

**AGREEMENT FOR A FLEXIBLE FLOW MANAGEMENT PROGRAM**

This Agreement to establish a Flexible Flow Management Program (FFMP2017 or this Agreement), is consented to by and among the State of Delaware (DE), the State of New Jersey (NJ), the State of New York (NY), the Commonwealth of Pennsylvania (PA), and the City of New York (NYC or City), (hereafter Decree Parties) who are Parties to the Amended Decree (Decree) of the U.S. Supreme Court in New Jersey v. New York, 347 U.S. 995 (1954).

**RECITALS**

1. In 1954, the United States Supreme Court entered a Decree in New Jersey v New York, 347 U.S. 995 (1954) (Decree). That Decree established certain rights and obligations for New York City and New Jersey concerning diversions of water out of the Delaware River Basin. Delaware, New Jersey, New York, Pennsylvania and New York City (hereinafter collectively referred to as the Decree Parties) were all Parties to the Supreme Court action and are bound by the terms of the Decree.
2. In 1961, Delaware, New Jersey, New York, Pennsylvania and the United States (hereinafter referred to collectively as the Compact Parties) entered into the Delaware River Basin Compact (Compact). The Compact established the Delaware River Basin Commission (DRBC or Commission), made up of the Compact Parties. The Compact provided the Commission with various authorities regarding water and associated management within the Delaware River Basin, subject to certain restrictions related to the Decree.
3. Article 3.4 of the Compact provides that the Compact Parties waived and relinquished for the duration of the Compact any right, privilege or power they may have to apply for any modification of the terms of the Decree which would increase or decrease the diversions

authorized or increase or decrease the releases required under the Decree except as may otherwise be provided in Article 3.3 of the Compact.

4. Article 3.3 of the Compact provides that the diversions, compensating releases, rights, conditions, obligations, and provisions for the administration of the Decree shall not be impaired, diminished or otherwise adversely affected without the unanimous consent of the Decree Parties, except during a Commission-declared state of emergency and after the Commission consults with the River Master.
5. In November 1982, the Decree Parties negotiated the Good Faith Agreement (GFA). The GFA included recommendations to the Commission for modified diversions and releases related to the operation of Cannonsville, Pepacton, and Neversink Reservoirs (New York City Reservoirs) and diversions by New Jersey. The recommended modifications, among other things, addressed drought-related diversion and release issues emanating from record drought in the 1960s as well as conservation-related releases. The GFA also included the unanimous consent of the Decree Parties to these proposed modifications.
6. The GFA recommendations for reductions during periods of drought in diversions by New York City and New Jersey and in flow objectives were incorporated into the Commission's Water Code through DRBC Resolution 83-13, also with the unanimous consent of the Decree Parties.
7. The GFA recommendations for augmented conservation releases from the New York City Reservoirs were adopted by the Commission as Docket D-77-20 CP (Revised) and were made a part of the Commission's Comprehensive Plan. With the unanimous consent of the Decree Parties, the provisions of D-77-20 CP (Revised) were modified several times on a temporary and experimental basis by means of Commission-issued dockets, through 2007.
8. In 2007, the Decree Parties, through unanimous consent, stipulated to the first of a series of flexible flow management programs that were implemented in lieu of D-77-20 CP (Revised) and

revisions. The flexible flow management program and its subsequent revisions modified the diversions by New Jersey under drought conditions and created a tailwater habitat protection program and a discharge mitigation program.

9. Upon termination of each applicable flexible flow management program and absent an agreement to proceed in another way, diversions and releases from New York City reservoirs and diversions by New Jersey would be in accordance with the provisions of D-77-20 CP (Revised) and the Water Code.
10. The most recent Flexible Flow Management Program terminated on May 31, 2017.
11. The Decree Parties have sought and obtained public comments in the formulation of this and prior agreements for the implementation of flexible flow management programs on the Delaware River. The Decree Parties will continue to seek public input as they implement the 2017 Flexible Flow Management Program (FFMP2017) and negotiate successor agreements.
12. The Decree Parties have met and conferred and have agreed to a program for the management of diversions, releases, and related operational procedures on the Delaware River that, for the term of this Agreement, will supersede and replace existing diversion, release and related operational procedures for the Delaware River. The Decree Parties during the term of this Agreement shall work to modify the program and to negotiate a long-term agreement to replace this agreement.

#### **AGREEMENT AND UNANIMOUS CONSENT**

Accordingly, the Decree Parties, consistent with the provisions of the Compact, HEREBY UNANIMOUSLY AGREE AND CONSENT to the following:

**I. THE FLEXIBLE FLOW MANAGEMENT PROGRAM**

The Flexible Flow Management Program (FFMP2017) is set forth in full in this Agreement, which includes [Appendix A](#), attached hereto and fully incorporated herein by reference. Appendix A may be modified by the unanimous consent of the Decree Parties.

**II. EFFECTIVE DATE**

This Agreement shall become effective upon unanimous signed consent by all of the Decree Parties (Effective Date).

**III. TERM OF AGREEMENT**

1. This Agreement is for a term starting on the Effective Date and is a predicate to a longer-term flexible flow management program. This Agreement may remain in effect until May 31, 2028 unless renewed, modified or terminated earlier pursuant to either Section III.4. or Section VII.
2. This Agreement provides for an interim review by the Decree Parties prior to May 31, 2023.
3. Based on the progress in negotiations made by May 31, 2023 and on the results of studies described in Section IV, the Decree Parties shall decide by unanimous consent to either: (a.) continue this Agreement until May 31, 2028, (b.) modify this Agreement, or (c.) continue this Agreement for a shorter term to allow for negotiations of an alternative course of action.
4. In the event that the Decree Parties do not reach unanimous consent on how to proceed, this Agreement shall terminate on May 31, 2023, except for those provisions related to the New Jersey diversion outlined in Section VIII.

**IV. MATTERS TO BE EVALUATED IN THE MODIFICATION OF THE FLEXIBLE FLOW MANAGEMENT PROGRAM**

1. During the term of this Agreement, if modifications to the FFMP2017 are agreed to by the unanimous consent of the Decree Parties, including any modifications that are identified as a

result of the studies referenced in Section IV.3, the FFMP2017 shall be modified and implemented accordingly. Negotiation necessary to reach unanimous consent regarding modifications to Appendix A or the Agreement may be based on the criteria set forth in Section IV.3. Modifications shall be recorded by and managed through the Office of the River Master at the request of the Decree Parties. After any modification is signed by all the Decree Parties, it will be made available to the public.

2. The Decree Parties have identified in Sections IV.3 through IV.5 a list of matters to be evaluated throughout the term of this Agreement. In reviewing proposed modifications to the FFMP2017 the Decree Parties shall consider, but are not limited to, in no order of priority, the following:

- (a.) Decree Party equity
- (b.) Net benefits and costs to environmental and economic resources
- (c.) Source and sustainability of water available to support modification and the environmental or economic resource(s)
- (d.) Habitat types—with naturally-occurring habitats receiving consideration over human-made habitats
- (e.) Scientific basis for modification
- (f.) Impacts to drought management, water supply and flood mitigation, including but not limited to: (i.) frequency, duration and seasonal timing of the various levels of drought; and (ii.) frequency, duration, levels of storage, diversions, releases and flows
- (g.) Extent to which the diversions and the Montague minimum basic rate of flow provided in the Decree are met
- (h.) Potential impacts to water quality, existing or draft National and State Pollution Discharge Elimination System permits and the assimilative capacity of the Delaware River
- (i.) Ease and practicability of operation
- (j.) Consistency with adaptive management principles
- (k.) Applicability and implementation of water conservation practices
- (l.) Impacts to salinity, including those associated with sea level rise.

3. Through May 31, 2023, the Decree Parties shall support and conduct the required studies and evaluations outlined in this Agreement in accordance with mutually agreeable scope, work schedules and timelines. The scope and work schedules will include progress monitoring and defined milestones. The Decree Parties will endeavor to commence the studies described below within six months of the execution of this Agreement, including completing scopes and schedules of work and identifying roles and responsibilities of the Decree Parties, the River Master's Office and other external parties as appropriate.
  - a. The primary objectives of the studies will be to evaluate the impacts and conditions resulting from the following:
    - i. The detachment of releases from the New York City Delaware Reservoirs from the position of the salt front during drought emergency and replacing the benefit that New York City releases have with respect to the salt front with an alternative methodology or methodologies that will provide comparable protection for existing resources within the Basin.
    - ii. The increase in the New Jersey Diversion during drought conditions (basinwide and/or lower basin).
    - iii. The increase in available storage for the lower Basin from either the optimization of existing storage or the development of new storage in the Basin in accordance with the mutually adopted GFA and water planning efforts conducted by the Decree Parties.
  - b. The studies identified in subdivision (a) above will evaluate the impacts to: the salt front, aquatic and fishery resources in the Basin, and projections of future sea level rise to salinity. The studies will also evaluate whether the changes identified in subdivisions IV.3.a.i through iii above will provide for comparable protection for existing resources

and uses within the Basin to avoid significant adverse impacts to the Basin. If studies by the Decree Parties or external entities on behalf of a Decree Party support that detachment provides comparable protection for existing resources and uses within the Basin and does not cause significant adverse impacts, then detachment will be implemented between June 1, 2023 and May 31, 2028, based on a schedule to be unanimously determined by the Decree Parties.

4. The Decree Parties shall study, evaluate, and consider the River Master's balancing adjustment procedure.
5. During the second five years of this Agreement, from June 1, 2023 through May 31, 2028, the Decree Parties shall identify and stipulate by unanimous consent the method of calculating the Excess Release Quantity.
6. The studies described in Sections IV.3 and IV.4 shall consider the following, as relevant, in no particular order of priority:
  - (a.) Coordination with DRBC plans and programs
  - (b.) Climate change and sea level rise
  - (c.) Thermal mitigation for habitat and ecological protection
  - (d.) Rapid flow change mitigation
  - (e.) Alternate uses of the F.E. Walter Reservoir
  - (f.) Montague and Trenton flow objectives
  - (g.) Drought management
  - (h.) Flood mitigation
  - (i.) Optimization of use of other sources of augmentation flows
  - (j.) Endangered species
  - (k.) Cold and warm-water and migratory fishery resources
  - (l.) Estuary and bay ecological health

(m.) Other relevant conditions

**V. CONSENT PURSUANT TO ARTICLE 3.3 OF THE COMPACT; RESOLUTION OF CONFLICTS**

This Agreement is a stipulation among the Decree Parties and constitutes the unanimous consent for DRBC to take certain actions authorized by Article 3.3 of the Compact. The Decree Parties shall implement this Agreement in advance and independent of any action by DRBC to amend Docket D-77-20 CP (Revised) and the Water Code to be consistent with this Agreement. In the case of a conflict among the provisions of this Agreement on the one hand, and DRBC Docket D 77-20 CP (Revised) or the Delaware River Basin Water Code, 18 CFR Part 410, Sections 2.5.3 through 2.5.6 (drought operations) on the other, the provisions of FFMP2017 will, nonetheless, be implemented during the term of this Agreement, until and unless the conflicts are resolved.

**VI. RESERVATIONS**

1. Nothing contained herein is nor should it be deemed to constitute a waiver or modification of, or limitation on, the Decree Parties' rights under the Decree or with respect to any other legal right, obligation, or duty. This Agreement shall not be cited as precedent of any intention to waive, modify, or limit such rights.
2. The Decree Parties have authorized certain actions, as part of FFMP2017 including, but not limited to discharge mitigation releases, to assist in mitigating the impacts of flooding immediately below the New York City Delaware Basin Reservoirs. By incorporating flood mitigation as an objective and taking the actions provided herein, the Decree Parties do not create or assume any duties or obligations regarding flood mitigation or in any way modify any such duties or obligations that may be otherwise prescribed by law.

**VII. TERMINATION AND REVERSION**

1. Any Decree Party may terminate this Agreement by providing written notice to the other Decree Parties of its intent to terminate this Agreement. This written notice shall be provided not less than 30 days prior to such termination date. The Decree Parties agree to enter into good faith negotiations to determine a course of action in the event of such termination.
2. Upon any failure by the Decree Parties to continue this Agreement, including operations described in Appendix A, as described in Section III.4 or Section VII.1, and without a subsequent executed agreement, operations shall revert to those provided in DRBC Docket D-77-20 CP (Revised) and Sections 2.5.3 through 2.5.6 of the DRBC Water Code.

**VIII. SAVINGS PROVISION FOR NEW JERSEY DIVERSIONS AND DIVERSION BANK**

1. Upon termination of this Agreement prior to May 31, 2028, pursuant to Section III.4 or Section VII.1, by any Decree Party other than New Jersey:
  - a. The River Master shall set aside, maintain, and make available a total of 1.034 billion gallons of the Excess Release Quantity as the “New Jersey Surviving Diversions Bank” for purpose of offsetting New Jersey’s diversions under Subdivision VIII.1.b during drought conditions.
  - b. New Jersey’s right to diversions in accordance with Section 4, Table 1 of Appendix A shall be allowed to take place until May 31, 2023 if such termination occurs prior to June 1, 2023 or until May 31, 2028 if such termination occurs after May 31, 2023.
2. The New Jersey Surviving Diversions Bank shall be accounted for and used as follows:
  - a. Once the New York City Reservoirs enter into drought watch, the combined storage of the New York City Delaware Reservoirs, for the purposes of determining drought

operations, shall be computed as the actual storage volume minus the New Jersey Surviving Diversions Bank volumes for purposes of determining storage zones.

- b. If the accumulated incremental increased diversions by New Jersey,<sup>1</sup> at any time, exceed the available water in the New Jersey Surviving Diversions Bank, the Lower Basin Reservoirs in Pennsylvania will provide the additional water to offset New Jersey's diversions.
- c. Releases from the New Jersey Surviving Diversions Bank shall be at the direction of DRBC with prior notification to New Jersey, and will be implemented by the River Master. Releases from the Lower Basin Reservoirs for New Jersey's diversion, if necessary, shall be at the direction of DRBC, in consultation with and at the request of New Jersey.
- d. Releases from the New Jersey Surviving Diversions Bank or from the Lower Basin Reservoirs in Pennsylvania to offset New Jersey's incremental increases in out-of-basin diversions, measured at Port Mercer, NJ shall be in accordance with timing procedures agreed upon by DRBC, New Jersey and the River Master. No offsetting or accounting for offsetting is required for New Jersey's increased diversion on any day when DRBC determines that no water is required to meet the current Trenton flow objective.
- e. The River Master will maintain the ongoing accounting for releases made from this bank. At no time during the year commencing June 1<sup>st</sup> shall releases from the New Jersey Surviving Diversions Bank exceed the balance of the bank. The bank will reset under normal conditions on June 1<sup>st</sup>. If under basin wide drought conditions on May

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<sup>1</sup> The accumulated incremental increased diversions by New Jersey shall be the differences in New Jersey's diversion, computed on the basis of Table 1 of the Good Faith Agreement, and the corresponding rates in Section 4, Table 1 of FFMP2017.

31<sup>st</sup> the balance of the New Jersey Surviving Diversions Bank shall remain available for use until normal conditions resume based on Figure 1 of Section 2.5.3. of the Water Code. Upon return to normal conditions, the New Jersey Surviving Diversions Bank will reset.

3. This Section VIII shall survive this Agreement until it expires on May 31, 2028.

**Agreement and Consent of the Parties to the  
1954 U.S. Supreme Court Decree  
Effective October 21, 2017**

STATE OF DELAWARE

The State of Delaware hereby approves this Agreement of the Parties to the U.S. Supreme Court Decree of 1954 for a Flexible Flow Management Program and consents to the submission of this Agreement to the Delaware River Basin Commission for adoption, exactly as drafted, or exactly as otherwise unanimously consented to by the Decree Parties, as appropriate through rules, dockets and/ or resolutions, provided, however, that the State of Delaware retains the right to terminate this Agreement or otherwise withdraw consent, consistent with the provisions of Paragraphs III.4, VII and VIII herein, in which case operations shall revert to those provided in DRBC Docket D-77-20 CP (Revised) and sections 2.5.2 through 2.5.6 of the DRBC Water Code, adopted by Resolutions 88-13 and 88-22 (revised) except as otherwise provided in the agreement and provided further that this approval and consent is subject to the further agreement of the Parties as provided for in Section 3.3(a) of the Delaware River Basin Compact.

//Signed by David R. Wunsch//

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**Agreement of the Parties to the  
1954 U.S. Supreme Court Decree  
Effective October 21, 2017**

STATE OF NEW JERSEY

The State of New Jersey hereby approves this Agreement of the Parties to the U.S. Supreme Court Decree of 1954 for a Flexible Flow Management Program and consents to the submission of this Agreement to the Delaware River Basin Commission for adoption, exactly as drafted, or exactly as otherwise unanimously consented to by the Decree Parties, as appropriate through rules, dockets and/or resolutions, provided, however, that the State of New Jersey retains the right to terminate this Agreement or otherwise withdraw consent, consistent with the provisions of Paragraphs III.4, VII and VIII herein, in which case operations shall revert to those provided in DRBC Docket D-77-20 CP (Revised) and sections 2.5.2 through 2.5.6 of the DRBC Water Code, adopted by Resolutions 88-13 and 88-22 (revised) except as otherwise provided in the agreement and provided further that this approval and consent is subject to the further agreement of the Parties as provided for in Section 3.3(a) of the Delaware River Basin Compact.

//Signed by Michelle Putnam//

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**Agreement of the Parties to the  
1954 U.S. Supreme Court Decree  
Effective October 21, 2017**

CITY OF NEW YORK

The City of New York hereby approves this Agreement of the Parties to the U.S. Supreme Court Decree of 1954 for a Flexible Flow Management Program and consents to the submission of this Agreement to the Delaware River Basin Commission for adoption, exactly as drafted, or exactly as otherwise unanimously consented to by the Decree Parties, as appropriate through rules, dockets and/ or resolutions, provided, however, that the City of New York retains the right to terminate this Agreement or otherwise withdraw consent, consistent with the provisions of Paragraphs III.4, VII and VIII herein, in which case operations shall revert to those provided in DRBC Docket D-77-20 CP (Revised) and sections 2.5.2 through 2.5.6 of the DRBC Water Code, adopted by Resolutions 88-13 and 88-22 (revised) except as otherwise provided in the agreement and provided further that this approval and consent is subject to the further agreement of the Parties as provided for in Section 3.3(a) of the Delaware River Basin Compact.

//Signed by Paul Rush//

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**Agreement of the Parties to the  
1954 U.S. Supreme Court Decree  
Effective October 21, 2017**

STATE OF NEW YORK

The State of New York hereby approves this Agreement of the Parties to the U.S. Supreme Court Decree of 1954 for a Flexible Flow Management Program and consents to the submission of this Agreement to the Delaware River Basin Commission for adoption, exactly as drafted, or exactly as otherwise unanimously consented to by the Decree Parties, as appropriate through rules, dockets and/ or resolutions, provided, however, that the State of New York retains the right to terminate this Agreement or otherwise withdraw consent, consistent with the provisions of Paragraphs III.4, VII and VIII herein, in which case operations shall revert to those provided in DRBC Docket D-77-20 CP (Revised) and sections 2.5.2 through 2.5.6 of the DRBC Water Code, adopted by Resolutions 88-13 and 88-22 (revised) except as otherwise provided in the agreement and provided further that this approval and consent is subject to the further agreement of the Parties as provided for in Section 3.3(a) of the Delaware River Basin Compact.

//Signed by Mark Klotz//

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**Agreement of the Parties to the  
1954 U.S. Supreme Court Decree  
Effective October 21, 2017**

COMMONWEALTH OF PENNSYLVANIA

The Commonwealth of Pennsylvania hereby approves this Agreement of the Parties to the U.S. Supreme Court Decree of 1954 for a Flexible Flow Management Program and consents to the submission of this Agreement to the Delaware River Basin Commission for adoption, exactly as drafted, or exactly as otherwise unanimously consented to by the Decree Parties, as appropriate through rules, dockets and/or resolutions, provided, however, that the Commonwealth of Pennsylvania retains the right to terminate this Agreement or otherwise withdraw consent, consistent with the provisions of Paragraphs III.4, VII and VIII herein, in which case operations shall revert to those provided in DRBC Docket D-77-20 CP (Revised) and sections 2.5.2 through 2.5.6 of the DRBC Water Code, adopted by Resolutions 88-13 and 88-22 (revised) except as otherwise provided in the agreement and provided further that this approval and consent is subject to the further agreement of the Parties as provided for in Section 3.3(a) of the Delaware River Basin Compact.

//Signed by Lisa Daniels//

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