



Town of Winchester

Town Manager's Office
71 Mt. Vernon Street
Winchester, MA 01890
Phone: 781-721-7133
Fax: 781-756-0505
townmanager@winchester.us

Board of Selectmen Meeting
Monday, August 8, 2016

BUSINESS

Docket Item G - 2: Fish Ladder Viewing Platform – VOTE to authorize
Town Manager to sign final agreement

Supporting Documents:

G - 2: Agreement to be signed by Town Manager

Action Required: VOTE to authorize the Town Manager to sign agreement.

**AGREEMENT WITH RESPECT TO THE
CENTER FALLS DAM FISH LADDER**

AGREEMENT made as of this ___ day of _____, 2016 by and between the Town of Winchester having an address of 71 Mt. Vernon Street, Winchester, MA 01890 (the "Town") and Bayer CropScience Inc. (by its Litigation Agent Stauffer Management Company LLC) and Pharmacia LLC [formerly known as Pharmacia Corporation] (by its Attorney-in-Fact Monsanto Company) (together the "Companies"), having an address c/o de maximis, Inc., Attn: Bruce Thompson, 200 Day Hill Road, Suite 200, Windsor, CT 06095.

WHEREAS, the Companies are the Settling Defendants under the terms of the Consent Decree entered in the case titled United States of America v. Bayer Crop Science Inc. and Pharmacia Corporation, Civil Action 1:08-cv-10325 (the "Consent Decree");

WHEREAS, pursuant to the Consent Decree, the Companies are in the process of implementing the Remedial Action for Operable Unit No. 2 (the "OU-2 Remedial Action") at the Industri-plex Superfund Site in Woburn, Massachusetts consistent with the Remedial Design approved by the U.S. Environmental Protection Agency ("EPA");

WHEREAS, as part of the OU-2 Remedial Action, the Companies will be undertaking certain wetlands replication work;

WHEREAS, as part of said wetlands replication work, the Companies are willing, at their expense, to implement the Center Falls Dam Fish Ladder project in accordance with the terms of this Agreement (the "Project"); and

WHEREAS, the Town wishes the Companies to implement the Project, consistent with its obligations to operate the Center Falls Dam.

NOW, THEREFORE, in consideration of the foregoing, of covenants and agreements set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Town and the Companies agree as follows:

1. The Companies assume responsibility for completing the design of the Project (the "Project Design"), which design once approved in writing by EPA shall be incorporated into and become part of the Remedial Design for the OU-2 Remedial Action. In order to assist the Companies with respect to the Project Design, the Town's consultant, VHB of Watertown, Massachusetts, has provided copies of the design work (including plans, drawings and specifications) generated to date for the Project, including where applicable, copies of electronic CAD files, to de maximis, inc., as the Companies' Project Coordinator for the OU-2 Remedial Action (the "Project Coordinator").

2. No later than such time as the Companies submit the Project Design to EPA for its review and approval, the Companies shall also submit copies of the Project Design to the Town for the Town's review and comment. The Town shall coordinate with the Companies and EPA in the finalization of the Project Design, so that it shall satisfy the reasonable requirements of the Town (including without limitation the control of flood waters the extent necessary to

protect public safety and welfare and the Town's other public duties and operational responsibilities associated with the Dam), as well as those imposed by the Commonwealth of Massachusetts' Division of Marine Fisheries, including without limitation the Operation and Maintenance Plan attached hereto as Exhibit A and made part hereof, as said plan may be amended or modified with the approval of EPA and concurrence of the Town ("O&M Plan"). Such coordination by the Town shall be undertaken in a timely manner, so that the Project Design can be duly approved by EPA and the Project constructed during the calendar year 2016 construction season. The Town will utilize the services of their consultant VHB to review the final design and to assist the Town in overseeing the construction of the Fish Ladder. The Companies shall reimburse the Town for, or pay directly to VHB, the services provided by VHB in accordance with the not-to-exceed budget attached hereto as Exhibit B and made part hereof.

3. Once the Project Design has been approved in writing by EPA, the Companies shall construct the Project in accordance with the approved Project Design, as said design may be amended or modified with the approval of EPA and the concurrence of the Town if necessary to account for conditions identified during such construction ("Project Construction"). Unless delayed due to *force majeure* circumstances, the Companies shall complete the Project Construction by no later than December 31, 2016. The Companies shall, at their sole cost and expense, be responsible for obtaining all necessary federal, state and local permits required for the Project Construction.

4. Following completion of Project Construction and, unless otherwise agreed by the Companies and the Town and approved by EPA, for so long as the Center Falls Dam Fish Ladder (the "Fish Ladder") shall remain in place, the Companies shall cause it to be operated, monitored, inspected, maintained, repaired and replaced ("Project Operation and Maintenance") in accordance with O&M Plan.

5. Notwithstanding any provision of this Agreement or the O&M Plan to the contrary, neither the Companies, their Project Coordinator nor their respective employees, agents, consultants or contractors shall have any right, authority, or responsibility with respect to the operation, monitoring, inspection, maintenance, repair or replacement of the Center Falls Dam ("Dam") or the condition of the Dam, nor shall they have any right, authority, or responsibility to manage or control the flow of water over, through, under or around the Dam. All authority, control and responsibility for the Dam and said flow of water in connection with it shall rest solely and exclusively with the Town, which, to the extent necessary to protect public safety and welfare by controlling flood waters and to the extent consistent with the Town's other public duties and operational responsibilities associated with the Dam, shall direct water flow through the Fish Ladder in a manner that complies with the requirements of the O&M Plan, to the extent feasible.

6. For purposes of implementing this Agreement, the Town hereby grants the Companies, the Project Coordinator and their respective employees, agents, consultants and contractors rights of access with workers, machinery, equipment and materials/supplies on, over, under and across the property, both real and personal, identified on Exhibit C attached hereto and made part hereof that is currently or may hereafter be owned, operated or controlled by the Town (the "Town's Dam Property"). The Project Coordinator shall notify the designated representative of the Town (the "Town's Representative") at least forty-eight (48) hours before

initiating Project Construction or Project Operation and Maintenance work (unless [a] such work is being performed in accordance with a schedule therefor that had previously been provided to the Town, with the first work pursuant to such schedule being performed at least forty-eight (48) hours after the schedule was provided to the Town, or [b] shorter notice is necessitated by emergency or other condition threatening injury or damage to person or property) and shall coordinate with the Town's Representative in an effort to minimize, to the extent feasible, disruption to the Town's Dam Property and the use thereof during the Project Design, Project Construction, and Project Operation and Maintenance. In no event shall the Project Construction damage the structural integrity or operational functions of the Dam. In addition, the Companies shall, upon completion of Project Construction, restore the Town's Dam Property to as near as possible the condition it was in immediately prior to the initiation of such construction, except for the presence of the Project for which an irrevocable license is granted pursuant to Paragraph 7 hereof.

7. The Companies and the Town agree that the Companies or an entity designated by the Companies (subject to the Town's reasonable approval) shall own the Fish Ladder. For this purpose, the Town hereby grants to the Companies and any designee approved by the Town) an irrevocable, non-exclusive license, commencing on the date of this Agreement, to:

- (a) Construct, install and erect the Project and all elements and components thereof and appurtenances thereto on, at, over and under the location as shown on the plan attached hereto as Exhibit C and made part hereof.
- (b) Subject to the limitations set forth in Paragraph 5 hereof, operate, inspect, maintain, repair and replace the Project and all elements and components thereof and appurtenances thereto in accordance with the O&M Plan.

Should the Companies wish to discontinue the Project, upon receipt of written approval from the EPA and the Massachusetts Division of Marine Fisheries ("DFM"), the Companies shall at their sole cost and expense remove the Project and all elements and components thereof and appurtenances thereto and shall promptly restore the Town's Dam Property to as near as possible the condition it was in prior to construction of the Project. This Agreement and the license granted hereunder shall terminate upon completion of any such restoration. The filing by the Companies of a voluntary petition in bankruptcy or the approval by a court of competent jurisdiction of a petition applicable to the Companies in any proceedings instituted under the provisions of the United States Bankruptcy Code, as amended, or under any similar acts which may hereafter be enacted shall constitute a default under this Agreement and shall automatically terminate this Agreement, unless the financial assurance provided pursuant to the Consent Decree shall provide sufficient in accordance with the terms of this Agreement. Notwithstanding the termination of this Agreement pursuant to the foregoing provisions of this Paragraph 7, the provisions of Paragraph 9 hereof shall remain in full force and effect as to all acts or omissions of the parties preceding the date of termination and, as such, shall be binding upon and inure to the benefit of the parties and their successors and assigns thereafter.

8. The Companies agree that they shall pay for all costs and expenses associated with Project Design, Project Construction, Project Operation and Maintenance, and Project

removal (if applicable pursuant to Paragraph 7 hereof), and that the Town shall have no liability or responsibility on account thereof.

9. The Companies agree to indemnify, defend and hold harmless the Town and its officers, officials, employees and agents (the "Indemnified Parties") from and against all loss, liability, damage and expense, including, without limitation, reasonable attorneys' fees and court costs, ever suffered or incurred by the Indemnified Parties on account of Project Design, Project Construction or Project Operation and Maintenance; provided, however, that it is expressly understood and agreed that the Companies and the Project Coordinator shall have absolutely no responsibility or liability on account of, and the Town hereby releases the Companies and the Project Coordinator from, any responsibility or liability resulting or arising from:

- (a) The operation, monitoring, inspection, maintenance, repair or replacement of the Dam; the condition of the Dam, except as maybe caused by acts of the Companies or the Project Coordinator; the flow of water over, through, under or around the Dam (other than flows associated with the Fish Ladder); or any conditions of flooding and loss or damage to person or property caused by, associated with or related to said flow of water; and
- (b) Any special, remote or consequential damages, whether in contract or tort.

10. The Companies or the Project Coordinator shall obtain and maintain in force during the duration of the Project commercial liability insurance with respect to their operations and activities associated with the Project in limits of not less than \$2,000,000 per occurrence and \$5,000,000 in the aggregate, which shall include contractual liability coverage and shall name the Town as an additional insured party. Upon the date of this Agreement and within thirty (30) days prior to the termination date of any such policy or policies of insurance, the Companies or the Project Coordinator shall provide to the Town's Representative certificate(s) of insurance which specify that such policy or policies may not be modified or cancelled without at least twenty (20) days advance notice to the Town.

11. Any notice, request, consent or other communication relating to this Agreement or the Project shall be deemed duly given or served if (a) sent by electronic communication such as electronic mail; (b) sent by a recognized overnight courier service; or (c) mailed by registered or certified mail, return receipt requested, in each case with all applicable postage and other charges prepaid, addressed to the recipient party at its following address or to such other address as such party may from time to time notify the other party of in writing.

To the Town:

Town of Winchester
Attn:
71 Mt. Vernon Street
Winchester, MA 01890

To the Companies:

de maximis, inc.
Attn: Bruce Thompson
200 Day Hill Road, Suite 200
Windsor, CT 06095

All notices, requests, consents and other communications hereunder shall be deemed to have been received (i) if made by electronic communication such as electronic mail, at the time that receipt thereof has been acknowledged by electronic confirmation or otherwise; (ii) if sent by overnight courier, on the next business day following the day such notice is delivered to the courier service; or (iii) if sent by certified mail, on the fifth business day following the day such mailing is made.

12. The Companies may at any time and from time to time change their Project Coordinator for purposes of this Agreement by written notice given to the Town. Upon the giving of such notice, the new Project Coordinator named therein shall have all the rights, responsibilities, obligations and protections as set forth in or accorded under this Agreement.

13. Notwithstanding any other provision of this Agreement to the contrary, if, following the second Five Year Review conducted by EPA with respect to OU-2 Remedial Action, the Town wishes to take title to the Project and all elements and components thereof and appurtenances thereto and, as an integral part thereof, assume and duly perform Project Maintenance in accordance with the O&M Plan, then the Town may so notify the Companies in writing and, if approved by EPA and DFM, the following shall occur:

(a) The Town shall assume and duly agree in writing for the benefit of the Companies and EPA to perform all of the Companies' obligations under the terms of the O&M Plan and all other obligations of the Companies under the Consent Decree as they relate solely and exclusively to the Project (and not as to any other matter covered by or regulated under the Consent Decree). Such agreement shall be consented to in writing by EPA, and shall include an acknowledgment and agreement by EPA that it shall look solely to the Town, and not to the Companies, with respect to all such matters that the Town is assuming and agreeing to perform with respect to the Project.

(b) Upon the agreement described in Paragraph 13(a) hereof being executed and delivered by all of the parties that are signatory to it and becoming effective in accordance with its terms, the Companies or their designee that owns the Project shall execute an instrument conveying all of their/its right, title and interest in and to the

Project and all elements and components thereof and appurtenances thereto to the Town without charge or cost to the Town.

(c) Upon the agreement described in Paragraph 13(a) hereof being executed and delivered by all of the parties that are signatory to it and becoming effective in accordance with its terms and the conveyance of title to the Project being effected as provided in Paragraph 13(b) hereof, this Agreement and all rights of access and licenses granted by the Town hereunder shall terminate and be of no further force or effect, except that the provisions of Paragraph 9 hereof shall survive such termination as to all acts or omissions of the parties preceding the date of termination and, as such, shall be binding upon and inure to the benefit of the parties and their successors and assigns thereafter.

14. If any provisions of this Agreement or any application thereof shall be deemed by a court to be invalid or unenforceable under a given set of circumstances, said provision(s) shall be interpreted so as to permit their enforceability to the maximum extent possible, failing which, this Agreement shall be interpreted as if such provision(s) were not a part hereof, and the remainder of this Agreement shall not be affected thereby.

15. This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts.

16. This Agreement and the attachments thereto contain all of the agreements of the parties with respect to the subject matter hereof and supersedes and terminates all prior or contemporaneous oral and written negotiations and dealings between them with respect to such subject matter. The agreement of parties contained in this Agreement shall not be modified or amended unless such modification or amendment is in writing and signed by the parties hereto.

17. This Agreement shall remain in full force and effect and be binding upon and inure to the benefit of all successors and assigns of the parties hereto, unless and until terminated pursuant to the provisions of Paragraph 7 or Paragraph 13(c) hereof, or otherwise terminated by written agreement executed by the Town and the Companies, which agreement shall be approved in writing by EPA.

18. The Companies shall not assign any right or delegate any duty under this Agreement without the prior written consent of the Town. Subject to the foregoing, this Agreement shall inure to the benefit of, and be binding upon, the parties' respective successors and assigns.

19. In any action to enforce the terms of this Agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees and court costs.

[Signatures are on Next Page]

IN WITNESS WHEREOF, this Agreement has been executed and delivered as a sealed instrument as of the date first above written by the duly authorized representatives of the Town and the Companies.

TOWN OF WINCHESTER

By: _____
Its _____, Being hereunto duly authorized

BAYER CROPSCIENCE INC. (by its Litigation Agent Stauffer Management Company LLC) and PHARMACIA LLC [formerly known as Pharmacia Corporation] (by its Attorney-in-Fact Monsanto Company)

By: de maximis, inc., their Project Coordinator

By: 
Its DAVID, Being hereunto duly authorized

EXHIBIT A

Operation and Maintenance Plan

The following Project Operation and Maintenance shall be conducted by the Companies or their Project Coordinator with respect to the Center Falls Dam Fish Ladder ("Fish Ladder"):

- Inspect the Fish Ladder at least weekly to remove any accumulated debris during the period from March 1 to October 31.
- Inspect the Fish Ladder monthly to remove accumulated debris during the period from November 1 to February 28 (or February 29, as applicable).
- Inspect the Fish Ladder annually and perform maintenance, if and as required, on the Fish Ladder in order to maintain the fishway in a condition that provides safe and efficient passage for sea-run fish.
- Inspect the channel immediately downstream and upstream of the Fish Ladder annually and remove accumulated debris/plant grown that may obstruct the Fish Ladder.
- Remove the Fish Ladder flash boards at the beginning of each migratory season (March 1) and re-install them at the end (October 31) of each migratory season.
- Document annual maintenance records (including repairs) to the Fish Ladder and major events related to river herring run.
- Modify the Operations and Maintenance Plan, including developing gate operating thresholds that relate to rainfall and streamflow data, three years after installation for review and approval by Town.
- Install staff gauge and monitor and record water levels upstream of the Fish Ladder on a weekly basis.
- Provide copies of reports, records and other documents prepared in connection with operation, maintenance and repair of the Fish Ladder as requested by the Town.

EXHIBIT B

VHB SCOPE OF SERVICES

Task 1 – 100% Remedial Design Drawing Review

On behalf of the City of Winchester, VHB will review the revised 100% Remedial Design Part 2 Drawings associated with installation of the Center Falls Dam Fish Ladder prepared by Haley & Aldrich for completeness based on comments and input from Mass Fisheries. This task assumes four (4) hours.

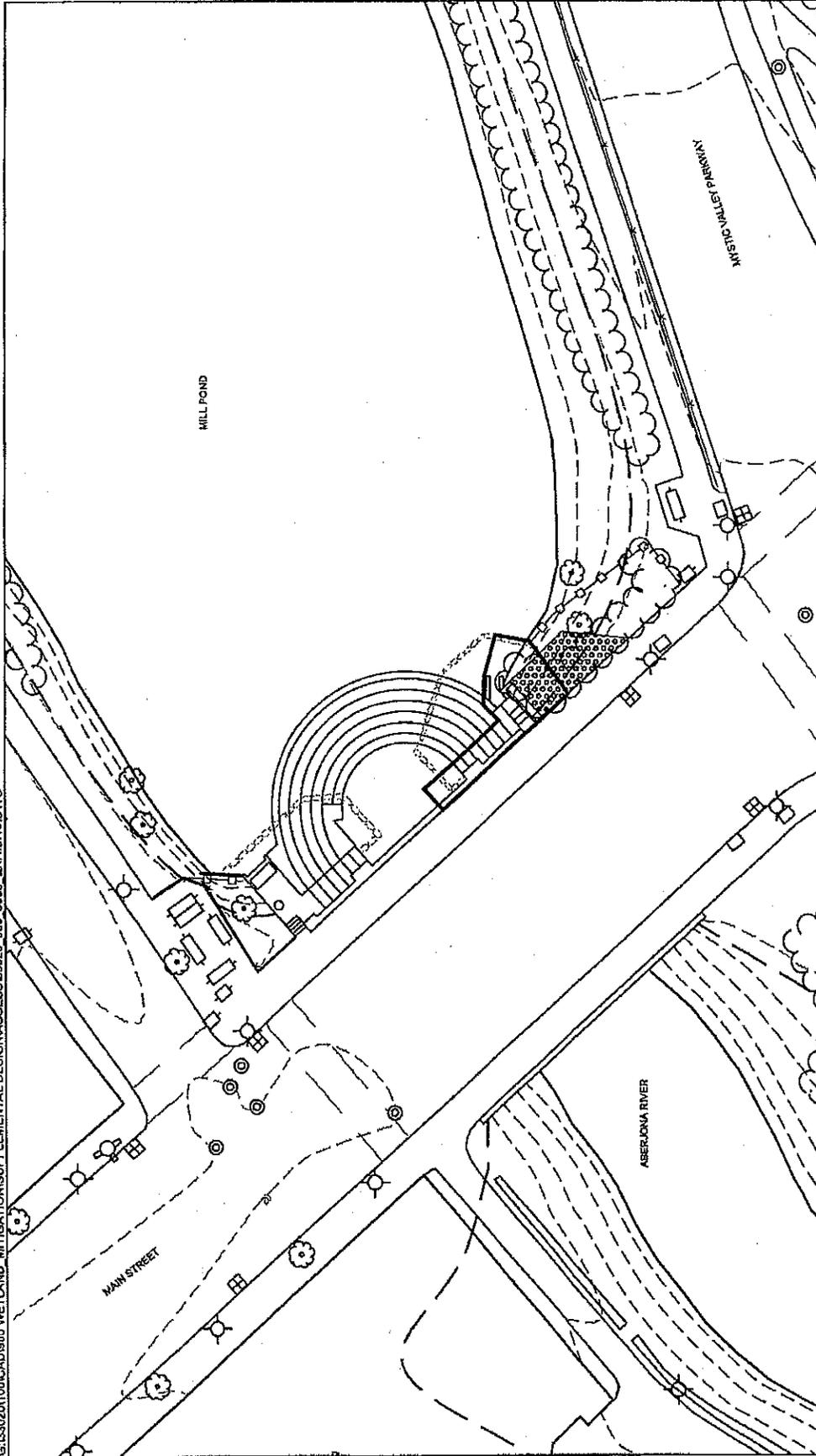
Task 2 – Remedial Action Meetings & Construction Oversight

On behalf of the City of Winchester, VHB will attend weekly Remedial Action meetings during construction activities, which is assumed to be for seven (7) weeks and conduct construction oversight during installation of the fish ladder. This task assumes one (1) visit per week for four (4) hours including travel.

VHB will perform the Scope of Services contained in Task 1-2 on a not-to-exceed basis as summarized below:

Not-To-Exceed Tasks	Fee
Task 1: Design Review	\$860.00
Task 2: Meetings & Construction Oversight	\$6,020.00
Total:	\$6,880.00

GARDNER, ZACHARY Printed: 7/12/2016 9:50 AM Layout: EXHIBIT 3(D&M)
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LEGEND

— LIMIT OF POTENTIAL OM&M WORK

HAILEY ALDRICH

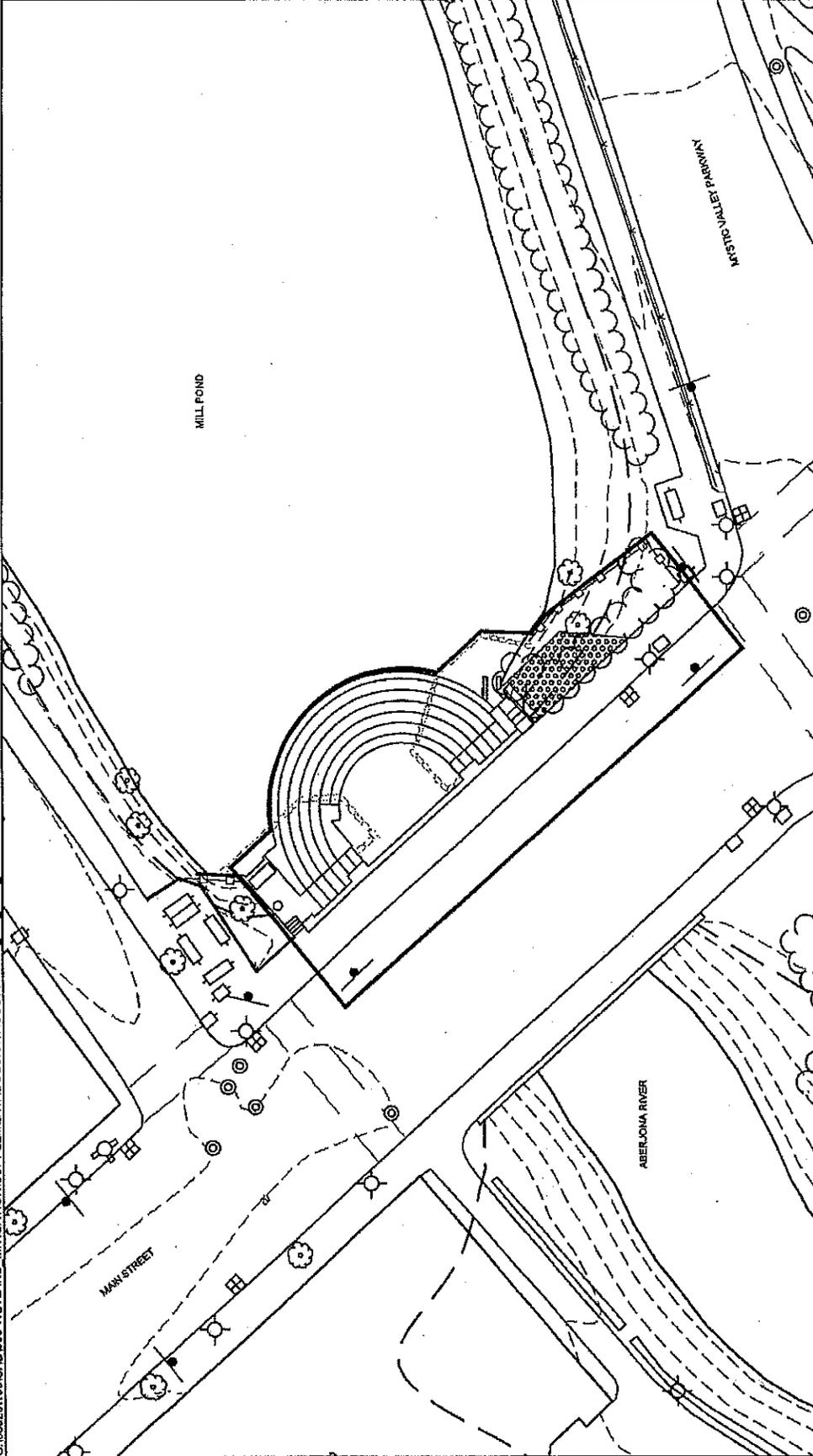
100% REMEDIAL DESIGN
INDUSTRIAL-PLEX OPERABLE UNIT 2 SUPERFUND SITE

RIGHTS OF ACCESS - OM&M PHASE
CENTER FALLS DAM FISH LADDER
WINCHESTER, MASSACHUSETTS

SCALE: AS SHOWN
JULY 2016

EXHIBIT C

GARDNER, ZACHARY Printed: 7/12/2016 9:56 AM Layout: EXHIBIT 3(CONSTRUCTION)
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100% REMEDIAL DESIGN
INDUSTRIAL/PLEX OPERABLE UNIT 2 SUPERFUND SITE



RIGHTS OF ACCESS -
CONSTRUCTION PHASE
CENTER FALLS DAM FISH LADDER
WINCHESTER, MASSACHUSETTS

SCALE: AS SHOWN
JULY 2016

EXHIBIT C



LEGEND
LIMIT OF WORK - CONSTRUCTION PHASE