

**HUDSON RIVER-BLACK RIVER REGULATING DISTRICT
BOARD MEETING
September 21, 2012**

Warren County Municipal Center
1430 State Route 9
Lake George, NY 12845

CALL TO ORDER

Chairman David W. Berkstresser called the meeting to order at 10:00 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 suggested two revisions to the Agenda. One pertaining to the Hudson River Area Office Lease and the second concerning an adjustment to unrestricted net assets. Mr. Finkle made a Motion to revise the proposed meeting agenda. Mr. Stover seconded it and the motion was unanimously approved.

PUBLIC COMMENT PERIOD

Chairman Berkstresser solicited comments from the public; hearing none.

APPROVAL OF THE JULY 10, 2012 BOARD MEETING MINUTES

A motion was made by Mr. Stover to approve the Minutes of the Board's July 10, 2012 meeting. Mr. Hayes seconded it and the motion was unanimously approved.

HUDSON RIVER AREA APPORTIONMENT GRIEVANCE HEARING

The Board conducted an Apportionment Grievance Hearing at which the beneficiaries identified in the Board's July 2012 Apportionment and others interested in or aggrieved by the Apportionment could seek a modification of the Apportionment. Prior to the Board meeting, the Board received and reviewed a consolidated complaint dated September 13, 2012 from Washington, Warren, Albany, Rensselaer and Saratoga Counties advanced on their behalf by the law firm Miller, Mannix, Schachner & Hafner, LLC..

Appearing at the Apportionment Grievance Hearing on behalf of the public corporations identified in the 2012 Apportionment were the following:

1. Stephen A. Pechenik, Esq., Rensselaer County Attorney;
2. Stephen Dorsey, Esq., Saratoga County Attorney.

On behalf of the Five Counties, attorney Mark Schachner presented oral testimony to the Board. Mr. Schachner's testimony covered the following points:

1. Mr. Schachner identified three categories into which each of the Five Counties challenges to the July 2012 Apportionment fall.
 - a. 'math errors' including:
 - i. Inappropriate inflation of the value of non-State properties through double counting of certain properties; and
 - ii. The placement of State land (specifically the Albany Port Commission properties) on the non-State property side of the ledger.
 - b. Undervalued State Bridges
 - c. Undervalued State Roads
2. Mr. Schachner made reference to the Administrative Complaint filed by the Five Counties. Specifically, Mr. Schachner noted that the Five Counties' Apportionment Grievance Hearing presentation would focus on the points noted above, but would preserve the arguments articulated in the instant complaint and those made in the previous/current Court challenge to the 2010 Apportionment in recognition of the decision due from the Court of Appeals on that legal challenge. For clarity, the Points raised in the Five Counties' September 13, 2012 administrative Complaint include:
 - a. Point 1 - HRBRRD failed to justify utilizing a different methodology to compute the State benefit than it used in the 2010 Apportionment to compute the generalized community benefit realized by the Five Counties.
 - i. HRBRRD's 2010 Apportionment indicated that flood control provided a 'generalized community benefit' to each of the Five Counties measured through:
 - ii. Continued use of roadways
 - iii. Expenditure of municipal disaster response resources
 - iv. The 2012 Apportionment merely aggregates the value of State-owned properties and infrastructure rather than determining 'a generalized community benefit' to the State.
 - b. Point 2 – HRBRRD committed errors in the calculation of the State benefit
 - i. HRBRRD did not justify its use of \$1.5 million per mile to determine the value of the State roadways in the floodplain.
 - ii. HRBRRD did not identify which portions of State and local highways are within the floodplain including:
 1. The type of highway (two-lane, two lane divided, interstate)
 2. Widths
 3. Materials used to construct

- 4. Improvements (retaining walls, guardrails)
- iii. HRBRRD did not justify its use of \$300 per square foot of bridge deck surface to value State bridges
- iv. HRBRRD failed to identify the source of this generally accepted 'standard'
 - 1. Existing bridge projects could yield actual costs.
- v. HRBRRD erroneously included the assessed valuation of certain parcels multiple times.
- c. Point 3 – HRBRRD failed to include State land and infrastructure titled to State Departments, commissions and the like.
 - i. Certain parcels are titled to the State, a Department, Commission etc. but are not reflected as State properties in the 2012 Apportionment:
- d. Point 4 – HRBRRD refused the Five Counties' request for a postponement
 - i. The Counties were harmed because they would have otherwise been able to provide additional comments, objections and detail to support a modification of the 2012 Apportionment.

Also, on behalf of the Five Counties, Laurence P. Farbstein, President of Industrial & Utility Valuation Consultants, Inc. presented oral testimony to the Board. Mr. Farbstein presented his resume and background. He then presented the Board with a table summarizing the revisions contemplated by the Five Counties' recalculation of non-State property values. He also presented the Board with a DVD containing a number of tables backing-up the figures depicted in the summary table. Mr. Farbstein's testimony covered the following points:

- 1. Point 1 – Identification of duplicate non-State properties and an explanation, based on methodologies employed by town and County Assessors, as to how multiple land classifications could result in the double, triple, quadruple, etc. counting of certain properties.
- 2. Point 2 – Identification of property owned by the Albany Port Commission which was classified as non-State property, but should have been classified as State property.
- 3. Point 3 – Five examples from the National Bridge Inventory depicting projects in NYS DOT Region 1, the DOT Region covering the area within the 100 Year floodplain protected by the HRBRRD's Conklingville Dam. Noted that, based on those projects, \$600 per square foot of bridge area is a reasonable figure for use in valuing the State bridges in the floodplain.
- 4. Point 4 – Indicated that, of the elements of the Apportionment studied, the Five Counties spent the least amount of time on analysis of the cost estimates for the valuation of State roadways within the 100 year flood plain. This was due to time constraints occasioned by the Notice of the Grievance Hearing provided by HRBRRD. Noted that the \$1.5 Million per mile figure appeared to be low, and noted that the basis for that figure did not detail whether the roads at issue were rural, suburban, or urban. Further, Mr. Farbstein indicated that the HRBRRD did not specify whether the 46.4 miles of State road were two lane or four lane roads.

The Board and staff engaged Mr. Schachner and Mr. Farbstein in a discussion to better understand the arguments and data advanced in favor of the Five Counties' position. The

documents presented by Mr. Farbstein are now part of the record and will be posted to the District's website with the other documents considered by the Board.

Mr. Finkle noted that the Board was sympathetic to the Five Counties' desire for more time to study the Apportionment, but stated that the Board is faced with the competing considerations. Mr. Finkle stated that every delay in completion of the Apportionment, and payment of the amounts due by the Five Counties, results in a further delay of payment to the School Districts and Municipalities which rely upon taxes due and payable from the Regulating District.

Chairman Berkstresser noted that it was likely that the July 2012 Apportionment would be modified to account for the arguments advanced by the Five Counties and further noted that the Assessments delivered to the State and each of the Five Counties would likely change. The Chair asked staff to prepare a revised Apportionment taking into account the data points noted in Mr. Farbstein and Mr. Schachner's presentation. Mr. Clark noted that the Board's next meeting, to be held October 10th, would take place in the Regulating District's Black River Area at a venue more accessible by folk concerned with issues facing the Black River Area and the North Country than persons concerned with the Hudson River Area Apportionment. Mr. Clark suggested that the Grievance Hearing be continued at the Board's November 2012 meeting, but noted that the meeting location and date, originally scheduled for November 6th, would have to be rescheduled.

Chairman Berkstresser indicated that the Apportionment would be tabled to the November meeting.

Meeting recessed for a break: 11:45 A.M.
Meeting reconvened: 12:00 P.M.

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 this month been directed to the defense of the Hudson River Area Apportionment adopted by the Board at the July 10th 2012 meeting. The balance of his time has been spent addressing demands lodged by the various hydropower entities following FERC's final Headwater benefits determination.

Board Authorization to Solicit Statement of Qualifications for Completion of Hawkinsville Dam Remediation and Removal Final Study and Design, Contract No. C012012.

Mr. Foltan recounted for the Board that in 2007 the Dam Safety section of the NYS DEC, Division of Water notified the Regulating District of certain deficiencies at the Hawkinsville Dam. Following subsequent consultant reports including a Remediation and Removal Alternatives Assessment, presentation of that report, and staff's recommendation for further study of Remediation Option 4 (inflatable weir) and the removal alternative, staff now seeks Board authorization for the completion of a final study of the recommended remediation alternative and the removal alternative, and the final design and construction monitoring of the preferred alternative, as selected by the Board.

Mr. Finkle made a motion for the Board to authorize the completion of the study. Mr. Stover seconded and the motion was unanimously adopted.

RESOLUTION TO APPROVE A TWELFTH AMENDMENT TO THE RETAINER AGREEMENT FOR LEGAL SERVICES IN CONNECTION TO ONGOING LITIGATION WITH ERIE BOULEVARD HYDROPOWER, L.P. AND NIAGARA MOHAWK POWER CORPORATION

Mr. Leslie noted that Niagara Mohawk Power Corporation has commenced a new lawsuit in the NYS Supreme Court in Herkimer County. This Article 78 challenge, like the many before it, disputes assessments levied on NiMo properties in the Black River Area. The law firm of Brown & Weinraub represents the Regulating District in each of the nineteen previous suits, covering assessments against NiMo properties in both River Regulating Areas from 2000 to date. Staff proposes to amend the Legal Services Contract with Brown & Weinraub to add the instant lawsuit. While neither the contract term, nor the not-to-exceed amount would be changed, this twelfth amendment is still subject to approval by the Office of the Attorney General and the Office of the State Comptroller. Mr. Leslie noted that he had already confirmed, verbally, with the Office of the Attorney General, that that office does not intend to represent the Regulating District with respect to the instant suits.

Mr. Hayes made a motion for the Board to approve the resolution authorizing the Executive Director to execute a Twelfth Amendment to the Erie/Nimo Retainer Agreement. Mr. Stover seconded and the resolution was unanimously adopted.

RESOLUTION AUTHORIZING EXECUTIVE DIRECTOR TO AMEND LEASE AGREEMENT WITH DAVID L. GRUENBERG, AS TEMPORARY RECEIVER OF RENTS & PROFITS (ACTING ON BEHALF OF SKY FOUR REALTY LLC) FOR THE ALBANY OFFICE

Mr. Ferrara explained that the landlord at 350 Northern Boulevard has requested space currently occupied by the Regulating District. As the Regulating District need not utilize that space, and the landlord has agreed to a reduction of \$1 per sq ft of space we will continue to rent. Mr. Ferrara recommended adoption of the Resolution.

Mr. Finkle made a motion for the Board to approve the Resolution authorizing the Executive Director to amend the lease agreement for 350 Northern Boulevard, Albany. Mr. Hayes seconded and the Resolution was unanimously adopted.

RESOLUTION ADJUSTING UNRESTRICTED NET ASSETS IN THE BLACK RIVER AREA TO NET ASSETS AS OF JUNE 30, 2012 PURSUANT TO NOTE #7 TO BASIC FINANCIAL STATEMENTS CONTAINED IN INDEPENDENT AUDITOR'S REPORT FOR FISCAL YEAR 6/30/2012

Mr. Ferrara noted that largely due to an increase in Hudson River Area liabilities, as of 6/30/2012, total District unrestricted net assets have decreased from \$2,285,553.00 as of 6/30/2011 to \$1,293,454.00 as of 6/30/2012. More specifically, the Hudson River Area net assets as of June 30, 2012 have gone negative to (\$437,686) and the Black River Area has

decreased to \$1,731,221. Footnote #7 (Net Assets) to the Auditor's Report has indicated a total of \$2,259,949.00 of unrestricted net assets split among the two watersheds for the purposes specified since the 06-07 audit. As that amount now exceeds the total amount of unrestricted net asset as of 6/30/2012, the amount designated requires adjustment. Mr. Ferrara recommended that the Board authorize the designation of unrestricted net assets to be decreased to an amount below the total net assets and be for the Black River Area only.

Mr. Stover made a motion for the Board to approve the Resolution authorizing the Chief Fiscal Officer to adjust unrestricted net assets. Mr. Hayes seconded and the Resolution was unanimously adopted.

STAFF REPORTS

Mr. Leslie presented his report to the Board.

On May 10, 2012, the Appellate Division Third Department rendered a 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*, finding that while the Apportionment methodology employed in March 2010 was neither irrational, nor inconsistent with the ECL, the Regulating District failed to deduct an amount chargeable to the state from the District's costs prior to apportioning the remaining costs to the beneficiaries identified. On June 12, 2012, Mark Schachner (attorney for the Five Counties) filed a Motion for Leave to Appeal (to the Court of Appeals) with the Appellate Division Third Department. The Motion sought permission from the Appellate Division to appeal their decision to the Court of Appeals. On July 31, 2012, the Appellate Division denied that request. On August 31, 2012, the Five Counties filed a Motion with the Court of Appeals seeking Leave to Appeal the Third Department's May 10, 2012 Decision to the Court of Appeals. The return date for the Five Counties' Motion to Seek Leave is September 10th. The Motion is 'on submission' which means that there will be no oral argument on the Motion before the Court of Appeals. AAG Paladino indicated that he would submit the Regulating District's and the DEC's opposition to the Five Counties' Motion by the September 10th deadline. A decision from the Court of Appeals, on the Motion for Leave to Appeal, is expected in six to eight weeks.

In compliance with the Appellate Division's Decision, the 2012 Apportionment establishes an amount chargeable to the state. The Apportionment has been filed and served on each of the five named beneficiaries as required by the Environmental Conservation Law. Copies of the Apportionment depicting the state share have also been sent to the NYS Comptroller and the Division of Budget.

On August 30, 2012, Erie Boulevard HydroPower L.P. filed a request for rehearing of FERC's HWB determination. Erie alleges that FERC's Order failed to reflect the new license issued to Green Island Power Authority on August 17, 2012 authorizing an increase in the Project's installed capacity from 6MW to 48 MW. The Regulating District has taken no position on the Erie filing.

On June 21, 2012, Northern Electric Power Company, L.P. and South Glens Falls, L.P. (“Boralex”) served a Summons and Complaint upon General Counsel at the Hudson River Area Office. On Thursday August 16th, the Executive Director and I spoke with representatives from Boralex and the Attorney General’s Office with regard to the suit and its impact on negotiations mandated by the FERC Headwater Benefits Determination. On August 31, 2012 K&L Gates LLP, counsel for Boralex, served the Attorney General with plaintiff’s Motion for Summary Judgment. AAG Dague will file the HRBRRD’s response to the Motion. Due to today’s Apportionment Grievance Hearing, AAG Dague has secured an extension to file to Monday the 24th.

The Executive Director has engaged in discussions with Erie Boulevard Hydropower L.P. and the Chief Fiscal Officer has spoken to Curtis/Palmer Hydropower regarding the commencement of HWB Payments under the FERC HWD Order. As noted above, Boralex and Albany Engineering have both commenced suits. We have now heard from Fort Miller Associates, but still have no contact from Stillwater Associates, New York State Electric & Gas or the Green Island Power Company. The Chief Fiscal Officer has secured a verbal commitment from FERC staff extending the September 14, 2012 due date for payment of the District’s \$154,790 share of FERC’s cost for the Oak Ridge National Laboratory to complete the HWB Study.

On June 4 and June 6th respectively, Fulton County and then Hamilton County brought suit to compel payment of school and property taxes. After submission and receipt of the Attorney General’s letter in response, Fulton County Supreme Court (Aulisi) issued a decision and Judgment in favor of Fulton County and another in favor of Hamilton County. The decision orders the Regulating District and each individual Board Member to pay \$1,660,129.90 within 10 days of Notice of Entry. (Hamilton = \$119,361.84). By letters dated August 23, 2012, the Attorney General’s office granted each Board member’s request for representation and indemnification with respect to the personal liability imposed by the Court’s Orders. AAG Dague filed a Motion to Reargue and accompanied myself and the Executive Director to the Judge’s chamber on the September 4 return date. Judge Aulisi offered to clarify his decision to reflect no intention to hold any of the Board members named in the decision personally liable for payment of either judgment. The parties also agreed to an extension of the deadline for compliance with the Court’s judgment to September 28th to provide sufficient time for the Board to complete the 2012 Apportionment Grievance Hearing procedure and for the Court to issue its clarification.

On September 29, 2010, U.S. District Court Judge Norman Mordue dismissed the NiMo federal Court Permit System and Assessment challenge. On March 7, 2012, the U.S. Court of Appeals 2nd Circuit (USCA 2nd Circuit) affirmed the District Court’s ruling on preemption and dismissal of DEC. However, the USCA 2nd Circuit also vacated the District Court’s abstention ruling and remanded NiMo’s federal and NY constitutional claims back to the District Court for further proceedings. Special Counsel Justin Driscoll indicates that the District Court has scheduled a scheduling conference for late October.

On September 19, 2012, Niagara Mohawk Power Corporation, d/b/a National Grid filed the 2012 version of their annual assessment challenge and Notice of Intention to File a Claim in

the Court of Claims. Justin Driscoll of Brown & Weinraub will prepare and serve the Regulating District's Answer.

On April 2, 2012, Albany County Supreme Court Judge Teresi granted Summary Judgment to Albany Engineering Corp awarding \$516,655.62 plus interest dating back to January 1, 2003 pursuant to an action against the Regulating District alleging that Assessments levied pursuant to ECL Article 15, Title 21 against Albany Engineering Corporation (AEC) between 2003 and 2007 lacked statutory authority. On August 23, 2012, the Attorney General participated in the mandated Civil Appeal Settlement Program meeting required by the Appellate Division Third Department. Mike Clark and I also attended.

Mr. Ferrara presented his report to the Board.

Mr. Ferrara presented to the Board a list of expenses incurred by Board Members for consideration this month.

Mr. Ferrara noted that the Cash Flow Report on page 101 of the Board packet does not reflect payment of the Headwater benefits Study fee. He indicated that he would follow-up with FERC to secure written confirmation of the verbal extension of time he has received for the Regulating District to pay such fee. Mr. Ferrara again noted that current fund balances in the Hudson River Area and in the Black River Area remain as forecasted.

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. He also noted that the Hudson River Area had engaged in extensive safety training and had undertaken some erosion control activities at Great Sacandaga Lake.

Mrs. Wright presented her report to the Board

RESOLUTION SCHEDULING DATE, TIME AND LOCATION OF THE OCTOBER 10, 2012 BOARD MEETING

Chairman Berkstresser asked for a Motion to adopt a Resolution setting the October 10, 2012 date of the Board's next meeting at Stillwater.

Mr. Hayes moved to adopt the Resolution. Mr. Finkle seconded it and the Resolution was unanimously adopted.

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 12:50 P.M.

RESOLUTIONS

12-31-09 RESOLUTION TO APPROVE A TWELFTH AMENDMENT TO THE RETAINER AGREEMENT FOR LEGAL SERVICES IN CONNECTION TO ONGOING LITIGATION WITH ERIE BOULEVARD HYDROPOWER, L.P. AND NIAGARA MOHAWK POWER CORPORATION

Mr. Hayes made a motion for the Board to approve the resolution authorizing the Executive Director to execute a Twelfth Amendment to the Erie/Nimo Retainer Agreement. Mr. Stover seconded and the resolution was unanimously adopted.

12-32-09 RESOLUTION AUTHORIZING EXECUTIVE DIRECTOR TO AMEND LEASE AGREEMENT WITH DAVID L. GRUENBERG, AS TEMPORARY RECEIVER OF RENTS & PROFITS (ACTING ON BEHALF OF SKY FOUR REALTY LLC) FOR THE ALBANY OFFICE

Mr. Finkle made a motion for the Board to approve the Resolution authorizing the Executive Director to amend the lease agreement for 350 Northern Boulevard, Albany. Mr. Hayes seconded and the Resolution was unanimously adopted.

12-33-09 RESOLUTION ADJUSTING UNRESTRICTED NET ASSETS IN THE BLACK RIVER AREA TO NET ASSETS AS OF JUNE 30, 2012 PURSUANT TO NOTE #7 TO BASIC FINANCIAL STATEMENTS CONTAINED IN INDEPENDENT AUDITOR'S REPORT FOR FISCAL YEAR 6/30/2012

Mr. Stover made a motion for the Board to approve the Resolution authorizing the Chief fiscal Officer to adjust unrestricted net assets. Mr. Hayes seconded and the Resolution was unanimously adopted.

12-34-09 RESOLUTION SCHEDULING DATE, TIME AND LOCATION OF THE OCTOBER 10, 2012 BOARD MEETING

Mr. Hayes moved to adopt the Resolution. Mr. Finkle seconded it and the Resolution was unanimously adopted.

Respectfully submitted,



Richard J. Ferrara
Secretary/Treasurer