

BERKSHIRE REGIONAL PLANNING COMMISSION
1 FENN STREET, SUITE 201, PITTSFIELD, MASSACHUSETTS 01201
TELEPHONE (413) 442-1521 · FAX (413) 442-1523
Massachusetts Relay Service: TTY: 771 or 1-800-439-2370
www.berkshireplanning.org

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CHARLES P. OGDEN, Treasurer

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

AGENDA

Rest of River Municipal Committee
Monday, September 9, 2013 -- 2:00 p.m.
Lee Town Hall

1. Introductions
2. Review of notes of July 12th and August 22nd , 2013 meetings
3. Status of Agreements
 - a. Drafting of Inter-Governmental Agreement
 - b. BRPC / Pawa Law Group Legal Services Agreement
 - c. Schedule for municipal approvals & signatures
 - d. Pawa & BRPC Budgets
4. Establish Negotiating Team
5. Status of Tracking of 39 Residential Properties Notified of Needed Sampling
6. Clean-up Transportation Impact Assessment
7. Other Business
8. Adjournment

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Meeting Minutes
Rest of River Municipal Committee
September 9, 2013 @ Lee Town Hall

The meeting opened at 2:08 pm

1. Introductions

Attending the meeting were the following:

Doug Clark, Pittsfield Community Development Dir.
Lauren Gaherty, BRPC
Jorja Marsden, Stockbridge Town Administrator
Nat Karns, BRPC
Jim McGrath, Pittsfield Park, Open Space, and Nat. Res. Program Manager
Bob Nason, Lee Town Manager
Jennifer Tabakin, Great Barrington Town Manager
Jeff Vincent, Lenox Special Projects Manager
Rene Wood, Sheffield Select Board

Media: Dick Lindsay, *Berkshire Eagle*

2. Review of Meeting Notes of 7-12-13 and 8-22-13

Meeting Notes, 7-12-13.

Section 1 correction: Doug Clark's title is "Community" Development Director, not "Economic" Development Director. Motion to accept meeting notes as amended by Rene Wood; seconded by Bob Nason. Approved unanimously as amended.

Meeting Notes, 8-22-13.

Section 1 corrections: Insert Jim McGrath and Pat Carlino as attendees, delete Bob Nason as attendee. Also delete note regarding Great Barrington, as the town was represented by Jennifer Tabakin. Correct spelling of *iBerkshires* reporter's name as Andy Mackeever.

Section 3 correction: In second paragraph, 1st sentence: add "Lauren Gaherty was nominated for Vice Chair" of the Committee.

Section 4 correction: In third paragraph, 4th sentence: delete "to try to make each one whole" and replace with "based on proportional contributions."

Section 4 correction: In 6th paragraph, 1st sentence delete the word "paying" and replace with "being."

Section 4 correction: In 7th paragraph, 1st sentence delete "non-cash services" and replace with "non-cash settlements."

Section 4 name spelling corrections: delete “Bracken” and replace with “Brackett” and delete “Koppelman & Page” and replace with “Kopelman & Paige.”

Motion to approve meeting notes as amended by Rene Wood; seconded by Jeff Vincent. Approved as amended, with Jorja Marsden abstaining.

3. Status of Agreements

Nat began the discussion by letting the Committee know that he had a detailed discussion with Matthew Pawa on the phone, and he agreed with almost every edit that Mr. Pawa suggested regarding the Intergovernmental Agreement (IGA). The revised IGA is clearer in several areas. The areas where there were disagreements involved public disclosure. The Pawa Firm is used to dealing with private clients, but Nat reminded the Committee that we are working in a public environment, and the Committee will need to be diligent to disclose what is necessary, while keeping some strategic information confidential. Confidential information will need to be marked as such.

The Committee again agreed that the BRPC was the Pawa Firm’s client, and that BRPC was serving in this role as the 6 Rest of River municipalities’ representative. The confidentiality between BRPC and Pawa will also be extended between BRPC and the municipalities.

Jennifer Tabakin, being a new representative to the Committee, asked for a little clarification on how this joint municipal Committee will function and respond to the EPA Remedy. Will this Committee serve as the sole voice of the municipalities in commenting on the Remedy? Committee members responded that this joint effort is viewed by them as a separate but parallel path from the EPA Remedy. This Committee is pursuing economic compensation from GE for damages that will occur due to cleanup activities. The Committee has gone to great lengths to make sure that the parallel efforts do not merge or influence each other, outside of the consensus of the Committee that no PCB landfill should be constructed in the county. This IGA is simply an agreement to hire legal services, and is not a policy document.

There will be a public comment period once the Remedy is issued, and each municipality will be free to comment on the Remedy as it pertains to their own individual community. This is important as the impacts will vary widely from community to community. For example, Pittsfield will have many residential properties impacted, but Lee will have dams with accumulated contaminated silt that will be impacted. Also, this Committee will not try to influence the opinions or comments that members of the public submit to the EPA.

The Committee agreed on language regarding a supermajority vote, which for a 6-member Committee, supermajority would be 5; for a 5-member Committee supermajority would be 4, and for a 4-member Committee supermajority would be 3. The agreed wording is that a supermajority is one that “shall require a supermajority vote of all current member MUNICIPALITIES.”

Once again the Committee agreed that a complete consensus vote of all current Committee members would be required for them to allow an in-county PCB landfill.

The Committee discussed the issue of how to distribute future settlements among the six municipalities, and once again they agreed that a mechanism that would determine how the funds will be distributed will be defined at a later date. The amount of cleanup that the EPA will require in its Remedy will help determine what type of distribution mechanism will be best for the six municipalities. So, at this time

the language of the IGA should remain broad.

The Committee agreed that it would again apply for District Local Technical Assistance grant to fund BRPC's role in the administration of the Pawa Firm agreement and administrative support for the Committee. Pittsfield agreed to again take the lead in applying for DLTA funds for calendar 2014.

BRPC will to make the editorial changes agreed to at the meeting, highlight the edits and forward the revised IGA to the Committee members the next day. Stockbridge and Pittsfield legal counsel will review the revised version of the IGA. If all goes well, BRPC will shepherd an original IGA around to the various select board meetings to procure signatures in the next 2-3 weeks.

The Committee then reviewed the Pawa Firm – BRPC document for legal services. The edits that the Committee recommended at the August 22nd meeting were all accepted by the Pawa Firm, which clarify the out-of-pocket costs and that Matthew Pawa himself would be in attendance at critical negotiating meetings with GE. Once again the Committee agreed that BRPC was the Pawa Firm's direct client, and that the municipalities were BRPC's clients. BRPC takes direction from the Committee and will act only upon the Committee's voted approvals. The parties at the negotiating table will be GE on one side and the Pawa Firm, BRPC and the Negotiating Subcommittee (consisting of selected members of the Committee) on the other side.

BRPC and the Committee set a schedule to get signatures for the IGA from the various select boards and city council.

The Committee agreed to a budget of \$24,000 for the Pawa Firm for preparing and conducting the initial negotiation session with GE, including a cap of \$23,000 for legal staff and additional \$1,000 for out-of-budget costs. Motion to accept the budget by Bob Nason, seconded by Rene Wood. Motion approved unanimously.

It was agreed that BRPC would immediately pass along to the Committee invoices from the Pawa Firm. Committee members will have five days to review the invoices and to forward any concerns they have about them to BRPC. BRPC would immediately pass those concerns along to Pawa. If there were no concerns about the invoices, BRPC will send each municipality their individual invoice for payment.

The Committee agreed to a capped budget of \$3,600 for BRPC to continue to support the Committee and to serve as the representative for the Committee through December 2013. This also includes some legal review of the IGA by BRPC counsel. Motion to accept the budget by Rene Wood, seconded by Bob Nason. Motion approved unanimously.

4. Establish Negotiating Team

This item was tabled.

5. Status of Tracking 39 Residential Properties Notified of Needed Sampling

This item was tabled, but Nat tasked the representatives to work with their assessors to determine if the potential PCB contamination is impacting the assessments or marketability of the properties listed.

6. Clean-up Transportation Impact Assessment

This item was tabled. Nat hopes to have this assessment at the next meeting. He will ask the municipalities to pass it along to their DPWs for input.

7. Other Business

Nat brought to the attention of the Committee an editorial piece from Richard Delmasto in the *Berkshire Eagle*. The article in the *Berkshire Record* was also discussed. In this article, George Wislocki was quoted as saying that the municipalities' pursuit of compensation from GE was a dangerous path to take. It is apparent that many people are unaware of what the municipalities hope to accomplish by joining together. Lauren will send copies of the newspaper articles to Committee members. Nat agreed to call George Wislocki to explain their goals.

8. Adjournment

The meeting was adjourned at 4:36 pm.

Meeting materials:

1. Agenda 9-9-13
2. Draft Intergovernmental Agreement 2013-08-19
3. Meeting Notes of July 12 and August 22, 2013.

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 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 has projected cleanup activities 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." 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.

INTERGOVERNMENTAL 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 will begin 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 studies and/or agreements, 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 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 for negotiations with GE; and that BRPC shall continue such communications if it is deemed necessary to pursue litigation related to the river, including but not limited to 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 agent and representative of the MUNICIPALITIES, subject to advice and approval from the MUNICIPALITIES per this Agreement, in assisting the Pawa Firm in these matters; and that BRPC shall act as the MUNICIPALITIES’ fiscal agent as described in Section 2. Notwithstanding the foregoing, the MUNICIPALITIES understand that BRPC is the Pawa Firm’s sole client with respect to negotiations and/or litigation related to Housatonic River Site.

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. 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 Mayor of Pittsfield shall appoint the two City representatives. The Boards of Selectmen from the Towns of Lee, Sheffield and Stockbridge shall each appoint two representatives from their respective towns. The Town Managers in Great Barrington and Lenox 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 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 negotiating positions and final settlement agreements with GE shall require a supermajority vote of all MUNICIPALITIES.
 - 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 socioeconomic damages to the MUNICIPALITIES associated with

the contamination and cleanup of the Housatonic River Site and, if necessary, in prosecuting litigation (e.g., 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 settlement offers to GE, or acceptance of settlement offers by GE, will preferably be made by consensus of the COMMITTEE. In the absence of complete consensus on such issue(s), the COMMITTEE shall make such decisions by supermajority of all MUNICIPALITIES. Any position to allow (i.e., to propose or accept a settlement offer or not to pursue an appeal of) an in-county landfill of PCB's from the Rest of River site shall require a unanimous decision of the COMMITTEE.

Any future 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, as well as decisions about any dispersion of settlements from GE to the MUNICIPALITIES, shall require a supermajority vote of all of the MUNICIPALITIES.

2. Payment of Fees, Costs and Expenses.

- 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.a., 2.a., 2.c. – 2.f.
- 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. In addition, out of pocket costs of up to \$1000 are also budgeted. 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 set forth 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. The MUNICIPALITIES hereby agree to make prompt payment to BRPC so that BRPC may remit payment to the Pawa Firm within 40 days of receiving a bill
- e. If the 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 and undertake reasonable ministerial responsibilities to properly conclude pending matters.
- 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 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.
- g. At any point in the future, if additional funds are needed beyond the initial \$60,000 provided in Section 2.b., each municipality's share of costs will be redefined. Approving the redefined share of costs shall require a supermajority vote of the COMMITTEE.

3. Distribution of Future Settlement(s).

- 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 costs incurred under Section 2

of this Intergovernmental Agreement, including any municipality which has withdrawn from the Agreement.

- b. All efforts will be made to fully reimburse each of the MUNICIPALITIES for costs incurred in negotiating a final settlement agreement with GE. In the event that the signed 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. In the event that no settlement funds are recovered as part of the signed agreement between the MUNICIPALITIES and GE, none of the MUNICIPALITIES will receive reimbursement funding.
 - c. After payments described in Sections 3.a. and 3.b. have been made, the COMMITTEE will determine the proportional distributions of funds from any settlement(s) between the MUNICIPALITIES and GE depending on circumstances at the time of the settlement(s). Such distributions will be determined by a supermajority of the COMMITTEE. Each Municipality which is a member of the COMMITTEE at the time that negotiations between the MUNICIPALITIES and the GE are finalized and signed by the MUNICIPALITIES and GE shall receive a minimum of 5% of such 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 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 the Pawa Firm 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 negotiations between the MUNICIPALITIES and GE, as described under Section 3.a. and 3.b. An individual municipality withdrawing from this Agreement before negotiations between the MUNICIPALITIES and the GE are finalized and signed by the MUNICIPALITIES and by GE should expect to have forfeited its right to any further recovery from any settlements arising out of such negotiations under Section 3.c. The Municipalities hereby acknowledge that in the event any of them withdraw from this contract, the Pawa Firm may continue to represent BRPC in this matter and as agent of the Municipalities who have not withdrawn.
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 Pawa Firm and BRPC, between the Pawa Firm and any of the MUNICIPALITIES and between BRPC and the MUNICIPALITIES concerning the Pawa Firm's legal advice shall be protected by the attorney-client privilege when labeled as privileged and confidential, that such information provided by the Pawa 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 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 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 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