collaborative

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<sup>101</sup> RCW 4.22.070 (a) provides:

A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

Constructware process, as well as statements showing that Jacobs was an extension of King County's staff.

**C. Under Stute, Weinert, and RCW 49.17.060, King County and Jacobs owed Mr. and Mrs. Cano non-delegable duties to provide a workplace free of WISHA violations.**

Ignacio Cano-Garcia alleges he was injured as a result of King County's and Jacobs' breaches of duties to provide him with a workplace free of violations of specific regulations promulgated under the Washington Industrial Safety and Health Act of 1973 (WISHA). Under RCW 49.17.060 (2), an employer owes a duty to every worker at a job site, including workers employed by others, to ensure that it and its workers' employers comply with WISHA regulations.

Mr. Cano alleges King County and Jacobs owed him these duties under Washington law, including Stute v. P.B.M.C. Inc., 114 Wn.2d 454, 788 P.2d 545 (1990) and Weinert v. Bronco Nat. Co., 58 Wn. App. 692, 795 P.2d 1167 (Div. 1, 1990) because they retained control of the job site and were in the best position to ensure his employer's compliance with safety regulations. This Stute / Weinert duty applies when a plaintiff's injuries are caused by a specific WISHA violation, and when either the defendant is a general contractor or the defendant retains the right to control the work performed on jobsite.

1. **Under RCW 49.17.060 (2), employers owe a duty to all workers on a job site, not just their own employees, to protect them from specific WISHA violations.**

The “specific duty” clause of RCW 49.17.060 provides a duty for an employer to protect all employees on a job site from specific WISHA violations. RCW 49.17.060 applies to “each employer” and includes two clauses.<sup>102</sup> The first clause provides a general duty to “furnish to each of his employees a place of employment free from recognized hazards.” As discussed by the Washington Supreme Court in both Stute v. P.B.M.C. Inc., 114 Wn.2d 454, 457-58, 788 P.2d 545 (1990) and Adkins v. Aluminum Co. of America, 110 Wn.2d 128, 152-53, 750 P.2d 1257, 1272 (1988) this “general duty clause” applies only to an employer’s direct employees. The second clause “imposes a specific duty to comply with WISHA regulations” Stute, 114 Wn.2d at 457 and “extends to employees of independent contractors when a party asserts that the employer did not follow particular WISHA regulations.” Id. The Washington Supreme Court in both Stute and Adkins followed its decision in Goucher v. J.R.

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<sup>102</sup> RCW 49.17.060 provides:

Each employer:

- (1) Shall furnish to each of his employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his employees: PROVIDED, That no citation or order assessing a penalty shall be issued to any employer solely under the authority of this subsection except where no applicable rule or regulation has been adopted by the department covering the unsafe or unhealthful condition of employment at the work place; and
- (2) Shall comply with the rules, regulations, and orders promulgated under this chapter.

Simplot Co., 104 Wn. 2d 662, 709 P.2d 774, 780 (1985). In Goucher, the court adopted the reasoning of the federal Sixth Circuit Court of Appeals in Teal v. E.I. DuPont de Nemours & Co., 728 F.2d 799 (6th Cir.1984). The Teal court examined 29 U.S.C. § 654(a), the federal OSHA counterpart to RCW 49.17.060, and found its specific duty clause established a duty for an employer to protect all employees on its premises, not just its own, from violations of specific safety regulations. The Goucher court described the Teal court's reasoning as:

When a party relies on the general duty clause, only those parties who are employees of the employer are protected. On the other hand, when a party relies on the specific duty clause on the ground that the employer failed to comply with a particular OSHA standard or regulation, then *all* of the employees who work on the premises of another employer are members of the protected class.

Goucher v. J.R. Simplot Co., 104 Wn. 2d 662, 672-673, 709 P.2d 774 (1985) (emphasis in original). The Goucher court found “this rationale to be sound and [held the plaintiff], in alleging the violation of particular WISHA regulations, [was] a member of the protected class.” Id. at 673.

- 2. Under Stute, a general contractor has *per se* control and non-delegable duties to protect all workers on its jobsite from WISHA violations.**

In Stute v. P.B.M.C. Inc., 114 Wn.2d 454, 788 P.2d 545 (1990) the Washington Supreme Court found RCW 49.17.060 (2) established a “**nondelegable** duty on general contractors to provide a safe place to work for employees of subcontractors” by ensuring its subcontractors comply with WISHA regulations. Stute, 114 Wn.2d at 463 (emphasis added). The Court explained a “general contractor’s supervisory authority is **per se** control over the workplace, and the duty is placed upon the general contractor as a matter of law.” Id. at 464 (emphasis added). The Court held “the general contractor should bear the primary responsibility for compliance with safety regulations because the general contractor’s **innate supervisory authority** constitutes sufficient control over the workplace.” Id. (emphasis added). This responsibility is justified as a “general contractor’s supervisory authority places the general in the best position to ensure compliance with safety regulations.” Id. at 463.

**3. There is a genuine issue of material fact as to whether King County or Jacobs were, in fact, general contractors on the Brightwater Project; their labels are not dispositive.**

While King County and Jacobs have labeled KST as the “general contractor” and Jacobs as a “construction manager,” such labels are not dispositive. There is evidence from which a finder of fact can infer that King County was, in fact, a general contractor on the Brightwater project.

King County, through its Wastewater Treatment division, is clearly in the business of building treatment plants and conveyance systems such as those constructed in the Brightwater project.<sup>103</sup> King County contracted with eight “main entities” to get the work done on the Brightwater project, including six companies working on the conveyances.<sup>104</sup> The project includes three major tunnel conveyance projects, plus three facilities contracts,<sup>105</sup> with a total budget estimated at about \$1.8 billion.<sup>106</sup>

Similarly, there is also evidence to support a finding that Jacobs was a general contractor on the project, as it was hired to manage the project “and get the work completed per the contract.”<sup>107</sup> To that end, Jacobs provided a detailed “Project Master Schedule” tracking each task on the project in detail,<sup>108</sup> provided construction management services including project management, project controls (scheduling), cost control and estimating, information management, contract administration, resident engineering and inspection, and unplanned work.<sup>109</sup> Jacobs implemented and administered the Constructware system, was intimately involved in

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<sup>103</sup> See CP 203 (Map labeled “System Investments”); CP 317 (Deposition of Leon Maday, pages 130:3 – 131:12).

<sup>104</sup> CP 298 (Deposition of Leon Maday, pages 38:4 – 40:15).

<sup>105</sup> CP 294 (Id. at 9:5-9).

<sup>106</sup> CP 299 (Id. at 42:11-14).

<sup>107</sup> CP 319 (Deposition of Leon Maday, page 138:11-13).

<sup>108</sup> CP 247 (Project Master Schedule); CP 320-324 (Deposition of Leon Maday, Oct. 29, 2010, pages 141:12 – 147:17 and 154:9 – 157:8).

<sup>109</sup> CP 335 (Id. at 10:24 – 11:19); CP 366-371 (Detailed discussion of Jacobs’ contract with King County in John Critchfield’s deposition).

the submittal review process, and had inspectors on site on a constant basis to monitor and track construction activities on a “minute by minute” basis.<sup>110</sup>

Although King County chooses to call each of the eight or more entities working for it on the project “general contractors,” a jury may find that these entities are actually subcontractors to King County and that King County is, in fact, a general contractor on the project. A jury may also find that although KST contracted with King County rather than with Jacobs directly, Jacobs was a general contractor for the purpose of Stute analysis.

Division One recently rejected a similar attempt to label away a defendant’s duties in Afoa v. Port of Seattle. In Afoa, the defendant Port claimed the contract with the plaintiff’s employer, EAGLE, was merely a “license agreement.” Division One found such labels to be “immaterial,” explaining:

Whether the agreement between the Port and EAGLE is called a “license agreement” or any other term is immaterial. Nor does it matter that the Port does not consider EAGLE to be an “independent contractor.” The issue is whether the Port has a contractual relationship with EAGLE by which it retained control over the manner in which EAGLE provided [the] ground services [work].

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<sup>110</sup> CP 356 (Deposition of John Critchfield, page 24:1-25).

Afoa v. Port of Seattle, \_\_ Wn. App \_\_, \_\_ P.3d \_\_, 2011 WL 612716, 3, Div. 1 No. 64545-5-I (Feb. 22, 2011).

**4. Under Weinert, non-delegable duties to protect workers from WISHA violations described in Stute extend to job site owners that retain control or hold innate supervisory authority over the site.**

The non-delegable duty recognized in Stute applies to job site owners who retain control over a workplace. *See e.g. Weinert v. Bronco Nat. Co.*, 58 Wn. App. 692, 795 P.2d 1167 (Div. 1, 1990); Kinney v. Space Needle Corp., 121 Wn. App. 242, 85 P.3d 918 (Div. 1, 2004); Doss v. IIT Rayonier, Inc., 60 Wn. App. 125, 126, 803 P.2d 4 (Div. 2, 1991), *review denied*, 116 Wn.2d 1034, 813 P.2d 583 (1991). In applying this duty, Washington sees no significant distinction between a job site owner and a general contractor where the owner's position is comparable to that of a general contractor. In Weinert v. Bronco Nat. Co., Division One wrote:

We do not overlook the fact that Bronco is an owner/developer rather than a general contractor hired by an owner. We see no significance to this factor insofar as applying Stute to the facts of this case. The owner/developer's position is so comparable to that of the general contractor in Stute that the reasons for the holding in Stute apply here. **The purpose of the statutes and regulations relied upon in Stute is to protect workers.** The basis for imposing the duty to enforce those laws on a general contractor exists with respect to an owner/developer who, like the general contractor, **has the same innate overall supervisory authority and is in the**

**best position to enforce compliance with safety regulations.**

Weinert, 58 Wn. App. at 696. (emphasis added). In Doss v. ITT Rayonier, Inc., Division Two followed Weinert in finding a defendant mill owner Rayonier owed duties to a worker employed by cleaning contractor Del Hur where “Rayonier required Del-Hur to comply with ‘applicable’ safety regulations, [and] both assigned safety supervisors to the job.” Doss v. ITT Rayonier, Inc., 60 Wn. App. 125, 126, 803 P.2d 4 (Div. 2, 1991), *review denied*, 116 Wn.2d 1034, 813 P.2d 583 (1991).

Similarly, the Kinney court wrote:

While jobsite owners are not *per se* liable under the statutory requirements of RCW 49.17, they may retain a similar degree of authority to control jobsite work conditions and subject themselves to WISHA regulations. This is true where a jobsite owner is in a better position to ensure WISHA compliance.

Kinney, 121 Wn. App. at 248-249. (emphasis in original). In distinguishing the facts in Kinney from those in the Washington Supreme Court’s decision in Kamla v. Space Needle Corp., 147 Wn. 2d 114, 52 P.3d 472 (2002) where the Space Needle Corporation was found not to have retained control of the work, the Kinney court explained, “where the jobsite owner does retain control it has a duty under WISHA to comply with the rules, regulations, and orders of that statute.” Kinney, 121 Wn. App. at 248, n. 12. In short, the difference between the duties of a general

contractor and the duties of a jobsite owner is that the jobsite owner's duties require a showing of retained control, whereas a general contractor retains control *per se*. Mr. and Mrs. Cano submit that even if King County is not found to be the general contractor and thus have *per se* control, sufficient evidence supports their claims that King County and Jacobs retained the requisite control of the workplace to have the duty to protect Mr. Cano from violations of WISHA regulations.

**5. The duties described in Stute and Weinert are concurrent within each defendant's scope of control.**

The duties described in Stute and Adkins are not limited to facts where the plaintiff is employed by an independent contractor that was directly retained by the defendants. Nor are the duties limited to only one entity found to be in the best position to ensure safety and WISHA compliance on the jobsite. The Stute court examined the duties in the context of one general contractor and one employer, and found "the general contractor should bear the primary responsibility for compliance with safety regulations." Stute, 114 Wn.2d at 464.

The concurrent duties and liability of more than one party who controls the work of employees of an independent contractors were affirmed in both Wienert and Husfloen v. MTA, 58 Wn. App. 686, 794 P.2d 859 (Div. 1, 1990). In Weinert, the plaintiff was employed directly

by Adrey Construction (“Adrey”). Adrey was employed by siding contractor D & D Siding and Construction (“D & D”), who was hired by defendant owner / developer Bronco National Company (“Bronco”). Weinert, 58 Wn. App. at 693. The Weinert court found that both Bronco and D & D owed duties to protect the worker from WISHA violations even though the jobsite owner did not hire the worker’s employer directly, and noted that D & D’s duty extended to the scope of the siding work it controlled. Id. at 697.

In Husfloen, the defendant maintained Stute was “distinguishable because it involved two rather than three levels of employers.” Husfloen, 58 Wn. App. 689-690. This Court again refused to restrict duties to a specific contractual formula, finding “This factual distinction is without consequence.” Id.

Likewise, the Washington Supreme Court held duties of more than one party under RCW 49.17.060(2) and Stute are “concurrent responsibilities to workers” and that the “‘independent negligence’ of one entity should not be equated with ‘sole negligence.’” Gilbert H. Moen Co. v. Island Steel Erectors, Inc. 128 Wn.2d 745, 757, 912 P.2d 472 (1996).<sup>111</sup>

The Supreme Court in Gilbert H. Moen explained:

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<sup>111</sup> See also WPI 15.01 (“there can be more than one proximate cause”) and Brashear v. Puget Sound Power & Light Co., Inc., 100 Wn.2d 204, 208, 667 P.2d 78, 80 (1983) (“the

The subcontractor, despite the general contractor's workplace safety duty, retains **concurrent responsibility** to meet workplace safety standards in the areas under its control. ... In recognition that the duty to observe safety standards is a shared duty, Stute referred to the general contractor's duty in this regard as a "prime" or "primary" responsibility. **However, each employer must comply with WISHA requirements.**

Gilbert H. Moen Co. v. Island Steel Erectors, Inc. 128 Wn.2d at 757-758 (emphasis added)(internal citations omitted). The facts here compare to those in the multi-party cases of Husfloen, Weinert, and Gilbert H. Moen. King County, Jacobs, and Mr. Cano's employer KST, each have concurrent responsibilities to Mr. Cano to ensure KST's compliance with safety regulations.

**6. King County and Jacobs cannot delegate non-delegable duties; disclaimers and indemnity provisions do not apply**

King County and Jacobs assert that provisions in King County's contract with KST assigned sole responsibility for safety to KST and also include indemnity provisions in favor of King County. They argue that these provisions shield them from liability or shift responsibility from them to KST. However, such provisions cannot delegate the non-delegable duties imposed under Stute, nor can they extinguish the duties of

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act of another person, though a proximate cause of the accident, does not excuse the defendant's negligence unless the other party's negligence was the sole proximate cause of the plaintiff's injuries.")

King County and Jacobs to Mr. and Mrs. Cano, especially where the Canos are not parties to the contract. In Gilbert H. Moen, in addition to explaining concurrent responsibilities, the Supreme Court addressed such provisions, explaining the effects relate to indemnification and the determination of who ultimately pays for the damages and who defends any actions. Such determinations are to be made in an indemnification proceeding outside the context of the injured worker's direct action. Gilbert H. Moen Co. v. Island Steel Erectors, Inc. 128 Wn.2d at 759-760.

Division Two also looks past disclaimers in the contract when resolving questions of control:

**[A] written contract provision disclaiming control is not determinative on the question of control.** The relationship of the parties, as amplified by the operating manual, the nature of the undertaking itself, and the amount of control actually exercised in performance of the undertaking, are the determinative factors.

Jackson v. Standard Oil Co. of California, 8 Wn. App. 83, 93, 505 P.2d 139, 145 (Div. 2, 1972) (emphasis added).

**7. Mr. and Mrs. Cano allege Mr. Cano's injuries resulted from specific WISHA violations**

Mr. and Mrs. Cano's claims that King County and Jacobs breached statutory duties under Stute and Weinert are supported by evidence of violations of several WISHA regulations, including but not limited to the following: WAC 296-800-11005, WAC 296-800-11010, WAC 296-800-

11035, WAC 296-155-040 (general standards for a safe workplace); WAC 296-155-200, WAC 296-155-180, WAC 296-800-160, WAC 296-155-17319, WAC 296-800-11005, WAC 296-800-11010 (regulations pertaining to requirements for personal protective equipment); WAC 296-155-110, WAC 296-800-140, WAC 296-800-14005, WAC 296-800-14020, WAC 296-800-14025 (regulations requiring accident prevention programs that are effective in practice); and WAC 296-800-130, WAC 296-800-13020, WAC 296-800-13025 (safety meeting requirements). Mr. and Mrs. Cano have provided evidence to support their claims that Mr. Cano's injuries were proximately caused by violations of these regulations. From the evidence presented, a jury may conclude that Mr. Cano was not provided with adequate PPE, adequate safety training, or with an accident prevention program that was effective in practice.

**8. Genuine issues of material fact exist as to whether King County and Jacobs retained control or held innate supervisory authority over the job site analogous to that of a general contractor.**

If King County and Jacobs are found to actually be general contractors on the Brightwater project, their control of the site would be established *per se*. But even if *per se* control is not found, there are genuine issues of material fact as to whether King County and Jacobs

retained the right to control the work on the jobsite or held innate supervisory authority analogous to that of a general contractor.

“Whether a right to control has been retained depends on the parties’ contract, the parties’ conduct, and other relevant factors. One such factor is a principal/employer’s interference in the work of the independent contractor; however, a right to control can exist even in the absence of that factor.” Phillips v. Kaiser Aluminum, 74 Wn. App. 741, 875 P.2d 1228 (Div. 2, 1994). Determining whether a jobsite owner is comparable to a general contractor is a highly fact-specific inquiry. “[T]his determination is fact-based, and turns on factors such as whether the [defendant] retained control over the manner in which [plaintiff’s employer] and its employees did their work.” Afoa v. Port of Seattle, \_\_\_ Wn. App \_\_\_, \_\_\_ P.3d \_\_\_, 2011 WL 612716, 7, Div. 1 No. 64545-5-I (Feb. 22, 2011) *citing* Kamla v. Space Needle Corp., 147 Wn.2d 114, 125, 52 P.3d 472 (2002).<sup>112</sup>

In Kamla v. Space Needle Corp, the Washington Supreme Court explained:

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<sup>112</sup> In Afoa, the Court of Appeals found there was at least a genuine question of material fact that the Port owed the same duties to plaintiff Brandon Afoa as claimed by Mr. and Mrs. Cano in this case. This holding is not inconsistent with that of Kamla, as shown by the decisions of Justice Linda Lau in both Afoa and Kamla. Justice Lau of Division One of the Court of Appeals concurred with the Afoa opinion. Justice Lau happens to have been the trial judge in Kamla, whose summary judgment in favor of the Space Needle Corp. was affirmed by the Supreme Court.

Jobsite owners can run the gamut from an owner/developer with the same degree of knowledge about WISHA compliant work conditions as that of a general contractor to a public corporation without any knowledge about WISHA regulations governing a specific trade. Because jobsite owners may not have knowledge about the manner in which a job should be performed or about WISHA compliant work conditions, it is unrealistic to conclude all jobsite owners necessarily control work conditions.

Kamla v. Space Needle Corp., 147 Wn.2d 114, 52 P.3d 472 (2002). The Kamla court found the Space Needle Corp. was not comparable to a general contractor with respect to Pyro, its fireworks subcontractor, because although the Space Needle Corp. had control of the premises, including the elevators that caused the Plaintiff's injury, it did not control the work.

In stark contrast, here the Wastewater Treatment Division of King County is a massive agency that is engaged in building conveyances and facilities throughout the Puget Sound region, including the \$1.8 billion Brightwater project. Jacobs is a professional construction manager that describes itself as an extension of King County's staff. If anyone can be said to have the same knowledge of WISHA standards and level of expertise as a general contractor, such that it is best position to ensure compliance with safety regulations, surely this would include King County and Jacobs. At the very least, the degree of control they have over the job site raises genuine issues of material fact.

Washington courts have found Stute and Weinert duties do not apply where defendants are relatively *unsophisticated* entities, such as homeowners, for whom the duties are inappropriate, or where a job site owner truly has minimal contacts with the work performed. Division Two has held these duties do not apply to homeowners renovating their personal residences who were not “employers” under the statute because they were “not engaging in an activity for gain or livelihood.” Rogers v. Irving, 85 Wn. App. 455, 463, 933 P.2d 1060 (Div. 2, 1997); Smith v. Myers, 90 Wn. App. 89, 950 P.2d 1018 (Div. 2, 1998). The Rogers court explained:

Homeowners, not being business enterprises, are typically ill-equipped to assume the duties that Rogers’ interpretation of ‘employer’ would impose upon them. They are unlikely to know how to provide features such as fall arrest systems, or how to contract for indemnity.

Rogers, 85 Wn. App. at 463. In Neil v. NWCC Investments, 155 Wn. App. 119, 229 P.3d 837 (Div. 1., 2010), Division One found no duty where there was no showing that defendant NWCC Investments had retained any control over the work. Specifically, the court noted that none of the contract documents showed that “NWCC Investments retained control over construction means or contained any express provisions regarding compliance with safety measures.” Id. at 122-123. Further, the

plaintiff's employer testified he spoke with the owner's representative only once and was never told how to perform any work. Id. at 128.

Again, in stark contrast, here there is ample evidence to show that King County's contract with KST retained the right to control the means and methods of the work as well as KST's safety practices, and exercised this control through its submittal requirements process, though its "project wide coordination," and through the "minute by minute" supervision of KST by Jacobs' inspectors. While King County and Jacobs may claim they are not directing the work, the submittal requirements process clearly shows they have control. KST is required to submit their plans for review prior to doing the work. Then King County, informed by Jacobs' recommendations, can both comment on and reject KST's plans. If KST's plans are rejected, it must submit new plans and gain King County's approval prior to doing the work. King County's veto power applies not only to safety, but to "all the technical submittals, all the method statements, [and] all the products they're going to use."<sup>113</sup> From these facts a reasonable juror may conclude that King County and Jacobs are in fact directing KST's work.

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<sup>113</sup> Deposition of Leon Maday, Oct. 29, 2010, page 67:12 – 19.

**D. Under Kelley and Afoa, King County and Jacobs owed Mr. and Mrs. Cano common law duties to provide Mr. Cano with a safe workplace under the retained control doctrine.**

Prior to Stute, Wienert, and the enactment of WISHA, Washington recognized a common law duty “to provide a safe place of work” where one who engaged an independent contractor “retained control” over some part of the work. Kelley v. Howard S. Wright Const. Co. 90 Wn.2d 323, 330, 582 P.2d 500, 505 (1978) *citing* Restatement (Second) of Torts § 409 (1965). This duty can also be established where “one who engages an independent contractor retains actual control over the workplace and affirmatively assumes responsibility for project safety.” Smith v. Myers, 90 Wn. App. 89, 95, 950 P.2d 1018 (Div. 2, 1998). However, a showing of actual control is not required. “The test of control is **not the actual interference** with the work of the subcontractor, **but the right to exercise such control.**” Kelley, 90 Wn.2d 323 at 331 *citing* Fardig v. Reynolds, 55 Wn.2d 540, 348 P.2d 661(1960) (emphasis added).

The common law duties were also reaffirmed in Afoa v. Port of Seattle. The Afoa court found the duties apply “where an employer must have retained a right ‘to so involve oneself in the performance of the work as to undertake responsibility for the safety of the independent contractor’s employees.’” Afoa v. Port of Seattle, \_\_\_ Wn. App \_\_\_, \_\_\_ P.3d \_\_\_, 2011 WL 612716, 5, Div. 1 No. 64545-5-I (Feb. 22, 2011) *quoting* Hennig v.

Crosby Group, Inc., 116 Wn.2d 131, 134, 802 P.2d 790 (1991) (*quoting Epperly v. Seattle*, 65 Wn.2d 777, 785, 399 P.2d 591 (1965)). The Afoa court also cited comment c. to Restatement (Second) of Torts § 414 (1965) with approval, finding common law duties apply where there is “such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.” Id. (*quoting Restatement (Second) of Torts § 414* (1965) cmt. c.) Division Two also reaffirmed common law duties under the retained control doctrine in Arnold v. Saberhagen Holdings, Inc., 157 Wn. App. 649, 240 P.3d 162 (Div. 2, 2010).<sup>114</sup>

While there may be some differences between the statutory duties and the duties under the common law doctrine of retained control, both duties involve similar inquiries into a defendant’s right to control the work on the job site. For the reasons discussed above in the context of the statutory duty, there are at least genuine issues of material fact as to whether King County and Jacobs retained the right to control Mr. Cano’s work. There are fact questions as to whether King County and Jacobs retained actual control over the workplace through Constructware, the submittal review process, and the “minute by minute” supervision of the

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<sup>114</sup> In an asbestos exposure case, the Arnold Court found that defendant Lockheed owed plaintiffs a duties of care under the retained control doctrine and duties of a possessor of land to an invitee. The Court found that statutory claims under WISHA were not available to the plaintiffs since the cause of action arose before the enactment of WISHA, but found that claims were available to the plaintiffs under WISHA’s predecessor statute.

project by Jacobs' inspectors on the site. There are also fact questions as to whether King County and Jacobs affirmatively assumed safety responsibilities through their veto power over KST's safety plans and practice, through grading and enforcement of their safety incentive plans under the SER program, and through the level of authority delegated to Jacobs' inspectors as documented in their Safety Observation Reports.

**E. Fact questions exist as to whether King County breached duties owed to Mr. Cano as an invitee on premises.**

It has been observed that “In the background [of jobsite injury cases] is the property owner’s common law duty to protect invitees from harm.” Kamla v. Space Needle Corp., 147 Wn. 2d 114, 129, 52 P.3d 472 (2002) (Chambers, J., Dissent). The “legal duty owed by a landowner to a person entering the premises depends on whether the entrant [is] a trespasser, licensee, or invitee.” Iwai v. State, 129 Wn. 2d 84, 90-91, 915 P.2d 1089 (1996). As the undisputed possessor of the jobsite premises, King County owed Mr. Cano the duty of an invitee. A possessor of land owes invitees an “affirmative duty to use ordinary care to keep the premises in a reasonably safe condition” Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 49, 914 P.2d 728 (1996). *See also* Younce v. Ferguson, 106 Wn.2d 658, 667, 724 P.2d 991 (1986) *citing* McKinnon v. Washington Fed. Sav. & Loan Ass'n, 68 Wn.2d 644, 650, 414 P.2d 773

(1966) (“An invitee is owed a duty of ordinary care.”) Under the Restatement (Second) of Torts § 343A as adopted in Washington, “a landowner is liable for harm [to an invitee] caused by an open and obvious danger if the landowner should have anticipated the harm, despite the open and obvious nature of the danger.” Kamla, 147 Wn.2d at 126.

As Mr. Cano was on the King County’s premises for a purpose connected with King County’s wastewater treatment business, he is a business visitor, which is an invitee. The Restatement (Second) of Torts § 332 (1965), as adopted in Washington, defines an invitee as follows:

- (1) An invitee is either a public invitee or a business visitor.
- (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
- (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

Restatement (Second) of Torts (1965) § 332 as quoted in Younce v. Ferguson, 106 Wn.2d 658, 667, 724 P.2d 991 (1986). “A licensee includes a social guest, that is, a person who has been invited but does not meet the legal definition of invitee.” Id. In contrast, “[e]mployees of independent contractors hired by landowners are invitees on the landowners’ premises.” Kamla, 147 Wn.2d at 126.

Fact questions exist as to whether Mr. Cano was injured as a result of conditions of the land including not only the concrete itself, but the seepage of water into the concrete that arguably led to the mixture of concrete and water exceeding the height of Mr. Cano's boots and breaching the duct tape seam. As such, there is a genuine issue of material fact as to whether King County breached its duty of ordinary care under the circumstances by allowing these conditions to exist.

**F. Mr. Cano's Labor and Industries claim must not be considered, and RCW 4.22.070(1) prohibits any apportionment of fault to Mr. Cano's employer.**

In oral argument, the trial court considered that Mr. Cano may have received worker's compensation payments for his injuries, as well as the fault of his employer, in its decision to grant summary judgment in favor of King County and Jacobs. RP 24:22 – 25:11. Consideration of either one of these items is improper.

Evidence of worker's compensation payments is generally inadmissible as a collateral source and irrelevant to liability. *See* RCW 51.28.070; Mebust v. Mayco Mfg. Co., 8 Wn.App. 359, 506 P.2d 326 (Div. 1, 1973); Johnson v. Weyerhaeuser Co., 134 Wn.2d 795, 953 P.2d 800 (1998); Wheeler v. Catholic Archdiocese of Seattle, 124 Wn.2d 634, 640, 880 P.2d 29, 32 (1994); RCW 51.28.070; Ciminski v. SCI Corp., 90 Wn.2d 802, 804, 585 P.2d 1182 (1978); Stone v. Seattle, 64 Wn.2d 166,

172, 391 P.2d 179 (1964). Note that the Washington Department of Labor and Industries has filed a Notice of Interest in Recovery in this matter. CP 18.

Any fault on the part of Mr. Cano's direct employer, KST, does not relieve King County and Jacobs of liability. Duties owed by King County, Jacobs, and KST are concurrent. Gilbert H. Moen Co. v. Island Steel Erectors, Inc. 128 Wn.2d 745, 757, 912 P.2d 472 (1991). Further, RCW 4.22.070(1) prohibits any fault from being attributed to KST. Since KST is Mr. Cano's employer, it is immune under Title 51 RCW. RCW 4.22.070(1) provides, in relevant part:

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages *except entities immune from liability to the claimant under Title 51 RCW.*

...

The entities whose fault shall be determined ... *shall not include those entities immune from liability to the claimant under Title 51 RCW.* Judgment shall be entered against each defendant except those who have been released by the claimant or *are immune from liability to the claimant.*

RCW 4.22.070(1) (emphasis added).

The Washington legislature amended RCW 4.22.070 in 1993 to prevent fault from being assessed to an employer with immunity under Title 51 in order to overrule Clark v. Pacificorp, 118 Wn.2d 167, 822 P.2d

162 (1991) which required a jury to apportion fault to all entities responsible for a workplace injury, including the injured worker's employer, in effect carving away part of the worker's recovery. This is no longer the case as explained by the Moen court:

RCW 4.22.070 was amended in 1993 in response to Clark . . . to exclude an employer with immunity under Title 51 as an entity against which fault could be assessed. In other words, it is now clear an entity in Moen's position could not use the empty-chair defense, and would be liable for the employer's share of the fault.

Moen, 128 Wn.2d at 759 n. 7. The Moen court held that evidence of the worker's employer's negligence can be used to reduce a third party general contractor's liability only in an indemnification proceeding outside the context of the injured worker's direct action. Id. at 759-760. The Supreme Court further emphasized its message in Edgar v. City of Tacoma, when it observed, "Under the 1993 version of RCW 4.22.070(1), the percentage of fault attributable to an immune employer is not a relevant issue of fact because it has no legal effect on the respective liability of the parties." Edgar v. City of Tacoma, 129 Wn.2d 621, 623, 919 P.2d 1236 (1996). Thus, as KST's duties are concurrent with King County's and Jacobs' duties, and no fault on the part of KST is to be applied to reduce the liability of King County or Jacobs, it cannot be applied to dismiss Mr. and Mrs. Cano's claims.

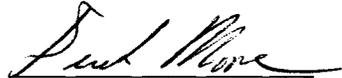
## V. CONCLUSION

Mr. Cano alleges he was injured as a result of King County's and Jacobs' breaches of statutory and common law duties as described above. When viewed in the light most favorably to Mr. and Mrs. Cano, as required by summary judgment standards, a reasonable juror may find that King County and Jacobs had innate supervisory authority over the job site and retained the right to control the work such that they were analogous to general contractors. There is also evidence to show King County breached duties to Mr. Cano as a business visitor invitee on premises.

Duties under Stute, Weinert, and the common law retained control doctrine are concurrent and King County and Jacobs are not relieved of these duties by any fault on the part of KST, Mr. Cano's employer. These duties are also non-delegable, such that any contractual provisions purporting to disclaim liability may entitle a defendant to indemnity, but do not affect the worker's direct action. For the aforesaid reasons, Mr. and Mrs. Cano respectfully request this Court reverse the dismissal of their claims.

Respectfully submitted this 1<sup>st</sup> day of April, 2011.

BISHOP LAW OFFICES, P.S.



Derek K. Moore  
WSBA No. 37921



Raymond E. S. Bishop  
WSBA No. 22794

## VI. APPENDIX

<u>No.</u>	<u>Description</u>	<u>No. of Pages</u>
1.	Photographs of Ignacio Cano-Garcia and his injuries	1
2.	Photographs of the Jobsite as provided by King County, Bates marked KC 001565; KC001567; and KC 001568 and as referenced to and discussed in the Deposition of Ignacio Cano-Garcia of December 20, 2010, 83:7-87:1.	3
3.	Copy of <a href="http://www.kingcounty.gov/environment/wtd/construction/north/brightwater.aspx">http://www.kingcounty.gov/environment/wtd/construction/north/brightwater.aspx</a> (last visited Jan. 17, 2011)	1
4.	Map of Puget Sound area labeled "System Investments" as marked as Exhibit 1 to the Deposition of Leon Maday, October 29, 2010	1
5.	Brightwater Treatment System Map as marked as Exhibit 2 to the Deposition of Leon Maday, Oct. 29, 2010	1
6.	Construction Management Organization Chart of the Brightwater Treatment System as Bates marked JCI 01003 by Defendant Jacobs Civil and as marked as Exhibit 5 to the Deposition of Leon Maday, Oct. 29, 2010	1
7.	Section 01063 of the Contract between King County and KST titled "Health and Safety," as Bates marked KC000487 – KC 000495 by Defendant King County and as marked as Exhibit 7 to the Deposition of Leon Maday, Oct. 29, 2010	9
8.	Section 01064 of the Contract between King County and KST titled "Safety Incentive Program," as Bates marked KC000497 – KC 000501 by Defendant King	5

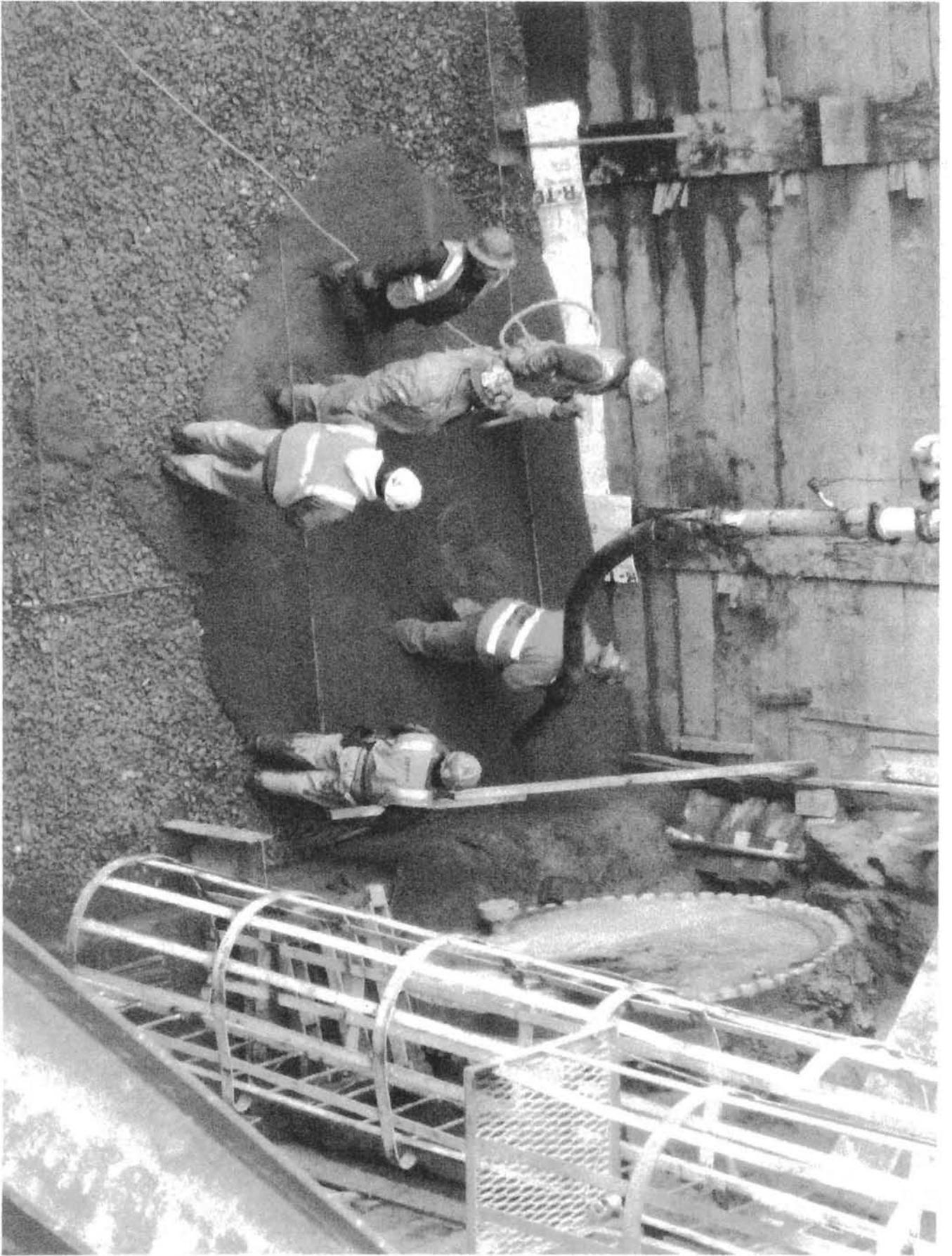
<u>No.</u>	<u>Description</u>	<u>No. of Pages</u>
	County and as marked as Exhibit 8 to the Deposition of Leon Maday, Oct. 29, 2010	
9.	Amendment No. 1 to “Construction Management Services Agreement” between King County and Jacobs Civil, as Bates marked KC001005 – KC 001017 by King County and as marked as Exhibit 9 to the Deposition of Leon Maday, Oct. 29, 2010	13
10.	Amendment No. 2 to “Construction Management Services Agreement” between King County and Jacobs Civil, as Bates marked JCI 00904 – JCI 00910 by Jacobs Civil and as marked as Exhibit 10 to the Deposition of Leon Maday, Oct. 29, 2010	7
11.	Project Master Schedule of the Brightwater Treatment System as marked as Exhibit 6 to the Deposition of Leon Maday, Oct. 29, 2010. To date, Respondents have not yet provided the more detailed chart of approximately 16 pages that Appellants requested	1
12.	“Safety Evaluation Scoring Form” as used in the depositions of Connie Krier and John Critchfield, which was originally provided by Defendant Jacobs Civil in response to Plaintiffs’ discovery requests and Bates marked JCI 00040 – JCI 00051. This was provided electronically in a .pdf file in a format much larger than 8 ½ x 11 inches. This copy has been cropped from its original size in an attempt to improve legibility when printed.	12
13.	December 23, 2008 “safety accident” e-mail from Devin Harmia and description of the incident as provided by Defendant Jacobs Civil in response to Plaintiffs’ discovery requests and Bates marked JCI 01078 and JCI 01077.	2

<u>No.</u>	<u>Description</u>	<u>No. of Pages</u>
14.	Safety Observation Reports of Noah Brenner as provided by King County and Bates Marked KC 000015 through KC 000024.	10
15.	Safety Observation Reports of Clifford Feurtado dated December 9, 2008 and December 10, 2008, as provided by King County and Bates Marked KC 000025 and KC 000026.	2
16.	Safety Observation Reports of Connie Krier dated December 9, 2008 and June 23, 2010, as Bates Marked JCI 01131 and JCI 01137 by Jacobs Civil and marked as Exhibits 1 and 2 to the Deposition of Connie Krier, Dec. 7, 2010.	2
17.	Section 01300 of the Contract between King County and KST titled "Health and Safety," as provided in response to Plaintiffs' discovery requests and Bates marked KC000536 – KC 000539 by Defendant King County.	4
18.	Published Opinion in <u>Afoa v. Port of Seattle</u> , __ Wn. App __, __ P.3d __, 2011 WL 612716, Div. 1 No. 64545-5-I (Feb. 22, 2011)	16

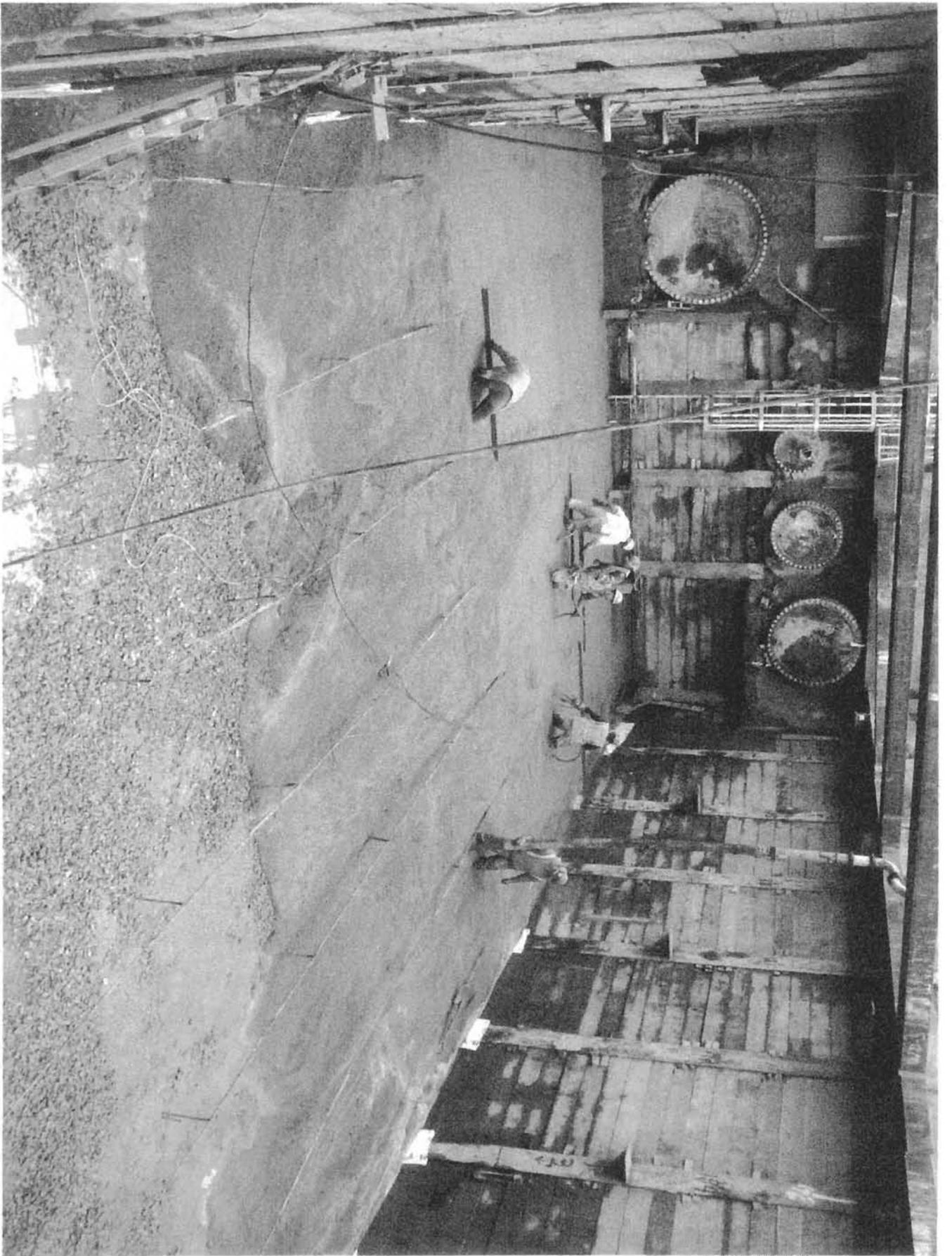
# APPENDIX 1



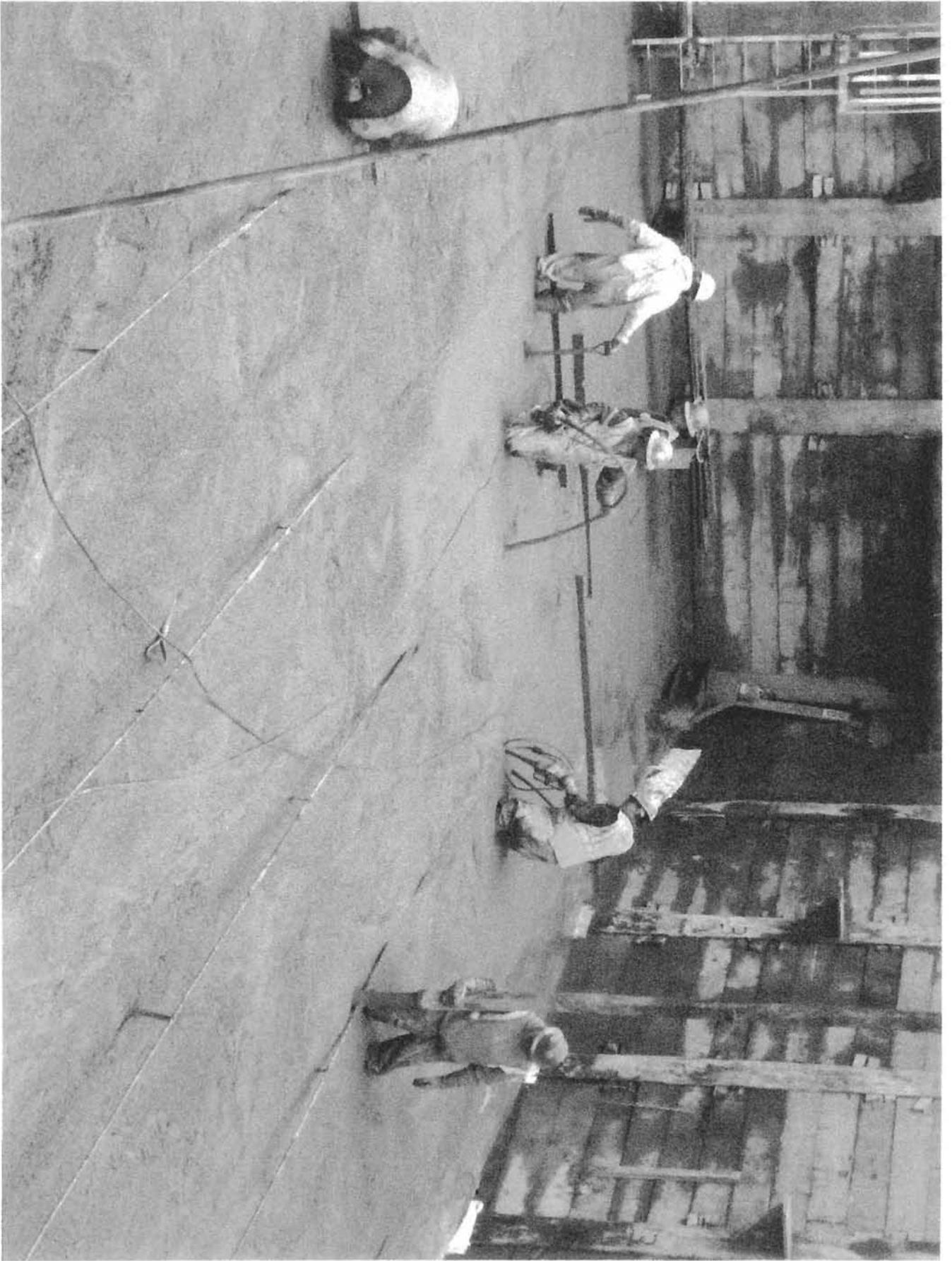
## APPENDIX 2



KC 001565



KC 001567



KC 001568

# APPENDIX 3



Holiday closure on Monday, Jan. 17: Most county offices will be closed in honor of MLK.

HOME NEWS SERVICES DIRECTORY CONTACT

Search

# Wastewater Treatment

King County, Washington

You're in: Wastewater Treatment -> Projects (planning, construction) -> North King County/South Snohomish projects -> Brightwater Treatment System



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- Alphabetical topics list
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- North King County/South Snohomish projects
- Brightwater Treatment System**
- Project description
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- Regionwide County projects
- Recently completed projects
- Being a good neighbor during construction
- Enhancing the environment with our facilities
- Protecting our assets
- Publications & resources
- Site map

## Brightwater TREATMENT SYSTEM

Treatment Plant, Conveyance, Marine Outfall

### Brightwater Project

In response to increased growth in our region, King County is constructing a new regional wastewater treatment plant, called Brightwater. Construction started in 2006. Treatment plant start-up and operations will begin in 2011, with the entire system scheduled to be completed in 2012.

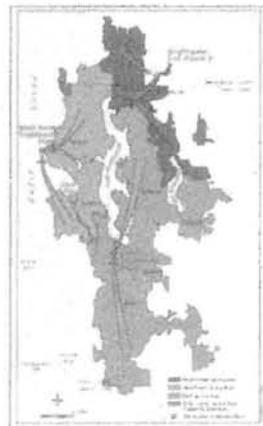
Brightwater will serve portions of King and Snohomish counties and support our mission to protect public health and the environment. The new facilities will include a treatment plant, conveyance (pipes and pumps taking wastewater to and from the plant), and a marine outfall.

This Web site provides information about the project, including:

- a description of the project and facilities
- [current project activities](#), including construction information and contacts
- [project background information](#)



Solids area digesters with Energy Building - view more project photos.



Brightwater will serve portions of King and Snohomish counties.

### Updates

#### 2010 Brightwater Project Cost Trend

Information about completion of the Brightwater conveyance tunnel between Ballinger Way in Shoreline and Lake Forest Park.

### Of interest

Read about construction & sign up for project updates

### News releases

Oct. 1, 2010 - Construction resumes on final Brightwater tunnel. Tunnel machine rebuild completed on schedule. 1.9 miles of mining to go

June 24, 2010 - Machines emerge in Bothell, Shoreline; tunneling now 85 percent complete

April 8, 2010 - Infrastructure projects support regional environmental, economic goals. Clean water investments a priority in 2010

April 5, 2010 - Light at the end of the Brightwater tunnel as contractor bids deal to complete construction on 'B-3'

Feb. 18, 2010 - King County Executive calls for new contractor to get Brightwater tunneling back on track

More project news releases

### Contact us if you need more information about Brightwater.

King County Brightwater Project

22505 State Route 9  
Woodinville, WA 98072  
E-mail: [Brightwater@kingcounty.gov](mailto:Brightwater@kingcounty.gov)  
Phone: 206-263-9453  
TTY Relay: 711

For construction-related questions and urgent issues, please contact the Brightwater construction information line at 206-205-5989.

Driving directions to Brightwater project office.

Updated: Jan 14, 2011

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# APPENDIX 4

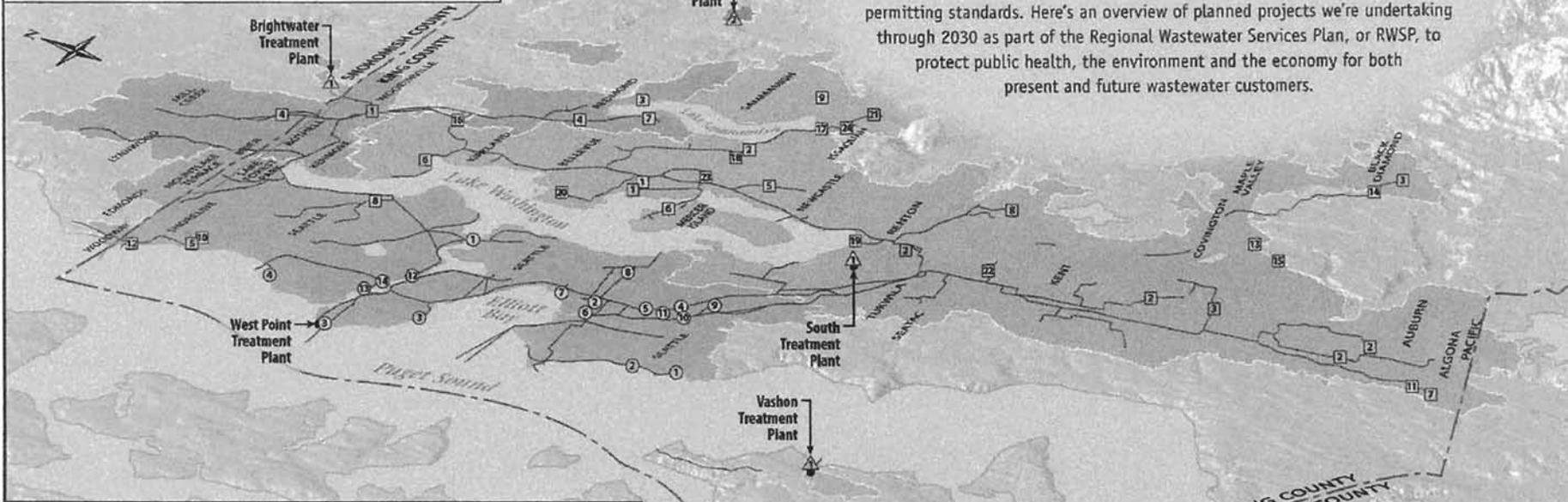
# System investments

## Regional Wastewater Services Plan Treatment Plant Projects

- | COMPLETED                          | UNDER CONSTRUCTION                 | FUTURE  |
|------------------------------------|------------------------------------|---|
| Upgrades to Vashon Treatment Plant | Brightwater Treatment Plant (2010) | Increase South Plant Capacity to 115 mgd (2025) |
|                                    | Carnation Treatment Plant (2008)   |   |

## Capital projects...

With another million people expected to make their home in the Puget Sound region by the end of the next decade, King County needs to make sure its regional wastewater system keeps pace with growth and meets permitting standards. Here's an overview of planned projects we're undertaking through 2030 as part of the Regional Wastewater Services Plan, or RWSP, to protect public health, the environment and the economy for both present and future wastewater customers.



## Recommended Conveyance Projects

- | COMPLETED                        | IN DESIGN AND CONSTRUCTION                               | FUTURE (2012 - 2030)*  |
|----------------------------------|--|--|
| 1 North Creek Storage Facility   | 1 Bellera Pump Station Upgrade                           | 1 Bellevue Inflow Inlet Parallel                                   |
| 2 Eastside Interceptor Section 1 | 2 Kent/Ashura Conveyance System Improvement Project      | 2 Westfield/Sunset Pump Station Replacement and Force Main Upgrade |
| 3 Mill Creek Relief Sewer        | 3 Black Diamond Storage                                  | 3 Sammamish Flats/Diversion  |
|                                  | 4 North Creek Pipeline                                   | 4 Northwest Lake Sammamish Interceptor Parallel                    |
|                                  | 5 Hidden Lake Pump Station and Sewer Improvement Project | 5 Coal Creek Siphon and Inlet Parallel                             |
|                                  | 6 Juanita Bay Pump Station Replacement Project           | 6 North Merger and East Interceptor Parallels                      |
|                                  | 7 Pacific Pump Station                                   | 7 Lake Hills Truck Replacement                                     |
|                                  | 8 Fairwood Interceptor Sewer Project                     | 8 Thornton Creek Interceptor Parallels                             |
|                                  |  | 9 Sammamish Flats Storage  |
|                                  |  | 10 Boeing Creek Storage  |
|                                  |  | 11 Aljona Pacific Inlet Stage 1                                    |
|                                  |  | 12 Richmond Beach Storage  |
|                                  |  | 13 Soco Pump Station Ditch Conveyance                              |
|                                  |  | 14 Soco Pump Station 11 with Conveyance                            |
|                                  |  | 15 Soco Pump Station 8 with Conveyance                             |
|                                  |  | 16 York Pump Station Modifications                                 |
|                                  |  | 17 Issaquah Storage  |
|                                  |  | 18 Eastgate Parallel Pipe Storage                                  |
|                                  |  | 19 Bryn Mawr Storage   |
|                                  |  | 20 Medina Storage  |
|                                  |  | 21 Issaquah Creek Highlands Storage                                |
|                                  |  | 22 South Renton Interceptor Parallel                               |
|                                  |  | 23 Factory Pump Station and Tank Diversion                         |
|                                  |  | 24 Issaquah Interceptor Section 2 Parallel                         |
- \* Modifications or changes to future projects may occur based on new information gathered in future years.

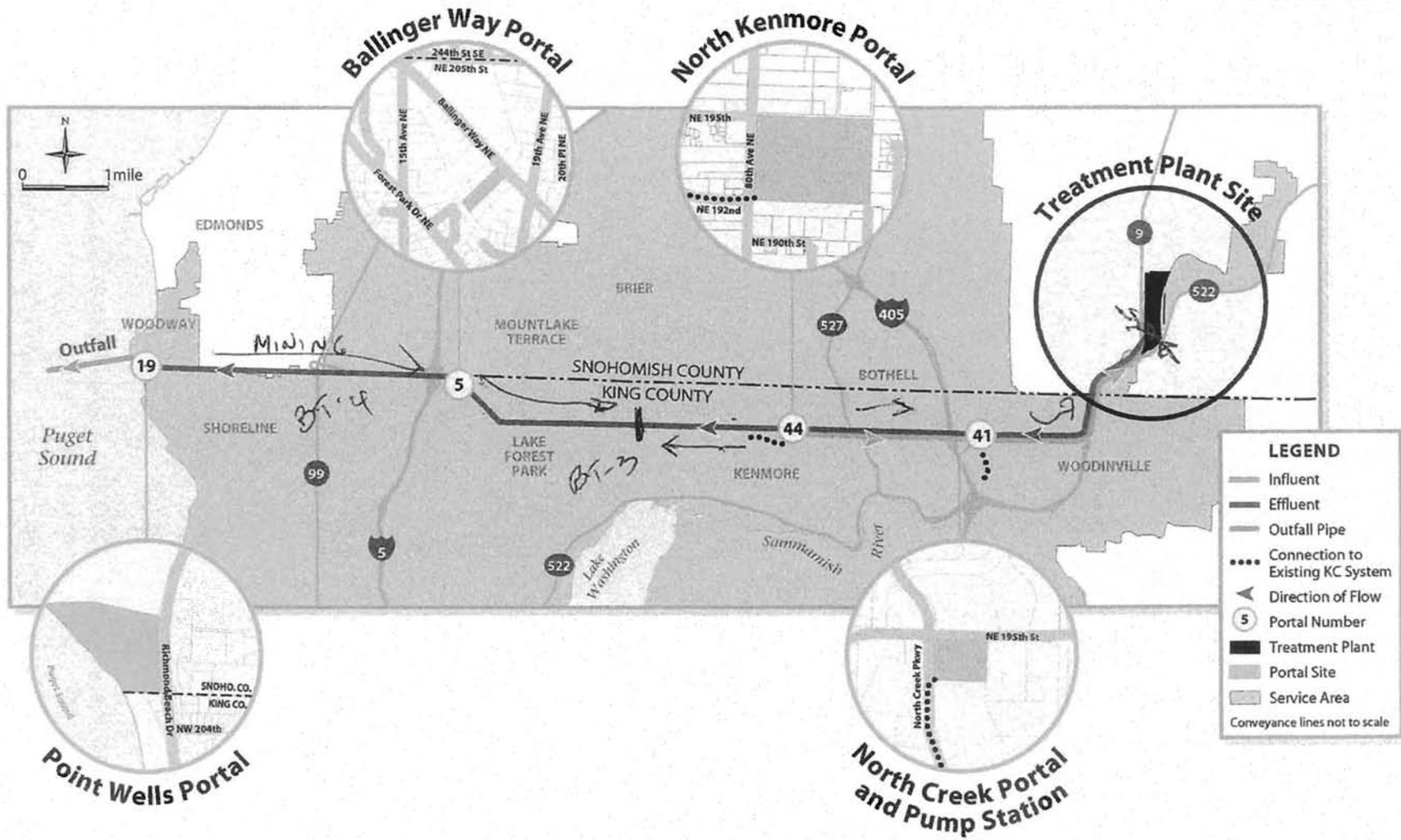
## Recommended Combined Sewer Overflow Control Projects

- | IN DESIGN (TO BE COMPLETED IN 2012) | PROJECTS SCHEDULED FOR COMPLETION DURING 2015 - 2030* |
|-------------------------------------|---|
| 1 Barton Street                     | 1 University/Montlake                                 |
| 2 Marzay Avenue                     | 2 Hanford #2/Lander                                   |
| 3 South Magnolia                    | 3 West Point Treatment Plant Improvements             |
| 4 North Beach                       | 4 Michigan  |
|                                     | 5 Brandon Street                                      |
|                                     | 6 Chelan Avenue                                       |
|                                     | 7 King Street/Kingdome                                |
|                                     | 8 Hanford at Rainier Avenue                           |
|                                     | 9 8th Avenue S  |
|                                     | 10 West Michigan                                      |
|                                     | 11 Terminal 115                                       |
|                                     | 12 3rd Avenue W                                       |
|                                     | 13 Ballard  |
|                                     | 14 11th Avenue W                                      |
- \* Modifications or changes to future projects may occur based on new information gathered in future years.

- Brightwater Service Area
- West Service Area
- South Service Area
- Carnation Service Area
- Vashon Service Area
- Existing Wastewater Pipeline
- Brightwater Conveyance

EXHIBIT  
mady  
1  
11-28-11

# APPENDIX 5



The Brightwater conveyance system is about 13 miles long with the pipelines located in underground tunnels. There are two additional pipelines approximately one mile long that will connect the new Brightwater pipelines to the existing King County wastewater system.

The information included on this map has been compiled from a variety of sources and is subject to change without notice. King County makes no representations or warranties, express or implied, as to accuracy, completeness, timeliness, or rights to the use of such information. King County shall not be liable for any general, special, indirect, incidental, or consequential damages including, but not limited to, lost revenues or lost profits resulting from the use or misuse of the information contained on this map. Any sale of this map or information on this map is prohibited except by written permission of King County.

# APPENDIX 6



# APPENDIX 7

SECTION 01063

HEALTH AND SAFETY

PART 1 GENERAL

1.01 SUMMARY

- A. This Section specifies procedures for complying with applicable requirements, laws, and regulations related to worker and the public safety and health. It is not the intent of the County to develop, manage, direct, and administer the safety and health programs of contractors or in any way assume the responsibility for the safety and health of their employees. It is required that all Contractors adhere to applicable federal, state, and local safety and health standards.
- B. It is not the intent of the County Wastewater Treatment Division (WTD) to list and identify all applicable safety codes, standards, and regulations requiring compliance by all contractor and subcontractor groups. Contractor and subcontractors shall be solely responsible for identifying and determining all safety codes, standards, and regulations that are applicable to the work.
- C. All Work shall meet the requirements in Chapter 49.17 RCW and 29 CFR 1926 and be considered in the bid amount per RCW 39.04.180, as applicable.
- D. Be responsible for employing adequate safety measures and taking all other actions reasonably necessary to protect the life, health, and safety of the public and to protect adjacent and County property in connection with the performance of the Work. This requirement applies continuously 24 hours a day, seven days a week, working and non-working hours.
- E. Contractor and subcontractors are encouraged to use the consulting services of the State of Washington's Department of Labor and Industries (WISHA). The Seattle Field Office is located at: 315 5th Avenue South, Suite 200  
Seattle, WA 98104-2607  
(206) 515-2800  
<http://www.lni.wa.gov/wisha/>
- F. Related Sections: The work of the following Sections is related to the work of this Section. Other Sections, not referenced below, may also be related to the proper performance of this work. It is the Contractor's responsibility to perform all the work required by the Contract Documents
  1. Section 01064: Safety Incentive Program<sup>A1</sup>
  2. <sup>A1</sup> Section 01999: Standard Forms.
  3. <sup>A1</sup> Section 02312: Tunnel Rescue Teams.

1.02 QUALITY ASSURANCE

- A. Referenced Standards: This Section incorporates by reference the latest revision of the following documents. It is a part of this Section as specified and modified. In case of a conflict between the requirements of this Section and those of a listed document, the requirements of this Section shall prevail.

Reference	Title
29 USC 651 et seq.	Federal Occupational Safety and Health Act
29 CFR 1910.148	Permit Required Confined Spaces
29 CFR 1910.147	Control of Hazardous Energy (lockout/tagout)
29 CFR 1926	Safety and Health Regulations for Construction
Chapter 296-24 WAC	WISHA General Safety and Health Standards
Chapter 296-36 WAC	WISHA Compressed Air Work
Chapter 296-37 WAC	WISHA Safety Standards for Commercial Diving
Chapter 296-45 WAC	WISHA Electrical Workers Safety Rules
Chapter 296-62 WAC	WISHA General Occupational Health Standards
Chapter 296-65 WAC	Asbestos Removal & Encapsulation

Brightwater Conveyance East Contract  
08/10/05

01063-1

C53060C  
Addendum No. 1



KC 000487

<u>Reference</u>	<u>Title</u>
Chapter 296-67 WAC	WISHA Process Safety Management Standards
Chapter 296-155 WAC	Construction Safety
Chapter 296-800 WAC	Safety and Health Core Rules
Chapter 296-824 WAC	Emergency Response
NFPA 820	Standard for Fire Protection in Wastewater Treatment and Collection Facilities
Chapter 49.17 RCW	Washington Industrial Safety and Health Act (WISHA)
RCW 39.04.180	Trench Safety Systems, Safety Systems Required
WAC 296-800-110	Employer responsibilities: Safe workplace -- Summary

**B. Qualifications:**

**1. Site Health and Safety Officer:**

- a. Possess a minimum of five years progressive safety experience in the field of underground safety and demonstrate work experience on projects similar in nature to the work to be done on this Contract.
- b. Be knowledgeable concerning all Federal and State regulations applicable to safety.
- c. Completed the OSHA 40-hour Safety and Health Course (OSHA 500).
- d. Possess competent person certification in construction safety disciplines related to the work to be performed and be able to identify competent persons required by State and Federal safety standards for which they are not certified.
- e. Training and current certification for CPR and First Aid.
- f. Possess training and be capable of performing accident investigations and developing a concise report.
- g. Possess training in the development and presentation of safety training meetings.

**2. Shift Safety Officers:**

- a. Possess a minimum of three years progressive safety experience in the field of underground safety and demonstrate work experience on projects similar in nature to the work to be done on this Contract.
- b. Be knowledgeable concerning all Federal and State regulations applicable to safety.
- c. Completed the OSHA 10-hour Safety and Health Course.
- d. Possess competent person certification in construction safety disciplines related to the work to be performed and be able to identify competent persons required by State and Federal safety standards for which they are not certified.
- e. Trained in and possess current certification for CPR and First Aid.

**3. Superintendent:**

- a. Experienced in compressed air work per WAC 296-36-020

**4. Although not required, the following qualifications may be considered as contributing to the relevant experience required herein for Paragraphs 01063-1.02B.1 and 01063-1.02B.2:**

- a. Certified Safety Professional (CSP) certification from the American Society of Safety Engineers.
- b. California Certified Gas Tester and the Certified Tunnel Safety Representative.
- c. MSHA Tunnel Rescue Team training certification, in the form of a Rescue Trainer card.
- d. Degree from an institution of higher learning in Occupational Safety and Health.
- e. ASSE Certified Safety Technician (CST).
- f. Qualification as an instructor in CPR/First Aid or the OSHA 30 hour program.

**1.03 SUBMITTALS**

**A. Procedures: Section 01300.**

**B. Qualifications.**

**C. Accident Prevention Plan (APP):**

1. Implement the Accident Prevention Program (APP) submitted per Section 00440 and accepted at the conclusion of the bid evaluation. Submit two copies, including all required revisions, within five days of the effective date of the NTP
2. Revisions during the Contract Time.

- D. **Site Specific Health and Safety Plan (HASP):**
1. Submit one copy of each version of the HASP for review prior to starting work. At a minimum, submit versions which address the following categories of construction work or as requested by the Project Representative:
    - a. North Creek Portal site (NCPS) preparation.
    - b. NCPS shaft and final lining.
    - c. Microtunnel and shafts.
    - d. Tunneling, concrete segment erection, and tail void grouting.
    - e. Tunneling inspection stops, maintenance stops, and boulder stops.
    - f. Treatment Plant (TP) site preparation and portal construction.
    - g. Tunnel final lining and backfilling.
    - h. Field tunnel pipe applied lining and tunnel pipe inspection.
    - i. Tunnel tours.
    - j. Activities not associated with the above categories of work.
  2. After all comments have been incorporated, submit two copies including all required revisions, for each HASP.
- E. Revised HASP that addresses changes requested per Paragraph 01063-3.02.
- F. Incident Report(s) and citations: Provide three copies.
- G. Minutes and list of attendees of the pre-Job safety meeting: Provide three copies within three days of the meeting.
- H. Minutes and list of attendees of weekly safety tailgate meeting: Provide three copies within three days of the meeting.
- I. Monthly Contractor Injury Summary Report: Provide three copies each month within ten days of the end of each month.
- J. Notice and listing of flammable liquids and liquefied petroleum gases when planned to be used on the work site.

#### 1.04 POSITION REQUIREMENTS

- A. **Site Health and Safety Officer:**
1. On-site, full time, safety professional responsible to perform safety functions.
  2. Have no other duties than safety related functions.
  3. **Administrator and enforcer of the SIP. See Section 01064.**<sup>M</sup>
- B. **Shift Safety Officers:**
1. Shall be on-site at all times when work is being performed when the Site Health and Safety Officer is not present.
- C. **Superintendent:**
1. Per WAC 296-36-020, a superintendent experienced in compressed air work and in full charge of the job, shall be on-site while work in compressed air is in progress.

#### 1.05 SITE HEALTH AND SAFETY RESPONSIBILITIES

- A. Review the entire scope of work and applicable Contract requirements, inspect the work site location, and adjacent structures and systems, and ensure that all safety considerations and requirements are addressed and planned prior to the start of work.
- B. Ensure that Contractor's employees and the Subcontractor's employees are knowledgeable of and comply with the APP and HASP.
- C. Site Health and Safety Officer shall have the training, responsibility, and full authority to coordinate, implement, and enforce the Contractor's and the Subcontractor's APP and HASP for the duration of this Contract.

- D. If the Site Health and Safety Officer is to be changed during the Contract, submit Qualifications of the proposed officer prior to implementation on the Contract.
- E. Names and telephone number of the following shall appear in the APP and HASP:
  - 1. Site Health and Safety Officer.
  - 2. All Shift Safety Officers.
  - 3. Compressed Air Superintendent.
- F. Ensure that safe work principles and practices are followed in completing work tasks.
- G. Be responsible to correct hazardous conditions and practices. When more than one Contractor is working within a given Site, identify which personnel have the authority to take action to prevent physical harm or significant property damage.
- H. If there is immediate danger to site safety and health:
  - 1. Take immediate action to remove workers from the hazard and stabilize or stop work until corrective actions can be implemented to eliminate the hazard.
  - 2. Immediately identify and implement corrective action to eliminate the hazard.
  - 3. Immediately notify the Project Representative and others, as necessary

1.06 CONTRACT SITE-SPECIFIC HEALTH AND SAFETY PLAN (HASP)

- A. A comprehensive HASP covers all aspects of the Contractor's work activities related specifically and distinctly to the work and site conditions.
- B. The HASP shall be based on a site specific hazard analysis and shall explain how the APP elements and any Contract specific safety procedures shall be applied to the identified hazards in the work.
- C. The HASP shall provide an appropriate work environment for all Site employees, County staff, and authorized individuals on the Site.
- D. HASP organization: organized and bound to readily accept revisions and additions.
  - 1. Outline form.
  - 2. Table of contents.
  - 3. Numbered pages.
- E. The following subparagraphs describe certain minimum precautions for consideration in developing the HASP. At a minimum, include in the HASP all of the items below which may apply to the work. There may be other items not noted below which the Contractor shall address in the HASP. Items below which are not needed shall be noted in the HASP as not applicable.
  - 1. Hazard Communication (WAC 296-62 Part C):
    - a. Contaminant gases that may be encountered include, but are not limited to, hydrogen sulfide, methane, carbon monoxide, and carbon dioxide.
    - b. Provide a written Hazard Communication Program and emergency management plan addressing these and other potential hazardous substances that may exist or be brought on site during the work.
    - c. For work requiring the use of hazardous materials and chemicals, provide a list and corresponding Material Safety Data Sheets (MSDS) for hazardous chemicals to be used on site. If no hazardous chemicals are to be used, provide statement to that effect.
  - 2. Confined Space (WAC 296-62 Part M):
    - a. All confined spaces identified in King County wastewater treatment facilities, structures and conveyance lines are designated and classified as Permit Required Confined Spaces.
    - b. The nature of the work may expose workers to permit-required confined spaces having possible explosive, toxic and oxygen deficient atmospheric conditions.
    - c. Prior to execution of work in confined spaces, provide a written Permit Required Confined Space Safety Program that meets the requirements of 29 CFR 1910.148 and WAC 296-62 Part M.

3. Hazardous Energy Control, Lock-out & Tag-out (WAC 296-24 Part A-4):
  - a. The nature of the work may expose workers to hazardous energy sources that include, but are not limited to, electrical, mechanical, pneumatic, hydraulic, thermal, and computerized systems. Provide a written plan outlining safe work practices addressing hazardous energy control procedures that meet the requirements of 29 CFR 1910.147 and WAC 296-24 Part A-4.
  - b. For work at existing WTD facilities, the written plan is to be coordinated and be compatible with the County's existing program for Lock-out/Tag-out.
4. Fall Prevention and Protection (WAC 296-24 Part J-1 and WAC 296-155 Part C-1):
  - a. The nature of the work may expose workers to fall hazards.
  - b. Use fall protection for all workers working from an unprotected elevation of six feet or more.
  - c. Working means traveling, stationary, or at any time exposed to a fall from a surface not protected by approved: handrails, guardrails, or some other fall elimination device.
  - d. WTD prohibits the use of positioning devices as the sole means of fall protection when working above six feet.
  - e. Provide a written Fall Prevention and Protection plan outlining safe work practices addressing fall hazards that meet the requirements of WAC 296-24 Part J-1 and WAC 296-155 Part C-1.
5. Personal Protective Equipment (PPE) (WAC 296-24 Part A-2):
  - a. The nature of the work may expose workers to miscellaneous injury hazards to the head, hands, feet, body, eyes, ears, etc.
  - b. Provide a written PPE plan outlining safe work practices addressing the use of personal protective equipment and clothing that meet the requirements of WAC 296-24 Part A-2.
  - c. Minimum PPE for all workers on active work sites include a minimum requirement to wear the following at all times:
    - 1) ANSI-approved hard hat.
    - 2) Reflective construction vest.
    - 3) Safety glasses.
    - 4) ANSI approved steel toe boots.
6. Biological Agents (WAC 296-62 Part J):
  - a. Wastewater systems carry a wide spectrum of disease-producing organisms.
  - b. Provide a written hazard communication and biological/bloodborne pathogen program detailing the preventive measures to be taken to provide an appropriate work environment for persons on the Site. These may include, but are not limited to, the following:
    - 1) Instruction in appropriate measures to avoid contamination.
    - 2) A preventative inoculation program (tetanus/diphtheria, etc.) available to all employees.
    - 3) PPE and clothing to protect against infection, including rubber boots with full sole and heel steel insert-liners, safety glasses or goggles, and gloves.
    - 4) Facilities for workers to clean up, wash, and maintain good personal hygiene practices.
7. Fire Protection- Hot Work and Hot Work Permits (HWP):
  - a. A HWP is utilized in all WTD facilities and construction sites where the potential for the ignition of explosive gases, liquids and flammable/combustible materials or oxygen enriched atmospheres may potentially exist.
  - b. The HWP provides written authorization to perform Hot Work operations and establishes conditions necessary to perform these operations.
  - c. Identify any type of work that produces a possible source of ignition in the presence of a fuel and oxygen (Fire Triangle) such as sparks, static electricity, welding, torch cutting, flame heating, brazing, grinding, sanding, and drilling. These activities are considered extremely dangerous in areas where the potential for a Lower Explosive Limit (LEL) above 10% or oxygen enriched atmosphere above 23% could be encountered.
  - d. A HWP is required for areas that are classified per the WAC and NFPA 820, as applicable.
    - 1) Permit-Required Confined Spaces.
    - 2) Process Safety Management system areas.
    - 3) Class 1 Division 1 and Class 1 Division 2 hazardous locations.
    - 4) All other areas where the hot work is in close proximity to combustibles or flammables.
  - e. Contractor HWP: for all sites under Contractor control. Annotate how Contractor HWP is established and employ a system for issuing and monitoring its use.
  - f. A HWP is valid only for the parties performing the work, the work shift during which the work is conducted, and only for the conditions observed and evaluated when the permit is issued.

8. Suspect Material:
  - a. Promptly suspend work and notify the Project Representative in writing of unusual conditions, including oily soil found on work site. Work shall remain suspended until the Project Representative authorizes, in writing, that the work may resume.
9. Process Safety Management (Chapter 296-67 WAC): Not Used.
10. Underground Construction (WAC 296-155 Part Q):
  - a. Requirements apply to construction of underground tunnels, shafts, chambers, and passageways, as well as cut-and-cover excavations which are both physically connected to ongoing underground construction operations and covered in such a manner as to create conditions characteristic of underground construction
  - b. Requirements do not apply to excavation and trenching operations covered by WAC 296-155, PART N, such as foundation operations for above-ground structures that are not physically connected to underground construction operations, and surface excavation.
  - c. Include compliance with the requirements of WAC 296-155-745 and the applicable requirements of Chapter 296-36 WAC.
  - d. Provide a Tunnel Safety Plan detailing how the Site is to be protected from the dangers of underground construction. Verify that the proposed Tunneling Safety Plan meets all requirements of the Reference Standards. As a minimum, the program shall include the following:
    - 1) Access and egress.
    - 2) Safety Instruction.
    - 3) Notification.
    - 4) Communications.
    - 5) Emergency provisions.
    - 6) Self-rescuers.
    - 7) Designated person.
    - 8) Emergency lighting.
    - 9) Rescue teams.
    - 10) Hazardous classifications.
    - 11) Gassy operations.
    - 12) Air quality and monitoring.
    - 13) Additional monitoring for potentially gassy and gassy operations.
    - 14) Ventilation.
    - 15) Illumination.
    - 16) Fire prevention and control.
    - 17) Welding, cutting, and other hot work.
    - 18) Ground support.
    - 19) Haulage.
    - 20) Electrical safety.
    - 21) Hoisting unique to underground construction.
  - e. In the Tunnel Safety plan, include a Tunnel Emergency Response and Rescue plan which outlines the tunnel emergency response actions to be taken and coordinated by the tunnel rescue teams and any additional emergency response support groups and agencies. Provide detailed emergency procedures including evacuation procedures and check-in/check-out systems. Include detailed drawings of the tunnel evacuation plan and re-entry plans:
    - 1) Prepare a plan for tunnel evacuation scenarios and a separate plan for authorized re-entry into the tunnel, to be implemented in the event that 10 percent of the Lower Explosive Limit (LEL) is indicated on the air monitoring system or when automatic shutdown occurs.
    - 2) Prepare the plans to specifically outline the duties and responsibilities of all affected personnel.
    - 3) Prepare the evacuation plan to provide for manual elimination of ignition sources from all battery-powered equipment.
  - f. Post the Tunnel Evacuation Plan in a readily visible location at all portals.
  - g. No personnel shall work in the tunnel until they have completed the required safety training and are certified for work by the Site Health and Safety Officer.
  - h. Either the Site Health and Safety Officer or the Shift Safety Officer shall be on site whenever personnel are in the tunnel.
  - i. No tunneling is permitted without a Tunnel Safety Plan that has been reviewed and accepted by the Project Representative and has been accepted by the Site Health and Safety Officer.

- j. Tunnel Rescue Teams: Section 02312.
- 11. Excavation, Trenching and Shoring (WAC 296-155 Part N):
  - a. Requirements apply to all open excavations made in the earth's surface, including trenches.
  - b. Include procedures for handling all General Protection Requirements included in WAC 296-155-655.
  - c. Comply with Requirements for Protective Systems included in WAC 296-155-657.
- 12. Commercial Diving Operations (Chapter 296-37 WAC):
  - a. Due to the hazards associated with commercial diving operations conducted within wastewater collection, underground construction, conveyance and treatment facility systems, specific safety protocols and procedures are required to ensure worker and diver safety.
  - b. Provide a comprehensive Safe Practices Manual for Diving Operations which complies with Chapter 296-37 WAC.
- 13. Flammable Liquids and Liquefied Petroleum Gases (LPG):
  - a. No propane, propylene, butane, isobutane, and butylenes shall be stored inside buildings.
  - b. Provide a written listing of each of the materials listed in Paragraph 01063- 1.06 E.13.a<sup>A3</sup> planned to be used on site and notice prior to arrival on the work site.
- 14. Compressed Air Work (Chapter 296-36 WAC)
  - a. When compressed air is expected to be used, include specific safety procedures to ensure worker safety as required by Chapter 296-36 WAC.
  - b. Compression and decompression *shall*<sup>A3</sup> be carried out in accordance with the approval of DL/ WISHA.
  - c. The best practices for the health and safety aspects of workers in tunnel hyperbaric environments as developed and applied in the international tunneling industry may be used to supplement these requirements. Suggested current best practice references for compressed air work include:
    - 1) Health and Safety Executive (HSE) Work in Compressed Air Regulations 1996 (U.K.)  
[http://www.opsi.gov.uk/si/si1996/Uksi\\_19961656\\_en\\_1.htm](http://www.opsi.gov.uk/si/si1996/Uksi_19961656_en_1.htm)<sup>A3</sup>
    - 2) 2001 Addendum 'A Guide to the Work in Compressed Air Regulations 1996 Guidance on Regulations'. (U.K)
    - 3) 'Recent Developments in UK Tunneling Decompression Practices' – D.R.Lamont (HSE)
    - 4) Tunneling Machine Airlocks Safety Requirements – European Standard EN 12110

#### 1.07 UTILITIES

- A. Call the Utilities Underground Location Center (UULC) before you dig (1-800-424-5555).
- B. During the performance of the work, take appropriate precautions when working near, around, and with utilities, in order to protect the health and safety of the worker, the public, property, and the environment.
- C. Provide a flagged warning line for all work conducted in proximity to power lines. Coordinate with utility owner for this work. Modify work to comply with owner requirements.
- D. Coordinate with the utility owner and the Project Representative to obtain approval to disconnect or reconnect utilities.

#### PART 2 PRODUCTS (NOT USED)

#### PART 3 EXECUTION

##### 3.01 SAFETY AND HEALTH REQUIREMENTS

- A. The Project Representative reserves the right to audit the Contractor's APP and Implementation of the HASP.
- B. The Project Representative reserves the right to stop that portion of the Contractor's work that is determined to be an imminent or immediate threat to worker health or safety.

- C. Ongoing work and hazardous situations that are considered a safety or health risk by the Project Representative shall be corrected immediately.
- D. Ensure that necessary air monitoring, ventilation equipment, protective clothing, hazardous energy control devices, fall prevention, and other specified supplies and equipment are made readily available to employees to facilitate implementation of the APP and the HASP.
- E. All WTD facility entry protocols shall be followed. Enter all WTD facilities in teams of two or more. With written approval of the Project Representative, Contractor employees may enter alone only for short-term walk through inspections that do not involve working on ladders, with electrical equipment, or entering confined spaces.
- F. Use of intoxicants, illegal or debilitating drugs: See the Project Labor Agreement in Section 00800.
- G. Submit to the Project Representative all safety-related citations received for Contract work immediately upon receipt.
- H. For underground tunnels, use tunnel rescue teams per Section 02312.

### 3.02 APP AND HASP REVISIONS

- A. In the event that conditions of the Work change, or when the Project Representative, regulatory agencies, or jurisdictions determine that the HASP or associated documents or organizational structure are inadequate to protect employees and the public:
  1. Modify the APP and HASP to meet the requirements of said regulatory agencies, jurisdictions, and the Project Representative.
  2. Provide submittal for revisions to the APP and HASP within seven days of the notice of a required modification.
  3. The revision shall be accepted by the Project Representative prior to changing work practices.

### 3.03 POSTING

- A. Provide and maintain a copy of the APP and the HASP at the Contractor's job site office and at each of the subcontractors' offices.

### 3.04 INCIDENT AND INJURY REPORTING

- A. Notify the Project Representative immediately of all incidents involving personal injury and property damage. Provide a written report known as the Incident Report within 24 hours of any incident. Report for each incident occurrence shall include:
  1. Description of the event.
  2. Names of personnel involved.
  3. Description of injuries and treatment required (short term and long term).
  4. Description of property damage.
  5. Site visits and inspections of other agencies as a result of an incident. Include names of the persons, purpose of the visit, and any other pertinent information.
- B. Submit a Monthly Contractor Injury Report on Form 01063-A per Section 01999 consisting of a summary of the current month's injury accidents.

### 3.05 SAFETY MEETINGS

- A. Conduct safety meetings with at least the following frequency:
  1. Pre-job safety meeting with Contractor staff and subcontractor staff.
  2. Pre-activity safety meeting with Contractor and subcontractor staff whenever a new work activity is about to begin.
  3. Tailgate meetings weekly for the duration of the Contract.

- B. Notify and allow attendance of Local Fire Department(s) representatives and the Project Representative. Notification shall include the time, date, and location of all Safety Meetings.
- C. Submit list of attendees and minutes for each meeting.

**3.06 TOUR AND INSPECTION GUIDELINES**

- A. It is imperative that the highest degree of protection is afforded to all third party individuals touring and inspecting the Site. Follow these guidelines containing general instructions for the organization, direction, and safe conduct of such tours:
  - 1. Escorted visitors:
    - a. While on the Site, personnel and groups not directly involved in the construction shall be accompanied at all times by an authorized representative, the Project Representative, or the Contractor Representative.
  - 2. Notification of tours:
    - a. Tours including technical inspections shall be authorized through the Project Representative providing maximum advance notice.
    - b. Consult with the Project Representative to coordinate the tour plan, identify specific rules, and ensure necessary safety precautions are taken during inspections and tours.
  - 3. Safety Indoctrination:
    - a. Before entering the Site, all visitors shall be informed regarding the need for careful, orderly conduct, and notified of any special hazards that may be encountered.
    - b. All visitors and tour groups shall comply with proper dress, *footwear*,<sup>As</sup> and other safety requirements deemed appropriate.
    - c. Tunnel entry requires special procedures and additional PPE. No visitors shall enter the tunnel without meeting the tunnel entry requirements.

**3.07 COMPLIANCE**

- A. Failure to comply with this Section may result in a stoppage of work until adequate safety and health measures are implemented. Delays resulting from such stoppages are the responsibility of the Contractor.
- B. Imminent hazards:
  - 1. Upon discovery of any situation that may, in the opinion of the County or the Contractor, reasonably be expected to cause serious imminent physical harm, injury, illness, death, or significant environmental damage, the Project Representative and the Contractor shall suspend the related work immediately.
  - 2. After being suspended, work may resume only after the hazard concerns have been corrected to the satisfaction of the Project Representative.

**3.08 TECHNICAL ASSISTANCE**

- A. Call or write for assistance with the requirements of this Section:
 

WTD Safety and Hazardous Materials Program Office 210 S. Jackson St. MS: KSC-NR-0515 Seattle, WA 98104	Kathy Bender, WTD Construction Safety Coordinator Phone: (206) 684-1273	Jim Faccone, WTD Safety and Hazardous Material Program Supervisor Phone: (206) 684-1237
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**END OF SECTION**

# APPENDIX 8

**SECTION 01064**  
**SAFETY INCENTIVE PROGRAM**

**PART 1 GENERAL**

**1.01 SUMMARY**

- A. This Section specifies a safety awareness program to encourage jobsite safety which provides for a Contractor Safety Incentive Program (CSIP) for the Contractor and its Subcontractors, and a separate Employee Safety Incentive Program (ESIP) for Contractor and Subcontractor employees, both based on certain performance criteria.
- B. Related Sections: The work of the following sections is related to the work of this Section. Other Sections, not referenced below, may also be related to the proper performance of this work. It is the Contractor's responsibility to perform all the work required by the Contract Documents.
  - 1. Section 01025: Measurement and Payment.
  - 2. Section 01063: Health and Safety.

**1.02 QUALITY ASSURANCE**

- A. Referenced Standards: This Section incorporates by reference the latest revision of the following documents. It is a part of this Section as specified and modified. In case of a conflict between the requirements of this Section and those of a listed document, the requirements of this Section shall prevail.

<u>Reference</u>	<u>Title</u>
Chapter 296-27 WAC	WISHA Recordkeeping and Reporting
29 CFR 1904	OSHA Recording and Reporting Occupational Injuries and Illnesses

**1.03 SUBMITTALS**

- A. Procedures: Section 01300.
- B. Employee Safety Incentive Program (ESIP).
- C. Project Incident Rate (PIR).

**1.04 DEFINITIONS**

- A. Project Incidence Rate (PIR): calculation at Substantial Completion of all Work which provides the basis for incentive/disincentive payments for the CSIP. The calculation of the PIR shall be in accordance with the following:  
$$PIR = ((N + Modifier 1) \times 200,000) / WH$$

N = Number of Recordable Injuries as defined in Chapter 296-27 WAC and as reported per Section 01063.  
WH = Total work hours by all eligible employees.
- B. Modifier 1:
  - 1. Injury equivalent based on Safety Evaluation Report's (SER).
  - 2. See Paragraph 01064-1.06E for calculation criteria.
- C. Safety Evaluation Reports (SER): A performance based system, which evaluates the entire Contract safety including: efforts, implementation, effectiveness, and results.

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C53060C  
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KC 000497

D. Safety Program: See Section 01063.

E. Target PIR: Developed by the County for this Contract to determine the basis for calculation of the incentive/disincentive payment for the CSIP.

1.05 SAFETY INCENTIVE PROGRAM (SIP)

A. The SIP has two parts:

1. Contractor Safety Incentive Program (CSIP).
2. Employee Safety Incentive Program (ESIP).

B. Administered and enforced by the Site Health and Safety Officer per Section 01063.

C. Participation is required by the Contractor and all its Subcontractors on the Contract.

D. Work of Suppliers and offsite manufacturing facilities are not included.

1.06 CONTRACTOR SAFETY INCENTIVE PROGRAM (CSIP)

A. Based upon the PIR as calculated in Paragraph 01064-1.04.

B. The Target PIR for this Contract is 4.3.

C. The number of injuries and work hours used in the PIR calculation shall include injuries and work hours for the following:

1. Contractor.
2. Subcontractors of every tier.
3. All on-site staff including: management; supervisory; and employees covered by the Project Labor Agreement (PLA).

D. If a fatality occurs resulting from an occupational injury or illness, no incentive payment will be made for the entire CSIP for the Contract and the maximum disincentive will apply.

E. SER Process:

1. A safety evaluation team will be established consisting of the Contractor's Representative, the Site Health and Safety Officer, the County's Construction Manager Safety Representative, the County's Health and Safety Supervisor, and the Project Representative.
2. An SER will include a semi-annual, performance based evaluation of all work for the preceding six month period, every six months, until the Substantial Completion of all Work.
3. The team will evaluate the Contractor's performance in implementing the required Contract safety plans, including but not limited to, the following:
  - a. Accident Prevention Program (APP).
  - b. Site Specific Health and Safety Plans (HASP).
  - c. Tunnel Safety Plans.
  - d. Traffic Control Plans.
  - e. Excavation and Trenching Plans.
  - f. Environmental and Hazardous Material Compliance.
  - g. Tunnel Rescue Teams.
  - h. Safety-related training programs.
  - i. Corporate commitment to safety.
  - j. Coordinated safety programs of all Contractors and Subcontractors at all Sites.
  - k. Recordable Injury severity.
4. The evaluation will identify and score safety items/issues noted during the review.
5. The SER form will be made available to the Contractor within seven days of the effective date of the Notice to Proceed.

6. Scoring for the SER period will be per Table 1:

Score	Rating	SER Score	Meaning
100% to 95%	Excellent	-1.0	No improvements warranted or necessary.
95% to 90%	Satisfactory	0.0	Minor general safety or hazardous issues* to be addressed.
89% to 80%	Unsatisfactory	1.0	Significant general/serious safety and/or hazardous issues*.
Below 80%	Poor	5.0	Serious, repeat, or willful safety and/or hazardous issues*.

\*Hazardous issues in the SER evaluation are those that can affect the safety of a project including, but not limited to, containment of fluids, hazardous materials, and other items that may cause sickness or injury.

7. At the conclusion of each SER, the Contractor will be provided with a copy of the complete report.
8. Calculation of Modifier 1:
- a. Upon Substantial Completion of all Work, Modifier 1 will be calculated as follows:
- 1) Beginning with the SER score from each evaluation period during the entire Contract, perform the following:
    - a) One of the highest (if more than one) and one of the lowest (if more than one) scores will be removed.
    - b) The remaining SER scores after the above removal, will be averaged by totaling all the scores and dividing by the amount of scores in the calculation.
    - c) Modifier 1 value will be applied into the PIR calculation.

#### 1.07 EMPLOYEE SAFETY INCENTIVE PROGRAM (ESIP)

- A. General:
1. Designed, implemented, and administered by the Contractor.
  2. Submit ESIP within 14 days of the effective date of the Notice to Proceed.
  3. Prompt and responsive medical attention is essential to a workforce that is healthy and safe. The program is not intended to encourage peer pressure situations that may tempt employees to work while hurt or discourage employees from reporting incidents.
  4. Meet or exceed the requirements listed in these guidelines.
  5. Include guidelines for expenses that are considerate of government allowable expenditures.
- B. Guidelines:
1. Intended to encourage high safety awareness and performance while requiring that all injuries and accidents be reported to the appropriate safety representative.
  2. Shall provide incentives for higher levels of safety consciousness for each shift and employee while fostering teamwork among individual participants.
  3. Design program and payments to allocate the incentive payment over the entire Contract Time and be representative of the amount of work occurring for each covered period.
  4. Applies to all on-site staff including: management; supervisory; and employees covered by the PLA.
- C. ESIP shall consist of three parts:
1. Part I:
    - a. Applies to crews/shifts.
    - b. A program to provide monetary rewards for a safety performance that meets program requirements for a time period not less than three months nor more than six months.
    - c. The objective is to reward each crew/shift that effectively controls accidents, injuries, and damage by promoting worker-to-worker encouragement to work safely.
    - d. Crews/shifts shall at a minimum meet the following requirements to receive a reward:
      - 1) No injuries.
      - 2) No safety citations.

- 3) Did not cause: a Recordable Incident as defined in 29 CFR 1904; property damage; or equipment damage.
- 4) Others as determined by the Contractor.

2. Part II:

- a. Applies to individuals.
- b. A program to provide monetary rewards for a safety performance that meets program requirements for a time period not less than three months nor more than six months.
- c. The objective is to provide rewards to individuals who have a safety record that meets program requirements as follows:
  - 1) No Injuries.
  - 2) No safety citations.
  - 3) Did not cause: a Recordable Incident as defined in 29 CFR 1904; property damage; or equipment damage.
  - 4) Others as determined by the Contractor.
- d. Provides for a method for recognition of individuals who go beyond their normal duties to prevent accidents or who recognize and report an unsafe condition that had the potential of causing serious injuries.

3. Part III:

- a. Provides for non-monetary rewards that may include free lunches, gift certificates, hats, shirts, etc.
- b. The Contractor is encouraged to use the Incentive for special safety awareness programs that benefit the entire Contract's labor force, including barbecues or other gatherings that support and improve safety awareness and performance.

D. Disciplinary Program:

1. Include a disciplinary program which incorporates the following concept:
  - a. Any individual who pressures another employee not to report an accident, injury, or illness or to seek medical treatment, and any individual who does not report an accident, injury, or illness or does not seek medical treatment, when needed, will, at a minimum, forfeit all their safety incentive rewards for six months that may have been due as a result of individual and crew related work.
  - b. Either of the above disciplinary actions shall be considered an offense as described in the SIP and more stringent disciplinary actions shall be taken if prior offenses have been committed. If the severity of the situation warrants, the individual shall be removed from the Site.

1.08 INCENTIVE AND DISINCENTIVE PROGRAM PAYMENT

A. The total available Safety Incentive Program is \$500,000 allocated as follows:

1. CSIP:
  - a. Maximum incentive: \$300,000, associated with a PIR of 2.3 or lower.
  - b. Maximum disincentive: (\$300,000), associated with a PIR of 6.3 or higher, or if a fatality occurs resulting from an occupational injury or illness.
2. ESIP: Maximum Incentive available:
  - a. Part I: \$100,000.
  - b. Part II and Part III: \$100,000.
  - c. If the Contractor elects to institute a program which exceeds the requirements indicated, the additional cost of the ESIP shall be paid for by the Contractor.

B. Measurement:

1. CSIP shall be measured at Substantial Completion of all Work, per Table 2:

Calculated PIR	CSIP Payment	Calculated PIR	CSIP Payment
		4.3	\$0
2.3 and below	\$300,000	4.4	(\$15,000)
2.4	\$285,000	4.5	(\$30,000)
2.5	\$270,000	4.6	(\$45,000)
2.6	\$255,000	4.7	(\$60,000)
2.7	\$240,000	4.8	(\$75,000)
2.8	\$225,000	4.9	(\$90,000)
2.9	\$210,000	5.0	(\$105,000)
3.0	\$195,000	5.1	(\$120,000)
3.1	\$180,000	5.2	(\$135,000)
3.2	\$165,000	5.3	(\$150,000)
3.3	\$150,000	5.4	(\$165,000)
3.4	\$135,000	5.5	(\$180,000)
3.5	\$120,000	5.6	(\$195,000)
3.6	\$105,000	5.7	(\$210,000)
3.7	\$90,000	5.8	(\$225,000)
3.8	\$75,000	5.9	(\$240,000)
3.9	\$60,000	6.0	(\$255,000)
4.0	\$45,000	6.1	(\$270,000)
4.1	\$30,000	6.2	(\$285,000)
4.2	\$15,000	6.3 and above	(\$300,000)*

\* If one or more fatalities occur resulting from an occupational injury or illness, this payment applies.  
 \*\* Calculate PIR to the nearest hundredth, and interpolate between the values shown in the above table as necessary.

2. ESIP shall be measured in accordance with a balanced distribution of payments designed to meet the guidelines specified herein and as incorporated into the ESIP program as submitted by the Contractor and accepted by the County.
- a. The Contractor will be reimbursed the direct expenses for reasonable costs paid as approved by the Project Representative:
- 1) Directly to crews, shifts, and employees.
  - 2) For non-monetary rewards.
  - 3) For group events.
- b. Costs of administering the program will not be reimbursed.

C. Payment:

1. CSIP: Payment per Section 00700, Article 6.2, at Final Payment, except that no Overhead and Profit mark-ups will be applied to the amount in Table 2.
2. ESIP: Payment per Section 00700, Article 6.2, no more frequent than quarterly, based on Project Representative approved direct expenses. No Overhead and Profit mark-ups will be applied to the direct expenses.

PART 2 PRODUCTS (NOT USED)

PART 3 EXECUTION (NOT USED)

END OF SECTION

Brightwater Conveyance East Contract  
09/20/05

01064-5

C53060C  
Addendum No. 1 and No. 5

KC 000501

# APPENDIX 9



KING COUNTY

Executed in 4 Counterparts  
of which this is  
Counterpart No. 1

**AMENDMENT NO. 1 to CONTRACT NO. P43020P  
CONSTRUCTION MANAGEMENT SERVICES AGREEMENT  
FOR THE BRIGHTWATER CONVEYANCE PROJECT**

WHEREAS, King County ("County") has a contract with Jacobs Civil, Inc., ("Consultant"), numbered P43020P ("Agreement"), executed on April 15, 2005; to provide construction management services for the Brightwater conveyance projects; and

WHEREAS, the parties wish to amend the Agreement for the purpose of adding certain construction management and cost estimating services, and revising the scope of work related to safety;

NOW THEREFORE, in accordance with Section 4 of the Agreement, the parties agree to the following modifications contained in this Amendment No. 1:

1. The Scope of Work is amended as described in Exhibit A.
2. The amount to be paid to the Consultant for work under this Amendment No. 1 shall be computed as set forth in the Cost Summary attached hereto as Exhibit B, which, by this reference is incorporated herein as if fully set forth, and shall be computed on a cost-plus-fixed-fee basis, but not to exceed a maximum amount of **NINE HUNDRED SIXTY-TWO THOUSAND FIVE HUNDRED FORTY-SEVEN DOLLARS AND EIGHTY-FIVE CENTS (\$962,547.85)** (hereinafter called the "Amendment No. 1 Total Price"), in accordance with SECTION 8, COMPENSATION, provisions B1, B2, B3, C, D, and E, and subject only to authorized adjustments as specifically provided in this Agreement.
3. **Fixed Professional Fee (Profit).** For work under Amendment No. 1, the County shall pay the Consultant a fixed professional fee (profit), which amount shall not exceed a maximum total sum of **SIXTY-THREE THOUSAND NINE HUNDRED TWENTY-SEVEN DOLLARS AND EIGHTY-FOUR CENTS (\$63,927.84)**. The Consultant acknowledges and agrees that this negotiated amount does and shall not include any profit to the Consultant on subconsulting contracts. It is understood and agreed that this fee is a fixed amount which cannot be exceeded because of any differences between the Amendment No. 1 Total Price and actual costs of performing the work required by this Agreement, and in no event shall payments to the Consultant exceed said Amendment No. 1 Total Price, adjusted as provided herein. It is further understood and agreed that



the fixed fee is only due and payable for Project work for which the County has given notice to proceed and for which the Consultant has satisfactorily completed. The fixed fee will be prorated and paid monthly in proportion to the Project work satisfactorily completed.

4. All other terms and conditions of the Agreement are to remain in full force and effect.

In witness whereof, the parties hereto have accepted this Amendment No. 1, which will become effective upon execution by the County.

KING COUNTY

JACOBS CIVIL, INC.

By: *Pam Bissonette*  
Pam Bissonette, Director  
Dept. of Natural Resources

By: *Dany VanWormingen*  
Title: *Manager, Seattle Operations*

DATE: *12/20/05*

DATE: *12/12/05*

**Construction Management Services  
for Brightwater Conveyance Project (P43020P)  
Amendment #1**

**EXHIBIT A  
SCOPE of WORK**

Amendment 1 to this contract incorporates revisions to the Scope of Work, discussed in further detail below. In addition, the Task Budgets are updated to reflect adjustments made through Task Order Reallocations that have been made during the initial period of work under the contract. Many of the changes made in this Amendment reflect the work done to date under the original contract to develop staffing plans for the construction support phase of the work. At the time the original contract scope and LOE were developed, the LOE was based on best available estimates of the staffing levels needed to accomplish the work. Planning work completed to date has identified some areas where more staff (labor hours) are needed, and other areas where fewer hours are needed. In general, these changes have been made through Task Order Reallocations.

**Task Order Reallocations:** These revisions to the task budgets have been made to adjust overhead rates where applicable (substituting home overhead rates for field office overhead rates), and making other adjustments to task budgets. Some of the adjustments resulted in decreases in task budgets, which were then used to increase other task budgets. The increases reflect additional labor hours needed to accomplish the work of each affected task, as discussed in further detail below.

**Table 1  
Budget Revisions Made by Task Order Reallocations**

Task No	TOR	Description Summary
100	1	Revised hours and budget to reflect: 1) Field OH in place of Home OH, 2) reduced number of hours expected to be billed.
150	10	Moved Woodall hours from Task 150 to 500
200	2	Change from Home OH to Field OH for Jacobs and epc staff
300	3	Add hours for office engineer and part time cost estimator from budget savings on other accounts. Added KJM hours by reducing other consultant hours in LOE. Moved Gowring 320 hours from Task 300 to 500
400	4	Reduced IT hours because KC is providing IT support.
500	5	Change from Home OH to Field OH for Jacobs and CH2M. Added 75 hours for Jacobs DPM. Moved Gowring from Task 300 to 500 (320 hours). Move Woodall hours from Task 150 to 500 under Lemley (120 hours)
600	12	Change from Home OH to Field OH for Jacobs and CH2M. Increased hours for Jacobs Deputy PM.
1000	6	Deleted duplicative hours in 2005, already covered in Task 100
1500	11	Placed Woodall's hours for Task 1500 under the subconsultant Lemley
2000	7	Deleted hours. Work will be performed under 3000 by Office Engineer
3000	8	Allocate hours and budget for a full time cost estimator. Change from Home OH to Field OH.
6000	9	Allocate hours and budget for IPS Assistant RE position through 2006.

**Amendment 1 Scope Revisions:** Table 2 provides a summary of the scope changes made by Amendment 1. Some of the changes affect only the written scope of work description. Most of the changes expand the scope of work included in the original contract, to reflect the responsibilities of the consultant, as a result of the development of the detailed Construction Management Plan during the initial phase of work under the contract.

**Table 2  
Summary of Scope Changes Made by Amendment 1**

<b>Task</b>	<b>Scope Revision</b>
151	Delete and replace text to clarify consultant responsibilities on construction sites
154	Increased responsibility for technical support on OCIP
301	Increased responsibility for cost estimating; provide 60%, 90%, Engineer's Estimates
505	Increased scope of constructability reviews to address IPS at 90% design
508	Revised scope of construction issues support to design team to address coordination at Portal 19 (West Tunnel and Outfall contracts)
507	Increased scope of constructability reviews to address ancillary facilities at 60% and 90% design
610	Increased scope for development of CM Plan to include team-building workshops for CM and KC staff
1510	Delete and replace text to clarify consultant responsibilities on construction sites
3000	Increases level of effort to accomplish the work in original scope, to reflect Construction Management plan responsibilities for Project Control
5100	Clarify consultant responsibility for documenting pre and post construction condition of structures in close proximity to tunnels and shafts
6500	Clarify consultant responsibility for inspection of demolition contracts

### **Revised Scope and Budget Descriptions**

Task descriptions are provided below for each task where the budget has been revised through either a Task Order Reallocation or Amendment 1 changes.

#### **Task 100: Project Management**

Task Order Reallocation 1 revised the budget for this task because the hours will be billed at the field office overhead rate, rather than the home office rate which was included in the budget. In addition, some of the budgeted hours will not be billed to this task, because project management work will be billed under Task 1000 once the construction support phase begins.

**DELETE Subtask 151: Safety Program in its entirety and replace with the following:**

**Subtask 151: Safety Program (Revised)**

The Brightwater Conveyance Project is a technically challenging tunneling project requiring extensive safety planning into the means and methods of construction including detailed coordination and planning with emergency response agencies. The tunnels will be constructed in environments where the tunnels experience high hydrostatic heads requiring sophisticated equipment and procedures to protect personnel and equipment.

The construction contractors have responsibility for site safety per the construction contract specifications. The CM consultant staff is responsible to become familiar with all requirements of the contractor's Site-Specific Health and Safety Plan, and to comply with applicable portions of the contractor's plan.

**Health and Safety Program:** For the Brightwater Conveyance project, the CM consultant's Safety Manager will provide a written Health and Safety Program that identifies the requirements for construction safety and the roles, responsibilities and authority for safety performance for the CM. The Safety Manager will provide recommendations to the CM and Project Representative regarding review and approval of contractors' safety programs (submittals). The Safety Manager will be responsible to coordinate with all contractor safety officers and safety officials representing emergency response agencies, the Federal Occupational Safety and Health Act of 1970 (OSHA), and the Washington Industrial Safety Act of 1973 (WISHA). The CM will develop a draft and final Health and Safety Program for CM consultant staff and review and revise/update as necessary.

The Safety Manager will hold periodic orientation programs for all employees working in the project office. The Safety Manager will determine training requirements for CM staff to comply with the CM's Health and Safety Plan, and will conduct training classes (or arrange to have them taught by qualified instructors) for all CM staff (including subconsultant staff as appropriate). On a space-available basis, these classes will be made available to King County staff. The CM will maintain records of all safety training for CM consultant staff. The CM will ensure that all sub consultants prepare Safety plans to cover their own staffs, and provide training as appropriate.

**Owner Controlled Insurance Program (OCIP):** The CM Health and Safety Program will incorporate applicable requirements of an Owner Controlled Insurance Program (OCIP). The Safety Manager is responsible to coordinate with the OCIP representatives for the implementation, monitoring and reporting of the project's safety performance in accordance with the requirements of the OCIP.

**Deliverables:**

- Draft and final CM project office Health and Safety Program (2 copies).
- Safety training records (upon request)
- Safety performance reports as defined in the Health and Safety Program.
- OCIP safety statistics and compliance reports.

**LOE Assumptions:**

- Safety Manager half time

**Task 150: Project Management Support**

Hours for Subconsultant Tom Woodall were moved from Task 150 (Subtask 153) to Task 500, as Tom Woodall's services were expected to be included in the subcontract with Lemley Associates.

**ADD to Task 150 Project Management Support:**

**Subtask 154: OCIP Support (New)**

The CM will engage King County's designated consultant to provide risk management and related consulting services as requested by King County. King County has contracted with Aon Risk Services to provide services for the design, implementation, and administration of the Brightwater Owner Controlled Insurance Program (OCIP). The CM's engagement of the consultant designated by King County is for the convenience of King County, and Consultant shall have no responsibility or liability for the services of the consultant. Services provided by King County's designated consultant may include:

- Review of Aon information and reports
- Review of OCIP insurance policies
- Review of OCIP documents and reports, including Administration and Insurance Manuals, Safety Manual and insurance policies
- Evaluate Risk Management Information System (RMIS)
- Attend and participate in meetings with County staff, contractors and consultants
- Participate in periodic review of OCIP performance

**Deliverable:**

- CM will direct King County's designated consultant to prepare memoranda with findings and recommendations for King County Risk Management and Program Management staff.

**LOE Assumption:**

- Risk Management Expert part-time for twelve months

**Task 200: Project Controls – Schedule**

The budget for this task was revised to reflect Field Office overhead rates rather than Home Office overhead, which were assumed in the budget. There are no changes to the labor hours for this task.

**Task 300: Project Controls – Cost Control and Cost Estimating Services**

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The scope for Task 300 includes setting up cost control systems that will be used during the construction phase. Early in the performance of the work under this task, it became apparent that the budget allocated for this task was not adequate to perform the work. The task budget was revised to add more cost estimating and office engineering support to ensure that the planning work could be successfully completed prior to the start of construction.

A part-time office engineer will assist with setting up the project office; project reporting, and coordinating the work of subconsultants. Part-time cost estimating support will allow for cost analysis of alternative approaches during final design.

#### **Subtask 301: Additional Cost Estimating Services (New)**

During Part 1, the CM shall prepare construction cost estimates for each construction contract at 60% and 90% design completion and prepare an engineer's estimate of anticipated bid costs based on each set of contract bid documents. The CM will utilize or develop software systems to provide a uniformity of all cost estimates and to provide consistency of cost estimates across all projects. The CM will acquire and maintain necessary cost estimating databases to support preparation of the cost estimates.

The CM will prepare cost estimate trend reports in a format acceptable to King County for each project as the cost estimates are developed. A trend report is expected at 90% and Engineer's Estimate for each contract. The purpose of the trend report is to provide a detailed comparison of the current estimate to the previous cost estimates for the same project element, highlighting the impacts of changes in the design, changes in the project scope, significant changes in prices, or other factors that affect the cost of the project. In addition, each cost estimate will be adjusted back to 2004 dollars, to allow comparison to the 30% estimate prepared by others.

The CM will assist the County as requested in maintaining a program level cost estimate and budget for the conveyance project.

#### **Deliverables:**

- Detailed construction cost estimates at 60% and 90% design for each contract.
- Engineer's Estimates of costs based on bid documents for each contract.
- Documentation of the basis for each estimate, including key assumptions.
- Cost estimate trend reports for each contract at 90% and Engineers Estimate.

#### **LOE Assumptions:**

- The duration for this level of effort is 15 months.

#### **Task 400: Information Management & Document Control**

The task budget for IT services to be performed in this task was reduced because King County staff is providing some of the IT support.

#### **Task 500: Constructability Reviews**

Adjustments were made to the budget for this task to reflect Field Office Overhead rates rather than Home Office Overhead rates, which were included in the original budget calculations. In addition, hours in the LOE worksheet for Mike Gowring were moved from Task 300 to Task 500, to more accurately reflect the work to be performed by Mr. Gowring. As discussed above, hours for Tom Woodall's services were moved from Task 150 to 500.

The budget for this task was revised to add hours for the Deputy Project Manager, to reflect responsibilities for coordinating constructability reviews for all the construction contracts included in the conveyance program.

#### **ADD to Task 500 Constructability Reviews:**

##### **Subtask 505: Influent Pump Station Constructability Review (New)**

The CM shall perform constructability reviews for the Influent Pump Station at the 90% design milestone. This review will address construction issues, contract administration, coordination between disciplines, and other issues relating to project construction.

Budgets and LOE for some Jacobs staff on Subtasks 502, 503 and 504 were reduced, which offset the additional LOE hours added for Subtasks 505 and 507 for other Jacobs staff.

##### **Deliverables:**

- Review comments on design submittals
- Presentation of key findings of constructability review to King County and designer's project teams
- Draft text of specification sections related to construction issues

##### **LOE Assumption:**

- Review (workshop) at 90% design by 9 experts for 5 days

##### **Subtask 506: Portal 19 staging area analysis and recommendations (New)**

Under this new subtask, the consultant will assist in development of plans for construction staging at Portal 19, with the intent of addressing needs of both the West Tunnel and Outfall contractors. Specific issues to address include:

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- Site access and security
- Laydown areas, segment storage, cranes
- Stormwater runoff control and treatment
- Transport of tunnel spoils by rail or barge
- Tunneling and Microtunneling shafts
- Slurry separation plant, spoil stockpile areas
- Electrical substations and distribution
- Worker parking areas and access
- Contractor and CM Offices, stores, workshops
- Minimizing interferences between contractors
- Compliance with noise ordinances, permit conditions, property restrictions
- Existing areas of contaminated soils
- Coordination with property owner operations and existing facilities

In order to minimize the potential for conflicts between the outfall and tunnel contractors, it is critical to have the staging areas coordinated between the two contracts, and have sufficient space to accommodate the anticipated needs for each.

As part of its existing scope of work, the Jacobs Civil CM team will assist in coordination with the West Tunnel design team. Work under this subtask will support the County in developing the drawings and specifications for the procurement documents for the Outfall Design/Build contract and the West Tunnel contract.

**Deliverable:**

- Construction staging site sketches and text to be incorporated into specification sections for Outfall Design/Build procurement documents

**Subtask 507: Constructability Reviews for Ancillary Facilities (New)**

The consultant will conduct constructability reviews for ancillary contracts that are part of the conveyance program, including Odor Control, North Creek facilities, Effluent Drop Structure, Reclaimed Water, and Hollywood PS Chemical Injection. This review will address construction issues, contract administration, coordination between disciplines, and other issues relating to project construction.

**Deliverables:**

- Review comments on design submittals
- Presentation of key findings of constructability review to King County and designer's project teams
- Draft text of specification sections related to construction issues

**LOE Assumption:**

- Five one-day reviews at 60% or 90% design, by 2 experts

### **Task 600: Construction Management Plan Development**

The budget for this task was revised to show Field Office Overhead rates rather than Home Office Overhead rates, as was assumed in the original budget.

The budget for this task was increased to allow more hours for the Deputy Project Manager, to reflect his anticipated level of involvement in development of procedures and guidelines for the construction phase. In part, this reflected the need to ensure that procedures developed for Conveyance construction management could be used by other Brightwater construction contracts.

### **ADD to Task 600: Construction Management Plan Development**

#### **Subtask 610: Team-Building Workshops for CM Team, King County staff and other consultants (New)**

The consultant will hold workshops to be attended by members of the CM consultant team, design consultant, and King County staff directly involved in construction management activities. The purpose of the workshops is to agree on goals for project construction and roles and responsibilities for the participants during the construction phase. Follow-up workshops will be held during the design phase for each contract.

#### **Deliverables:**

- Prepare and submit topics and agenda for workshops
- Submit summary of workshop results with agreements and action items

#### **LOE Assumptions:**

- One-day Project team-building workshop for King County and CM consultant teams – one Facilitator
- Half-day team-building workshops for Central and West contracts – one Facilitator

### **Task 1000: Project Management**

The budget for this task was revised to reflect a more accurate projection of hours anticipated for this task in 2005. Some of these hours were duplicated in Task 100, and as a result they were deleted from Task 1000.

**DELETE** Subtask 1510 Safety Program in its entirety and replace with the following:

**Subtask 1510: Safety Program (Revised)**

Revise and update CM Health and Safety Plan prepared under Part I to reflect conditions anticipated during the construction phase. Provide safety training to CM consultant staff to meet all applicable requirements. Maintain records of safety training. Ensure adequate orientation to job-site conditions for all new consultant staff. Provide refresher classes and other training as necessary to ensure all consultant staff is current on all requirements. On a space-available basis, make training available to KC staff on the project. (KC will maintain records of KC staff training.) Maintain all safety training records for CM staff.

The complexity of the tunneling and underground conditions anticipated in the Brightwater Conveyance project requires special attention to safety by the CM. In addition to the requirements stated above, the CM will conduct the specialized training necessary to certify CM project personnel in first aid and CPR, confined space entry, 24-hour and 40-hour OSHA safety training with emphasis on underground hazards and safety requirements. The CM's safety expert will make periodic visits to project work sites, attend monthly safety meetings and work with the construction contractors' safety staff to insure compliance with all safety requirements of the contracts. The CM will provide tunnel and construction safety expertise to the design team and King County as requested during the planning and implementation of the work. The CM's safety expert will respond to safety issues that arise on the project and coordinate emergency response planning with appropriate agencies. The CM will prepare monthly reports regarding the safety performance of the project, including recommendations for improved procedures and methods to improve safety. The CM will coordinate monthly with owner controlled insurance representatives.

The CM's Safety Manager will oversee the implementation of the CM's Health and Safety Program that identifies the requirements for construction safety and the roles, responsibilities and authority for safety performance for the CM. The Safety Manager will provide recommendations to the Project Representative regarding review and approval of contractors' safety programs (submittals). The Safety Manager will be responsible to coordinate with all contractor safety officers and safety officials representing emergency response agencies, the Federal Occupational Safety and Health Act of 1970 (OSHA), and the Washington Industrial Safety Act of 1973 (WISHA).

**Safety Authority:** The CM consultant staff has the authority to stop work immediately if they believe that the safety violation presents an immediate danger to life or health of the CM consultant staff or others on the construction site.

**Deliverables:**

- Project office Health and Safety Program revisions.
- Safety training records and other safety records (upon request)
- Draft and final monthly safety reports.

**LOE Assumption:**

- Safety Manager half time

#### **Task 2000: Project Controls – Schedule**

The budget for Task 2000 was reduced so that project control support for both cost and schedule controls could be performed by an Office Engineer under the Task 3000 budget.

#### **Task 3000 Project Controls – Cost Estimating**

The task budget for Task 3000 is increased by transferring some hours from Task 2000, and by revising overhead rates as appropriate. The Officer Engineer budgeted under this task will perform the Change Order cost estimating work in the original scope of work. During the pre-construction planning phase, it was recognized that this work would require a full-time estimator to cover the work under all construction contracts that are part of the conveyance program.

Under the re-allocations between Tasks 2000 and 3000, the net budget total for the two Project Control tasks was reduced by \$213,005. See below for scope and budget added to Task 3100 under Amendment 1.

#### **Task 3100: Program Cost Control**

The budget and LOE for this task is increased in Amendment 1 to allow an additional Project Control Engineer. This staff position will provide support to the tunnel construction contracts. The need for an additional staff person was identified as part of the work of developing the Construction Management Plan (Task 600). As a result of the development of staffing plans as part of the CM Plan, the need was identified for additional project control support, beyond what was in the original budget for Task 3000.

#### **ADD to Task 5000 – Construction Contract Administration**

##### **Subtask 5100: Pre-construction and post-construction documentation of structures and roadways (New)**

This task involves the documentation of pre-existing conditions for certain identified roadway and building structures within 70 feet of tunnel centerlines along the tunnel alignments for the East, Central and West tunnels, and for facilities and structures adjacent to shaft construction and micro-tunneling projects. Documentation of the pre-existing condition of the identified structures and surface facilities will be made before tunneling or construction occurs in the vicinity of the subject properties, but no earlier than six months before tunneling or excavation approaches the properties. The scope of work includes the following for each subject property:

- Assist King County staff in obtaining Rights of Entry
- Photographing and videotaping the inside and outside of all structures.

- Taking measurements of critical structural elements and identification of measurement benchmarks.
- Documenting any existing visible damage or visible structural defects.

The CM will develop procedures for collecting the pre-construction data, including forms for data collection. The procedures will include provisions for archiving the documentation and for conducting post-construction data collection and analysis of the pre and post construction data.

#### **Task 6000: Inspection and Resident Engineering Services**

Construction of the Influent Pump Station (IPS) is scheduled to begin in 2008. As a result, the original scope of work for the CM contract did not include LOE and budget for construction support for the IPS. However, during the pre-construction planning phase, it became apparent that it would be advantageous to include scope for the CM team to become familiar with the IPS design and participate in the design process, which will be complete in early 2006. As a result, the budget for this task was revised to allow time for the Assistant RE for IPS beginning in 2005.

As part of Amendment 1, the LOE for Task 6000 was reduced to delete hours budgeted for 2005 that will not be billed.

#### **ADD to Task 6000 Inspection and Resident Engineering Services**

##### **Subtask 6500: Demolition Contracts (New)**

Provide construction contract administration and field inspection services for the Portal 41 and 46 Demolition contracts.

##### **Deliverables:**

- Project files, including all submittals, RFIs, correspondence, permit tracking documentation
- Document control logs
- Submittal log, updated as necessary
- RFI log, updated as necessary
- Daily inspection reports
- Photos, videos, and logs

##### **LOE Assumption:**

- Resident Engineer half time

#### **Task 8000: Additional Unplanned / Critical Work**

Task Order Reallocations discussed above under each task resulted in changes in the task budgets, some of which were shifts among task budgets. Remaining budget savings due

# APPENDIX 10



KING COUNTY

Executed in 4 Counterparts  
of which this is  
Counterpart No. 2

**AMENDMENT NO. 2 to CONTRACT NO. P43020P  
CONSTRUCTION MANAGEMENT SERVICES AGREEMENT  
FOR THE BRIGHTWATER CONVEYANCE PROJECT**

WHEREAS, King County ("County") has a contract with Jacobs Civil, Inc., ("Consultant"), numbered P43020P ("Agreement"), executed on April 15, 2005, to provide construction management services for the Brightwater conveyance projects; and

WHEREAS, on December 20, 2005, the parties executed Amendment No. 1 to the Agreement;

WHEREAS, the parties wish to amend the Agreement for the purpose of adding certain construction management services;

NOW THEREFORE, in accordance with Section 4 of the Agreement, the parties agree to the following modifications contained in this Amendment No. 2:

1. The Scope of Work is amended as described in "Exhibit A," which by this reference is incorporated herein.
2. The amount to be paid to the Consultant for work under this Amendment No. 2 shall be computed as set forth in the Cost Summary attached hereto as Exhibit B, which, by this reference is incorporated herein as if fully set forth, and shall be computed on a cost-plus-fixed-fee basis, but not to exceed a maximum amount of **EIGHT HUNDRED EIGHTY-SIX FOUR HUNDRED NINETY-EIGHT DOLLARS AND SEVENTY-SEVEN CENTS (\$886,498.77)** (hereinafter called the "Amendment No. 2 Total Price"), in accordance with SECTION 8, COMPENSATION, provisions B1, B2, B3, C, D, and E, and subject only to authorized adjustments as specifically provided in this Agreement.
3. **Fixed Professional Fee (Profit).** For work under Amendment No. 6, the County shall pay the Consultant a fixed professional fee (profit), which amount shall not exceed a maximum total sum of **SEVENTY-NINE THOUSAND ONE HUNDRED EIGHTY-NINE DOLLARS AND FIFTEEN CENTS (\$79,189.15)**. The Consultant acknowledges and agrees that this negotiated amount does and shall not include any profit to the Consultant on subconsulting contracts. It is understood and agreed that this fee is a fixed amount which cannot be exceeded because of any differences between the Amendment No. 2 Total Price and actual costs of performing the work required by this

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Amendment No. 2



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Agreement, and in no event shall payments to the Consultant exceed said Amendment No. 2 Total Price, adjusted as provided herein. It is further understood and agreed that the fixed fee is only due and payable for Project work for which the County has given notice to proceed and for which the Consultant has satisfactorily completed. The fixed fee will be prorated and paid monthly in proportion to the Project work satisfactorily completed.

4. All other terms and conditions of the Agreement are to remain in full force and effect.

In witness whereof, the parties hereto have accepted this Amendment No. 2, which will become effective upon execution by the County.

KING COUNTY

JACOBS CIVIL, INC.

By: Pam Bissonnette  
Pam Bissonnette, Director  
Dept. of Natural Resources

By: Alan Wankewicz  
Title: Manager, Seattle Operations

DATE: 6/23/06

DATE: 6/12/06

**Construction Management Services  
for Brightwater Conveyance Project (P43020P)  
Amendment #2**

**EXHIBIT A  
SCOPE of WORK**

Amendment 2 to this contract will add two new subtasks and revise budgets of existing tasks, as discussed in further detail below. New subtasks are added to provide support to construction of the Influent Pump Station and Ancillary contracts; and to coordinate efforts related to start-up and system integration of the conveyance system. As some tasks in the existing Scope of Work are now completed, the budgets for the designated tasks can be adjusted to reflect the actual cost at completion. Task Order Re-allocations included in Amendment 2 will shift available funds to other tasks in the existing scope to cover work that was not anticipated at the time of the original contract and Amendment 1.

**Table 1  
Summary of Changes made by Task Order Reallocations  
and Amendment 2**

<b>Task No</b>	<b>Description Summary</b>
300	Revise hours and budget to reflect Home OH in place of Field OH for remaining estimating labor.
1000	Increased task budget to fund positions full-time for the contract period.
2000	Provide overall program schedule management and reporting.
3000	Provide additional cost estimating support during construction.
4000	Provide Constructware training, and additional document control support.
6400	Revise start date for Resident Engineering for West Tunnel contract.
6600	New task to address Resident Engineering work to support IPS contract.
6700	New task to address Resident Engineering work to support Ancillary contracts

**Revised Scope and Budget Descriptions**

Task descriptions are provided below for each task where the scope and/or budget are revised through either a Task Order Reallocation or Amendment 2 changes.

**Task 300: Project Controls – Cost Control and Cost Estimating Services**

Amendment 1 added subtask 301 for additional cost estimating services. At the time, the work was contemplated to be performed at the Brightwater Project Office. However, the staff and resources were located at the CM consultant's offices in Bellevue. Therefore, a balance of the labor hours will be charged at the Home Office overhead rate. The task budget and hours have been adjusted to reflect the split between Field and Home office overhead rates.

**Task 1000: Project Management**

The task budget is increased to cover full-time project management service during the construction phase. The scope for this task was developed on the assumption that the project manager's time would be covered in this task, on a full-time basis. However, the hours were not correctly reflected in the LOE spreadsheet, with the result that the number of hours needs to be increased to provide sufficient budget for the full-time project manager. The designated reallocation of budget will accommodate the increased hours for the project manager.

**Subtask 2100: Program Schedule**

Under Subtask 2100, The CM will provide overall program schedule and project controls management service to the project. At the time that the original scope was developed, it was undetermined how responsibilities for schedule development and maintenance would be shared between King County staff and the CM consultant. As part of the CM planning process, the scope has been further defined in detail.

The program level schedule (conveyance program) will incorporate input from all of the contract schedules, and milestones/key activities from the marine outfall and treatment plant contracts. Startup activities and sequence will be developed and coordinated across contracts, where necessary. The program level schedule will provide input from all of the conveyance contract schedules into King County's Master Schedule. The CM is responsible for:

- Analysis of the Conveyance and Treatment Plant interface points to establish key milestones for each program to allow completion of the entire project most efficiently.
- Establish startup and commissioning interrelationships for planning purposes.
- Analysis of Schedule updates to determine if changes on one element of the project are likely to affect the other at the interface points.
- Development of contingency plans to address schedule issues that might occur.

**LOE Assumptions:**

- Chief Scheduler is 500 hrs/yr. for supervision and reporting.
- Scheduler/Project Controls is 800 hrs/yr. and allocates his time among Tasks 2000 and 3000.

The remaining scope under Task 2000 remains unchanged.

**Task 3000: Construction Cost Control and Estimating**

The task budget for Task 3000 was originally developed on the assumption that estimating services for contract change orders would require a part-time estimator. With construction now getting underway, it has become apparent that it is likely to require a full-time estimator to keep up with the work load generated by multiple construction

contracts, and the requirements for documentation of change orders. A task budget reallocation will add to the budget for full-time estimating service from the start of construction.

**Task 4000: Information Management and Document Control**

At the time the original scope was developed, the level of Document Control service required for the project using the Constructware software package - in comparison with other traditional construction management using document logs and other methods - was not accurately forecasted. In the pre-construction phase, the CM consultant developed detailed procedures to manage the construction contracts using the Constructware software and meeting all King County policies and procedures. The original contract provided for a part-time document control position during construction of the three tunnel contracts, and a full-time position is required. The task budget is increased through a re-allocation to make this a full-time position.

**ADD Subtask 4100: Constructware Training and Support (by re-allocation)**

The CM will provide training in the use of Constructware to County employees, consultants and contractors. The task budget is increased by a budget re-allocation to provide this training position, and in addition to Constructware training, this staff person will also provide backfill or part-time document control duties for construction contracts.

**LOE Assumptions:**

- Constructware Trainer is full-time, including hours for training and document control support.

**Task 6000: Inspection and Resident Engineering Services**

The scope of the Resident Engineering task includes work by the Resident Engineer for each contract to assist in the design process, preparation of bid documents (by others), and to become familiar with the scope of the work prior to the time the NTP is issued to the Contractor. For the West Tunnel contract, the original scope and budget was based on the assumption that the Resident Engineer would begin work on a full-time basis about three months in advance of the issuance of NTP to the Contractor.

As the West Tunnel design contract is nearing completion, there are additional unplanned tasks that need to be completed prior to the start of work originally assumed for this scope. Through a budget re-allocation, the budget for this task will be increased to allow the Resident Engineer to assist on a part-time basis in the upcoming months while design is nearing completion and the bid period is underway. Specific work to be addressed includes:

- Cost estimate review and management service (90%, 100% and Engineer's Estimate).
- Contract milestone review and input.
- Contract addendum review and input.

- Bid evaluation.
- Respond to technical design and coordination issues.

**ADD Subtask 6600: IPS Inspection and RE Services (Amendment 2)**

The original scope of work covers the time period through Dec. 31, 2007. Construction of the Influent Pump Station (IPS) is scheduled to begin in 2008. The County is now scheduled to complete design in 2006, advertise for bids, and complete contract award in early 2007. Task management is now necessary to incorporate IPS, and allow the contractor to order long lead time equipment and complete related work requiring no site access. As a result, the CM scope needs to be amended to add RE service for the IPS contract.

Work under this new Subtask will include providing the field inspection and resident engineering services for the IPS contract as follows:

- The RE will be principally involved in the planning and coordination of the pre-construction services for the IPS contract including pre-bid meetings, design reviews, pre-construction surveys, permitting, coordination of construction impact mitigation provisions, planning for field office staffing and operations, and responding to technical questions and RFI's during the bidding and award phase of the contract.
- The RE will provide coordination during the IPS start up, testing, and commissioning requirements.
- Additional RE inspection services will be provided for the IPS contract during Part II of the CM Services contract.

**LOE Assumptions:**

- Resident Engineer (RE) full time for the period April 1, 2006 through Dec 31, 2007.

**Deliverables:**

- Technical memos addressing construction issues, for use by King County staff involved in the design process.
- Daily inspection reports.
- Photos, videos and logs.

**ADD Subtask 6700: Ancillary Contracts Inspection and RE Services (Amendment 2)**

The original scope of work addressed CM services for the three major tunnel contracts. As discussed above, IPS CM service is being added in a new subtask. This subtask will add RE service for other conveyance contracts not specified above. This includes field inspection and resident engineering services for the following project elements:

- North Creek Facilities
- North Kenmore/Ballinger Way Odor Control Facilities

- Hollywood Pump Station Chemical Injection
- System Integration
- Brightwater Influent Network Improvements (BINI)

During Part 1, the scope of Resident Engineering services is as follows:

- The RE will be principally involved in the planning and coordination of the pre-construction services for each contract including pre-bid meetings, design reviews, pre-construction surveys, permitting, coordination of construction impact mitigation provisions, planning for inspection staffing, and responding to technical questions and RFI's during the bidding and award phase of the contracts.
- The RE will provide system-wide coordination during start up, testing, and commissioning requirements.
- Inspection and any additional RE services will be provided for the Ancillary contracts under separate amendment, or during Part II of the CM Services contract.

LOE Assumptions:

- Resident Engineer (RE) full time for the period May 1, 2006 through Dec 31, 2007.

Deliverables:

- Technical memos addressing construction issues, for use by King County staff involved in the design process.
- Daily inspection reports.
- Photos, videos and logs.

# APPENDIX 11



## APPENDIX 12

A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T
<b>Safety Evaluation Scoring Form</b>																			
<b>Field Project Safety Evaluation Report</b>																			
HSEP 2.21b																			
Project/Location: Brightonwater Conveyance Program - East Project						Client: King County Waste Water Treatment Dept.				Date:12/10/08									
Evaluation Team: Alan Norris, John Fisher, Jeff Wahl, Devin Harmia, Connie Krier, Jim Dulle, Jim Eila						Workforce		72		EMF		1.25							
EMF only applies to Section D (Site Hazards and Controls). All other sections of the SER are scored without the EMF.																			
12.5																			
<b>Summary of Evaluation</b>																			
The SER Team met with Devin Harmia, Jacobs Asst. RE, and Michael Barlitto, Kenny Construction, Site Safety Representative, on this date to survey the work environment.																			
The team reviewed an incident that occurred late the week before when a concrete laborer at the Water Treatment Project site suffered severe concrete burns to his feet when concrete went up over his boots. A meeting was scheduled for later this week with the contractor to discuss actions for improving safety on this site. The OSHA Recordable Injury Rate for the month of November has been reported to be at 16.8.																			
The North portal site is under de-mobilization and there was limited activity observed at the Water Treatment project site. The evaluation team also visited the hole through location at the Waste Water Treatment Facility. This is where potential hazards will be as the contractor removes the TBM from the excavation.																			
<b>Observations Requiring Immediate Action</b>																			
No serious hazards were observed during this SER. The items identified were discussed with the evaluation team and are summarized below. Please respond with seven days as to the corrective actions taken to address the deficiencies outlined. Please use the Corrective Action Worksheet.																			
<b>Scoring Summary</b>																			
SER Category		Current SER		Previous SER		% Change													
A - Leadership Engagement and Management Commitment		47		47		-1													
B - Employee Involvement		60		67		-10													
C - HSE Program Implementation		67		77		-13													
D - Hazards and Controls		85		67		27													
E - Programs, Procedures, and Documentation		65		93		-8													
Overall Score		69		70		-2													
<b>A, B, &amp; C - PEOPLE AND PROGRAM EVALUATION</b>																			
SER Category		Score (0-3)		Findings and Comments															
A - Leadership Engagement and Management Commitment		1		With the significant contractor employment turnover the transfer of information from the contractor to the craft workers seems to have been compromised. The Contractor Safety Manager commented that turnover has had a negative affect on the safety performance. The issues as described seem to persist from the previous SER. Group safety activities include safety oriented training lunches, ice cream socials and meetings with various levels of safety discussions including different groups.															
A leadership effectively communicates the mission/vision of the organization as well as expectations regarding ensuring an injury-free work environment.		1		Contractor employee interviews indicated a significant communication gap in resolving safety issues exists. There is a gap between operations and safety.															
A leadership engagement assessment process is used to assess the engagement of leadership at all levels. This process is used to coach and mentor leaders on roles and responsibilities regarding safety leadership.		2		Contractor leadership in regard to safety on this project has always been limited. Jacobs project management continues to improve the program process.															
Site leadership demonstrates a thorough understanding of the site HSE program and is actively engaged in all aspects of the program.		1		Jacobs project management is involved in day to day contacts and safety issues by supporting the field staff. Contractor staff needs to improve interaction with work force.															
Site leadership openly demonstrates their commitment to ensuring a safe work environment and leads by example.		1		While the Jacobs project team is well engaged in the safety process the contractor's leadership appears to be distanced from the craft personnel.															
Leadership is visible in the workplace (spends time in the field).		2		The contractor has implemented a program that enhances the project incentive program of the Client's. Contractor personnel appear to be managing issues in a punitive manner.															
Site leadership understand their roles and responsibilities with regard to overall management and leadership of the safety program.		1		Contractor understands the potential hazards that are associated with the work, but fails to properly pre-plan to eliminate or reduce these hazards.															
Site leadership at all levels recognize employees for working safely and for making positive contributions to the safety program.		2		Jacobs leadership personnel are actively engaged in the safety process. The contractor would benefit from more interaction from project management.															
Site leadership has a good understanding of the hazards associated with the scope of the work and the controls necessary to mitigate risk. They also understand how the various elements of the site HSE program help ensure appropriate focus.		2		The project management team understands the majority of the safety challenges associated with this program. Contractor management and employee communication is poor.															
Site leadership demonstrates knowledge of the current HSE metrics and goals for the site as well as a good understanding of the challenges and impediments to improvement.		1		The Contractor does not appear to have made any improvement in the planning process as injuries continue to occur at a consistent rate. It was not apparent that the contractor is engaging in mentoring and coaching for safety.															
Site leadership promotes teamwork, communications, and integrated planning of activities to maximize group participation and learning.		1		Subscore Category A															
Site leadership hold personnel accountable for safety. They also actively coach and mentor other leaders and employees on improving behaviors and intentions regarding safety.		47																	
<b>B - Employee Involvement</b>																			
Employees demonstrate an understanding of the site safety program and their role and responsibility in ensuring an injury-free work environment. They also understand the expectations of their leadership with regard to safety.		2		All CM staff have a clear understanding of the program and actively participate in the OPR process and training. Contractor employees seem to have less of an understanding of safe work practices.															
Employees are familiar with and actively participate in all aspects of the safety program.		2		This issue continues to persist as evidenced by the recent injury incident which resulted in concrete burns. It seems apparent with the number of incidents on site that contractor employees are not recognizing the need to control or abate hazards that evolve in the work place or they are deviating from task plans.															
Employees recognize the hazards associated with their work and understand the importance and effectiveness of the controls in place to mitigate risk. They also understand the role of the safety program in ensuring appropriate focus on these controls.		1		Employee training completion is now being tracked by a internet based project management computer program. Results are sent out to employees of what training they need to complete. Contractor training effectiveness is questionable.															
Employees are engaged in training including orientation training and toolbox talks. Employees receive training appropriate for the tasks they perform and the equipment they operate.		2		Contractor employees do not seem to be taking an active role in advising others of safety issues. A worker was asked to secure a propane tank by the Contractor Safety manager and he questioned why it had to be secured.															
Employees are encouraged to intervene when they observe at risk behavior and conditions. The interventions are positive as result in action.		1		Hazard recognition training is continuous and the staff has a strong understanding of the construction process hazard. The Contractor personnel did not appear to take ownership of the safety program.															
Employees demonstrate a commitment to and ownership of the safety program policies, procedures, and practices.		1																	
Employees receive recognition for their positive contributions to ensuring an injury-free work environment.		2																	
Employees are aware of the emergency response plan and their role and responsibilities should an emergency occur.		3		Copies of the plan are located in each office and all staff members have been trained on the plan.															
Employees participate in a safety committee or other similar group activity that is engaged in discussing and taking action on relevant safety issues.		2		Group safety activities include safety oriented training lunches, ice cream socials and meetings with various levels of safety discussions including different groups.															
Employees are involved in mentoring, coaching, and assisting less experienced employees.		1		The contractor has no formalized process.															

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T
<b>C - HSE Program Implementation</b>																				
41	A site safety plan and hazard analysis (HASP or equivalent) exists, is current and complete, addresses hazards, credits, emergency response, etc., and is reviewed regularly by employees to ensure relevance.																			
42	The site safety plan identifies the highest risk hazards and outlines strategies for mitigating the risk associated with those hazards. The site safety plan estimates scores on-going from the risk mitigation measures associated with those hazards and includes:		3																	
43	The site safety plan utilizes the credible approach for implementation of core safety elements (pre-task planning, safety observations, safety meeting, incident reporting and investigation, and audits).		2																	
44	A pre-task planning process is implemented, involves the supervisor and all workers, and offers a process for resolving the quality and effectiveness of the pre-task plan.		1																	
45	Pre-task plans are developed for each task and are effective in identifying hazards. The pre-task plans consider changes to the work environment or condition, adjacent work activities, overhead conditions, and other factors that could affect the success of the task.		1																	
46	A formal process exists for identifying and reporting unsafe conditions and behaviors. The process is reviewed and evaluated to ensure effectiveness.		1																	
47	Data from the observation process is used to identify and correct deficiencies and to drive improvement. Actions are taken to improve safety and reduce the number of observations and actions taken to provide to employees.		1																	
48	Observations and audits are conducted on a routine basis. Data from these audits is used to identify improvement opportunities. Actions are timely and commensurate to the workers.		1																	
49	Incidents are tracked and investigated in a timely manner. Supervision participates in the investigations and results are communicated to the workers. The workers understand the results of the investigations and the actions taken to prevent the incidents associated with the work. The ratings generally describe the risks and complexities required for the work.		1																	
<b>Subscore C</b>																				
<b>D - HAZARDS &amp; CONTROLS EVALUATION</b>																				
<b>1. Housekeeping and Sanitation</b>																				
50	The general appearance of the site is neat and orderly.		2																	
51	Trash, debris, and liquids are not allowed to accumulate.		1																	
52	Walkways are maintained clear, where appropriate designated walkways are established.		1																	
53	Materials and equipment are stored properly.		1																	
54	Cords and hoses are routed in a manner to prevent trip hazards or damage (covered or otherwise protected).		1																	
55	Refrigeration units are maintained in good condition, and possible sources of contamination.		1																	
56	Refrigeration units are maintained in good condition, and possible sources of contamination.		1																	
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100	Refrigeration units are maintained in good condition, and possible sources of contamination.		1																	
<b>4. Personal Protective Equipment</b>																				
The site has a PPE policy that addresses minimum mandatory PPE requirements as well as PPE requirements for visitors.																				
101	The policy is understood by management and workers.		5	12.5	7.5															
102	The policy is understood by management and workers.		5	12.5	7.5															
103	The policy is understood by management and workers.		5	12.5	7.5															
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128	The policy is understood by management and workers.		5	12.5	7.5															
129	The policy is understood by management and workers.		5	12.5	7.5															
130	The policy is understood by management and workers.		5	12.5	7.5															





A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T
240	Employees are trained and qualified in first aid and CPR. AEDs are available and personnel are trained in their use.																		
241	Storage areas are organized and properly utilized (heavy items on bottom shelves).																		
242	Emergency exits are well marked and clear.																		
243	A facility siting analysis has been performed/reviewed for siting of occupied facilities.																		
244	<b>17. Environmental</b>	0	12.5	12.5	No deficiencies observed.														
245	Potential environmental hazards on the site have been identified and evaluated.																		
246	The project has coordinated with the client regarding environmental compliance issues.																		
247	Employees are trained and qualified to work with and around hazardous materials.																		
248	A recycling program is in place.																		
249	Appropriate environmental permits have been obtained.																		
250	The site emergency response plan addresses chemical spills.																		
251	Hazardous wastes have been identified.																		
252	Spill containment is provided around tank and drum storage.																		
253	Employees understand their roles and responsibilities in the environmental program.																		
254	Containers are properly labeled.																		
255	<b>18. Other</b>	#N/A	NA	NA															
256	Add additional site-specific hazards here and/or add additional sections as required.				There may be multiple other categories based on site specific hazards.														
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268	<b>Subscore Category D</b>	95	200	170	Total for category is based on points received divided by points possible for these categories evaluated.														
269	<b>E - PROGRAMS, PROCEDURES, AND DOCUMENTATION EVALUATION</b>	Deduction	Points Possible	Points Received	Findings and Comments														
270	<b>1. Confined Space</b>	#N/A	NA	NA	No confined space work activity was observed.														
271	Is a written confined space program required?				Assess each category based on observation of the workplace. Utilize the questions in Figure 5 of the procedure (HSEEP 2.2) as well as the Documentation Checklist in Figure 6, as a guide. Additional categories may be added as required based on site specific program and hazard control requirements.														
272	Have confined space hazard analyses been performed?																		
273	Does a written program exist?																		
274	Are personnel trained?																		
275	Has a rescue plan been developed?																		
276	<b>2. Emergency Response</b>	0	10	10	Emergency Response plans exist and are communicated to all site personnel.														
277	Does a written emergency response plan exist? Are employees aware of the plan?				The plan is coordinated with the client and local rescue authorities.														
278	Is the emergency response plan coordinated with the client/site plan?																		
279	Are emergency response drills performed?																		
280	Are the site office facilities tied into the client/site emergency alarm/notification system?																		
281	Does the written plan address all credible scenarios?																		
282	Is the emergency plan reviewed and updated periodically?																		
283	<b>3. Control of Hazardous Energy (Lockout/Tag out)</b>	10	10	0	The Contractor has a LOTO, but implementation of the program needs to be improved. This continues to be an issue.														
284	Is a control of hazardous energy program required?																		
285	Is the program documented? Is it reviewed periodically?																		
286	Have specific energy control (LOTO) procedures been developed?																		
287	Are the procedures being used? Are the personnel trained and qualified?																		
288	Is the LOTO training current?																		
289	Is the program periodically audited?																		
290	<b>4. Site Access Control</b>	2	10	8	Site access is adequately controlled.														
291	Is site access adequately controlled?				Safety related signage needed at the entrance gate to the Water Treatment site indication construction site.														
292	Is visitor (including client personnel) access controlled?																		
293	Is there a sign-in/sign-out sheet?																		
294	Are the site boundaries adequately marked and controlled?																		
295	Are there security and/or safety issues that are not addressed by the current program?																		
296	<b>5. Utility Clearance</b>	0	10	10	No deficiencies noted.														
297	Is there a system for identification of underground utilities?																		
298	Is the utility clearance system integrated with the work permit system?																		
299	Does the utility clearance system apply to all ground and structure penetration activities?																		
300	Does the utility clearance system include a formal survey process?																		
301	Have underground utilities, including utilities embedded in structures, been identified?																		
302	<b>6. Work Permits</b>	#N/A	NA	NA															
303	Is there a permit to work system?																		
304	Does the permit system adequately control hazardous work (hot work, live break, etc.)?																		
305	Does the permit to work involve a site assessment?																		
306	Does the permit system require positive verification of the safe condition?																		
307	Does the permit system include awareness of adjacent work activities and hazards?																		
308	<b>7. Line and Equipment Opening</b>	2	10	8	No deficiencies noted. A task analysis procedure is in place for job tasks called "Take 5." The effectiveness of the program needs to be evaluated as the site continues to experience injury incidents.														
309	Are line and equipment openings performed?																		
310	Is there a process for identification of hazards and controls?																		
311	Is there a process for controlling access to the area during the work?																		
312	Are positive isolation means utilized?																		
313	Is the Line Breaking and Equipment Opening Checklist used?																		
314	<b>8. Competent Person Designation</b>	0	10	10	No deficiencies noted.														
315	Is there a process for designation of competent persons on site?																		
316	Are competent persons identified for hazardous activities?																		
317	Do the competent persons have the appropriate training?																		
318	Are the competent persons engaged in the work?																		
319																			
320	<b>9. Critical Lifts</b>	0	10	10	No deficiencies noted.														
321	Does the site perform critical lifts?				Plans are required for critical lifts. Critical lifts plans are reviewed prior to task.														
322	Is the pre-lift checklist used to ensure appropriate precautions have been taken?																		
323	Is critical lift planning performed and documented?																		
324	Are critical lift plans reviewed by a qualified person?																		
325																			



A		B	C
1			SER Corrective Action Plan
2			
3		<b>DEFICIENCY</b>	<b>CORRECTIVE ACTION</b>
4	<b>NO.</b>	<b>DESCRIPTION</b>	
5	1	Contractor employee interviews indicated a significant communication gap in resolving safety issues onsite. There is a gap between operations and safety.	We have met with Kenny's Corporate Safety and drafted a letter to the CI
6	2	There appears to be a trend in the lack of planning or implementation of the planned tasks on site.	
7	3	A Contractor employee received serious chemical burns when working with and exposed to wet concrete.	
8	4	The area where the mixing plant formerly was located had water accumulation.	
9	5	The red conex box at the Water Treatment plant was in need of organizing.	
10	6	The guardrail at the North Portal where the mixing plant had been located is too low due to the elevated slab. The Contractor noted the slab is going to be removed.	
11	7	A secondary means of access is needed in the excavation at the Water Treatment site.	
12	8	Many individuals were observed at the Water Treatment site not wearing safety glasses. It was near the shift end.	
13	9	A propane tank was left free standing and was stored within 20 feet of oxygen cylinders by the Contractors' trailer at the Water Treatment site. Also, an oxygen and acetylene tank were left stored on a welding cart at the fab area.	
14	10	There was no fire extinguisher located near the flammable compressed gas storage area at the Water Treatment site.	
15	11	The Contractor has a LOTO, but implementation of the program needs to be improved.	
16	12	Arc flash hazards need to be identified.	
17	13	Haz-Com training has been provided for the project staff. However the effectiveness of the Haz-Com training is in serious question due to the recent concrete burn incident.	
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Top soil height is too low due to slumped side.



Water accumulation needs to be abated.



Propane unsecured and within close proximity to Oxygen (connected) No fire extinguisher in storage area



Oxygen and Acetylene stored together.



Storage container needs organizing



Photo of the TBM having pushed through at the Waste Treatment site.

	A	B	C	D	
1	Score	General Assessment Criteria Description	Leadership Engagement	Employee Involvement	
2					
3	0	No evidence exists on which to base an assessment; Jacobs HSE program elements not implemented.	No notable leadership engagement in any aspect of the HSE program	No notable employee involvement in any aspect of the HSE program	Jacobs HSE program
4	1	Some evidence exists to support an assessment; Jacobs program elements partially implemented or in initial or rudimentary stages.			
5	2	Consistent evidence exists to support assessment; Jacobs program elements implemented but not functioning at a high level.			
6	3	High degree of evidence exists to support assessment; Jacobs program elements are fully implemented and functioning at high level.	Proactive engagement in all aspects of the HSE program by the entire leadership team without outside influence or pressure	All employees are engaged in all aspects of the HSE program there is an active and effective employee safety committee or council; there is a culture of caring	Fully implement the context effective; be
7					
8	<b>Note: These descriptions are to be used for assessing categories A, B, and C.</b>				

1	<b>Leadership Engagement and Management Commitment</b>
2	How does the site leadership demonstrate a thorough understanding of the site HSE program?
3	What are the standards of performance or expectations for management and supervision?
4	What is the leadership engagement assessment process? How is it being used?
5	How often does management and supervision conduct walkthroughs? What levels of management participate in the walkthroughs?
6	How often do you participate in walkthroughs? When was the last walkthrough you performed?
7	How is management and supervision engaged in training?
8	What training have you had?
9	Have you delivered training on site?
10	How is management and supervision engaged in the incident investigation process?
11	Have you participated in an incident investigation? Describe the process and how you think it might be improved.
12	How is management and supervision engaged in the pre-task planning (SPA) and observation (SOR or BSOR) processes?
13	How many SORs have you done?
14	How many SPAs have you reviewed?
15	How often do supervisors conduct safety meetings with their employees? Who leads the meetings?
16	When was the last time you participated in a safety meeting? What was the topic?
17	Describe two ways the site leadership demonstrates their commitment to ensuring a safe work environment for the workers?
18	How did you last demonstrate your commitment to a safe work environment?
19	Discuss the hazards associated with the work. Does the site leadership demonstrate an understanding of the hazards associated with the work being performed on the site?
20	Does the site leadership demonstrate an understanding of the controls in place and their effectiveness at reducing risk?
21	What keeps you up at night?
22	When did the site leadership last review the HASAP for completeness?
23	Has the site leadership set goals and objectives and communicated them to the employees? What are the goals and objectives for the project?
24	Discuss roles and responsibilities. Does the site leadership demonstrate an understanding of their roles and responsibilities?
25	How do you recognize employees for working safely? When did you last recognize an employee and for what?
26	What are the current HSE metrics?
27	What do you perceive as being your biggest challenge or impediment to improvement?

Employee Involvement	
1	
2	How do employees access the site safety plan (HASAP) and site safety rules?
3	What are the site safety goals and objectives?
4	What do you do if you observe an unsafe act or condition?
5	When was the last time you participated in training?
6	When was the last time you participated in a walkthrough?
7	Describe the pre-task planning process. When was the last time you participated in an SPA? Do you have any suggestions for improvement?
8	Describe the safety observation process. How many SORs have you submitted? When was the last time you submitted an SOR? Do you have any suggestions for improvement?
9	How do you report an incident? Have you ever reported an incident?
10	Do you feel like you are held accountable for safety?
11	What are your safety responsibilities?
12	Is there a safety committee on site? If so, do you participate in the committee?
13	Have you ever submitted a safety suggestion?
14	Have you been trained on the emergency response or evacuation plan? Describe the plan. Where is your assembly point?
15	What do you perceive as your highest risk activities? Do you feel that the controls in place are adequate? Do you have any suggestions for improvement?

# APPENDIX 13

## **safety accident**

Devin Harmia

**Sent:** Tuesday, December 23, 2008 10:47 AM

**To:** Misty Fisher

**Cc:** Roger Smith

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On 12-3-08 three KST laborers received very bad concrete burns. 1 laborer will need to have skin graphs and will be out 6-8 months. 2 laborers that were injured were sent to the sight after a KST safety meeting about concrete burns took place. No other information was given to the new guys when they arrived. The crew work for 6 hours in concrete approx. 2 feet deep. The concrete got into the laborers boots. Proper PPE was not provided to perform work.

On 12-13-08 a KST laborer broke his leg during a ground collapse. The laborer was installing lagging next to excavated material. They were exposed to approx. 8 feet of unsupported wet material. This material failed and collapsed on the workers leg and broke it.

If you need anything else let me know.

**Devin Harmia**  
KBA, Inc. 425.455.9720  
[dharmia@kbacm.com](mailto:dharmia@kbacm.com)

[www.kbacm.com](http://www.kbacm.com)

*"Construction Management Specialists"*

On Friday December 5, 2008 the East Contractor – Kenny/Shea/ Traylor was pouring a base slab in the receiving pit at the treatment plant portal. The pour started at approximately 1pm and concluded at 6:30 pm. The depth of the pour was approximately 18 inches. Photos show areas where they appear to be up to their thighs in wet concrete.

One of the laborers who normally operates the Loki was loaned out to the crew at the treatment plant portal for the day. This individual had on gloves, yellow boots approximately 12” high and rain pants. The pants were taped to the boots with duct tape.

The take 5 meeting for the day was on concrete safety. Over the course of the pour he got concrete in his boot. He left for the day and no problems were anticipated with this individual.

On Saturday he came to see the contractor’s safety officer with a concrete burn and was taken to the clinic for treatment. They applied an anti-bacterial cream at the time, along with giving him a prescription for later use.

On Monday he notified the contractor he had an appointment with a specialist for this condition. After consulting with the specialist he was admitted to a local hospital. He has burns above the ankle on the calf area on both legs that will require skin grafts this Friday morning. He remains hospitalized at this time.

After seeing the specialist he did not notify contractor and they found out about this individual after one of our inspectors spoke to his son- who also works on the project. Our inspector wrote this up in a SOR. When Connie Krier of Jacobs saw this she notified the contractor they had an employee in the hospital.

Originally, at first we heard reports that there had been a concrete exposure at the portal area. Upon questioning the contractors safety officer he stated that he was trying to get in contact with the individual about returning to work, and needed time to investigate.

On Tuesday, the next pour was scheduled. It was much smaller in the total amount than the first. It was much better organized than the first and proper PPE were being worn.

With one individual requiring hospitalization, the state of Washington must be notified. This has been brought to the attention of the contractor.

# APPENDIX 14

## Safety Observation Report

SOR Details	
<b>SOR No.</b>	C-SOR-1150
<b>Submitted By</b>	Noah Brenner
<b>Linked DIR</b>	<u>Treatment Plant Portal Site - TPP Portal: 11/28/2008 - Day</u>
<hr/>	
<b>Project</b>	Conveyance Project
<b>Contract</b>	East Tunnel Contract

Status Information			
<b>Created By</b>	Noah Brenner	<b>Date Created</b>	11/28/2008 2:55:53 PM
<b>Followed Up By</b>		<b>Date Closed</b>	11/28/2008 2:55:54 PM
<b>Status</b>	Closed		
<b>Notes</b>	Submitted Nov 28 2008 2:55PM. No follow-up required.		

Observation and Follow-Up	
<b>Date/Time</b>	11/28/2008 1:00:00 PM
<b>Location</b>	Treatment Plant Portal Site - TPP Portal
<b>SOR Type</b>	Incident
<b>Condition Type</b>	Unsafe
<b>Category</b>	Near Miss
<b>Observation Details</b>	Laborer using jackhammer was not wearing safety glasses, only perscription glasses, when his hose at the hammer broke. The hose slipped out of the safety tie and swung in the air. Air from the hose knocked out the laborer's dentures.
<b>Immediate Corrective Action</b>	Air turned off
<b>Action to Prevent Recurrence</b>	Safety ties need to be tightened around hoses.
<b>Follow-Up Required</b>	No

KC 000015

## Safety Observation Report

SOR Details	
<b>SOR No.</b>	C-SOR-1152
<b>Submitted By</b>	Noah Brenner
<b>Linked DIR</b>	<u>Treatment Plant Portal Site - TPP Portal: 11/29/2008 - Day</u>
<hr/>	
<b>Project</b>	Conveyance Project
<b>Contract</b>	East Tunnel Contract

Status Information			
<b>Created By</b>	Noah Brenner	<b>Date Created</b>	11/29/2008 11:44:31 AM
<b>Followed Up By</b>		<b>Date Closed</b>	11/29/2008 11:44:31 AM
<b>Status</b>	Closed		
<b>Notes</b>	Submitted Nov 29 2008 11:44AM. No follow-up required.		

Observation and Follow-Up	
<b>Date/Time</b>	11/29/2008 8:00:00 AM
<b>Location</b>	Treatment Plant Portal Site - TPP Portal
<b>SOR Type</b>	Observation
<b>Condition Type</b>	Unsafe
<b>Category</b>	PPE
<b>Observation Details</b>	laborer using jack hammer to chip concrete not wearing protective glasses. Only wearing perscription glasses.
<b>Immediate Corrective Action</b>	none
<b>Action to Prevent Recurrence</b>	na
<b>Follow-Up Required</b>	No

## Safety Observation Report

SOR Details		Status Information			
<b>SOR No.</b>	C-SOR-1151	<b>Created By</b>	Noah Brenner	<b>Date Created</b>	11/29/2008 11:42:58 AM
<b>Submitted By</b>	Noah Brenner	<b>Followed Up By</b>		<b>Date Closed</b>	11/29/2008 11:42:59 AM
<b>Linked DIR</b>	Treatment Plant Portal Site - TPP Portal: 11/29/2008 - Day				
<hr/>					
<b>Project</b>	Conveyance Project				
<b>Contract</b>	East Tunnel Contract				

Observation and Follow-Up	
<b>Date/Time</b>	11/29/2008 10:00:00 AM
<b>Location</b>	Treatment Plant Portal Site - TPP Portal
<b>SOR Type</b>	Observation
<b>Condition Type</b>	Unsafe
<b>Category</b>	Work site condition
<b>Observation Details</b>	Excavation not draining. Lots of standing water in the pit creating very mucky conditions, 1-2 ft of muck in places. Crews are limited to where and how they can move throughout the excavation, possibly becoming stuck in the mud.
<b>Immediate Corrective Action</b>	none
<b>Action to Prevent Recurrence</b>	pit needs to be properly sloped to drained and sumps and pumps need to be kept working to their best performance all day.
<b>Follow-Up Required</b>	No

KC 000017

## Safety Observation Report

SOR Details	
<b>SOR No.</b>	C-SOR-1155
<b>Submitted By</b>	Noah Brenner
<b>Linked DIR</b>	<u>Treatment Plant Portal Site - TPP Portal: 12/1/2008 - Day</u>
<hr/>	
<b>Project</b>	Conveyance Project
<b>Contract</b>	East Tunnel Contract

Status Information				
<b>Created By</b>	Noah Brenner	<b>Date Created</b>	12/1/2008	3:54:24 PM
<b>Followed Up By</b>		<b>Date Closed</b>	12/1/2008	3:54:25 PM
<b>Status</b>	Closed			
<b>Notes</b>	Submitted Dec 1 2008 3:54PM. No follow-up required.			

Observation and Follow-Up	
<b>Date/Time</b>	12/1/2008 9:00:00 AM
<b>Location</b>	Treatment Plant Portal Site - TPP Portal
<b>SOR Type</b>	Observation
<b>Condition Type</b>	Unsafe
<b>Category</b>	Scaffolds, Ladders
<b>Observation Details</b>	There is only one ladder set up as an in/out to the excavation. PIT needs an additional ladder.
<b>Immediate Corrective Action</b>	none
<b>Action to Prevent Recurrence</b>	na
<b>Follow-Up Required</b>	No

## Safety Observation Report

SOR Details	
<b>SOR No.</b>	C-SOR-1173
<b>Submitted By</b>	Noah Brenner
<b>Linked DIR</b>	<u>Treatment Plant Portal Site - TPP Portal: 12/4/2008 - Day</u>
<hr/>	
<b>Project</b>	Conveyance Project
<b>Contract</b>	East Tunnel Contract

Status Information			
<b>Created By</b>	Noah Brenner	<b>Date Created</b>	12/4/2008 4:51:44 PM
<b>Followed Up By</b>		<b>Date Closed</b>	12/4/2008 4:51:45 PM
<b>Status</b>	Closed		
<b>Notes</b>	Submitted Dec 4 2008 4:51PM. No follow-up required.		

Observation and Follow-Up	
<b>Date/Time</b>	12/4/2008 11:00:00 AM
<b>Location</b>	Treatment Plant Portal Site - TPP Portal
<b>SOR Type</b>	Observation
<b>Condition Type</b>	Unsafe
<b>Category</b>	PPE
<b>Observation Details</b>	Laborer using chipping gun not wearing safety glasses.
<b>Immediate Corrective Action</b>	none
<b>Action to Prevent Recurrence</b>	Told KST Safety, Mike. Mike said he will get a pair of safety glasses that will go over workers prescription glasses, by tomorrow.
<b>Follow-Up Required</b>	No

## Safety Observation Report

SOR Details	
<b>SOR No.</b>	C-SOR-1172
<b>Submitted By</b>	Noah Brenner
<b>Linked DIR</b>	<u>Treatment Plant Portal Site - TPP Portal: 12/4/2008 - Day</u>
<hr/>	
<b>Project</b>	Conveyance Project
<b>Contract</b>	East Tunnel Contract

Status Information				
<b>Created By</b>	Noah Brenner	<b>Date Created</b>	12/4/2008	4:13:16 PM
<b>Followed Up By</b>		<b>Date Closed</b>	12/4/2008	4:13:17 PM
<b>Status</b>	Closed			
<b>Notes</b>	Submitted Dec 4 2008 4:13PM. No follow-up required.			

Observation and Follow-Up	
<b>Date/Time</b>	12/4/2008 6:30:00 AM
<b>Location</b>	Treatment Plant Portal Site - TPP Portal
<b>SOR Type</b>	Observation
<b>Condition Type</b>	Unsafe
<b>Category</b>	Scaffolds, Ladders
<b>Observation Details</b>	Ladder was placed too far from the opening of the hand rail.
<b>Immediate Corrective Action</b>	Told foreman that ladder was unsafe, he correct the landing.
<b>Action to Prevent Recurrence</b>	na
<b>Follow-Up Required</b>	No

## Safety Observation Report

SOR Details		Status Information	
<b>SOR No.</b>	C-SOR-1186	<b>Created By</b>	Noah Brenner <b>Date Created</b> 12/6/2008 2:24:47 PM
<b>Submitted By</b>	Noah Brenner	<b>Followed Up By</b>	Alan Norris <b>Date Closed</b> 12/12/2008 10:15:03 AM
<b>Linked DIR</b>	<u>Treatment Plant Portal Site - TPP Portal: 12/6/2008 - Day</u>	<b>Status</b>	Closed
<b>Project</b>	Conveyance Project	<b>Notes</b>	Submitted Dec 6 2008 2:24PM. Sent to Birsen Zeyrek for follow-up. Forwarded to Alan Norris for further follow-up on Dec 8 2008 9:56PM.
<b>Contract</b>	East Tunnel Contract		

Observation and Follow-Up	
<b>Date/Time</b>	12/6/2008 8:00:00 AM
<b>Location</b>	Treatment Plant Portal Site - TPP Portal
<b>SOR Type</b>	Observation
<b>Condition Type</b>	Unsafe
<b>Category</b>	Scaffolds, Ladders
<b>Observation Details</b>	2nd ladder for in/out to excavation did not have a proper landing at the top. Workers were stepping over the guard rail to get onto the ladder.
<b>Immediate Corrective Action</b>	told foreman to correct ladder, but was never corrected.
<b>Action to Prevent Recurrence</b>	na
<b>Follow-Up Required</b>	Yes
<b>Follow-Up Details</b>	Alan/Devin, Pls. discuss and resolve at the Safety Meeting. Thks, Birsen  The treatment plant portal has had the concrete slab poured and a second means of egress has been established. It will have the proper landing area

KC 000022

## Safety Observation Report

SDR Details	
<b>SOR No.</b>	C-SOR-1198
<b>Submitted By</b>	Noah Brenner
<b>Linked DIR</b>	<u>Treatment Plant Portal Site - TPP Portal: 12/9/2008 - Day</u>
<hr/>	
<b>Project</b>	Conveyance Project
<b>Contract</b>	East Tunnel Contract

Status Information			
<b>Created By</b>	Noah Brenner	<b>Date Created</b>	12/9/2008 4:20:08 PM
<b>Followed Up By</b>		<b>Date Closed</b>	12/9/2008 4:20:08 PM
<b>Status</b>	Closed		
<b>Notes</b>	Submitted Dec 9 2008 4:20PM. No follow-up required.		

Observation and Follow-Up	
<b>Date/Time</b>	12/9/2008 1:00:00 PM
<b>Location</b>	Treatment Plant Portal Site - TPP Portal
<b>SOR Type</b>	Observation
<b>Condition Type</b>	Safe
<b>Category</b>	PPE
<b>Observation Details</b>	Crews pouring concrete had on proper PPE including waders, gloves, and safety glasses.
<b>Immediate Corrective Action</b>	na
<b>Action to Prevent Recurrence</b>	na
<b>Follow-Up Required</b>	No

## Safety Observation Report

SOR Details	
<b>SOR No.</b>	C-SOR-1210
<b>Submitted By</b>	Noah Brenner
<b>Linked DIR</b>	<a href="#">Treatment Plant Portal Site - TPP Portal: 12/11/2008 - Day</a>
<hr/>	
<b>Project</b>	Conveyance Project
<b>Contract</b>	East Tunnel Contract

Status Information				
<b>Created By</b>	Noah Brenner	<b>Date Created</b>	12/11/2008	3:34:05 PM
<b>Followed Up By</b>		<b>Date Closed</b>	12/11/2008	3:34:06 PM
<b>Status</b>	Closed			
<b>Notes</b>	Submitted Dec 11 2008 3:34PM. No follow-up required.			

Observation and Follow-Up	
<b>Date/Time</b>	12/11/2008 9:00:00 AM
<b>Location</b>	Treatment Plant Portal Site - TPP Portal
<b>SOR Type</b>	Observation
<b>Condition Type</b>	Unsafe
<b>Category</b>	Scaffolds, Ladders
<b>Observation Details</b>	Only one ladder set up for an in/out to the excavation.
<b>Immediate Corrective Action</b>	none
<b>Action to Prevent Recurrence</b>	na
<b>Follow-Up Required</b>	No

# APPENDIX 15

## Safety Observation Report

SOR Details	
SOR No.	C-SOR-1194
Submitted By	Clifford Faurtado
Linked DIR	North Creek Portal Site - Main Tunnel - 12/8/2008 - Day
Project	Conveyanca Project
Contract	East Tunnel Contract

Status Information	
Created By	Clifford Faurtado Date Created 12/9/2008 7:33:17 AM
Followed Up By	Alan Norris Date Closed 12/12/2008 10:17:20 AM
Status	Closed
Notes	Submitted Dec 9 2008 7:33AM Sent to Birsen Zeyrek for follow-up. Forwarded to Alan Norris for further follow-up on Dec 10 2008 9:30PM

Observation and Follow-Up	
Date/Time	12/8/2008 6:30:00 AM
Location	North Creek Portal Site - Main Tunnel
SOR Type	Observation
Condition Type	Unsafe
Category	PPE
Observation Details	<p>According to the information that I received, on 12-05-08 four (4) of KST's laborers sustained concrete burn, while they were pouring concrete at the TPP. One of these laborers, Ignacio, has been hospitalized on 11-09-08, as a result of his concrete burns.</p> <p>On 12-08-09 Ignacio went to the Hospital regarding his concrete burns, after the doctor examined him, the doctor decided to hospitalized Ignacio. Ignacio is currently in the hospital.</p> <p>According to the information that I received, both of Ignacio's legs are swollen from the knees down and he has difficulty walking.</p>
Immediate Corrective Action	None
Action to Prevent Recurrence	KST know that this concrete pour is deep, they should have provided these laborers with hip whalers. One of these laborers that got concrete burns, told me that the re-bars in this pour, was above their rubber boots.
Follow-Up Required	Yes
Follow-Up Details	<p>This incident has been discussed with KST already. KST had the correct PPE for the subsequent pours. An incident report has also been requested. I think this should be closed out. Alan, I will leave it up to you to close it out.</p> <p>Birsen</p> <p>The contractor is performing a Top Root investigation. We complete a follow up meeting will be held. The situation will be monitored.</p>

KC 000025

## Safety Observation Report

SOR Details		Status Information	
SOR No.	C-SOR-1202	Created By	Clifford Faurtado - Date Created 12/10/2008 6:53:54 AM
Submitted By	Clifford Faurtado	Followed Up By	Birsen Zeyrek - Date Closed 12/10/2008 9:32:04 PM
Linked DIR	North Creek Portal Site - Main Tunnel: 12/9/2008 - Day	Status	Closed
Project	Conveyance Project	Notes	Submitted Dec 10 2008 6:53AM. Sent to Birsen Zeyrek for follow-up.
Contract	East Tunnel Contract		

Observation and Follow-Up	
Date/Time	12/9/2008 3:00:00 PM
Location	North Creek Portal Site - Main Tunnel
SOR Type	Observation
Condition Type	Unsafe
Category	PPE
Observation Details	According to the information that I received, Ignacio is still hospitalized and is expected to be hospitalized for two to three weeks. He needs skin graft over the area that has concrete burned.
Immediate Corrective Action	None
Action to Prevent Recurrence	KST need to focus more on prevention, they need to provide these workers with the proper tool in order for these workers to do their job well and safely.
Follow-Up Required	Yes
Follow-Up Details	Dublication

KC 000026

# APPENDIX 16

## Safety Observation Report

### SOR Details

SOR No. C-SOR-1197

Submitted By Connie Krier

Project Conveyance Project

Contract East Tunnel Contract

### Status Information

Created By Connie Krier Date Created 12/9/2008 2:59:00 PM

Followed Up By Birsen Zeyrek Date Closed 12/10/2008 9:31:28 PM

Status Closed

Notes Submitted Dec 9 2008 2:59PM. Sent to Birsen Zeyrek for follow-up.

### Observation and Follow-Up

Date/Time 12/9/2008 1:00:00 PM

Location Treatment Plant Portal Site - TPP Portal

SOR Type Observation

Condition Type Unsafe

Category Work site condition

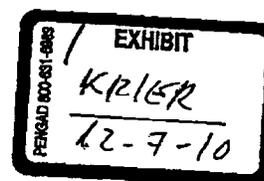
**Observation Details**  
 upon arrival at TPP Alan Norris and myself first watched to make sure all employees involved in the concrete pour were wearing the appropriate PPE. Four employees were wearing hip wadders and one had on rain gear and boots with the boots taped at the top to avoid any concrete spilling into the boots. It was then noticed that the ladder access that would need to be used to exit the shaft was tied to the guard rail with no ladding area. We also noted that gas cylinders were being tied to the guard rail and not properly stored. There was a welder working on the top of the TBM with no fall protection, only boards to use as a standing surface. The grinder being used by the welder had no guard, this issue was immediately corrected by the onsite foreman.

**Immediate Corrective Action**  
 The grinder was removed from service, the foreman said he would get the ladder access immediately corrected. The welder had moved down the TBM enough the the fall hazard was eliminated, he would also have the bottles moved.

**Action to Prevent Recurrence**  
 KST needs to have their safety team have more of a hands on approach. a member of the safety team needs to be on site when new activities are started to ensure that all safety protocol is followed and PPE is available. There was no safety officer from KST on site during the concrete pour taking place today, even after the accident that occurred last friday 12-5-08.

Follow-Up Required Yes

Follow-Up Details Dublication.

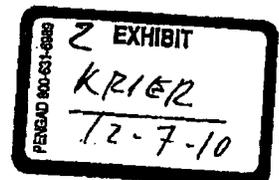


## Safety Observation Report

SOR Details	
<b>SOR No.</b>	C-SOR-2528
<b>Submitted By</b>	Connie Krier
<hr/>	
<b>Project</b>	Conveyance Project
<b>Contract</b>	East Tunnel Contract

Status Information	
<b>Created By</b>	Connie Krier
<b>Date Created</b>	6/23/2010 11:27:00 AM
<b>Followed Up By</b>	
<b>Date Closed</b>	6/23/2010 11:27:07 AM
<b>Status</b>	Closed
<b>Notes</b>	Submitted Jun 23 2010 11:27AM. No follow-up requested. Jun 23 2010 11:27AM: SOR closed.

Observation and Follow-Up	
<b>Date/Time</b>	6/23/2010 7:30:00 AM
<b>Location</b>	Treatment Plant Portal Site - TPP Portal
<b>SOR Type</b>	Observation
<b>Condition Type</b>	Unsafe
<b>Category</b>	PPE
<b>Observation Details</b>	I recieved a phone call from Jim Greeley stating he was concerned about the employees working in the CDF pour at the TPP. I asked what PPE was being worn and he explained only boot with rain gear taped to them.
<b>Immediate Corrective Action</b>	I called and spoke to Jack Finn and reminded him of past injuries that had occured due to concrete pours. Realizing he was not the general super at that time I refreshed his memory about KST's corrective measures of wearing Hip wadders while working in concrete. I explained Dcut taps around rainpants onto boots was not proper protection. I urged Jack to reconsider the PPE his employees were wearing today. Jack said he would have the employees wear hip wadders and invited me to come out to site. I agreed to visit site. I did visit the site and saw employees wearing the proper PPE for the job that was being done.
<b>Action to Prevent Recurrence</b>	Review lessons learned on a regular basis to prevent repeat injuries.
<b>Follow-Up Required</b>	No



# APPENDIX 17

**SECTION 01300**

**SUBMITTALS PROCEDURE**

**PART 1 GENERAL**

**1.01 SUMMARY**

- A. This Section specifies procedures and requirements for all submittals, Substitutions, Deviations, Requests for Information (RFIs), and the master submittal list required by the Specifications.
- B. Submit descriptive information which will enable the Project Representative to assess whether the proposed materials, equipment, or methods of work are in general conformance with the work and in compliance with the Contract.
- C. No fabrication or construction work shall occur on a specific submittal item without an Acceptable Disposition.

**1.02 MASTER SUBMITTAL LIST**

- A. Prepare and submit within 20 days after the effective date of the Notice to Proceed, a Master Submittal List listing all items for which submittals are required by the Specifications. Provide a schedule indicating the submittal dates in chronological order for each submittal. Organize by Specification Section number and include the following information for all listed items:
  - 1. Item identification.
  - 2. Specification Section number.
  - 3. Identification of those items which are substitutions or contain deviations from the Specifications.
  - 4. Identification of those items which require other jurisdictional agency review and approval.
  - 5. Columns for future use as information becomes available shall be provided for the following items:
    - a. Trade name, model, and catalog designation.
    - b. The scheduled need dates for control purposes.
    - c. Date submitted.
    - d. The date approval is needed.
    - e. The date on which material is needed.
- B. Coordinate and integrate all submittal dates with the Baseline Schedule.

**1.03 CONTRACTOR RESPONSIBILITIES**

- A. Be responsible for the accuracy and completeness of the information contained in each submittal.
- B. Verify that the material and equipment described in each submittal conforms to the requirements of the Contract prior to submittal.
- C. Ensure that the material, equipment and methods of work used shall be as described in the submittal.
- D. Ensure there is no conflict with other submittals. Notify the Project Representative where such submittal may affect the work of another submittal.
- E. Ensure coordination of submittals among the suppliers, related crafts, subcontractors, and with the planned work.
- F. Submit a request using Form 01300-B per Section 01999 for all substitution requests.
- G. Call out all Deviations from the Contract on the submittal Form 01300-A per Section 01999 and note where applicable in the body of the submittal.

#### 1.04 CONSTRUCTION DIFFERING FROM THAT INDICATED IN THE CONTRACT DOCUMENTS

##### A. Approved Equal:

1. **Definition:** An item of material or equipment proposed by the Contractor that has the same function, quality, durability, appearance, strength, and design characteristics equal to that named, that meets the requirements of the Specification, and is sufficiently similar so that no change in related work is required. The item of material or equipment shall reliably perform at least equally well for the function imposed by the design concept of the completed work as a functioning whole. In general, Approved Equal applies to manufactured items.
2. Clearly mark on the submittal Form 1300-A.
3. Acceptance is at the Project Representative's discretion and the decision regarding acceptance or rejection shall be final. If the Contractor disagrees, a Request for Change Order shall be filed in accordance with the provisions of Section 00700. Contractor shall not assume acceptance at any time prior to the rendering of decision by the Project Representative.

##### B. Substitution:

1. **Definition:** An item of significant difference in materials, equipment, means, method, technique, dimension, sequence, or procedure which functionally meets the Contract requirements, but does not meet the Specification(s) and is equal to or better than the specified item.
2. Submit a request for Substitution with the submittal. Use Form 01300 - B and address and complete all items in the form. The request shall include complete specifications or means and methods for the item including procurement, operational and maintenance cost data.
3. Any Substitution not identified on the submittal is not accepted or approved regardless of any subsequent action on the submittal by the County and any such substitution shall not relieve the Contractor from complying with the original Contract requirements.
4. Substitutions shall be authorized only by Change Order to the Contract.
5. Acceptance is at the Project Representative's sole discretion and the decision regarding acceptance or rejection shall be final. Contractor shall not assume acceptance at any time prior to the rendering of a written decision by the Project Representative.

##### C. Deviations:

1. **Definition:** A minor change to a specified material, procedure or product proposed by the Contractor, or an omission of a required item from a submittal, that does not fully conform to the requirements specified, but conforms to dimensional, operational, and maintenance requirements and can be shown to accomplish the functional and operational and maintenance cost performance of the specified item.
2. Annotate in the submittal all deviations from stated requirements in the Contract. Any Deviation not identified on the submittal is not accepted or approved regardless of any subsequent action on the submittal by the County and deviation shall not relieve the Contractor from complying with the original Contract requirements.
3. Acceptance is at the Project Representative's sole discretion and the decision regarding acceptance or rejection shall be final. Contractor shall not assume acceptance at any time prior to the rendering of a written decision by the Project Representative. A change order may be required by the Project Representative for an accepted Deviation.

##### D. Value Engineering:

1. See Section 01013.

#### 1.05 DEFINITIONS

- A. **Acceptable Disposition: Review Action of "1" or "2"** per Paragraph 01300-3.03B.1.and B.2.
- B. **Request for Information (RFI):** A document submitted by the Contractor to clarify or request an interpretation of some portion of the drawings, specifications or other Contract Documents.

#### PART 2 PRODUCTS (NOT USED)

## **PART 3 EXECUTION**

### **3.01 TRANSMITTAL PROCEDURE**

#### **A. General:**

1. Submittals shall be accompanied by Submittal/Transmittal Form 01300-A received from the Project Representative. Equipment numbers shall be listed on Form 01300-A for items being submitted. A separate form shall be used for each specific item, class of material, equipment, and items specified in separate, discrete sections for which a submittal is required. Submittals for various items shall be made with a single form when the items taken together constitute a manufacturer's package or are so functionally related that expediency indicates checking or review the group or package as a whole. No multiple-section submittals will be allowed except where previously approved by the Project Representative.
2. A unique number, sequentially assigned, shall be noted on the transmittal form accompanying each item submitted. Original submittal numbers shall have the following format: "XXX"; where "XXX" is the sequential number assigned by the Contractor. Resubmittals shall have the following format: "XXX-Y"; where "XXX" is the originally assigned submittal number and "Y" is a sequential letter assigned for resubmittals, i.e., A, B, or C being the first, second, and third resubmittals, respectively. Submittal 25B, for example, is the second resubmittal of Submittal 25.
3. Submit all proposed Approved Equals as a part of the submittal process.
4. Submit RFI's as specified in Section 00700.

### **3.02 SUBMITTAL COMPLETENESS**

- A. Submittals without all required information are not acceptable and may be returned. The Project Representative may choose to put an incomplete submittal on-hold for up to seven days to allow time for the Contractor to provide missing information. The on-hold time will be in addition to the days specified for the return of a submittal stated in Paragraph 01300-3.03B.
- B. RFIs are subject to review as specified in Section 00700.

### **3.03 SUBMITTAL REVIEW PROCEDURE**

- A. Unless otherwise indicated, for each submittal, submit the following:
  1. One reproducible original of all submitted information. Individual sheets shall not exceed 22 inches x 34 inches.
  2. Seven additional copies of each submittal including all submitted information.
  3. Samples: Submit the number requested in the Specification Section.
  4. Certificates: Will be considered as information. No copy shall be returned.
  5. Submittals indicated as submit for information only three copies. No copy shall be returned.
- B. Unless otherwise indicated, within 17 days after receipt of each submittal or resubmittal, the submittal or resubmittal will be returned to the Contractor. The returned material will consist of a maximum of three marked-up copies of the submittal. The returned submittal will indicate one of the following actions:
  1. If the review indicates that the submittal is in general conformance with the Contract, the submittal copies shall be marked "No Exceptions Taken" and given a Review Action of "1." In this case, implement the work covered in the submittal.
  2. If the review indicates that the submittal requires limited corrections, the submittal copies will be marked "Note Markings" and given a Review Action of "2." In this case, begin to implement the work covered in the submittal in accordance with the markings noted. Where submittal information is to be incorporated in O&M data, a corrected copy shall be resubmitted; otherwise, no further action is required.
  3. If the review reveals the submittal is insufficient and contains incorrect data and the comments are of a nature that can be confirmed, the submittal copies shall be marked "Comments Attached -- Confirm" and given a Review Action of "3." A Review Action "3" does not allow implementation of the work covered by the submittal until the information requested to be confirmed in the submittal has been revised, submitted, and returned to the Contractor with a Review Action of either "1" or "2."

4. If the review reveals the submittal is insufficient or contains incorrect data and the comments require that the submittal be revised and resubmitted, the submittal copies shall be marked "Comments Attached --Resubmit" and given a Review Action of "4." A Review Action "4" does not allow implementation of the work covered by the submittal until the information in the submittal has been revised, resubmitted, and returned to the Contractor with a Review Action of either "1" or "2."
5. If the review reveals that the submittal is not in general conformance with the Contract, or if the submittal is incomplete, the submittal copies shall be marked "Rejected" and given a Review Action of "5." Submittals containing deviations or substitutions from Contract which have not been clearly identified by the Contractor fall into this category. A Review Action "5" does not allow implementation of the work covered by the submittal until the information in the submittal has been revised, resubmitted, and returned with a Review Action of either "1" or "2."
6. RFI's will be returned within 14 days of receipt.

#### 3.04 EFFECT OF REVIEW OF SUBMITTALS

- A. Review of submittals shall not relieve the Contractor of its responsibility for errors therein and shall not be regarded as an assumption of risks or liability by the County.
- B. No disposition of the submittal by the Project Representative changes the requirements of the Specification and Drawings.
- C. RFI responses are limited as specified in Section 00700.

**END OF SECTION**

# APPENDIX 18

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION ONE

BRANDON APELA AFOA, )  
 )  
 Appellant/Cross-Respondent, )  
 )  
 v. )  
 )  
 PORT OF SEATTLE, )  
 )  
 Respondent/Cross-Appellant. )

No. 64545-5-1

PUBLISHED OPINION

FILED: February 22, 2011

FILED  
COURT OF APPEALS DIV #1  
STATE OF WASHINGTON  
2011 FEB 22 AM 8:56

SPEARMAN, J.—In general, one who employs an independent contractor is not liable for injuries sustained by an independent contractor's employees. But a well established exception to the general rule is where an employer of an independent contractor retains control over some part of the work, in which case, the employer has a duty within the scope of that control to provide a safe place to work. At issue in this case is whether these same rules apply where the contract between the Port and appellant Brandon Afoa's employer is a "license agreement." We hold that they do and that questions of fact exist as to whether the Port retained sufficient supervisory authority over the manner in which Afoa performed his work. Accordingly, we reverse summary judgment and remand for further proceedings.

FACTS

Brandon Afoa was injured as a result of collision while he was operating a powered industrial vehicle on the airplane ramp at Seattle-Tacoma International Airport, which is owned and operated by the Port of Seattle. Mr. Afoa worked for Evergreen Aviation Ground Logistics Enterprises, Inc. ("EAGLE"). EAGLE provided "aircraft ground handling services" at the airport, including aircraft movement and loading and unloading aircraft cargo and baggage, under a "license agreement" with the Port. Afoa claims the brakes and steering on the vehicle failed while he was operating it, causing him to collide with a broken piece of equipment that had been left on the tarmac. The piece of equipment fell on him, crushing his spine and leaving him paraplegic. Afoa sued the Port, alleging it breached common law and statutory duties by failing to provide him with a safe workplace.

The Port moved for summary judgment, arguing that Afoa's suit was barred by the public duty doctrine, and that the Port did not owe any duty of care to the employees of EAGLE, because EAGLE was not an independent contractor with the Port and because the Port had no authority or control over EAGLE's work. The Port also argued that it owed no duty to Afoa under the Washington Industrial Safety and Health Act ("WISHA") because it is not an "employer," and Afoa is not an "employee" as those terms are defined in the statute. In addition, the Port sought sanctions against Afoa under CR 11. The trial court granted the motion for summary judgment, but denied the request for sanctions. Afoa appeals and the Port cross-appeals the denial of sanctions.

## DISCUSSION

### *Standard of Review*

When reviewing a motion for summary judgment, we engage in the same inquiry as the trial court. Marks v. Wash. Ins. Guar. Ass'n, 123 Wn. App. 274, 277, 94 P.3d 352 (2004). Summary judgment is appropriate if the pleadings, depositions, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). "Like the trial court, we consider facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party." Marks, 123 Wn.2d at 277. Summary judgment is appropriate only if, from all the evidence, reasonable persons could reach but one conclusion. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The existence of a legal duty is generally a question of law. Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996). But where duty depends on proof of certain facts that may be disputed, summary judgment is inappropriate. Sjogren v. Props. of the Pac. N.W., LLC, 118 Wn. App. 144, 148, 75 P.3d 592 (2003).

### *Common Law Duty*

Afoa argues there are material questions of fact regarding whether the Port owed him a common law duty to provide a safe workplace in the same manner as a general contractor that has control over the way in which jobs are performed at a construction site. The Port contends that summary judgment was proper because its actions were strictly limited to ensuring compliance with what it refers to as a simple "license

agreement” with Afoa’s employer, EAGLE. We agree with Afoa for the reasons described herein.

In general, an employer who contracts with an independent contractor is not liable for injuries sustained by an independent contractor’s employees. RESTATEMENT (SECOND) OF TORTS § 409 (1965); Kelley v. Howard S. Wright Constr. Co., 90 Wn.2d 323, 330, 582 P.2d 500 (1978); Stute v. P.B.M.C., Inc., 114 Wn.2d 454, 460, 788 P.2d 545 (1990). But where the employer retains control over some part of the independent contractor’s work, the employer has a duty within the scope of that control to provide a safe place to work. Stute, 114 Wn.2d at 460; Kennedy v. Sea-Land Serv., Inc., 62 Wn. App. 839, 851, 816 P.2d 75 (1991); RESTATEMENT (SECOND) TORTS § 414 (1965). In Kamla v. Space Needle Corp., 147 Wn.2d 114, 119, 52 P.3d 472 (2002), the Supreme Court explained the rationale for holding employers who retain control over a jobsite liable for injuries incurred by employees of independent contractors:

Employers are not liable for injuries incurred by independent contractors because employers cannot control the manner in which the independent contractor works. Conversely, employers are liable for injuries incurred by employees precisely because the employer retains control over the manner in which the employee works.

Kamla, 147 Wn.2d at 119.

Regarding the issue of control, the test is not simply whether there is an actual exercise of control; rather, the test is whether the employer contracting with independent contractor retains a right to direct the manner in which the work is performed. Kamla, 147 Wn.2d at 121. Indeed, the right to control can exist even where

the employer does not actually interfere with the independent contractor's work. Phillips v. Kaiser Aluminum & Chem. Corp., 74 Wn. App. 741, 750, 875 P.2d 1228 (1994). "Whether a right to control has been retained depends on the parties' contract, the parties' conduct, and other relevant factors." Id.

Washington courts have recognized a difference between merely overseeing contract compliance and becoming involved in the manner in which the contractual obligations are performed. For example, "[t]he retention of the right to inspect and supervise to insure the proper completion of the contract does not vitiate the independent contractor relationship." Hennig v. Crosby Group, Inc., 116 Wn.2d 131, 134, 802 P.2d 790 (1991) (quoting Epperly v. Seattle, 65 Wn.2d 777, 785, 399 P.2d 591 (1965)). Instead, an employer must have retained a right "to so involve oneself in the performance of the work as to undertake responsibility for the safety of the independent contractor's employees." Id. The RESTATEMENT (SECOND) TORTS § 414 (1965) CMT. C. is instructive on this issue:

It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

In Kamla, the Space Needle hired an independent contractor to install a fireworks display on the Space Needle. Kamla, an employee of the independent contractor, was

injured when his safety line snagged on a moving elevator and dragged him through the elevator shaft. Kamla, 147 Wn.2d at 118. He argued that the Space Needle was liable as a jobsite owner under the retained control exception. The Supreme Court disagreed, noting that the Space Needle did not assume responsibility for worker safety or retain the right to control or interfere with the manner in which the independent contractor and its employees set up the fireworks. Id. at 121-22. Instead, the Space Needle merely agreed to provide access to the display site, crowd control, firefighters, permit fees, technical assistance, security, and public relations. Id.

Similarly, in Hennig, the Supreme Court held that a contract authorizing the Port of Seattle to inspect an independent contractor's work to ensure contract compliance did not impose liability on the Port:

It is one thing to retain a right to oversee compliance with contract provisions and a different matter to so involve oneself in the *performance* of the work as to undertake responsibility for the safety of the independent contractor's employees.

Hennig, 116 Wn.2d at 134.

By contrast, in Kelly, the general contractor expressly assumed responsibility for "supervising and coordinating all aspects of the work" and "agreed to be responsible for 'initiating, maintaining and supervising all safety precautions and programs in connection with the work[.]'" Kelly, 90 Wn.2d at 327. As such, the Supreme Court held that the exception applied and the general contractor's contractual duty of care to the employees of its subcontractors was nondelegable. Id. at 333-34. The Court thus affirmed the judgment against the general contractor.

Afoa argues this case is more like Kelly than Kamla or Henning. We agree. The Port's argument that it owes no duty to Afoa because EAGLE is not an independent contractor with the Port and its contract with EAGLE is merely a "license agreement," misses the mark. Whether the agreement between the Port and EAGLE is called a "license agreement" or any other term is immaterial. Nor does it matter that the Port does not consider EAGLE to be an "independent contractor." The issue is whether the Port has a contractual relationship with EAGLE by which it retained control over the manner in which EAGLE provided ground services such as loading and unloading aircraft cargo and baggage and aircraft movement. The Port contends that it does not. But an examination of the agreement between EAGLE and the Port, when viewed in a light most favorable to Afoa, reveals questions of material fact on this issue.

The agreement provides that EAGLE "shall comply with all Port regulations including the Port's SCHEDULE OF RULES AND REGULATIONS FOR SEATTLE-TACOMA INTERNATIONAL AIRPORT . . . ." The Port's schedule includes a wide range of rules and regulations that appear to govern many details of EAGLE's operation of its own vehicles. For example, section 4 of the schedule includes the following provisions:

**MOTOR VEHICLE OPERATIONS**

**A. GENERAL**

...

7. No more than six (6) baggage or cargo carts will be towed by a single baggage tug or other vehicle at any one time and will not exceed fifteen (15) miles [24 km] per hour.

...

9. Operators of vehicles which, because of design/function, that restrict operator visibility to sides and rear of vehicle, shall utilize ground marshaller for guidance during backing operations or when operating within restricted space areas.

...

#### B. IN-TERMINAL BUILDING

1. Any person operating equipment within the passenger terminal building will abide by all posted speed regulations in these areas and in any event not exceed five (5) miles [8 km] per hour.
2. Any person operating equipment prior to entering into or exiting from any tunnel area or other area where vision is impaired shall, within three (3) feet [1 meter] of any exit or obstruction, bring the equipment to a complete stop and sound the horn before entering the apron or adjoining area.

...

#### C. FIELD

1. All vehicular equipment in the Air Operations Area, cargo, tunnel, access road, aircraft parking, or storage areas must at all times comply with any lawful signal or direction of Port employees. All traffic signs, lights, and signals shall be obeyed, unless otherwise directed by Port employees.

...

8. No person shall operate any motor vehicle or motorized equipment on the aircraft movement or parking areas of the Airport at a speed in excess of twenty (20) miles [32 km] per hour, or less where conditions warrant. Designated motor vehicle drive lanes shall be utilized where provided unless specific authorization to the contrary is given by a Port employee.

...

10. Any vehicular equipment operating within the Air Operations Area must display signs of commercial design on both sides of the vehicle which identify the vehicle to the Airport tenant,

construction firm, or vendor concerned. Firm names must appear in letters a minimum of two (2) inches [5 cm] high. In addition, any vendor's vehicle must display a current ramp permit issued by the Director [of Aviation of the Port of Seattle]. (See also Section 8, Enforcement, Security Violation Procedure subparagraph B.4.a(7).)

11. No person shall park any motor vehicle or other equipment or materials in the Air Operations Area of the Airport except in a neat and orderly manner and at such points as prescribed by the Director.
12. No person shall paint, repair, maintain, or overhaul any motor vehicle or other equipment or materials in the Air Operations Area of the Airport except in such areas and under such terms and conditions as prescribed by the Director.

Additionally, the regulations provide that EAGLE employees "shall comply with written or oral instructions issued by the Director or Port employees to enforce these regulations[.]" and that "the Director is empowered to issue such other instructions as may be deemed necessary for the safety and well-being of Airport users or otherwise in the best interests of the Port." Moreover, this comports with the declarations of Afoa and EAGLE ramp supervisor Toiva Gaoa, who both testified that the Port retained "exclusive control" over the area where Afoa was injured; that they were required to obey Port rules and personnel in the event of a conflict between Port and EAGLE directives; and that the Port required them to take a Port-administered driving test before being permitted to use the ramp area of the tarmac.

The Port disputes Afoa's evidence, claiming that it had nothing to do with training Afoa to operate his vehicle, and that it "does not employ, manage, or supervise EAGLE or any of its employees[.]" The Port contends its agreement with EAGLE and the Port rules and regulations merely require EAGLE employees to follow all applicable laws.

The Port also points to language in its agreement with EAGLE indicating that EAGLE is solely responsible for its own equipment, and that the Port “accepts no liability for [EAGLE’s] equipment.” But at best, this is conflicting evidence, showing that genuine issues of material fact exist regarding whether the Port so involved itself in the performance of EAGLE’s work as to undertake responsibility for the safety of EAGLE’s employees. As such, we hold summary judgment was improper, and reverse.

*Statutory Duty*

Afoa also argues that the Port owed him a statutory duty under the WISHA. We agree. RCW 49.17.060(2)<sup>1</sup> imposes a nondelegable duty on all general contractors to ensure compliance with WISHA regulations. Kamla, 147 Wn.2d at 122 (citing Stute, 114 Wn.2d at 464). The Supreme Court in Stute imposed primary responsibility for compliance with WISHA regulations on the general contractor because its “innate supervisory authority constitutes sufficient control over the workplace.” Stute, 114 Wn.2d at 464.

The rule set forth in Stute has been extended to other parties who are sufficiently analogous to justify imposing statutory liability. For example, in Weinert v. Bronco Nat’l Co., 58 Wn. App. 692, 795 P.2d 1167 (1990), this court held that the duty announced in Stute applied not only to general contractors, but also to jobsite owners who retain control or supervisory authority over the performance of a subcontractor’s work:

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<sup>1</sup> RCW 49.17.060(2) provides that each employer “[s]hall comply with the rules, regulations, and orders promulgated under this chapter.”

We do not overlook the fact that Bronco is an owner/developer rather than a general contractor hired by an owner. We see no significance to this factor insofar as applying Stute to the facts of this case. The owner/developer's position is so comparable to that of the general contractor in Stute that the reasons for the holding in Stute apply here. The purpose of the statutes and regulations relied upon in Stute is to protect workers. The basis for imposing the duty to enforce those laws on a general contractor exists with respect to an owner/developer who, like the general contractor, has the same innate overall supervisory authority and is in the best position to enforce compliance with safety regulations.

Weinert, 58 Wn. App. at 696. Likewise, in Doss v. ITT Rayonier, Inc., 60 Wn. App. 125, 803 P.2d 4 (1991), an employee of an independent contractor hired by ITT Rayonier was killed in an accident at the jobsite. The estate alleged that ITT Rayonier violated a specific WISHA provision. The court noted ITT Rayonier was a jobsite owner and not a general contractor, but found "no significant difference . . . between an owner-independent contractor relationship and a general contractor-subcontractor relationship." Doss, 60 Wn. App. at 127 n.2.

By contrast, the Supreme Court in Kamla held that under the facts of that case, the Space Needle's relationship with an independent contractor who installed a fireworks display was not sufficiently analogous to that of a general and subcontractor to justify imposing a nondelegable duty to ensure WISHA compliance. Kamla, 147 Wn.2d at 123-24. The court reasoned that even though jobsite owners may have the authority to control jobsite work conditions, they may not have knowledge or expertise about WISHA regulations. Because such jobsite owners cannot instruct contractors on how to work safely, they may rely on their contractors to ensure WISHA compliance. Id. at 124-25. Accordingly, "[i]f a jobsite owner does not retain control over the manner in

which an independent contractor completes its work, the jobsite owner does not have a duty under WISHA to 'comply with the rules, regulations, and orders promulgated under [chapter 49.17 RCW]." Id. at 125. For this reason, the Supreme Court held the Space Needle was not liable to the contractor's employee because it did not retain the right to control the manner in which the contractor and its employees accomplished their work. Id.; see also Neil v. NWCC Investments v. LLC, 155 Wn. App. 119, 127, 229 P.3d 837, rev. denied, 169 Wn.2d 1018, 238 P.3d 502 (2010) (Stute's duty "does not extend to owners that do not retain the right to control the manner in which the independent contractor and its employees perform their work"). Kamla, 147 Wn.2d at 125.

Afoa argues that, as was the case with the businesses in Weinert and Doss, the Port's control and authority is sufficiently analogous to that of a general contractor to justify application of the Stute rule.<sup>2</sup> The Port responds that the Stute rule does not apply because it is not an "employer" and Afoa is not an "employee" as those terms are defined under WISHA. An "employer" is defined as:

any person . . . or other business entity which engages in any business . . . in this state and employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person or persons[.]

RCW 49.17.020(4). The term "employee" means:

[A]n employee of an employer who is employed in the business of his employer whether by way of manual labor or otherwise and every person in this state who is engaged in the employment of or who is working under an independent contract the essence of which

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<sup>2</sup> Afoa contends the Port violated a variety of regulations regarding inspection, maintenance, and training for the use of powered industrial trucks: WAC 296-863-20005, -20025, -30005, -30010, -20020, -60005, and -40010.

is his or her personal labor for an employer under this chapter whether by way of manual labor or otherwise.

RCW 49.17.020(5).

The gravamen of the Port's argument on this issue is that "neither Mr. Afoa, EAGLE, nor the air carriers were working under an independent contract with the Port the essence of which was their personal labor for the Port." But this is not required by the statute. Rather, WISHA requires only that an employer "engage[] in any business . . . in this state and employ[] one or more employees[.]" RCW 49.17.020(4). Likewise, WISHA merely requires that Afoa be "[a]n employee of an employer who is employed in the business of his or her employer whether by way of manual labor or otherwise[.]" RCW 49.17.020(5).<sup>3</sup>

More importantly, whether Stute is applied does not turn on an analysis of the definitions of "employer" and "employee" under WISHA. Instead, the question is whether the business entity retains such control or supervisory authority over the performance of a subcontractor's work as to be analogous to a general contractor. Weinert, 58 Wn. App. at 696. If that is the case here, the Port has a nondelegable duty to ensure WISHA compliance for everyone employed at the work site. Id. Again, this determination is fact-based, and turns on factors such as whether the Port retained control over the manner in which EAGLE and its employees did their work, Kamla, 147 Wn.2d at 125; whether the Port had "the greater practical opportunity and ability to

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<sup>3</sup> The Port also claims the location where Afoa was injured was not a "work place" as is defined under WISHA. We reject this argument, however, because it rests on the Port's claim that it was not an employer and Afoa was not an employee.

insure compliance with safety standards,” Stute, 114 Wn.2d at 462; and whether the Port had “innate supervisory authority,” Doss, 60 Wn. App. at 128.

As is described above, the evidence viewed in a light most favorable to Afoa shows that genuine issues of material fact exist regarding whether the Port retained such control or supervisory authority over the performance of EAGLE’s work as to be analogous to a general contractor. As such, we hold summary judgment was improperly granted on this issue.

*Duty to Business Invitee*

Afoa also argues that the Port breached a duty of care it owed to him as a business invitee. “The legal duty owed by a landowner to a person entering the premises depends on whether the entrant falls under the common law category of a trespasser, licensee, or invitee.” Iwai v. State, 129 Wn.2d 84, 90-91, 915 P.2d 1089 (1996). With regard to an invitee, “[a] landowner is liable for harm caused by an open and obvious danger if the landowner should have anticipated the harm, despite the open and obvious nature of the danger.” Kamla, 147 Wn.2d at 126. Here, Afoa provided an aerial photograph of the airport at the time of the accident purporting to show that the tarmac was cluttered with broken equipment. Although it is very difficult to make out any detail in the photograph, Afoa also testified that there was “a great amount of machinery cluttered in and around” the area where he had his accident, and that he was injured when he “collided with a broken piece of large machinery[.]”

The Port does not argue Afoa's evidence is insufficient to create a question of fact as to whether the Port breached a duty of care to a business invitee. Instead, the Port claims that Afoa was not a business invitee because it never "invited" him onto its property, and that Afoa was merely a licensee. According to the Port, therefore, it cannot be liable because Afoa knew or had reason to know of the clutter and the risk involved with the clutter. RESTATEMENT (SECOND) OF TORTS § 342 (1965). We reject this argument. To determine whether an entrant is a licensee or an invitee, "[t]he ultimate goal is to differentiate (1) an entry made for a business or economic purpose that benefits both entrant and occupier, from (2) an entry made for a purpose that either (a) benefits only the entrant or (b) is primarily familial or social." Beebe v. Moses, 113 Wn. App. 464, 467-68, 54 P.3d 188 (2002) (quoting Thompson v. Katzer, 86 Wn. App. 280, 286, 936 P.2d 421 (1997)). Afoa was present on the Port's property for a business purpose that benefited both parties, and was therefore a business invitee.

Given the Port declined to provide any argument on whether Afoa's testimony created a question of fact regarding breach of a duty to a business invitee, Afoa's evidence is unopposed, and we reverse summary judgment on this issue.

*Public Duty Doctrine*

The Port contends Afoa's claims are barred by the public duty doctrine. We reject this argument. The public duty doctrine merely recognizes the lack of an actionable duty to provide good government; in other words, that "a duty to all is a duty to no one." J & B Dev. Co. v. King County, 100 Wn.2d 299, 303, 669 P.2d 468 (1983)

(overruled on other grounds by Taylor v. Steven County, 111 Wn.2d 159, 759 P.2d 447

(1988)). In Taylor, our Supreme Court described the public duty doctrine as follows:

Under the public duty doctrine, no liability may be imposed for a public official's negligent conduct unless it is shown that 'the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general . . . .'

Taylor, 111 Wn.2d at 163 (quoting J & B Dev. Co., 100 Wn.2d at 303). Here, Afoa is not alleging a breach of a public duty, and as such the doctrine does not apply.

*Sanctions*

In its cross-appeal, the Port claims the trial court erred by declining to award sanctions against Afoa under CR 11, and it seeks fees and costs for what it contends is a frivolous appeal. Given our resolution of this appeal, we reject the Port's arguments as to sanctions.

Reversed and remanded for further proceedings consistent with this opinion.

Speckman, J.

WE CONCUR:

Leach, A.C.J.

Jan, J.

COURT OF APPEALS  
DIVISION II

11 APR - 1 AM 8:51

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

COURT OF APPEALS, DIVISION TWO,  
OF THE STATE OF WASHINGTON

IGNACIO CANO-GARCIA and  
MARIBEL CANO,  
Plaintiffs,  
vs.  
KING COUNTY, WASHINGTON and  
JACOBS CIVIL, INC.  
Defendants.

COURT OF APPEALS NO.: 41765-1-II  
PIERCE COUNTY NO.: 10-2-06381-7

**CERTIFICATE OF SERVICE**

I certify that on today's date I served via ABC Legal Messenger Service to:

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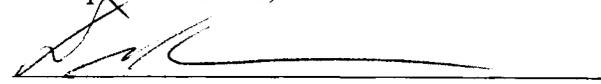
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the following document(s):

- BRIEF OF APPELLANTS;
- VERBATIM TRANSCRIPT OF PROCEEDINGS.

Dated this 1<sup>st</sup> day of April, 2011.

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