MICHAEL A. SIRAGUSA
ERIE COUNTY ATTORNEY

COUNTY OF ERIE

MARK C. POLONCARZ
COUNTY EXECUTIVE

DEPARTMENT OF LAW

MICHELLE M. PARKER
FIRST ASSISTANT COUNTY ATTORNEY

JEREMY C. TOTH
SECOND ASSISTANT COUNTY ATTORNEY

March 11, 2013

Mr. Robert
M. Graber, Clerk
Erie County Legislature
92 Franklin Street. 4th Floor
Buffalo, New York 14202

Dear Mr. Graber:

In compliance with the Resolution passed by the Erie County Legislature on June 25, 1987, regarding notification of lawsuits and claims filed against the County of Erie, enclosed please find a copy of the following:

File Name:	*Pearce, Mitchell, Estate of, by Administratrix Suzanne Pearce v. County of Erie, et al.*
Document Received:	Notice of Motion with Motion
Name of Claimant:	Suzanne Pearce 39 Klas Avenue West Seneca, New York 14224
Claimant's attorney:	Timothy M. Hudson, Esq. Paul William Beltz, P.C. 36 Church Street Buffalo, New York 14202

Should you have any questions, please call.

Very truly yours,

MICHAEL A. SIRAGUSA
Erie County Attorney

By: Michelle Parker
Michelle M. Parker
First Assistant County Attorney

MMP:dld
Enclosure

STATE OF NEW YORK
SUPREME COURT :: COUNTY OF ERIE

SUZANNE PEARCE, Administratrix of
the Estate of MITCHELL PEARCE

Claimant,

vs.

ERIE-WYOMING JOINT
WATERSHED BOARD
50 Commerce Way
East Aurora, New York 14052

ERIE COUNTY SOIL & WATER
CONSERVATION DISTRICT
50 Commerce Way
East Aurora, New York 14052

WYOMING COUNTY SOIL &
WATER CONSERVATION DISTRICT
31 Duncan Street
Warsaw, New York 14569

COUNTY OF ERIE
95 Franklin Street
Buffalo, New York 14202

TOWN OF WEST SENECA
1250 Union Road
West Seneca, New York 14224

Respondents.

NOTICE OF MOTION

ORAL ARGUMENT REQUESTED

Index No.:

Assigned Justice:
Hon.

This paper received at the
Erie County Attorney's Office
from Mark Winsick on
the 28 day of February 2013
at 1:40 a.m./p.m.
Assistant County Attorney

PLEASE TAKE NOTICE that upon the annexed affidavit of Timothy M. Hudson, Esq. sworn to on the 21st day of February, 2013; and the affidavit of Suzanne Pearce, Esq., sworn to the 21st day of February 2013; and upon all of the pleadings and proceedings had herein,

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ERIE COUNTY CLERK
RCPT # 13031234
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the claimant will move this Court at a Special Term thereof to be held before the Honorable Henry J. Nowak, Justice of the Supreme Court, at the Erie County Courthouse, 25 Delaware Avenue, Part 12, Buffalo, New York, on the 10th day of April, at 9:30 a.m., or as soon thereafter as counsel can be heard, for an Order pursuant to Section 50-e(5) of the General Municipal Law, for permission to serve a late notice of claim, and for such other and further relief as this Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR 2214(b), answering affidavits, if any, must be served upon the undersigned at least 7 days before the return date of this motion.

DATED: Buffalo, New York
February 24, 2013

Timothy M. Hudson
PAUL WILLIAM BELTZ, P.C.
Attorneys for Claimant
36 Church Street
Buffalo, New York 14202-3905
(716) 852-1000

TO:

ERIE-WYOMING JOINT
WATERSHED BOARD
50 Commerce Way
East Aurora, New York 14052

ERIE COUNTY SOIL & WATER
CONSERVATION DISTRICT
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TOWN OF WEST SENECA
1250 Union Road
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STATE OF NEW YORK
SUPREME COURT :: COUNTY OF ERIE

SUZANNE PEARCE, Administratrix of
the Estate of MITCHELL PEARCE

Claimant,

vs.

ERIE-WYOMING JOINT
WATERSHED BOARD,

ERIE COUNTY SOIL & WATER
CONSERVATION DISTRICT,

WYOMING COUNTY SOIL &
WATER CONSERVATION DISTRICT,

COUNTY OF ERIE,

TOWN OF WEST SENECA.

Respondents.

AFFIRMATION

Index No.:

Timothy M. Hudson, being duly sworn, deposes and states:

1. I am an attorney at law duly licensed to practice my profession in the State of New York and am associated with the law firm of Paul William Beltz, P.C., attorneys for the claimant. As such, I am fully familiar with the facts and circumstances surrounding this action.

2. I make this affirmation in support of claimant's motion for an Order permitting claimant to serve a late notice of claim. (See Proposed Notice of Claim, attached hereto as **Exhibit A**).

3. That this claim for wrongful death and conscious pain and suffering action arises out of an incident that occurred on June 12, 2012, in Buffalo Creek, at the downstream-most low head-type dam located across that portion of the creek commonly known as the Earsing Sills Oxbow.

4. As a result of injuries sustained in the June 12, 2012 incident, claimant's decedent, an infant, died on June 17, 2012.

5. That deponent's office was contacted and retained by Suzanne Pearce, and based upon the above, is duly filing this motion on behalf of the claimant.

6. As is set forth in Mrs. Pearce's affidavit, attached hereto in support of this motion, Mrs. Pearce first contacted your deponent's office more than 90-days subsequent to Mitchell Pearce's death. (See Affidavit of Suzanne Pearce, attached hereto as **Exhibit B**).

7. Mrs. Pearce recently opened an estate for her late son, petitioned the Surrogate to Issue Limited Letters of Administration, and was named Administratrix of the Estate on December 21, 2012. (See Limited Letters of Administration, attached hereto as **Exhibit C**).

I. Claimant's Notice of Claim for Wrongful Death is Timely

8. Claimant's Notice of Claim for wrongful death is timely as it is made within 90 days of the appointment of an administrator. See General Municipal Law § 50-e (1)(a).

9. Plaintiff is serving an executed copy of the proposed Notice of Claim under separate cover upon defendants, along with the instant motion. (See Verified Notice of Claim, attached hereto as **Exhibit D**).

10. Thus only the conscious pain and suffering claim requires leave from the Court to be served on Respondents.

II. No Notice of Claim is Necessary for Respondents ERIE-WYOMING JOINT WATERSHED BOARD, ERIE COUNTY SOIL & WATER CONSERVATION DISTRICT, and WYOMING COUNTY SOIL & WATER CONSERVATION DISTRICT.

11. Respondents ERIE-WYOMING JOINT WATERSHED BOARD, ERIE COUNTY SOIL & WATER CONSERVATION DISTRICT and WYOMING COUNTY SOIL & WATER CONSERVATION DISTRICT are soil and water conservation districts and/or partnerships between soil and water conservation districts. They are not political subdivisions or departments of county government.

12. Section 50-e (1) of the General Municipal Law sets forth the notice of claim requirement. In relevant part, the statute provides that notice of claim in tort cases need only be made "where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation . . . " (See id.)

13. Section 50-i of the General Municipal Law require presentation of a tort claim by notice of claim for actions against "a city, county, town, village, fire district or school district for personal injury, wrongful death or damage to real or personal property . . . . "

14. No such notice requirement exists for Soil and Water Conservation Districts.

15. Under New York law, soil and water conservation districts may be created by action of the board of supervisors of any county, but such districts are separate and distinct from the county. See Soil & Water Conservation Districts Law § 5 & 9 (McKinney's 1997);

see also 1980 N.Y. Op. Att'y Gen. 62 (September 10, 1980) (interpreting soil and water districts to be separate and distinct from County government).

16. The legislature empowered Soil and Water Conservation Districts "[t]o sue and be sued in the name of the district," and there exists no notice of claim requirement as a condition precedent to the commencement of an action against such districts. (See Soil & Water Conservation Districts Law § 9(9) (McKinney's 1997).

17. Although there appears to be no requirement that the soil and water district entities be served with Notice of Claim as a pre-condition of suit, the issue has not been litigated. Your deponent seeks to serve Notice of Claim on the soil and water conservation district entities in an abundance of caution.

III. Late Notice of Claim for Conscious Pain and Suffering Should be Permitted

18. The decision to grant leave to serve a late notice of claim is left to the sound judgment of the trial court, and the decision to grant such leave are reviewed only for abuse of discretion. Matter of Trusso v. Board of Educ. of Jamestown City School Dist., 24 A.D.3d 1302 (4th Dept. 2005).

19. In deciding whether to permit the service of a late notice of claim, the Courts weigh four factors. Those factors are "(1) whether the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter, (2) whether the claimant was an infant or mentally or physically incapacitated, (3) whether the claimant had a reasonable excuse for the delay in filing a notice of claim, and (4) whether the municipality was prejudiced by the delay." Andrew T.B. v. Brewster

Cent. Sch. Dist., 18 A.D.3d 745 (2d Dept. 2005) (quoting from Rogers v City of Yonkers, 271 AD2d 593 (2000)).

20. Those factors weigh in favor of permitting claimant to serve late notice of the conscious pain and suffering claim.

21. The decedent was incapacitated by infancy at the time of the incident. Mitchell Pearce, was an infant of 14 years old at the time of incident on June 12, 2012.

22. The Respondents had actual knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter.

23. Respondent Town of West Seneca dedicated its June 25, 2012, meeting to Mitchell Pearce's memory. (See Town of West Seneca Board Minutes, attached as **Exhibit E**). The Town Board of the Town of West Seneca heard from the Chairperson of the West Seneca Environmental Commission regarding Mitchell Pearce's rescue and the dangers posed by the low head dams. (See id.)

24. The Erie County Soil and Water Conservation District held a Board of Directors meeting on July 10, 2012, and discussed the drowning of Mitchell Pearce. (See Erie County Soil and Water Conservation District Board Minutes, attached as **Exhibit F**). Those minutes indicate that Mr. Gaston:

> "reported on an accidental drowning that occurred in Buffalo Creek, in the vicinity of the sills on June 12, 2012. M. Gaston reviewed the history of the Erie Wyoming Joint Board, the sills and the inherent dangers associated with low head dams. **M. Gaston was directed to schedule an Erie/Wyoming Joint Board meeting.** R. Waterman made a motion **to notify the county attorney's office and seek guidance in regards to the sills**; Seconded by J. Mills; Motion passed; Carried."

(See id.)(emphasis added).

The minutes thus make clear that within 30 days of the incident, Respondent Erie County Soil and Water Conservation District, Respondent Erie/Wyoming Joint Watershed Board, and Respondent County of Erie – through the County Attorney's Office – had actual knowledge of the essential facts constituting the claim.

25. The Joint Board, which included members from both the Erie County Soil and Water Conservation District and the Wyoming County Soil and Water Conservation District, subsequently did hold such a meeting on September 17, 2012. (See Draft Joint Board Minutes, attached as **Exhibit "G"**) The draft Joint Board Meeting Minutes confirm that all Respondents had actual knowledge of the essential facts constituting the claim.

26. Claimant had reasonable excuse for the delay. As Mrs. Pearce sets forth in her Affidavit, she first contacted your deponent's law firm more than 90-days after the death of her son. (See Affidavit of Pearce, **Exhibit B**).

27. Upon being contacted by Mrs. Pearce, your deponent promptly took action to identify the individuals and entities potentially responsible for the low head dam and to assist Mrs. Pearce in opening an Estate for Mitchell Pearce.

28. Because the five low head-type dams on Buffalo Creek have no physical address registered with the Clerk of Court, preliminary investigation into the ownership and maintenance responsibilities of the premises was far more difficult than in an ordinary negligence action.

29. Your deponent made prompt demands pursuant to the Freedom of Information Act and Freedom of Information Law to various governmental entities, including the New York Department of Environmental Conservation, the USDA Natural

Resources Conservation Service, the Erie County Soil and Water Conservation District, the Wyoming County Soil and Water Conservation District, the Joint Board, and the Town of West Seneca to determine the individual(s) and/or entity(ies) that may have had responsibility for ownership, regulation, maintenance, inspection, and/or repair of the low head-type dam. To date, your deponent has received some responses from some public corporations and/or entities, but other demands remain outstanding.

30. Respondents have not been prejudiced in any way by the delay. As set forth more fully above, the Notice of Claim is timely with respect to the wrongful death claim. As the conscious pain and suffering claim arises from the same set of facts and circumstances, there can be no credible assertion that Respondents are somehow prejudiced.

31. In addition, Respondents not only had actual notice of the facts underlying the claim, but it also appears from the enclosed meeting minutes that Respondents had actually investigated Mitchell Pearce's drowning and have already taken steps to the dangers posed by the low head dams on Buffalo Creek within the first 90 days following the incident.

WHEREFORE, claimant respectfully requests the Court to grant claimant's motion to serve a late notice of claim pursuant to General Municipal Law §50-e(5), and for such other and further relief as this Court deems just and proper.

Timothy M. Hudson.

February 24, 2013
Buffalo, New York.