SEYFARTH SHAW

Anchorage, A Municipal Corporation vs. United States

Assembly Briefing, April 26, 2019

Presentation Agenda

01 Project Background

02 Project Issues

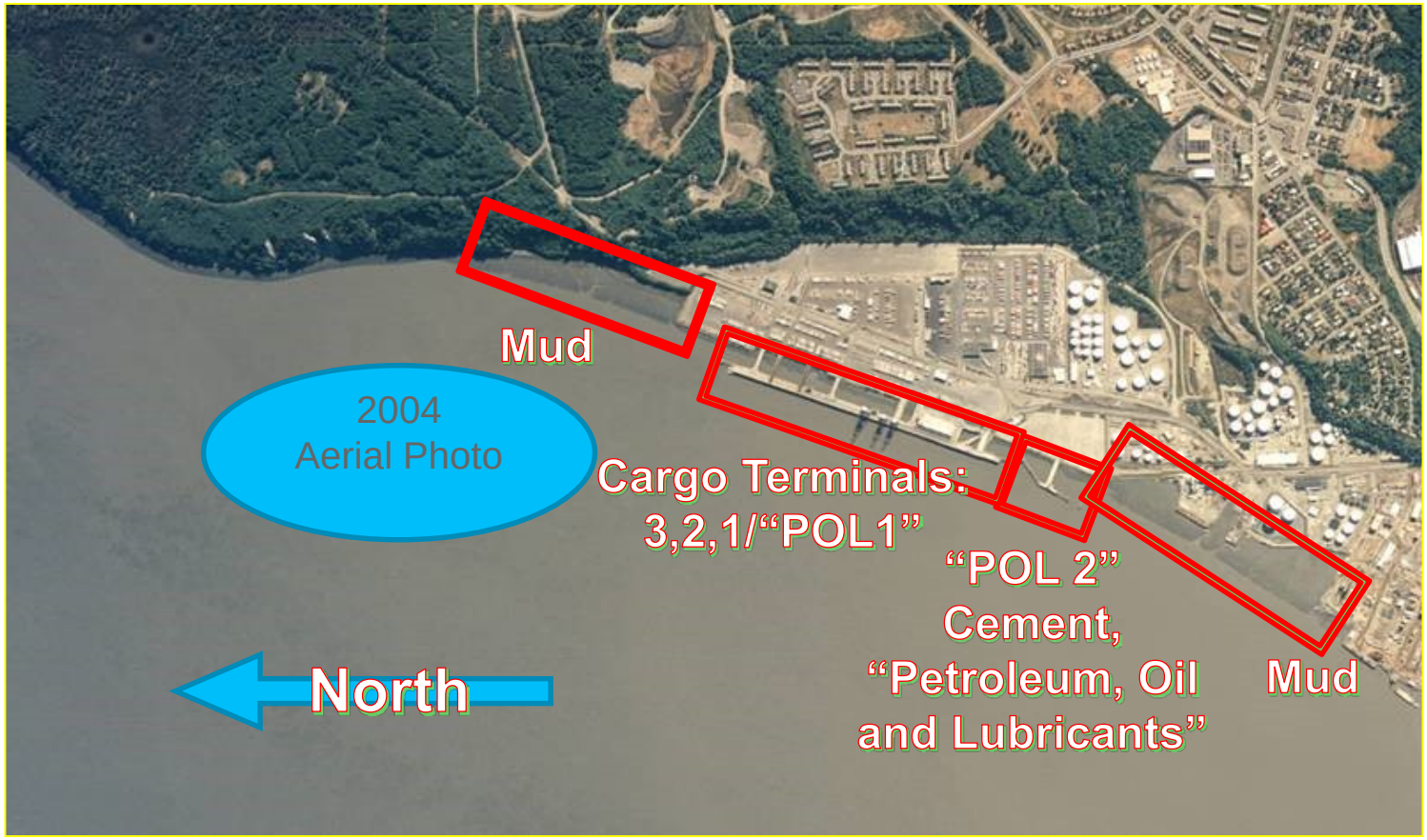
03 The MOA's Litigation Position

04 Private Party Lawsuit and Settlement

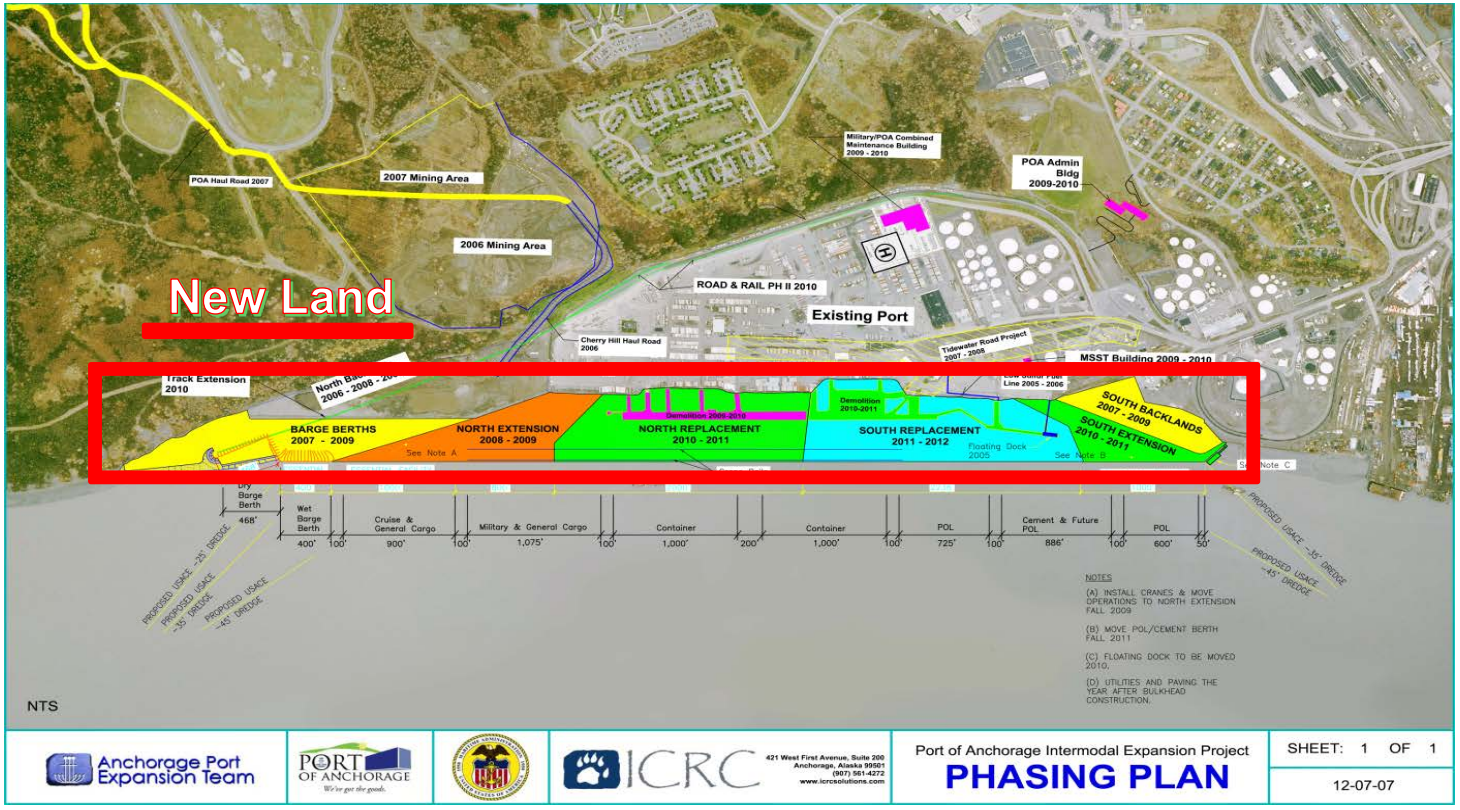
05 Current Status of the Lawsuit Against MarAd

Project Background

Pre-PIEP Port



The Port of Anchorage Intermodal Expansion Project (PIEP) Vision



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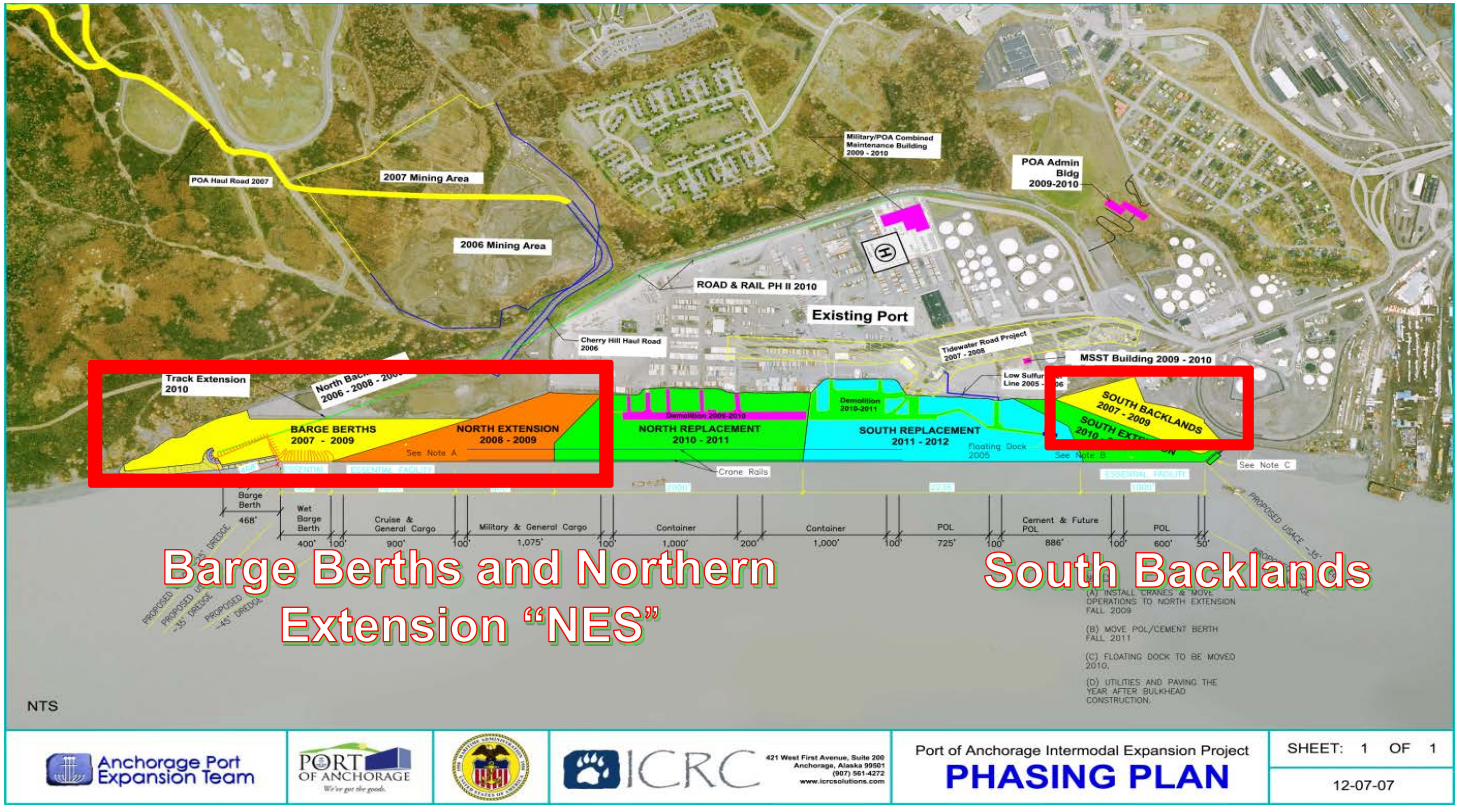
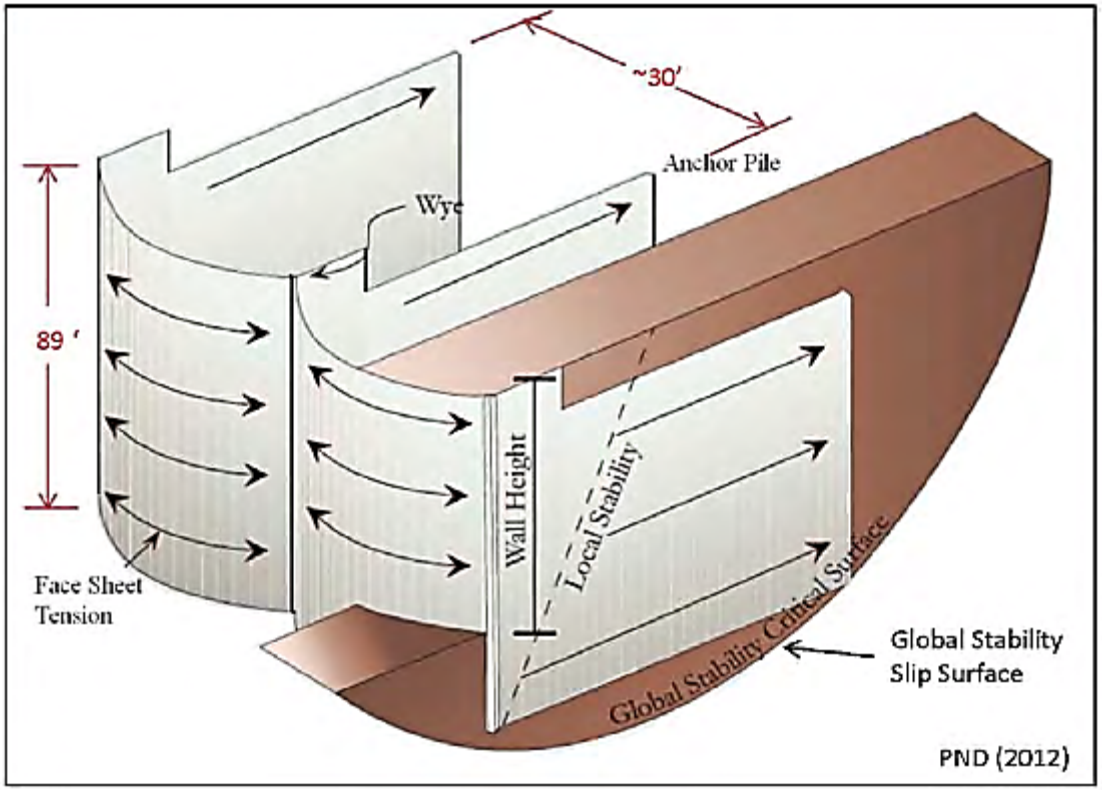


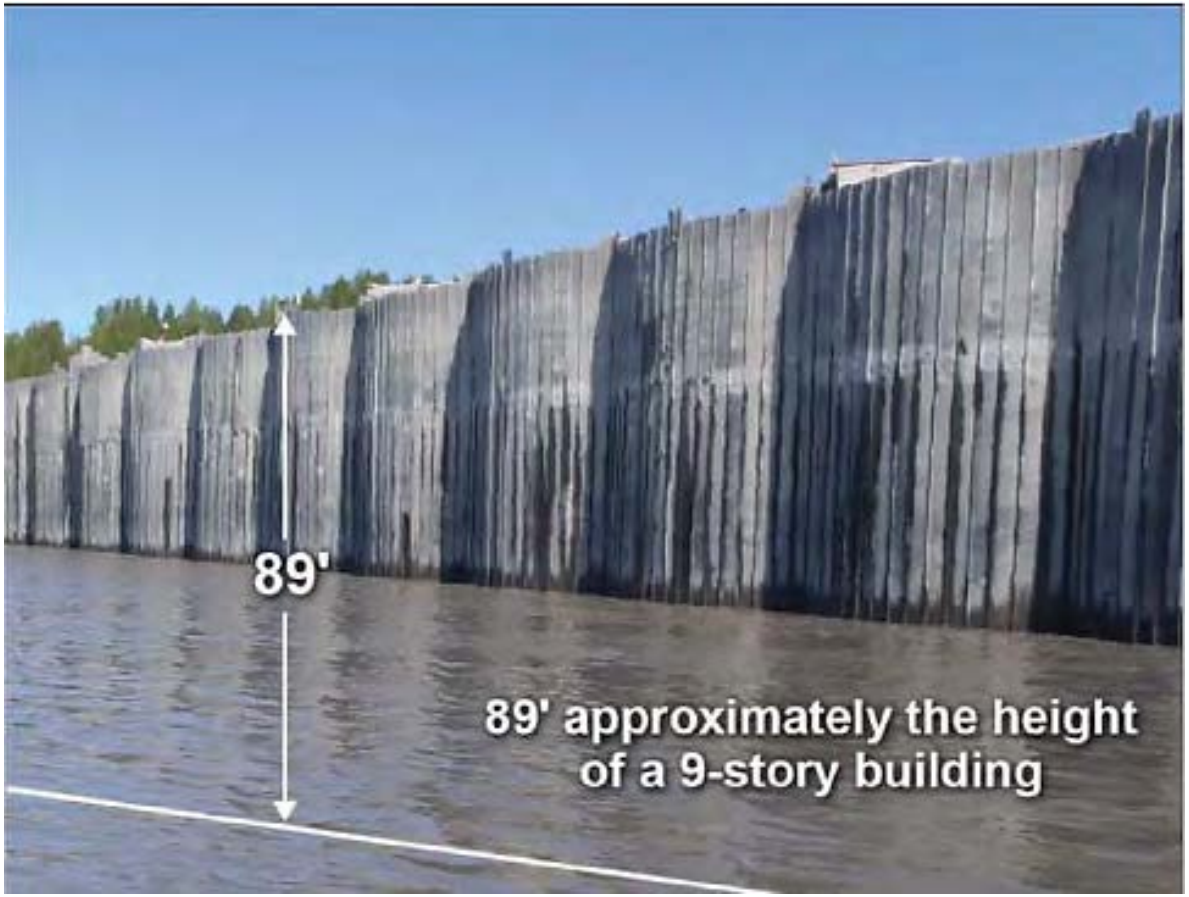
PORT of ALASKA

Open Cell Sheet Pile (OCSP) System



“Open Cell Sheet Pile” Construction

Constructed Open Cell Sheet Pile For The North Extension



Project Issues

Sheet Pile Damage Discovered

- MarAd's Contractor had difficulty driving sheet piles.
- PND's recommendations to ease pile driving were ineffective.
- Follow-on contractor (West Construction) expressed concern that damage was widespread.

Example of Damaged Sheet Pile

Example of Damaged Sheet Pile

Example of Unzipped Sheet Pile

Sheet pile "unzipping"

Example of Twisted Sheet Pile

PND0380100

Example of Damaged Sheet Pile

Sinkholes Resulting from Unzipped Interlocks

Sinkhole Damage

Dive Inspection Reveals Widespread Damage, October 2010

Key observations are as follows:

1. At the Wet Barge Berth, damage is present in every cell at face sheets or wyes at WBB cells 27-38. WBB cells 36-38 were removed during August-September 2010 and also found to have tailwall sheet damage.
2. At the North Extension cells 13-30, no damaged face sheets were found. NE cells 9-12, 31 and 32 were removed during August-September 2010 and were found to have face and tailwall sheet damage.
3. At the North Extension cells 41-66, damage is present at multiple cells spread throughout the entire area. NE cells 38-40 were removed during August 2010 and also found to have face and tailwall damage.

Examples of separated interlocks – WBB Cell 36 (left), face sheets pulled from NE Cell 39 (right).

1506 West 36th Avenue · ANCHORAGE, ALASKA 99503 · Phone 907.561.1011 · Fax 907.563.4220

Attachments

- Dive Inspection Report

P | N | D

MARAD's Award Fee Evaluations In 2009 Were Critical Of ICRC's Performance

QAP subcontract was not completed successfully. The subcontract is being de-scoped, and the proposed credits do not equal the estimated cost to complete that work. Subcontract change orders have been submitted for consent with insufficient information to support those changes. Eventually, limited data was provided. Program Management has been unacceptable, schedule has not been met, nor are cost controls effective.

ICRC's inability to properly manage their subcontractors is a major weakness. Given the substantial amount of subcontract work being performed for both design and construction of the project, substantial cost overruns have taken place in addition to schedule delays. This has had a major impact on the critical path of the program. ICRC and their subcontractors have been late in meeting design milestones and designs have required numerous revisions, which have resulted in cost escalations.

The contractor has implemented some project activities successfully, but has failed to implement the project as a whole. ICRC core activity for the PIEP is to build the bulkhead structure that will create new real estate and serve as the foundation for the container cranes. ICRC has failed to implement and manage the bulkhead construction, negatively impacting the program performance. ICRC has put corrective action plans in place to mitigate the impact, but the project remains behind schedule and over budget. Therefore, ICRC has shown lack of ability to implement a Quality Control System to manage the project successfully.

Decision Made to Conduct Further Analysis

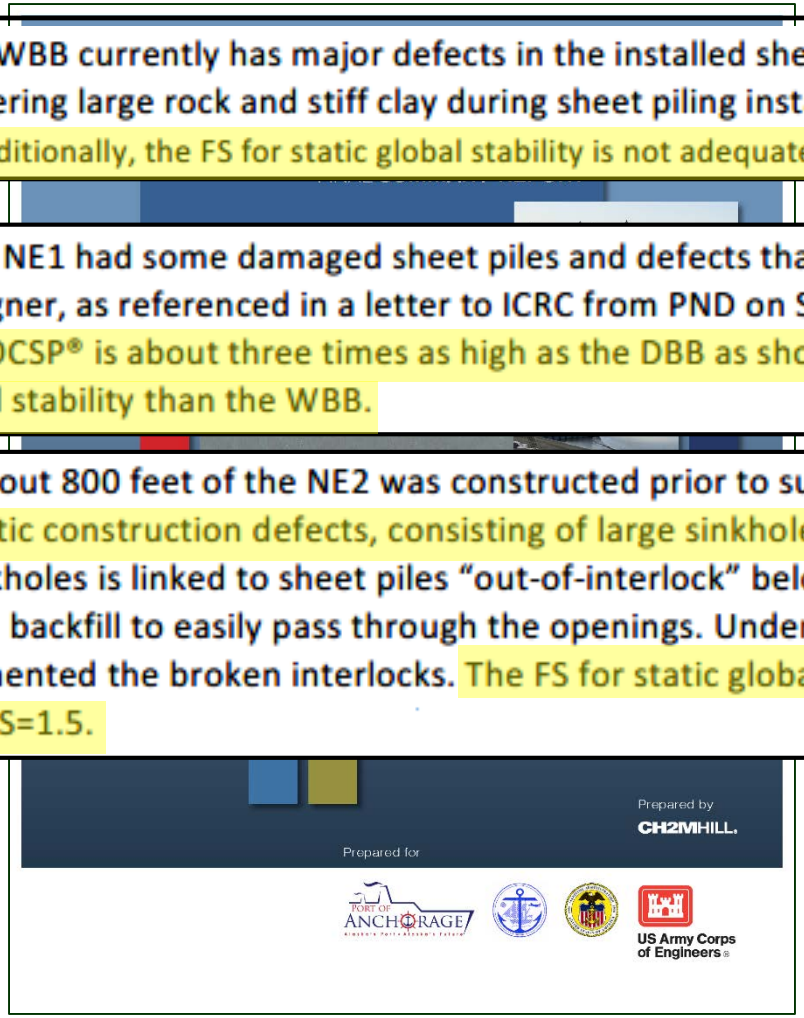
- Due to widespread damage, decision was made in 2010 to suspend the Project and conduct a comprehensive investigation.
- MarAd engaged the United States Army Corps of Engineers (USACE) to hire an independent engineer to investigate design and construction.
- USACE enters into contract with CH2M Hill for independent analysis under supervision of USACE / ERDC.

2013 Study Finds Irreparable Design and Construction Deficiencies

Wet Barge Berth (WBB). The WBB currently has major defects in the installed sheet piling. Most of the problems stem from encountering large rock and stiff clay during sheet piling installation. Many of the sheets are damaged beyond repair. Additionally, the FS for static global stability is not adequate for the WBB.

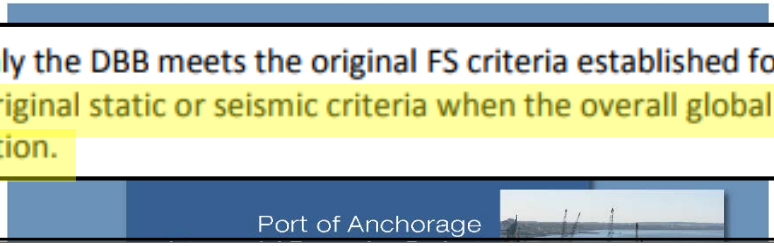
North Extension 1 (NE1). The NE1 had some damaged sheet piles and defects that have been repaired according to the original designer, as referenced in a letter to ICRC from PND on September 23, 2011. However, this section of the OCSP® is about three times as high as the DBB as shown in Figure ES-2 and has an even lower FS for static global stability than the WBB.

North Extension 2 (NE2). Only about 800 feet of the NE2 was constructed prior to suspension of construction. The NE2 has had the most dramatic construction defects, consisting of large sinkholes opening behind the sheet piling. The cause of the sinkholes is linked to sheet piles "out-of-interlock" below the water line, creating an opening for saturated backfill to easily pass through the openings. Underwater inspections and forensic explorations have documented the broken interlocks. The FS for static global stability is 1.13, which is significantly below the required FS=1.5.



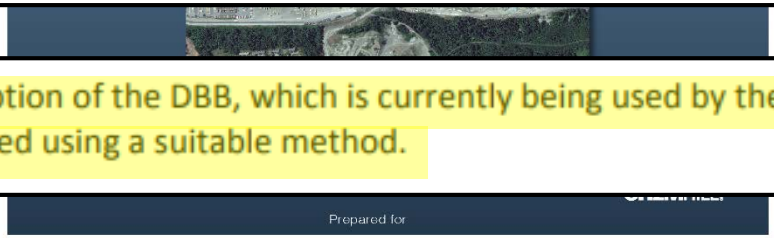
Overall Conclusions Regarding Suitability of the Structure (2013)

Suitability. Installed properly, only the DBB meets the original FS criteria established for the project. The WBB, NE1, and NE2 do not meet the original static or seismic criteria when the overall global stability of the structure is taken into consideration.



Condition of Existing Structures. The installation has numerous defects. The WBB and NE2 are irreparable from a construction perspective, and if they could be repaired they would not have the necessary FS for global stability. NE1 has been repaired to acceptable construction conditions, according to the original designer; however, it too does not have the necessary FS values originally established for the project.

The OCSP® system is inadequate relative to global stability and seismic displacements based on the PIEP design criteria.



In essence, then, with the exception of the DBB, which is currently being used by the POA, the North Expansion projects need to be reconstructed using a suitable method.

MARAD Also Engages AECOM To Perform A Root Cause Analysis

SOLICITATION/CONTRACT/ORDER FOR COMMERCIAL ITEMS
OFFEROR TO COMPLETE BLOCKS 12, 17, 23, 24, & 30

1. REQUISITION NUMBER: MA-PR220-20110017 | PAGE OF: 1 | 12

2. CONTRACT NO.: GS-23F-0114M | 3. AWARD/EFFECTIVE DATE | 4. ORDER NUMBER: DTMA-91-F-2011-000081 | 5. SOLICITATION NUMBER | 6. SOLICITATION ISSUE DATE

7. FOR SOLICITATION INFORMATION CALL: | a. NAME: Bruce Markman | b. TELEPHONE NUMBER (No collect calls): 202.366.1942 | 8. OFFER DUE DATE/LOCAL TIME

9. ISSUED BY: CODE 00091
U.S. DOT/ Maritime Administration
Office of Acquisition MAR-380
1200 NEW JERSEY AVENUE SE
MAIL STOP W-28-201
WASHINGTON DC 20590-0001

10. THIS ACQUISITION IS: [X] UNRESTRICTED; [ ] SET ASIDE % FOR; [ ] SMALL BUSINESS; [ ] HUBZONE SMALL BUSINESS; [ ] 8(A)
NAICS: 541330
SIZE STANDARD: $4.00

11. DELIVERY FOR FOB DESTINATION UNLESS BLOCK IS MARKED: [ ] SEE SCHEDULE

12. DISCOUNT TERMS

13a. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 700)

13b. RATING

14. METHOD OF SOLICITATION: [ ] RFQ [ ] IFB [ ] RFP

15. DELIVER TO: CODE 00091
U.S. DOT/Maritime Administration
Office of Acquisition

16. ADMINISTERED BY: CODE 00091
U.S. DOT/Maritime Administration
Office of Acquisition

C.2.1. Root Cause Analysis

MarAd requires a consulting firm to perform a root cause analysis of damage that occurred during the installation of sheet pile on the Project. The firm will analyze the damage that has been uncovered on to determine (1) what went wrong during the installation of the sheet pile and (2) who is at fault.

The contractor shall work directly with the following primary individuals in difinitizing the work requirement prior to commencing work under this purchase order:

Bruce Markman, 202-366-1942, bruce.markman@dot.gov

(Use Reverse and/or Attach Additional Sheets as Necessary)

25. ACCOUNTING AND APPROPRIATION DATA: 7011 1750HQ 2011 1OPEDOE220.0000122004.25304.610000600
26. TOTAL AWARD AMOUNT (For Govt. Use Only): $500,000.00

[ ] 27a. SOLICITATION INCORPORATES BY REFERENCE FAR 52.212-1, 52.212-4. FAR 52.212-3 AND 52.212-5 ARE ATTACHED. ADDENDA A — [ ] ARE [ ] ARE NOT ATTACHED.
[X] 27b. CONTRACT/PURCHASE ORDER INCORPORATES BY REFERENCE FAR 52.212-4. FAR 52.212-5 IS ATTACHED. ADDENDA — [ ] ARE [X] ARE NOT ATTACHED.

[ ] 28. CONTRACTOR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN _____ COPIES TO ISSUING OFFICE. CONTRACTOR AGREES TO FURNISH AND DELIVER ALL ITEMS SET FORTH OR OTHERWISE IDENTIFIED ABOVE AND ON ANY ADDITIONAL SHEETS SUBJECT TO THE TERMS AND CONDITIONS SPECIFIED HEREIN.

[X] 29. AWARD OF CONTRACT REF. _____ OFFER DATED _____. YOUR OFFER ON SOLICITATION (BLOCK 5), INCLUDING ANY ADDITIONS OR CHANGES WHICH ARE SET FORTH HEREIN, IS ACCEPTED AS TO ITEMS:

30a. SIGNATURE OF OFFEROR/CONTRACTOR

31a. UNITED STATES OF AMERICA (SIGNATURE OF CONTRACTING OFFICER)

30b. NAME AND TITLE OF SIGNER (Type or Print) | 30c. DATE SIGNED | 31b. NAME OF CONTRACTING OFFICER (Type or print): Bruce Markman | 31c. DATE SIGNED: 09/29/2011

AUTHORIZED FOR LOCAL REPRODUCTION
PREVIOUS EDITION IS NOT USABLE

STANDARD FORM 1449 (REV. 4/2002)
Prescribed by GSA - FAR (48 CFR) 53.212

Consensus That Design and Construction are Defective

- CH2M Hill's conclusions were vetted by USACE experts at ERDC.
- MarAd's independent engineer, AECOM, agreed with conclusions it reviewed.
- The MOA sought independent verification of the CH2M Hill Suitability Study through Simpson, Gumpertz & Hager (SGH).
- SGH and Dr. Timothy Stark at the University of Illinois confirm CH2M Hill's findings.

The MOA's Litigation Position

The MOA's Position Is Unchanged

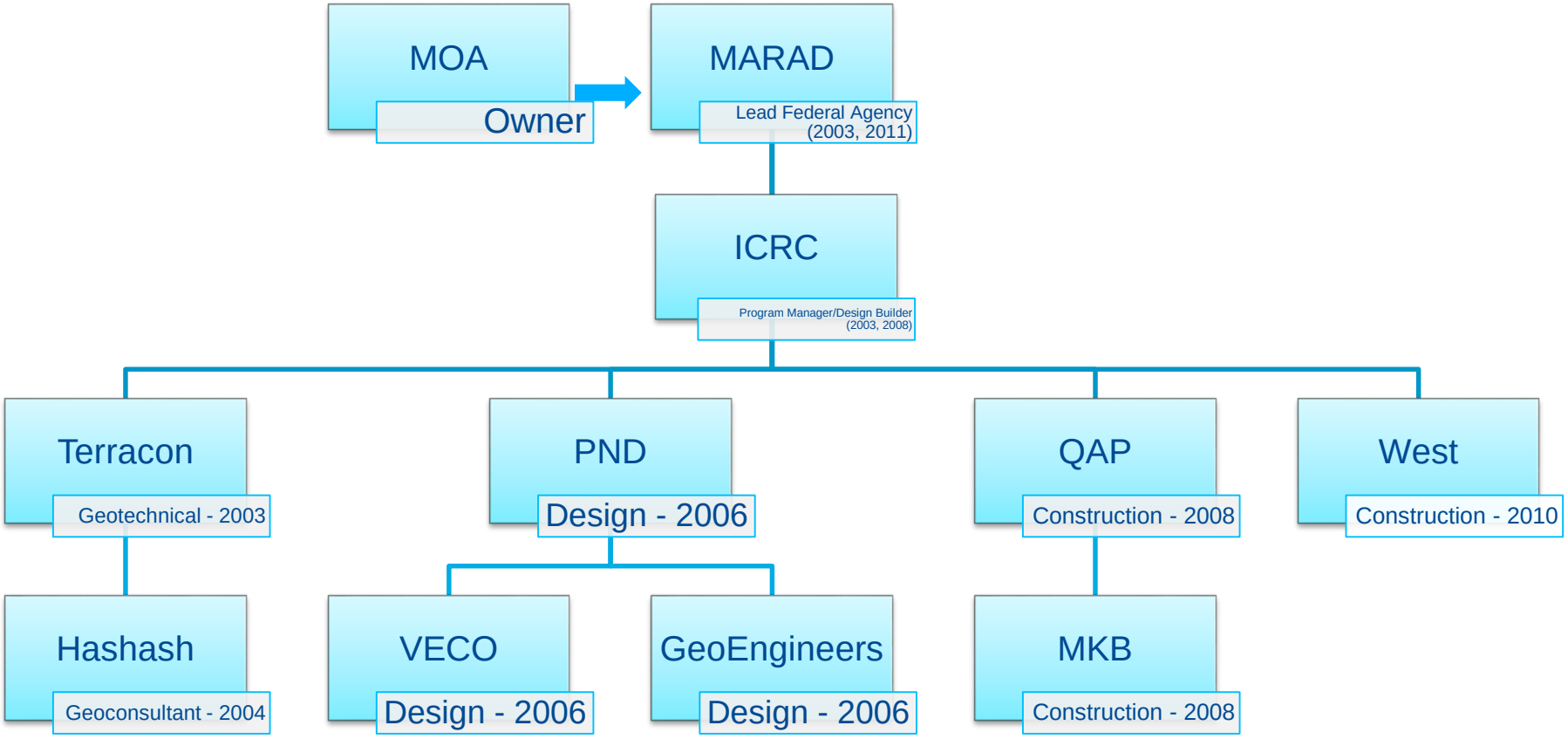
- The OCSP design is not suitable for the Port of Alaska.
- Widespread construction defects render the OCSP installed at the POA entirely unusable.
- OCSP installed at the POA must be removed and the backfill stabilized.

The MOA's Position is Unchanged

- MarAd / ICRC failed to properly manage and correct design and construction deficiencies.
- Private party engineers, designers and reviewers failed to adequately investigate soil conditions at the Project site, failed to provide a suitable design and failed to identify design issues during the review process.
- Contractors failed to properly install sheet piles, resulting in widespread construction defects.
- MarAd failed to properly insure Project risks, failed to require corrective work, failed to pursue surety rights and settled with the contractors using the MOA's money and without the MOA's knowledge and consent.

Private Party Litigation and Settlement

Contractual Relationships Limited the MOA's Available Claims



The MOA Could Assert Only Negligence Claims

- No contractual relationship with designers, engineers or contractors.
- MarAd held all of the design and construction Contracts.
- The MOA had to assert negligence and professional negligence claims, which required getting past numerous legal hurdles.
- Despite those legal hurdles, the MOA pursued claims for the defective design and construction of the Project.

MarAd's Conduct Limited Claims

- MarAd settled claims with ICRC and the contractors paying them additional money and providing a release of claims.
- MarAd funded the settlement with the MOA's money.
- Settlement and release extinguished the MOA's rights against the contractors surety bond and resulted in insurance policies lapsing.
- For example, PND, the engineer of record for the Project, had only a $1 Million eroding limits insurance policy.

Why Settle?

- The MOA had a high risk of prevailing at trial and not being able to collect anything.
- MarAd's settlement of claims limited available insurance money for settlement.
- There were also legal challenges to claims due to lack of contractual privity.

Settlement Does Not Change The MOA's Position

- Lack of available insurance proceeds alone drove settlement decisions.
- Settlement is not an indication that the design for the PIEP is satisfactory.
- The MOA and the independent experts hired by the MOA, the USACE and MarAd all concluded that the OCSP is defective and is not suitable for the POA.

Status of Current Lawsuit

MARAD's Contractual Breaches

- Failed To Assess Properly The Feasibility Of The Design
- Failed To Ensure During Design Development The OCSP's Design Suitability
- Failed To Ensure The Proper Construction Of The OCSP System
- Failed To Perform The Administrative/Management Obligations Of A Lead Federal Agency
- Improperly Settled With Contractors Without The MOA's Knowledge or Consent And Using The MOA's Money

Litigation Status / Upcoming Events

- Fact Discovery Complete (nearly 40 depositions taken).
- The MOA produced expert reports; the Government's expert reports must be produced by May 6, 2019.
- Summary Judgment motions must be filed no later than June 6, 2019.
- Trial likely to commence in late Fall.

Questions?

SEYFARTH SHAW

Thank You