

STATE OF COLORADO

Colorado Water Conservation Board Department of Natural Resources

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TO: Colorado Water Conservation Board Members

FROM: Linda J. Bassi, Chief
Stream and Lake Protection Section

DATE: January 20, 2009

SUBJECT: **Agenda Item 19, January 27-28, 2009 Board Meeting**
Stream and Lake Protection -- Financial Policy 19

Bill Ritter, Jr.
Governor

Harris D. Sherman
DNR Executive Director

Jennifer L. Gimbel
CWCB Director

Dan McAuliffe
CWCB Deputy Director

Introduction

In this agenda item, Staff will present the latest version of Financial Policy 19 (Expenditures of Funds for Water Acquisitions for Instream Flow Use Pursuant to section 37-60-123.7, C.R.S.) to the Board and request the Board to adopt the policy. Proposed Financial Policy 19 is attached to this memo. HB 08-1346 (CWCB's Water Projects Bill) established an annual appropriation of \$1,000,000 to the Board to pay for the costs of acquiring water, water rights, and interests in water for instream flow ("ISF") use. HB 1346 requires the Board to adopt criteria and guidelines regarding its implementation of this spending authority prior to any expenditures of the funds. Financial Policy 19 sets forth those criteria and guidelines. HB 1346 provides that the primary priority for expenditures of these funds shall be the costs of water right acquisitions for existing or new ISF water rights to preserve the natural environment to a reasonable degree. The funds also may be used in limited circumstances for the costs of water acquisitions to: (1) preserve the natural environment of species that have been listed as threatened or endangered under state or federal law, or are candidate species or likely to become candidate species; (2) support wild and scenic alternative management plans; or (3) provide federal regulatory certainty. Proposed Financial Policy 19 sets forth: (1) a list of the types of costs that the Board will consider for expenditures of the funds; (2) a list of the information that staff will provide to the Board in connection with requests for expenditures of the funds; (3) a proposed prioritization of requests for expenditures of the funds; and (4) for leases of water for ISF use, a proposed method of calculating compensation based upon the use of the water after the lease term.

Staff Recommendation

Staff recommends that the Board adopt Financial Policy 19 with an effective date of March 1, 2009.

POLICY NUMBER: 19

SUBJECT: **EXPENDITURES OF FUNDS FOR WATER ACQUISITIONS FOR INSTREAM FLOW USE PURSUANT TO SECTION 37-60-123.7, C.R.S.**

EFFECTIVE DATE: _____, 2009

POLICY: The Colorado Water Conservation Board (“CWCB”) may expend funds provided under section 37-60-123.7, C.R.S. to pay for the costs of acquiring water, water rights and interests in water for instream flow (“ISF”) use. The primary priority for expenditures of these funds shall be the costs of water right acquisitions for existing or new ISF water rights to preserve the natural environment to a reasonable degree. These funds also may be used in limited circumstances for the costs of water acquisitions to (1) preserve the natural environment of species that have been listed as threatened or endangered under state or federal law, or are candidate species or likely to become candidate species; (2) support wild and scenic alternative management plans; or (3) provide federal regulatory certainty. The CWCB shall approve any expenditure of funds pursuant to section 37-60-123.7, C.R.S.

The CWCB will consider recommendations from the CWCB staff for expenditures of funds to pay for the following types of costs related to acquiring water, water rights and interests in water for ISF use:

1. lease or purchase price of water, water rights or interests in water for ISF use;
2. costs of preliminary evaluations of the feasibility of a temporary or permanent transfer of a water right for ISF use;
3. costs of historical consumptive use analyses of water rights;
4. costs of water rights appraisals;
5. costs of water rights title searches;
6. costs related to negotiating and finalizing the agreement(s) necessary for the transaction;
7. costs related to obtaining a decreed right to use the water for ISF purposes; and
8. any other costs related to an acquisition of water for ISF use that the Board may deem appropriate.

PURPOSE: To establish priorities and procedures for expenditures of funds under section 37-60-123.7, C.R.S. for the costs of acquiring water, water rights and interests in water for instream flow use.

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APPLICABILITY: This policy and procedure applies to recommendations from the CWCB staff to the Board for expenditures of funds to pay the costs of acquiring water, water rights and interests in water for instream flow use under section 37-60-123.7, C.R.S.

PROCEDURE: The CWCB staff will proceed under ISF Rule 6 in bringing proposed water acquisitions to the Board. When a proposed acquisition will involve the expenditure of funds under section 37-60-123.7, C.R.S., staff will prepare for the Board's consideration a summary of the financial aspects of the proposal, which will be part of the administrative record, including but not limited to:

- a. where applicable, the lease or purchase price of water, water rights or interests in water for ISF use, which, for a purchase of water, shall be supported by an appraisal or other appropriate valuation method;
- b. a breakdown of costs related to the proposal, such as
 - 1) costs of preliminary evaluations of the feasibility of a temporary or permanent transfer of a water right for ISF use;
 - 2) costs of historical consumptive use analyses of water rights;
 - 3) costs of water rights appraisals;
 - 4) costs of water rights title searches;
 - 5) costs related to negotiating and finalizing the agreement(s) necessary for the transaction; and
 - 6) costs related to obtaining a decreed right to use the water for ISF purposes.
- c. the amount of money staff is recommending that the Board spend on the proposal, and what costs the money will be applied to;
- d. the source of funds available to cover any remaining costs (for example, cost sharing by the water rights owner or a conservation group, including but not limited to the Colorado Water Trust, Trout Unlimited or The Nature Conservancy); and
- e. any in-kind services provided by the water rights owner or a conservation group, including but not limited to the Colorado Water Trust, Trout Unlimited or The Nature Conservancy.

In addition to the information listed above, staff also will bring all information required by ISF Rule 6 to the Board for its consideration, including, but not limited to, information related to the factors listed in ISF Rules 6e. and 6f.

The CWCB staff will prioritize and recommend expenditures for water acquisitions in the following order:

- a. Water acquisitions that supplement existing ISF water rights that are not always fully satisfied by existing stream flows.

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- b. Water acquisitions that make water available for new ISF water rights.
- c. Water acquisitions that: (1) preserve the natural environment of species that have been listed as threatened or endangered under state or federal law, or are candidate species or likely to become candidate species; (2) support wild and scenic alternative management plans; or (3) provide federal regulatory certainty.
- d. Water acquisitions that provide permanent protection.

For leases of water, water rights or interests in water under section 37-92-102(3), the Board shall request an affidavit from the lessor stating the lessor's intended use of the water right during and after the term of the lease. The Board shall calculate the amount of compensation to be paid for the lease, and may increase or decrease that amount, based upon:

- a. the lessor's stated intent as set forth in the affidavit and on the administrative record before the Board;
- b. the fair market value of the subject water right;
- c. the existence of one or more of the following circumstances:
 - (1) The lessor agrees in writing to put the water right back to its original decreed use after the term of the lease.
 - (2) The lessor agrees in writing to give the CWCB a right of first refusal on purchasing the water right at a fair market value if the lessor sells the water right after the term of the lease.
 - (3) The leased water will provide water to critical habitat for a species that has been listed as threatened or endangered under state or federal law, or is a candidate species or likely to become a candidate species.
 - (4) The positive or negative effects of public access, if any, to the ISF reach through which the Board will use the leased water.
 - (5) The historical consumptive use of the leased water could be used downstream of the ISF reach for compact compliance purposes.
 - (6) The lessor has entered into, or intends to enter into, an agreement for the lease of the historic consumptive use of the subject water right downstream of the ISF reach that would not have occurred but for the lease to the CWCB.
 - (7) The lessor or the CWCB will receive payment for leasing the historical consumptive use of the subject water right for use downstream of the ISF reach.
 - (8) The lessor has informed the Board that it intends to sell the subject water right after the term of the lease; and
- d. any other pertinent information before the Board.

All lease agreements shall:

- a. require the lessor to supplement the above-referenced affidavit if the lessor's intent or actions regarding use of the water right during

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and after the term of the lease change during the term of the lease, including, but not limited to, lessor entering into an agreement for downstream use of the historic consumptive use of the leased water right, or a sale or subdivision of the land upon which the leased water historically has been used; and

- b. shall establish a mechanism for adjusting the compensation to the lessor based upon such supplementation and change(s).

NOTE: Recognizing that future needs and responses to those needs cannot be predicted with certainty, the Colorado Water Conservation Board reserves the right to expend funds for any water acquisition that it determines worthy of funding in accordance with applicable law.

Approved by the CWCB

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