

Regulatory Impact Statement
For
Hudson River – Black River Regulating District
Grievance Hearing Procedures

Title 6, Part 606 of the Official Compilation of Codes, Rules and Regulations of
the State of New York

December 8, 2009

1. Statutory Authority

The Hudson River – Black River Regulating District (“the District”) is a public corporation created pursuant to Environmental Conservation Law (ECL) Article 15, Title 21. ECL Section 15-2103 declares, “...*river regulating districts may be created...*” pursuant to ECL Title 21 of Article 15 “...*to construct, maintain and operate reservoirs within such districts...*” ECL section 15-2105 sets forth direction and criteria for the organization of the boards of river regulating districts and pursuant to ECL section 15-2109(1), “*The board shall have the power to make all necessary rules and regulations which shall be effective when approved by the department.*”

2. Legislative Objective

The Regulating District was created to regulate the flow of the Hudson River and Black River, primarily for the purposes of flood control and augmentation of low flows. Pursuant to NY ECL 15-2121, the legislature directed the Regulating District Board to apportion the costs to construct and operate the necessary reservoirs, less the amount chargeable to the state, among the public

corporations and parcels of real estate benefitted thereby. Embodied within that mandate is a requirement that the Board meet at a time and place specified to hear all persons and public corporations interested in or aggrieved by such apportionment and that upon approval or modification of the apportionment, such person or public corporation aggrieved may upon notice to the Board review the determination of the Board in the same manner as a review is had of the determination of a board of assessors in making an assessment. The proposed rule establishes a grievance hearing procedure including notice provisions, complaint parameters, hearing conduct standards and imposing the burden of proof.

The Regulating District's current Rules and Regulations, which govern the use, operation and maintenance of the Great Sacandaga Lake, 6 NYCRR Part 606, were approved on July 13, 1992 by the New York State Department of Environmental Conservation (NYSDEC), adopted October 19, 1992 by Resolution of the Board of the Hudson River-Black River Regulating District, and became effective January 27, 1993. The current rules do not establish a procedure for interested and/or aggrieved parties to exhaust administrative remedies before challenging the statutorily mandated apportionment in a court of law.

The proposed rule additions are consistent with the current rules and regulations previously approved by the NYSDEC to administer the Access Permit

System, but will themselves be subject to Department approval as required by NY ECL 15-2109(1).

3. Needs and Benefits

Needs:

The Proposed Rules are required to allow for the efficient administration of the apportionment grievance process. By statute, the Regulating District is required to prepare a statement showing each public corporation and a description of each parcel of real estate benefitted by the Regulating District's reservoirs and the percentage of the Regulating District's costs to be borne by each. This "apportionment" statement is to be filed with the clerk of each county, town, village, or city affected or containing any real estate which is benefitted. NY ECL 15-2123(3) requires that the legislative body of every such county, town, village or city levy and assess such costs upon the relevant public corporation. The statute further requires that such assessments be collected in the same manner and by the same procedure as general taxes are collected. In short, the Regulating District's costs are to be assessed upon benefitted public corporations and parcels based on an apportionment of those costs among those benefitted public corporations and parcels. The proposed rules articulate the process through which the counties, towns, villages and cities, as well as the owners of individual parcels, can challenge the Regulating District's determination regarding who should bear the cost to maintain the reservoir facilities which

prevent flooding and provide low flow augmentation to the communities benefited.

Benefits:

These Proposed Rules will improve the efficiency, predictability, understanding and fairness of the process by which those public corporations and owners of parcels of real estate chosen to share in the cost to operate the Regulating District's facilities can assure themselves that those costs are appropriately allocated among those who benefit from such facilities. Providing an efficient, transparent, forum through which affected parties can advocate for modifications to the apportionment of costs will serve to limit unnecessary effort and expense by the Regulating District and those affected parties.

4. Costs

Cost to Regulated Parties

As stated above, the Proposed Rules are being developed to provide predictability and finality to the statutorily mandated apportionment grievance process. The public corporations and parcels of real estate benefited by the maintenance and operation of the Regulating District's reservoirs and related facilities have, to a great extent, received those benefits for decades without shouldering the full burden of providing those benefits. In light of the shift in responsibility occasioned by a federal court decision, many of those

municipalities will, for the first time, be faced with collecting and paying assessments for benefits their constituents have taken for granted.

The Regulating District's enabling statute requires that the Regulating District Board apportion the costs to operate the Regulating District's facilities, less the amount which may be chargeable to the state, among the public corporations and parcels of real estate benefited by such facilities in proportion to the amount of benefit which shall inure to each, NY ECL §15-2121. The United States Court of Appeals' *Albany Engineering v. FERC* decision, (2008, 548 F.3rd 1071), has forced the Regulating District to reapportion most costs from the FERC licensed merchant power plants along the Hudson and Sacandaga Rivers to the public corporations in that area. NY ECL §15-2121 also requires that the Regulating District Board allow persons and public corporations interested in or aggrieved by the Board's apportionment determination to review such determination in the same manner as a review is had of a determination of a board of assessors in making an assessment. The proposed rule establishes a grievance hearing procedure to facilitate the efficient administration of the determination review required by NY ECL §15-2121(5).

The Proposed Rules implement the statutory requirement for a cost effective, non-judicial, forum through which interested and aggrieved parties can raise concerns and have those concerns addressed. Municipalities will realize cost savings by being able to direct individual constituents to participate in the Regulating District's apportionment grievance hearing process rather than face administrative and court challenges themselves. The Proposed rules will provide

the municipalities with definite timeframes, clear direction regarding complaint process and content, and a transparent open meeting at which to rebut established presumptions by meeting the proscribed burden of proof. It is anticipated that public corporations will utilize existing resources to present their concerns, in writing and through oral testimony at hearing, without the need for consultants and/or specialized models or evidence. Non-public interested or aggrieved parties will face costs similar to those faced when mounting an assessment challenge.

Cost to Agency

The Regulating District has developed the Proposed Rules utilizing existing staff as an in-house project. The Proposed Rules are not expected to result in additional costs for implementation beyond what the District currently incurs for administration of its typical monthly meeting schedule. The Proposed Rules are expected to facilitate the efficient collection of the Regulating District's periodic assessment. A transparent, open grievance process is less costly than defending Article 78 challenges.

Cost to Local Governments

The Regulating District will be solely responsible for administering the apportionment grievance hearing process. The municipalities have no responsibility for administration. It is important to note that the District pays approximately \$2.6 million in property taxes annually to the municipalities and

other taxing jurisdictions around Great Sacandaga Lake and the payment of those taxes will not be affected by this rulemaking.

5. Local Government Mandates

This rule making will not impose any program, service, duty or responsibility upon counties, cities, towns, villages, school districts, fire districts or other special districts.

6. Paperwork

This rule will not impose any reporting requirement, including forms or other paperwork.

7. Duplication

No rules or other legal requirements of either the State or federal government exist at the present time which duplicate, overlay or conflict with the Proposed Rules.

8. Alternatives

The first alternative is the “null alternative” or the “do nothing” alternative. For decades, the Regulating District utilized an apportionment completed in 1925 to allocate its costs among the parcels of real estate and public corporations benefited by the flood control and flow augmentation provided by the Regulating District’s facilities. As such, the statutory provisions which derive from legislation

enacted at the turn of the 20th century have remained untested for more than 80 years. In addition, the advent during the 1970's of modern procedures for municipal tax assessment challenges have obscured the procedures used as a guidepost by the Regulating District's enabling statute. Establishing streamlined, transparent procedures through which parties can ensure that they, and their constituents, are assessed only for their appropriate share of the Regulating District's costs weighed against the use of the null alternative.

The process for establishing new grievance hearing procedures resulted in multiple drafts. *The first Draft was subject to analysis by the Regulating District's sister state agencies, such as the Department of Environmental Conservation and the Office of Real Property Services.*

9. Federal Standards

The federal government has set no standards for the same or similar subject areas addressed by the Proposed Rules. Pursuant to Article 408 of the license issued to the Regulating District by the Federal Energy Regulatory Commission (FERC) the District is required to notify FERC during any rulemaking process affecting Title 6, Part 606 of the New York Code of Rules and Regulations.

10. Compliance Schedule

Upon publication of the Notice of Adoption in the State Register, all regulated parties shall be required to comply with the Proposed Rules.