

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

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

AGENDA

Rest of River Working Group
Thursday, August 22, 2013 -- 9:00 a.m.
Stockbridge Town Hall – Select Board Meeting Room

1. Introductions
2. Review of notes of July 12, 2013 meeting
3. Status of Working Group as a Public Body & Open Meeting Law
4. Agreement Status
 - a. Drafting of Inter-Governmental Agreement between BRPC and six municipalities
 - b. Town updates
5. Draft agreement between Pawa and BRPC
6. Other business
7. Adjournment

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Meeting Notes
Rest of River Municipal Committee
August 22, 2013 @ Stockbridge Town Offices

The meeting opened at 9:02 am

1. Introductions

Attending the meeting were the following:

Pat Carlino, Lee Select Board
Doug Clark, Pittsfield Community Development Dir.
Lauren Gaherty, BRPC
Nat Karns, BRPC
Jim McGrath, Pittsfield Park, Open Space, and Nat. Res. Program Manager
Jennifer Tabakin, Great Barrington Town Manager
Jeff Vincent, Lenox Special Projects Manager
Rene Wood, Sheffield Select Board
Media: Dick Lindsay, *Berkshire Eagle*; Andy Mackeever, *iBerkshires.com*

2. Review of Meeting Notes of 7-12-13

BRPC did not present a set of meeting notes for approval. They will be presented at the next meeting of the committee.

3. Status of Working Group as a Public Body

Nat updated everyone on the status of the group as a public body as defined in Mass. General Laws. BRPC legal counsel is of the opinion that the group of community representatives make up a public body, so BRPC posted this current meeting on its website and sent the agenda for posting to each of the six communities. BRPC will take responsibility for public postings in the future, will take minutes and will act as the official keeper of records for the committee. At this point in the process there is not a need for the committee to go into Executive Session, but BRPC will be in contact with legal counsel to determine when the time will come when Executive Session will be necessary in the legal strategy process with the Pawa Law Group (Pawa) and in negotiations with GE.

Rene Wood made the motion and Doug Clark seconded the motion to elect Nat Karns as the Chairman and Lauren Gaherty as Vice-Chair of the Rest of River Municipal Committee (Committee). This motion was approved unanimously by the Committee.

4. Agreement Status

The Committee began a detailed discussion about the content of the Intergovernmental Agreement (IGA)

that will govern how the Committee functions. A Preamble was inserted into the IGA to establish an overall background on the importance of the Rest of River cleanup and why the Committee was established. Lauren gave the Committee an overview of the main sections of the IGA:

- Section 1 establishes the makeup of the Committee;
- Section 2 outlines how the Committee will work with BRPC and Pawa in approaching the GE negotiations;
- Section 3 outlines how future settlement funding will be distributed;
- Section 4 is the term of the IGA;
- Section 5 outlines termination and withdrawal of a community from the Committee; and
- Section 6 discusses the confidentiality of Committee members.

The issue of supermajority vote was discussed at length, whether it should be a supermajority of voting members present at the meeting or a supermajority of total members. Committee members were in general agreement that a supermajority of five should be established for important decisions such as negotiations with GE. There was concern among the members that it could be difficult to ensure that a minimum of five voting members would be present at a meeting where such an important decision will be made, and the idea of having all the municipalities appoint a third representative as a backup to ensure full participation was discussed. After consideration, it was generally agreed that a third municipal representative for each municipality was unneeded. Pat Carlino made the motion that a supermajority should be a passing vote of no less than five voting municipal members for important issues regarding GE negotiations and Rene seconded the motion. This motion was approved unanimously by the Committee. It was agreed that the issue of an in-county landfill would still require complete consensus of the Committee. For general business, such as budget items, the vote would remain a simple majority where a quorum was present.

The issue of a municipality withdrawing from the Committee – what the process would be and what, if any, costs were to be reimbursed to the withdrawing municipality – was discussed. All agreed that if a settlement were received from GE, the first payments from the settlement would reimburse the municipalities for their contribution towards legal and administration costs while they were a part of the Committee. Even a withdrawing municipality would receive this. If the settlement were less than needed to make each municipality whole, the funds received would be distributed based on proportional contributions. If no cash settlement is received from GE, then no one will be compensated for their contribution to legal/administration costs. It was agreed that a withdrawing municipality should not expect to receive settlement funds beyond the initial repayment of costs incurred if they withdraw before the full negotiation process with GE has been completed.

Nat will approach Pawa to get an estimated budget for out-of-pocket costs.

The Committee discussed at length the issue of additional funding that towns may have to contribute to continue future negotiations with GE. If future funds are needed to continue to negotiate, Rene is concerned that a municipality might not be able to contribute a full 1/6th towards the budget as was done in the initial phase of \$60,000. She proposed that the IGA spell out the process by which such a municipality could continue to participate and remain a member of the Committee, but petition the Committee for a smaller percentage of the budget than the full 1/6th contribution. Pat agreed that a renegotiation process be allowed by the Committee, but would prefer to see broad and simpler language in the IGA to explain that process. Nat and Jennifer suggested simpler language that BRPC will incorporate into the next version of the IGA. It will explain “renegotiation” of future contributions.

BRPC is being paid for its work in this process through a District Local Technical Assistance (DLTA) grant.

BRPC will provide a budget to the Committee showing the remaining funds in the DLTA grant, along with a budget for work that may extend beyond the grant.

The Committee discussed what future settlements might include, and agreed that it may be cash settlement, non-cash settlements (new bike paths, boat launches, etc), or a mix of both. It was agreed that a supermajority of the Committee will be required to agree on an overall final settlement that would include settlements to each of the municipalities. The Committee agreed to the language in the IGA that states that each of the municipalities will receive a minimum of 5% of the settlement (after the initial payments made to each of the municipalities to make them whole).

The Committee discussed the issue of confidentiality: determining what materials can be held in confidentiality and still meet the open meeting law. BRPC will seek legal advice on what materials can be held in confidentiality and get very clear guidance on Executive Session procedures for this process.

Next steps: BRPC will incorporate comments from today's meetings and then forward the next version to the Committee. Members will have a few days to review and BRPC will forward the revised version to its law firm Brackett & Lucas. Once B&L have commented, then BRPC will forward it to the municipalities so that they can send it to their town/city counsels. The very final version will then need to be signed by municipal CEOs.

All Committee members confirmed that each of their \$10,000 commitment for the initial \$60,000 negotiating fund was finalized and available for use by the Committee.

The Committee briefly discussed the Pawa/BRPC Legal Service Agreement (LSA), and Jeff Vincent and other Committee members would like to have it more clearly defined when it is appropriate that individual town counsels can contact Pawa with questions they may have regarding their municipal clients. Committee members offered several suggestions, and BRPC will draft language that the Committee will consider in the next version of the LSA. Language suggested: "upon authorization from BRPC, Pawa will be authorized to provide information to individual municipal legal counsel upon request."

Committee members asked BRPC to clarify with Pawa that Matthew Pawa will be the principal negotiator at table when the municipalities meet with GE. Language needs to be added to the LSA that states that Pawa himself, or at the very least another principle of the firm, will be the chief negotiator at the table.

A schedule for final edits and legal review was set. Sheffield will shepherd it to Kopelman & Paige on behalf of the three towns that use that firm and the 3 towns will share the cost. The goal would be to get the final agreement to the various boards by early/mid-September. The Committee agreed to meet to finalize the IGA on September 9th.

Rene made a motion to endorse the changes made to the Agreement and Jeff seconded the motion. The motion passed unanimously.

5. Adjournment

The meeting was adjourned at 2:33 pm.

Meeting materials:

1. Agenda 8-22-13
2. Draft Intergov Agreement 2013-08-19

PREAMBLE

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 a portion of the watershed as an Area 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 has projected cleanup activities could last between five and 50 years in duration, depending on the level of work that is required by the U.S. Environmental Protection Agency (EPA). It is expected the Rest of River Communities will experience a series of negative socioeconomic impacts during the cleanup including, but not limited to, property devaluation, damages to road infrastructure, loss of tax revenues, a decrease in outdoor recreation and tourism, and a diminished quality of life for residents near construction sites or along transportation routes.

INTERMUNICIPAL AGREEMENT

This AGREEMENT is 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 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 this action as the six municipalities cited in the Rest of River cleanup, are deeply mindful of the impacts and consequences that the cleanup will have on Berkshire County residents, businesses, resources, economic development and municipal operations. The MUNICIPALITIES have a keen awareness of these Berkshire County impacts as they pursue settlements for the socioeconomic damages resulting from the PCB contamination of the Housatonic River and the EPA-ordered cleanup.

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

communicate the position of the MUNICIPALITIES to the Pawa Firm in its negotiations with GE, and to continue such communications if it is deemed necessary to pursue an appeal of EPA's remedy under the federal Resource Conservation and Recovery Act ("RCRA"). The MUNICIPALITIES have agreed that BRPC shall enter into a contract for legal services with Pawa Firm, and that BRPC will be responsible for all coordination between Pawa Firm and the MUNICIPALITIES; that BRPC shall act as the representative of the MUNICIPALITIES, subject to advice and approval from the MUNICIPALITIES per this Agreement, in assisting Pawa 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 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. The Mayor of Pittsfield shall appoint the two City representatives. The Boards of Selectmen from the Towns of Lee, Sheffield and Stockbridge shall appoint two Town representatives. The Town Managers in Great Barrington and Lenox shall appoint two Town representatives. Each municipality shall have one vote on the COMMITTEE. A majority of MUNICIPALITIES must have at least one representative present in order to constitute a quorum and to conduct any business.
 - a) The Pawa Firm. The COMMITTEE shall deliberate and provide direction to the BRPC in order for BRPC to provide direction to Pawa Firm regarding the negotiations on the MUNICIPALITIES' behalf with General Electric regarding compensation for socio-economic damages to the MUNICIPALITIES associated with the contamination and cleanup of the Housatonic River Site and, if necessary, in prosecuting an appeal of EPA's remedy under RCRA.

The COMMITTEE shall by majority vote of the MUNICIPALITIES present, establish rules that govern its operating practices, and to vote and approve estimated budgets of time and out-of-pocket costs from Pawa Group and BRPC prior to incurring any costs.

- b) GE. Decisions regarding negotiating positions with GE will preferably be made by consensus of the COMMITTEE. In the absence of complete consensus, the COMMITTEE shall make such decisions by supermajority vote of those MUNICIPALITIES present and constituting a quorum. A supermajority vote

requires that a majority of the COMMITTEE be present for a quorum and that at least 2/3 of those municipalities represented at the meeting vote in agreement. Any position to allow an in-county landfill of PCB's from the Rest of River site shall require complete consensus of the COMMITTEE.

Any future decisions regarding weighting of votes based on contributions for payments of costs, for socioeconomic impacts suffered by the individual municipalities due to cleanup activities and any dispersion of payments from GE to the MUNICIPALITIES shall require a supermajority vote of the COMMITTEE present and constituting a quorum.

2. Payment of Fees, Costs and Expenses for Negotiations.

- a. The MUNICIPALITIES have agreed to pay all approved fees, costs and expenses, including reasonable out-of-pocket costs, payable by the BRPC to the Pawa Firm, for legal services in accordance with its legal 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 initially funded this Agreement by an appropriation of Sixty Thousand Dollars (\$60,000.00), which is available for payment of costs to the Pawa Firm and BRPC as stipulated in Section 1., 2a. and 2.d.
- c. The MUNICIPALITIES have agreed that a negotiating team of COMMITTEE members selected by the COMMITTEE will participate with the Pawa Firm in negotiations between the MUNICIPALITIES and GE. The Pawa Firm will participate in an initial meeting with GE 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 the COMMITTEE's review and approval prior to commencing additional work.
- d. BRPC will review and submit all estimated budgets, including time and out-of-pocket costs, prepared by Pawa Firm to the COMMITTEE for review and approval prior to incurring expenses as stipulated in Section 1. Upon receipt of bills from Pawa Firm for time and expenses which have been authorized by the COMMITTEE, BRPC will promptly circulate the bills to the representatives who shall indicate their approval or any concerns within five days to BRPC. If there are no concerns, BRPC will promptly invoice the MUNICIPALITIES who will promptly process payment to BRPC. When all MUNICIPALITIES have paid, BRPC will promptly process payment to Pawa Firm.

- 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 pre-approved by the COMMITTEE and payable by BRPC up to the time of notice of cancellation and further reasonable fees and costs necessary to complete essential tasks.
- f. The MUNICIPALITIES have agreed to provide compensation to the BRPC for its services in contracting with the Pawa Firm on behalf of the MUNICIPALITIES and in coordinating negotiations between the MUNICIPALITIES and the Pawa Firm and GE. BRPC will submit estimated budgets, including time and direct costs, to the COMMITTEE for review and approval prior to incurring expenses.
- g. Any municipality may ask the COMMITTEE to adjust its percentage of contribution based on either municipal appropriations, the EPA Remedy or other factors which would change its contribution of an equal one-sixth (1/6) share. The COMMITTEE will consider such a request and grant it upon one or more of the MUNICIPALITIES adjusting their percentage of contribution to accommodate the percentage adjustment the asking municipality is seeking. Such change will be handled as per Section 7.

3. Distribution of Future Financial Settlement.

- a. The initial payments from any future financial settlement between the MUNICIPALITIES and GE shall be issued to each of the MUNICIPALITIES to reimburse them for their portion of the approved negotiation costs incurred under Section 2 of this Intergovernmental Agreement, including any municipality which has withdrawn from the Agreement.
- b. The COMMITTEE will determine the proportionality of future financial settlement, after the initial payments described in 3.a., to each MUNICIPALITY, depending on circumstances at the time of the settlement and/or the EPA issuing its remedy under RCRA. The disbursement of future funding from a financial settlement between the MUNICIPALITIES and GE will be determined by a supermajority of the COMMITTEE present and constituting a quorum. Each Municipality which is formally a member of the COMMITTEE at the time that financial negotiations between the MUNICIPALITIES and the GE are finalized and signed by the MUNICIPALITIES shall receive a minimum of 5% of such settlement.
- c. In the event that the signed settlement agreement between the MUNICIPALITIES and GE does not cover the total amount of the 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.

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 initial three year contract 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.

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 to close the agreement. BRPC will immediately inform Pawa of the termination and order that all work cease. 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 involvement 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. An individual municipality withdrawing from this Agreement shall be reimbursed for its contributed costs incurred for legal negotiations between the MUNICIPALITIES and GE, as described under Section 2.a. and 2.c. An individual municipality withdrawing from this Agreement before financial negotiations between the MUNICIPALITIES and the GE are finalized and signed by the MUNICIPALITIES should expect to forfeit their portion of a future financial settlement arising out of such negotiations, as described in Section 2.b.

6. Confidentiality and Non-Disclosure. Due to the sensitive nature of the expected negotiations and potential litigation, 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, and BRPC staff involved shall treat

all communications and briefings as confidential and legally protected, unless and until agreements are reached which require final action in open session. If any municipality determines to withdraw from this agreement, all communications and briefing information shall continue to be treated as confidential and legally protected.

7. 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.
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 six municipal clerks for posting as required by the Open Meeting Law. BRPC shall also post all COMMITTEE agendas on its website in accordance with 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 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 this instance, consent of the COMMITTEE shall mean a majority vote of the MUNICIPALITIES present and constituting a quorum. In the absence of the consent of a majority of the COMMITTEE and BRPC, either party may seek dispute resolution through a court of competent jurisdiction.
10. Law Governing. This Agreement and all rights and obligations, including matters of construction, validity and performance shall be governed by the law 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.

Daniel Bianchi, Mayor
City of Pittsfield

Chair, Board of Selectmen
Town of Great Barrington

Chair, Board of Selectmen
Town of Lee

Chair, Board of Selectmen
Town of Lenox

Chair, Board of Selectmen
Town of Sheffield

Chair, Board of Selectmen
Town of Stockbridge

Nathaniel W. Karns
Executive Director
Berkshire Regional Planning Commission