



COLORADO

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Conservation Board**

Department of Natural Resources

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TO: Colorado Water Conservation Board Members

FROM: Greg Johnson
Water Supply Planning Section

DATE: May 18, 2017

AGENDA ITEM: 25. HB16-1228 Criteria and Guidelines Update
Agricultural Water Protection Programs

Staff recommendation: This item is informational only, with no Board action requested.

Background:

To implement House Bill 16-1228 CWCB staff have developed draft Criteria and Guidelines for the establishment of Agricultural Water Protection Programs in Water Division 1 or 2. These new programs would enable the use of an Agricultural Water Protection Water Right, also created by the bill. This effort has been conducted in concert with the Division of Water Resources (DWR) and their development of Rules Governing the Review of a Substitute Water Supply Plan for the Lease, Loan, or Trade of a Decreed Agricultural Water Protection Water Right.

Drafts of both the Criteria and Guidelines, and the Rules, were created with the input of an advisory planning committee involving staff from the CWCB, DWR, and the Attorney General's office, along with a collection of stakeholders that were involved in the creation of the bill. These drafts were then refined per public input at meetings held in Greeley, Sterling, La Junta, and Salida.

Under House Bill (HB) 16-1228, the owner of a decreed irrigation water right may file a water court application to change the right to an "agricultural water protection water right" (AWPWR). The AWPWR is created to simultaneously preserve ongoing irrigation and provide the flexibility to lease a portion of the water right to accommodate potentially unknown future uses (up to 50% of historical consumptive use). The delivery of the AWPWR to the new point of diversion, for the new use, must be done in accordance with a substitute water supply plan approved pursuant to the new DWR rules. This statutory allowance is applicable to Water Divisions 1 and 2 only.

The Criteria and Guidelines are included with this memo, however due to the timing of the public comment period (closed May 5, 2017), an updated version will likely be distributed at the meeting.

Discussion:

The statutory deadline for CWCB approval of the Criteria and Guidelines is October 26, 2017. Staff will present on the status of the current draft and help answer any questions about the document and process.





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Criteria and Guidelines for the Establishment of an Agricultural Water Protection Program in Water Division 1 or 2 for the Implementation of an *Agricultural Water Protection Water Right* as allowed by House Bill 16-1228

I. INTRODUCTION

These Criteria and Guidelines address the creation of Agricultural Water Protection Programs (AWPPs), which are required for the ongoing monitoring and operation of an Agricultural Water Protection Water Right (AWPWR). The AWPPs established in compliance with this guidance are tasked with monitoring the 50% or more of each participating AWPWR that will remain in agricultural use, unless they are enrolled in an approved federal, state, or local conservation program. The use of up to 50% of each AWPWR for non-agricultural purposes must be in compliance with a Substitute Water Supply Plan and subsequent Rules promulgated by the Division of Water Resources.

Background

Under House Bill (HB) 16-1228, codified at section 37-92-305(4)(c), C.R.S. (2016)¹, the owner of an absolute decreed irrigation water right used for agricultural purposes may file an application to the water court to change the right to an “agricultural water protection water right” (AWPWR), which is defined in section 37-92-305(19), C.R.S. The AWPWR is created to simultaneously preserve ongoing irrigation use of a water right and provide the flexibility to lease a portion of the water right to accommodate potentially unknown future uses. The delivery of the AWPWR to the new point of diversion, for the new use, must be done in accordance with a substitute water supply plan (SWSP) approved pursuant to section 37-92-308(12), C.R.S. and rules promulgated pursuant to section 37-80-123, C.R.S. This statutory allowance is applicable to Water Divisions 1 and 2 only.

The change decree for an AWPWR must quantify historical diversions and historical consumptive use of the water being changed; quantify and require maintenance of historical return flows in time, place, and amount; and identify terms and conditions that will be used in an SWSP issued pursuant to section 37-92-308(12), C.R.S. Once a final decree is issued for the AWPWR, in order to use the AWPWR, the owner of the water right must apply to the State Engineer for a SWSP to lease, loan, or trade up to fifty percent of the quantified historical consumptive use. The SWSP application must identify a specific beneficial use and the applicant for the SWSP must be the owner of the water right for which the AWPWR has been decreed. The function of the SWSP is to provide notice to the SWSP notification list and obtain approval from the Division of Water Resources (DWR) to deliver the water to a new point of

¹ All statute references in this document are to C.R.S. (2016)

diversion for a specific beneficial use with terms and conditions that prevent injury. The term of the approval is one year, but the applicant may obtain up to two subsequent one year approvals without giving notice and without applying for a new SWSP.

Under section 37-60-133, C.R.S., the Colorado Water Conservation Board (“Board”) is required to develop Criteria and Guidelines for the establishment of an agricultural water protection program (“AWPP”) in Division 1 and 2 pursuant to section 37-92-305(19)(b)(IV)(B), C.R.S. The purpose of an AWPP as stated in section 37-60-133(1)(a), C.R.S., is to assure sufficient protection and monitoring of AWPWRs pursuant to section 37-92-305(19)(b)(III), C.R.S., as an alternative to participation in a federal, state, or local conservation program for the purposes of monitoring AWPWRs under section 37-92-305(19)(b)(IV)(A), C.R.S.

The AWPP will be proposed by and sponsored by a local entity responsible for monitoring AWPWRs within its jurisdiction which are voluntarily enrolled in its program. The AWPP must be approved by the Board and provide annual monitoring and reporting sufficient to ensure that at least 50% of the historical consumptive use portion of each AWPWR enrolled in its program is still being used for agricultural purposes on the property for which it was historically decreed.

Purpose

The water associated with the historical use of the AWPWR that is not leased, loaned, or traded must continue to be used for agricultural purposes. To ensure that the non-leased water continues to be used for agricultural purposes, the owner of the AWPWR is required to participate in either an established federal, state, or local conservation program (defined in section 37-92-305(19)(b)(IV)(A), C.R.S.), or an AWPP as envisioned by the bill. The purpose of these Criteria and Guidelines is to create a standard for applications for AWPPs as identified in section 37-92-305(19)(b)(IV)(B), C.R.S. to ensure compliance with section 37-92-305(19)(b)(III), C.R.S.. The Board developed these Criteria and Guidelines in consultation with the State Engineer and a technical advisory group and after seeking input from the public.

II. SCOPE OF THE CRITERIA AND GUIDELINES

The provision in the bill that the Criteria and Guidelines are to “assure sufficient protection and monitoring of agricultural water protection water rights pursuant to section 37-92-305(19)(b)(III), C.R.S.,” is to ensure that the non-leased water continues to be used for agricultural purposes. More specifically, section 37-92-305(19)(b)(IV), C.R.S. states:

“The owner of the agricultural water protection water right is required to participate in one or more of the following programs:

As established by the federal government, the state, a subdivision of the state, or a nonprofit organization, conservation programs that conserve the land historically served by the irrigation water right, which programs include Colorado’s Conservation Easement Program established in Article 30.5 of Title 38 C.R.S., the United States Fish and Wildlife Service Easement Program, The Natural Resources Conservation Services

Easement Program, the Colorado Division of Parks and Wildlife Easement Program, and a county open space easement program: or

An agricultural water protection program designed to assure compliance with the terms of subparagraph (III) of this paragraph (b). The program must be sponsored by an eligible entity through a formal action or ordinance and in compliance with minimum criteria and guidelines established by the Colorado Water Conservation Board pursuant to section 37-60-133. An eligible entity may enroll Agricultural Water Protection Water Rights only from a water right historically decreed within the entity's geographic boundary."

Emphasis added. Section 37-92-305(19)(c), C.R.S. defines an eligible entity as

"an entity in Water Division 1 or 2 that: has geographic boundaries that are located entirely within the water division of the water right's historical place of use and are defined in an original or amended document governing the entity; and is a water conservation district, water conservancy district, irrigation district, ditch or reservoir company, nonprofit water provider, or a municipality."

The scope of the Criteria and Guidelines is to outline the process for creating an AWPP as identified in section 37-92-305(19)(b)(IV)(B), C.R.S., and ensure AWPP compliance with section 37-92-305(19)(b)(III), C.R.S. These Criteria and Guidelines apply to Water Divisions 1 and 2.

III. CRITERIA AND GUIDELINES

A. Summary of Submittal Process

In order to seek approval of an AWPP, a sponsoring eligible entity that meets the criteria of section 37-92-305(19)(c), C.R.S. must submit an AWPP proposal to the Board. The AWPPs exist solely to ensure that at least 50% of the historical consumptive use of participating AWPWRs remains in irrigation use on the property for which the absolute irrigation water was historically decreed, or another property served by the same ditch system.

At a minimum, the entity's proposal shall include:

1. A general description of the entity and documentation of the entity's compliance with the eligibility requirements under section 37-92-305(19)(c), C.R.S.
2. A general description of the proposed AWPP
3. Documentation of the entity's formal action or ordinance to sponsor the proposed AWPP
4. Acknowledgement of intent to protect the partial continued agricultural use of each AWPWR sponsored by the program and compliance with these guidelines and all other applicable existing statutes and decrees.
5. The case number for any water right(s) currently proposed or decreed for an AWPWR that will rely on the proposed AWPP (if available), along with a legal description and

map of the irrigated acreage that was historically irrigated by the water right(s) and of the acreage that will continue to be irrigated by the water right(s) (if available)

6. Legal description and map of the entity's geographic boundary
7. Legal description and map of the proposed AWPP boundary, if different from the entity's geographic boundary (must be located entirely within either Water Division 1 or 2)
8. Any limitations on number of participants to be sponsored by the AWPP
9. Any limitations on the acreage of land to be sponsored by the AWPP
10. Details of the application, review, approval, annual registration, and agreement process for inclusion of AWPWRs in the proposed AWPP.
11. Details of the entity's proposed AWPP monitoring process to ensure continued irrigation for each enrolled AWPWR annually, at a minimum, including, but not limited, to the nature of inspections, responsible personnel, inspection form, affidavit of continued irrigation, time of year, diversion records or accounting, and photo documentation.
12. Details of the entity's policy for records retention for all documents related to the proposed AWPP and acknowledgement of document availability upon request by Board staff
13. Acknowledgment and summary of an annual reporting process for the proposed AWPP for submission to the Colorado Water Conservation Board by December 31st of each year
14. Acknowledgement of intent to provide continual public notice by posting a list of all AWPWRs in the proposed AWPP at the entity's primary office
15. Acknowledgement of intent to comply with the required substitute water supply plan (SWSP) process for approval of the beneficial use of the portion of the AWPWR not being used for agricultural purposes, as detailed in the House Bill (HB) 16-1228 (section 37-92-305(4)(c), C.R.S.) and the related Rules promulgated by the State Engineer's Office.

Details related to the beneficial use of the portion of the AWPWR not being used for agricultural purposes will be addressed by the SWSP, not the AWPP.

B. Summary of Board Review Process

The following is the process for Board review of AWPPs:

1. Following the submission of a proposal for an AWPP by a sponsoring entity, the Board will post the proposal on its website.
2. The sponsoring entity shall provide written notice to all parties on the Division of Water Resource's SWSP list of the proposal.
3. Parties may submit comments to the Board on the proposed AWPP within 30 days of notice via SWSP list,
4. Board staff will consider all comments on a proposed plan prior to providing a recommendation for Board consideration at the next regularly scheduled Board meeting.
5. Board staff may request additional information from the project sponsoring entity pertaining to the proposed plan.
6. The Board will consider the proposal and vote on whether to approve or deny the proposed AWPP. Board staff will notify the AWPP sponsor of the Board's decision within 10 days of the Board's decision.

C. Standard of Denial and Suspension for proposed Agricultural Water Protection Programs

The Board may reject any proposal that does not assure sufficient protection or monitoring of an AWPWR, including if the AWPP is not supported by an eligible entity as defined in section 37-92-305(19)(c), C.R.S. or if the proposed AWPP does not ensure that at least 50% of the historical consumptive use by volume of an AWPWR that is not being leased, loaned or traded, continues to be used for agricultural purposes for the duration of the lease, loan or trade. The Board may suspend an AWPP that has been approved in the event the AWPP does not assure sufficient protection or monitoring of an AWPWR, including if the AWPP is not supported by an eligible entity or to the extent such program fails to ensure that an AWPWR continues to be used for agricultural purposes in at least equal proportion with that amount of water being leased, loaned or traded. If an AWPP is suspended, Board Staff will notify DWR regarding the operation of any related SWSPs.

D. Monitoring of Agricultural Water Protection Water Rights Under an Agricultural Water Protection Program

The eligible entity supporting the AWPP shall provide reasonable evidence that each included AWPWR continues to divert water and irrigate historically irrigated lands to the extent required by sending an annual report, by December 31 of each year, to Board staff, consistent with the approved AWPP. Such evidence detailed in the annual report may consist of: the nature of inspections, responsible personnel, inspection forms, affidavits of continued irrigation, time of year, diversion records or accounting, and photo documentation.

Board staff shall review all annual reports and give an annual summary report to the Board. Board staff shall keep records of irrigation under the AWPP as long as the program is in existence. In the event that an AWPP does not have any AWPWR operations in any given year, the entity shall send a letter to Board staff indicating there were no operations in lieu of an annual report.

An AWPP may cover a geographic area that encompasses entities (e.g. ditch and reservoir companies) that preclude or could potentially preclude involvement in such a program (per bylaws, operational issues, etc.).