STATE OF NEW YORK

Board of Hudson River-Black River Regulating District
350 Northern Boulevard, Albany, New York 12204 Phone (518) 465-3491
FAX (518) 432-2485

To: Members of the Board
From: Robert Leslie, General Counsel
Re: Public Corporations and Parcels of Real Estate Benefited
Date: Prepared November 23, 2009 for the December 8, 2009 Meeting

As the Regulating District Board embarks upon a reapportionment of the costs to maintain and operate the Hudson River Area facilities, it is worth taking a look at the statutory basis for doing so; specifically what the legislature contemplated by the phrase "among the public corporations and parcels of real estate benefited". The provision within the Regulating District's enabling statute dealing with apportionment, NY ECL §15-2121(1) requires that the Board prepare a statement estimating the total cost to construct each reservoir, including interest on debt and all other expenses necessarily incurred in such construction and operation. The Board fulfills this responsibility through the adoption of the Regulating District's budget.

Once the Board has estimated the costs to be apportioned, NY ECL §15-2121(2) provides that:

> [t]he Board shall then apportion such cost, less the amount which may be chargeable to the state, among the public corporations and parcels of real estate benefited, in proportion to the amount of benefit which will inure to each such public corporation and parcel of real estate by reason of such reservoir. Such apportionment shall be made in writing and shall show the name of each public corporation and *a brief description of each parcel of real estate benefited; 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 the amount which may be chargeable to the state 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 of real estate. (emphasis added)

Note that the statute requires that the Board show the 'name of each public corporation', but does not require that the Board prepare a description of the land within that entity. By contrast, each parcel of real estate benefited must be described and linked to the owner or owners thereof. The manner in which the Regulating District has prepared its annual assessment shows how it has historically viewed this disparate apportionment treatment.

The Regulating District's annual assessments have treated 'parcels' separately from 'public corporations'. The statutory provision on 'assessments', NY ECL §15-2123(1), requires the Board to prepare a statement showing the name of each public corporation and a description of each parcel of real estate benefited. This is the same language used in the earlier section setting up the apportionment. The Regulating District's statement of annual assessment addresses these requirements by listing each hydropower company, the proportion of cost, and total dollars to be borne by such company. Up through last year, each hydropower plant was linked to a parcel number on the statement of annual assessment which then referred back to a description of that parcel. By contrast, the entries for the cities of Albany, Troy, Rensselaer and Watervliet and the entry for the Village of Green Island did not get linked to any particular parcel.

The provision on assessments, Section 15-2123, treats these two groups (public corporations and individual parcels) differently throughout the assessment process. The legislative body for each municipality levies the assessment on the municipality as a whole. The county legislature levies the amount to be collected directly on the relevant county or town. The common council of a city levies upon its city and the village board of trustees levies upon the relevant village. By contrast, for individual parcels, the statute contemplates that each county legislature shall create a separate assessment roll and levy any assessment directly upon any specific parcel identified for apportionment.

The Regulating District's first apportionment split the benefit derived among the 'parcels of real estate' lying along the Sacandaga and Hudson Rivers upon the basis of 'head'. Each of these parcels, except those owned by National Grid, were/are owned by the hydropower companies. The first apportionment also identified some, but not all, of the public corporations lying along the Hudson River. The United States Court of Appeals decision in *Albany Engineering v. FERC* eliminated the Regulating District's authority to assess the FERC licensed hydropower companies, but did not affect the Regulating District's authority to apportion its costs among the remaining parcels of real estate, or among the public corporations benefiting from the Regulating Districts facilities. As a result, the question faced by the current Regulating Board is the same question faced by the first Regulating District Board: "which public corporations and parcels of real estate should share in the cost to operate the Regulating District's facilities?" The only difference wrought by the *Albany Engineering v. FERC* decision is that the Board can no longer include the FERC licensed hydropower company parcels in the mix.

Before picking among the public corporations and individual parcels, the Board should determine whether any portion of its costs should be assessed against the state. Throughout NY ECL §15-2121, the statute provides for the Regulating District to apportion its cost "...less the amount chargeable to the state". NY ECL §15-2123(5) also provides for the Regulating District's consideration of amounts appropriated by the state. However, while the Regulating District's statute makes provision for both assessments against the state and appropriations from the state, neither have historically materialized. Case in Point: Buried within the definition of "Benefit or benefits" at NY ECL §15-2101(3) is the following statement "In the event that any regulating reservoir operates to relieve the state of any obligation by reason of diversion of the water of any river for canal purposes, the state, to the extent that the maintenance and operation of such reservoir may accomplish such relief, shall be deemed to have received benefit therefrom." Despite this provision, the Regulating District does not collect an assessment from the state based on canal flow augmentation. According to the Gomez and Sullivan Report, the Regulating District provides a negligible benefit to the state by diverting flow to the NYS Champlain canal. Thus, any apportionment of costs to the state, if based on value of that benefit received, might not amount to much. In addition, the Regulating District's enabling statute makes provision for the utilization of an appropriation to cover its costs but does not confer upon the Regulating District the authority to compel an appropriation from the NYS Legislature. Despite the lack of a track record for seeking an assessment from the state, the Board should determine whether to do so in the future.

Turning back to the discussion of an apportionment among public corporations and parcels, let us first focus on an apportionment against individual parcels. Historically, the bulk of the burden to defray the cost to operate the Regulating District's facilities was placed on the parcels of real estate along the Sacandaga and Hudson Rivers which generate or had the potential to generate hydropower. The balance was apportioned to public corporations. Now, due to the *Albany Engineering v. FERC* case, the Regulating District can no longer directly assess FERC licensed hydropower companies using state law, but rather must rely upon FERC's calculation of the relative headwater benefit derived by each generator under federal law. That leaves only the National Grid lands within the group of 'parcels'

traditionally assessed within the reach of the Regulating District's power to assess under state law. Although National Grid contests the Regulating District's apportionment of costs to the undeveloped National Grid properties, the current apportionment remains valid and enforceable. Were National Grid to develop the parcels on which they could theoretically generate power, one could assume that such generating capacity would be subject to FERC licensure and that such parcels would then be protected from Regulating District assessment under state law by the Albany Engineering v. FERC decision. However, even the elimination of both the FERC licensed hydropower companies and the National Grid parcels does not preclude an apportionment against individual parcels of real property within the Hudson River Area. Nonetheless, such an apportionment would have to articulate a basis for treating some parcels differently than others if less than all parcels within the Regulating District's territorial jurisdiction were to share equally in the apportionment.

One way to address the question of who should share in the apportionment of costs is to break out the benefit derived by each affected group. Based on previous recommendations, the Board has elected to apportion costs based on benefits from flow control (flood protection) and, flow augmentation (waste water and white water recreation). With respect to flow control, the benefit could be attributed to individual parcels, neighborhoods, or to whole communities. Those parcels which flood less frequently or with less severity could be considered to have received a flood control benefit. The value of that benefit could be determined for each parcel or neighborhood. However, simply aggregating the value of the flood benefit to all such parcels would not accurately represent the value of potential flood avoidance to the community as a whole. Such a methodology would fail to account for costs to the community like the loss of highways, blockage of pathways to hospitals, industrial facilities or retail establishments, and the expenditure of municipal disaster response resources, etc. Therefore, an apportionment of only those parts of a community close to the River (the ones flooded) fails to capture the value of the benefits received by those parcels located farther away. Conversely, the flood avoidance benefit to the community as a whole could be captured in an apportionment of costs to the community as a whole. This analysis assumes that as the group against whom an apportionment is asserted increases in size, the potential for disparate treatment diminishes.

There are other practical considerations in selecting to apportion costs against a community rather than against individual parcels within that community. For instance, NY ECL §15-2121(4) requires that the Board, or a majority of the members thereof, view the premises and public corporations benefited before it apportions costs against such premises. There is no case law interpreting exactly what the legislature meant when it required that the Board 'view' the premises. However, because the statute separately mentions 'public corporations', and fails to define the term premises, one could infer that the legislature intended that the Board, or a majority thereof, visit the individual parcels identified for apportionment. While a visit to a few dozen Adirondack region hydropower companies in the summer circa 1925 may have imposed a burden, viewing thousands of individual properties, even with the benefit of modern transportation, could still prove costly and time consuming.

The original apportionment limited the number of public corporations to whom an apportionment lay. The five municipalities originally identified, Albany, Troy, Rensselaer, Watervliet and Green Island, represent some but not all of the public corporations which line the Hudson and Sacandaga Rivers and may derive a flood benefit. The term "public corporation" is not defined within NY ECL title 21 of Article 15, but is defined for the purposes of all of Article 15 by NY ECL §15-0107(2) and all of the ECL by NY ECL §1-0303 to mean public corporation as defined at NY General Corporation Law §3(1). The General Corporation Law was repealed in 1973. The definition of a public corporation is now covered by General Construction Law §66 which defines a public corporation to include a municipal

corporation, a district corporation, or a public benefit corporation. In addition, as noted at NY ECL §1-0303(20), the term public corporation includes all public authorities.

The General Construction Law further defines a municipal corporation to include counties, towns, cities, villages and school districts. A district corporation in essence includes any territorial division of the state established by law which possesses the power to contract indebtedness and levy taxes or benefit assessments upon real estate. These definitions are important because while the Board might be inclined to expand an apportionment of its costs from four cities and a village to include counties, towns, cities and villages, the Board might also determine to include school districts, public benefit corporations, district corporations, or public authorities.