IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE CITY OF WAUKEGAN, ILLINOIS	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	No. 07 C 5008
NEW NGC, f/k/a NATIONAL GYPSUM COMPANY, BRP US INC., f/k/a BOMBARDIER MOTOR CORPORATION OF AMERICA, LAFARGE NORTH AMERICA, INC., LAFARGE BUILDING MATERIALS INC., f/k/a BLUE CIRCLE, INC., ST. MARYS CEMENT, INC. and WAUKEGAN PORT DISTRICT,	)	Judge Kennelly Magistrate Judge Valdez
	)	
Defendants.	)	

NOTICE OF FILING

TO: See attached service list

PLEASE TAKE NOTICE that the undersigned has, on this 13th day of May, 2008, caused to be filed with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff's Corrected Second Amended Complaint, without exhibits (the exhibits to the original Second Amended Complaint, filed May 1, 2008, are incorporated into the Corrected Second Amended Complaint).

The City of Waukegan

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One of its attorneys

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CERTIFICATE OF SERVICE

I, Michael S. Blazer, an attorney for The City of Waukegan, hereby certify that on May 13, 2007, I caused a copy of Plaintiff's corrected Second Amended Complaint to be served upon the parties on the attached Service List via the Court's Electronic Filing system, in accordance with Local Rule 5.9.

The City of Waukegan

By: s/Michael S. Blazer
One of its attorneys

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE CITY OF WAUKEGAN, ILLINOIS Plaintiff, v. NEW NGC, f/k/a NATIONAL GYPSUM COMPANY, BRP US INC., f/k/a BOMBARDIER MOTOR CORPORATION OF AMERICA, LAFARGE NORTH AMERICA, INC., LAFARGE BUILDING MATERIALS INC., f/k/a BLUE CIRCLE, INC., ST. MARYS CEMENT, INC. and WAUKEGAN PORT DISTRICT, Defendants.	)	No. 07 C 5008 Judge Kennelly Magistrate Judge Valdez

SECOND AMENDED COMPLAINT

Now comes Plaintiff, the City of Waukegan, Illinois, an Illinois Home Rule Municipality (the "City" or "Waukegan"), by its attorneys, and for its Second Amended Complaint against Defendants, New NGC, f/k/a/ National Gypsum Company ("Gypsum"), BRP US Inc., f/k/a Bombardier Motor Corporation of America ("Bombardier"), Lafarge North America, Inc. ("Lafarge"), Lafarge Building Materials, Inc. ("LBM"), St. Marys Cement, Inc. ("St. Marys"), and Waukegan Port District (the "Port District"), states:

Allegations Common to All Counts

Nature of the Action

1. This is a civil action brought pursuant to §107(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. 9607(a), and §5 of the Illinois Water Pollutant Discharge Act ("IWPDA"), 415

ILCS 25/5. The City seeks to recover costs it has incurred in connection with the Outboard Marine Corporation, Inc. ("OMC") Superfund facility.

2. The area that is the subject of this Complaint includes Operable Units 1, 3 and 4 of the OMC National Priorities List Site (the "OMC NPL Site"), and including Waukegan Harbor (the "Harbor"), all of which are located in Waukegan. Operable Units 1, 3 and 4 of the OMC NPL Site are described in Figure 2 to a Record of Decision ("ROD") issued by the United States Environmental Protection Agency ("USEPA") on September 10, 2007. (A copy of said Figure is attached hereto as **Exhibit A**.) (A map depicting segments of the Harbor commonly known as the Outer Harbor, Entrance Channel, Inner Harbor, Marina, Inner Harbor Extension, Slip 1, North Harbor and Slip 4 is attached hereto as **Exhibit B**.) (A Color Coded and Annotated Map of the Harbor depicting parcel boundaries, PIN numbers and the location of the Sheet Pile Sea Wall surrounding the present boundaries of the Harbor is attached hereto as **Exhibit C**.) The subject portions of the OMC NPL Site and Harbor are referred to collectively in this Complaint as the "Facility".

3. In addition, the City seeks a declaratory judgment, pursuant to CERCLA §113(g)(2), 42 U.S.C. 9613(g)(2) and §5 of the IWPDA, declaring that the Defendants are liable for any further response costs that the City may incur as a result of releases or threatened releases of hazardous substances at the Facility.

Jurisdiction and Venue

4. This Court has jurisdiction over the parties to this action and the subject matter hereof pursuant to 42 U.S.C. 9613(b) and 28 U.S.C. 1331. This Court has supplemental jurisdiction pursuant to 28 U.S.C. 1367 over the State law claims herein,

all of which are so related to the claims in Count I that they form part of the same case or controversy.

5. Venue is proper in this district pursuant to 42 U.S.C. 9613(b) and 28 U.S.C. 1391(b) and (c), because the claims arose, and the actual and threatened releases of hazardous substances and pollutants, occurred in this District.

Parties

6. The City is a person who has incurred necessary costs of a response as defined in CERCLA §101(25), 42 U.S.C. 9601(25).

7. Gypsum is a corporation organized and existing under the laws of the State of Delaware and doing business in Waukegan, Lake County, Illinois, and specifically in and around the Harbor. Gypsum leases property in and around the Harbor, including submerged land, located in the following segments of the Harbor depicted in **Exhibit B**: Slip 1, Inner Harbor Extension and North Harbor and as depicted in **Exhibit C** by PIN No. 08-20-100-055.

8. Bombardier is a corporation organized and existing under the laws of the State of Delaware and doing business in Waukegan, Lake County, Illinois, and specifically in and around the Harbor. Bombardier owns property in and around the Harbor, including submerged land, located in the following segments of the Harbor depicted in **Exhibit B**: Inner Harbor Extension and North Harbor and as depicted in **Exhibit C** by PIN No. 08-22-100-062.

9. Lafarge is a corporation organized and existing under the laws of the State of Maryland and doing business in Waukegan, Lake County, Illinois, and specifically in and around the Harbor. LaFarge leases property in and around the Harbor, including submerged land, located in the following segments of the Harbor depicted in **Exhibit B**:

Slip 1 and Inner Harbor Extension, as depicted in **Exhibit C** by PINs 08-22-100-020, 08-22-100-038 and 08-22-100-056.

10. LBM is a corporation organized and existing under the laws of the State of Alabama and doing business in Waukegan, Lake County, Illinois, and specifically in and around the Harbor. The City is informed and believes that LBM leases property in and around the Harbor, including submerged land, located within the following segments of the Harbor depicted in **Exhibit B**: Slip No.1 and as depicted in **Exhibit C** by PIN 08-22-100-056.

11. St. Marys is a corporation organized and existing under the laws of the State of Delaware and doing business in Waukegan, Lake County, Illinois, and specifically in and around the Harbor. St. Marys exercises rights to property in and around the Harbor, including submerged land, located in the following segments of the Harbor depicted in **Exhibit B**: Slip 1 and as depicted in **Exhibit C** by PIN 08-22-100-056.

12. The Port District is a special purpose unit of government created pursuant to the Waukegan Port District Act, 70 ILCS 1865/3, and whose territory includes portions of the Harbor. The Port District operates property in and around the Harbor. The Port District also owns property in and around the Harbor, including submerged land, located within the following segments of the Harbor depicted in **Exhibit B**: Slip 1 and Inner Harbor Extension as depicted in **Exhibit C** by PINs 08-20-100-020, 08-20-100-038 and 08-20-100-056.

13. Local Harbor regulations are established by the Port District and enforced by its Executive Director. These regulations include a speed limit of 5 mph (4.3 knots), which is enforced in the Inner and Outer sections of the Harbor. (See National

Oceanographic and Atmospheric Administration ("NOAA") Coast Pilot 6, Chapter 11, Lake Michigan, attached hereto as **Exhibit D**, p. 68.)

The Facility

14. The Facility includes the referenced portions of the OMC NPL Site and all areas in which hazardous substances, pollutants or contaminants have come to be located within the Harbor, including submerged land in Slip 1, Inner Harbor Extension, and North Harbor owned or leased by Gypsum, Bombardier, LaFarge, LBM, St. Marys and the Port District.

15. At all times material hereto, OMC was a marine products manufacturer. In the course of its operations, OMC used hydraulic fluid containing polychlorinated biphenyls ("PCBs") as a lubricant for its aluminum casting and machining operations. PCBs are a hazardous substance.

16. During these operations, hydraulic fluid containing PCBs was discharged from the OMC facility to several areas at the OMC NPL Site. (A map generally reflecting concentrations of PCBs that have come to be located in the sediments of the Harbor, including in sediments located on submerged land within segments of the Harbor owned or leased by Defendants, is attached hereto as **Exhibit E**.)

17. Substantial quantities of PCBs were discharged from and to the OMC NPL Site and came to be located in sediments located on submerged land throughout the Harbor.

18. In 1981, the United States and Canadian governments identified the Harbor as one of 43 Areas of Concern or severely degraded geographic areas located within the Great Lakes Basin. The OMC NPL Site was subsequently added to the National Priorities List.

19. In February 1992, OMC completed a sediment remediation project in the Harbor that entailed dredging, treating, and disposing of approximately one million pounds of PCB-contaminated sediments from what was known as the Upper Harbor, which included most, but not all, of the North Harbor. The OMC remediation area is depicted on Figure 9 to the Work Plan attached to the Consent Decree entered on October 7, 1988 between the United States and OMC (the "1988 Consent Decree"). (A copy of said Figure 9 is attached hereto as **Exhibit F**.)

20. The PCB-contaminated sediments from the Upper Harbor were deposited in three containment cells. One containment cell was constructed on a segment of submerged land of the Harbor, and what had been a boat slip, known as Slip 3. The former Slip 3 is depicted on **Exhibits A** and **F**. The two additional containment cells, known as the West and East Containment Cells, were constructed on land that was not submerged, located on the north end of the OMC NPL Site. The location of the West and East Containment Cells is depicted on **Exhibit A**.

21. In December 2000, OMC permanently closed its Waukegan lakefront manufacturing operations and filed for Bankruptcy protection under Chapter 11 of the Bankruptcy Code.

22. Despite the dredging remediation project of the Upper Harbor performed by OMC in the early 1990's, PCB contamination persists in sediments at levels above one part per million (the current regulatory limit) in the Entrance Channel, Marina, Inner Harbor, Inner Harbor Extension, Slip 1, North Harbor and Slip 4, as these Harbor segments are depicted in **Exhibit B**. (A summary of some of the available data concerning the maximum concentration of PCBs in the Harbor segments is depicted in a report compiled by CH2M Hill, USEPA's environmental consultant, entitled "Data

Evaluation Summary Report Waukegan Area of Concern, Waukegan Illinois WA No. 028-RDRD-1109 / Contract No. EP-S5-06-01, relevant portions of which are attached hereto as **Exhibit G** (Tables 1-11)).

History, Ownership and Control of Waukegan Harbor

23. Over time, the northern portions of the Harbor have been sub-divided into distinct parcels by tax parcel identification numbers ("PINs") which are owned or leased by, among others, the Defendants herein. (**Exhibit C**) This includes what are (or were) submerged lands of the Inner Harbor Extension, Slip 1, former Slip 2, former Slip 3 and the North Harbor.

24. In 1796, Congress passed an "Act providing for the sale of lands of the United States in the territory northwest of the River Ohio, and above the Mouth of the Kentucky River." 4 Cong. Ch. 29, 3 Stat. 464 (1796) (the "Northwest Ordinance"). The Northwest Ordinance designated all Federal lands north and west of the Ohio River available for private sale in order to encourage settlement and raise funds for the Federal government. The Northwest Ordinance prescribed the manner and method in which public land would be divided, surveyed, and sold. Congress passed numerous public land sale statutes in the early 1800's to further the sale of such lands held by the Federal government.

25. On April 24, 1820, Congress passed "An act for the further provisions of the Sale of Public Lands," 16 Cong. Ch. 51, 3 Stat. 566. On February 1, 1846, pursuant to said statute, a private citizen named John Lewis ("Lewis") purchased approximately 55 acres of dry land along the shore of Lake Michigan (the "Lewis Property"). Portions of the Lewis Property have since been excavated and come to be a submerged and a

segment of the Harbor. (See Property Title Report for Harbor and Harbor front properties, a copy of which is attached hereto as **Exhibit H**, pp. 1, 4.)

26. The conveyance of the Lewis Property was duly recorded with the Lake County Recorder of Deeds on January 19, 1865. (**Exhibit H**, pp. 6-7)

27. A land patent documenting the purchase and sale of the Lewis Property was issued to Lewis by the General Land Office of the United States. (See 1846 Land Patent granted by General Land Office, a copy of which is attached hereto as **Exhibit I**.)

28. Slip 1, the Inner Harbor Extension, former Slip 2, former Slip 3 and the North Harbor did not exist when the Lewis Property was conveyed to Lewis in 1846. (See Waukegan Harbor, Illinois Water Level Map depicting contiguous shoreline in 1853, a copy of which is attached hereto as **Exhibit J**; recreation of Waukegan Plat Map of 1861, a copy of which is attached hereto as **Exhibit K**.)

29. The City is informed and believes that approximately the western half of what is now Slip 1, part of the Lewis Property, was dry land at the time of the conveyance to Lewis.

30. The City is further informed and believes that, after the conveyance to Lewis in 1846, the shoreline of Lake Michigan constituting the eastern boundary of the Lewis Property, through a combination of accretion or filling of submerged land, was extended eastward to include what is now approximately the eastern half of Slip 1, the Inner Harbor Extension, former Slip 2, former Slip 3 and the North Harbor.

31. Between 1879 and 1882, the U.S. Army Corps of Engineers ("ACOE") conceived and implemented a plan to create an artificial harbor in Waukegan. This included excavating a portion of the Lewis Property. The City is informed and believes that implementation of the ACOE plan resulted in the dredging of the Lewis Property,

thus creating an interior basin and a narrow channel connecting it to an exterior basin. (See ACOE Waukegan Harbor History, excerpted from *Those Army Engineers: A History of the Chicago District, U.S. Army Corps of Engineers*, John W. Larson, 1979, a copy of which is attached hereto as **Exhibit L**.)

32. On July 14, 1893, after several conveyances of the Lewis property (see **Exhibit H**, pp. 154-156), Charles H. Costner and Emily Pell Costner conveyed a portion of Tax PIN 08-22-100-055 to the Elgin, Joliet & Eastern Railway Company ("EJ&E). (See **Exhibit C; Exhibit H**, p. 156) This transfer was duly recorded by the Lake County Recorder of Deeds on July 18, 1893. (See **Exhibit H**, p. 156)

33. The City is informed and believes that Slip 1, the Inner Harbor Extension, former Slip 2, former Slip 3 and the North Harbor, all segments of the Harbor, were not submerged land and did not exist prior to the conveyances to Lewis and, subsequently, to the EJ&E.

34. Prior to commencement of a Federal Harbor dredging project provided for in the Rivers and Harbors Act of 1899, EJ&E constructed slips in the Harbor and the City dredged the channel between two piers and constructed a timber dock on the Lewis Property. (See **Exhibit L**) The City is informed and believes that the Harbor was configured in a manner depicted in a Harbor Map from the late 1800s, a copy of which is attached hereto as **Exhibit M**)

35. On December 30, 1902, American Steel and Wire Company of New Jersey conveyed a separate portion of PIN 08-22-100-055 (see **Exhibit C**) to EJ&E. This conveyance contained land including what became Slip 3 and a portion of the Northern Harbor which was part of the original Lewis Property. (A copy of a plat map depicting the Harbor configuration in the early 1900s is attached hereto as **Exhibit N**.)

36. The foregoing conveyance was duly recorded by the Lake County Recorder of Deeds on January 2, 1903. (See **Exhibit H**, p. 156)

37. The City is informed and believes that EJ&E altered the configuration of the Harbor in the early 1930's by excavating land on the Lewis Property, widening the northern Harbor and extending it northward. The City is further informed and believes that EJ&E excavated an additional slip on the Lewis Property directly north of Slips 1 and 2, which became Slip 3. (See 1934 Waukegan Township Precinct Map, a copy of which is attached hereto as **Exhibit O**).

38. On October 15, 1956, Gypsum's predecessor, National Gypsum Company ("Old Gypsum") entered into a seventy year lease with EJ&E (the "Gypsum Lease") for a portion of the Lewis Property described as PIN 08-22-100-055. (See **Exhibit C**) The Gypsum Lease included portions of the original Lewis Property that became submerged areas of Slips 1, 2, and 3, Inner Harbor Extension and the North Harbor. (A copy of the Gypsum Lease is attached hereto as **Exhibit P**.)

39. On or about July 1, 1993, Old Gypsum assigned all of its right, title and interest in, to and under the Gypsum Lease to Gypsum. This was accomplished as part of an asset purchase agreement resulting from the bankruptcy of Old Gypsum, *In re National Gypsum Company*, No. 90-37213-hdh11 (N.D. Bank. Tex) (the "Old Gypsum Bankruptcy"). (A copy of the Assignment of Lease is attached hereto as **Exhibit Q**; see also Old Gypsum Bankruptcy Docket No. 4294, April 28, 2000 First Amended and Restated Joint Plan of Reorganization.)

40. Since the foregoing assignment, Gypsum has assumed and exercised all of the rights and powers under the Gypsum Lease formerly exercised by Old Gypsum with respect to the property encompassed by the Gypsum Lease.

41. The Gypsum Lease provides that:

a. The tenant (Old Gypsum or Gypsum via assignment) was and is required to pay all taxes levied on the property during the existence of the lease. (§Third)

b. The tenant has the authority to assign the lease, or sublet the premises in whole or in part. However, the tenant was not released from liability which may have resulted from said assignment or sublet. (§Fourth)

c. The tenant was and is granted peaceable possession arising out of or in connection with the navigable waters, waterways, channels or slips, docks or watercourses adjacent to or upon the premises subject to the rights and claims of Federal, State and municipal agencies. (§Seventh)

d. Old Gypsum had permission and authority to fill in the portion of the premises designated as Slip 2, and fill in a portion of Slip 3, subject to requisite permits and licenses. (§Tenth)

e. Old Gypsum had permission to demolish any buildings on the leased property associated with the filling of Slips 2 and 3. (§Tenth)

f. The tenant was and is granted permission and authority to change or remove any existing bulkhead, pierhead, deck, deadman, or anchor and dredge to and maintain at harbor depth all lands under water lying within the leased premises, as well as lands under water leading to and adjoining such boundaries, including the

United States Government Harbor, the Main Channel, the southerly portion of Slip 1, and the northerly portion of former Slip 3. (§Tenth)

g. EJ&E would permit and cooperate with Old Gypsum in the removal of land owned by EJ&E, which in the opinion of Old Gypsum impaired the approach from the U.S. Government Harbor to Slip 1, in order that a westerly harbor line of the Harbor, as the same existed as of the date of the Gypsum Lease, may extend a line northerly to Slip 1 and dredging to harbor depth of the area east of the harbor line as to extend northerly. (§Tenth)

h. The Gypsum Lease contains an option to extend the lease for an additional 30 years. (§Eleventh)

42. On January 18, 1957, in furtherance of a plan to implement a Harbor dredging and filling project consistent with its rights under the Tenth section of the Gypsum Lease, Old Gypsum sought and obtained a permit from the Port District to perform the excavation and filling of Old Gypsum's Harbor property. (A copy of Old Gypsum's permit from the Port District is attached hereto as **Exhibit R**) The Port District permit provided, in relevant part, that Old Gypsum was:

a. Permitted to remove certain portions of land that obstructed navigation by hindering the approach of lake freighters from the Great Lakes to Slip 1 and interfered with the maneuverability of such vessels in docking in Slip 1. Old Gypsum was required to dredge the portion of the area removed to the depth of the Harbor. (¶I)

b. Permitted to provide a dike across what was then Slip 2 at the entrance of the main channel and fill in Slip 2 with suitable material. (¶II)

c. Required to dredge and maintain or cause to be maintained at harbor depths all lands lying within the boundaries of the leased premises, as well as lands under water leading to and adjoining such boundaries, including the Entrance Channel and Inner Harbor whose jurisdiction resides with the U.S. Government. (¶X) (See **Exhibit B** for Harbor segment locations)

43. The January 18, 1957 Port District permit was modified by an amendment passed by the Port District on January 20, 1957. (A copy of said permit modification is attached hereto as **Exhibit S.**)

44. On January 18, 1957, pursuant to the Port District's authority and control over Harbor operations, Old Gypsum and the Port District also entered into an Agreement setting forth the conditions regarding the use of the portion of Slip 1 that is part of the leased premises under the Gypsum Lease (the "Slip 1 Use Agreement"). (A copy of the Slip 1 Use Agreement is attached hereto as **Exhibit T**.) The City is informed and believes that Gypsum succeeded to Old Gypsum's rights under the Slip 1 Use Agreement as part of the Old Gypsum Bankruptcy.

45. The Slip 1 Use Agreement provides, in relevant part, that Old Gypsum (and Gypsum by succession):

a. Shall have primary use of its portion of Slip 1, but Old Gypsum's use should not unreasonably preclude the use of Slip 1 by the Port District. "Primary use" means that vessels of Old Gypsum were

given priority in loading and unloading, including the right to interrupt the loading and unloading of other vessels with proper notice. (¶2)

b. May use the southerly side of Slip 1, leased to the Port District by EJ&E, for the purposes of warping, mooring and towing Old Gypsum's vessels. (¶3)

c. Must maintain Slip 1 at Harbor depth without cost to the Port District. (¶8)

d. Agrees to remove land and construct a dock to retain shore property, and dredge to Harbor depth the underwater land in the area so removed, within five years should the Port District not have requisite funding to perform the project. (¶9)

46. On October 4, 1957, in furtherance of its dredging and filling plan, Old Gypsum also obtained a permit from the ACOE allowing for the activities that were the subject of the Port District permit. (A copy of the ACOE permit is attached hereto as **Exhibit U**.)

47. The City is informed and believes that Old Gypsum performed the dredging and filling project set forth in its permits from the Port District and ACOE, and the Harbor was thus constructed to its present configuration in approximately 1960. (See "Slip 1, Waukegan Harbor Dredging Permit Application" to the ACOE, Illinois Environmental Protection Agency ("IEPA"), and Illinois Department of Natural Resources ("IDNR") on behalf of the Port District (the "Dredging Application"), a copy of which is attached hereto as **Exhibit V**, "Project Description", p. 1 (page 7 of 108).)

48. The City is informed and believes that Old Gypsum, followed by Gypsum after its acquisition, have consistently paid the real estate taxes assessed on those portions of the premises subject to the Gypsum Lease that are submerged, consistent with the obligations under ¶Third of the Gypsum Lease (**Exhibit P**). (See Lake County Property Tax Assessment Information for PIN 08-22-100-055, a copy of which is attached hereto as **Exhibit W**.)

49. Gypsum's activities have also included exercising control over the sea wall encompassing Slip 1. On January 23, 2008, Gypsum submitted an Application for Building Permit to the City seeking authorization to reconstruct a portion of the sea wall in Slip 1 that had failed. (A copy of said Permit Application is attached hereto as **Exhibit X**) The foundation of the sea wall is imbedded in the submerged lands of Slip 1, in the area included in the property leased by Gypsum. (See **Exhibit C**) The subject permit was issued by the City, and Gypsum performed the subject work.

50. On March 13, 1957, EJ&E conveyed to the Port District a portion of PIN 08-22-100-056 containing a portion of Slip 1. (See **Exhibit C**; **Exhibit H**, p. 338). The conveyance was duly recorded with the Lake County Recorder of Deeds on May 3, 1957. (See **Exhibit H**, p. 338)

51. The City is informed and believes that on May 1, 1957 EJ&E leased the southern portion of Slip 1, including the southwesterly dock, to the Port District. Said lease was recorded with the Lake County Recorder of Deeds on June 7, 1957. (See lease dated June 1, 1961 between Port District and Huron Portland Cement Company ("HPCC"), a copy of which is attached hereto as **Exhibit Y**, at p. 3.)

52. On November 21, 1989, EJ&E conveyed PIN 08-22-100-047, constituting the southern portion of what was Slip 3, to OMC. PIN 08-22-100-047 is a portion of

what had been the Lewis Property, and at the time of the 1989 conveyance was submerged. (See **Exhibit C**; **Exhibit H**, pp. 118, 192) OMC took title to this submerged land in order to convert Slip 3 into the PCB containment cell depicted on **Exhibit A**.

53. The transfer of PIN 08-22-100-047 was duly recorded with the Lake County Recorder of Deeds on December 4, 1989. (See **Exhibit H**, p. 192)

54. At the time of the 1989 conveyance of PIN 08-22-100-047, OMC already owned the northern portion of Slip 3, a portion of the Lewis Property that had become submerged via excavation. (See **Exhibit C**; **Exhibit H**, p. 232)

55. On June 1, 1961, the Port District entered into a 98-year lease with HPCC, encompassing portions of PINs 08-22-100-020, 08-22-100-038, 08-22-100-056 (the "Lafarge Lease"). (A copy of the Lafarge Lease is attached hereto as **Exhibit Y**.)

56. The City is informed and believes that the Lafarge Lease includes portions of Slip 1 and the Inner Harbor extension. (See **Exhibit C**)

57. The City is informed and believes that Lafarge is the successor to HPCC with respect to the Lafarge Lease, having purchased HPCC in 1986. (See History of Mineral Trade, extracted from *Final Environmental Impact Statement/Management Plan,* Jay C. Martin, 1996, John W. Larson, 1979, a copy of which is attached hereto as **Exhibit Z**; September 18, 2000 letter from Lafarge to the Port District, a copy of which is attached hereto as **Exhibit AA**.)

58. The Lafarge Lease provides that:

a. Lafarge has the right, privilege, permit and license to dock and moor deep draft, self-loading Great Lakes vessels serving its facilities along side of the dock on the southwesterly side of Slip 1 for purposes of loading and unloading its goods. This includes the

use of the Port District's portion of Slip 1. Moreover, the lease permits Lafarge to use the Gypsum portion of Slip 1 for the purposes of warping, mooring, and towing such vessels. (¶5)

b. The Port District's portion of Slip 1 is available for winter storage of vessels serving Lafarge's facilities. (¶5)

c. The Port District agrees to ensure that dock facilities are made available to vessels serving Lafarge's facilities for purposes of loading and unloading. (¶5)

d. The Port District was obligated to complete, at its own cost and expense, a dock in accordance with existing drawings and specifications entitled "Proposed Widening of Slip No. 1, Waukegan Port District, Waukegan, Illinois Port Terminal," dated September 12, 1960 as amended. Should the widening and deepening project not have been completed, the tenant had the authority to complete the project according to the drawings and specifications. (¶10)

e. Lafarge is required to contribute to the cost of dredging of the Port District's portion of Slip 1 in proportion to its total tonnage loaded and unloaded across the dock. (¶11)

f. The Port District is required to maintain, at its own cost and expense, the depth of Slip 1 at 19 feet below the Low Water Datum of 578.5 feet, provided that Lafarge contribute to the cost in proportion to the tonnage loaded and unloaded at the dock. (¶11)

g. Lafarge is required to remove, at its own expense, any disabled vessel serving or intended to serve its facility while moored at the

dock in Slip 1, the approaches thereto, or while coming or going from the dock, or while turning. (¶12)

h. Lafarge is required to pay all taxes charged on the premises during the existence of the lease, including all taxes upon improvements and personal property. (¶16)

i. Lafarge may assign the lease; however, it is not released from liability for failure to keep or perform the terms and conditions of the lease. (¶17)

59. On May 1, 1964, U.S. Steel Company entered into a 93-year agreement with the Port District encompassing a portion of Parcel No. 08-22-100-056 on Slip 1 (the "St. Marys Agreement"). (See **Exhibit C**) A copy of the St. Marys Agreement is attached hereto as **Exhibit BB**. The City is informed and believes that St. Marys is the successor in interest to U.S. Steel, having assumed the obligations under the St. Marys Agreement. (See August 24, 2007 Port District Memorandum, a copy of which is attached hereto as **Exhibit CC**, at p. 2)

60. The St. Marys Agreement provides that:

a. St. Marys has the right, privilege, permit and license to dock and moor vessels alongside the dock in Slip 1 for the purposes of loading and unloading its goods, including the use of the Port District's portion of Slip 1. St. Marys' vessels have continuous and uninterrupted use of the dock until such unloading and loading is complete upon 48 hour notice to the Port District. The right, privilege, permit and license was also granted to Gypsum's portion

of Slip 1 for the purposes of warping, mooring, and towing said vessels. (¶5)

b. The Port District limited St. Marys' use to service vessels not exceeding 500 feet in length without its written consent. Further, St. Marys is not allowed any vessel serving its facility at the dock to use the dock within 156 hours of departure of the last vessel serving such facility without written permission. (¶9)

c. St. Marys is required to contribute to the cost of normal wear and tear maintenance to the face of the Dock in order to keep it in good condition in proportion to its tonnage loaded and unloaded across the dock. (¶10)

d. The Port District is required to maintain, at its own cost and expense, the depth of Slip 1 at 19 feet below the Low Water Datum of 578.5 feet. (¶11)

e. St. Marys is required to contribute to the cost of dredging of the Port District's portion of Slip 1 in proportion to its total tonnage loaded and unloaded across the dock. (¶11)

f. St. Marys is required to remove, at its own expense, any disabled vessel serving or intended to serve its facility while moored at the dock, in Slip 1, the approaches thereto, or while coming or going from the dock. (¶12)

g. St. Marys is required to pay all taxes charged on easements in the St. Marys Agreement. (¶17)

h. St. Marys may assign the agreement; however, St. Marys is not released from liability for failure to keep or perform the terms and conditions of the agreement. (¶ 14)

61. On January 1, 1997, Larsen Marine Service, Inc. ("Larsen") conveyed a small portion of PIN 08-22-100-52 to OMC. This was also a portion of former Slip 3. (See **Exhibit C**; **Exhibit H**, pp. 282) The transfer was duly recorded by the Lake County Recorder of Deeds on May 21, 1997. (See **Exhibit H**, p. 282)

62. On June 15, 1998, EJ&E conveyed two parcels adjacent to, abutting and submerged under the Harbor to the Port District – PINs 08-22-100-020 and 08-22-100-038, along with the portion of PIN 08-22-100-056 not previously conveyed in 1957. (See **Exhibit C**; **Exhibit H**, pp. 27, 68, 338) The transfers were duly recorded with the Lake County Recorder of Deeds on June 19, 1998. (See **Exhibit H**, pp. 27, 68, 338)

63. On March 9, 2001, the OMC Bankruptcy Estate conveyed Parcel No. 08-22-100-62 to Bombardier (the "Bombardier Property"). The Bombardier Property includes portions of the North Harbor and Inner Harbor Extension. (See **Exhibits B, C**; and **Exhibit H**, p. 386.) The transfer was duly recorded by the Lake County Recorder of Deeds on March 14, 2001. (See **Exhibit H**, p. 386.)

64. The City is informed and believes that the land upon which the Bombardier Property exists was constructed from fill resulting from Harbor dredging projects.

65. The City is informed and believes that Bombardier has paid the real estate taxes assessed on the Bombardier Property, including the submerged portions, since taking title. (See Lake County Property Tax Assessment Information for PIN 08-22-100-062, a copy of which is attached hereto as **Exhibit DD**.)

66. In summary, the submerged lands in the Inner Harbor Extension, Slip 1 and North Harbor (as identified in **Exhibit B**) are owned or leased as follows (see **Exhibit C**):

a. Port District: PINs 08-22-100-020, 08-22-100-038 and 08-22-100-056, which include submerged lands in Slip No. 1 and the Inner Harbor Extension.

b. Bombardier: PIN 08-22-100-062, which includes submerged lands in the Inner Harbor Extension and North Harbor.

c. Gypsum leases PIN 08-22-100-055 from EJ&E, which includes submerged lands under Slip 1, Inner Harbor Extension and North Harbor.

d. Lafarge leases PIN 08-22-100-020 and a portion of PIN 08-22-100-038 from the Port District, which includes submerged lands under Slip 1 and Inner Harbor Extension.

e. St. Marys leases PIN 08-22-100-038 from the Port District, which includes submerged lands under Slip 1.

67. As reflected in the Title Reports (**Exhibit H**), fee simple title to these parcels, including what eventually became submerged lands, has been conveyed free and clear since the original 1846 conveyance of the Lewis Property.

68. The Federal government has acknowledged that certain Defendants own and operate what became submerged portions of the Harbor. The National Oceanic and Atmospheric Administration ("NOAA") and the ACOE recognize the following:

a. The south side of Slip 1, also referred to as the "Lafarge Cement Dock", is owned by the Port District and operated by Lafarge. (See

Exhibit D, p. 68; ACOE Port Series No. 48, a copy of which is attached hereto as **Exhibit EE**, p. 101.)

b. The North Side of Slip 1, also referred to as the "Gold Bond Building Products Dock", is leased to Gypsum by EJ&E, and operated by Gold Bond Building Products, a division of Gypsum. (**Exhibit D**, p. 68; **Exhibit EE**, p. 101)

c. The western end of Slip 1, also referred to as the "St. Marys Cement Company Waukegan Terminal Dock", is owned by the Port District and operated by St. Marys. St Marys receives cement by barge at this location. (**Exhibit EE**, page 102)

The Dredging of Slip 1

69. On December 9, 2000, Lafarge, in conjunction with Gypsum, Blue Circle Cement ("Blue Circle") and EJ&E, on behalf of the Port District, submitted a Joint Application Form entitled "Slip 1, Waukegan Harbor Dredging Permit Application" to the ACOE, Illinois Environmental Protection Agency ("IEPA"), and Illinois Department of Natural Resources ("IDNR") on behalf of the Port District (the "Dredging Application"). (A copy of the Dredging Application is attached hereto as **Exhibit V**.)

70. The City is informed and believes that LBM is the successor by merger to Blue Circle. (See Illinois Secretary of State Corporate filing information for LBM, a copy of which is attached hereto as **Exhibit FF;** Federal Trade Commission Report, "Clears Merger of Lafarge and Blue Circle", a copy of which is attached hereto as **Exhibit GG**)

71. The purpose of the project contemplated by the Dredging Application (the "Slip 1 Dredging Project") was to deepen Slip 1 by approximately five feet. The applicants sought to deepen Slip 1 because the Harbor as it existed at that time could

not accommodate the navigation of fully loaded ships making deliveries of products, such as cement and gypsum rock, to LaFarge, St Marys, LBM and Gypsum. (**Exhibit V**, "Project Description", p. 1 (page 7 of 108).)

72. The Dredging Application provides that a clamshell or cable-arm bucket would be utilized to excavate approximately 13,000 cubic yards of sediment and 5000 cubic yards of hardpan (undisturbed glacial till). The applicants proposed to dispose of the material as an Illinois Special Waste at the Onyx-Zion landfill. (**Exhibit V**, pp. 3-6 of 108; "Sediment Disposal", p. 3 (page 9 of 108).)

73. The applicants acknowledged in the Dredging Application that they were aware that PCB contamination existed in the sediment sought to be dredged from Slip 1. The applicants acknowledged that the presence of this contamination precluded open lake disposal and required disposal at a secured facility. (**Exhibit V**. "Sediment Removal", pp. 2-3 (pages 8-9 of 108).)

74. The Dredging Application contains Slip 1 sediment boring sampling results conducted by the ACOE in 1996 and 1997 and Lafarge in 2000. (**Exhibit V,** "Sediment Removal", pp. 2-3 (pages 8-9 of 108); Tables at pp. 36-42 of 108; Analytical Results at pp. 50-101 of 108). These sampling results reflect the presence of PCB contamination in sediments in Slip 1 above current regulatory limits.

75. The applicants concluded that it would be difficult to contain the turbidity generated in Slip 1 during the dredging project by using a clamshell or bucket to remove the sediment, thus contributing to the discharge of PCBs in the Harbor. (**Exhibit V**, "Turbidity Control", pp. 4-5 (pages 10-11 of 108).)

76. The dredging project was ultimately performed. The City is informed and believes that the dredging of sediments caused PCB contaminated sediment to escape

from the clamshell or bucket during the dredging process, resulting in the disturbance, suspension and redistribution of PCB-contaminated sediments in the Harbor, specifically in Slip 1.

Harbor Operations

77. The City is informed and believes that Lafarge and Gypsum own, manage or operate large deep draft cargo vessels that bring cargoes into Slip 1 through the Harbor. (See Great Lakes Fleet Page Vessel Feature – Paul H. Townsend, a copy of which is attached hereto as **Exhibit HH**, pp. 2-3.)

78. The City is further informed and believes that Gypsum, Lafarge, LBM and St. Marys, as part of their normal business operations, including operations in and around Slip 1, have routinely and consistently contracted for the delivery of materials to their respective docking facilities via the large deep draft cargo vessels which traverse the Harbor for the purpose docking at Slip 1.

79. The City is informed and believes that the large deep draft cargo vessels that traverse the Harbor for the purpose of docking in and unloading from Slip 1 generate prop wash that disturbs, suspends and redistributes PCB-contaminated sediments throughout the Harbor. Such disturbances have mixed sediments into the water column, disrupted the benthic zone, and influenced Harbor water quality, thus exacerbating the PCB contamination in the Harbor.

80. On May 29, 2007, CH2M Hill, the environmental consulting firm retained by the USEPA, completed a technical memorandum entitled “Data Evaluation Summary Report Waukegan Area of Concern, Waukegan, Illinois WA No. 028-RDRD-1109/Contract No. EP-S5-06-01” (the “Prop Wash Report”). (**Exhibit G**)

81. As set forth in the Prop Wash Report, CH2M Hill collected water samples behind the Sam Laud, a commercial vessel that was docked at Gypsum's dock in Slip 1, to determine the impact as commercial ships entered and left the Harbor. The Prop Wash Report confirms that the propeller action from the ship disturbed the Harbor sediments and resulted in, among other things, exceedances of preliminary effluent limits for PCB contamination. (**Exhibit G**, p. 3, Water Samples from Behind a Commercial Vessel, and p. 23, Table 3, Site Water from Behind Commercial Vessel Analytical Result Summary.)

82. The City is informed and believes that Gypsum, LaFarge, LBM and the Port District knew before the Prop Wash Report was issued that deep draft vessels disturb, suspend and redistribute PCB contamination in the Harbor. (See **Exhibit V**. "Excavation Depth", p. 4 (page 10 of 108).)

83. The City is informed and believes that, as part of Gypsum's normal business operations, it operates docking and mooring facilities in the Harbor and is responsible for the maintenance of all lands under water lying within its leased premises, as well as lands under water leading to and adjoining such boundaries, including the United States Government Harbor, the Main Channel and Slip 1. (See **Exhibit P**, ¶10)

84. The City is informed and believes that, as part of Lafarge's normal business operations, it operates docking and mooring facilities in the Harbor and is responsible for the maintenance of the navigability of Slip 1, and the approaches thereto in the Harbor. (See **Exhibit Y**, ¶¶10-11)

85. The City is informed and believes that, as part of St. Marys' normal business operations, it operates docking and mooring facilities in the Harbor and is

responsible for the maintenance of the navigability of portions of Slip 1 and the approaches thereto in the Harbor. (See **Exhibit BB**, ¶¶11-12)

86. The City is informed and believes that, as part of Bombardier's normal business operations, it operates a submerged engine testing facility in the Harbor, on the east side of the Inner Harbor Extension and across the Harbor from Slip 1. The propellers in the testing facility cause prop wash to routinely disturb, suspend and redistribute PCB-contaminated sediments throughout the Harbor. Such disturbances have mixed sediments into the water column, disrupted the benthic zone, and influenced Harbor water quality, thus exacerbating the PCB contamination in the Harbor.

87. All of the Defendants owned, either through direct ownership or through leasehold interests, and operated land within the Facility at the time of disposal or where contaminants have come to be located. To date, none of the Defendants has reimbursed the City for any of the aforementioned costs.

COUNT I
CLAIM FOR COST RECOVERY UNDER CERCLA

1-87. The City adopts and realleges paragraphs 1 through 87 of the Allegations Common to All Counts as paragraphs 1 through 87 of this Count I.

88. CERCLA §107(a), 42 U.S.C. 9607(a), provides, in pertinent part, that the following persons, among others, are liable for response costs which are consistent with the National Contingency Plan, 40 C.F.R. Part 300, and which have been incurred by the City as result of a release or threatened release of hazardous substances from a facility:

a. The current owner or operator of the facility;

b. Any person who at the time of disposal of any hazardous substance owned or operated the facility;

42 U.S.C. 9607(a).

89. Each of the Defendants falls within the class of persons described in §§107(a)(1) and/or 107(a)(2) of CERCLA, 42 U.S.C. 9607(a)(1) and (a)(2).

90. The Site, and all locations where PCBs have come to be located, are collectively a "facility' within the meaning and scope of CERCLA §§109(9) and 107(a). 42 U.S.C. 9601(9) and 9607(a).

91. The City is informed and believes that the sediments in the Harbor at the Facility contain PCBs, a hazardous substance, within the meaning and scope of CERCLA §§101(14) and 107(a), 42 U.S.C. 9601(14) and 9607(a).

92. Disposal of PCBs, a hazardous substance, occurred at the Facility during the times in which Defendants owned and/or operated the Facility, within the meaning and scope of CERCLA §§101(29) and 107(a), 42 U.S.C. 9601(29) and 9607(a).

93. There have been releases or the threat of releases of hazardous substances into the environment at or from the Facility, within the meaning and scope of CERCLA §101(22), 42 U.S.C. 9601(22).

94. The actual and threatened "releases" of hazardous substances from the Facility have caused the City to incur "response costs" within the meaning and scope of CERCLA §§101(25) and 9607(a), 42 U.S.C. 9601(25) and 9607(a).

95. The City has incurred, and will continue to incur, response costs in connection with the investigation of the PCBs at the Facility and potential remedial actions, including, but not limited to, costs for design of a dredging project aimed at the

removal of PCBs in the Harbor. The costs incurred by the City are consistent with the National Contingency Plan, 40 C.F.R. Part 300.

96. Each of the Defendants is a current owner and operator of the Facility, and at the time of disposal was an owner and operator of the Facility, within the meaning and scope of CERCLA §§107(a)(1) and (a)(2), 42 U.S.C. 9607(a)(1) and (a)(2)(c).

97. Each of the Defendants is jointly and severally liable to the City, pursuant to CERCLA §107(a), 42 U.S.C. 9607(a), for all response costs incurred by the City in connection with the Facility, including (without limitation) pre-judgment interest.

98. Pursuant to CERCLA Section 113(g)(2), 42 U.S.C. §9613(g)(2), the City is also entitled to a declaratory judgment, binding on any subsequent action to recover further response costs relating to the Facility, that the Defendants are jointly and severally liable for such costs.

WHEREFORE, the City prays for judgment against Defendants as follows:

A. For judgment against Defendants, jointly and severally, for all response costs incurred by the City in connection with the Facility, including pre-judgment interest;

B. For a declaratory judgment, binding on all subsequent actions to recover further response costs relating to the Facility, that each of the Defendants is jointly and severally liable for such costs;

C. For such other relief as the Court deems appropriate.

COUNT II
CLAIM FOR COST RECOVERY UNDER
ILLINOIS WATER POLLUTANT DISCHARGE ACT

1-87. The City adopts and realleges paragraphs 1 through 87 of the Allegations Common to All Counts as paragraphs 1 through 87 of this Count II.

88. The IWPDA, 415 ILCS 25/1 *et seq*., provides, in pertinent part, that the discharge of pollutants by the owner or operator of a facility, directly or indirectly into water, is prohibited, and said owner or operator shall be liable for actual costs incurred by a governmental body for removal of such pollutants, including attorneys fees, court costs and other expenses of litigation. 415 ILCS 25/3 and 25/5.

89. Each of the Defendants falls into the class of persons defined in IWPDA §§2(h) and 5, 415 ILCS 25/2(h) and 25/5.

90. The Site, and all locations where PCBs have come to be located are collectively a "facility" within the meaning and scope of IWPDA §§2(e) and 5, 415 ILCS 25/2(e) and 25/5.

91. The City is informed and believes that sediments in the Harbor at the Facility contain PCBs, a pollutant, within the meaning and scope of IWPDA §§2(b) and 5, 415 ILCS 25/2(b) and 25/5.

92. The Harbor is a body of water located in the territorial limits of the City, as defined in IWPDA §§2(f) and 3, 415 ILCS 25/2(f) and 25/3.

93. Discharge of PCBs, a pollutant, occurred at the Facility during the times in which Defendants owned or operated the Facility within the meaning and scope of IWPDA §§2(c) and 5, 415 ILCS 25/2(c) and 25/5.

94. The discharge of PCBs from the Facility has caused the City to incur removal costs within the meaning and scope of IWPDA §§2(d) and 5, 415 ILCS 25/2(d) and 25/5.

95. The City is a governmental body within the meaning and scope of IWPDA §§2(g) and 5, 415 ILSC 25/2(g) and 25/5.

96. The City has incurred, and will continue to incur, removal costs in connection with the investigation and implementation of actions necessary to minimize damage to the public health or welfare from discharges of PCBs at the Facility and in the Harbor.

97. Each of the Defendants is liable to the City, pursuant to IWPDA §5, for all removal costs incurred by the City in connection with the Facility, 415 ILCS 25/5.

98. Pursuant to IWDPA §5, 415 ILCS § 25/5, the City is also entitled to recover its attorneys fees, court costs and other expenses of litigation related to the recovery of removal costs.

WHEREFORE, the City prays for judgment against Defendants as follows:

D. For judgment against Defendants, jointly and severally, for all removal costs incurred by the City in connection with the Facility and the Harbor, including pre-judgment interest;

E. For a declaratory judgment, binding on all subsequent actions to recover further removal costs relating to the Facility and the Harbor, that each of the Defendants is jointly and severally liable for such costs;

F. For attorneys fees, court costs and other litigation expenses pursuant to 415 ILCS 25/5; and

G. For such other relief as the Court deems appropriate.

The City of Waukegan

By: s/Michael S. Blazer
One of its attorneys

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EXHIBIT A

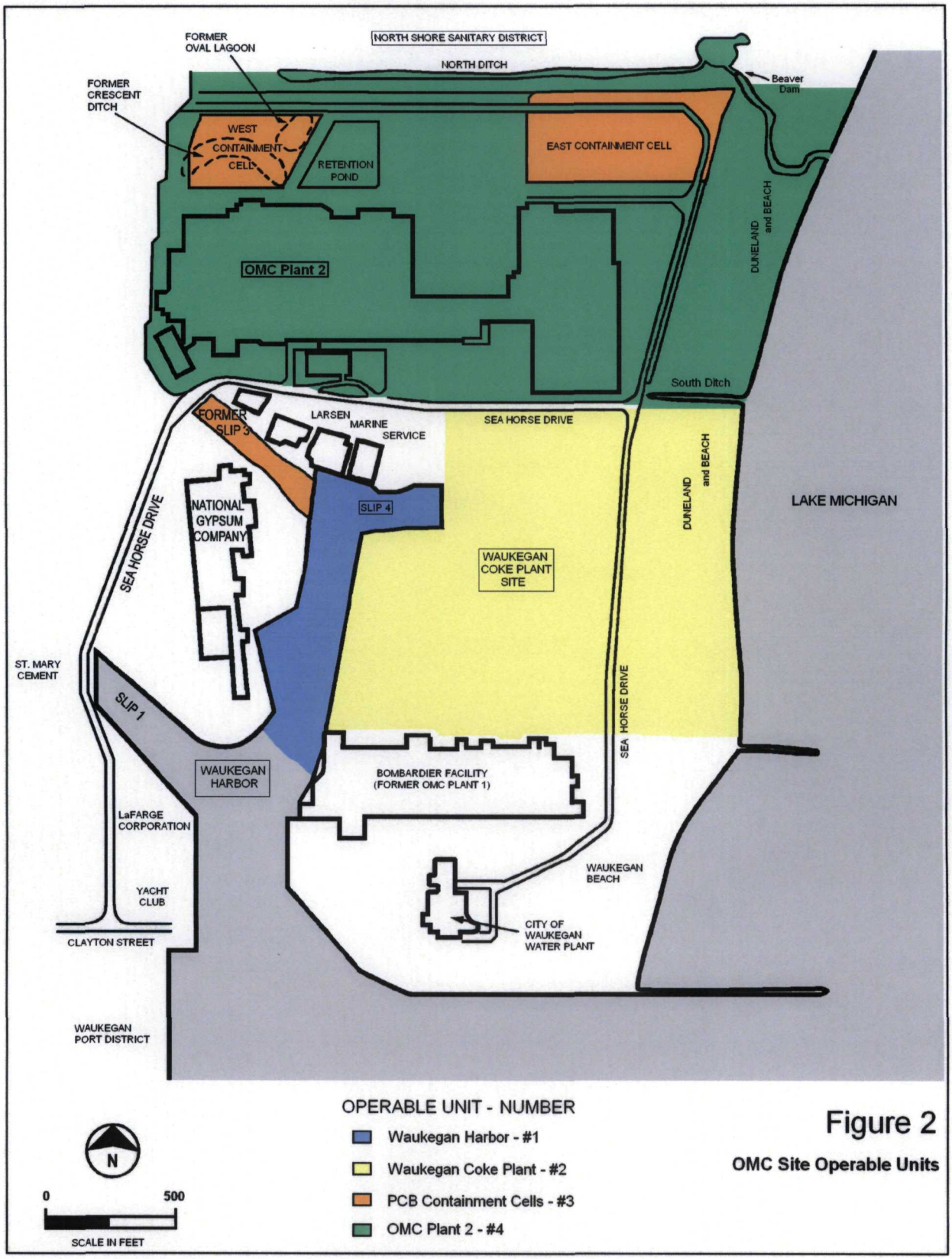


Figure 2

OMC Site Operable Units

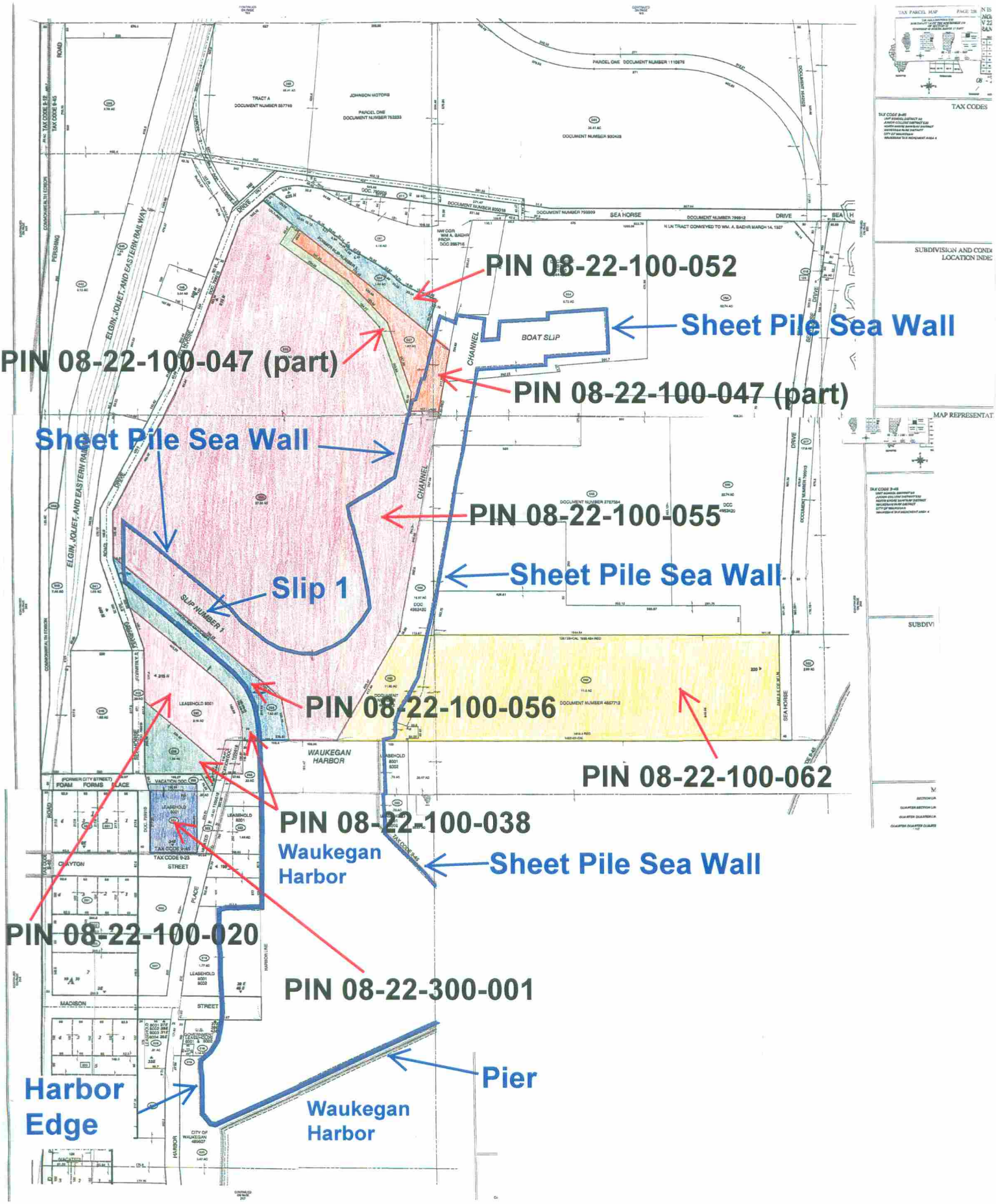
EXHIBIT B

FIGURE 1
Waukegan Harbor Segments
Waukegan Harbor

E102005008MKE WH_Fig1_Segments_v2.ai 10-7-05 jls

CH2MHILL

EXHIBIT C


PIN 08-22-100-052
Sheet Pile Sea Wall
PIN 08-22-100-047 (part)
PIN 08-22-100-047 (part)
Sheet Pile Sea Wall
PIN 08-22-100-055
Sheet Pile Sea Wall
Slip 1
PIN 08-22-100-056
PIN 08-22-100-062
PIN 08-22-100-038
Waukegan Harbor
Sheet Pile Sea Wall
PIN 08-22-100-020
PIN 08-22-300-001
Pier
Harbor Edge
Waukegan Harbor
BOAT SLIP
CHANNEL
SEA HORSE DRIVE
ELGIN, JOLIET, AND EASTERN RAILWAY
WAUKEGAN HARBOR
SLIP NUMBER 1
TAX CODES

PIN	Order Number ('s)	Reference	Color
08-22-100-047 (part)	C55585501 and C55585504 (1957-Present) C55585512 (1840's-1957)	Parcel 14 from 1409-723463 and part of legal from document 3369494 "exhibit A" page 5	yellow-orange
08-22-100-047 (part)	C55585502 and C55585504 (1947-Present) C55585513 (1840's-1957)	Parcel 15 from 1409-723463 and part of legal from document 3369494 "exhibit A" page 5	lime green
08-22-100-052	C55585503 (1957-Present) C55585514 (1840's-1957)	Parcel 19 from 1409-723463 and 08-22-100-052 (OMC)	teal
08-22-300-001	C55585505 (1957-Present)	Parcel 1 and 2 in documents 3267958 and 6182851	navy blue
08-22-100-020	C55585506 (1957-Present) C55585515 (1840's-1957)	Legal from document 2512094 "schedule 1" page 4	bubble gum
12-18-200-013 and 12-18-200-014	C55585507 (1957-Present)	Legal from document 2196686 "exhibit A" page 10	maroon
08-22-100-055	C55585504 and C55585508 (1957-Present) C55585516 (1840's-1957)	08-22-100-055 (EJE) and part of legal from document 3369494 "exhibit A" page 5	mauve
08-22-100-062	C55585509 (1957-Present) C55585517 (1840's-1957)	08-22-100-062 (BMCA)	yellow
08-22-100-056	C55585510 (1957-Present) C55585518 (1840's-1957)	08-22-100-056 (WPD)	sky blue
08-22-100-038	C55585511 (1957-Present) C55585519 (1840's-1957)	08-22-100-038 (WPD)	green

EXHIBIT E

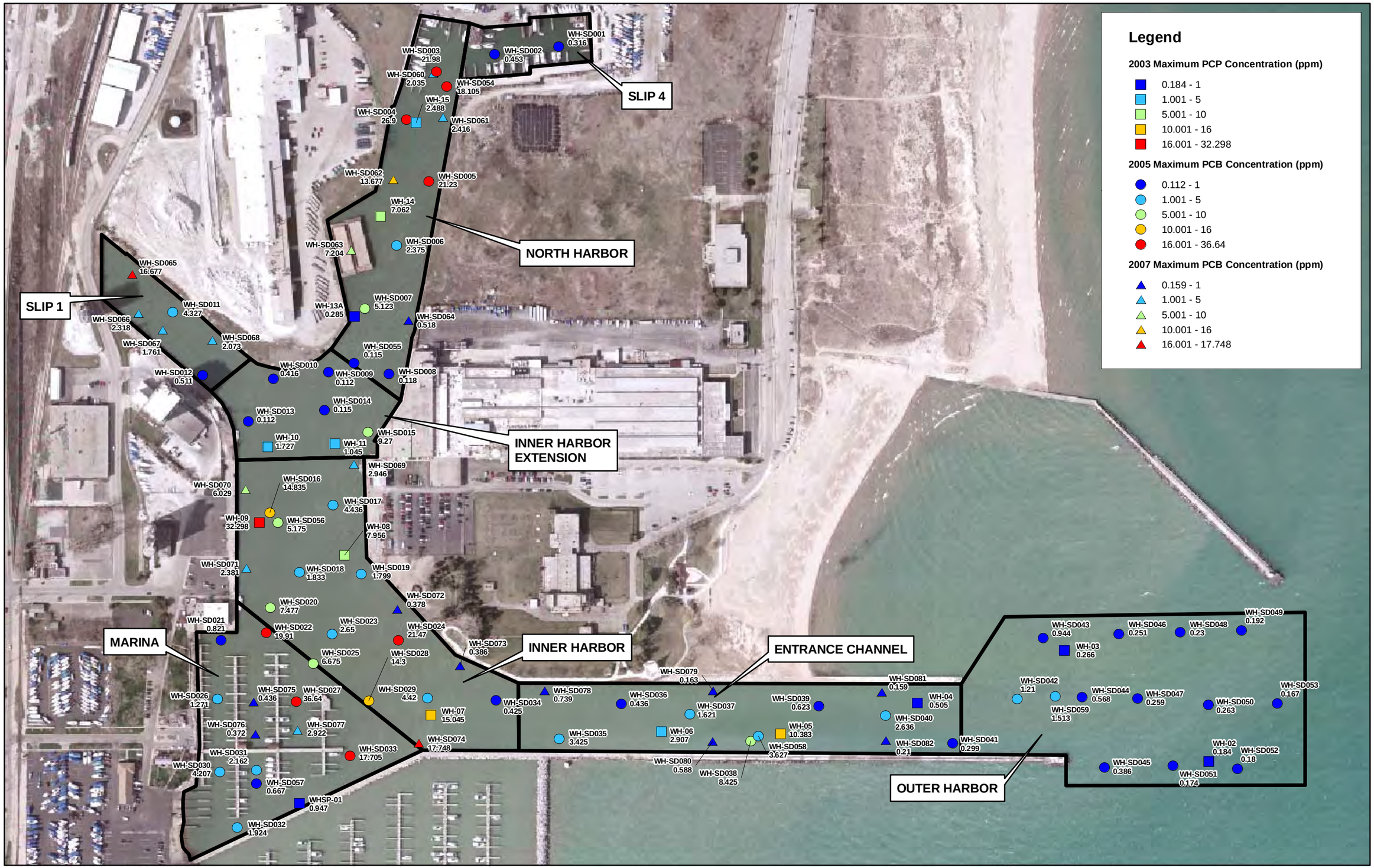


Figure 1
Maximum PCB Concentrations
Waukegan Harbor Area of Concern
Waukegan, Illinois

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CH2M HILL