In the Matter of

ALBANY, RENSSELAER, SARATOGA, WARREN AND WASHINGTON COUNTIES, NEW YORK,

Complainants,

Concerning the proposed Apportionment of the

HUDSON RIVER – BLACK RIVER REGULATING DISTRICT.

COMPLAINT FOR REVIEW AND/OR MODIFICATION OF THE DISTRICT'S PROPOSED APPORTIONMENT PURSUANT TO 6 NYCRR § 606.130

This Complaint is submitted on behalf of the Counties of Albany, Rensselaer, Saratoga, Warren and Washington pursuant to 6 NYCRR § 606.130. The Counties will make a single presentation during the Grievance Hearing scheduled for September 21, 2012, which is anticipated not to exceed two hours.

I. BACKGROUND

The Hudson River-Black River Regulating District (District) adopted an apportionment on March 30, 2010 dividing its costs among the Counties of Albany, Rensselaer, Saratoga, Warren and Washington. This apportionment was the subject of challenge by the Counties which resulted in a Supreme Court Decision, Appellate Division Order and, more recently, a Motion to the Court of Appeals for leave to appeal.

The Appellate Division Order upheld the District's methodology, but remitted the apportionment back to the District and directed the District to deduct from the Counties' share those costs correctly the responsibility of the State of New York. The Appellate Division reasoned:

> [T]he District provides no explanation in its submissions on this appeal regarding why it declined to consider the proportional flood protection benefit to state property despite the presence of numerous state roads, bridges and other infrastructure, as well as state parks located throughout the counties. In light of the undisputed presence of a substantial amount of state property within the District's jurisdiction and the District's conclusion that flood protection is the proper benefit upon which to conduct apportionment, its failure – without explanation – to consider this benefit to the state strikes us as irrational.[1]

The Court remitted the matter back to the District to quantify these State benefits and deduct the amount of such benefits from the apportionment. The Counties will not restate the objections made previously, as this administrative review process is an extension of the previous apportionment and the Counties have fully preserved their rights to raise those issues if further appellate review is authorized.

The proposed revised apportionment now under consideration calculates the State's share of benefit to be 11.96%. The Counties have received and reviewed all materials provided by the District in support of this figure, have independently analyzed the State property and infrastructure at issue and identified numerous errors, miscalculations and flawed reasoning relied upon by the District in reaching its conclusion. For the following reasons, the District has undervalued State land and infrastructure to the detriment of the Counties.

[1] Appellate Division Opinion and Order at 12.

II. METHODOLOGY

The District's conclusion that the Counties are "benefited" is not due to the Counties' ownership of any land or infrastructure, but due to the supposed generalized community benefit of flood control. The District took the position that flood control did not benefit any particular parcel of land, fixture or piece of infrastructure, but rather benefited the general community through continued use of roadways and continued access to industrial facilities, retail establishments and hospitals. The District further relied upon the potential "expenditure of municipal disaster response resources"[2] for support of this intangible benefit allegedly enjoyed by the Counties. However, this is not the methodology used by the District to determine the State's benefit.

Mere deduction of State-owned land and infrastructure from the previous apportionment does not capture the same generalized community benefit enjoyed by the State. In fact, when explaining why the District did not simply apportion costs among the actual landowners benefited during its 2010 apportionment adoption process, the District:

> [C]onsidered, but rejected, a methodology that would have simply aggregated the value of the flood benefit to the individually owned parcels within the floodplain, determining that such a methodology would not accurately represent the full flood protection benefits to the community as a whole and would fail to account for costs such as the loss of highways, blockage of pathways to hospitals, industrial facilities and retail establishments, and the expenditure of [ ] disaster response resources.[3]

Contrary to its previous methodology and the reasons offered in support of that methodology, in determining the amount to deduct from the 2010 apportionment, the

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[2] Appellate Brief of the District dated December 9, 2011 at page 27.
[3] *Id.*

District merely aggregates the value of State-owned land and infrastructure. Without justification, the District fails to consider the same "generalized community benefit" enjoyed by the State as that supposedly enjoyed by the Counties. While it may be "difficult to discern the portion . . . of the state budget spent on emergency operations"[4], this is irrelevant, as the District did not undertake this analysis when charging the Counties for this same alleged benefit. The District has failed to justify its disparate treatment of the Counties and the State in this regard.

III. ERRORS IN CALCULATING STATE BENEFIT

In calculating the value of State roadways within the hypothetical 100-year floodplain, the District concludes that each road is valued at $1.5 Million per mile. It is not clear how the District arrived at this figure. The District appears to have considered the costs of interstate road construction in Arkansas and the costs of two-lane arterial road construction in Florida. However, it does not appear that the District ever considered whether and to what extent these figures are applicable to the actual value of State roadways at issue here in New York.

The Counties' analysis is limited due to the District's failure to identify which portions of what roadways are located within its hypothetical 100-year floodplain. While the District concludes that 46.4 miles of State roadways are within this floodplain, the District failed to consider and identify the types of roadways at issue (i.e. two-lane, two-lane divided, interstate), the width of the roadways at issue, the materials used and other improvements such as retaining walls or guardrails that may be relevant to the "per mile" value. As the roadway value necessarily depends not only upon length, but

[4] Memorandum from Counsel to the District dated July 5, 2012 at 9.

these other factors, the Counties' consultant was unable to calculate the true value of the State roadways at issue.

Likewise, the District's reliance on $300 per square foot of bridge deck surface to establish a value for the State-owned bridges within the hypothetical 100-year floodplain undervalues bridges. While District Staff appear to rely upon this figure as a generally accepted industry "standard", this is not the case and the District failed to identify the source of this "standard". There exist bridge reconstruction projects that have yielded actual construction costs per square foot, yet the District has relied upon this "standard" rather than the actual value of such infrastructure.

In addition, it appears that the District has erroneously included the assessed valuation of certain parcels multiple times and, as a result, the total value of properties calculated by the District is incorrect. As a direct result, the State's percentage of interest established by the District is likewise erroneous.

IV. ADDITIONAL STATE LANDS/INFRASTRUCTURE ERRONEOUSLY EXCLUDED

The District fails to include in its calculation State land and infrastructure titled to State Departments, Commissions and the like. The District is charged with quantifying the benefit enjoyed by the State. It was not directed nor is it authorized to exclude State assets simply because they may not be titled in the name of the "State of New York". No explanation for this failure is offered in the materials provided to the Counties. Obviously, this error or oversight is detrimental to the Counties.

V. ADDITIONAL INFORMATION/DETAIL

As the District is aware, the Counties requested postponement of the Grievance Hearing to provide reasonable time to analyze and respond to the District's proposed apportionment. While the Counties acknowledge that the District rescheduled the Public Hearing from September 18th to September 21st to avoid conflict with a religious Holiday, the additional three days do not provide the Counties sufficient time to finalize their review effort. Had they had the opportunity to do so, the Counties would likely have been in a position to provide additional objections, comments and detail. As the time provided was not sufficient, additional arguments may be raised for the first time at the Grievance Hearing on September 21st.

Dated: September 13, 2012

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