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REVISED AGENDA

Rest of River Municipal Committee
February 23, 2018, 9:30 a.m., Lee Town Hall

1. Introductions
2. Review of minutes of Jan. 5, 2018 meeting
3. EPA Update to Appellants
4. EAB Decision and next steps
5. Other Business
6. Executive Session – to discuss ongoing litigation
7. Adjournment

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

Please Note: In the case of inclement weather on the day of the meeting, please call BRPC at 413-442-1521, ext. 15 to confirm if the meeting is still being held.

ENVIRONMENTAL APPEALS BOARD ALTERNATIVE DISPUTE RESOLUTION PROGRAM INFORMATION SHEET

I. Overview

The Environmental Appeals Board (“EAB” or “Board”) has implemented an alternative dispute resolution (“ADR”) program to assist parties in resolving disputes before the Board. The Board has established this ADR program in recognition of the many benefits associated with the use of ADR and the success experienced by other federal agencies and by federal courts (including appellate courts) in settling contested matters through ADR. ADR refers to voluntary techniques for resolving conflict with the help of a neutral third party. As the Agency has stated, resolving conflict through the use of ADR can have many benefits, including:

- Faster resolution of issues;
- More creative, satisfying and enduring solutions;
- Fostering a culture of respect and trust among EPA, its stakeholders, and its employees;
- Improved working relationships;
- Increased likelihood of compliance with environmental laws and regulations;
- Broader stakeholder support for Agency programs; and
- Better environmental outcomes.

EPA’s Policy on Alternative Dispute Resolution, 65 Fed. Reg. 81,858 (Dec. 27, 2000).

The EAB’s ADR program offers parties in appropriate cases the option of participating in ADR with the assistance of an EAB Judge acting as a neutral evaluator/mediator. An EAB Attorney, acting as a neutral, may also participate. The primary purpose of this program is to provide a neutral, confidential forum for the settlement of cases before the Board. As discussed further below, participation is completely voluntary and is conducted in compliance with the confidentiality provisions of the Administrative Dispute Resolution Act of 1996 (“Act”), 5 U.S.C. § 574. The Board has access to video conferencing equipment and, where appropriate, this equipment can be employed in the ADR process. In some cases, the Board or the assigned Settlement Judge may determine that use of the EAB’s ADR program would be inappropriate. Under these circumstances, the parties are not precluded from pursuing settlement outside the Board’s ADR program.

II. Procedures

When a matter is filed with the Environmental Appeals Board, the Clerk of the Board will, in most cases, send a letter to each party inviting participation in the Board's ADR program. The parties will be given approximately two weeks to respond to the Clerk's letter. Should all parties agree to participate in ADR, the process will proceed in the manner described below. (Note: should the parties wish to participate in the Board's ADR program at a later date, they may file a joint request with the Clerk of the Board).

The ADR process will proceed as follows:

A. Settlement Judge Assignment and Stay of Proceedings

An Environmental Appeals Judge will be assigned as a "Settlement Judge" and will serve as a neutral evaluator/mediator. The Settlement Judge may be assisted by a Board staff attorney serving as an "EAB Settlement Counsel," who will also serve as a neutral party. Upon assignment of the Settlement Judge and the EAB Settlement Counsel, the Board will issue an order notifying the parties of this assignment and staying the proceedings for 60 calendar days, or such other time period as the Board deems appropriate, to allow the ADR process to proceed. In appeals filed under Part 22, however, this stay will not extend the deadline for any other party to file a notice of appeal under section 22.30(a). (Note: the Board may determine that a shorter stay is appropriate due to time constraints or that ADR is not appropriate.)

In petitions for review of permits under the Clean Air Act New Source Review Program or other permits involving new sources, the following additional procedures apply. Given the time-sensitive nature of NSR appeals, the Board gives its highest priority to the timely resolution of NSR cases relative to other matters on the Board's docket. (See Revised Order Governing Petitions for Review of Clean Air Act New Source Review Permits (EAB Mar. 27, 2013)) (available on the EAB's website). In balancing the many benefits of ADR as well as the need to facilitate the expeditious resolution of NSR appeals, the Board may, in its discretion, require that all responses to a petition for review be filed while ADR proceedings are in process.

An order staying a proceeding for ADR will only be extended where, in the opinion of the Settlement Judge, the parties have made substantial progress toward resolution but require additional time to reach a final agreement. Absent settlement or substantial progress, the matter will be returned to the EAB active docket for resolution. Under these circumstances, neither the Settlement Judge nor the EAB Settlement Counsel will participate in any way in the Board's resolution of this matter.

B. Initial Status Conference/Scheduling of Initial ADR Meeting

Following the Board's Stay Order (or designation order in new source review cases), the Settlement Judge and/or the EAB Settlement Counsel will contact the parties and conduct a

status conference during which the parties will be given additional information on the ADR process and a date will be set for an initial ADR meeting. Before the initial meeting, parties must review and sign the Agreement to Participate in ADR and return the signed copy to the Settlement Judge. By signing the agreement, the parties affirm that they have reviewed the ADR Information Sheet, understand how the EAB's ADR process works, and will participate in good faith.

C. Issue Summaries

Within 10 calendar days following the status conference, or such other date that the Settlement Judge deems appropriate, each party will file with the Settlement Judge a brief written submission (no more than 15 double-spaced pages) summarizing the issues in dispute and its positions on those issues. In addition to identifying any jurisdictional or policy issues, these submissions must include any background information that might facilitate settlement discussions. The submissions must also include discussions of what the parties seek from ADR and their perspective on what a successful agreement might include. Unless authorized by the preparing party, these written submissions will not be shared with any other party. If, based on the written submissions, the Settlement Judge determines that ADR would be inappropriate for the EAB's ADR Program, parties will be so advised and the matter will be returned to the EAB active docket. Under these circumstances, the parties are not precluded from pursuing settlement outside the Board's ADR program. When a matter is returned to the EAB active docket, neither the Settlement Judge nor the EAB Settlement Counsel will participate in any way in the Board's resolution.

D. Initial ADR Meeting

At the initial ADR meeting, the Settlement Judge and/or the EAB Settlement Counsel will begin by explaining the Board's ADR process, including issues of confidentiality. As directed by the Settlement Judge, the parties may be required to make oral presentations and may respond to presentations of the other participant(s). For the ADR process to be effective, the participants must have the authority to settle the matter or have ready access to an individual with such authority. Parties as well as their representatives may participate.

E. Evaluation/Mediation

In conjunction with or following the initial ADR meeting, the Settlement Judge and the EAB Settlement Counsel will meet separately with each of the parties in private session. During these private sessions, the parties can freely discuss with the Settlement Judge and the Settlement Counsel anything they did not wish to discuss in open session. Unless authorized by the communicating party, the Settlement Judge and the EAB Settlement Counsel may not disclose any information provided in private session. The Settlement Judge will provide each party with a confidential, oral assessment of the strengths and weaknesses of their case. Thereafter, the Settlement Judge and/or the EAB Settlement Counsel will provide appropriate

assistance to facilitate the efforts of the parties in reaching a resolution. In the alternative, following the Settlement Judge's assessment, the parties may wish to engage in direct discussions without the presence of the Settlement Judge or the EAB Settlement Counsel and attempt to fashion a mutually agreeable resolution.

It is important to note that the above-mentioned oral assessment, while informed by the Settlement Judge's knowledge and experience, has no binding effect on the decision of the Board in the event issues are not resolved through ADR and the matter is returned to the Board's active docket. The assessment is based solely on the information the parties provided during the ADR process and should not be used as a definitive predictor of the outcome should the Board ultimately be called upon to render a decision on the matter.

F. Termination of ADR

Under the following circumstances, the ADR process will be terminated and the matter will be returned to the EAB's active docket for resolution: (1) the Settlement Judge, at any point following his/her designation, determines, in his/her discretion, that ADR is no longer appropriate; (2) the Settlement Judge, in his/her discretion, determines that the ADR process has not made substantial progress within the stay period; or (3) any party determines that it no longer wishes to participate in ADR. When a matter is returned to the EAB's active docket, neither the Settlement Judge nor the EAB Settlement Counsel will participate in any way in the Board's resolution.

G. Resolution of Issues Through ADR

If the parties reach an acceptable resolution to all or part of their dispute, the resolution shall be reduced to writing and signed by the duly authorized representatives of each party. Upon execution of any agreement resolving all issues, the parties shall file a joint motion to dismiss the pending matter. The Board will then issue an order dismissing the appeal. If some, but not all issues have been resolved, and the issues are severable, the parties shall file a motion for dismissal of the resolved issues. The Board will issue an order returning the remaining issues to the EAB's active docket for resolution. When a matter is returned to the EAB active docket, neither the Settlement Judge nor the EAB Settlement Counsel will participate in any way in the Board's resolution of the pending issues.

H. Issues Not Resolved Through ADR

Any issues not resolved through ADR (in whole or in part) will be returned to the EAB active docket for resolution by the Board. Again, should the matter be returned to the EAB active docket, neither the Settlement Judge nor the EAB Settlement Counsel will participate in any way in the Board's resolution.

I. Evaluation

Following completion of the ADR process, whether all, some or none of the issues were resolved, the parties will receive an evaluation form from EPA's Conflict Prevention and Resolution Center to elicit their views and document their experience with the Board's ADR program.

III. Confidentiality

The confidentiality of communications made during ADR is governed by the provisions of the Administrative Dispute Resolution Act of 1996 ("ADRA"), 5 U.S.C. § 574. The following is a summary of ADRA confidentiality requirements:

The ADRA precludes a neutral from voluntarily disclosing, or through discovery or other compulsory process being required to disclose, any dispute resolution communication or any communication provided in confidence to the neutral unless:

- (1) all parties to the dispute resolution proceeding and the neutral agree in writing;
- (2) the dispute resolution communication has already been made public;
- (3) the dispute resolution communication is required by statute to be made public; or
- (4) a court determines that disclosure is necessary to prevent manifest injustice, help establish a violation of law, or prevent serious harm to public health or safety, after taking into account the integrity of dispute resolution proceedings in general.

The ADRA also states that a party to a dispute resolution proceeding shall not voluntarily disclose or be required to disclose (through discovery or other compulsory process) dispute resolution communications unless:

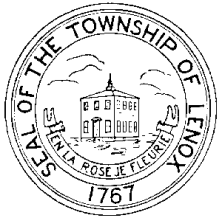
- (1) the party prepared the communication;
- (2) all parties agree in writing to the disclosure;
- (3) the communication has already been made public;
- (4) the communication is required by statute to be made public;
- (5) a court determines that disclosure is necessary to prevent manifest injustice, help establish a violation of law, or prevent serious harm to public health or safety, after taking into account the integrity of dispute resolution proceedings in general;

- (6) the communication is relevant to determining the existence or meaning of a settlement agreement resulting from the dispute resolution proceeding or to enforce such an agreement; or
- (7) except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

The parties may agree among themselves to confidentiality protections beyond those provided for by the ADRA. For example, parties may agree in writing to keep statements they make, or documents they share with all of the other parties, confidential. This agreement for additional confidentiality protection, however, does not prevent communications not specifically protected under the ADRA from being required to be disclosed through discovery or other compulsory process or in response to information requests under federal statutes, such as the Freedom of Information Act (FOIA). The ADRA does protect communications between a party(ies) and a neutral from being disclosed pursuant to a FOIA request.

In furtherance of the requirements of the ADRA, the EAB has established internal procedures to ensure that dispute resolution communications by, or taking place in the presence of, a Settlement Judge and/or the EAB Settlement Counsel will not be disclosed to other EAB Judges or Counsel to the Board or Board staff who will participate in the resolution of the matter should the issues are not resolved through ADR. Upon agreement of all parties to participate in the Board's ADR program, the Settlement Judge and/or the EAB Settlement Counsel will establish a separate ADR file for use during the ADR process. Any written materials generated by or provided to the Settlement Judge during ADR will be placed in the ADR file and will be maintained as confidential. Only the Settlement Judge and the EAB Settlement Counsel will be authorized to review material in the ADR file. The Settlement Judge and the EAB Settlement Counsel will protect the confidentiality of the ADR proceedings and will not communicate with other EAB staff about what transpires during the ADR process. However, as specified in the ADRA, the parties should be aware that documents otherwise admissible in a proceeding before the Board are not rendered inadmissible because of their use in the ADR process.

Neither these EAB procedures nor the provisions of the ADRA are intended to preclude disclosure of the appeals that are chosen for ADR, nor are they meant to prevent dissemination of information about the types of appeals going through the EAB's ADR program or about overall program results. Generic information about those cases entering ADR will be available to the public. In addition, the Board may generate reports on the ADR program for evaluation and analysis that may include generic information about the cases selected for ADR and the outcome of ADR process in these cases, without identification of the parties or the specific issues in controversy. Cases resolved through ADR, as well as written settlement agreements, may be publically identified.



HOUSATONIC REST OF RIVER MUNICIPAL COMMITTEE

Meeting Minutes

Rest of River Municipal Committee, February 23, 2018, Lee Town Hall

1. **Introductions.** The meeting opened at 9:35 a.m. Attending the meeting were the following Committee members:

Warren Archey, Lenox Select Board
Pat Carlino, Lee Select Board
Christopher Ketchen, Lee Town Chief Administrative Officer & Lenox Town Manager
Christopher Rembold, Great Barrington Planner
S. Shatz, Stockbridge Representative
Rene Wood, Sheffield Representative

Others present:

Lauren Gaherty, BRPC
Nat Karns, BRPC
Jim McGrath, Pittsfield Representative
Jim Murphy, U.S. EPA
Jerry Parnass, Berkshire Eagle reporter
Dean Tagliaferro, U.S. EPA

2. **Review of minutes of January 5, 2018 meeting.** Motion to accept as presented by S. Shatz, seconded by P. Carlino. Minutes accepted as presented, with R. Wood abstaining.

3. **EPA Update to Appellants.** J. Murphy and D. Tagliaferro briefed the Committee on the current status of the EAB process. EPA has asked the EAB to reconsider its decision on the issue of legally allowed future work in the cleanup area. EPA staff is working to respond to the many issues raised by the EAB regarding the siting of a PCB landfill. Although EPA staff did not know the exact timeline for their filing of responses on the landfill issue, they offered it would probably be in the range of 2-3 months from now. Staff did not know how long it would be for the EAB to make a decision on the response. It is not likely to be the 7 or so months that it took to get the original EAB judgement.

EPA staff was primarily meeting with the Committee to gauge their interest in joining a potential Alternate Dispute Resolution (ADR) process. This process would be overseen by the EAB, with all appellants, the states and the City of Pittsfield being invited to join if they choose. This option is being offered by the U.S. EPA Administrator's office as a way to move forward a backlog of cleanups, including this one. D. Tagliaferro stressed that there was no preconceived end game on any of the

issues. ADR is seen as a possible process to bring together several of the parties to see if maybe some things can move forward. This process would occur as a parallel process. EPA staff would continue to develop its responses to the EAB on the landfill, because this work has been ordered by the EAB and has to be completed.

At this time EPA is informally garnering interest and would like to begin mediation expeditiously if possible. They would prefer to get an answer in a week if possible, and they encouraged us to contact the EAB staff working on this.

N. Karns reported that he's already spoken to Susan Gardinier-Kimball, an EAB Senior Counsel, about the process. He passed out a fact sheet about the ADR process to the Committee and gave an overview of what he'd learned so far.

An EAB judge, one that had not presided over the GE case, would oversee the process, with support of EAB legal staff, to provide a neutral process. Typically this ADR occurs before the EAB process begins but this one is post-EAB. He cautioned the Committee that the fact sheet is general in nature and drafted for the typical, pre-EAB process, and that the proposed ADR process here may vary from the fact sheet in some ways.

At this juncture the EAB believes that many of the parties are prepared to take their disputed positions through the various appeals venues, and this process is seen as a way to possibly see if there are at least a few areas where the full appeals route could be avoided. The appellants being asked are ROR Municipal Committee, BEAT, HRI, Cook; interested party is City of Pittsfield; states are MA and CT; MassAudubon and Green Berkshires may also be asked but this last hasn't been decided.

S. Shatz stated is opinion that this can hardly be seen as a neutral process, with one EAB judge reviewing the decisions of their colleagues.

The parameters to be discussed will have to be determined early in the process. At this point there are no pre-set boundaries and the ADR discussions can include issues outside of the landfill and future work decisions that the EAB remanded to EPA. N. Karns stated that Ms. Gardinier-Kimball stated that the exact parameters up for discussion will have to be worked out before the EAB will enter into a ADR process.

R. Wood asked for a definition of consensus – with the several parties listed above being involved, would consensus require a unanimous vote for the disputed items? Or does consensus occur with a majority of parties? If we are going to direct resources towards this process, she feels we need to know the rules of the game and the potential chance of agreement.

S. Shatz asked if a directive from the EAB judge has been formally issued? If so, we should definitely participate. But, he is unsure if we should participate if it is only an informal inquiry. Because this process would be occurring before the EPA responds to the EAB's remand, we don't know our relative strengths and weaknesses going in. He believes we should wait until the EAB process fully plays out. What if the EAB comes back and agrees with us on the off-site landfill? We would then have leverage to join a ADR process. He is uncomfortable with the timing of the ADR, which is before we know the outcome of the EAB's final decision.

J. Murphy reported that the position of the EPA remains the same. They have been tasked with a response and they will be going through with it to defend their position for an out of state landfill in a stronger way.

The Committee is concerned about the potential costs of having the Pawa firm represent us in the ADR process. This adds to the total cost of remaining in the permitting process. They need to have a discussion with the Pawa firm about the potential outcomes and the costs of the ADR process.

The Committee agreed that it would be wise to draft all our questions and talk to the EAB prior to making any decision on whether to join the ADR. Members were asked to send their questions to L. Gaherty by Mon., Feb. 26 so that she could compile and ready them for a conference call with the EAB senior counsel.

EPA staff left the meeting at 10:30 a.m.

4. EAB Decision and Next Steps. N. Karns gave the Committee an update on the EAB remand process. On the landfill issue we need to provide information to EPA to bolster their arguments in their remand response.

EPA has filed for a reconsideration of the EAB's judgement on future legally permitted work. We on the local level need to gather information about additional costs they have incurred due to the handling of PCB contaminated soils. This type of information can bolster EPA's argument that GE must be held responsible for costs when future work in Rest of River involves PCB handling. As an example he stated that MassDOT estimates that at a minimum it will incur an extra \$50,000 for the Valley Mill bridge, and that involves reusing the existing abutments – it is not digging into the banks or soil to set new footings. The costs for Lenox in upgrading a new sewer line in New Lenox will undoubtedly be more.

The Committee lost its argument to include the MA Hazardous Waste Facility Siting Act as an ARAR. But the EAB left open the option for the Committee to file in state court. We did not prevail in our request for GE responsibility in perpetuity.

The EPA is currently putting together its response and additional information that the EAB has requested on the landfill issue. If the permit is remanded a second time, EPA will have to redraft the permit and hold another public comment period for that part of the permit. Only after the permit is reissued and all administrative appeals have been exhausted can anyone appeal it to the First Circuit.

S. Shatz stated his desire to know the downsides of not participating. If we refuse to participate in the ADR, could it in any way harmful effect on our position us in the First Circuit? If there is no downside, and if GE refuses to participate, then he sees no reason to participate in any kind of remediation.

C. Ketchen wants to know if any discussions that occurred in mediation negatively effect our position? At this point he doesn't think so, but he'd hate to be wrong about that. Could another

party come back at a later process and say we were willing to discuss or consider a position during mediation, but now at this later process you are not willing to discuss or consider it.

It was agreed that a conference call will be set up with the EAB staff for Tue, Feb. 27, and that N. Karns, L. Gaherty, R. Wood and S. Shatz would attend.

5. Executive Session – to discuss ongoing litigation. At 10:55 a.m. N. Karns requested a motion to go into Executive Session to discuss legal strategy for actual litigation regarding the EPA Rest of River Clean-up and the appeals of the EPA's Permit and the EAB decision. Such discussion, if held in open meeting, may have a detrimental effect on the legal position of the Rest of River Municipalities legal action with EPA and GE. As the agenda suggests, we expect to adjourn from Executive Session and do not expect to reconvene in regular session. Motion made by P. Carlino, seconded by R. Wood; motion carried unanimously. Roll call vote: P. Carlino, Lee, AYE; W. Archey, Lenox, AYE; R. Wood, Sheffield, AYE; C. Rembold, Great Barrington, AYE; S. Shatz, Stockbridge, AYE.

6. Adjournment. The meeting adjourned at 10:55 a.m.

Meeting Materials:

- Revised Meeting Agenda 2-23-18
- Meeting Minutes of 1-5-18
- *EAB Alternate Dispute Resolution Program Information Sheet*

Respectfully submitted,
Lauren Gaherty, BRPC