

**BERKSHIRE REGIONAL PLANNING COMMISSION**  
**1 FENN STREET, SUITE 201, PITTSFIELD, MASSACHUSETTS 01201**  
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KYLE HANLON, Chair  
SHEILA IRVIN, Vice-Chair  
MARIE RAFTERY, Clerk  
CHARLES P. OGDEN, Treasurer

NATHANIEL W. KARNS, A.I.C.P.  
Executive Director

## **AGENDA**

**Rest of River Municipal Committee**  
**November 15, 2016, 3:00 p.m.**  
**Selectman's Room, Stockbridge Town Office Building**

1. Introductions
2. Review of minutes of November 1, 2016 meeting
3. Housatonic River Citizens Coordinating Council update
4. Intergovernmental Agreement
5. Executive Session – further legal strategy for probable EPA appeal and appeals court proceedings
6. Adjournment

***City and Town Clerks: Please post this notice pursuant to M.G.L. Chapter 39, Section 23B.***

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## Meeting Minutes

**Rest of River Municipal Committee**  
**November 15, 2016, 3:00 p.m., Stockbridge Town Office Building**

**1. Introductions.** The meeting opened at 3:06 p.m. Attending the session were the following Committee members:

Warren Archey, Lenox Select Board  
Christopher Ketchen, Lenox Town Manager  
Bob Nason, Lee Town Administrator  
Steve Shatz, Stockbridge Selectman  
Rene Wood, Sheffield Representative

Others present:

Lauren Gaherty, BRPC  
Nat Karns, BRPC

**2. Review of minutes of Oct. Nov. 1, 2016 meeting.** Motion to accept by R. Wood, seconded by W. Archey. Minutes accepted as written by W. Archey, S. Shatz, B. Nason; R. Wood abstained because she did not attend one of the meetings.

**3. Housatonic River Citizens Coordinating Council update.** L. Gaherty gave a quick summary of the CCC meeting of Nov. 9th. The EPA staff gave the group an overview of the final permit contents and the permit process moving forward. There were a few revisions to the final permit, and the revision that would be of most interest to the group involves PCB contamination at dams and impoundments. The draft permit directed GE to pay for incremental costs that third parties incur due to the testing, handling and disposing of PCB contaminated soils. GE objected to paying for third party work. The final permit states that GE itself must deal with the PCBs disturbed in future work, rather than paying for costs incurred by others. The end result is that GE must still pay for work and costs dealing with PCBs, it is now that they must do it themselves or hire their own subcontractor.

The only appeal brief that has been submitted to date has been from the Housatonic River Initiative (HRI). They are appealing the permit because they do not believe that it removes enough of the PCBs from the environment, and that they do not believe that EPA has worked hard enough to search out and pilot test technologies that break down PCBs. HRI has been consistent in their concerns and views for many years. L. Gaherty stated that she was surprised that other organizations who believe the same way, such as Citizens for PCB Removal, are not joining them in their brief. Also, GE has

requested and been given a word extension, allowing them to utilize a maximum of 17,000 words in their brief instead of the default maximum of 14,000. EPA agreed with the extension, requesting the same courtesy later when they file their response to GE.

4. **Intergovernmental Agreement (IGA).** The Committee reviewed and approved edits to the revised IGA as they read through the document. The major changes included:

- The term ARARs were removed from Preamble Goal #2 and replaced with broader language that allows the communities to use whatever legal means are available through the Hazardous Waste Siting Act to protect the communities' interests.
- Goal 3 – specifically state that GE is “legally and financially” responsible in perpetuity for PCBs.
- Define “on site” as narrow as possible, referring to the areas of work listed in the permit, which is generally within the 10-year floodplain. Uncontaminated land and lands outside these areas should not be considered “on site.”
- Section I.b.iv. was deleted.
- Section 2.b. All agreed to remove the listing of an exact budget amount.

R. Wood updated the Committee about the Town of Sheffield's stance regarding the IGA. She has brought the new Select Board up to date on the workings of the Committee, the IGA renewal and the projected work load ahead. The Town of Sheffield has proposed to pay a cap of 5% of the total approved expenditures of the Committee going forward. This will replace the Town's current 20% share of the total, and would mean a 5% share for Sheffield and an approximate 24% for each of the other four towns. The Town of Lenox agreed to this proposal, stating that they understood Sheffield's limited cleanup impacts and were glad to hear that the town was staying united with the other Committee members. Others agreed that preserving unity was of greatest importance.

R. Wood made the motion to accept the IGA as amended, seconded by S. Shatz. The motion carried unanimously.

The Committee then discussed the timeline by which the IGA will be brought for signature by the BRPC and the various Select Boards. Each will work with BRPC to set a timeline for signatures.

5. **Executive Session.** The Committee moved into Executive Session to discuss legal strategy at 4:25 p.m., with the intent of not returning to regular session with a motion made by R. Wood and seconded by W. Archey. Roll call vote: S. Shatz, Stockbridge AYE; W. Archey, Lenox AYE; B. Nason, Lee AYE; R. Wood, Sheffield AYE (Great Barrington not present).

6. **Adjournment.** The Committee did not return to regular session.

Meeting Materials:

- Meeting Agenda 11-15-16
- Meeting Minutes of 11-1-16
- Intergovernmental Agreement Amendment 11-15-16

Respectfully submitted,  
Lauren Gaherty, BRPC

## PREAMBLE

### Draft Version 11-15-16

The cleanup of the Housatonic River of PCBs is viewed as one of the most important regional issues in recent Berkshire County history due to the geographical extent of the cleanup, the duration of proposed cleanup activities and the associated socioeconomic impacts on Berkshire communities. The Housatonic River Watershed encompasses approximately 53% of Berkshire County and contains all or a portion of 26 of the 32 Berkshire communities. The Commonwealth of Massachusetts has designated portions of the watershed as Areas of Critical Environmental Concern, and the Massachusetts Natural Heritage and Endangered Species Program has noted the rich biodiversity of the Housatonic River Watershed.

The East and Main branches of the Housatonic River between Pittsfield and Sheffield in Massachusetts are heavily contaminated by PCBs due to the handling and disposal operations of General Electric Company (GE). Under the Consent Decree of 1999 and its subsequent amendments GE has agreed to conduct cleanup activities to remove PCBs from the river. GE's *Corrective Measures Study* of 2010 offers projected cleanup activities that could last between five and 50 years, depending on the level of work that is required by the U.S. Environmental Protection Agency (EPA). The impacted section of the Housatonic River in Massachusetts encompasses the City of Pittsfield and the Towns of Lenox, Lee, Stockbridge, Great Barrington, and Sheffield (the "Rest of River Communities").

In 2014 the EPA issued its *Draft Modification to the Reissued RCREA Permit (Permit)* which directed GE to clean up the "Rest of River", which is defined as the Housatonic River downstream of the confluence of the West and East Branches and extending south to Long Island Sound. The *Permit* outlines a cleanup that is estimated by the EPA to reduce the downstream transport of PCBs by 88-89% by removing approximately 990,000 cubic yards of contaminated material over an estimated period of 13-15 years. Overall the Housatonic Rest of River Municipal Committee supports the EPA's *Permit*, although there are areas where the Committee believes that the *Permit* could be improved to provide more long-term protection of human health and the environment.

The Committee has determined that the cleanup of the Housatonic River must at a minimum meet the following goals to be protective of human health, the natural environment and residents' quality of life:

1. A strict adherence to the *Permit's* directive that GE "shall dispose of all contaminated sediment and soil, as well as other waste material, off-site at existing licensed facilities that are approved to receive such waste material and are in compliance with EPA's off-site rule (40 C.F.R. 300.440.) The Permittee shall maximize the transport of such waste material to off-site facilities via rail" (*Permit*, Sec. II.B.6 and Attachment D).

2. The Massachusetts Hazardous Waste Facility Siting Act (MGL c21D) is listed as an Applicable or Relevant and Appropriate Requirement (ARAR) for all temporary cleanup activities that are listed in that act (staging and construction areas, storage areas, dewatering and treatment facilities, etc.). The Committee acknowledges that handling, moving, dewatering and stockpiling of contaminated sediments and soils will occur during the cleanup, but all agree that such activities must be temporary and materials must be derived solely from Rest of River PCB cleanup activities.

3. GE remains responsible in perpetuity for monitoring, controlling and removing PCBs whenever contamination levels exceed performance standards during and after completion of the cleanup. EPA's *Permit* allows significant volumes and concentrations of PCBs to remain in the Rest of River environment, employing capping throughout the river system to control PCBs left behind after the cleanup is completed. It is imperative that the entirety of the legal liability and financial burden remains squarely on the shoulders of GE and any of its successors to avoid becoming an unfair burden of future generations to monitor and manage those PCBs left behind.

4. EPA requires GE to aggressively search for and employ new or emerging technologies that have the potential to destroy PCBs or break them into less- or non-toxic components as alternatives to conventional technologies that include excavation/dredging and disposal of contaminated soils and sediments. New or emerging technologies that reduce disturbance of significant floodplain or wetland habitats or that can be done *in situ* should be given highest priority.

5. The definition of "on-site" is narrowly confined to only those areas that are currently contaminated and that are specifically listed in the *Permit* as sites that GE must clean up, **which are generally areas within the 10-year floodplain as shown on the map of Figure 2 of the *Permit*. On-site does not extend to areas that are outside the 10-year floodplain nor to any areas currently uncontaminated by PCBs.** The EPA's *Permit* is already allowing PCBs to remain in millions of cubic yards of river/wetland/impoundment sediment, riverbank and floodplain soils throughout the river corridor, from Pittsfield to Long Island Sound. We oppose any action that will allow GE to expand the area of land within the Housatonic River Watershed that would be permanently impacted by PCB contamination, including the siting of any permanent hazardous materials or waste facility.

The following amendment reflects the events that have occurred since the signing of the original Intergovernmental Agreement (IGA) of 2013 and the current strategy of the Rest of River municipal governments as they jointly and as a united entity move forward through the EPA permitting process and a highly probable federal appeals court process. This IGA outlines how the Rest of River Municipal Committee will proceed through and retain legal counsel to proceed through the EPA permitting process and the federal appeals court process if necessary.

## **INTERGOVERNMENTAL AGREEMENT**

This AGREEMENT (the “Agreement”) is made and entered into this \_\_\_\_ of November, 2016 by and among the BERKSHIRE REGIONAL PLANNING COMMISSION (hereafter “BRPC”), having principal offices at 1 Fenn Street, Suite 201, Pittsfield, MA 01201, and the municipalities of Great Barrington, Lee, Lenox, Sheffield and Stockbridge (hereafter “MUNICIPALITIES”), all governmental units as defined under M.G.L. c. 40, §4A.

The MUNICIPALITIES will continue to actively participate in the EPA permitting and appeals process and, where deemed necessary, participate in the other administrative and/or court proceedings (collectively the “Appeals”) to protect the health and welfare of the environment and the people within the five Rest of River communities. The MUNICIPALITIES may pursue opportunities to negotiate with GE regarding compensation for socioeconomic damages to the MUNICIPALITIES associated with the contamination and cleanup of the Housatonic River Site, as defined by the EPA. The MUNICIPALITIES, while undertaking these actions are deeply mindful of the impacts and consequences that cleanup activities will have on Berkshire County residents, businesses, resources, economic development and municipal operations.

The MUNICIPALITIES have agreed that BRPC, as agent for the MUNICIPALITIES, shall retain a law firm (hereafter the “Law Firm”) approved by the municipalities; that BRPC shall communicate the position of the MUNICIPALITIES to the Law Firm regarding filing of legal arguments during the EPA permit and appeals process, during the federal appeals and in negotiations with GE (the EPA and court proceedings are hereafter collectively referred to as the “Appeals”); and that, if it is deemed necessary by the MUNICIPALITIES to pursue litigation related to the river cleanup BRPC shall so communicate the position of the MUNICIPALITIES to the Law Firm for the purposes of pursuing the Appeals. The MUNICIPALITIES have agreed that BRPC will be responsible for all coordination between the Law Firm and the MUNICIPALITIES; that BRPC shall act as the agent and representative of the MUNICIPALITIES, subject to advice and approval from the MUNICIPALITIES per this Agreement, in assisting the Law Firm in these matters; and that BRPC shall act as the MUNICIPALITIES’ fiscal agent as described in Section 2.

Each party to this Agreement has obtained authority to enter into this Agreement pursuant to M.G.L. c. 40, § 4A. The MUNICIPALITIES have obtained authorization by vote of their Boards of Selectmen. BRPC has obtained authorization by vote of the Commission.

Therefore, in consideration of the mutual promises, payments and agreements contained herein, the parties, intending to be legally bound thereby, agree as follows:

1. Governing Body and Voting Procedures. The MUNICIPALITIES shall form a governing body (“COMMITTEE”) consisting of two representatives from each municipality. The Boards of Selectmen from the Towns of Great Barrington, Lee,

Lenox, Sheffield and Stockbridge shall each appoint two representatives from their respective towns. Each municipality shall have one vote on the COMMITTEE. A majority of MUNICIPALITIES must have at least one appointed representative present in order to constitute a quorum and to conduct any business. General business shall be conducted using a majority vote of the MUNICIPALITIES present and constituting a quorum. Business involving the Appeals shall require a majority vote of the MUNICIPALITIES present and constituting a quorum.

- a. The Law Firm. The COMMITTEE shall deliberate and provide direction to the BRPC in order for BRPC to provide direction to the Law Firm regarding the negotiations on the MUNICIPALITIES' behalf with GE regarding compensation for socioeconomic damages to the MUNICIPALITIES associated with the contamination and cleanup of the Housatonic River Site and, if necessary, in prosecuting all Appeals.

The COMMITTEE shall, by majority vote of the MUNICIPALITIES present and constituting a quorum, establish rules that govern its operating practices, and vote and approve estimated budgets of time and out-of-pocket costs payable to the Law Firm and BRPC prior to incurring any costs.

- b. Votes.
  - i. Decisions regarding financial settlement offers regarding claims against third parties such as GE, or acceptance of settlement offers by GE, shall require a majority vote plus one of the COMMITTEE and be subject to approval by the select boards of each MUNICIPALITY.
  - ii. To allow or not to pursue an appeal of an in-county landfill of PCB's from the Rest of River site shall require a unanimous vote of the COMMITTEE and be subject to approval by the Select Boards of each of the MUNICIPALITIES.
  - iii. Decisions regarding any distribution of funds received shall require a majority vote plus one and be subject of approval by the select boards of each of the MUNICIPALITIES.
  - iv. Any decisions regarding weighting of votes based on contributions for payments of costs and/or based on socioeconomic impacts suffered by the individual MUNICIPALITIES due to cleanup activities shall require a unanimous vote of the COMMITTEE.

2. Payment of Fees, Costs and Expenses.

- a. Subject to the provisions of this Agreement, the MUNICIPALITIES have agreed to pay all approved fees, costs and expenses, including reasonable out-of-pocket costs, payable to the Law Firm, for legal services in accordance with its contract, and all approved fees, costs and expenses incurred by BRPC, subject to approval by the COMMITTEE as required in Section 1 of this agreement.
- b. The MUNICIPALITIES have funded this Agreement by through specific appropriations beginning in fiscal year 2017, in the amount of \$87,337.94. Funding for subsequent fiscal years is subject to appropriation by each of the MUNICIPALITIES.
- c. BRPC will review and submit all estimated budgets, including time and out-of-pocket costs, prepared by the Law Firm to the COMMITTEE for review and approval prior to incurring expenses as set forth in Section 1. Upon receipt of bills from the Law Firm, BRPC will promptly circulate the bills to the representatives of the COMMITTEE who shall indicate their approval or any objections to BRPC within five business days. If there are no objections, BRPC will promptly invoice the MUNICIPALITIES who will promptly process payment to BRPC. When all MUNICIPALITIES have paid, BRPC will promptly process payment to the Law Firm, however BRPC shall have authority but no obligation to make partial payments to the Law Firm when fewer than all the MUNICIPALITIES have made payment to BRPC. Provided that the COMMITTEE has previously approved the Law Firm bill, the MUNICIPALITIES hereby agree to make prompt payment to BRPC so that BRPC may remit payment to the law Firm within 40 days of receiving a bill.
- d. If the Law Firm contract is cancelled, the MUNICIPALITIES will be responsible for any fees, costs or expenses, including out-of-pocket expenses, incurred by the Law Firm incurred prior to the date of cancellation and pre-approved by the COMMITTEE.
- e. The MUNICIPALITIES have agreed to provide compensation to the BRPC for its services in contracting with the Law Firm on behalf of the MUNICIPALITIES and in coordinating negotiations and/or litigation between the MUNICIPALITIES and GE. BRPC will submit estimated budgets, including time and direct costs, to the COMMITTEE for review and approval prior to incurring expenses.

f. If additional funds are needed beyond the current fiscal year budget provided in Section 2.b., the COMMITTEE will have the option to redefine what portion of the additional funds will be supplied by each MUNICIPALITY. Any additional funds will be subject to municipal appropriation. Approving the redefined share of costs shall require a unanimous vote of the COMMITTEE.

3. Distribution of Future Settlement(s).

a. The initial payments from any future financial settlement between the MUNICIPALITIES and GE, or through the Appeals, shall be distributed to each of the MUNICIPALITIES which are then a party to this Agreement to reimburse them for their portion of the approved costs incurred under this Agreement.

b. Reasonable efforts will be made to reimburse each of the MUNICIPALITIES which remain as participants under this Agreement for costs incurred in negotiating a final settlement agreement with GE or through any Appeals. In the event that the settlement agreement between the MUNICIPALITIES and GE does not cover the total amount of the approved costs incurred by the MUNICIPALITIES, initial settlement payments to each of the MUNICIPALITIES shall be proportionally prorated to reflect the costs incurred by each municipality as a percentage of the total costs incurred by the MUNICIPALITIES as a whole.

c. After payments described in Sections 3.a. and 3.b. have been made, the COMMITTEE will determine the proportional distributions of the value of any settlement(s) between the MUNICIPALITIES and GE, or the MUNICIPALITIES and the paying entity. Each municipality that is a member of the COMMITTEE at the time negotiations between the MUNICIPALITIES and GE or between the MUNICIPALITIES and the paying entity are finalized shall receive a minimum of 5% of any financial settlement, net of the payments described in Sections 3.a. and 3.b.

4. Term. The term of this Agreement shall be for three years, commencing with the date of execution of the Agreement. It is further understood and agreed that the three-year term may be extended by a majority vote of the COMMITTEE present and constituting a quorum with renegotiations commencing three (3) months prior to the expiration of the three-year period. Participation by each of the MUNICIPALITIES is, however, subject to annual appropriation.

5. Termination.

- a. The COMMITTEE, upon majority vote of those present and constituting a quorum, or BRPC may terminate this Agreement upon thirty (30) days written notice, without cause. Upon notice of termination, all work shall cease, except that necessary terminate obligations created under this Agreement and to withdraw from all Appeals. BRPC will immediately inform the Law Firm of the termination and order that all work cease except as may be otherwise required as set forth in the second sentence of this Section 5.a. The MUNICIPALITIES will be responsible for paying the budgeted and pre-approved costs incurred to the date of termination as described in Sections 2.a. - 2.f.
  - b. Any individual municipality may terminate its participation in this Agreement and the COMMITTEE upon thirty (30) days' notice, without cause. Notification will be submitted to the COMMITTEE and BRPC in writing. The withdrawing municipality will continue to be responsible for paying its share of the pre-approved budgeted expenses that exist on the date that the termination notice is submitted to the COMMITTEE and will continue to strictly abide by the terms of the Confidentiality and Non-Disclosure section of this Agreement.
  - c. A municipality withdrawing from this Agreement shall not be reimbursed for its contributed costs incurred for negotiations between the MUNICIPALITIES and GE or between the MUNICIPALITIES and the paying entity, as described under Section 3.a. and 3.b.
6. Confidentiality and Non-Disclosure. To the extent permitted by law, all municipal representatives currently serving, or who have served, on the COMMITTEE or other municipal officials who have been briefed on the negotiations and/or litigation, as well as involved BRPC staff, shall treat all communications labeled as privileged and confidential and briefings, deliberations and decisions made in Executive Session as privileged and confidential and legally protected. If any municipality determines to withdraw from this Agreement, all such communications and briefings, deliberations and decisions shall continue to be treated as privileged and confidential and legally protected unless and until agreements are reached which require final action in open session.

To the extent permitted by law, all communications between the Law Firm and BRPC, between the Law Firm and any of the MUNICIPALITIES and between BRPC and the MUNICIPALITIES concerning the Law Firm's legal advice shall be protected by the attorney-client privilege when labeled as privileged and confidential, that such information provided by the Law Firm to BRPC and/or the MUNICIPALITIES shall be

treated as privileged and confidential attorney work product (whether or not such information is shared by BRPC with the municipalities), and that privileged and confidential information shared under this agreement is to be protected from disclosure under the Public Records Act.

7. Amendment and Payment Schedules. This Agreement may be amended from time to time but only by a unanimous vote of the MUNICIPALITIES.
8. Notices. BRPC shall be responsible for providing notice of meetings and copies of all material to the COMMITTEE members and shall provide copies of all agendas to the five municipal clerks for posting to the extent required by the Open Meeting Law. BRPC shall also post all COMMITTEE agendas on its website to the extent required by the Open Meeting Law and shall maintain the official copy of all meeting materials and minutes.
9. Resolution of Disputes. In the event of any dispute between the BRPC and the COMMITTEE, or amongst the MUNICIPALITIES arising out of this Agreement, the BRPC, MUNICIPALITIES and the COMMITTEE agree to submit their disputes to a neutral third party for mediation. Each party to mediation shall pay a prorated share of the cost of such mediation.

A party wishing to subject a dispute to nonbinding mediation shall give notice to the other party(ies) within sixty (60) days after a dispute shall arise, which notice shall contain the name of the proposed mediator. Any party may object to the choice of mediator by notice given within thirty (30) days thereafter and seek to have a mediator chosen by the Chief Judge of the Superior Court for Berkshire County, but if no objection is filed, the mediator proposed shall mediate the dispute. Upon the appointment of a mediator, mediation shall be concluded within sixty (60) days following appointment of a mediator. If a mediation of such dispute is not successfully achieved any aggrieved party may pursue such remedies as are afforded under law.

**CAN THERE BE ANY EXTENSION OF TIME OF ALL PARTIES AREE?**

10. Law Governing. This Agreement and all rights and obligations, including matters of construction, validity and performance shall be governed by the laws of the Commonwealth of Massachusetts.
11. Severability. Should any part of this Agreement be rendered or declared invalid by a court of competent state or federal jurisdiction, such invalidation shall not invalidate the remaining portions thereof, and they shall remain in full force and effect.

12. Captions. The captions herein are inserted only as a matter of convenience and for reference, and in no way define, limit or describe the scope of the Agreement nor the intent of any provision hereof.
  
13. Entire Agreement. This Agreement constitutes the entire agreement between the parties and any other agreements, whether written or oral, that may exist are excluded from the terms herein.

**NOTE: WILL DEAL WITH FORMATTING AFTER ACCEPTING ALL TRACK CHANGES.**

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Sean A. Stanton, Chairman

Great Barrington Board of Selectmen

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Thomas Wickham, Chairman  
Lee Board of Selectmen

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Warren Archey, Chairman  
Lenox Board of Selectmen

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Nadine A. Hawver, Chairman  
Sheffield Board of Selectmen

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Ernest J. Cardillo, Chairman  
Stockbridge Board of Selectmen

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Nathaniel W. Karns, Executive Director  
Berkshire Regional Planning Commission