

Dated: May 23, 2016.

Kevin J. Wolf,

Assistant Secretary for Export Administration.

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DELAWARE RIVER BASIN COMMISSION

18 CFR Part 420

Clarifying Language in the Basin Regulations—Water Supply Charges Relating to Certificates of Entitlement

AGENCY: Delaware River Basin Commission.

ACTION: Final rule.

SUMMARY: The Delaware River Basin Commission is codifying revisions to its *Basin Regulations—Water Supply Charges*. The revisions involve no changes in the substance or administration of the rule. They were made in order to clarify the language of the rule to conform to the Commission's decisions and practices so as to provide better notice to users regarding how the Commission implements its entitlements program and to avoid future controversy.

DATES: This final rule is effective July 5, 2016.

FOR FURTHER INFORMATION CONTACT: Pamela Bush, 609-477-7203.

SUPPLEMENTARY INFORMATION:

Background

The Delaware River Basin Commission ("DRBC" or "Commission") is a federal-interstate compact agency charged with managing the water resources of the Delaware River Basin on a regional basis without regard to political boundaries. Its members are the governors of the four basin states—Delaware, New Jersey, New York and Pennsylvania—and the North Atlantic Division Commander of the U.S. Army Corps of Engineers, representing the federal government.

By Resolution No. 2006-2 on March 1, 2006, the Commission approved revisions to its *Basin Regulations—Water Supply Charges*, 18 CFR part 420, to clarify the language of the rule to conform to the Commission's decisions and practices, in order to provide better notice to users regarding how the Commission implements its entitlements program and to avoid future controversy. The revisions involved no changes in the substance or administration of the rule. Although the adopted revisions were incorporated into the Commission's *Administrative*

Manual Part III—Basin Regulations—Water Supply Charges, which uses a unique numbering system, the corresponding sections of the *Code of Federal Regulations* were never updated to include them. This final rule adds the approved changes to the federal code.

Notice of the proposed revisions was published in the **Federal Register** at 70 FR 60496, October 18, 2005. Notice also appeared in the *Delaware Register of Regulations*, 9 DE Reg. 674, November 1, 2005; *New Jersey Register*, 37 N.J.R. 4206, November 7, 2005; *New York State Register*, November 2, 2005 (page 4); and *Pennsylvania Bulletin*, 35 Pa.B. 6094, Nov. 5, 2005. The Commission held a public hearing on the proposed revisions on December 7, 2005 and accepted written comments on them through January 10, 2006. The changes were adopted by unanimous vote approving Resolution No. 2006-2 at the Commission's public business meeting on March 1, 2006.

Additional Materials

Additional materials can be found on the Commission's Web site, www.drbc.net. These include: the notice of the proposed amendments published in the **Federal Register**, at http://nj.gov/drbc/library/documents/water-charges-codify/1_FR_PropRule_CertsEntitle101805.pdf; and in the state registers at <http://www.nj.gov/drbc/about/regulations/other-rulemakings.html>; the text of the draft revisions as proposed, at http://nj.gov/drbc/library/documents/water-charges-codify/6_ProposedText_WaterSupplyChargingRegs_Art5.2.pdf; Resolution No. 2006-2, adopting the revisions as final, at http://nj.gov/drbc/library/documents/water-charges-codify/7_Res2006-02_CertEntitle_adopted030106.pdf; and the Minutes of the Commission's business meeting of March 1, 2006, explaining the differences between the proposed and adopted rule text, at http://nj.gov/drbc/library/documents/water-charges-codify/8_Min_030106_note-pgs18-21.pdf.

With adoption of this final rule, the Commission will reference the CFR version of the *Basin Regulations—Water Supply Charges* for most purposes. For the foreseeable future, however, both versions will remain posted on the Commission's Web site, at <http://www.nj.gov/drbc/about/regulations/>.

List of Subjects in 18 CFR Part 420

Water supply.

For the reasons set forth in the preamble, the Delaware River Basin Commission amends part 420 of title 18

of the Code of Federal Regulations as follows:

PART 420—BASIN REGULATIONS—WATER SUPPLY CHARGES

■ 1. The authority citation for part 420 continues to read as follows:

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

■ 2. Revise § 420.31(d) through (f) to read as follows:

§ 420.31 Certificate of entitlement.

* * * * *

(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 paragraph (f) of this section.

(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 paragraph (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 paragraph (e)(3) of this section, 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 paragraph (e)(2)(ii) of this section, 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 paragraph (f)(1)(i) of this section 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 paragraph (f)(1)(i) of this section terminates pursuant to this paragraph (f)(1) 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 paragraph (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 paragraphs (e)(2) through (5) of this section 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 paragraphs (e)(2) through (5) does not fall within the exemption of paragraph (f)(2)(i) of this section on the basis that a corporate reorganization constitutes part of the merger, plan, transaction or series of transactions.

Dated: May 26, 2016.

Pamela M. Bush,

Commission Secretary and Assistant General Counsel.

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