SUPREME COURT
STATE OF NEW YORK — COUNTY OF SARATOGA

ALBANY, RENSSELAER, SARATOGA,
WARREN and WASHINGTON COUNTIES,

Petitioners-Plaintiffs,

- against -

DECISION and JUDGMENT
RJI # 45-1-2010-0913
Index #2010-2135

THE HUDSON RIVER-BLACK RIVER
REGULATING DISTRICT and THE NEW
YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,

Respondents- Defendants.

APPEARANCES

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STEPHEN A. FERRADINO, J

The petitioners/plaintiffs (hereinafter Counties) in this combined Article 78 and declaratory judgment action have requested an order and judgment invalidating and declaring unenforceable and void the apportionment adopted by the respondents/ defendants. In opposition the respondents/defendants (hereinafter respectively Districts and DEC) have requested an order pursuant to CPLR 3212 granting summary

judgment dismissing the Counties' complaint in its entirety. The parties were afforded the opportunity to present extensive oral argument on the motion in chambers on March 10, 2011. The court appreciated the professional, thoughtful and thorough oral arguments presented by counsel.

The Districts are creatures of statute. The Hudson River District was created by the NYS Legislature in 1922. Conservation Law of 1911, c. 647 §590, amended L 1920, c. 463, §1. In 1959 the legislature combined the Hudson District with the Black River Regulating District to form the Hudson River-Black River Regulating District. ECL §15-2137. The District covers up to 3.2 million acres of land lining miles and miles of water frontage. The Districts were formed and authorized to "construct, maintain and operate reservoirs for the purpose of regulating the flow of streams 'when required by the public welfare, including public health and safety.' " *Board of Hudson River Regulating Dist. v Fonda, J. & G.R. Co.*, 249 NY 445, 451-452 [1928]. In more recent times the duties of the District, pursuant to ECL article 15, have been enumerated as maintenance and operation of dams, reservoirs and appurtenant facilities in the Hudson and Black River basins for the purpose of regulating the flow of those rivers. *Niagara Mohawk Power Corp. v State,* 300 AD2d 949 [2002]; citing ECL §§15-2103, 15-2105. The District is empowered through legislation to apportion costs associated with operation and maintenance of the reservoirs on the "public corporations and parcels of real estate benefitted" by the operation of the reservoirs." ECL §15-2121 (2), *et seq.*

From its inception 95% of the District costs were apportioned to the hydropower companies within the district and the remaining 5% was apportioned amongst municipalities within the District. This formula was unchallenged and met the funding

needs of the District for decades. However, intervention by the Federal Energy Regulatory Commission (FERC) in 1992 set in motion decisions that ultimately dramatically altered the apportionment formula. The ability of the District to continue to employ its longstanding apportionment formula with respect to hydropower plants was abolished by the Federal Court decision *Albany Engineering Corp. v FERC,* 548 F3d 1071 [DC Cir. 2008]. This single decision eviscerated the District's power to apportion almost all of its costs as it had since 1925 to the numerous hydropower companies. The decision left the District without a viable apportionment plan and the necessary funds to support its operations. As a result the District had to establish a new apportionment of costs on the "public corporations and parcels of real estate benefitted" by the operation of the reservoirs." ECL §15-2121 (2), *et seq.*

The District board needed to raise funds to continue to carry out the District's mission to "construct, maintain and operate reservoirs for the purpose of regulating the flow of streams 'when required by the public welfare, including public health and safety.' " *Board of Hudson River Regulating Dist. v Fonda, J. & G.R. Co.*, 249 NY 445, 451-452 [1928]. The unenviable task of reapportionment was undertaken by the District's board with input of counsel and a variety of experts. The District board needed to raise funds to continue to carry out the District's mission to "construct, maintain and operate reservoirs for the purpose of regulating the flow of streams 'when required by the public welfare, including public health and safety.' " *Board of Hudson River Regulating Dist. v Fonda, J. & G.R. Co.*, 249 NY 445, 451-452 [1928]. The August 2009 RFP issued by the District limited any re-apportionment study to three specific areas: (1) waste assimilation; (2) whitewater recreation and (3) flood protection. The District board

concluded that flood protection was the "most direct and clearly defined benefit to the beneficiaries derived from the operation of the river regulating reservoirs." This reasoning is in consonance with the mission of the District and it's history of utilizing a broad category of defined benefit to determine the apportionment. The District board sought to apportion the costs among the five counties based upon their respective flood protection benefits. Before making its final decision the District's board was given DEC approval for its plan and considered input from the municipalities that were to receive increased assessments under the new apportionment scheme.

Not surprisingly the Counties balked at making the requested payment assessed against them through the new apportionment. They have advanced numerous arguments in challenging the basis of the apportionment and the procedures of the Board. They argue that the District board 1) failed to take into account the benefits conferred upon both public corporations and parcels, 2) did not conduct the necessary visual inspection of the parcels, 3) failed to consider and assess the benefits conferred upon State owned property, 4) failed to provide a description of each parcel of real estate benefitted, 5) did not properly identify each benefitted parcel of real estate for tax collection purposes. The arguments are grounded upon what the Counties believe is a proper reading of what it considers clear, unambiguous statutory language. The District contends its reading of the applicable statutes ECL §§ 15-2121 and 15-2123 renders its actions with respect to the apportionment to be "wholly consistent with both the spirit and letter of the law."

The actions taken by the District board were consistent with its historical approach of not evaluating and viewing individual parcels but apportioning based upon

the global standards related to the purpose for which the regulating district was established to enhance and regulate the flow of streams for the public good and safety of the region. Certainly flood control is part of that rubric. The charge of the District can not be carried out without funds. For decades the power plants bore almost all of the allocation of costs. This scheme was not questioned for decades and as a result the legislation has not been closely examined. The District has elected to apportion to the counties most benefitted by the flood control the costs of the District. The Counties are considered public corporations pursuant to ECL § 2111(3) and thus entities properly subject to apportionment and the methodology employed to establish the apportionment was reasonable.

While an alternate scheme of apportionment proposed by the Counties may also be considered reasonable in that it would comport with the statutory language it can not be said that the decision of the District board was arbitrary and capricious because it did not employ the approach advanced by the Counties. Essentially the counties have advanced a statutory interpretation and methodology that may comply with the statutory language but it is unwieldy and would cause " objectionable consequences". The court is constrained to avoid any statutory interpretation that causes such a result. See, *Metropolitan Life Ins. Co. v Durkin*, 301 NY 376 [1950]; NY Statutes §141. The court will not undercut the District board's decision making authority by invalidating and declaring unenforceable and void the apportionment. Rather it will grant the District board the deference to which it is entitled. While the Counties were dissatisfied with the lack of inquiry by the District board at the public hearing the board is under no legal obligation to engage in such exchange. The Counties submitted written

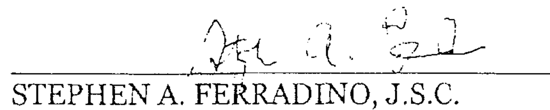
memorandum that the District board considered. Furthermore there is no indication that the DEC failed to properly discharge its duties.

"It has long been an axiom in this state ... that the legislature is presumed to have intended to do justice, unless its language compels the opposite conclusion' " *Mtr. of Caldwell v Alliance Consulting Group, Inc.*, 6 AD3d 761 at 764 [2004], quoting *People ex rel. Beaman v. Feitner*, 168 NY 360, 366 [1901]; see, also, McKinney's Cons. Laws of N.Y., Book 1, Statutes, 141, 146]. In this case it is clear that it is time for the Legislature to examine the laws associated with the District. The recent legal decisions have abolished the long standing apportionment scheme. The District has been left to modify its long standing apportionment with cumbersome and less than clear legislation. This matter has come to the attention of the legislature. The court takes judicial notice of such efforts including proposed legislation by Assemblyman Butler and Senator Breslin. Additionally the equal protection question regarding apportionment is currently pending before the Second Circuit with the briefing process not yet completed. See, *Niagara Mohawk Power Corporation, dba National Grid, Plaintiff-Appellant, v. Hudson River Black River Regulating District, New York State Department of Environmental Conservation*, Defendants-Appellees., 2011 WL 770729, (Appellate Brief) (2nd Cir. Feb 24, 2011) Brief and Special Appendix for Plaintiff-Appellant (NO. 10-4402-CV). It is expected that clarification and or changes to the Environmental Conservation Law will be forthcoming in light of these legislative initiatives and future federal decision.

The petitioners/plaintiffs request for an order and judgment invalidating and declaring unenforceable and void the apportionment adopted by the respondents/

defendants is denied. The respondents/ defendants motion for summary judgment dismissing the Counties' complaint in its entirety is granted. Any relief not specifically granted is denied. No costs are awarded to any party. The original decision and judgment order shall be forwarded to the respondents/ defendants for filing and entry. The underlying papers will be filed by the court.

Dated: April 1, 2011
Malta, New York



STEPHEN A. FERRADINO, J.S.C.

Papers Received and Considered:

Notice of Petition dated May 28, 2010

Summons dated May 28, 2010 with attached Exhibits A-C

Affirmation of Leah Everhart, Esq., dated October 13, 2010 with attached Exhibits 1-2

Petitioner-Plaintiffs' Memorandum of Law in Support of Petition/ Complaint dated October 13, 2010

Verified Answer dated August 6, 2010

Administrative Record comprised of Exhibits A-U

Notice of Motion dated November 29, 2010

Affidavit of Robert Leslie, Esq., sworn to November 29, 2010 with attached Exhibits 1-9

Affidavit of Larry S. Eckhaus, Esq., sworn to November 29, 2010 with attached Exhibits 1-2

Affidavit of Robert S. Foltan, P.E., sworn to November 29, 2010 with attached Exhibit 1

Memorandum of Law in Opposition to the Petition/Complaint and in Support of Respondents'/ Defendants Motion for Summary Judgment Pursuant to CPLR §3212 with attached Exhibit A

Petitioner-Plaintiffs' Reply Memorandum of Law in Support of Petition/ Complaint and Memorandum of Law in Opposition to Motion for Summary Judgment dated January 7, 2011