

HUDSON RIVER BLACK RIVER REGULATING DISTRICT  
COUNTY OF ALBANY

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In the Matter of the Application of

THE COUNTY OF WASHINGTON, NY,  
Petitioner

VERIFIED COMPLAINT

For modification/withdrawal of apportionment  
under NYS ECL Sec. 15-2121 by the

**Administrative Proceeding  
NYS ECL Sec. 15-2121**

HUDSON RIVER BLACK RIVER  
REGULATING DISTRICT,  
Respondent.

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The County of Washington, a municipal corporation organized under the laws of the State of New York and as a Public Corporation aggrieved by the apportionment to it of a portion of the total cost and expense of the Great Sacandaga Lake Reservoir by the Hudson River Black River Regulating District, as and for a complaint, exception to, and demand for modification of, said appropriation, states the following:

1. This is an administrative grievance brought by the County of Washington, New York (County) under NYS Environmental Conservation Law (ECL) Sec. 15-2121 in response and objection to the apportionment approved by the Board of the Hudson River Black River Regulating District (HRBRD) on January 12, 2010 in Resolution No.: 10-6-01, certified to the NYS Department of Environmental Conservation (DEC) January 12, 2010, and approved by DEC in an undated letter received by the Board February 3, 2010. For the reasons set forth herein, the County takes exception to and objects to the apportionment in entirety as applicable to Washington County and seeks withdrawal and/or modification of the apportionment under Sec. 15-2121.
2. The amount of said apportionment allegedly attributable to the County of Washington is \$171,357.09, 6.53% of the total.
3. Jurisdiction and venue rests with the Board at Albany, New York in accordance with ECL Sec. 15-2121 (4) and the Board's notice (undated) under the hand of Richard J. Ferrara, Sec.-Tres. requiring the filing of the instant complaint at the Board's Offices located at 350 Northern Blvd., Albany

on or before March 23, 2010.

4. The County respectfully requests ten minutes to present documents, exhibits and oral testimony.
5. Petitioner is the County of Washington, New York, a municipal corporation established under the laws of New York State, with offices located at 383 Broadway, Fort Edward, New York, an identified entity allegedly subject to the Board's apportionment approved January 12, 2010 by Board Resolution No.: 10-6-01.
6. Respondent is a public corporation established pursuant to Art. 15, Title 21 of the NYS ECL, identified and designated by statute as the Hudson River Black River Regulating District under ECL Sec. 15-2139(3).
7. The name and, address and telephone number of the representative of Complainant Washington County is its duly appointed County Attorney Roger A. Wickes, Esq. Washington County Attorney, 383 Broadway, Fort Edward, New York 12828 (518-746-2216)
8. Authority for the objections herein is derived from ECL Sec. 15-2121 and associated sections.

POINT ONE

9. The District has failed to perform its duty and failed to observe premises as required by statute (C.P.L.R. Sec. 7803[1])
10. ECL Sec. 15-2121 (4) provides, in pertinent part, that: "The board, or a majority of the members thereof, before making such apportionment shall view the premises and public corporations benefitted."
11. There is no proof submitted that the Board, or a majority thereof, physically attended and observed the premises or corporations allegedly subject to the apportionment.
12. By memo dated January 7, 2010 General Counsel Robert Leslie, Esq. relates, without reference to any authority, that: "Current staff is of the opinion that the word "view", when taken in this context, contemplates a thorough understanding of: the breadth and scope of the apportionment; against whom such apportionment will lie; and the relative amount to be borne by each such entity." There is no authority for the Board to interpret the statute in such manner.
13. Even assuming that this interpretation is true, as will be seen below, the District did not even perform a cursory "review" of the wealth of data available in arriving at its apportionment.

14. “It is a general rule in the interpretation of statutes that the legislative intent is primarily to be determined from the language used in the act, considering the language in its most natural and obvious sense.” NYS Statutes, Sec. 232. Further, “Words of ordinary import used in a statute are to be given their usual and commonly understood meaning, unless it is plain from the statute that a different meaning is intended.” Sec. 232. Additionally; “From this general rule it is deducible that words of ordinary import are to be construed according to their ordinary and popular significance, and are to be given their ordinary and usual meaning. That is to say, as a general proposition, words which have not received a technical or peculiar significance from long habitual construction, or by legislative definition, are to be interpreted according to the meaning with which they were generally accepted at the time of the enactment...” Sec. 232

15. The term “view” found in ECL Sec. 15-2121(4) is not defined by statute, nor has the term received a technical or peculiar significance in the context of the ECL.

16. Accordingly, neither the Board or it’s staff are authorized to substitute their interpretation of the word “view” from the generally recognized “most natural and obvious sense” (Sec. 232). Rather, the Board must give the word its “usual and commonly understood meaning” when interpreting Sec. 15-2121. (Sec. 232).

17. That is, in the context presented; “The board, or a majority thereof...” is required under Sec. 15-2121 to physically visit, observe and assess each and every premises and public corporation allegedly subject to the statute.

18. In this case, there is no proof offered that either the Board in total or a majority physically visited each parcel and corporation allegedly benefitted. In fact, there is admission that the “natural and obvious sense” of the statutory requirement was ignored.

19. The apportionment process was therefore flawed, not consistent with the requirements of Sec. 15-2121, and represents an actionable failure to perform a statutory mandate. Accordingly, the apportionment fails and should be withdrawn.

## POINT TWO

20. The District’s apportionment is an arbitrary and capricious abuse of discretion (C.P.L.R. Sec. 7803[3]) in that it fails to determine or apportion any benefits to New York State.

21. ECL Sec. 15-2121 requires, in relevant part, the Board determine to determine the “...amount of benefit which will inure to each public corporation...” by reason of the Sacandaga Reservoir.

22. §15-2121 further requires that, once the benefit is determined, the Board's apportionment is to be applied against benefitted parcels and public corporations "...less the amount which may be chargeable to the state,...."

23. There is no proof showing the Board performed a comprehensive study and analysis of NYS real and/or personal property and made any associated benefit analysis. The sole representation in this context is commentary offered in the November 23, 2009 memo from Robert Leslie, Esq., General Counsel, referencing the Gomez and Sullivan Report of 2003 which concludes that there is "negligible benefit to the state by diverting flow to the NYS Champlain canal." No mention or analysis is made in the memo of Board inquiry or investigation into other possible benefits to NYS beyond canal flow. For instance, completely ignored are state interests in resources of: state roads and highways, state bridges, state recreation opportunities, state and local waste assimilation and nuisance prevention, navigation, as well as statewide flood protection and hydroelectric power generation. NYS has obvious interests to be protected, if not enhanced, by District activities in each of these subject areas, yet there is no analysis or consideration given to State interests in this context as required under Sec. 15-2121(2).

24. A review of the ownership of the properties used for the apportionment is also revealing. Although the District does not apportion any benefit to the State, of the municipal entities owning property in the apportioned area (9,942.2325 acres), .359 acres are federal, 617.119 are state owned, 11.742 are county owned and 22.340 are town owned making the State the largest municipal owner of property within the apportioned acreage area with the County as the second smallest.

25. Compliance with Sec. 15-2121 requires analysis and determination of state interests. The statutorily required analysis has not occurred in the instance of the Board's apportionment. The Board's failure to conduct a comprehensive inquiry and make associated determinations of possible State interests is inconsistent with the requirements of Sec. 15-2121. Thus the apportionment is flawed, a violation of statutory procedure, representing an actionable arbitrary and capricious abuse of discretion. Accordingly, the apportionment fails and should be withdrawn.

### POINT THREE

26. The District's decisions and apportionment are an arbitrary and capricious abuse of discretion (C.P.L.R. Sec. 7803[3]) since they failed to examine the actual benefits to the apportioned counties and contain a flawed determination of benefit to the parcels and public corporations.

27. ECL Sec. 15-2121(2) in pertinent part, requires the Board to "...apportion...cost among the public corporations and parcels of real estate benefitted, in proportion to the amount of benefit which will inure to each such public corporation and parcel of real estate...."

28. The Board calculated the apportionment using three stages of analysis: 1. hydraulic modeling of the Hudson River flood plain; 2. generation of GIS maps showing an inventory of properties within the flood plain; and 3. summation of property values culminating in a benefit shared between properties based upon total value of each property. See Memorandum to the Board dated January 7, 2010 from Executive Director LaFave and staff.

29. Sec. 15-2121(2) requires calculation of benefit to include: the name of each public corporation and a brief description of each parcel of real estate benefitted; the name of the owner or owners of each such parcel of real estate, so far as can be ascertained; the proportion of such cost ...less state costs...to be borne by each expressed in decimals; and the amount to be paid by each such public corporation or the owner or owners of each such parcel.

30. The apportionment here did not comply with the identification and evaluation requirements of 15-2121(2). The Board merely established a summary calculation of District costs split between affected municipalities within the five Counties in general. The apportionment merely totaled the number of properties in various municipalities adjacent to a flood plain map within each County, then proportionately divided the amounts between the five affected Counties. There is no proof offered by the District showing each parcel was evaluated to show actual flood effects and damages.

31. Further, there is no evidence that the District performed more than a perfunctory examination of the available data used to apportion their costs to the counties.

32. Even a cursory examination of the data used to compile the District's apportionment reveals that there is an underlying flaw in utilizing the County as the apportioned entity. For example, the District's apportionment states that Washington County has a total of 602 parcels with a portion of that parcel within the 100 year flood plain. The entire value of those parcels was used to calculate Washington County's portion of the assessment.

33. A quick request to the Washington County Real Property Tax Services Department would have revealed that those 602 parcels identified by the District comprise 9,942.2325 total acres of land. Of that total acreage only 2,187.1041 or 28% is actually within the flood plan. The remaining 72% of the acreage used for apportionment has no contact with the flood plain whatsoever.

34. Washington County consists of 535,680 total acres. Two state prisons and other exempt facilities take approximately 20,300 acres off the tax rolls leaving 515,380 acres as the tax base of the County. Out of that net tax base, 26,363 acres is forest land that is owned by the State of New York representing 5.1% of the net tax base of the County by acreage. That entire tax base acreage of the County (515,380) is asked to pay the apportionment for what in reality is only 2,187.1041 acres of benefit. In reality, only .43% of Washington County's tax base lies within the 100 year flood plain as indicated by the District.

35. Just as the Board failed to undertake an study related to the actual benefit to the County of Washington, it also failed to study the benefit to the individual towns in which the allegedly benefitted acreage lies.

36. The numbers are just as stark for each town. The approximate total acreage of the Village of Hudson Falls and towns of Fort Edward, Greenwich and Easton is 87,495.34 acres. The total acreage used for apportionment in those municipalities is 9,942.2325 acres making the actual percentages of those municipalities utilized for apportionment 1.1%. When utilizing the flood plain acreage analysis, that percentage falls to .3%.

37. The actual utilization of these properties is also revealing. Real Property classification codes reveal the following:

<u>Classification</u>	<u>Acreage</u>
Field Crops	1504.219
Private Forest	376.202
Res Vacant Land	116.027
Rural Vacant >10	452.556
State Forest	46.475
Vac Farmland	785.196
Vacant Land	12.568
<u>Vacant Rural</u>	<u>130.112</u>
Total	3423.355

It is generally acknowledged that these classification codes cover vacant land. There may be other parcels with different classifications that increase the amount of vacant land, these represent the minimum. The figures reveal that of the apportioned area (9,942.2325 acres), approximately 35% is vacant.

38. The methodology applied by the Board was inconsistent with the requirements of Sec. 15-2121(2) because it did not identify, evaluate and assess costs against each parcel. Additionally, there was no evaluation made of relative damages to each property given various levels of water in the flood plain. Thus the apportionment is flawed, a violation of statutory procedure, representing an actionable arbitrary abuse of discretion. Accordingly, the apportionment fails and should be withdrawn.

#### POINT FOUR

39. The District's current apportionment should be barred As inequitable and unfair under the doctrine of equitable estoppel.

40. It is settled that the doctrine of estoppel precludes enforcement of a right otherwise permissible which results in injustice to a party who has acted to its detriment in reliance on previously established conduct. (Citations omitted.)

41. Never before in history has the District apportioned costs against Counties as it intends in the current reapportionment. In light of the District's prior course of conduct, Washington County did not budget for an apportionment of any District costs to be chargeable against the County. The County was induced to act to its detriment by the District's prior conduct.

42. The apportionment is therefore flawed and unjust. Accordingly, the District should be precluded from enforcing the intended apportionment under the doctrine of equitable estoppel.

#### POINT FIVE

43. The District has failed to reapportion within a reasonable time thus violating the doctrine of laches.

44. It is settled that failure to assert a right for an unreasonable and unexplained length of time is a bar to enforcement of the right when it operates to the detriment of another acting in reliance.

45. Under the circumstances presented, for over eighty years, since creation of the District, costs have never been assessed against Counties. As a result, Washington County has never budgeted to pay District costs, and did not budget for such costs in 2010.

46. In its budgets of the last several years, the County has worked hard to stabilize and reduce the County levy. The County's total budget is approximately \$112 million. Out of that total, the County derives income from a number of sources such as federal and state payments as well as fees and reimbursements for services. The real number in a county budget that impacts the taxpayer, however, is the county tax levy. The County's revenue from the real property tax levy in 2010 is \$27,467,800. An assessment of \$171,357.09 represents .62% of the tax levy or over one half a percent increase that would be required to pay the apportionment.

47. The County budget does not run with much of a surplus. The County's fund balance is approximately \$8 million. Since the County requires approximately \$10 million for cash flow purposes (i.e. to reimburse villages, towns and school districts for unpaid taxes etc.), the County has very little to no extra cash on hand. Past budgets have also appropriated fund balance in order to keep the tax levy stable. Funds for this assessment were not included in the 2010 budget. In fact, at date of this writing, the County is using approximately \$3 million of its fund balance in the 2010 budget and is awaiting the impact from anticipated cuts in state funding. Other revenues are down. For instance the County failed to meet its 2009 sales tax budget by over \$1.2 million. The initial projected tax increase for 2011 is 15.3%.

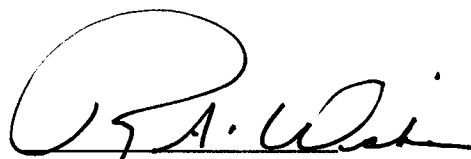
48. Imposition of the proposed apportionment would further compromise the fiscal position of the County which, given current state budget issues and funding reductions as well as national economic and market conditions, is already severely compromised.

49. Given the length of time over which the District chose not to apportion costs against Counties, and reliance on that conduct by Washington County in preparing yearly budgets for over eighty years, the current apportionment should be precluded under the doctrine of laches.

50. Finally, Washington County hereby adopts and incorporates the arguments made in this proceeding by the counties of Albany, Rensselaer, Saratoga and Warren to the extent not made herein.

WHEREFORE, for the reasons set forth above the County respectfully requests, in the alternative, that; the apportionment be withdrawn, and/or alternatively, the apportionment be modified in accordance with objections stated herein; and/or alternatively the District take such other and further action in accordance with law.

DATED: Fort Edward, New York  
March 19, 2010



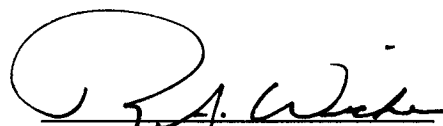
Roger A. Wickes, Esq.  
Washington County Attorney  
Attorney for: Washington County, NY  
383 Broadway, Bldg. B  
Fort Edward, New York 12828  
518-746-2216

TO: HRBRRD

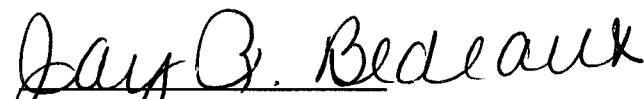
VERIFICATION

State of New York    )  
County of Washington ) SS.:

Roger A. Wickes, affirms under penalty of perjury that; 1. He is the duly appointed County Attorney for the County of Washington; 2. the County of Washington is the Petitioner in this proceeding; 3. that Petitioner is a governmental subdivision; 4. that he is acquainted with the facts of this matter; he makes this verification pursuant to CPLR Sec. 3020(d)(2); 5. he has read the foregoing complaint and knows the contents thereof; the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

  
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Roger A. Wickes

Sworn to before me this  
19<sup>th</sup> day of March, 2010.

  
\_\_\_\_\_  
Notary Public

JOY R. BEDEAUX  
Notary Public, State of New York  
No. 01BE6066297  
Qualified in Washington County  
Commission Expires November 13, 2013