

BERKSHIRE REGIONAL PLANNING COMMISSION
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SHEILA IRVIN, Chair
KYLE HANLON, Vice-Chair
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CHARLES P. OGDEN, Treasurer

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

AGENDA

**Rest of River Working Group
Tuesday, July 16, 2013 - 11 a.m.
Stockbridge Town Hall – Select Board Meeting Room**

- 1. Introductions (we have several new faces)**
- 2. Brief background on how we got where we are**
- 3. Status of Agreements**
 - a. Draft agreement between Pawa Law Group and BRPC**
 - b. Drafting of Inter-Governmental Agreement between BRPC and six municipalities**
 - c. Availability of \$10,000 from each municipality?**
- 4. Reconfirmation of decision to use this approach**
- 5. Questions to resolve on the Inter-Governmental Agreement**
- 6. Revisions needed to draft agreement between Pawa and BRPC**
- 7. BRPC support – budget issues**

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Meeting Notes
Rest of River Municipal Group
July 12, 2013 @ Stockbridge Town Offices

1. Introductions

Attending the meeting were the following:

Doug Clark, Pittsfield Economic Development Dir.

Lauren Gaherty, BRPC

Nat Karns, BRPC

Jorja Marsden, Stockbridge Town Administrator

John McNinch, Lenox Selectman

Bob Nason, Lee Town Manager

Jeff Vincent, Lenox Special Projects Manager

Rene Wood, Sheffield Select Board

Note: Representatives from Great Barrington were unable to attend because of a last minute issue that arose in the town.

2. Brief Background – how we got here

A brief summary of the Housatonic River cleanup process and its potential socioeconomic impacts on the Rest of River communities was given by Nat. US EPA has made it clear that pursuing socioeconomic damages through the RCRA process cannot be done; it will require a separate negotiation and/or legal process. Nat reported to the group that additional residential properties along the river will soon be tested for presence of PCBs by the GE; he learned of this new testing at the last Citizens Coordinating Committee meeting. EPA will be issuing a fact sheet about the testing with maps of the properties, and these will be given to the affected towns. Rene Wood stated that the Town of Sheffield would like to see a new round of sampling done in the town to establish an updated pre-cleanup set of baseline data, to use in monitoring water quality downstream of cleanup activities to make sure that PCBs are not being sent downstream during cleanup activities. The existing set of data for Sheffield was old, being done about 10 years ago.

3. Agreements and Budgets

The draft Intermunicipal Agreement (Agreement) was discussed at this meeting. The Pawa Law Group (Pawa) is being retained to serve as the chief negotiator and legal counsel for the 6 Rest of River communities. Pawa prefers to have one central client, rather than 6 individual clients, so BRPC will serve as the client to Pawa Law Group, representing the 6 Berkshire communities. BRPC and the 6 communities will sign an Agreement that spells out the conditions under which BRPC will serve as the communities' representative and intermediary with Pawa. The Group then discussed the purpose and details of the

draft Agreement before them. The Rest of River communities will provide direction to BRPC in its interaction with Pawa; BRPC would also serve as the financial agent of the communities. The Agreement also describes in detail how the 6-community group would function. Many of the towns have Koppelman and Page as town counsel, so it was agreed that one of the towns would have them review the Agreement once rather than have several lawyers charging for the same work several times over. Lenox agreed to send it to K&P on behalf of Lenox, Sheffield and possibly Great Barrington.

Each of 5 communities present at the meeting reaffirmed their initial \$10,000 commitment to pay Pawa to serve as the communities' negotiator with the GE. No one was present from Great Barrington, so that town's financial commitment was unclear.

Each town shall have two representatives on the joint committee, to be appointed by the municipal Chief Executive Officer or the Town Managers if the Select Board so chooses. The communities will form a Committee, and that Committee will make and vote on all decisions. BRPC will receive direction from the Committee and communicate that direction to Pawa. A small number of representatives from the Committee will create a negotiating subcommittee to work with Pawa in direct negotiations with GE. Having direct municipal representation at the negotiating table was seen as an important component of the negotiating team.

There was a discussion regarding the group's meetings and their legal strategy process. BRPC will get legal guidance on the group's entering into Executive Session to discuss legal matters to comply with the Open Meeting Law. It was expected that BRPC will post meetings of the group on its website and send to each of the town/city halls.

The group went through the draft Agreement in detail, discussing the various functions of the committee, including municipal representation, budget approvals, paying legal and administrative fees, quorums and casting votes on decisions. BRPC will incorporate edits made to the document and send the revised version to each of the representatives.

There was a great deal of discussion regarding the fees from Pawa. As a first step, there is a \$60,000 budget for negotiation fees, and there is an initial \$23,000 budget for the first negotiation round with GE. The attorneys' fees were fairly clear in the firm's proposal, but the out-of-pocket costs were less clear. Many at the table were concerned that these costs could be quite substantial – travel, overnight stays, paralegals, etc. The group decided that Pawa must present a cost estimate of these out-of-pocket costs for the first negotiating round. The group would approve of budgets and invoices by majority vote of the communities present and constituting a quorum.

The group discussed a Lee PCB landfill, and agreed that a consensus vote is necessary for the group to accept any in-county landfill for PCBs.

The group agreed that the first costs to be reimbursed from any settlement are to each of the municipalities for their portions of the upfront costs for negotiation. The representatives spoke at length about determining the proportion of funds that each of the communities would receive from a GE settlement. They discussed several types of criteria upon which to base the proportionality, but because EPA's Remedy has not yet been issued, there is no real way at this time to determine the most appropriate methodology.

Rene would like to see something in the agreement that allows the committee to revise the proportionality of additional contributions into the budget for future legal representation. Although

Sheffield contributed an equal \$10,000 into the budget for this initial work, it was unlikely that they would contribute an equal share in the future, given that the town will likely receive a smaller portion of a future settlement because they will likely suffer lesser impacts than others from the cleanup. The other members agreed that such a request should be considered in the future, but would rather deal with such an issue later once the EPA's Remedy is issued and they have a better idea of what type of cleanup is being proposed.

The committee agreed that the agreement needed to add more detail to the clause regarding withdrawal of a community from the committee. This would include language that stipulates what payments the withdrawing community could receive from any future settlement with GE. Also it was agreed to insert severability and confidentiality clauses into the draft Agreement.

BRPC will continue to serve the committee using grant funds from an existing District Local Technical Assistance grant that the agency has. Once those funds run out, they will be paid using a small portion of the original \$60,000 budget. BRPC agreed to present a budget to the committee.

BRPC will serve as the fiscal agent for the committee. Each of the communities will talk to their respective accountants to determine the most effective method to be able to pay Pawa within a reasonable time period. Nat will talk to Pawa and explain that a 40-day pay period is more reasonable than the 20 days requested by Pawa. Nat will also ask Pawa to provide a cost estimate for the firms' out-of-pocket costs for the initial negotiations, because the committee will need to pre-approve budgets.

Resolution of disputes clause – consent should be changed from “consent of both parties” to consent of “majority of parties.”

Committee members were instructed to send comments or edits to Nat or Lauren, not to the full committee. BRPC will incorporate edits and will send out a revised version of the Agreement. BRPC will poll the members and set up the next meeting of the committee.

The committee adjourned after 1 hours, 57 minutes.

Meeting notes transcribed by L. Gaherty.

INTERMUNICIPAL AGREEMENT

AGREEMENT made and entered into this ____ day of _____, 2013 by and between 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, Pittsfield, Sheffield and Stockbridge (hereafter “MUNICIPALITIES”) , all governmental units as defined under M.G.L. c. 40, §4A.

The MUNICIPALITIES are in negotiations with General Electric regarding compensation for economic damages to the MUNICIPALITIES associated with the contamination and cleanup of the Housatonic River Site, as defined by the U. S. Environmental Protection Agency.

The MUNICIPALITIES have agreed that BRPC shall hire the law firm of Pawa Law Group, P.C., 1280 Centre Street, Suite 230, Newton, MA 02459 (hereafter “Pawa Firm”); that BRPC shall represent the MUNICIPALITIES in Pawa Firm’s negotiations with General Electric, and if deemed necessary, in prosecuting an appeal of EPA’s remedy under the federal Resource Conservation and Recovery Act (“RCRA”). The MUNICIPALITIES have agreed that BRPC enter into a contract for legal services with Pawa Firm and that BRPC be responsible for all coordination between Pawa Firm and the MUNICIPALITIES. BRPC shall act on behalf of the MUNICIPALITIES, subject to advice and approval from the MUNICIPALITIES, in assisting Pawa Firm with negotiations, and if necessary, prosecution of an appeal.

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 or City Council with the approval of the Mayor.

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. The MUNICIPALITIES shall form a governing body (“COMMITTEE”) consisting of two representatives from each municipality. One representative shall be the Chief Executive Officer (“CEO”) of the municipality and the other member shall be appointed by the Board of Selectmen or the City Council. [Each municipality shall have one vote on the COMMITTEE – or - Each representative shall have one vote on the COMMITTEE]

The Committee shall deliberate and provide guidance and advice to the BRPC in its negotiations with General Electric regarding compensation for economic damages to the MUNICIPALITIES associated with the contamination and cleanup of the

Comment [NK1]: Is this getting to a point that we will need to comply with Open Meeting Law requirements?

Comment [NK2]: It hasn't been set-up quite this way thus far and varies a little bit depending on the form of govt. Mayor and a staff member; depending on the style and formal powers of the town manager – Lenox does one way, Gt Barrington did differently; other three towns pretty much as written.

Comment [NK3]: This is how the group has operated but everything has been by consensus thus far. Need to make decision.

Comment [NK4]: I think this is weak - it may not be “normal” but I think BRPC in this role will act based on the decisions of the committee and the committee’s role is much stronger than providing guidance and advice. I will have to have agreement from the Commission that they agree with this.

Housatonic River Site and, if necessary, in prosecuting an appeal of EPA's remedy under RCRA.

The Committee shall, by majority vote of its voting members, vote and approve estimated budgets and bills for payment submitted by BRPC; and establish rules that govern its operating practices.

Decisions regarding negotiating positions with GE will preferably be made by consensus of the Committee members. In the absence of complete consensus, the Committee shall, by [majority/supermajority] vote of its voting members, make such decisions.

2. Payment of Fees, Costs and Expenses.

a. The MUNICIPALITIES have agreed to pay all fees, costs and expenses, including reasonable out-of-pocket costs, payable by the BRPC in its legal services contract with Pawa Firm.

b. The Municipalities have initially funded this Agreement by an appropriation of Sixty Thousand Dollars (\$60,000.00), which shall be placed in an escrow account to be managed and controlled by the BRPC, pursuant to approval by a majority vote [two-thirds] of the ~~Commission~~Committee. [This is dependent upon the number of voting representatives on the Committee.]

c. BRPC and the Pawa Firm have agreed that Pawa will participate in an initial meeting with General Electric in this matter under a capped fee agreement. Pawa Firm will cap fees on its preparation and participation in the initial meeting at \$23,000.00 such that any time incurred in excess of the cap will not be billed to BRPC. The cap does not include out-of-pocket costs. Pawa Firm will submit estimated budgets for future phases of work for BRPC's review and approval.

d. BRPC will review and submit all estimated budgets prepared by Pawa Firm to the Committee for review and approval prior to providing Pawa authorization to proceed.

e. If the BRPC/Pawa Firm legal services contract is cancelled, the MUNICIPALITIES will be responsible for any fees, costs or expenses, including out-of-pocket expenses, incurred by Pawa Firm and payable by BRPC up to the time of notice of cancellation and further reasonable fees and costs necessary to complete essential tasks.

Comment [NK5]: What happens if one or more members are diametrically opposed to a critical decision made by vote and determine it is in their municipality's critical best interest to go in a different direction? Withdrawal from the committee and the further joint negotiations is an obvious step but then there are issues of maintaining confidentiality of the negotiating position, etc. Is there a "penalty" for withdrawing from the committee or, conversely, a "bonus" for sticking it out.

Comment [NK6]: Does this just pertain to bills from Pawa or does it also include BRPC costs? Need a bit more clarity.

Comment [NK7]: Question from BRPC attorney: Will the municipalities put the funding in an escrow account for BRPC, subject to their approval? Or will the Municipalities hold the funds and disperse individually to BRPC? Is there some general agreement as to a percentage paid by each municipality?

[Unless the MUNICIPALITIES are seeking town meeting approval for funding in advance it is not clear how there can be a timely response to Pawa Firm budget proposals.] How do the MUNICIPALITIES want to handle this? The section in the BRPC/Pawa Firm contract does not set a time limit on BRPC's response to Pawa Firm's estimated budgets. See last sentence in Budgeting provision.]

f. If the negotiations with GE or prosecution of an appeal of EPA's remedy under RCRA result in a monetary settlement with the municipalities, such settlement shall first be applied to reimburse each municipality for its expenses under this agreement. The Committee shall determine how to fairly and equitably apportion additional settlement amounts, if any.

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3. 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 initial three year contract may be extended with renegotiations commencing three (3) months prior to the expiration of the three-year period.
4. Termination.
5. Amendment and Payment Schedules. This Agreement and the payment provisions contained herein, may be amended from time to time but only by a written amendment signed by all parties.
6. Notices. (to each municipal representative? Will set out list.)
7. Resolution of Disputes. In the event of any dispute between the BRPC and the MUNICIPALITIES whether arising out of this Agreement or under the provisions of this Agreement, the matter may, upon the consent of both parties, be first submitted to a neutral third party for mediation. In the absence of the consent of both parties, either party may seek dispute resolution through a court of competent jurisdiction.
8. Law Governing. This Agreement and all rights and obligations, including matters of construction, validity and performance shall be governed by the law of Massachusetts.
9. 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.

10. 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.