

A RESOLUTION amending the *Basin Regulations – Water Supply Charges* and the *Comprehensive Plan Regarding Certificates of Entitlement*.

WHEREAS, by Resolution No. 74-6 in May of 1974, the Commission instituted a system of water supply charges for surface water diversions or withdrawals within the Basin; and

WHEREAS, Resolution No. 74-6, which was codified in the *Basin Regulations – Water Supply Charges*, provided for the issuance of certificates of entitlement to then-current water users, establishing the amount of water each could lawfully take from the surface waters of the Basin without charge, consistent with Section 15.1(b) of the *Compact*; and

WHEREAS, Resolution No. 74-6 further provided that a certificate of entitlement was not transferable, except under limited circumstances set forth in enumerated exceptions; and

WHEREAS, because entitlements treat users that commenced water withdrawals before the enactment of the *Compact* more favorably than users who commenced water withdrawals later, even though all users benefit equally from the facilities financed by water supply charges, courts and the Commission have emphasized the need to eliminate entitlements over time; and

WHEREAS, both the Commission and the courts have construed narrowly the exceptions to the rule that entitlements are not transferable; and

WHEREAS, in 1994, in response to a ruling by the Third Circuit in *Texaco Refining and Marketing, Inc. v. DRBC*, 824 F. Supp. 500 (D.Del. 1993), *aff'd.*, No. 93-7475 (3d Cir. June 24, 1994) (*per curiam*), the Commission adopted Resolution No. 94-20, incorporating an explicit “change of ownership and/or control” test and eliminating two exceptions, including the merger exception that was part of the Commission’s regulations at the time; and

WHEREAS, in addition, the exception for corporate reorganizations embodied in Section 5.2.1.F.2 of the *Water Charging Regulations* was amended in 1994 to apply only when the reorganization “does not affect ownership and/or control”; and

WHEREAS, although the Commission has in its decisions consistently held that changes in ownership or control would extinguish a certificate, the language of the regulations has never explicitly defined “changes in ownership or control”; and

WHEREAS, in spite of the 1994 amendment, some members of the Basin community have continued to advance interpretations of the language of the rule that conflict with the Commission’s consistent interpretation; and

WHEREAS, to avoid further controversy, the Commission in 2005 proposed a more thorough revision of the rule, intended to enhance the clarity of the language; and

WHEREAS, notice of the proposed rule change appeared in the *Federal Register* on October 18, 2005 and in the registers of the four Basin States between November 1 and November 7, 2005 as well as on the Commission's website; and

WHEREAS, the Commission's notices included the dates of a scheduled public hearing and invited written comment on the proposed amendments; and

WHEREAS, the public hearing took place during the Commission's regularly scheduled business meeting on December 7, 2005 and the comment period remained open through January 10, 2006; and

WHEREAS, the Commission received no comments at its hearing on December 7 and only one comment during the written comment period; and

WHEREAS, the sole commenter recommended, among other things, that all entitlements be eliminated, a recommendation that contravenes Section 15.1(b) of the *Compact* and which the Commission thus lacks the authority to accept; and

WHEREAS, several minor modifications to the language of the proposed rule were made, based upon comments by the Commission staff, to ensure clarity and consistency with the Commission's practice; now therefore;

BE IT RESOLVED by the Delaware River Basin Commission:

1. The text of Sections 5.2.1.D. through F. of the *Basin Regulations – Water Supply Charges* is hereby replaced by the attached.
2. Article 5.2 of the *Basin Regulations – Water Supply Charges* as amended is hereby incorporated in the Commission's *Comprehensive Plan*.

This Resolution shall take effect immediately.

/s/ Kevin C. Donnelly

Kevin C. Donnelly, Chairman *pro tem*

Pamela M. Bush

Pamela M. Bush, Esquire, Commission Secretary

Adopted: March 1, 2006

Section 5.2.1 Certificate of Entitlement.

Subsections A, B and C are unchanged. The following subsections replace current subsections 5.2.1 (D - F):

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 Section 5.1.3.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 Section 5.2.1.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 Section 5.2.1.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 5.2.1.E 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 Section 5.2.1.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 5.2.1.E. For purposes of calculating the twenty percent threshold in Section 5.2.1.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 Section 5.2.1.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 Section 5.3.3 shall apply to water uses outside the scope of the certificate of entitlement.

(iii) A certificate of entitlement that has been transferred pursuant to Section 5.2.1.F.1(i) terminates pursuant to this Section 5.2.1.F.1(iii) 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 Section 5.2.1.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 Sections 5.2.1.E.2, E.3, E.4 and E.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 Sections 5.2.1.E.2, E.3, E.4 and E.5 does not fall within the exemption of Section 5.2.1.F.2(i) on the basis that a corporate reorganization constitutes part of the merger, plan, transaction or series of transactions.