

PART 420

BASIN REGULATIONS – WATER SUPPLY CHARGES

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BASIN REGULATIONS—WATER SUPPLY CHARGES

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AUTHORITY: Delaware River Basin Compact, 75 Stat. 688.

DELAWARE RIVER BASIN COMMISSION

PART 420

BASIN REGULATIONS—WATER SUPPLY CHARGES

GENERAL

§ 420.1 Definitions.

For the purposes of this part 420, except as otherwise required by the context:

(a) *Person* means any person, corporation, partnership, association, trust, or other entity, public or private.

(b) *Water user* means any person who uses, takes, withdraws or diverts surface waters within the Delaware River Basin.

(c) *Executive Director* means the Executive Director of the Delaware River Basin Commission.

(d) *Consumptive use* means the water lost due to transpiration from vegetation in the building of plant tissue, incorporated into products during their manufacture, lost to the atmosphere from cooling devices, evaporated from water surfaces, exported from the Delaware River Basin, or any other water use for which the water withdrawn is not returned to the surface waters of the basin undiminished in quantity.

WATER SUPPLY POLICY

§ 420.21 Policy.

The provisions of Resolution No. 71-4 (Comprehensive Plan) relating to water supply charges, are incorporated herein and made a part thereof.

§ 420.22 Prohibition; sanctions.

Any person, firm, corporation or other entity, including a public corporation, body or agency, who shall use, withdraw or divert surface waters from the basin, shall pay such charges therefore as may be required by this Resolution. Any violation of this Resolution shall be subject to penalty as prescribed under Article 14.17 of the Compact. The Commission may also recover the value (according to the established water pricing schedules of the Commission) of any such use, withdrawal, or diversion, and invoke the jurisdiction of the courts to enjoin any further use, withdrawal or diversion, unless all charges under this Resolution are paid in full when due.

§ 420.23 Exempt uses under the Compact.

(a) Section 15.1(b) of the Delaware River Basin Compact provides that "no provision of section 3.7 of the Compact shall be deemed to authorize the Commission to impose any charge for water withdrawals or diversions from the basin if such withdrawals or diversions could lawfully have been made without charge on the effective date of the Compact;..." In compliance with this provision: There shall be no charge for water withdrawn or diverted in quantities not exceeding the legal entitlement of the user, determined as of October 27, 1961. Each water user may submit proof satisfactory to the Commission of the factors constituting legal entitlement, as defined in paragraph B. hereof. In absence of proof of these conditions as of October 27, 1961, the quantity of water exempt from charge to each user will be the legal entitlement of the user determined as of March 31, 1971.

(b) For the purposes of paragraph (a) of this section:

(1) *Legal entitlement* means the quantity or volume of water expressed in million gallons per month determined by the lesser of the following condition:

(i) A valid and subsisting permit, issued under the authority of one of the signatory parties, if such permit was required as of October 27, 1961, or thereafter;

(ii) Physical capability as required for such taking; or

(iii) The total allocable flow without augmentation by the Commission, using a seven-day, ten-year, low-flow criterion measured at the point of withdrawal or diversion.

(2) *Physical capability* means the capacity of pumps, water lines and appurtenances installed and operable, determined according to sound engineering principles. The physical capability specifically includes plant facilities actually using water, but excludes facilities which may have been installed in anticipation of future plant expansion not yet realized.

(c) Whenever adequate records of legal entitlement for agricultural irrigation purposes are not available to the Commission, such legal entitlement shall be measured by the maximum number of acres under irrigation by the water user at any time during the year ending March 31, 1971, allowing one acre-foot of surface water annually per acre irrigated.

(d) Notwithstanding the provisions of paragraphs (a), (b) and (c), there shall be no charge for water made available from storage where:

(1) The cost of the storage facility has or will be otherwise paid for by the user;

(2) Such storage controls a drainage area; and

(3) The use does not exceed the yield of such storage without augmentation from other surface water of the basin.

§ 420.24 Effective date of rates.

Rates and charges shall apply to all water users not exempt hereunder or and after the date of the first impoundment of water for water supply purposes at the Beltzville Reservoir (February 8, 1971), or the effective date hereof, whichever is later.

ENTITLEMENT; MEASUREMENT; BILLING

§420.31 Certificate of entitlement.

(a) The Executive Director will issue to each known water user a certificate of entitlement within 30 days after the effective date of these regulations subject to the provisions of paragraph (b). In addition, any other water user may apply for a certificate of entitlement at any time. A preliminary notice of entitlement shall be issued to each user. Such entitlement shall become final and take effect, unless the user shall file with the Commission, within 20 days after the service of the notice of entitlement, a request for hearing by the Commission. At such hearing, the water user may show cause why the proposed entitlement shall not take effect.

(b) The Executive Director shall schedule a hearing to be held not less than ten days after receipt of a request for a hearing by the Commission. Hearings shall be conducted and the results thereof subject to review in accordance with Article 5 of the Commission's Rules of Practice and Procedure.

(c) A final certificate of entitlement will be issued either upon expiration of the time to request a hearing, where there has been no request, or in accordance with the determination of a hearing where one is held.

(d) *Limitations.*

(1) A certificate of entitlement is granted to a specific user for water withdrawals or diversions at a specific facility in the amount of the Legal Entitlement as defined in § 420.23(b).

(2) A certificate of entitlement shall not be applied, transferred or modified to apply to a facility other than the facility initially specified in the certificate.

(3) A certificate of entitlement may not be transferred from the certificate holder to another user, except as provided in the exceptions set forth in § 420.31(f).

(4) A certificate of entitlement does not exempt the certificate holder from paying water supply charges for any portion of water withdrawals or diversions used outside the facility specified in the certificate and any additional service area to which the facility supplied water as of October 27, 1961 or at the facility specified in the certificate by a user other than the certificate holder. For purposes of this § 420.31(d)(4), a certificate holder claiming an exemption from charges for water supplied within a service area shall submit proof satisfactory to the Commission identifying the facility's service area as of October 27, 1961. In the absence of proof of the service area as of October 27, 1961, the service area defined in the Commission docket, if any, for the facility in effect at the time the certificate was issued shall be deemed to be the facility's service area. In the absence of proof of a service area, the certificate shall only exempt the certificate holder from paying water supply charges for water used at the facility.

(e) *Termination of certificate.*

(1) A certificate of entitlement terminates pursuant to this section and without the need for Commission action if at least one of the following occurs:

(i) The certificate holder dissolves or otherwise ceases to exist,

(ii) The certificate holder ceases the withdrawals or diversions at the facility to which the certificate of entitlement applies, or abandons the intake, provided that a shutdown of the facility for maintenance or improvement, or a replacement of the intake, that is performed at the earliest practicable commercially reasonable time following commencement of the shutdown or replacement, shall not be deemed to be a cessation of withdrawal or diversion,

(iii) The certificate holder through contract, lease or other agreement ceases to be the user or public water system supplier of the water withdrawn or diverted at the facility, or

(iv) There is a change in the ownership or control of the facility. Once terminated, a certificate of entitlement may not be reinstated or reissued.

(2) A change in ownership or control of the facility includes, but is not limited to, any transaction, acquisition, merger or event (collectively "transaction") resulting in at least one of the following:

(i) A transfer of title to the facility,

(ii) A person or entity or the shareholders or other owners of an entity becoming the beneficial owner, directly or indirectly, or acquiring alone or in concert the power or right to vote at least 20 percent of any class of ownership interest in a certificate holder or any of its parent entities, regardless of the tier in the corporate or entity structure at which the transaction occurs,

(iii) A change in ownership or control for purposes of any of the certificate holder's or any of its parent corporations' employee agreements, or

(iv) A change of the *de facto* controlling interest in a certificate holder or any of its parent entities, regardless of the tier in the corporate or entity structure at which the change occurs.

(3) A change of the *de facto* controlling interest in an entity includes, but is not limited to, a change of the persons or entities with the ability or authority, expressed or reserved, to direct the management or policies of an entity and/or to take at least one of the following actions:

(i) Amend or change the entity's identity (e.g. joint venture agreement, unincorporated business status);

(ii) Appoint or remove at least 50% of the members of the Board of Directors or Trustees of a corporation, general partner of a partnership, or a similar member of the governing body of an entity;

(iii) Amend or change the by-laws, constitution, or other operating or management direction of the entity;

(iv) Control the sale of, use of or access to any or all of the entity's assets;

(v) Encumber the entity's assets by way of mortgage or other indebtedness;

(vi) Control any or all of the assets or other property of the entity upon the sale or dissolution of the entity;

(vii) Dissolve the entity;

(viii) Arrange for the sale or transfer of the entity to a new ownership or control;

(ix) Select or change the management of the entity or determine management compensation;
or

(x) Set operating policies, financial policies or budgets.

(4) For purposes of applying § 420.31(e)(3), consideration may be given to circumstances particular to the person or entity and certificate holder involved, including without limitation the ability of that person or entity to take actions in light of the number of shares in the certificate holder or its parent entities that are actively voted, the practice of any majority shareholder in exercising or refraining from exercising majority rights, and any agreements giving the person or entity the right to control votes of others.

(5) A series of transactions undertaken pursuant to a plan or that are otherwise related shall be considered a single transaction for purposes of this section. For purposes of calculating the twenty percent threshold in § 420.31(e)(2)(ii), the securities, shares or other interests held immediately prior to the transaction shall be added to the securities, shares or other interests acquired in the transaction.

(f) *Exceptions.*

(1) *Agricultural exception.*

(i) Whenever ownership or possession of land in agricultural use is transferred, any certificate of entitlement with respect to such land shall be deemed to run with the land, if but only if within sixty days following the land transfer the new user demonstrates to the Executive Director that it will continue to use the water withdrawn or diverted for agricultural irrigation. Following any such timely demonstration, the Executive Director shall transfer the certificate of entitlement to the new user. The Executive Director may extend the sixty day period for good cause shown.

(ii) A certificate of entitlement that has been transferred pursuant to § 420.31(f)(1)(i) relieves the user of the obligation to pay water supply charges only with respect to the quantity of water in fact used by the new certificate holder for agricultural irrigation up to the Legal Entitlement specified in the certificate, and not with respect to the quantity of water used for any other purposes. The provisions of § 420.43 shall apply to water uses outside the scope of the certificate of entitlement.

(iii) A certificate of entitlement that has been transferred pursuant to § 420.31(f)(1)(i) terminates pursuant to this paragraph and without the need for Commission action if and when the certificate holder ceases using the water for agricultural irrigation, provided that if the cessation occurs in conjunction with a transfer of ownership or possession of the land in agricultural use, the certificate of entitlement may be transferred to a new user pursuant to § 420.31(f)(1)(i). Once terminated, a certificate of entitlement may not be reinstated or reissued.

(2) *Corporate reorganization exceptions.* The following provisions apply where a corporate parent directly or indirectly owning 100% of each class of shares of all of its subsidiary corporations decides to reorganize those subsidiary corporations without affecting the corporate parent's 100% ownership interest.

(i) Whenever a corporate reorganization consists solely of a change of the name, identity, internal corporate structure, or place of organization of a corporate certificate holder or any of its parent corporations, the Executive Director may reissue a certificate of entitlement in the name of the new owner of the facility, provided that the reorganization does not affect ownership and/or control by the certificate holder's corporate family of companies within the meaning of §§ 420.31(e)(2) through (5) and does not alter the ultimate corporate parent's 100% ownership interest.

(ii) A merger or other plan, transaction or series of transactions that effectuates a change of ownership or control within the meaning of §§ 420.31(e)(2) through (5) does not fall within the exemption of § 420.31(f)(2)(i) on the basis that a corporate reorganization constitutes part of the merger, plan, transaction or series of transactions.

§ 420.32 Measurement and billing of water taken.

(a) The quantity and volume of waters used by each person shall be determined by meters, or other methods approved by the Commission, installed, maintained and read by or on behalf of the taker. Meters or other methods of measurement shall be subject to approval and inspection by the Commission as to installation, maintenance and reading.

(b) Each user of surface water who is not exceeding the quantity specified in his "certificate of entitlement" shall annually, on or before January 31, file with the Commission, on a form to be prescribed by the Executive Director, a report of the user's physical capability, as defined, permit limitations, and the volume of water used during the preceding year.

(c) Each user of surface water who is taking a quantity of water greater than the amount specified in his "certificate of entitlement" shall report his usage to the Commission on or before April 30, July 31, October 31 and January 31, of each year covering the next preceding calendar quarter, respectively, on forms to be prescribed by the Executive Director. The amount due for water usage in excess of the legal entitlement for each of the first three quarters of a calendar year shall be computed and paid by the user, together with the report.

(d) The Commission will render a statement of the net amount due based on the fourth quarter report, including a negative or positive adjustment, so that the net total billing and payment for four quarters will equal the total water used during the four quarters less the user's legal entitlement, if any.

§ 420.33 Payment of bills.

The amount due for each quarter shall bear interest at the rate of 1 percent per month for each day it is unpaid during 30 days after the due date of the quarterly report for the first three quarters and 30 days after the bill is rendered for the fourth quarter.

CHARGES; EXEMPTIONS

§ 420.41 Schedule of water charges.

The schedule of water charges established in accordance with § 420.22 shall be as follows:

(a) \$105 per million gallons for consumptive use, subject to paragraph (c) of this section; and

(b) \$1.05 per million gallons for non-consumptive use, subject to paragraph (c) of this section.

(c) On July 1 of every year, beginning July 1, 2017, the rates established by this section will increase commensurate with any increase in the annual April 12-month Consumer Price Index

(CPI) for Philadelphia, published by the U.S. Bureau of Labor Statistics during that year.¹ In any year in which the April 12-month CPI for Philadelphia declines or shows no change, the water charges rates will remain unchanged. Following any indexed adjustment made under this paragraph (c), revised consumptive and non-consumptive use rates will be published in the *Federal Register* by July 1 and posted on the Commission's website. Interested parties may also obtain the current rates by contacting the Commission directly during business hours.

§ 420.42 Contracts; minimum charge.

Subject to the exclusions for certificates of entitlement and exempt uses, the Executive Director may require contracts for any taking, use, withdrawal or diversion of waters of the basin. Each contract shall provide for a minimum annual payment in accordance with an estimated annual demand schedule, regardless of use, withdrawal or diversion. The failure of any person to execute a contract under this section shall not affect the application of other requirements of this Resolution.

§ 420.43 Exempt use.

The following uses shall be exempt from charge:

- (a) Nonconsumptive uses of less than 1,000 gallons during any day, and less than 100,000 gallons during any quarter;
- (b) Ballast water used for shipping purposes;
- (c) Water taken, withdrawn or diverted from streams tributary to the River Master's gauging station at Montague; and
- (d) Water taken, withdrawn or diverted below River Mile 38 (the mouth of the Cohansey River) and such proportion of waters taken, diverted or withdrawn above River Mile 38 and below River Mile 92.4 (the mouth of the Schuylkill River) as the Executive Director may determine, on the basis of hydrologic studies, would have no discernable effect upon the maintenance of the salt front below the mouth of the Schuylkill River.

§ 420.44 Cooling water.

Water used exclusively for cooling purposes which is returned to the stream in compliance with the effluent requirements of applicable water quality standards, shall be charged at the nonconsumptive use rate except that losses due to instream evaporation caused by cooling uses will be charged as consumptive use.

§ 420.45 Historical use.

A person who or which could not for any reason use, take, withdraw or divert waters of the basin from the place in question on March 31, 1971, shall not be entitled to a certificate of entitlement.

¹Consumer Price Index – U/ Series ID: CUURA102SA0 / Not Seasonally Adjusted / Area: Philadelphia-Wilmington-Atlantic City, PA-NJ-DE-MD / Item: All items / Base Period: 1982-84=100.

HYDROELECTRIC POWER WATER USE CHARGES

§ 420.51 Hydroelectric power plant water use charges.

(a) *Annual base charges.* Owners of conventional run-of-river hydroelectric power plants that benefit from water storage facilities owned or partially owned by the Commission shall pay an annual base charge to the Commission. The amount of the base annual charge shall be one dollar per kilowatt of installed capacity.

(b) *Annual variable charges.* In addition to the base charge established in A. above, annual charges based on power generated at each facility will be assessed as follows:

(1) Owners of hydroelectric power plants that benefit from increased hydraulic head available to the hydroelectric project as a result of investments by the Commission shall be charged one mill per kilowatt-hour of energy produced.

(2) Owners of hydroelectric power plant that derive additional benefits from increased flows available to the hydroelectric project that would not have been available without the Commission-sponsored project shall be charged one-half mill per kilowatt hour of energy produced. No charges for increased flows will be required when charges for increased hydraulic head are in effect.

(3) Charges for the use of any facilities such as pipe conduits, outlet works, and so on, installed in, on or near a Commission-sponsored project that benefits the hydroelectric project in any way will be determined on a case-by-case basis as approved by the Commission.

(c) *Credits.* The owner of any hydroelectric generating facility shall receive a credit against the current year water use fee otherwise payable to the Commission for any amount which the Commission receives from the U.S. Army Corps of Engineers or from the Federal Energy Regulatory Commission for each calendar year.

(d) *Exemptions.* No payment will be required when hydroelectric power facility water use charges would amount to less than \$25 per year. Retroactive charges will not be assessed for facilities which have already obtained Commission approval pursuant to section 3.8 of the Delaware River Basin Compact. All hydroelectric generating projects that do not benefit from storage owned or partially owned by the Commission are exempt from these Commission water charges.

(e) *Payment of bills.* The amount due each year shall bear interest at the rate of 1 percent per month for each day it is unpaid beginning 30 days after the due date. Payments are due within 30 days of the end of each calendar year. Annual base charges will be prorated for periods less than a year.

[53 FR 45260, Nov. 9, 1988]
