

**HUDSON RIVER-BLACK RIVER REGULATING DISTRICT
BOARD MEETING
OCTOBER 8, 2013
10:00 A.M.**

Stillwater Hotel
2591 Stillwater Road
Stillwater Reservoir
Lowville, New York 13360

CALL TO ORDER

Chairman David W. Berkstresser called the meeting to order at 10:07 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.

MOTION TO ADOPT OR REVISE THE MEETING AGENDA

Chairman Berkstresser asked for a motion to adopt or revise the meeting agenda. Mr. Stover made a motion to adopt the proposed meeting agenda without revision. Mr. Hayes seconded it and the motion was unanimously approved.

PUBLIC COMMENT PERIOD

Chairman Berkstresser solicited comments from the public, hearing none.

APPROVAL OF THE SEPTEMBER 10, 2013 BOARD MEETING MINUTES

Chairman Berkstresser asked for a motion to adopt the September 10, 2013 Meeting Minutes. Mr. Finkle advanced the motion to approve the Minutes of the Board's September 10, 2013 Regular Board Meeting. Mr. Stover seconded it and the motion was unanimously approved.

EXECUTIVE DIRECTOR'S REPORT

Mr. Clark provided his report. Mr. Clark reported upon his continuing dialog with the parties with whom the Regulating District is engaged in litigation concerning refund claims. Mr. Clark also reported to the Board that the Office of the State Comptroller has notified the Regulating District that it will be conducting an audit of the Regulating District's finances. Mr. Clark noted that the audit was not unexpected. He also noted continuing discussions with representatives from the Fulton County Board of Supervisors regarding the project to supply

Fulton County with potable water. Mr. Clark reported that he spoke at the annual meeting of the Great Sacandaga Lake Association. Mr. Clark noted that representatives from Mercer would be available to lead a tour of the Mercer hydropower plant co-located at the Stillwater Dam immediately following the Board's meeting.

CONTRACTS

RESOLUTION TO APPROVE THIRD AMENDMENT TO CONTRACT C092007 WITH GOMEZ AND SULLIVAN ENGINEERS, P.C.

Mr. Ferrara referred to the Board's prior approval of Resolution 08-22-05 for the completion of the Conklingville Dam Breach Analysis; noting that the original contract amount of \$170,000 was later increased to \$273,090 to cover additional engineering work. Mr. Ferrara recommended the Board extend the contract (C092007) with Gomez & Sullivan Engineers, Inc. to December 31, 2016 to accommodate unfinished work.

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

RESOLUTION TO AUTHORIZE THE SOLICITATION OF LEGAL SERVICES TO REPRESENT THE DISTRICT IN A LAWSUIT TO BE FILED AGAINST ERIE BOULEVARD HYDROPOWER L.P.

Mr. Leslie articulated the basis for a suit against Erie Boulevard Hydropower L.P. He noted that the Federal Energy Regulatory Commission's July 31, 2012 headwater benefits determination set Erie Boulevard Hydropower L.P.'s 2002-2008 headwater benefit assessment at \$1,849,640 and set Erie's current ongoing annual headwater benefit assessment from 2009 to present at \$365,100. Based on those figures, through the Regulating District's current fiscal year, Erie now owes a total headwater benefit assessment of \$3,675,140 ($\$1,849,640 + \{\$365,100 * 5 \text{ years} - 2009-10, 2010-11, 2011-12, 2012-13, \& 2013-14\}$). Erie claims it is due credit for \$7,296,868 which represents the difference between state law based assessments Erie paid between 2002-2008 (\$9,146,508) and the 2002-2008 Headwater Benefits assessment (\$1,849,640) assigned to Erie by FERC. The Regulating District rejects Erie's claim for an offset because Erie released any and all claims related to the assessments at issue. Between 2000 and 2005, Erie Boulevard Hydropower L.P. commenced six separate Article 78 proceedings challenging the 2000-01, 2001-02, 2002-03, 2003-04, 2004-05 & 2005-06 assessments and apportionments levied by the Regulating District Board on premises owned by the Petitioner. The parties reached an agreement accepted on May 23, 2006 by Fulton County Supreme Court Justice Richard T. Aulisi in a Stipulation of Settlement and Order memorializing the terms and conditions of the settlement. Pursuant to the Stipulation of Settlement and Order, the Regulating District provided Erie Boulevard Hydropower L.P. with a reduction in assessment for fiscal years 2006-07, 2007-08 & 2008-09 in the amount of \$822,220. The Regulating District also agreed to appropriate an additional \$380,000 to reduce assessments to all statutory beneficiaries in the Hudson River Area in order to provide Erie Boulevard hydropower with an additional monetary benefit in the form of a reduction in assessment of \$46,740 for Regulating District's budget years 2006-07, 2007-08 & 2008-09. Erie and the Regulating District also acknowledged that they entered into a May 2006 amendment extending the Reservoir Operating Agreement as part of the consideration for

the Stipulation of Settlement and Order. Each of the parties on behalf of itself and on behalf of any person or entity claiming by, through or under it, released and forever discharged each of the other parties...from any and all claims, demands, judgments, liabilities, damages, and causes of action of every kind and character, whether such claims arise in contract or tort, are founded upon statutory or common law, or whether such claims are known or unknown, at law or in equity (“Claim” or collectively “Claims”), arising out of or in any way related to the District’s budgets, assessments and apportionments for the budget years, July 1, 2000 to June 30, 2001, July 1, 2001 to June 30, 2002, July 1, 2002 to June 30, 2003, July 1, 2003 to June 30, 2004, July 1, 2004 to June 30, 2005, July 1, 2005 to June 30, 2006, which such party may now have against the Released Parties (to the extent that such claims originated in whole or in part, based upon presently existing facts, that could have originated in whole or in part on or before the date hereof). Erie agreed to waive any future challenges or claims with respect to the District’s July 1, 2006 to June 30, 2007, July 1 2007 to June 30, 2008 and July 1, 2008 to June 30, 2009 budgets, assessments and/or apportionments and agreed not to bring any lawsuit or legal action of any kind challenging, contesting or disputing the District’s budgets, assessments, and/or apportionments for the period July 1, 2006 to June 30, 2009. FERC’s assistant general counsel for hydro-licensing has stated that FERC’s adjudicatory process would not be an appropriate venue through which to determine the validity and scope of Erie’s release, but that such issue should be first resolved in a state or federal court. Erie has expressed a willingness to defer payment of the headwater benefit assessment for the two decades required for exhaustion of amounts Erie claims it is due and, as further evidence thereof, has to date declined to join the litigation course taken by the other hydropower companies asserting similar claims. The Regulating District has determined that in order to secure payment of Erie’s headwater benefits payment, it is going to have to commence a lawsuit to secure a judicial determination of the application of the 2006 release to Erie’s claim that Erie is owed a refund of a portion of the state law based assessments Erie paid between 2002 and 2008. The Regulating District has requested that the New York State Attorney General represent the interests of the Regulating District to secure a declaratory judgment upholding the terms of such release in the face of Erie’s defense to its obligation to immediately pay the headwater benefits assessments due. To date, the Attorney General has not had adequate time to respond to that request and, therefore, could still decline the Regulating District’s request for representation in this instance. Mr. Leslie recommended that the Board authorize the Executive Director to solicit legal representation in the event the Attorney General declines the Regulating District’s request for assistance.

Mr. Finkle moved to adopt the Resolution. Mr. Stover seconded it and the Board adopted the Resolution unanimously.

STAFF REPORTS

Mr. Leslie presented his report to the Board. Mr. Leslie noted that this month he assisted the Executive Director and the Chief Fiscal Officer in the preparation of a report detailing the HRBRRD’s use of outside counsel from January 1, 2011 to date. Records demonstrate that the Regulating District averaged \$324,000 per year in 07-08, 08-09, & 09-10. Upon the departure of the previous Executive Director, and in a concerted effort to curtail the use of outside counsel, the Regulating District’s expenditures for outside counsel dropped to an average of \$38,000 per year in 10-11, 11-12, & 12-13. The Regulating District now solicits and secures representation

from the Attorney General where appropriate, avoids unnecessarily litigious positions, and limits use of outside counsel to the bounds of the contract under which such counsel is retained.

On September 13, 2013 the AG's Office participated in oral argument before the Appellate Division Third Department with respect to the HRBRRD's appeal of Albany Engineering's judgment on their assessment refund claim. The Appellate Division's decision is expected in 6 to 8 weeks. HRBRRD challenges Judge Teresi's grant of Summary Judgment to AEC awarding \$516,655.62 plus interest dating to January 1, 2003. HRBRRD Counsel assisted the assigned Assistant Attorney General to prepare for the argument.

Mr. Leslie noted that he, the Executive Director and the Chief Fiscal Officer participated in another round of Civil Appeals Settlement Conferences with representatives for Northern Electric Power Company, L.P. and South Glens Falls, L.P. ("Boralex") and staff and a settlement judge from the Appellate Division Third Department.

Mr. Leslie noted that Lewis County Attorney Richard Graham contacted the Regulating District to determine our interest in filing an Amicus (or Friend of the Court) Brief in Niagara Mohawk's appeal against a Supreme Court decision upholding Lewis County's foreclosure on 1200 acres for NiMo's non-payment of HRBRRD assessments. (The County rejected NiMo's partial tax payments because NiMo excluded the assessments owed to HRBRRD when it submitted its school and county tax payment. NiMo erroneously claims that the HRBRRD assessments have no basis due in part to the U.S.C.A. DC Cir. Court's Albany Engineering decision.) NiMo failed to pay the \$371 HRBRRD assessment two years in a row and, after foreclosure, ended up paying a \$67,000 penalty (calculated at 5% of the assessed value of the 1200 acres foreclosed upon) to the County in order to repurchase said properties just days before the foreclosure became final. NiMo sued the County to vacate the default on the County's foreclosure proceeding and thereby (NiMo hopes) avoid the \$67,000 penalty. A Lewis County Supreme Court rejected NiMo's Petition and now NiMo has appealed that rejection to the Appellate Division 4th Department.

In accordance with training requirements imposed by the Joint Commission on Public Ethics and a separate training requirement imposed by the NYS Inspector General, Counsel has provided Comprehensive Ethics training to all of the Regulating District's Financial Disclosure Filers. The training addressed conflicts, nepotism, gifts and approvals necessary for outside activities. A nepotism complaint which surfaced during training proved unfounded based on proper interpretation of the terms 'relative' and 'supervision'. The discussions on gifts addressed the 'New and Noteworthy' exceptions to acceptance of a gift (even from disqualified sources) noting that the food and beverages valued at \$15 or less per event are now excluded and that comp tickets to an event are permissible where the event is widely attended (must be offered by the sponsor of the event and 25 individuals, not from our agency, must attend or have in good faith been invited to attend), and the event is related to the Board Member, officer or employee's duties or allowed such person to perform a ceremonial function appropriate to that person's position. (Distinguish an invite to speak at a Boat show on permissible dock configurations vs. box seats to the next Miley Cyrus concert). Senior Staff are reminded to seek and secure approval for outside activities such as public or private employment for compensation, campaigning or running for office, serving as a director or officer of a for profit corporation or institution...etc.

Mr. Ferrara presented his report to the Board.

At the close of fiscal September 2013, general fund balances for the HRA and BRA were approximately \$1,485,870 and \$119,204 respectively. Regulating District transactional processing and reporting for the fiscal month of September was completed in an accurate and timely fashion.

Mr. Ferrara noted that the Regulating District's independent audit report was timely submitted by the September 30, 2013 deadline. The audit will be presented to the Board in December.

Mr. Ferrara noted that the Bond resolutions for serial bond issuances to cover the cost of capital projects at Conklingville and to cover the cost of possible settlements are currently drafted by the District's bond counsel. An issue has been raised by Bond Counsel as to the minimum number of Board Members required to approve those resolutions.

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

Mr. Hodgson presented his report to the Board.

Chairman Berkstresser expressed his desire to address an issue with a previous Board Resolution. Mr. Stover made a motion to rescind Resolution 13-30-08 adopted at the Board's August meeting. Mr. Finkle seconded and the motion was adopted unanimously.

Chairman Berkstresser also asked the Executive Director to explore the possibility of purchasing tablets for the Board to facilitate distribution, retention, and search-ability of the various materials presented in advance of monthly Board Meetings. Mr. Clark indicated that he would check for a state contract covering such equipment.

RESOLUTION SCHEDULING DATE, TIME AND LOCATION OF THE NOVEMBER 13, 2013 BOARD MEETING

Chairman Berkstresser asked for a motion to adopt a Resolution setting the next meeting of the Board of the Hudson River-Black River Regulating District for Wednesday, November 13, 2013 at the Warren County Municipal Center, 1340 State Route 9, Lake George, New York 12845 at 10:00 A.M.

Mr. Hayes moved to adopt the Resolution. Mr. Stover 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 10:42 A.M.

RESOLUTIONS

13-36-10 RESOLUTION TO APPROVE THIRD AMENDMENT TO CONTRACT C092007 WITH GOMEZ AND SULLIVAN ENGINEERS, P.C.

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

13-37-10 RESOLUTION TO AUTHORIZE THE SOLICITATION OF LEGAL SERVICES TO REPRESENT THE DISTRICT IN A LAWSUIT TO BE FILED AGAINST ERIE BOULEVARD HYDROPOWER L.P.

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

13-38-10 RESOLUTION SCHEDULING DATE, TIME AND LOCATION OF THE NOVEMBER 13, 2013 BOARD MEETING

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

Respectfully submitted,

Richard J. Ferrara
Secretary/Treasurer