

**HUDSON RIVER-BLACK RIVER REGULATING DISTRICT
BOARD MEETING**

July 10, 2012

Mayfield Municipal Complex
28 North School Street
Mayfield, New York 12117

CALL TO ORDER

Chairman David W. Berkstresser called the meeting to order at 10:57 A.M.

PLEDGE OF ALLEGIANCE

ROLL CALL

Present: Board Chairman David W. Berkstresser; Second Vice Chair Mark M. Finkle; Board Members Albert J. Hayes, Thomas Stover and; Executive Director Michael A. Clark; General Counsel Robert P. Leslie; Chief Engineer Robert S. Foltan; Chief Fiscal Officer Richard J. Ferrara; Hudson River Area Administrator John Hodgson; Black River Area Administrator Carol L. Wright.

Excused: Michael F. Astafan

MOTION TO ADOPT OR REVISE THE MEETING AGENDA

Chairman Berkstresser asked for a motion to revise the meeting agenda to include discussion of the Laubenstien/Santucci appeal. Mr. Hayes made a Motion to adopt the proposed meeting agenda as revised. Mr. Stover seconded it and the motion was unanimously approved.

PUBLIC COMMENT PERIOD

Chairman Berkstresser solicited comments from the public. The Board heard extended comments from access permit holders involved in appeals before the Board and from members/officers of various associations interested in the outcomes of those appeals. The Board also heard comments from the Superintendent of Schools for the Northville District.

APPROVAL OF THE JUNE 12, 2012 BOARD MEETING MINUTES

A motion was made by Mr. Stover to approve the Minutes of the Board's June 12, 2012 meeting. Mr. Finkle seconded it and the motion was unanimously approved.

EXECUTIVE DIRECTOR'S REPORT

Mr. Clark reported that his focus, and the focus of the Chief Engineer, the Chief Fiscal Officer, General Counsel and the Hudson River Area Administrator, has again this month been

directed to the development of a Hudson River Area Apportionment as a result of the Appellate Division Third Department's May 10, 2012 decision in the Five Counties litigation.

Chairman Berkstresser asked Mr. Clark to ensure that the Board's meeting minutes reflect that he and other Board members visited the site of the Laubenstein /Santucci appeals. Chairman Berkstresser then made note of the comments made by Mr. Laubenstein, Mrs. Santucci, and Mr. Michalek earlier in the meeting.

Chairman Berkstresser asked for a Motion from the Board to resolve the Laubenstein appeal. Mr. Hayes moved to grant the appeal by Mr. & Mrs. Laubenstein. Mr. Stover seconded the Motion. Chairman Berkstresser solicited comments on the Motion and then asked for a vote on the Motion. The Motion failed by a vote of 0-4.

Chairman Berkstresser asked for a Motion from the Board to resolve the Santucci appeal. Mr. Stover moved to grant the appeal by Mr. & Mrs. Santucci. Mr. Hayes seconded the Motion. Chairman Berkstresser solicited comments on the Motion and then asked for a vote on the Motion. The Motion failed by a vote of 0-4.

FINANCE COMMITTEE REPORT

RESOLUTION TO APPROVE AN APPORTIONMENT FOR THE HUDSON RIVER AREA

Mr. Stover reported that the Committee had considered and now recommends that the Board adopt a resolution to approve an apportionment for the Hudson River Area. Mr. Stover presented a draft resolution and asked Mr. Clark to describe to the full Board staff's recommendations with respect to the Apportionment methodology and procedure for adoption.

- a. At Mr. Clark's request, Mr. Leslie noted for the Board his opinion that the Board's consideration and adoption of the Apportionment is an action subject to the State's environmental quality review act, but that the action falls within several of the actions enumerated in SEQRA's Type II list. Specifically, Mr. Leslie noted that the Board's adoption of an Apportionment fits within the actions enumerated at 6 NYCRR §617.5(c)(20), (21), (27), and/or (37). The Apportionment is an activity which is routine, although infrequent, and necessary to the continuance of the agency's administration and management. It does not fund or create any new program nor reorder agency priorities. That portion of the Apportionment which requires the Board to estimate the costs of the District is, for SEQRA purposes, a budgetary process which does not, in and of itself, commit the agency to commence, engage in, or approve any particular course of action. In that light, the Apportionment is merely an adoption of a policy or procedure through which the agency funds its activities. Finally, the Apportionment itself is an action required by statute and through court order. None-the-less, were the Board to consider the Apportionment to be an unlisted action, Mr. Leslie advised that staff is aware of no impacts from the action which would negatively affect the environment. Chairman Berkstresser asked the Board if any of its members knew of any such impact; hearing none.
- b. Mr. Clark lead the Board through a discussion in which he and staff summarized the written documents prepared for the Board and outlined the apportionment

- methodology recommended by staff. He then described the procedural steps necessary to adopt the apportionment and satisfy the Appellate Division Third Department's May 10, 2012 decision. The Board considered the following issues:
- i. Staff recommends the new Apportionment in light of the Appellate Division Third Department's May 10, 2012 decision which declared the Board's previous Apportionment invalid to the extent that it failed to consider and reduce the total amount to be Apportioned by the amount chargeable to the State
 - ii. This Apportionment uses the same methodology which the Appellate Division Third Department determined to be rational.
 - iii. The Apportionment will be used to re-set the percentage of costs for the Regulating District's fiscal years 2009-2010, 2010-2011, & 2011-2012 to be borne by the identified beneficiaries and the state. It will also be used to establish the percentage of costs for the current and future fiscal years. Staff calculated the amount chargeable to the state to be 11.96% of the Regulating District's Hudson River Area costs.
 - iv. The need for the Apportionment arose from the United State Court of Appeals, DC Circuit November 28, 2008 decision.
 - v. Pursuant to ECL 15-2125(1), the Apportionment calculates a 'Reasonable Return to the State' at zero dollars.
 1. Reasonable return includes the value of rights and property of the State used
 2. This equals six percent of the value of State lands flowed
 3. However, State lands flowed does not include private lands purchased
 4. No State lands were used to construct the Reservoir
 5. Reasonable Return also includes value of State services rendered
 6. No direct State resources have been employed to enable the Regulating District's current operations
 - vi. Consistent with the Appellate Division Third Department's ruling, staff again recommends grouping towns, villages, cities and individual parcels to establish the County beneficiaries
 - vii. Staff recommends not breaking out the expenses or beneficiaries associated with the Indian Lake Reservoir.
 1. The added cost would not materially reduce, and may not reduce at all, the charges imposed upon the identified beneficiaries.
 2. Indian Lake expenses are small (\$62k of \$3.8 Million)
 3. Many of the same beneficiaries, small volume, steep channel, limited floodplain
 4. Benefits from GSL mathematically/statistically account for protection provided by IL (hydraulic modeling margins/error)
 - viii. The statutory requirement to view does not require that the entire Board visit each parcel, or even each municipality within the petition area. Rather, it contemplates a thorough understanding of the apportionment's breadth & scope. In as much as federal law prohibits the District from apportioning costs among hydroelectric power companies, it is rational to conclude that the requirement to view the individual hydropower generating facilities is moot. The Appellate Division Third Department decision affirmed this interpretation.

- ix. The Board must certify the Apportionment to DEC for approval. In addition, should the Apportionment be modified after the Board hears grievances, the Board must then certify the modified Apportionment to DEC for its approval.
- x. The Board must afford any interested person an opportunity to grieve the apportionment
 - 1. The Board plans to hold an Apportionment Grievance Hearing at the September meeting. The Board Chair asked Mr. Clark to secure a location for the September meeting in the Hudson River Area at a location easy for the Five Counties and their counsel to attend.
 - 2. HRBRRD Regs will govern the hearing process
 - 3. The Board asked staff to publish Notice of the Hearing once the District secured DEC approval of the Apportionment.
 - 4. The Board Chair asked staff to prepare a press release to announce the Apportionment
- xi. This new Apportionment uses the same methodology used in the March 30, 2010 Apportionment.
 - 1. Compare value of real property within a 100-year floodplain within each County within the Regulating District's petition area downstream of the Conklingville Dam to all such properties.
 - 2. A slight revision to the data inputs will reduce each County's total property value by the value of State Properties within that County.
 - 3. This Apportionment will utilize the same data compiled for the 2010 Apportionment. Staff found no evidence that the Assessment rolls provided by the Counties have undergone a material change
- xii. As noted in the Chief Engineer's September 10, 2010 Memo, staff recommends that the District not utilize the methodology suggested by the Consultant (AEG)
- xiii. The methodology utilized to calculate the Amount Chargeable to the State (aka "State Share") is similar, but not identical to the methodology used to compare among the Counties.
 - 1. Both use the same property values within the 100-year floodplain
 - 2. Both recognize that, after hydropower, flood protection is the most substantial, clearly defined benefit.
 - 3. The state share calculation identifies and extracts the value of all State properties lying within the affected counties and adds that figure to the value of state roadways and state bridges before comparing such sum to the value of all non-state properties within the affected counties.
 - 4. State roads are valued at \$1.5 M per mile
 - 5. State bridge values are calculated at \$300 per Sq Ft
- xiv. Although the various benefits (augmentation, waste assimilation, canal operation, flood protection, recreation, quality of the environment) derived by the State and by the Counties may differ, the use of value of state and the value of non-state property within the 100-year flood plain as a basis for calculating a respective proportion of benefit derived by the state and each county remains equally rational and reasonable as the methodology used in the March 30, 2010 apportionment. The flood protection benefit realized by each beneficiary and the State continues to represent all benefits received by those beneficiaries and the State.
- xv. Staff rejected a number of alternative methodologies

Chairman Berkstresser thanked staff for its efforts putting together the extensive documentation supporting the Apportionment and noted that each of the sitting Board members had also heard the same presentation to the Finance Committee. Mr. Finkle made a motion for the Board to approve the resolution adopting the Hudson River Area Apportionment. Mr. Stover seconded and the resolution was unanimously adopted.

RESOLUTION TO ADOPT REVISED JULY 1, 2009 THROUGH JUNE 30, 2012 BUDGET

Mr. Stover reported that the Committee had considered and now recommends adoption of a revised July 1, 2009 through June 30, 2012 budget. Mr. Ferrara explained that, similar to the revision to the current budget, a revision to the 2009-2012 budget is required to accurately reflect the amount chargeable to the State wrought by the Apportionment which the Committee is advancing to the full Board for consideration and passage. This revision will not affect any of the cost elements of the budget, but will rather cause the 2009-2012 budget to accurately reflect the amount to be assessed to HRA beneficiaries.

Mr. Finkle made a motion for the Board to approve the resolution adopting a revised July 1, 2009 through June 30, 2012 budget. Mr. Hayes seconded and the resolution was unanimously adopted.

RESOLUTION TO ADOPT REVISED JULY 1, 2012 THROUGH JUNE 30 2015 BUDGET

Mr. Stover reported that the Committee had considered and now recommends adoption of a revised July 1, 2012 through June 30, 2015 budget. Mr. Ferrara explained that because the Apportionment being advanced to the Board includes an amount chargeable to the State, the 2012-2015 budget adopted by the Board through Resolution 12-24-06 at the June 2012 meeting requires revision. This revision will not affect any of the cost elements of the budget, but will rather cause the 2012-2015 budget to accurately reflect the amount to be assessed to HRA beneficiaries.

Mr. Finkle made a motion for the Board to approve the resolution adopting a revised July 1, 2012 through June 30, 2015 budget. Mr. Stover seconded and the resolution was unanimously adopted.

STAFF REPORTS

Mr. Leslie presented his report to the Board.

Mr. Leslie reported on June 12th, the attorney for the Five Counties filed a Motion for Leave to Appeal the Appellate Division's May 10, 2012 decision in the matter of Albany, Rensselaer, Saratoga, Warren and Washington Counties vs. The Hudson River-Black River Regulating District and The New York State Department of Environmental Conservation. A decision on the Motion is expected in August. The Appellate Division 3rd Dept ruled that the Regulating District failed to consider an amount chargeable to the state. However, the Appellate Division upheld the

methodology utilized by the Regulating District in arriving at the apportionment of costs against the Counties. In short, the March 2010 Apportionment has been invalidated and must be redone.

Mr. Leslie reported that on June 21st, Northern Electric Power Company, L.P. and South Glens Falls, L.P. (subsidiaries of Boralex) commenced an action seeking refunds of amounts assessed under color of State law between FERC's issuance of a license to the Regulating District in September 2002 and the United States Court of Appeals, DC Circuit's decision November 2008 decision. The Attorney General's office has indicated it will represent the Regulating District in the suit.

On June 4th and June 6th, Fulton County and then Hamilton County brought suit to compel payment of school and property taxes. The Attorney General's office has indicated it will also represent the Regulating District in defense of these suits.

Mr. Leslie reported that the Regulating District is awaiting a decision on the Motion to Reargue and is helping the Attorney General to perfect its appeal of the April 2, 2012, Albany County Supreme Court (Judge Teresi) grant of summary judgment to Albany Engineering Corp. awarding \$516,655.62 plus interest dating back to January 1, 2003.

Mr. Ferrara presented his report to the Board.

Mr. Ferrara noted that current fund balances in the Hudson River Area and in the Black River Area remain as forecasted.

Mr. Ferrara also noted that fiscal year-end financial reporting/closing activities are underway and as indicated will run through the second week in July. Financials will be provided in September.

Mr. Ferrara noted that the compliance reporting required through PARIS for June 30, 2013 has been completed and submitted on time.

Mr. Foltan presented his report to the Board

Mr. Hodgson presented his report to the Board

Mr. Hodgson reported staff remains busy arbitrating disputes among permit system area neighbors. Mr. Hodgson reported upon the arrival and initial training of the newly rehired field assistant; noting that the transition is working well.

Mrs. Wright presented her report to the Board

RESOLUTION SCHEDULING DATE, TIME AND LOCATION OF THE SEPTEMBER 11, 2012 BOARD MEETING

Chairman Berkstresser noted that, in accordance with the apportionment resolution adopted earlier in the meeting, the Board would consider any complaint/grievance with respect to the apportionment at the September 11th meeting. He asked that staff work to schedule a new location for the September meeting. Chairman Berkstresser asked for a Motion to adopt a

revised Resolution setting the September 11th date of the meeting but with an understanding that the location of such meeting would be moved to a location more suitable for attendance by the Five Counties and/or their counsel.

Mr. Hayes moved to adopt the Resolution as revised. Mr. Stover seconded it and the Resolution was unanimously adopted.

MOTION FOR EXECUTIVE SESSION

Chairman Berkstresser called for a Motion to adjourn to Executive Session to discuss the Regulating District's position in light of the actions commenced by Hamilton and Fulton Counties and the action commenced by the Boralex subsidiaries. Chairman Berkstresser invited the Executive Director, the Chief Fiscal Officer and General Counsel to participate noting that the Board would not conduct business upon its return from Executive Session. Mr. Finkle moved to adopt the Motion. Mr. Stover seconded and the motion was adopted unanimously. The Board adjourned to Executive Session at 12:37 PM and returned at 12:46 PM.

ADJOURNMENT

There being no further business to come before the Board, Mr. Hayes moved to adjourn the meeting. Mr. Stover seconded it. The motion was unanimously approved. The meeting adjourned at 12:46 P.M.

RESOLUTIONS

12-27-07 RESOLUTION TO APPROVE AN APPORTIONMENT FOR THE HUDSON RIVER AREA

Mr. Finkle made a motion for the Board to approve the resolution adopting the Hudson River Area Apportionment. Mr. Stover seconded and the resolution was unanimously adopted.

12-28-07 RESOLUTION TO ADOPT REVISED JULY 1, 2009 THROUGH JUNE 30, 2012 BUDGET

Mr. Finkle made a motion for the Board to approve the resolution adopting a revised July 1, 2009 through June 30, 2012 budget. Mr. Hayes seconded and the resolution was unanimously adopted.

12-29-07 RESOLUTION TO ADOPT REVISED JULY 1, 2012 THROUGH JUNE 30, 2015 BUDGET

Mr. Finkle made a motion for the Board to approve the resolution adopting a revised July 1, 2012 through June 30, 2015 budget. Mr. Stover seconded and the resolution was unanimously adopted.

**12-30-07 RESOLUTION SCHEDULING DATE, TIME AND LOCATION OF THE
SEPTEMBER 11, 2012 BOARD MEETING**

Mr. Hayes moved to adopt the Resolution as revised. Mr. Stover seconded it and the Resolution was unanimously adopted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard J. Ferrara", with a long horizontal flourish extending to the right.

Richard J. Ferrara
Secretary/Treasurer