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VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

May 2, 2012

BETA Group, Inc.
c/o Michael E. Grilli, Registered Agent
660 Grove Street
Framingham, MA 01701

RE: **NOTICE OF CLAIM AND DEMAND PURSUANT TO M.G.L. c.21E & c.93A**
Wetland Adjacent to Keith Middle School, 225 Hathaway Boulevard,
New Bedford, Massachusetts
DEP RTN 4-21300

Dear BETA Group, Inc.:

The City of New Bedford (hereinafter the "City") hired BETA Group, Inc. (hereinafter "BETA") to design and implement a cleanup of PCBs from the wetland area located adjacent to the Keith Middle School (hereinafter "KMS"). The City paid approximately $2.4 Million Dollars for the wetland remedial design and implementation. Sampling conducted after BETA completed its work revealed levels of PCBs far in excess of allowable levels and indicates that BETA was negligent in either its design or implementation of the cleanup or both, and that this negligence resulted in release of PCBs within the Wetland. The City demands that BETA pay all costs the City has incurred and will continue to incur to complete the PCB wetland cleanup that BETA was hired and paid to design and implement. BETA is liable for its negligence, for a breach of express and/or implied warranty, for breach of contract and for violations of c.21E and c.93A.

This letter is also a formal **Notice of Claim and Demand Letter** pursuant to M.G.L. c.21E, §4A and M.G.L. c.93A. Pursuant to M.G.L. c.21E, §4A, BETA must respond to this Notice within **forty-five** (45) days. BETA must respond to this Notice within thirty (30) days pursuant to M.G.L. c.93A. However, for the purpose of simplicity, the City hereby extends the time period for BETA's required response under c.93A to **forty-five** (45) days.

BACKGROUND

In or about 2000, the City sought a location to construct a new middle school. Vanasse Hangen Brustlin, Inc. ("VHB") was retained to undertake an environmental due-diligence investigation as a possible location for a new middle school and discovered elevated levels of oil and/or hazardous materials ("OHMs"), including without limitation PCBs, metals, and polycyclic aromatic hydrocarbons.

Upon discovery of OHMs, the City notified the Massachusetts Department of Environmental Protection (MADEP), as required by c.21E and the regulations known as the Massachusetts Contingency Plan (MCP-310 CMR 40.0000 *et seq.*). MADEP assigned Release Tracking Number 4-15685 to track required response actions to address the OHM release(s) at the KMS site.[1]

Laboratory analysis of the soil samples collected by VHB detected PCB concentrations regulated under the Toxic Substances Control Act (TSCA) and the regulations at 40 CFR Part 761.61 (the PCB Regulations"). In August 2005, the City entered a Consent Agreement and Final Order (CAFO) with the United States Environmental Protection Agency (USEPA) to

[1]Information describing such response actions and activities at the KMS site, including summaries of the data and all reports concerning the Wetland behind KMS, can be found at http://www.newbedford-ma.gov/McCoy/sitemap/sitemap.html (to see information related to the areas of the site, click on the appropriate button on the map shown on the webpage), www.mass.gov/dep/sites/Site_Info.asp?textfield_RTN=4-0015685 and/or at www.epa.gov/region1/mccoyfield/index.com.

conduct required response actions under TSCA and the PCB Regulations. The City submitted to USEPA a Risk-Based Cleanup and Disposal Plan under the PCB Regulations to address the PCB impacts discovered by the VHB environmental assessment. As part of its conditional approval for the City's Risk Based Cleanup and Disposal Plan, USEPA required that additional investigations of the surrounding areas[2] be undertaken by the City. Required additional investigations included sampling the Wetland.

In 2004, the City retained BETA to continue to conduct necessary response actions pursuant to the MCP and to simultaneously address the requirements of the Risk Based Cleanup and Disposal Plan conditionally approved by USEPA.

Investigation of the Wetland

BETA's investigations of the Wetland adjacent to KMS undertaken on behalf of the City found sediments in the Southern and Northern Wetland to be impacted with PCBs.[3] (see Appendix, BETA, 2005a – 2005g, BETA 2006a – 2006k)

In response to these findings, BETA proposed to USEPA, on behalf of the City, a remedy to cleanup the PCBs in the Wetland, which USEPA conditionally approved (see Appendix, BETA, 2005d -2005e, BETA, 2006c – 2006j). The remedy designed by BETA included the removal of up to 6 inches of impacted sediments with PCB concentrations in excess of 1 mg/kg for off-site disposal, capping of PCB impacted soils along the embankment adjacent to the

[2]The KMS site now extends beyond the original KMS parcel and now includes KMS, an adjacent Wetland, NBHS, other contiguous City-owned parcels, including without limitation, the ("Nemasket Street lots"), acquired private residences, and may include additional properties. A map of the parcels within the currently approximated boundaries of the Site is provided at Exhibit A.

[3]The Wetland adjacent to KMS is divided by a land bridge, with the area south of the land bridge referred to as the Southern Wetland and the area to the north referred to as the Northern Westland. The Northern Wetland was subdivided into two areas (Areas B and C) for the Wetland restoration project. Area B included the portion of the Wetland adjacent to the Phase I Embankment. Area C is a separate area located in the northwest portion of the Northern Wetland. The Northern Wetland including subareas B and C are shown on Figure 1.

easterly side of the Wetland with a geotextile marker overlain by three feet of clean granular fill with vegetated topsoil, and subsequent restoration of the Wetland, including replacement of the excavated Wetland sediments with organic wetland soils and replanting Wetland vegetation.

Pre-Excavation Data Collection:

In preparation for the remedy, BETA reportedly performed pre-excavation sampling during the period between July 2004 and April 2005 to delineate the lateral and vertical extent of sediments in the Northern and Southern Wetlands that contained PCB concentrations above the target cleanup criterion. BETA reportedly collected sediment samples from the Wetland, as set forth below:

- 0 to 6 inches deep at 129 locations (92 in the Northern Wetland and 37 in the Southern Wetland);
- 6 to 12 inches deep at six locations (5 in the Northern Wetland and 1 in the Southern Wetland);
- 12 to 24 inches deep at two locations (1 in the Northern Wetland and 1 in the Southern Wetland);
- 24 inches deep at one location in the Southern Wetland),

In addition to these sediment samples, BETA reportedly collected soil samples along the water-line, at depths ranging from 1 to 8 feet below ground surface (bgs), at 33 Wetland locations to characterize the vertical distribution of PCBs.

Wetland Remedy Implementation

In or about late 2006, the City contracted with BETA to implement the cleanup plan BETA designed. PCB impacted sediment and Wetland restoration activities were not only designed by BETA, but the agreement with the City required that the implementation of the cleanup plan be conducted under the direction and oversight of BETA.

BETA reported that, at the time of Wetlands remedy implementation, an additional 12 to 36 inches of soil was removed from the toe of the slope embankment along the east side of the Wetland. The soil in this area was originally to be removed as part of the previously completed embankment stabilization in order to meet the cap thickness requirement of 3 feet over PCB-impacted soils or reach the target cleanup level of 1 mg/kg established by USEPA. However, the soil in this area was reportedly judged by BETA at that time to be inaccessible due to the high water level in the Wetland during the original stabilization activities. Consequently, soil at the toe of the slope was reportedly not removed at that time, necessitating an adjustment by BETA to its remedial design. Since concentrations of PCBs in soils along the tow of the slope exceeded 1 mg/kg, and the minimum 3-foot thick soil cap could not be installed without encroaching into the Wetland, additional excavation was required to complete the embankment cap. All these activities were conducted by a contractor under the direction and oversight of BETA.

According to Volume 1 of BETA's *Final Completion and Inspection Report prepared for the McCoy Field/Keith Middle School,* dated December 2006, (see Appendix, BETA 2006c), the Phase 1 Embankment cap was reportedly completed under the direction and oversight of BETA at the time of Wetland remediation. BETA's design called for soil impacted by PCBs above 1 mg/kg to be removed from the bottom of the Phase I Embankment and for the geotextile separation barrier along the completed portion of the embankment to be extended to the toe of slope at the edge of the Wetland. BETA's design called for the end of the extended geotextile fabric to be folded into the excavation and for crushed stone to be placed on top of the barrier to provide additional stability for the slope. Finally, BETA's designed remedy specified that the geotextile was to be covered with granular fill, a warning barrier, and vegetated topsoil to meet the 3-foot thick cap criterion.

Excavation of the Southern Wetland was completed first. The Northern Wetland remediation, which required dewatering since portions of the Northern Wetland contained 4 to 5 feet of water, was conducted next. The Wetland remediation activities in the northern half of the

Northern Wetland and the excavation of the toe of the embankment and Wetlands sediment in that portion of the Wetland was completed "in the wet" (see Figure 1). Dewatering was reportedly difficult because of surface water drainage into the Wetlands that occurred during precipitation events through the storm water outfalls constructed to serve the new KMS and located along the east side of the Northern Wetland (see Figure 1). The southern end of the Northern Wetland near the land bridge was also dewatered, but the organic sediments remained saturated and were of a semi-fluid consistency. It is also significant to note that a peripheral area in the northwest portion of the Northern Wetland (Area C), was dewatered and excavated. During dewatering of this area, water was reportedly discharged to an adjacent wetland area to the south.

Excavation of the impacted sediments in the Northern Wetland proceeded from south to north. Active dewatering was performed only during daylight hours while excavation occurred, and was terminated at night. Bladder bags were used to divide the Northern Wetland into three cells to facilitate dewatering and sediment removal. The sequence of excavation in the Northern Wetland proceeded as follows:

- **Embankment modification.** A section of the toe of the Phase I Embankment was excavated and the geotextile separation barrier on the embankment was exposed;
- **Sediment excavation.** Sediments were excavated from the Wetland adjacent to the toe of the Phase I Embankment. In the southern half of the Northern Wetland, up to a few hundred feet would be excavated prior to performing confirmatory sampling or extending geotextile;
- **Post-excavation sampling.** In general, post-excavation sediment samples were collected from the excavated area shortly after the removal of sediments to confirm that the 1 mg/kg PCB cleanup criterion was met; and

- **Geotextile extension.** The geotextile separation barrier was extended into the Wetland and crushed stone was placed on the end of the geotextile in the Wetland.

BETA reported that post-excavation sediment samples collected from locations shown on Figure 2 indicated that the concentrations of PCBs in the excavated areas met the 1 mg/kg design criteria. BETA then ordered and oversaw the backfill of the Wetland with engineered wetland soils having a minimum organic carbon content of 12-percent, and the replanting of wetland vegetation. It is significant to note that portions of the toe of the Phase I Embankment below the water-line were sometimes left exposed (i.e., were not covered with geotextile and crushed stone) for a few days after excavation and before BETA collected confirmatory samples. Under these conditions, impacted soils adjacent to the excavated portion of the Phase I Embankment would likely have been unstable.

Discovery of Post-Remediation PCB Sediment Impacts

In accordance with the requirements of the long-term monitoring program required by USEPA as a condition on its approval of the BETA remedy, sediment sampling of the Wetland adjacent to KMS was later performed by TRC Solutions, Inc. (TRC)[4]. During the initial long-term monitoring event, TRC collected four samples (i.e., locations SD-01 through SD-04) from areas that had been excavated and reported by BETA to meet the 1 mg/kg its design criterion (see Appendix, TRC 2008a – 2008b). PCBs above the 1 mg/kg BETA design remediation criterion were detected in one of the samples (i.e., SD-03). Additional samples were then collected by TRC from within the excavated Wetland.

At great cost to the City, over 400 sediment/soil samples were eventually collected by TRC during the investigation that followed the detection of total PCBs above the 1 mg/kg

[4]In 2007, the City retained the services of TRC Solutions, Inc. to replace BETA.

sediment cleanup criterion in SD-03. (see Appendix, TRC 2009a – 2010b). This investigation identified concentrations of PCBs in sediments greater than 1 mg/kg both in and adjacent to the excavated portion of the Northern Wetland, and PCBs were detected at levels as high as 834 mg/kg in an area of replaced (backfilled) sediments within the reconstructed Wetland.

The City continues to pay for assessment and remediation of the Wetland pursuant to the conditional USEPA approval of the BETA remedy, and in accordance with the requirements of c.21E and the MCP. USEPA and MADEP are now requiring additional response actions to be conducted to address the Wetlands. The City placed a fence around the Wetlands to prevent potential exposure to the public and is evaluating how to address the Wetland conditions remaining after the failed BETA remedial design and/or remedy implementation.

As the costs mounted, the City requested an expert to identify the source of the PCBs detected during the post BETA wetland remedial actions. The City was first advised in or about February 2011, that the PCBs remaining in the Wetland were potentially caused by the negligent BETA design and/or remedy implementation overseen by BETA. The expert's initial impressions were confirmed in communications to the City in April 2012.

The City would not be incurring these costs had BETA designed and/or conducted appropriate and necessary response actions required by the MCP and the USEPA Risk-Based Cleanup and Disposal Plan to remove the PCB-impacted sediment from the Wetland. BETA failed to provide LSP[5] services in accordance with the degree of skill and care ordinarily exercised by qualified professionals performing the same type of services at the same time under similar conditions in the same locality. *See* 309 CMR 4.02 ("In providing Professional Services, a licensed site professional shall act with reasonable care and diligence, and apply the knowledge and skill ordinarily exercised by licensed site professional in good standing…").

[5]LSPs are scientists and/or engineers that are licensed and thereby authorized by the Commonwealth to direct and oversee the assessment and cleanup of oil and/or hazardous materials that have been released into the environment. LSPs are regulated by 310 CMR 40.0169 (1) and 309 CMR 1.00 *et seq.*

BETA, as the LSP, bore responsibility and accountability to design, recommend and conduct actions necessary and appropriate to respond to the releases of PCBs, and to recommend against actions inconsistent with such responsibility. Had BETA designed, recommended and/or conducted appropriate and necessary response actions required by the MCP to be performed in the Wetland, no actions beyond occasional continued monitoring would have been necessary.

One or more of the following negligent actions or failures to act by BETA resulted in the failure of the BETA remedy:

- BETA failed to completely delineate the full extent of sediments containing PCBs above 1 mg/kg during pre-excavation sampling. Consequently, these sediments that should have been, but were not targeted for excavation or capping, and/or that should have been but were not subjected to post-remedial sampling since they were not in areas of active sediment removal.

- BETA also failed to appropriately conduct or direct dewatering during the soil removal cleanup effort resulting in releases of PCBs from one portion of the Wetland to another. The Northern Wetland was not continuously dewatered. Portions of the Wetland were dewatered at the beginning of the day, but dewatering was not continued overnight. The fluctuating water levels and resulting increased hydraulic gradient at the edge of the Wetland during dewatering cycles resulted in the mobilization of PCB impacted materials along the embankment into the Wetland after the initial PCB impacted sediment removal.

- The fill face along the edge of the cap was not stabilized during overnight periods under the direction of BETA, and the head differential and saturated conditions along the disturbed soils resulted in a release of PCB-impacted

soils into portions of the Wetland from other areas within the Wetland along the excavation face.

- PCB-impacted soils became mobilized during placement of stone backfill by BETA and/or directed by BETA in the Wetland along the unstabilized fill face, causing further releases of PCBs from one portion of the Wetland to another.

- BETA allowed sediment transport by runoff/overland flow from impacted areas outside of the excavated area and adjacent to the cap and/or wetland.

- Lastly, in at least one case, BETA allowed or directed dewatering effluent containing PCBs to be discharged from areas undergoing remediation to areas in the Wetland that were previously cleaned, thereby allowing one portion of the Wetland to release and transport PCBs to another portion.

These actions and/or inactions by BETA caused releases of PCBs from on portion of the Wetland to another, and resulted in significant unnecessary response costs to the City. Had BETA appropriately designed and/or directed the implementation of appropriate and necessary response actions, in accordance with the prevailing standard of care, the Wetland would be cleaned up and regulatory closure would have been achieved. Instead, the City is now paying TRC to cleanup BETA's mistakes.

LEGAL LIABILITY

BETA is liable to the City for its equitable share of reasonable response costs under M.G.L. c. 21E and the MCP for the release(s) of PCBs in the Wetland behind the KMS. The City has incurred, and continues to incur assessment and clean-up costs as a result of the release(s) of PCBs. BETA is liable for 100% of these costs for the reasons enumerated herein.

A. PROFESSIONAL NEGLIGENCE

BETA was negligent in its failure to perform required response actions in accordance with representations and the terms set forth in its agreement with the City, and in accordance with the requirements of the Massachusetts General Laws Chapter 21E and the Massachusetts Contingency Plan. These failures were the actual and proximate cause of the release of PCBs and resulting damages suffered by the City, as set forth with specificity herein.

Negligence, "without qualification and in its ordinary sense, is the failure of a responsible person, either by omission or by action, to exercise that degree of care, vigilance and forethought, in the discharge of the duty then resting on him, the person of ordinary caution and prudence ought to exercise under the particular circumstances." Altman v. Aronson, 121 N.E. 505, 506 (Mass. 1919); Stepakoff v. Kantar, 473 N.E.2d. 1131, 1135 (Mass. 1985). The negligence for professionals is adjusted slightly, requiring a professional to exercise that degree of skill and care ordinarily exercised by qualified professionals performing the same type of services at the same time under similar conditions in the same locality. *See* Stepakoff v. Kantar, 473 N.E.2d. 1131 at 1135. The standard for gross negligence is adjusted in degree from that of ordinary negligence to that which is "materially more want of care than constitutes simple inadvertence...Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence... It falls short of being such reckless disregard of probable consequences as is equivalent to a willful and intentional wrong." *See* Altman v. Aronson, 121 N.E. 505 at 506. In this case, BETA held itself out as an expert in the assessment, design and implementation of remedies to address OHMs, and thus will be held to a higher degree of care than the average professional consultant similarly situated.

BETA failed to follow the requirements of M.G.L. c.21E, and the MCP, as well as the policies, guidelines and procedures produced by the DEP and USEPA and the USEPA

conditionally approved Risk-Based Cleanup and Disposal Plan to such a degree that actions taken and those actions not taken, but which should have been taken, constitute gross negligence on the part of BETA and are sufficient to create liability under M.G.L. c.93A.

B. BREACH OF CONTRACT

BETA is also liable for the reasonable response costs for responding to the releases of PCBs in the Wetland during the botched cleanup pursuant to its agreement with the City. The City retained BETA to conduct the necessary and appropriate response actions per the requirements of the MCP, and the MADEP, and to simultaneously address the requirements of the USEPA, to assess and cleanup the OHMs at the Wetland behind the KMS. Whether the contract was explicit and in writing, or implicit and understood by the parties, BETA was responsible and/or accountable for recommending and/or conducting actions necessary and appropriate to respond to the releases of PCBs, and to recommend against actions inconsistent with such responsibility. It is clear that BETA did not design and/or recommend and/or conduct appropriate and necessary response actions required by the MCP to be performed in the Wetland. Accordingly, BETA is liable for breach of contract.

BETA's breach of its agreement with the City is also sufficient to create liability under M.G.L. c. 93A. A disregard of known arrangements in which benefits were secured to the breaching party, "constitutes an unfair act or practice for c.93A purposes." Bradley v. Dean Witter Realty, Inc., 967 F.Supp. 19, 29 (D.Mass.1997)(quoting Anthony's Pier Four, Inc. v. HBC Assoc., 583 N.E.2d. 806, 821 (Mass.1991).

C. BREACH OF IMPLIED AND/OR EXPRESS WARRANTIES

BETA designed and implemented the remedy to clean up the PCBs in the Wetland, which was conditionally approved by USEPA. BETA impliedly and expressly warranted to the City, MADEP and USEPA that the remedy included all necessary and appropriate response actions to assess and cleanup the PCBs in the Wetland. BETA breached these warranties

because the actions and/or inactions by BETA did not remediate the PCBs, and instead caused releases within the Wetland. BETA's breach has caused the City to incur many otherwise unnecessary response costs. If BETA refuses to pay for all reasonable costs arising from its failures, such refusal will be an unfair or deceptive act or practice in violation of c.93A for failure to honor a warranty. See M.G.L. c.93A, §2(c), 940 CMR 3.08(2).

D. M.G.L. C.21E

Chapter 21E is known as the Oil and Hazardous Materials Release Prevention and Response Act, and is essentially the Massachusetts Superfund act. Chapter 21E sets forth a "strict liability scheme whereby designated persons bear responsibility for cleanup costs and other damages resulting from environmental contamination." Pirovano v. Gould, Inc., No. 91-13304-MA, slip opinion at 7 (D. Mass. Feb. 25, 1994) (citing Mailman's Steam Carpet Cleaning Corp. v. Lizotte, 415 Mass. 865, 870 (1993). Chapter 21E, §5(a) lists those categories of persons liable for a release of hazardous material, and "[i]f a person falls into any of these five categories, the statute imposes liability without regard to fault." Griffith v. New England Tel. & Tel. Co., 420 Mass 365, 366 (1995) (*"Griffith II"*).

BETA is a person liable under M.G.L. c. 21E, §5(a)(5) as **"any person who otherwise caused or ... is legally responsible for a release or threat of release of oil or hazardous material from a ... site."**

Here, releases of PCBs from one portion of the Wetland to others were clearly caused by the negligent actions and/or inactions of BETA and/or BETA's agents, servants, representatives, and/or employees. As a responsible party under Chapter 21E, BETA is liable for reimbursement of past and future costs incurred by the City in responding to the releases of PCBs in the Wetland.

BETA is also liable under Chapter 21E, §5(a)(3), which imposes liability on **"any person who by contract, agreement or otherwise, directly or indirectly, arranged for the transport, disposal, storage or treatment of hazardous material to or in a site or vessel from or at which there is or has been a release or threat of release of hazardous material"**. BETA, as the party responsive for designing and directing the wetland remedy, was an "arranger" for the purposes of M.G.L. c.21E, §5(a)(3), and is strictly liable without regard to fault for the cost of response actions to address the PCBs released from one portion of the Wetland to others.

In addition, BETA is liable under Chapter 21E Section 5(a)(4), which imposes liability on **"any person who, directly, or indirectly, transported any hazardous material to transport, disposal, storage or treatment vessels or sites from or at which there is or has been a release or threat of release of hazardous material."** (Emphasis added). BETA was a "transporter" for the purposes of M.G.L. c.21E, §5(a)(4), in that "but for" the design and/or implementation errors, releases of PCBs would not have occurred within the Wetlands, and is therefore, strictly liable without regard to fault for the cost of response actions to address the PCBs in the Wetland.

During cleanup of the Wetland, BETA was negligent in that it relocated and/or arranged for the relocation of PCB contaminated material from areas undergoing remediation to other areas in the Wetland. By relocating and/or arranging for the relocation of the PCB contaminated material, BETA transported and/or arranged for the transport of PCBs from one portion of the Wetland to others and/or otherwise caused or contributed to releases of the PCBs and/or additional releases of PCBs in the Wetland.

Accordingly, BETA is a "person" responsible under section 4 of Chapter 21E for an equitable share of reasonable response and cleanup costs incurred by the City, including attorney and consultant fees. See Dedham Water Co. v. Cumberland Farms Dairy, Inc. et al, 889 F.2d 1146 (1st Cir. 1989).

Under Chapter 21E, §4, any person who "undertakes a necessary and appropriate response action regarding the release or threat of release of oil or hazardous material shall be entitled to reimbursement from any other person liable for such release or threat of release for the reasonable costs of such response action." M.G.L. c.21E, §4. In other words, Chapter 21E, §4 creates a private right of action whereby any person who undertakes containment and removal of oil or hazardous material can recover the cleanup costs incurred from any other person responsible for the contamination. See M.G.L. c.21E, §4; Griffith v. New England Tel. & Tel. Co., 414 Mass. 824 (1993), remanded 420 Mass 365 (1995); and Garweth Corp. v. Boston Edison Co., 415 Mass. 303 (1993).

If BETA believes that another party potentially caused or contributed to the release of PCBs within the Wetland, and is a responsible party under c.21E, we encourage BETA to seek contribution of an equitable share of response actions from any such party. Kindly note that BETA is nevertheless strictly liable for the reasonable response actions costs incurred as a result of the releases of OHM.

In view of the facts outlined in detail herein, the City hereby seeks reimbursement from BETA for a 100% of the response action costs incurred to-date and, further seeks BETA's agreement to pay for or reimburse the City for future assessment and response costs, which may include response action related attorneys' fees, incurred in connection with the releases of PCBs resulting from BETA's negligent actions or failures to act. BETA is responsible for all response action costs that the City has incurred and will incur directly related to the Wetlands, as detailed herein.

BETA cannot reasonably assert, under the circumstances, that BETA is not liable for the response action costs incurred by the City in connection with the releases of PCBs within the Wetlands.

It is reasonably clear that BETA is a "person liable" under Chapter 21E and liable for paying its equitable share of reasonable response costs incurred by the City. If BETA fails to accept responsibility for the releases of PCBs within the Wetlands or fails to agree to pay the City past and future costs arising from the releases, BETA is in further violation of c.21E. In such event, BETA will have committed unfair or deceptive acts or practices in violation of c.93A. See Meguid v. Atlantic Petroleum Corp., 2 Mass.L.Rptr. 255 (Mass. Super. 1994)(the Court held that "***a violation of G.L. c.21E would constitute a violation of G.L. c. 93A, §2***, because chapter 21E is an 'existing statute' 'meant for the protection of the public's health, safety or welfare...")(emphasis added); Williams v. Hines, CV97-104 (Hampden Superior Court) (court ruled that Defendant violated G.L. c.21E, §5(a)(5) causing the release of oil at Plaintiff's home, and found that the Defendant's violation of c.21E, §5(a)(5) was pursuant to 940 CMR 3.16(3), a violation of G.L. c.93A).

If BETA continues to attempt to avoid liability under M.G.L. c.21E, when liability appears reasonably clear, by failing to reasonably respond, BETA may be additionally liable to the City pursuant to M.G.L. c.93A, and as such, may be additionally liable for multiple damages, and attorney's fees and costs, pursuant to M.G.L. c.93A. See Meguid; Williams.

DAMAGES

As indicated above, BETA is liable to the City to pay for 100% of the reasonable response action costs required to address the conditions in the Wetlands, including the costs of investigative, assessment, remedial and containment costs and attorneys' fees closely related to the response actions pursuant to M.G.L. Chapter 21E.

As of this date, the City has expended approximately $2.4 Million Dollars for response action costs, excluding attorneys' fees closely related to the required response actions.

Additional sampling is necessary and ongoing and a remedy will have to be designed and implemented. Projected future costs could be an additional two to three million dollars.

OFFER TO SETTLE

In light of the clear liability of BETA as a party responsible for the releases of PCBs in the Wetland due to the failed design and/or implementation of a remedy, we expect that it would be very difficult for BETA to maintain in "good faith" that BETA has no liability or obligation to indemnify and/or reimburse the City for the response costs that the City has and will incur. We urge BETA to contact us immediately to decide upon short-term, interim and long-term solutions and to enter into a Settlement Agreement with the City.

The City is willing to discuss a reasonable settlement offer advanced by BETA. We suggest a meeting with BETA as soon as possible.

CONCLUSION

The City seeks to resolve this matter expeditiously. While the City continues to reserve all of its rights in this matter, we anticipate BETA's agreement to schedule a mutually convenient time to discuss this matter and to commit to a reasonable settlement agreement.

Very truly yours,
City of New Bedford

John A. Markey, Jr.
City Solicitor

encl.

APPENDIX

BETA, 2005a — *Risk-Based Cleanup Request, Revision 0: School Site at McCoy Field, New Bedford, Massachusetts, RTN 4-15685.* Prepared for: New Bedford School Department, New Bedford, Massachusetts. Prepared by: BETA Group, Inc., Norwood, Massachusetts. March 21, 2005.

BETA, 2005b — *Risk-Based Cleanup Request, Revision 1: School Site at McCoy Field, New Bedford, Massachusetts, RTN 4-15685.* Prepared for: City of New Bedford, Massachusetts. Prepared by: BETA Group, Inc., Norwood, Massachusetts. May 3, 2005.

BETA, 2005c — *Risk-Based Cleanup Request, Revision 2: School Site at McCoy Field, New Bedford, Massachusetts, RTN 4-15685.* Prepared for: City of New Bedford, Massachusetts. Prepared by: BETA Group, Inc., Norwood, Massachusetts. May 16, 2005.

BETA, 2005d — *Wetlands Risk-Based Cleanup Request: Wetlands Site at McCoy Field, New Bedford, Massachusetts, RTN 4-15685.* Prepared for: City of New Bedford, Massachusetts. Prepared by: BETA Group, Inc., Norwood, Massachusetts. June 17, 2005.

BETA, 2005e — *Wetlands Risk-Based Cleanup Request, Revision 1 (Revised Portions Only) – Volume I of I: Wetlands Site at McCoy Field, New Bedford, Massachusetts, RTN 4-15685.* Prepared for: City of New Bedford, Massachusetts. Prepared by: BETA Group, Inc., Norwood, Massachusetts. September 1, 2005.

BETA, 2005f — *Immediate Response Action Status Report 9, RTN 4-15685 – New Bedford Public Schools McCoy Field, New Bedford, Massachusetts.* Prepared for: New Bedford Public Schools, 256 Parker Street, New Bedford, Massachusetts. Prepared by: BETA Group, Inc., Norwood, Massachusetts. October 3, 2005.

BETA, 2005g — *Amended Immediate Response Action Plan 3, RTN 4-15685 – New Bedford Public Schools McCoy Field, New Bedford, Massachusetts.* Prepared for: New Bedford Public Schools, 256 Parker Street, New Bedford, Massachusetts. Prepared by: BETA Group, Inc., Norwood, Massachusetts. October 3, 2005.

BETA, 2006a — *Immediate Response Action Status Report 10, RTN 4-15685 – New Bedford Public Schools McCoy Field, New Bedford, Massachusetts.* Prepared for: New Bedford Public Schools, 256 Parker Street, New Bedford, Massachusetts. Prepared by: BETA Group, Inc., Norwood, Massachusetts. May 5, 2006.

BETA, 2006b — *Notice of Intent – Remediation General Permit.* Prepared for: New Bedford Public Schools, 256 Parker Street, New Bedford, Massachusetts. Prepared by: BETA Group, Inc., Norwood, Massachusetts. July 5, 2006.

BETA, 2006c — *Final Completion and Inspection Report - Volume 1 of 8: Long-Term Monitoring Plan - McCoy Field/Keith Middle School, 225 Hathaway Boulevard, New Bedford, Massachusetts.* Prepared for: City of New Bedford, Department of Environmental Stewardship, 133 William Street, New Bedford, Massachusetts. Prepared by: BETA Group, Inc., Norwood, Massachusetts. December 2006.

BETA, 2006d — *Final Completion and Inspection Report - Volume 2 of 8: Phase I Embankment & Clean Corridor Documents - McCoy Field/Keith Middle School, 225 Hathaway Boulevard, New Bedford, Massachusetts.* Prepared for: City of New Bedford, Department of Environmental Stewardship, 133 William Street, New Bedford, Massachusetts. Prepared by: BETA Group, Inc., Norwood, Massachusetts. December 2006.

BETA, 2006e — *Final Completion and Inspection Report - Volume 3 of 8: Phase II Cap & Utility Construction - McCoy Field/Keith Middle School, 225 Hathaway Boulevard, New Bedford, Massachusetts.* Prepared for: City of New Bedford, Department of Environmental Stewardship, 133 William Street, New Bedford, Massachusetts. Prepared by: BETA Group, Inc., Norwood, Massachusetts. December 2006.

BETA, 2006f — *Final Completion and Inspection Report - Volume 4 of 8: Cap & Vapor Barrier Documents - McCoy Field/Keith Middle School, 225 Hathaway Boulevard, New Bedford, Massachusetts.* Prepared for: City of New Bedford, Department of Environmental Stewardship, 133 William Street, New Bedford, Massachusetts. Prepared by: BETA Group, Inc., Norwood, Massachusetts. December 2006.

BETA, 2006g — *Final Completion and Inspection Report - Volume 5 of 8: Wetland Remediation, Cap Thickness Verification, and Activity and Use Limitation Documents - McCoy Field/Keith Middle School, 225 Hathaway Boulevard, New Bedford, Massachusetts.* Prepared for: City of New Bedford, Department of Environmental Stewardship, 133 William Street, New Bedford, Massachusetts. Prepared by: BETA Group, Inc., Norwood, Massachusetts. December 2006.

BETA, 2006h — *Final Completion and Inspection Report - Volume 6 of 8: Long-term Monitoring Plan - McCoy Field/Keith Middle School, 225 Hathaway Boulevard, New Bedford, Massachusetts.* Prepared for: City of New Bedford, Department of Environmental Stewardship, 133 William Street, New Bedford, Massachusetts. Prepared by: BETA Group, Inc., Norwood, Massachusetts. December 2006.

BETA, 2006i — *Final Completion and Inspection Report - Volume 7 of 8: Initial Site Monitoring Results - McCoy Field/Keith Middle School, 225 Hathaway Boulevard, New Bedford, Massachusetts*. Prepared for: City of New Bedford, Department of Environmental Stewardship, 133 William Street, New Bedford, Massachusetts. Prepared by: BETA Group, Inc., Norwood, Massachusetts. December 2006.

BETA, 2006j — *Final Completion and Inspection Report - Volume 8 of 8: Laboratory Analytical Data: Indoor & Foundation Air Monitoring - McCoy Field/Keith Middle School, 225 Hathaway Boulevard, New Bedford, Massachusetts*. Prepared for: City of New Bedford, Department of Environmental Stewardship, 133 William Street, New Bedford, Massachusetts. Prepared by: BETA Group, Inc., Norwood, Massachusetts. December 2006.

BETA, 2006k — *Wetland Replication Final Action Plan #2*. Prepared for: New Bedford Public Schools, 256 Parker Street, New Bedford, Massachusetts. Prepared by: BETA Group, Inc., Norwood, Massachusetts. December 20, 2006.

TRC, 2008a — *Immediate Response Action Plan and Imminent Hazard Evaluation. PCB Contaminated Wetland Sediments. Release Tracking Number (RTN) 4-21300, Wetland to Rear of Keith Middle School, 225 Hathaway Boulevard, New Bedford, Massachusetts*. Prepared for: City of New Bedford, Department of Environmental Stewardship, 133 William Street, New Bedford, Massachusetts. Prepared by: TRC, Lowell, Massachusetts. August 2008.

TRC, 2008b — *Immediate Response Action Status Report. PCB Contaminated Wetland Sediments. Release Tracking Number (RTN) 4-21300, Wetland to Rear of Keith Middle School, 225 Hathaway Boulevard, New Bedford, Massachusetts.* Prepared for: City of New Bedford, Department of Environmental Stewardship, 133 William Street, New Bedford, Massachusetts. Prepared by: TRC, Lowell, Massachusetts. October 2008.

TRC, 2009a — *Immediate Response Action Status Report. PCB Contaminated Wetland Sediments. Release Tracking Number (RTN) 4-21300, Wetland to Rear of Keith Middle School, 225 Hathaway Boulevard, New Bedford, Massachusetts.* Prepared for: City of New Bedford, Department of Environmental Stewardship, 133 William Street, New Bedford, Massachusetts. Prepared by: TRC, Lowell, Massachusetts. April 2009.

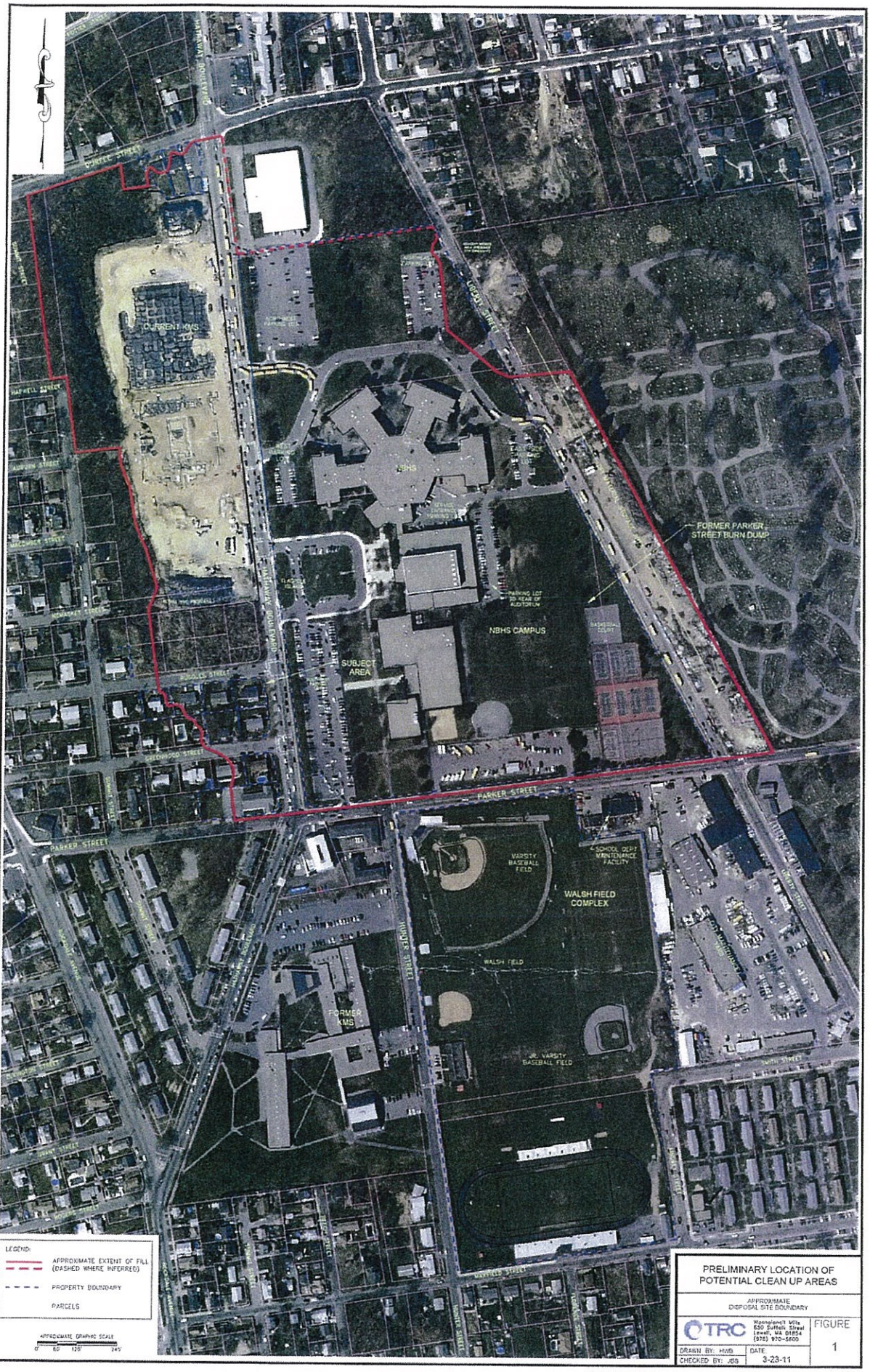
TRC, 2009b — *Immediate Response Action Status Report. PCB Contaminated Wetland Sediments. Release Tracking Number (RTN) 4-21300, Wetland to Rear of Keith Middle School, 225 Hathaway Boulevard, New Bedford, Massachusetts.* Prepared for: City of New Bedford, Department of Environmental Stewardship, 133 William Street, New Bedford, Massachusetts. Prepared by: TRC, Lowell, Massachusetts. September 2009.

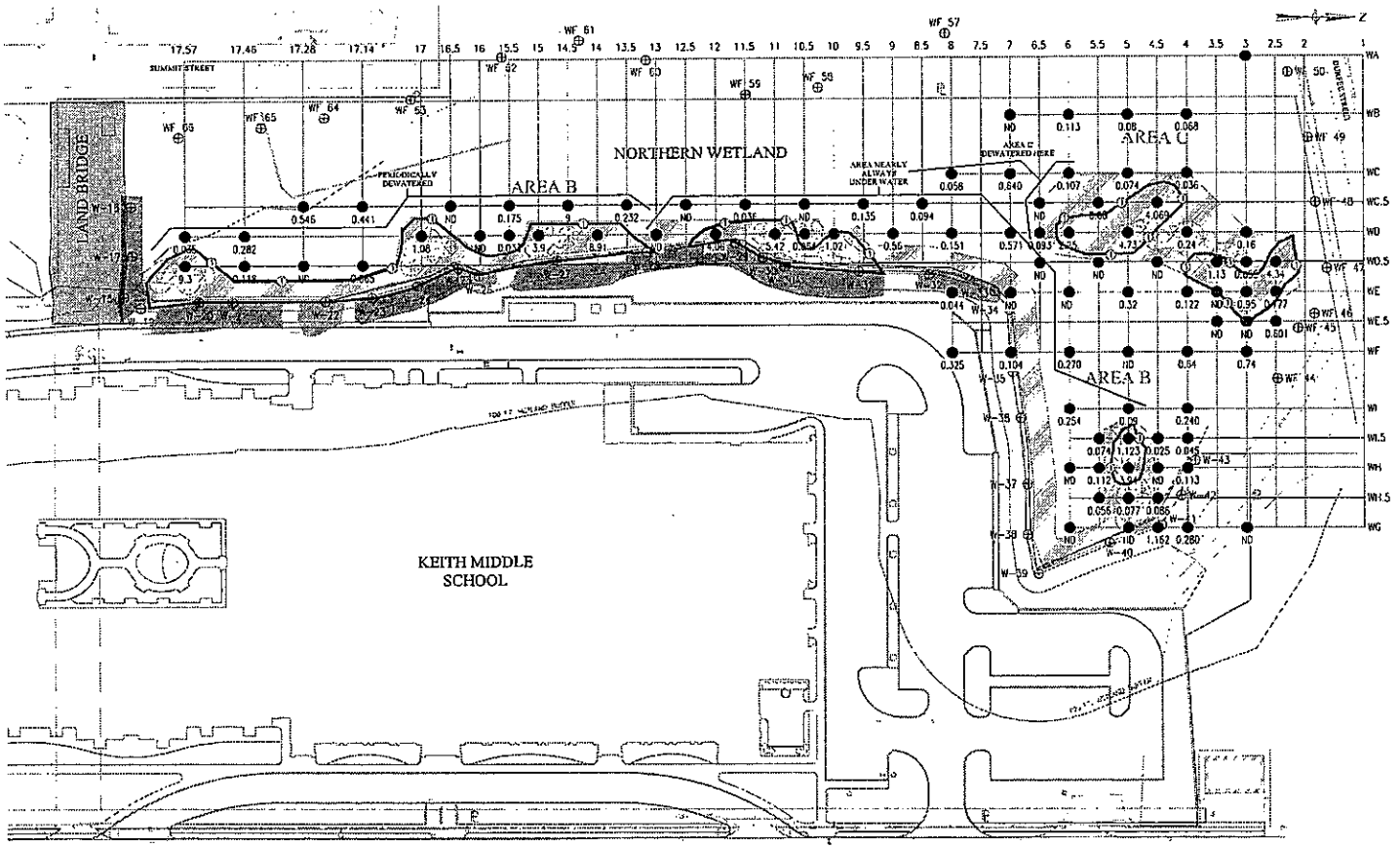
TRC, 2010a — *Immediate Response Action Status Report. PCB Contaminated Wetland Sediments. Release Tracking Number (RTN) 4-21300, Wetland to Rear of Keith Middle School, 225 Hathaway Boulevard, New Bedford, Massachusetts.* Prepared for: City of New Bedford, Department of Environmental Stewardship, 133 William Street, New Bedford, Massachusetts. Prepared by: TRC, Lowell, Massachusetts. March 2010.

TRC, 2010b — *Immediate Response Action Completion Report. PCB Contaminated Wetland Sediments. Release Tracking Number (RTN) 4-21300, Wetland to Rear of Keith Middle School, 225 Hathaway Boulevard, New Bedford, Massachusetts.* Prepared for: City of New Bedford, Department of Environmental Stewardship, 133 William Street, New Bedford, Massachusetts. Prepared by: TRC, Lowell, Massachusetts. October 2010.

* ONLY THE REPORTS PREPARED BY TRC SOLUTIONS INC. AND FILED WITH MADEP ARE INCLUDED ON THE ENCLOSED CD.

EXHIBIT A


PARKER STREET
CURRENT KMS LOT
NBHS
FORMER PARKER STREET BURN DUMP
NBHS CAMPUS
SUBJECT AREA
VARSITY BASEBALL FIELD
SCHOOL DEPT MAINTENANCE FACILITY
WALSH FIELD COMPLEX
WALSH FIELD
FORMER KMS
JR. VARSITY BASEBALL FIELD
LEGEND:
APPROXIMATE EXTENT OF FILL (DASHED WHERE INFERRED)
PROPERTY BOUNDARY
PARCELS
APPROXIMATE GRAPHIC SCALE
0' 60' 120' 240'
PRELIMINARY LOCATION OF POTENTIAL CLEAN UP AREAS
APPROXIMATE DISPOSAL SITE BOUNDARY
TRC
Wannalancit Mills
650 Suffolk Street
Lowell, MA 01854
(978) 970-5600
FIGURE
1
DRAWN BY: HWB
DATE
CHECKED BY: JBS
3-23-11



CONC. IN UPPER 1-4" SOIL AT TOE OF PHASE 1 EMBANKMENT

1-5 MG/KG

5-10 MG/KG

10-20 MG/KG

>20 MG/KG

LEGEND

- SAMPLE LOCATION 0-6"
- SAMPLE LOCATION 1-4'
- INFERRED 1 MG/KG PCB ISO CONCENTRATION CONTOUR IN SEDIMENT 0-6" BGS
- EXCAVATED AREA

MG/KG = MILLIGRAM PER KILOGRAM
ND = NOT DETECTED

SCALE IN FEET: 1"=40'

TRC 249 WESTERN AVENUE AUGUSTA, ME 04330

PROJECT NO: 115058

REV	DESCRIPTION	DATE	DES	CHK	APP
A	ISSUED FOR REVIEW	10/05/10	JLB	JSH	

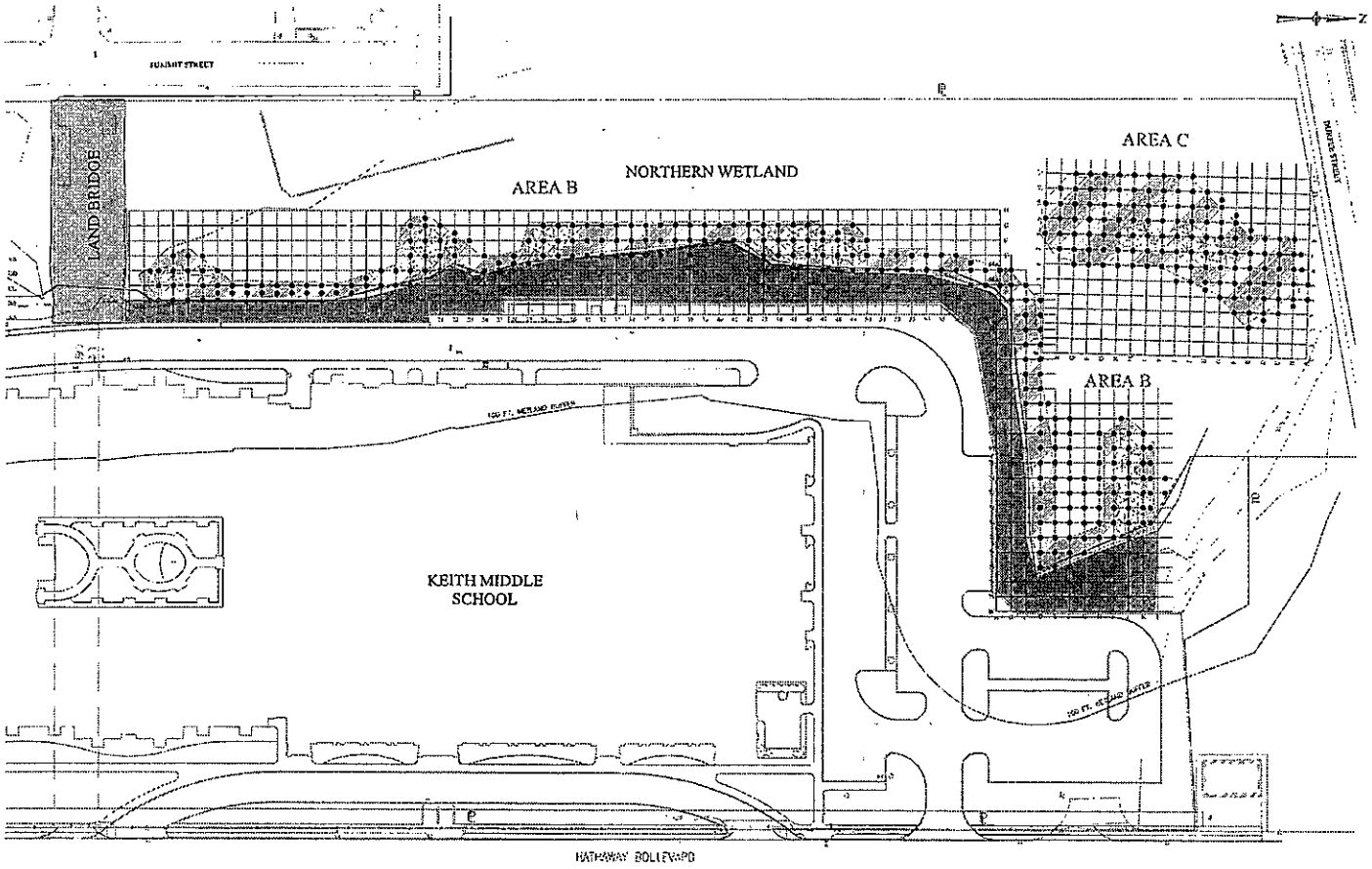
PRE EXCAVATION WETLAND SAMPLING RESULTS
PCBS IN SHALLOW SEDIMENT 0-6" BGS
KMS WETLAND
NEW BEDFORD MASSACHUSETTS

10/10 DAR AS NOTED SCALE

TRC

FIGURE 1

REV. A



LEGEND

- POST CONFIRMATORY SAMPLE LOCATIONS 0-6" BGS
- PHASE 1 EMBANKMENT
- EXCAVATED AREA

MG/KG = MILLIGRAM PER KILOGRAM

SCALE IN FEET: 1"=40'

NOTE:

PCB CONCENTRATIONS <) MG/KG AT ALL LOCATIONS

TRC 249 WESTERN AVENUE AUGUSTA, ME 04330

PROJECT NO: 115058

REV	DESCRIPTION	DATE	DES	CHK	APP
A	ISSUED FOR REVIEW	10/05/10	JLB	JSH	

POST EXCAVATION CONFIRMATORY SAMPLING LOCATION PLAN
KMS WETLAND
NEW BEDFORD MASSACHUSETTS

10/10 AS NOTED

TRC FIGURE 2 REV. A