

STATE OF COLORADO

Colorado Water Conservation Board

Department of Natural Resources

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TO: Colorado Water Conservation Board Members

John W. Hickenlooper
Governor

FROM: Linda Bassi, Chief
Stream and Lake Protection Section

Mike King
DNR Executive Director

DATE: March 6, 2014

James Eklund
CWCB Director

SUBJECT: **Agenda Item 19, March 18-19, 2014 Board Meeting**
Stream and Lake Protection –Amendments to Policy 19 (Expenditures for
Instream Flow Acquisitions)

Introduction

Section 37-60-123.7(1), C.R.S., enacted in 2008, authorizes a continuous appropriation of \$1,000,000 to the CWCB annually for the costs of water acquisitions for instream flow (“ISF”) use. Section 15 of the 2013 CWCB Projects Bill amended section 37-60-123.7(1) to allow these funds to be used for water acquisitions that will improve the natural environment to a reasonable degree. Prior to that amendment, the statute limited use of the funds to paying the costs of water acquisitions to preserve the natural environment to a reasonable degree. To implement this statutory revision, staff has provided proposed revisions to CWCB Policy 19 - Expenditures of Funds for Water Acquisitions for Instream Flow Use Pursuant to Section 37-60-123.7, C.R.S., attached to this memo. The Board discussed revisions to Policy 19 at its July 2013 meeting. After that meeting, staff received additional input on the revisions from stakeholders and board members. This memo sets forth additional revisions to Policy 19 that are based upon that input. The latest redlined version of Policy 19 is attached to this memo.

Staff Recommendation

Staff recommends that the Board review and discuss the additional revisions to Policy 19 and consider adopting a revised Policy 19 at this Board meeting.

Background

On May 13, 2013, Governor Hickenlooper signed Senate Bill 13-181, the CWCB Projects Bill, into law. Section 15 of the Projects Bill amended section 37-60-123.7 to read as follows:

37-60-123.7. Acquisitions of water for instream flows. (1) In addition to any other moneys appropriated from the Colorado water conservation board construction fund, up to one million dollars in the fund are continuously appropriated to the board annually to pay for the costs of acquiring water, water rights, and interests in water for instream flow use. The total amount of the continuous appropriation that is unencumbered in any fiscal year must not exceed one million dollars. The primary priority for expenditures of these revenues is the costs of water acquisitions for existing or new instream flow water rights

to preserve and improve the natural environment to a reasonable degree. These revenues also may be used, in limited circumstances, for the costs of water acquisitions to:

- (a) Preserve and improve the natural environment of species that have been listed as threatened or endangered under state or federal law, or are candidate species, or are likely to become candidate species;
- (b) Support wild and scenic alternative management plans; or
- (c) Provide federal regulatory certainty.

The amendments to this statutory provision consisted of adding the words “and improve” after “preserve” in two places, along with some editorial revisions.

Discussion

As discussed with the Board in July 2013, in addition to adding “improve” where appropriate, the proposed revisions to Policy 19:

1. require the Board to consider the balance between consumptive and nonconsumptive needs and uses of water on the subject stream when considering recommendations from the CWCB staff for expenditures of funds for water acquisitions to improve the natural environment to a reasonable degree (page 1, last paragraph);
2. provide examples of metrics that the Board can use to evaluate the benefits that may result from using acquired water, alone or in combination with other acquired water, to improve the natural environment to a reasonable degree (page 2, section 2 of attached Policy 19); and
3. direct staff to prioritize proposed expenditures for acquisitions as set forth in the Policy at times when there is insufficient funding available for pending proposals (page 3, section 4).

Based upon input received since the July 2013 CWCB meeting, staff has added a new section 3 to Policy 19, set forth below. This section provides that the Board will consider additional factors when a proposed expenditure involves irrigation water rights, and is intended to address stakeholder concerns about issues related to dry-up of agricultural lands.

3. When a proposed expenditure is for a water acquisition involving irrigation water rights, staff will provide the following information for the Board to consider:
 - a. The circumstances leading to the water right owner’s decision to transfer an interest in the subject water to the Board for instream flow use, to the extent such information is available;
 - b. The extent to which the land historically irrigated by the subject water right will be dried up as a result of the acquisition (e.g., split season lease, rotational fallowing); and
 - c. The current level of local dry-up of agricultural lands and the potential impact to agriculture of the proposed acquisition.

Also in response to public comments, staff has re-drafted section 2.d at the top of page 3 in an attempt to make it clearer.

July 2013 version:

Confirmation that the additional water resulting from the acquisition will not be detrimental to the aspects of the natural environment intended to be benefited by the acquired water; and

March 2014 version:

An analysis of the degree to which the additional water resulting from the acquisition: (1) benefits the natural environment and (2) does not result in hydraulic conditions that are detrimental to the aspects of the natural environment intended to be benefited by the acquired water, such as habitat requirements for a particular life stage of a fish species; and

To refresh the Board's memory, section 2.d was added to address the perception that there is no upper limit on the amount of water that can be used to improve the natural environment. As staff and the Board discussed in July 2013, while protecting additional flows in a stream can provide the types of benefits listed in section 2 of revised Policy 19, there is a limit to how much additional water is beneficial. There is an upper limit on the rate of velocity in a stream that various life stages of fish can tolerate. At some point, higher flows reduce the amount of available habitat for fish.

Staff will walk through these revisions with the Board at the meeting for discussion.

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: ~~March 1, 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 or improve 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 or improve 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.

When considering recommendations from the CWCB staff for expenditures of funds for water acquisitions to improve the natural environment to a reasonable degree, the CWCB shall consider the balance between consumptive and nonconsumptive needs and uses of water on the subject stream.

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.

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: 1. 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 any other individual or entity); and
- e. any in-kind services provided by the water rights owner or any other individual or entity.

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.

2. When a proposed expenditure is for a water acquisition that, alone or in combination with other water acquisitions, will improve the natural environment to a reasonable degree, the CWCB staff, in coordination with Colorado Parks and Wildlife staff, also will provide the following information:

- a. The degree to which the acquired water will add useable habitat to riffles, pools and runs within the subject ISF reach;

- b. The amount of additional useable area for fish and macroinvertebrates that the acquired water will provide;
 - c. Where applicable, the amount of protection from high temperatures and low oxygen levels in hot summer months that the acquired water will provide;
 - d. An analysis of the degree to which the additional water resulting from the acquisition: (1) benefits the natural environment and (2) does not result in hydraulic conditions that are detrimental to the aspects of the natural environment intended to be benefited by the acquired water, such as habitat requirements for a particular life stage of a fish species ~~Confirmation that the additional water resulting from the acquisition will not be detrimental to the aspects of the natural environment intended to be benefited by the acquired water;~~ and
 - e. Where applicable, an estimate of the degree to which the acquired water will increase moisture levels in the alluvial aquifer to support the riparian vegetation in the subject stream reach.
- 3. When a proposed expenditure is for an acquisition of irrigation water rights, staff will provide the following information for the Board to consider:
 - a. The circumstances leading to the water right owner's decision to transfer an interest in the subject water to the Board for instream flow use, to the extent such information is available;
 - b. The extent to which the land historically irrigated by the subject water right will be dried up as a result of the acquisition (e.g., split season lease, rotational fallowing); and
 - c. The current level of local dry-up of agricultural lands and the potential impact to agriculture of the proposed acquisition.
- 34. In the event that there is insufficient funding available for pending proposed expenditures, ~~T~~the CWCB staff will prioritize and recommend expenditures for water acquisitions in the following order:
 - a. Permanent or temporary water acquisitions that 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.
 - a.b. Permanent or temporary water acquisitions that supplement existing ISF water rights that are not always fully satisfied by existing stream flows.
 - c. Water acquisitions that facilitate the appropriation of new ISF water rights that are the minimum amount necessary to preserve the natural environment to a reasonable degree.
 - d. Permanent or temporary water acquisitions that improve 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.

- e. Permanent or temporary water acquisitions that support wild and scenic alternative management plans.
- f. Permanent or temporary water acquisitions that provide federal regulatory certainty.
- b.g. Water acquisitions to improve the natural environment to a reasonable degree.
- ~~e.h. Permanent or temporary 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.~~

In general, water acquisitions that provide permanent protection will be given a higher priority than temporary acquisitions.

4. 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 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
January 27-28, 2009 Board Meeting
Agenda Item # 19s~~