

# **RESOLUTION NO. \_\_\_\_\_**

## **RESOLUTION BY THE BOARD OF DIRECTORS OF THE NAPA SANITATION DISTRICT FIXING A FAIR AND EQUITABLE CAPACITY CHARGE FOR ELIGIBLE BUILDINGS WITH EXISTING PERMITTED INDUSTRIAL USERS**

**WHEREAS**, the District Code requires the payment of capacity charges when new connections are made to NapaSan's sewer system and when a change in use or strength of discharge results in an increased loading to NapaSan's sewer system; and

**WHEREAS**, commercial users are charged based on building square footage and the type of use (office, retail, hospital, restaurant, etc.) (District Code section 5.02.030.B); and

**WHEREAS**, industrial customers, by contrast, are charged based on the measured strength and flow of the wastewater (District Code section 5.020.030.C); and

**WHEREAS**, NapaSan has recently identified a number of facilities connected to its sewer system that housed unpermitted industrial users, and NapaSan therefore determined that those users were subject to various requirements under the District Code, including the requirement to obtain an Industrial User Permit (NSD Code § 4.04.040) and the requirements to pay sewer service charges (NSD Code § 5.01.060) and capacity charges (NSD Code § 5.02.030.C) based on the user's measured strength and flow; and

**WHEREAS**, most of those previously unpermitted industrial users have obtained Industrial User Permits from NapaSan, which permits give the users a special capacity entitlement that gives the user, but not the property owner where the use exists, a right to discharge, without paying a capacity charge, a specified amount of capacity based on the previous three-year-average use; and

**WHEREAS**, the owners of property on which the previously unpermitted industrial users operate desire to have capacity for other industrial users that may occupy their properties in the future. They assert that NapaSan's capacity charge policies were unclear at the time of construction of their buildings and therefore prevented them from using the opportunity to purchase capacity for potential industrial users at the then-current rates. The owners therefore assert that it would be "unjust or inequitable" to apply the current capacity charge to their buildings and seek relief in the form of a program to allow temporarily similarly situated property owners to purchase capacity, up to the capacity granted in Industrial User Permits, at the rates in effect at the time their buildings were constructed plus interest; and

**WHEREAS**, it is not the intention of the Board to establish a program that provides refunds to building owners who have already purchased capacity, but to provide a program that brings users and buildings into compliance with District Code and policy.

**NOW, THEREFORE, LET IT BE RESOLVED** that the Napa Sanitation District Board of Directors finds, pursuant to District Code section 5.01.075.C and 4.01.060, that applying the full industrial capacity charge established by District Code section 5.02.030.C to buildings occupied by industrial users with special capacity entitlements greater than the building itself would be unjust or inequitable because the District's policies regarding the need to purchase additional capacity for

industrial users in already-permitted commercial buildings were unclear and uncertain. Therefore, it is the purpose of this resolution to temporarily fix a just and equitable capacity charge to allow such buildings to purchase capacity at the rate in effect at the time of occupancy, adjusted for inflation. The resolution gives such building owners the opportunity—for a reasonable, but limited, period of time—to purchase the capacity that they could have purchased when the buildings were constructed.

**NOW, THEREFORE, LET IT BE FURTHER RESOLVED** that the Napa Sanitation District Board of Directors adopts the following program to be implemented by the General Manager:

1. **Special Capacity Charge Program** – NapaSan shall, as a means of relieving the unjust or inequitable application of the District Code to certain eligible properties, offer eligible non-residential building owners the ability to purchase capacity at the cost of capacity when the building construction was first completed (based on Certificate of Occupancy), adjusted for inflation (“the Special Capacity Charge”). The building owner or representative may purchase EDU of capacity up to the difference between (1) the number of EDU currently assigned to the building as paid for and assigned to the IU tenant space and (2) the number of EDU permitted for use by NapaSan in an Industrial User Permit for the Industrial User in the building.
2. **Eligibility** – To be eligible for this program, the following conditions must be met:
  - The building must be occupied by an industrial user with a current industrial user permit issued by NapaSan prior to June 30, 2017.
  - The building occupant’s industrial user permit must allow for the discharge of industrial waste to the sanitary sewer.
  - The number of EDU permitted in the industrial user permit is greater than the number of EDU paid for and assigned to the premises.
  - The building must have been issued its initial Certificate of Occupancy prior to January 1, 1997.
  - The industrial user must have been discharging industrial waste from the building prior to January 1, 2007 and have been in continuous operation from January 1, 2007 through the adoption date of this resolution.
3. **Determination of Special Capacity Charge** – For the purposes of this program, the inflation factor used to determine the Special Capacity Charge offered pursuant to this program shall be the Engineering News Record Construction Cost Index for the San Francisco Region (“ENR-CCI”). The General Manager shall determine the rate of the Special Capacity Charge per EDU by multiplying the capacity charge per EDU in place at the time of the eligible building’s Certificate of Occupancy by the most recently published ENR-CCI at time of purchase divided by the ENR-CCI index when the Certificate of Occupancy was issued. The product shall be used to calculate the Special Capacity Charge for the capacity purchased.
4. **Expiration** – Purchases of capacity must be completed prior to the end of the NapaSan business day on Monday, December 31, 2018. Purchases made after this date will be subject to the regular capacity charge fee in place at that time. A property owner may purchase the capacity available under this program in any portion and in any number of increments.
5. **Deferred Payment** – Property owners may elect to defer payment for a purchase of capacity by entering into an agreement with NapaSan. Such agreements shall be in a form acceptable to

NapaSan Legal Counsel and shall include the following terms: the deferred agreement shall give the property owner a temporary capacity right equal to the amount of Special Capacity Rights purchased, subject to the terms of the agreement; deferred payments shall be made in equal monthly installments over a duration of no more than 5 years; each payment shall convert a pro-rata portion of the temporary capacity right into a permanent Special Capacity Right; interest on the deferred payment shall be charged at 4% per annum; failure to pay an installment when due shall be subject to 10% penalty; the failure to pay an installment within 30 days of the due date shall terminate the agreement and result in loss of temporary capacity rights and of the ability to purchase additional permanent Special Capacity Rights; deferral agreements shall not be transferrable to purchasers; and the agreement shall be recorded against the property.

6. **Recognition of Capacity Charges** – NapaSan recognizes only that capacity that has been purchased, or recognized in an Industrial User Permit, for the purpose of calculating exceedances of capacity by industrial users. Applications for purchase of capacity, letters of intention or other similar instruments are not sufficient to secure the recognition of capacity, except that for properties under an agreement according to the Deferred Payment Option, the capacity being financed shall be recognized by NapaSan as having been purchased so long as the owner is current on all payments and other terms of the agreement.
7. **Waiver** – All sales of capacity under the program, whether involving some or all of the capacity for which a property owner is eligible to purchase under the program, shall be expressly conditioned on the property owner expressly waiving any and all rights it may have to challenge NapaSan's ability to charge the property owner, or its successors and assigns, for capacity not previously purchased in the amounts specified in the District Code section 5.02, or its successor. Such waiver, however, shall not prevent the property owner from challenging the validity and amount of NapaSan's future capacity charge increases.

I hereby certify that the foregoing Resolution was duly and regularly adopted by the Board of Directors of the Napa Sanitation District at Napa, California, this 17<sup>th</sup> day of May, 2017, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

---

Secretary, Napa Sanitation District

APPROVED:

---

Chair, Board of Directors  
Napa Sanitation District  
2811244.2