RESPONSE TO COMMENTS FOR APPORTIONMENT GRIEVANCE HEARING

1. The District failed to Observe Premises as Required by Statute.

The Counties argue that NY ECL §15-2121(4) requires the Board to physically visit, observe and assess each and every premises and public corporation subject to the Apportionment. The Counties each argue that in reading NY ECL 15-2121(4), the Board failed to interpret the word "view" by its 'ordinary and usual meaning' as required by general rules of statutory interpretation. Further, the Counties argue that 'view' has not been defined by statute, nor has the term received a technical or peculiar significance in the context of the Environmental Conservation Law. Because physically observing an entire county would be both impracticable, and would add cost but no value, the Counties interpretation of 'view' would result in an absurdity and frustrate legislative intent.

The Counties' partial citation to NY Statute §232, which the Counties provide in support of their argument, fails to include language included later in the same section reading: "…and while there is a presumption that words of an act were properly and correctly used, they will not be given their ordinary meaning when such meaning involves an absurdity or inconsistency, or when it is repugnant to the clear intention of the legislature…", NY Statutes §232. The Regulating District's enabling statute takes pains to ensure that the Regulating District Board be fully appraised of the issues surrounding the adoption of an Apportionment. The word 'view', when taken in this context, contemplates a thorough understanding of: the breadth and scope of the apportionment; against whom such apportionment will lie; and the relative amount to be borne by each such entity. In the absence of a written record or a definition explaining the legislature's intent, and in light of available modern technology, such an appreciation can best be gained through review of aerial photographs, inundation mapping, and the presentation of staff's data analysis.

The 2010 apportionment lies against public corporations. In contrast to the initial Apportionment against a small set of Hydropower sites aligned along the River, it is impracticable to physically observe the entirety of land subject to the Apportionment. It is absurd to interpret the word 'view' to require physical presence in each County; an act which could be achieved, and in all likelihood has been achieved, by a majority of the Board individually driving along the public highways in each of the five affected counties. It is also absurd to contemplate the time and expense necessary for the Board to view and/or make a particularized benefit assessment for every parcel in each affected County. The ultimate cost of such an effort would be added to the cost apportioned. In contrast, the Board took a systematic approach to observe data, maps, photographs and arguments brought on by the affected counties.

2. The District failed to determine or apportion any benefits to New York State.

The State legislature itself authorized the establishment of the district and provided authority to assess those who benefit from the flood protection and flow augmentation it provides. It could have, but did not, shoulder the burden of defraying all Regulating District

costs. While the Regulating District's enabling statute makes provision for the utilization of an appropriation to cover its costs, it does not confer upon the Regulating District the authority to compel an appropriation from the NYS Legislature.

NY ECL §15-2123(5) 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.

In addition, NY ECL §15-2101(3) defines benefit to a person, a public corporation or the state. That section specifically notes that the state is deemed to have received benefit from the maintenance and operation of a river regulating reservoir if the reservoir is operated to relieve the state of any obligation by reason of diversion of the water of any river for canal purposes. The Regulating District does not operate the Great Sacandaga Lake reservoir or divert the water of any river to relieve the state of any obligation for canal purposes. Any indirect benefit to canal purposes is incidental to reservoir operation and de minimus in magnitude.

3. The District failed to examine the actual benefits to the apportioned counties.

The methodology used by the Regulating District to derive the apportionment is based on a certain, rational, and reasonable proportion of property values of property within the 100-year floodplain. The methodology utilizes the flood benefit received as representative of all benefits received and recognizes those entities who equitably share responsibility for such costs.

Establishing an apportionment solely on the basis of a calculation of actual benefits does not recognize and account the indirect or intrinsic benefit derived by the communities adjacent to Sacandaga and Hudson River.

4. The District's Apportionment contains a flawed determination of benefit to the parcels and public corporations.

As stated in the *Preliminary Plans of the Sacandaga Reservoir*, approved by the Board of Hudson River - Black River Regulating District January 23, 1924, and as certified to the Water Control Commission, January 23, 1924,

> "The regulated flow resulting from operation of the Sacandaga Reservoir discharging into the Sacandaga River and flowing therefrom in the Hudson River will benefit either directly or indirectly the following counties, towns, cities and villages adjacent to these rivers:
>
> Saratoga County
>
> Hadley
> Corinth

Moreau
Northumberland
Saratoga
Stillwater
Half Moon
Waterford
South Glens Falls
Corinth
Schuylerville
Stillwater
Waterford
Victory Mills
Palmer

Warren County

Luzerne
Queensbury
Glens Falls

Washington County

Kingsbury
Fort Edward
Greenwich
Easton
Fort Edward
Hudson Falls
Fort Miller
Thomson

Albany County

Colonie
Bethlehem
Coeymans
Albany
Cohoes
Watervliet
Green Island

Rensselaer County

Schaghticoke

North Greenbush
East Greenbush
Schodack
Troy
Rensselaer
Castleton

The towns and cities above listed have a total population of 333,049. All lands along and adjacent to the Sacandaga River below the Conklingville Dam and along and adjacent to the Hudson River below its confluence with the Sacandaga River and the water power developments and the water power sites located on these streams will be benefited by the maintenance and operation of the Sacandaga Reservoir."

5. The Apportionment failed to include those benefitted outside the District's boundaries.

The Regulating District has consistently interpreted its legislative authority as extending its jurisdictional control only so far as the boundaries as described in the petition creating the District. NY ECL §15-2103(4)(b) provides that: "After such a river regulating district shall have been created as a public corporation hereunder, the certificate creating the same shall be final and binding upon all the public corporations and real estate ***within the district***, and shall finally and conclusively establish the regular creation and organization of such district" (emphasis added)

The boundaries of the Regulating District are clear and distinct. Pursuant to NY ECL §15-2103(2) regulating districts are formed through the submission of a petition for the organization of the district to the department (currently DEC, formerly known as the Water Control Commission). The Hudson River Regulating District was formed by a petition presented to the Water Control Commission on July 8, 1922. That petition provides a description of the territory included within the District. The relevant portion of the August 2, 1922 Water Control Commission Order granting the petition reads: "[t]*he territory constituting the watershed of the Hudson River and its tributaries within the State of New York above the intersection of the southerly boundary lines of the counties of Albany and Rensselaer with the Hudson River, excepting therefrom the watershed of the Mohawk River and its tributaries, be created…the Hudson River Regulating District"*. The General Plan for the regulation of the flow of the Hudson, approved in a June 7, 1923 Order of the Water Control Commission, contains a map which shows that the Regulating District extends to the intersection of the southerly boundary lines of Albany and Rensselaer counties with the Hudson River.

6. The Apportionment should be barred as inequitable and unfair under the doctrine of equitable estoppel.

The Counties argue that the District's current apportionment should be barred as inequitable and unfair under the doctrine of equitable estoppel. The Counties' argument fails.

Equitable estoppel against a governmental entity is foreclosed in all but the rarest of circumstances. Parties alleging estoppel must demonstrate a manifest injustice or show that the

governmental action would defeat a legally obtained right. Particularly with respect to the collection of taxes, parties must first show the governmental entity is not engaged in a governmental function; but rather that the alleged wrongful governmental act is proprietary in nature, or exercised in a corporate capacity. The rare use of estoppel against governmental action protects public, as opposed to private, monies by ensuring against fraudulent acts and omissions by governmental employees. Finally, the separation of powers doctrine cautions against unnecessary intrusion of the judiciary upon the executive function. Each of these arguments supports the failure of the equitable estoppel claim.

A County's authority to budget is not impacted by the Regulating District's apportionment. Second, the Regulating District's Apportionment is, in effect, a tax, subject to particular deference in the equitable estoppel arena. Third, the Regulating District's apportionment is a statutorily defined public function. The apportionment, and by extension the Regulating District's determination years ago not to apportion costs against any County, clearly implicates public rather than private monies. Finally, the Regulating District Board's action is executive in nature and should be subject to deference from the judiciary.

Turning next to the specific equitable estopple argument posed, the necessary elements of equitable estoppel are not present. The first element requires wrong doing by the governmental entity and that the Government misrepresent or conceal facts. The Counties allege that the District wrongly never before apportioned costs against any County. No entity contested the Regulating District's initial apportionment. The Regulating District's authority to act is a matter of public record. With respect to alleged misrepresentation or concealment of facts, the Counties make no allegation of the facts allegedly concealed or the manner in which the Regulating District attempted to conceal such facts.

The second element necessary to establish equitable estoppel requires that the government's wrongful conduct must have induced action in reliance without knowledge of the true facts. The act or omission claimed by the Counties is the failure to budget for payment of an assessment based on the Regulating District's apportionment of a portion of the District's costs to the County. The claim fails because it fails to identify the facts of which the Counties did not have knowledge at the time any one of them adopted their budget(s). The Counties had all of the relevant facts. The Regulating District's statutory authority to apportion costs is a matter of public record.

The Third element requires the Counties to prove that any one of them changed its position, to its own detriment, in reliance on the Regulating District's failure to apportion any costs against that County for the last 80^{+} years. The Counties allege that they failed to budget for the District's apportionment. Washington County's Complaint makes clear that the six figure amount of the District's apportionment against the County is far less than the roughly $8 million fund balance the County has prepared to keep the County tax levy stable. The apportionment does not prevent the County from budgeting for such costs.

7. The District has failed to reapportion within a reasonable time thus violating the doctrine of laches.

The Counties argue that because the Regulating District has not levied an assessment against the counties for over 80 years, and because the Counties adopted their current year fiscal budgets in reliance upon the fact that they would not receive a Regulating District assessment levy in this current fiscal year, the doctrine of laches precludes the Regulating District from levying such assessments now. The Counties' laches argument fails.

Laches is an equitable principal to be used in defense of a claim. The defense of latches is unavailable against a governmental entity like the Regulating District when it is acting in a governmental capacity to enforce a public right or to protect a public interest.

8. Since the original Apportionment, there has been no change in any County's status which would make them equitably liable for inclusion in the new Apportionment.

The counties interpret NY ECL §15-2121(7) to require the Board to show some change in the status of an entity before the entity can be included in a subsequent apportionment. The Counties rely upon language at NY ECL §15-2121(7) providing "*If powers be developed after such apportionment has been made or if for any other reason any public corporation or any parcel of real estate becomes liable equitably for such subsequent expenses, a subsequent apportionment may be made in the same manner and subject to the same review as the original apportionment*." For eighty+ years, the Regulating District used 'head' as the basis for the apportionment of costs against the merchant hydropower companies lining the river. The initial apportionment spread a small percentage of the flood benefit among five impacted municipalities. The 'powers be developed' language at NY ECL §15-2121(7) ensured that the owner of any new hydropower development on the river would share in the costs apportioned. Conversely, the preemption wrought by the US Court of Appeals Albany Engineering v. FERC eliminated the hydropower companies from sharing their equitable portion of the Regulating District's costs. The new Apportionment, does not utilize 'head' as its basis. It utilizes the flood benefit received as representative of all benefits received and recognizes those entities who equitably share responsibility for such costs.

The Counties also argue that NY ECL §15-2121(7) sets forth the statutory authority for **any** subsequent Apportionment, such as the January 12, 2010 Apportionment. While subdivision 7 does provide authority to ensure that the owner of any new hydropower development on the river would share in the costs apportioned, it along with subdivision 8 requires that, in the absence of consent by all entities, the Regulating District Board levy the entire assessment on the basis of benefits shared as provided in Title 21 of Article 15.

In addition, subdivisions 7 and 8 do not provide the only authority for the Board to conduct a de novo Apportionment. NY ECL §§15-2121(6) and 15-2125(2) provide for the apportionment of construction costs beyond the original estimate and the apportionment of annual operation and maintenance charges. Both sections are distinct and separate from the NY

ECL §15-2123(5) provision requiring that if an assessment levy is insufficient to pay current obligations, the Board shall make a new assessment to make up the deficiency. In short, a myriad of circumstances permit the Board to start an Apportionment from scratch.

9. Equal Protection.

The Counties argue that the Board has failed to apportion costs to a multitude of public corporations and individual parcels of real estate and that by requiring only the Counties to bear the entire cost of the apportionment; the Board has denied equal protection of the law to the county residents who will bear the burden placed upon each County. In addition, the Counties argue that by apportioning cost to the Counties as a whole without discriminating between those portions of the county which derive a direct benefit by virtue of owning property within the flood plain and those county residents living outside of the flood plain, the Board has denied equal protection of the law to county residents living outside the flood plain.

As noted in NY Jurisprudence 2nd Edition, *the purpose of the equal protection clause of the 14th Amendment is to secure every person within a state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or by its improper execution through duly constituted agents. The equal protection clause creates no substantive rights, but rather, it embodies the general rule that states must treat like cases alike but may treat unlike cases accordingly.*

The strictures of the equal protection clause are invoked when the state engages in invidious discrimination. A violation of equal protection arises where: (1) a person, compared with others similarly situated, is selectively treated; and (2) such treatment is based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person. Mere different treatment of persons similarly situated, without more, does not establish an equal protection claim; what matters is impermissible motive. A successful disparate treatment claim requires a showing that:

1) the claimant was similarly situated to others and received different treatment from those persons;
2) the defendant's actions were irrational and wholly arbitrary; and
3) the plaintiff was subjected to intentional disparate treatment.

For purposes of review under the equal protection clause of Federal Constitution, courts generally accord states broad discretion to create classifications in implementing economic and social welfare policy. In such instances, the court leaves it to the political process to bring about the repeal of undesirable legislation; if a statute has some reasonable basis, the court sustains it even if the classification is not made with mathematical nicety or results in some inequality. (From NY Jur 2nd, citations omitted)

The Regulating District Board determined that by grouping the towns, cities, villages and the individual parcels of real estate within each such public corporation, the potential for disparate treatment of one individual parcel, neighborhood or municipality when compared to

others diminishes. While those persons residing inside the flood plain boundary may receive a greater or more direct benefit than those living beyond it, and while some living beyond the boundaries of the affected counties may receive a benefit similar to those living within such boundaries, the Board's determination to apportion costs to the affected counties is sound.

Briefly stated, the costs to run the Regulating District are imposed on the entities situated within the boundaries of such District deriving the benefits of such District based upon studies and determinations wholly independent of nefarious motive.

10. The Apportionment failed to consider all of the benefits identified in the petition for the creation of the Hudson River Regulating District filed in the Office of Water Control Commissioner on July 6, 1922. Those benefits included floods, sanitation and sewage issues during low flow of the river, sea water being as far north as Poughkeepsie during low flows of the river, navigation problems when there is no sufficient water, generation of electrical energy, operation of New York Central Railroad and D&H Railroad and "public and private interests in many respects not enumerated". …The Board apparently determined that "flood protection is the most direct and clearly defined benefit and failed to identify, quantify or evaluate any other benefit and purpose for which the District was originally established.

Flow regulation benefit studies completed on the Board's behalf 1) indicate that flood protection benefit is the majority benefit, 2) benefits associated with control of salt front, canal operation and navigation are de minimus, and 3) provided the Board with sufficient information for it to make the decision to base an apportionment on the value of properties that receive flood protection benefits. The acknowledgement or recognition of benefits other than flood protection does not preclude the Regulating District from using a certain, reasonable, and rational method for determining an apportionment (apportionment based on value of flood protected property) when developing an assessment of beneficiaries. In addition, certain benefits are derived by those outside the jurisdictional boundaries of the district.

11. The Regulating District failed to provide adequate notice of the grievance hearing to the individual property owners and/or the Municipalities (C,T,V) to whom the Counties will have to ultimately pass on the costs apportioned.

NY ECL §15-2121(4) provides in part that "…Upon the approval [of the Apportionment] by the [environmental conservation] department, the board shall cause a copy thereof to be served upon the chairman or other presiding officer of the county legislative body of each county, the mayor of each city, the supervisor of each town, and the mayor of each village, ***named in the apportionment***,…" (emphasis added). The Regulating District served copies of the Apportionment on the appropriate bodies in accordance with the statute. Only the five

counties were named in the Apportionment. No other public corporations or individual property owners were named in the Apportionment and thus, no other municipality was served.

12. The District boundaries appear ambiguous. This ambiguity is to the detriment of the Counties and benefited property owners.

The boundary of the Regulating District is established in the General Plan for the Regulation of the Flow of the Hudson River and Certain of its Tributaries, June 27, 1923. The Plan states, "…the territory constituting the watershed of the Hudson River and its tributaries within the State of New York above the intersection of the southerly boundary lines of the counties of Albany and Rensselaer with the Hudson River, excepting therefrom the watershed of the Mohawk River with its tributaries be created into the Hudson River Regulating District."

13. Method of Apportionment is Flawed.

The Regulating District Board considered many different methodologies to arrive at the apportionment. The use of property values as the basis for establishing a ratio between counties coupled with the Regulating District's in-house analysis of the "without GSL" 100-year floodplain and the resulting inundation mapping created a straightforward, reasonable and rational apportionment methodology.

Use of a directly calculated benefit, such as flood damage, implies that river regulation benefits are limited to only those who are included in a floodplain. The benefits derived from river regulation extend beyond a floodplain and include:

- commuters from throughout the counties that cross flood prone Hudson River bridges;
- communities outside of the floodplain whose fire and rescue departments would be flooded or would not be able to cross through the floodplain to provide services;
- communities outside of the floodplain whose wastewater facilities are damaged by a flood or would need to be shutdown because of flooding.
- residents and businesses outside of the floodplain whose water treatment facilities are damaged by a flood or would need to be shutdown because of flooding.

14. The Board has Improperly Placed the Collection and Grievance Processes upon the Complainant Counties.

The Board has apportioned the counties and the counties are the beneficiary who the Regulating District expects will pay the assessment.

15. The Board has Abdicated Its Statutory Duty to apportion costs among not only public corporations, but also parcels of real estate.

The Boards statutory duty requires it to Apportion costs among those who derive the benefit. The Board has Apportioned costs according to the ECL.