

13-03-03

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

**WHEREAS**, on March 30, 2010, the Regulating District Board adopted an Apportionment of costs which was later challenged by the beneficiaries named therein, and;

**WHEREAS**, while the Apportionment was upheld by an April 1, 2010 decision of the NYS Supreme Court, Saratoga County, a May 10, 2012 decision of the Appellate Division, Third Department ruled such Apportionment invalid in that the Regulating District Board failed to deduct the benefits to the State derived prior to apportioning the remaining costs among the named beneficiaries; and

**WHEREAS**, the named beneficiaries' motions for leave to appeal the Appellate Division's decision to the Appellate Division, Third Department and then to the NYS Court of Appeals were both denied in decisions dated July 27, 2012 (App Div 3d Dept.) and October 30, 2012 (NYS Court of Appeals); and

**WHEREAS**, in anticipation of such leave denials, on July 10, 2012 the Board of the Hudson River-Black River Regulating District determined the total cost to operate and maintain the Regulating District's Hudson River Area facilities (Great Sacandaga Lake, formerly Sacandaga Reservoir), inclusive of the operation and maintenance expenses incurred, and unfunded, for the Regulating District's fiscal years 2009-2010, 2010-2011, 2011-2012 and 2012-2013; and

**WHEREAS**, the Board of the Hudson River-Black River Regulating District, at the July 10, 2012 Board meeting, adopted the "State of New York Hudson River-Black River Regulating District Great Sacandaga Lake Operation and Maintenance Cost and Apportionment of Operation and Maintenance Cost" apportionment for the Regulating District's Hudson River Area facilities; and

**WHEREAS**, the Regulating District Board, served a copy of such apportionment as provided at NY ECL §15-2121, noticing and publishing the time and place at which the Board will meet to hear any public corporation or person aggrieved by the Board's apportionment determination; and

**WHEREAS**, on July 10, 2012, the Board certified the Apportionment to the Department of Environmental Conservation for its approval; and

**WHEREAS**, by letter dated July 19, 2012, the Department Commissioner approved the Apportionment; and

**WHEREAS**, the Board having heard those aggrieved by the Board's apportionment determination at an apportionment grievance hearing held September 21, 2012; and

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**WHEREAS**, pursuant to ECL 15-2121(6) and 15-2125(1), the Regulating District Board included within its estimate of the amount sufficient to pay the expense of the maintenance and operation of the Regulating District's facilities a reasonable return to the state upon the value of the rights and property of the state used and;

**WHEREAS**, at the time of the reservoir's construction the Regulating District Board acquired, at fair market value, title to private lands now underlying the Great Sacandaga Lake and pursuant to ECL 15-2111(8) acquired such lands in the name of the State of New York and;

**WHEREAS**, the Regulating District Board assessed the cost of such land acquisitions connected with the reservoir's construction to the beneficiaries of the Regulating District's Hudson River Area facilities; and

**WHEREAS**, no lands required for the reservoir's construction were acquired from the State of New York and;

**WHEREAS**, because no state lands were utilized in the reservoir's construction, the beneficiaries of the Regulating District's Hudson River Area facilities have not realized a windfall through an uncompensated use of State lands for purposes ultimately benefitting such downstream entities; and

**WHEREAS**, the Regulating District Board has determined that 'the value of the rights and property of the state used' for the calculation of the reasonable return to the state as required and defined by ECL 15-2121(6) and 15-2125(1) does not contemplate inclusion of the value of the use of private lands acquired by the Regulating District and taken in the name of the State of New York, but does contemplate a six percent (6%) return on the value of State lands utilized for reservoir purposes; and

**WHEREAS**, the absence of 'rights and property of the state' utilized for construction, operation and maintenance of the Great Sacandaga-Reservoir results in a zero value for 'rights and property of the state' in the reasonable return to the state calculation; and

**WHEREAS**, in the absence of any state work-force labor requested or offered by the state, and/or the absence of an invoice from the State for services rendered, the Regulating District Board has determined that the value of the services of the state rendered is zero; and

**WHEREAS**, the Regulating District Board has determined that the sum of the value of state 'rights and property used' (\$ zero) and the value of the services of the state rendered (\$ zero) result in a 'reasonable return to the state' of zero; and

**WHEREAS**, NY ECL §15-2121(2) and §15-2125(2) require the Regulating District Board to apportion such cost, less the amount chargeable to the state, among the public corporations and parcels of real estate benefited, in proportion to the amount of benefit which shall inure to each

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such public corporation and parcel of real estate by reason of such reservoir; and

**WHEREAS**, in a decision rendered on November 28, 2008, the United States Court of Appeals, DC Circuit determined that the Federal Power Act preempts the Regulating District's use of state law to collect the Regulating District's annual costs of operations and maintenance from the federally licensed hydropower companies operating within the Hudson River Area; and

**WHEREAS**, the Regulating District Board has determined that in order to ensure consistency of process and the durability of this Apportionment of costs among the state and the other beneficiaries of the Regulating District's Hudson River Area facilities, the amount which may be chargeable to the state is to be calculated by multiplying the total estimated annual costs of operations and maintenance by the proportion of such costs to be paid by the state; and

**WHEREAS**, the Regulating District Board has determined the proportion of such costs to be paid by the state through a comparison of the value of state roads, bridges, parks and other state infrastructure lying within the 100 year flood plain (without reservoir) to the value of the non-state roads, bridges, parks and other assessed properties lying within that same floodplain; and

**WHEREAS**, the Regulating District Board's use of the relative proportion of property values in each county to the total property values in all of the affected counties and the use of the relative value of the state to non-state roads, bridges, parks and other infrastructure is intended to be representative of the total benefits received by each county and the state including: flood protection; wastewater treatment costs avoided; whitewater recreation opportunity enhancements; improvements to municipal and state water supplies; and other benefits (such as: improved health, safety, and welfare; improved (non-hydropower) industrial/commercial opportunities; and/or agricultural transport/irrigation enhancements) which are de minimus, difficult to quantify, and/or costly to calculate; and

**WHEREAS**, upon hearing the named beneficiaries' grievances, the Regulating District Board has determined the amount chargeable to the state to be 22.18% of the Regulating District's Hudson River Area estimated annual cost of operation and maintenance; and

**WHEREAS**, the Regulating District Board has applied the proportion of costs chargeable to the state to the total estimated annual costs of operations and maintenance resulting in a state share which will then be subtracted from the total estimated annual costs of operations and maintenance so that the resulting balance can be apportioned among the remaining beneficiaries; and

**WHEREAS**, the Regulating District Board has determined that by grouping the towns, cities, villages and the individual parcels of real estate within each such public corporations, the potential for disparate treatment of one individual parcel, neighborhood or municipality when compared to others diminishes; and

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**WHEREAS**, the Regulating District Board embraces the basis for, and re-affirms the conclusions and determinations made in connection with, the Board's March 2010 Apportionment of costs as informed by the various court decisions and as modified by the Board's July 10, 2012 Apportionment of Costs;

**WHEREAS**, the attached written apportionment shows the Board's estimate of an amount sufficient to pay the expense of the maintenance and operation of the Regulating District's Hudson River Area facilities and reflects the amount chargeable to the state which has been subtracted from such cost; and

**WHEREAS**, the attached written apportionment shows the name of each public corporation benefited and the proportion of such cost, less the amount chargeable to the state to be borne by each, expressed in decimals and the amount to be paid by each such public corporation; and

**WHEREAS**, the amount to be paid by each such public corporation is determined by multiplying the total cost, less the amount which may be chargeable to the state, by the decimal representing the proportion thereof to be borne by each public corporation; and

**WHEREAS**, the Regulating District Board, or a majority of its members, have viewed the public corporations benefited; and

**WHEREAS**, in addition to the basis for apportionment memorialized for the Board throughout the Apportionment process an agreement has been reached among and between the Hudson River – Black River Regulating District, a public corporation having its principal address and place of business at 350 Northern Boulevard Suite 304, Albany, New York (District) and **Albany County**, a municipal subdivision of the State of New York, having its principal office and place of business at 112 State Street, Albany, New York; **Rensselaer County**, a municipal subdivision of the State of New York, having its principal office and place of business at 1600 7<sup>th</sup> Avenue, Troy, New York; **Saratoga County**, a municipal subdivision of the State of New York, having its principal office and place of business at 40 McMaster Street, Ballston Spa, New York; **Warren County**, a municipal subdivision of the State of New York, having its principal office and place of business at 1340 State Route 9, Lake George, New York; and **Washington County**, a municipal subdivision of the State of New York, having its principal office and place of business at 383 Broadway, Fort Edward, New York (Counties); and

**WHEREAS**, the Counties of Fulton and Hamilton have agreed to accept payment of their respective money judgments entered in their favor in actions commenced against the Regulating District in Fulton County Supreme Court bearing index Numbers 2012-00425 and 2012-00430 in two equal installments from the Regulating District; the first installment to be made on or before March 31, 2013 and the second installment to be made on or before March 31, 2014; and

**WHEREAS**, pursuant to the aforesaid mentioned agreement and ECL 15-2121(7), the public corporations listed in the preceding paragraph have executed and delivered to the Board a  
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consent, executed and acknowledged in a like manner as a deed, by which the listed counties acknowledge that they are the public corporations benefitted by the Regulating District's Hudson River Area improvements and that they consent to bear the cost thereof, less any sum previously appropriated by the State therefore, together with charges provided for in ECL 15-2125, and to have such charges assessed against them as provided in Article 15, Title 21 of the Environmental Conservation Law; and

**WHEREAS**, as provided at ECL 15-2121(8), the Board accepts such consent, and herein levies the entire assessment upon the public corporations named therein on the basis of the benefits received by the terms of such consent, and coincidentally on the basis of the benefits shared by such parties as determined throughout the Apportionment process in the manner proscribed at ECL Article 15, Title 21; and

**WHEREAS**, NY ECL §15-2121 requires that the Regulating District Board shall, upon its approval of the apportionment, certify such apportionment to the Department of Environmental Conservation for approval; and

**WHEREAS**, following the apportionment grievance hearing, the apportionment as modified and as accepted in accordance with the Consent procedure outlined at ECL Article 15, Title 21, shall now become final and conclusive following approval of the modified apportionment by the Department of Environmental Conservation; and

**NOW THEREFORE BE IT RESOLVED**, the Board of the Hudson River-Black River Regulating District does hereby accept the consent presented by Albany, Rensselaer, Saratoga, Warren and Washington Counties, and adopt the attached "State of New York Hudson River-Black River Regulating District Great Sacandaga Lake Operation and Maintenance Cost and Apportionment of Operation and Maintenance Cost" apportionment for the Regulating District's Hudson River Area facilities to supercede the apportionment adopted by the Board December 5, 1924 and the apportionment adopted by the Board on March 30, 2010 (later invalidated by the Appellate Division Third Department to the extent that the March 30, 2010 Apportionment failed to deduct the benefits to the state derived from the reservoir prior to apportioning the remaining costs) and the Apportionment adopted by the Board on July 10, 2012; and

**BE IT FURTHER RESOLVED**, pursuant to NY ECL §15-2121, the Board of the Hudson River- Black River Regulating District certifies such apportionment to the Department of Environmental Conservation for its approval; and

**BE IT FURTHER RESOLVED**, that upon approval by the Department of Environmental Conservation the Board of the Hudson River-Black River Regulating District directs staff to serve the apportionment as required by NY ECL §15-2121; and

**BE IT FURTHER RESOLVED**, that once approved and served, the Regulating District Board's apportionment is final and conclusive fixing the apportionment and basis of

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apportionment of all subsequent expenses to be incurred in the maintenance and operation of the Regulating District's Hudson River Area facilities.

Attachment

Approved as to form:



Robert P. Leslie  
General Counsel

Motion was made by Mr. Finkle and seconded by Mr. Stover that the Resolution be approved.

Present and Voting:

<u>MEMBER</u>	<u>AYE</u>	<u>NOE</u>	<u>ABSTAIN</u>
* Mr. Berkstresser.....	<u>X</u>	_____	_____
Mr. Finkle .....	<u>X</u>	_____	_____
Mr. Hayes.....	<u>X</u>	_____	_____
Mr. Stover .....	<u>X</u>	_____	_____

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