

**HUDSON RIVER-BLACK RIVER REGULATING DISTRICT  
BOARD MEETING  
MARCH 12, 2013**

**10:00 A.M.**

Utica State Office Building  
207 Genesee Street  
Utica, New York

**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; First Vice Chair Mark M. Finkle; Second Vice Chair Albert J. Hayes; Board Member Thomas Stover and; Executive Director Michael A. Clark; General Counsel Robert P. Leslie; Chief Fiscal Officer Richard J. Ferrara; Chief Engineer Robert Foltan; Hudson River Area Administrator John Hodgson; Black River Area Administrator Carol L. Wright.

**Excused:**

**MOTION TO ADOPT OR REVISE THE MEETING AGENDA**

Chairman Berkstresser asked if there was a need for a Motion to revise the meeting agenda. Mr. Hayes made a Motion to adopt 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 JANUARY 31, 2013 BOARD MEETING MINUTES**

A motion was made by Mr. Finkle to approve the Minutes of the Board's January 31, 2013 organizational meeting and regular board meeting. Mr. Hayes seconded it and the motion was unanimously approved.

**RESOLUTION TO APPROVE AN APPORTIONMENT FOR THE HUDSON RIVER AREA WITH MODIFICATION**

Mr. Clark led the Board through a discussion of the procedural history which has taken place in the Apportionment process to date. To wit: Mr. Clark directed the Board's attention to the draft "*Resolution To Approve an Apportionment for the Hudson River Area with Modification*" which recites the Board's initial adoption of an Apportionment in March 2010;

and the Appellate Division Third Department's May 10, 2012 decision invalidating said Apportionment to the extent that the Board failed to deduct the benefits to the State derived prior to apportioning the remaining costs among the named beneficiaries. Mr. Clark noted that in July 2012 the Board's Finance Committee considered and recommended adoption of an Apportionment. Mr. Clark highlighted portions of the Board's July 2012 Meeting Minutes. He noted:

- The Board's SEQRA determination of no adverse effect on the environment;
- The Apportionment the Board adopted in July 2012 utilized the same methodology for apportioning among the Five Counties that the Appellate Division had determined to be rational;
- The Board determined the amount chargeable to the State to be 11.96% of the Regulating District's Hudson River Area costs;
- The Board's July 2012 Apportionment calculated the 'Reasonable Return to the State' to be zero dollars; and
- The Board elected not to separately breakout the expenses and beneficiaries associated with the Indian Lake reservoir.

Mr. Clark explained that following the Board's adoption of the July 2012 Apportionment, the Board certified the Apportionment to the NYS DEC for approval as required in the Regulating District's enabling statute and that upon that approval, staff served the Apportionment on each of the relevant parties. Mr. Clark reminded the Board that it convened an Apportionment Grievance Hearing at its September 21<sup>st</sup> Board Meeting in Warren County and that each of the Five Counties named in the Apportionment were represented at that Hearing by the firm of Miller, Mannix, Schachner & Hafner, LLC of Glens Falls.

Mr. Clark directed the Board to the minutes from its September 2012 meeting which memorialize the concerns raised by the Five Counties with respect to the Board's calculation of the State Share. Specifically, counsel and a consultant for the Five Counties challenged a number of 'math errors' including: inappropriate inflation of the value of non-State properties through double counting of certain properties and the placement of State land (specifically the Albany Port Commission properties) on the non-State side of the ledger; undervalued State Bridges; and undervalued State Roads. Mr. Clark also noted the Minute's recitation of four additional issues raised by the Five Counties in their written complaint, and preserved, but not specifically addressed, at the Hearing by the Five Counties' counsel. Finally, Mr. Clark reminded the Board that the Chair had tabled action on the Apportionment at the conclusion of the Apportionment Grievance Hearing portion of the Board's September 21<sup>st</sup> Meeting.

Next, Mr. Clark reminded the Board that the Five Counties' Motion for leave to appeal the Appellate Division's May 10, 2012 decision upholding the HRBRRD's Apportionment Methodology was denied by the Appellate Division Third Dept on July 27<sup>th</sup> and a subsequent Motion for Leave to Appeal was denied by the Court of Appeals on October 30, 2012.

Mr. Clark noted for the Board that shortly after the September meeting, Regulating District staff and representatives from the Five Counties began to meet to address each of the concerns raised by the Five Counties counsel and consultant. Mr. Clark then directed the Board to review two memorandum to the Board dated November 9, 2012. These two Memorandums, one from the Executive Director and Staff and the other from HRBRRD Counsel, provide the Board with

the basis and documentation to support a modification to the State Share and address each of the remaining issues raised in the Five Counties complaints. These are the same memorandum and documents provided to the Board in anticipation of the Board's December 11, 2012 meeting. Copies of these documents were provided to the Five Counties counsel via email on November 9<sup>th</sup> and have been placed for public display on the HRBRRD website.

Directing the Board to the first memorandum "*2012 Hudson River Area / Great Sacandaga Lake Apportionment Revisions to Non-State and State Property Value Inventories*" dated 11/9/2012, Mr. Clark reminded the Board that staff's recommended Apportionment calculated the Apportionment to reflect a separation of the benefit derived by the State from the benefit derived by the counties in order to determine the amount chargeable to the State. Mr. Clark further explained that in order to separate the flood benefit derived by the State from the flood benefit derived by the counties, staff developed an inventory of non-State owned properties and State-owned 100-year "without GSL" flood protected properties. Staff also determined the value of State-owned roads and State-owned bridges and then compared the value of State-owned and State-maintained flood protected real property, roadways and bridges with non-State properties in the flood plain consistent with the Appellate Division's decision. Mr. Clark noted that in response to changes suggested by the Five Counties' counsel and consultant, staff made the following changes to the inventory of real property values: staff removed apparent duplicate data from the inventories for both non-State and State-owned property inventories; staff completed a line-by-line review of the property inventories for proper separation of non-State and State-owned properties. Mr. Clark noted that staff then recalculated the full market value of non-State property to be \$3,293,594,628 and State owned property to be \$262,545,908 and recommends utilization of these new values.

Also in response to the Five Counties' counsel and consultant's suggestions, staff determined that 141.0 'lane-miles' of state roadway could be better utilized to value rural, suburban and interstate road costs/value than staff previously used 46.4 'center-line' miles of State roadways within the 100-year 'without-GSL' flood plain. Mr. Clark noted that staff continued to utilize the average unit value per lane mile of \$1,500,000 and thus recommends that the Board revise the value of State roadways receiving flood protection in the in the 100-year 'without GSL' flood plain from its July 2012 recommendation of \$69,600,000 to \$211,500,000.

Mr. Clark noted that staff's July 2012 Apportionment recommendation utilized \$300 per square foot of bridge deck area to calculate the value of the nineteen State bridges within the 100-year "without GSL" flood plain. Mr. Clark noted that comments received during the September 21<sup>st</sup> Grievance Hearing suggested that a bridge deck value of \$300 per sq ft. did not accurately reflect the average value of the bridges within the 100-year "without GSL" flood plain. Mr. Clark noted that staff re-evaluated its calculation of the unit value for bridge decks to utilize a weighted average calculation based entirely on actual local bridge replacement values. Mr. Clark noted that as a result, staff recommends that the Board revise the bridge deck unit value from its July 2012 recommendation of \$300/ sq. ft. to \$487.48. By applying this unit value to the uncontested 953,519 sq. ft of total bridge deck area utilized previously, the value of the State bridges receiving flood protection in the 100-year "without-GSL" flood plain is moves from \$286,055,700 to \$464,821,442.

Mr. Clark noted that based on the values summarized above, and more particularly upon the values depicted in the Memo referenced earlier, the percentage of cost 'chargeable to the State is 22.18%. Mr. Clark, and the balance of the Regulating District's Senior Staff recommended that the Board modify the Apportionment adopted in July 2012 to reflect a State share of 22.18%.

Mr. Clark noted that the Regulating District staff and representatives from the Five Counties have engaged over the last several months in a series of talks and exchanges to negotiate a schedule of payments by the Five Counties to address amounts assessed covering HRBRRD Fiscal Years 2009-2012 and assessments going forward. The result of those talks is the agreement presented to the Board by Mark Schachner of Miller, Mannix, Schachner & Hafner, LLC of Glens Falls representing the five counties. Mr. Clark introduced Mr. Schachner to the Board.

Mr. Leslie indicated that he received from Mr. Schachner and Ms. Everhart facsimile copies of the signature pages of the Apportionment Consent Agreement with a request that the same be presented to the Board on behalf of Albany, Rensselaer, Saratoga, Warren and Washington Counties.

Mr. Clark, Mr. Leslie & Mr. Ferrara recommended that the Board accept the Apportionment agreement proffered by the Five Counties. Mr. Clark explained that the Agreement, in the form of a Consent executed and acknowledged in like manner as a deed as per Environmental Conservation Law Sections 15-2121(7) & (8) of the Regulating District's enabling statute, fixes the state's share of Regulating District expenses and allocates each Counties' proportionate share of the Regulating District's Hudson River Area fixed annual assessments. The Agreement provides in part for the satisfaction of 2009-2010, 2010-2011, and 2011-2012 assessments through payment by the Counties of \$3.5 Million (\$3,500,000) and additional payments for the next six annual assessments in the amount of \$2,994,100. This represents a significant reduction in the amounts which could have been assessed.

Mr. Ferrara pointed to page 23 of the Board packet noting that the re-casted budget amounts which could have been assessed totaled \$9.2 Million. Mr. Ferrara noted that the Consent Agreement requires the satisfaction of several material Hudson River Area balance sheet liabilities for the period 2009-2012. These include; the payment of the Fulton/Hamilton County past due tax judgments in the amount of \$1.78 Million over two years; payment of Saratoga County past due taxes in the amount of \$2.8 Million over two and ½ years; and initial payments of \$371,000 to the Black River Area note totaling \$3.045 Million. Mr. Ferrara noted that repayment of that note will likely take 30 years and recommended that the Board formally acknowledge the re-structured payment schedule. Mr. Ferrara indicated that at the same time, the Regulating District would be making payments to Fulton and Hamilton Counties for current tax liabilities estimated at \$5 Million through the end of HRBRRD's fiscal 2015.

Mr. Clark noted that the Board's acceptance of the Apportionment Consent Agreement would resolve longstanding litigation, re-establish the Regulating District's revenue stream, and enable the Regulating District to fulfill its mission to maintain the high-hazard structures under its jurisdiction and pay its ongoing obligations (including school and property taxes). In addition, Mr. Clark acknowledged that the settlement takes into account the impact upon the Five

Counties (sister public entities) and recognizes significant cutbacks and staff reductions at the Regulating District.

Chairman Berkstresser inquired as to the effect of the proposed write-off of amounts previously assessed upon the Board's ability to fund future actions. Mr. Ferrara indicated that the answer involves the timing of the write-off and the proposed new action. He noted that he will work with the Regulating District's internal auditor, but that the main factor will likely be the competitiveness of the market at the time the Board seeks to 'bond' projects or expenses. Finally, he noted that there will be an impact, but that ultimately the impact will be felt in the costs to incur new debt rather than act as a prohibition to such debt.

Mr. Finkle asked for clarification with respect to the payments and credits to Saratoga County in light of the tax bill the District owes to that County. Mr. Clark and Mr. Ferrara provided that clarification.

Mr. Finkle made a Motion to accept the consent presented by Albany, Rensselaer, Saratoga, Warren and Washington Counties, and to adopt the Resolution to approve an Apportionment for the Hudson River Area with Modification. Mr. Stover seconded the Motion. The Resolution was adopted unanimously.

#### **RESOLUTION APPROVING A REVISED BUDGET FOR THE HUDSON RIVER AREA FOR THE PERIOD JULY 1, 2012 THROUGH JUNE 30, 2015 AND THE ESTABLISHMENT OF STATE SHARE**

Mr. Ferrara explained that the Board's adoption of the July 1, 2012 through June 30, 2015 budget and the July 1, 2009 through June 30, 2012 budget did not contemplate an amount chargeable to the State. In light of the Board's adoption of the Apportionment at this meeting, including its amount chargeable to the state, Mr. Ferrara recommended that the budget be revised to reflect such charge.

Mr. Stover made a motion to adopt the Resolution to revise the 2009-2012 and 2012-2015 budgets. Mr. Hayes seconded the Motion and the Resolution was unanimously adopted.

#### **EXECUTIVE DIRECTOR'S REPORT**

Mr. Clark provided his report. He made a special point to applaud the work performed by members of the Senior staff: Robert Foltan; Richard Ferrara; Robert Leslie; and himself, to bring this complicated negotiated settlement forward. Specifically, he praised the effort and willingness to remain at their posts during difficult and uncertain times. Praise was also extended to Harris Dague of the Attorney General's Office, Ken Hamm of the Department of Environmental Conservation, Members of the Governor's Staff, and the many representatives and employees of Albany, Rensselaer, Saratoga, Warren, Washington, Fulton and Hamilton Counties.

Mr. Clark noted that even in the face of the shortfalls encountered over the last four years, and the significant effort to effect a settlement, the more mundane tasks facing these same staff

members continued unabated. Finally, Mr. Clark forecast for the Board the introduction next month of a resolution to address a proposed policy on Domestic Violence in the Workplace.

## **STAFF REPORTS**

Mr. Leslie presented his report to the Board.

Mr. Leslie noted that judgments in favor of Fulton (\$1,660,129.90) and Hamilton (\$119,361.84) Counties remain outstanding.

Mr. Leslie reported that Albany County Supreme Court Justice Joseph C. Teresi ruled against the Regulating District in a January 17, 2013 Decision and Order in the Northern Electric Power Company, L.P. and South Glens Falls L.P. v. HRBRRD case (the Plaintiffs are collectively known as “Boralex”). As characterized by the Attorney General’s Office, the decision is a decisive win for the plaintiffs. None-the-less, the assigned AAG indicated he believed there were grounds for appeal and that he would commence the internal process within the AG’s office to commence an appeal. Mr. Leslie noted that this is the second negative decision HRBRRD has suffered with respect to the HWB Refund issue. HRBRRD now faces judgments totaling (\$3,244,475.66 plus interest) (AEC - \$516,665.62 plus interest at 9%, Northern Electric \$2,368,480.51 plus interest at 9%, South Glens Falls \$359,329.53 plus interest at 9%). The AG has put the AEC case under appeal to the Appellate Division Third Department. Mr. Leslie indicated that the Board can expect the AG to also support/prosecute the appeal of the Boralex case as well. Mr. Leslie noted that HRBRRD faces another pending HWB Refund suit (New York State Electric & Gas) seeking \$771,667.58 plus interest.

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 2<sup>nd</sup> Circuit (USCA 2<sup>nd</sup> Circuit) affirmed the District Court’s ruling on preemption and dismissal of DEC. However, the USCA 2<sup>nd</sup> 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’s scheduling conference set for late October was postponed without date due to Hurricane Sandy.

Finally, Mr. Leslie reminded the Board and Senior Staff regarding the Governor’s Project Sunlight initiative.

Mr. Ferrara presented his report to the Board.

At the close of fiscal February 2013, general fund balances for the HRA and BRA were approximately \$224k and \$514k respectively. Regulating District transactional processing and reporting for the fiscal month of February was completed in an accurate and timely fashion. Regulating District expenses for the month came in at forecasted levels. Mr. Ferrara noted that permit system renewal fee receipts through February are \$317K and thus are ahead of last year’s pace.

Mr. Ferrara pointed the Board to a Memo he penned at page 89 of the Board packet addressing the cash flow implications of the Board’s adoption of the Apportionment. He noted

that in order to meet minimum cash flow for the successful achievement of the Hudson river Area operations, it was necessary to extend the amortization period of the BRA note payable in the amount of \$3.045 MM and to further manage such payments.

Chairman Berkstresser asked for a Motion authorizing the CFO to 1) amortize the Black River Area note payable, adopted pursuant to resolution 11-24-08, over a period of 30 years; and 2) to manage payments, particularly in the first three years, as cash flow in both watersheds warrant. Mr. Finkle made the Motion. Mr. Stover seconded and the Motion carried unanimously.

Mr. Ferrara presented the Board with the list of Board Member expenses depicted at page 90 of his report. Chairman Berkstresser asked for a Motion to approve said expenses. Mr. Hayes made the Motion to approve \$216.45 expenses incurred by Mr. Stover. Mr. Finkle seconded and the Motion was approved unanimously.

Mr. Ferrara explained that the State's office in charge of increasing the State's utilization of Minority and Women Owned Businesses (MWBE) contacted the CFO and Executive Director in order to develop a strategy for greater utilization of MWBE's by the Regulating District. Mr. Ferrara noted that the restoration of the Regulating District's revenue stream will likely positively impact the Regulating District's rate of MWBE utilization as the Regulating District begins again to engage firms for capital projects.

Mr. Foltan presented the Chief Engineer's report to the Board.

Mr. Hodgson presented his report to the Board.

Mrs. Wright presented her report to the Board.

## **RESOLUTION SCHEDULING DATE, TIME AND LOCATION OF THE APRIL 9, 2013 BOARD MEETING**

Chairman Berkstresser asked for a Motion to adopt a revised Resolution setting the April 9, 2013 date of the Board's next meeting at the Warren County Office Building in Lake George.

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 11:24 P.M.

## **RESOLUTIONS**

### **13-03-03 RESOLUTION TO APPROVE AN APPORTIONMENT FOR THE HUDSON RIVER AREA WITH MODIFICATION**

Mr. Finkle made a Motion to adopt the Resolution to approve an Apportionment for the Hudson River Area with Modification. Mr. Stover seconded the Motion. The Resolution was adopted unanimously.

### **13-04-03 RESOLUTION APPROVING A REVISED BUDGET FOR THE HUDSON RIVER AREA FOR THE PERIOD JULY 1, 2012 THROUGH JUNE 30, 2015 AND THE ESTABLISHMENT OF STATE SHARE**

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

### **13-05-03 RESOLUTION SCHEDULING DATE, TIME AND LOCATION OF THE APRIL 9, 2013 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