

**BEFORE THE COLORADO WATER CONSERVATION BOARD  
STATE OF COLORADO**

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**IN THE MATTER OF THE RULEMAKING HEARING TO REVISE RULES  
CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE  
LEVEL PROGRAM, 2 CCR 408-2**

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**PREHEARING STATEMENT OF STAFF TO THE COLORADO WATER  
CONSERVATION BOARD**

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Pursuant to the Hearing Officer's November 20, 2020 Order Re: Procedures and Deadlines for Prehearing Submissions, Staff to the Colorado Water Conservation Board ("CWCB Staff") submits the following Prehearing Statement:

**A. Statement of Position**

CWCB Staff recommends the Colorado Water Conservation Board adopt the rules as noticed and proposed on October 14, 2020, and published in the Colorado Register on October 25, 2020. These proposed rule amendments are consistent with the requirements of House Bill 20-1157 and existing ISF rules, and will enable the proper implementation of section 37-83-105, C.R.S (2020) regarding temporary loans of water for instream flow use.

The exercise of temporary loans of water for instream flow use processed under the proposed rule amendments will not negatively impact existing beneficial uses of water rights and will not negatively impact local economies. Further, this rulemaking should be limited in scope to the topics and rule amendments that were noticed and proposed on October 14, 2020 and published in the Colorado Register on October 25, 2020. Any proposed rule amendments outside the scope of the October

14, 2020 Notice of Proposed Rulemaking should be rejected by the Colorado Water Conservation Board.

## **B. Witness List**

1. Linda Bassi, Section Chief of the CWCB Stream and Lake Protection Section (resume included as Appendix A).
  - i. Ms. Bassi may testify to the following:
    1. Any relevant events or circumstances that helped inform the statutory changes contained in House Bill 20-1157;
    2. The requirements in House Bill 20-1157, including the requirement that the Board promulgate rules;
    3. Development of proposed rules, including public outreach;
    4. Proposed revisions to the rules; and
    5. Responses to issues and proposed amendments raised by the other parties to this proceeding or in public comment.
  - ii. Ms. Bassi will be available to answer questions from the Board as required during the rulemaking hearing.
2. Kaylea White, Senior Water Resources Specialist (resume included as Appendix B). Ms. White may also testify to the information contained in B.1.i, and will be available to answer questions from the Board as required during the rulemaking hearing.

### **C. Statement of Open Legal Questions**

To the extent any other party to this rulemaking is requesting rule amendments to rules or provisions that are outside the scope of what was included in the Notice of Proposed Rulemaking, filed on October 14, 2020 and published in the Colorado Register on October 25, 2020, those amendments should be rejected by the Board. Pursuant to subsections 24-4-103(3) and (4)(c), C.R.S., of the state Administrative Procedure Act, “[r]ules, as finally adopted, shall be consistent with the subject matter as set forth in the notice of proposed rule-making.” Because the October 14, 2020 Notice of Proposed Rulemaking included only non-substantive corrections to an outdated website reference and references to Colorado Parks and Wildlife, and revisions to “amend Rules 6k. and 6m. to implement HB 20-1157,” any rule amendments adopted by the Board outside the scope of updating those references and implementing HB 20-1157 would likely be invalidated for failure to comply with the state Administrative Procedure Act.

### **D. Statement of Relief Requested**

CWCB Staff requests the CWCB adopt the rules as noticed, proposed, and published in the Colorado Register. CWCB Staff reserves the right to propose additional rule revisions prior to or at any hearing in this matter.

### **E. Desired Time**

CWCB Staff requests 90 minutes to present any testimony, rebuttal information, and to answer any questions.

## F. Exhibit List

<u>Exhibit Number</u>	<u>Exhibit Name</u>
CWCBStaff-1	House Bill 20-1157
CWCBStaff-2	Section 37-83-105, C.R.S. (effective Sept. 14, 2020)
CWCBStaff-3	Rules Concerning the Colorado Instream Flow and Natural Lake Level Program 2 CCR 408-2
CWCBStaff-4	Notice of Proposed Rulemaking, published in the Colorado Register on October 25, 2020
CWCBStaff-5	Proposed Rule Amendments to Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2
CWCBStaff-6	Statement of Basis and Purpose

Dated this 10th day of December, 2020.

PHIL WEISER  
Attorney General

/s/ Jen Mele

JEN MELE, #30720

First Assistant Attorney General

MARC SARMIENTO, #46322

ALLISON ROBINETTE, #49930

Assistant Attorneys General

Natural Resources & Environment Section

Attorneys for the Staff to the Colorado Water Conservation Board

\*Counsel of Record

**CERTIFICATE OF SERVICE**

I hereby certify that I have duly served the copies of the foregoing **Prehearing Statement of the Staff to the Colorado Water Conservation Board** upon all parties herein by email, this 10th day of December, 2020, addressed as follows:

**Hearing Officer**

Amy Beatie  
Deputy Attorney General  
Natural Resources & Environment Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, Colorado 80203  
720-508-6296  
Email: [Amy.Beatie@coag.gov](mailto:Amy.Beatie@coag.gov)

Copy to: [john.watson@coag.gov](mailto:john.watson@coag.gov)

**Rulemaking Parties**

<p><u>Staff to the Colorado Water Conservation Board</u></p> <p>Linda Bassi Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441, ext. 3204 Email: <a href="mailto:linda.bassi@state.co.us">linda.bassi@state.co.us</a></p>	<p><u>The Nature Conservancy</u></p> <p>Aaron Citron 2424 Spruce Street Boulder, CO 80302 520-730-3421 Email: <a href="mailto:aaron.citron@tnc.org">aaron.citron@tnc.org</a></p>
<p><u>Colorado Water Trust</u></p> <p>Kate Ryan 3264 Larimer Street, Suite D Denver, CO 80205 720-570-2897 Email: <a href="mailto:kryan@coloradowatertrust.org">kryan@coloradowatertrust.org</a></p>	<p><u>City of Aurora</u></p> <p><i>Counsel:</i></p> <p>John M. Dingess 3600 S. Yosemite Street, Suite 500 Denver, CO 80237 303-779-0200 Email: <a href="mailto:jdingess@hrodllaw.com">jdingess@hrodllaw.com</a>; <a href="mailto:mail@hrodllaw.com">mail@hrodllaw.com</a></p>

	<p><i>Staff Contact:</i></p> <p>Erich Fowler  15151 E. Alameda Parkway, Suite 3600  Aurora, CO 80012  303-739-7467  Email: <a href="mailto:esfowler@auroragov.org">esfowler@auroragov.org</a></p>
<p><u>Mesa County, Colorado</u></p> <p>Amber Swasey  Mesa County Community Development  P.O. Box 20,000-5022  Grand Junction, CO 81502  970-244-1762  Email: <a href="mailto:amber.swasey@mesacounty.us">amber.swasey@mesacounty.us</a></p>	<p><u>Trout Unlimited</u></p> <p>Drew Peternell  Trout Unlimited  P.O. Box 4165  Eagle, CO 81631  303-20-3057  Email: <a href="mailto:drew.peternell@tu.org">drew.peternell@tu.org</a></p>
<p><u>Western Resource Advocates,  Conservation Colorado, and the  National Audubon Society</u></p> <p>John Cyran  2260 Baseline Road  Boulder, CO 80302  303-746-3802  Email:  <a href="mailto:john.cyran@westernresources.org">john.cyran@westernresources.org</a></p>	<p><u>Colorado River Water Conservation  District</u></p> <p>Peter C. Fleming  Jason V. Turne  Lorra Nichols  Colorado River Water Conservation  District  P.O. Box 1120  Glenwood Springs, CO 81602  970-945-8522  Email: <a href="mailto:pfleming@crwcd.org">pfleming@crwcd.org</a>  <a href="mailto:jturner@crwcd.org">jturner@crwcd.org</a>  <a href="mailto:lnichols@crwcd.org">lnichols@crwcd.org</a></p>
<p><u>Colorado Parks and Wildlife</u></p> <p><i>Counsel:</i></p> <p>Elizabeth Joyce  1300 Broadway, 7th Floor  Denver, CO 80203  720-508-6761  Email: <a href="mailto:elizabeth.joyce@coag.gov">elizabeth.joyce@coag.gov</a></p>	

<p><i>Staff Contacts:</i></p> <p>Katie Birch Rob Harris 6060 Broadway Denver, CO 80216 303-291-7335 303-291-7550 Email: <a href="mailto:katie.birch@state.co.us">katie.birch@state.co.us</a> <a href="mailto:robert.harris@state.co.us">robert.harris@state.co.us</a></p>	
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/s/\_\_\_\_\_

Margaret Popick

**LINDA J. BASSI**  
**COLORADO WATER CONSERVATION BOARD**  
**1313 SHERMAN STREET, ROOM 721, DENVER, CO 80203**  
**(303) 866-3441**

**BAR ADMISSIONS**

Admitted to Colorado Bar, October 1994.

**EDUCATION**

**Illinois Institute of Technology Chicago-Kent College of Law** Chicago, IL  
**Juris Doctorate, May 1994**

**Columbia College** Chicago, IL  
**Bachelor of Arts with honors in Photography, January 1984**

**PROFESSIONAL EXPERIENCE**

**Colorado Water Conservation Board** Denver, CO  
**Chief, Stream and Lake Protection Section** September 2007 – present

Supervise, lead, and coordinate with Section staff on all aspects of the Instream Flow (“ISF”) Program, including rulemaking, legislative efforts, ISF appropriations, acquisitions and opposition cases, and participation in various stakeholder group processes.

**Colorado Water Conservation Board** Denver, CO  
**Legal and Physical Protection Specialist** September 2004 – August 2007

Worked on legal protection of ISF water rights; monitoring and enforcement of ISF water rights; acquisitions of water, water rights, and interests in water for ISF use; and development of policies concerning the ISF Program. Proposed, drafted and advocated for legislation to clarify and further all aspects of the ISF Program.

**Colorado Dept. of Law, Natural Resources and Environment Section** Denver, CO  
**First Assistant Attorney General, Water Rights Unit** July 2001—August 2004  
**Assistant Attorney General, Water Rights Unit** June 1995—July 2001

While First Assistant AG, supervised eight attorneys and four classified employees. As First and as Assistant AG, represented the CWCB in ISF water rights litigation, new appropriation proceedings, and acquisitions of water rights for ISF use. Assisted the CWCB and Division of Water Resources in developing and drafting policies and rules concerning water rights administration, CWCB loans, the ISF Program, and other water matters. Negotiated rules revisions with interested parties, advised clients on rulemaking procedures, and represented clients at rulemaking hearings. Drafted and reviewed legislation, and testified at legislative hearings on behalf of clients and the Attorney General.

**HONORS**

- Attorney General’s Legacy Award, 2020.
- Division of Water Resources Water Unit Attorney of the Year Award, 1997.

## **PUBLICATIONS**

- John J. Cyran, Linda Bassi and Ted Kowalski, “The City of Central Decision, Victory for Colorado’s Instream Flow Program, Colorado’s Prior Appropriation System, and Colorado,” 10 U. Denv. Water L. Rev. 259 (Spring 2007).
- Linda J. Bassi, Susan J. Schneider, and Kaylea M. White, “ISF Law – Stories about the Origin and Evolution of Colorado’s Instream Flow Law in this Prior Appropriation State,” 22 U. Denv. Water L. Rev. 389 (Spring 2019).

## KAYLEA M. WHITE

1313 Sherman St., Suite 719, Denver, CO • 80203 • phone (303) 866-3441 X3240 • kaylea.white@state.co.us

### LICENSES AND REGISTRATIONS

**Colorado Licensed Attorney**, #36917, 2005, (*currently inactive*)  
**Registered Geologist**, California # 5460, 1989  
**Certified Hydrogeologist**, California # 80, 1992  
**Private Pilot, VFR rating**, Mammoth Mtn Airport, California, 1998  
**Wilderness First Responder and First Aid**, National Certificates, 1998

### EDUCATION

**Vermont Law School**, South Royalton, VT. **Juris Doctorate**, Aug 2002-May 2005  
**University of California**, Santa Barbara, CA. PhD Student in Donald Bren School of Environmental Science & Management, 1999-2001. Left PhD program to pursue a law degree.  
**California State University**, Fresno, CA. **Master of Science**, Hydro & Engineering Geology, 1989-1993  
**Trinity University**, San Antonio, TX. **Bachelor of Science**, Geology/Earth Science, 1981-1985

### PROFESSIONAL EXPERIENCE

**Colorado Water Conservation Board**, Denver, CO. *Senior Water Resources Specialist*, 2008-present  
Manager of the program areas for legal protection and acquisitions of water rights in the Stream and Lake Protection Section of CWCB. Assist with rulemaking and legislative efforts. Provided expert testimony in Donala Water and Sanitation District, 2-09CW73, March 9, 2011.

**Lind, Lawrence & Ottenhoff**, Windsor, CO. *Associate Attorney*, 2006-2008  
Lead attorney in water court litigation, including settlement negotiations, depositions and trial preparations.

**S.S. Papadopoulos & Assoc., Inc.**, San Francisco, CA. *Senior Project Hydrologist*, 2002  
Responsible for marketing and development of water resources business; Provided consulting expert witness support for copper mine waste litigation.

**Western Water Consulting**, San Francisco, CA. *Owner/Water Resources Consultant*, 1997-2001  
Assistant Project Coordinator for National Railroad Merger NEPA compliance EIS for the US Surface Transportation Board; water resources specialist for EIS impact analysis performed for the Central Utah Project Completion Act.

**Montgomery Watson**, Sacramento, CA. *Senior Water Resources Project Manager*, 1993-97  
Wrote NEPA EIS and CEQA EIR documents for environmental impacts of major future water supply projects for local and federal water agencies including USBR, USACE, East Bay MUD; Designed and implemented analytical water supply models with IGSM (Integrated Groundwater and Surface water Model).

**California Department of Water Resources (DWR)**, Fresno, CA. *Engineering Geologist*, 1988-93  
Established the Kern Water Bank model of GW/SW aquifer storage and recovery water supply project for the State Water Project using MODFLOW; DWR representative for Salinas Basin water plan, including saline water intrusion management.

**HWS Consulting**, Lincoln, NE. *Staff Geologist*, 1986-88  
Managed technical groundwater contamination remediation projects.

**H.E. White – Petroleum Geologist**, Austin, TX. *Geologist*, 1985-86  
Assisted with oil and gas exploration, drilling, and mapping.

### PUBLICATIONS

- Linda J. Bassi, Susan J. Schneider, and Kaylea M. White, “ISF Law – Stories about the Origin and Evolution of Colorado’s Instream Flow Law in this Prior Appropriation State,” 22 U. Denv. Water L. Rev. 389 (Spring 2019).

## Appendix B

# An Act

HOUSE BILL 20-1157

BY REPRESENTATIVE(S) Roberts and Will, Arndt, Bird, Buentello, Cutter, Duran, Esgar, Exum, Froelich, Kennedy, Kipp, McCluskie, McKean, McLachlan, Michaelson Jenet, Sandridge, Snyder, Soper, Titone, Valdez D., Woodrow, Young, Becker;  
also SENATOR(S) Donovan, Bridges, Gonzales, Hansen, Moreno, Rodriguez, Winter, Zenzinger, Garcia.

CONCERNING THE COLORADO WATER CONSERVATION BOARD'S AUTHORITY  
TO USE WATER THAT A WATER RIGHT OWNER VOLUNTARILY LOANS TO  
THE BOARD FOR INSTREAM FLOW PURPOSES.

*Be it enacted by the General Assembly of the State of Colorado:*

**SECTION 1.** In Colorado Revised Statutes, 37-83-105, **amend** (1), (2)(a) introductory portion, (2)(a)(IV), (2)(a)(V), (2)(b) introductory portion, (2)(b)(I) introductory portion, (2)(b)(II), (2)(b)(V), (2)(b)(VI), (2)(b)(VII), and (2)(b)(VIII); and **add** (2)(a)(III.5), (2)(a)(III.7), (2)(a)(VI), (2)(b)(II.5), and (3) as follows:

**37-83-105. Owner may loan agricultural water right - loans to Colorado water conservation board for instream flows - rules.**  
(1) (a) Subject to the limitations of this subsection (1) and pursuant to the

*Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.*

procedures set forth in ~~paragraph (b) of subsection (2)~~ SUBSECTION (2)(b) of this section THAT APPLY TO AN EXPEDITED LOAN DESCRIBED IN SUBSECTION (2)(a)(III.7) OF THIS SECTION, the owner of a water right decreed and used solely for agricultural irrigation purposes may loan all or a portion of the water right to another owner of a decreed water right on the same stream system and that is used solely for agricultural irrigation purposes for no more than one hundred eighty days during any one calendar year if the ~~division~~ STATE engineer approves ~~such~~ THE loan in advance and the loan does not cause injury to other decreed water rights.

(b) THE OWNER OF ANY DECREED WATER RIGHT MAY LOAN WATER TO THE COLORADO WATER CONSERVATION BOARD FOR USE AS INSTREAM FLOWS:

(I) TO PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE PURSUANT TO A DECREED INSTREAM FLOW WATER RIGHT HELD BY THE BOARD; OR

(II) TO IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE FOR A STREAM REACH FOR WHICH THE BOARD HOLDS A DECREED INSTREAM FLOW WATER RIGHT.

(2) (a) ~~A water right owner may loan water to the Colorado water conservation board for use as~~ WATER MAY BE USED FOR instream flows pursuant to a ~~decreed instream flow water right held by the board~~ LOAN AUTHORIZED UNDER THIS SECTION for a period not to exceed one hundred twenty days IN A SINGLE CALENDAR YEAR, subject to the following:

(III.5) WATER RIGHTS LOANED PURSUANT TO THIS SECTION ARE NOT PRECLUDED FROM CONCURRENT OR SUBSEQUENT INCLUSION IN A WATER CONSERVATION, DEMAND MANAGEMENT, COMPACT COMPLIANCE, OR WATER BANKING PROGRAM OR PLAN, AS IS OR MAY BE SUBSEQUENTLY DEFINED OR DESCRIBED IN STATUTE.

(III.7) AN EXPEDITED LOAN APPROVED TO PRESERVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE PURSUANT TO THIS SUBSECTION (2)(a) HAS A TERM OF UP TO ONE YEAR. THE LOAN PERIOD BEGINS WHEN THE STATE ENGINEER APPROVES THE EXPEDITED LOAN. IF AN EXPEDITED LOAN IS APPROVED, THE APPLICANT SHALL NOT REAPPLY FOR AN ADDITIONAL EXPEDITED LOAN OF THE WATER RIGHT.

(IV) (A) A RENEWABLE loan approved TO PRESERVE OR IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE pursuant to this ~~paragraph (a) shall~~ SUBSECTION (2)(a) MUST not be exercised for more than ~~three~~ FIVE years in a ten-year period AND FOR NO MORE THAN THREE CONSECUTIVE YEARS, for which only a single approval by the state engineer is required. The ten-year period ~~shall begin~~ BEGINS when the state engineer approves the loan. AN APPLICANT MAY REAPPLY FOR AND the state engineer ~~shall not~~ MAY approve a RENEWABLE loan pursuant to this ~~paragraph (a)~~ SUBSECTION (2)(a) for ~~another~~ UP TO TWO ADDITIONAL ten-year ~~period;~~ ~~except that, if the agreement has not been exercised during the term of the agreement, an applicant may reapply one time by repeating the application process pursuant to this subsection (2)~~ PERIODS.

(B) IF AN APPLICANT HAD PREVIOUSLY BEEN APPROVED FOR AND HAD EXERCISED AN EXPEDITED LOAN PURSUANT TO SUBSECTION (2)(a)(III.7) OF THIS SECTION AND SUBSEQUENTLY APPLIES AND IS APPROVED FOR A RENEWABLE LOAN, THE ONE-YEAR LOAN PERIOD OF THE EXPEDITED LOAN COUNTS AS THE FIRST YEAR OF THE FIVE-YEAR ALLOWANCE FOR THE SUBSEQUENT RENEWABLE LOAN.

(C) IN EACH YEAR THAT A RENEWABLE LOAN IS EXERCISED, THE APPLICANT SHALL PROVIDE THE WRITTEN NOTICE DESCRIBED IN SUBSECTION (2)(b)(II) OF THIS SECTION.

(V) A party may file comments concerning potential injury to ~~such~~ THE party's water rights or decreed conditional water rights due to the operations of the loan of ~~a~~ THE water right to ~~a decreed instream flow right~~ with the state engineer by January 1 of the year following each year that the loan is exercised. The procedures of ~~paragraph (b) of this subsection (2)~~ SUBSECTION (2)(b) OF THIS SECTION regarding notice, opportunity to comment, the state engineer's decision, and an appeal of ~~such~~ THE decision shall again be followed with regard to ~~such~~ THE party's comments. IN AN APPEAL TO THE WATER JUDGE IN THE APPLICABLE WATER DIVISION OF THE DETERMINATION MADE BY THE STATE ENGINEER PURSUANT TO THIS SECTION, THE APPLICANT HAS THE BURDEN OF PROOF THAT THE LOANED WATER RIGHT DOES NOT CAUSE INJURY TO OTHER VESTED OR CONDITIONALLY DECREED WATER RIGHTS. ANY APPEAL OF A DECISION BY THE STATE ENGINEER CONCERNING THE LOAN PURSUANT TO THIS SECTION SHALL BE MADE IN ACCORDANCE WITH THE PROCEDURES SET FORTH IN SUBSECTION (2)(b)(VIII) OF THIS SECTION.

(VI) RULES PROMULGATED BY THE COLORADO WATER CONSERVATION BOARD PURSUANT TO SUBSECTION (3) OF THIS SECTION.

(b) In determining whether injury will occur, the ~~division~~ STATE engineer shall ensure that the following conditions are met:

(I) The ~~proponent~~ APPLICANT has filed a request for approval of the loan with the ~~division~~ STATE engineer, together with a filing fee in the amount of ~~one~~ THREE hundred dollars. ~~Moneys from~~ THE STATE ENGINEER SHALL TRANSMIT the fee ~~shall be transmitted~~ to the state treasurer, ~~and deposited~~ WHO SHALL DEPOSIT THE FEE in the water resources cash fund created in section 37-80-111.7 (1). The request for approval ~~shall~~ MUST include:

(II) The ~~proponent~~ APPLICANT has SUBMITTED PROOF TO THE STATE ENGINEER, IN A FORM AND MANNER DETERMINED BY THE STATE ENGINEER, DEMONSTRATING THAT THE APPLICANT provided written notice of the request for approval of the loan by first-class mail or electronic mail to:

(A) All parties on the substitute water supply plan notification list established pursuant to section 37-92-308 (6) for the water division in which the proposed loan is located; and ~~proof of such notice is filed with the division engineer;~~

(B) A REGISTERED AGENT OF A DITCH COMPANY, IRRIGATION DISTRICT, WATER USERS' ASSOCIATION, OR OTHER WATER SUPPLY OR DELIVERY ENTITY WITHIN WHOSE SYSTEM THE WATER RIGHTS FALL.

(II.5) THE APPLICANT HAS PROVEN THAT THE LOAN WILL NOT INJURE DECREED WATER RIGHTS, DECREED EXCHANGES OF WATER, OR OTHER WATER USERS' UNDECREED EXISTING EXCHANGES OF WATER TO THE EXTENT THAT THE UNDECREED EXISTING EXCHANGES HAVE BEEN ADMINISTRATIVELY APPROVED BEFORE THE DATE OF THE FILING OF THE REQUEST FOR APPROVAL OF THE LOAN.

(V) The ~~division~~ STATE engineer has given the owners of water rights and decreed conditional water rights ~~fifteen days after the date of mailing of notice under subparagraph (II) of this paragraph~~ (b) THE OPPORTUNITY to file comments on the proposed loan ~~except that the division engineer may act on the application immediately after the applicant~~

~~provides evidence that all persons entitled to notice of the application under subparagraph (II) of this paragraph (b) have either consented to or commented on the application. Such~~ WITHIN THE RELEVANT TIME FRAME INDICATED IN THIS SUBSECTION (2)(b)(V). THE comments shall MUST include any claim of injury or any terms and conditions that should be imposed upon the proposed loan to prevent injury to a party's water right RIGHTS and any other information the commenting party wishes the ~~division~~ STATE engineer to consider in reviewing the proposed loan. THE STATE ENGINEER SHALL PROVIDE THE PARTIES ENTITLED TO NOTICE UNDER SUBSECTION (2)(b)(II) OF THIS SECTION:

(A) FIFTEEN DAYS AFTER THE DATE OF MAILING OF NOTICE FOR EXPEDITED LOANS AUTHORIZED UNDER SUBSECTION (2)(a)(III.7) OF THIS SECTION TO PROVIDE COMMENTS ON THE PROPOSED LOAN; AND

(B) SIXTY DAYS AFTER THE DATE OF MAILING OF NOTICE FOR RENEWABLE LOANS AUTHORIZED UNDER SUBSECTION (2)(a)(IV) OF THIS SECTION TO PROVIDE COMMENTS ON THE PROPOSED LOAN.

(VI) The ~~division~~ STATE engineer, after consideration of any comments received, has determined that the operation and administration of the proposed loan will not cause injury to other decreed water rights, DECREED EXCHANGES, OR UNDECREED EXCHANGES AS DESCRIBED IN SUBSECTION (2)(b)(II.5) OF THIS SECTION and, for loans made pursuant to ~~paragraph (a) of this subsection (2)~~ SUBSECTION (2)(a) OF THIS SECTION, will not affect Colorado's compact entitlements. The ~~division~~ STATE engineer shall impose such terms and conditions as are necessary to ensure that these standards are met. In making the determinations specified in this ~~subparagraph (VI)~~ SUBSECTION (2)(b)(VI), the ~~division~~ STATE engineer shall NEED not be required to hold any formal hearings or conduct any other formal proceedings, but may conduct a hearing or formal proceeding if the ~~division~~ STATE engineer finds it necessary to address the issues.

(VII) The ~~division~~ STATE engineer shall approve or deny the proposed loan within ~~twenty~~ TEN days after the ~~date of mailing of notice under subparagraph (II) of this paragraph (b), or within five days after the applicant provides evidence that all persons entitled to notice of the application under subparagraph (II) of this paragraph (b) have either consented to or commented on the application, whichever is earlier~~ PERIOD FOR COMMENTS ON THE PROPOSED LOAN SPECIFIED IN SUBSECTION (2)(b)(V)

OF THIS SECTION HAS EXPIRED.

(VIII) When the ~~division~~ STATE engineer approves or denies a proposed loan, the ~~division~~ STATE engineer shall serve a copy of the decision on all parties to the application by first-class mail or, if ~~such~~ THE parties have so elected, by electronic mail. Neither the approval nor the denial by the ~~division~~ STATE engineer ~~shall create~~ CREATES any presumptions ~~shift the burden of proof, or serve~~ OR SERVES as a defense in any legal action that may be initiated concerning the loan. ~~Any~~ A PARTY MAY FILE AN appeal of a decision by the ~~division~~ STATE engineer concerning the loan pursuant to this section ~~shall be made~~ to the water judge in the applicable water division within fifteen days after the date ~~on which~~ THAT THE STATE ENGINEER, FOLLOWING THE STATE ENGINEER'S CONSIDERATION OF ANY COMMENTS SUBMITTED PURSUANT TO SUBSECTION (2)(a)(V) OF THIS SECTION, SERVES the decision ~~is served~~ on the parties to the application. THE APPLICANT HAS THE BURDEN OF PROOF TO DEMONSTRATE THAT THE LOANED WATER RIGHT DOES NOT CAUSE INJURY TO OTHER VESTED OR CONDITIONALLY DECREED WATER RIGHTS, DECREED EXCHANGES, OR UNDECREED EXCHANGES AS DESCRIBED IN SUBSECTION (2)(b)(II.5) OF THIS SECTION. The water judge shall hear ~~such~~ AND DETERMINE THE appeal on an expedited basis USING THE PROCEDURES AND STANDARDS SET FORTH IN SECTION 37-92-304 (3) CONCERNING MATTERS REREFERRED TO THE WATER JUDGE BY THE WATER REFEREE.

(3) THE COLORADO WATER CONSERVATION BOARD SHALL PROMULGATE RULES REGARDING THE FOLLOWING NECESSARY STEPS FOR ITS REVIEW AND ACCEPTANCE OF LOANS FOR INSTREAM FLOW USE PURSUANT TO SUBSECTION (1)(b)(II) OF THIS SECTION:

(a) THE BOARD'S REVIEW OF THE PROPOSED LOAN, INCLUDING A REQUIREMENT THAT THE BOARD REQUEST AND REVIEW A BIOLOGICAL ANALYSIS FROM THE DIVISION OF PARKS AND WILDLIFE CONCERNING THE EXTENT TO WHICH THE PROPOSED LOAN WILL IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE;

(b) A REQUIREMENT THAT WHEN CONSIDERING A PROPOSED LOAN, THE BOARD SHALL GIVE PREFERENCE TO LOANS OF STORED WATER, WHEN AVAILABLE, OVER LOANS OF DIRECT FLOW WATER; AND

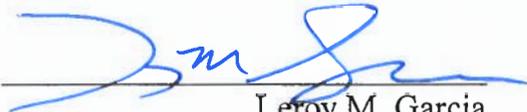
(c) THE BOARD'S DETERMINATION, AFTER A HEARING ON THE

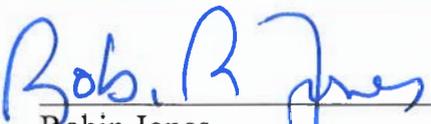
MATTER, IF REQUESTED, WHETHER TO ACCEPT THE PROPOSED LOAN.

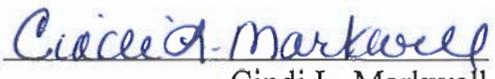
**SECTION 2. Act subject to petition - effective date - applicability.** (1) This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August 5, 2020, if adjournment sine die is on May 6, 2020); except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2020 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

(2) This act applies to conduct occurring on or after the applicable effective date of this act.

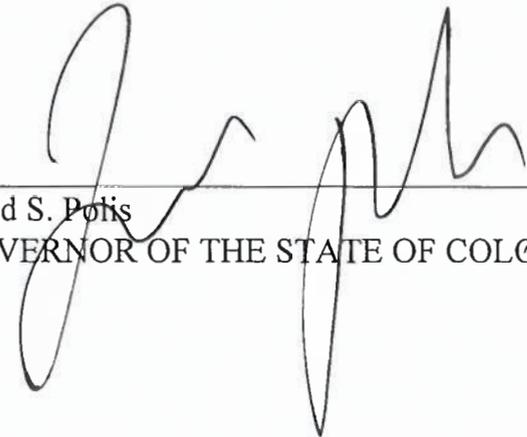
  
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KC Becker  
SPEAKER OF THE HOUSE  
OF REPRESENTATIVES

  
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Leroy M. Garcia  
PRESIDENT OF  
THE SENATE

  
\_\_\_\_\_  
Robin Jones  
CHIEF CLERK OF THE HOUSE  
OF REPRESENTATIVES

  
\_\_\_\_\_  
Cindi L. Markwell  
SECRETARY OF  
THE SENATE

APPROVED March 20, 2020 at 12:50 pm  
(Date and Time)

  
\_\_\_\_\_  
Jared S. Polis  
GOVERNOR OF THE STATE OF COLORADO

## Document: C.R.S. 37-83-105

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### C.R.S. 37-83-105

**Copy Citation**

Current through all laws passed during the 2020 Legislative Session

**CO - Colorado Revised Statutes Annotated    TITLE 37. WATER AND IRRIGATION    WATER RIGHTS AND IRRIGATION    WATER RIGHTS - GENERALLY    ARTICLE 83. EXCHANGE OF WATER**

#### 37-83-105. Owner may loan agricultural water right - loans to Colorado water conservation board for instream flows - rules

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**(1)** (a) Subject to the limitations of this subsection (1) and pursuant to the procedures set forth in subsection (2)(b) of this section that apply to an expedited loan described in subsection (2)(a)(III.7) of this section, the owner of a water right decreed and used solely for agricultural irrigation purposes may loan all or a portion of the water right to another owner of a decreed water right on the same stream system and that is used solely for agricultural irrigation purposes for no more than one hundred eighty days during any one calendar year if the state engineer approves the loan in advance and the loan does not cause injury to other decreed water rights.

**(b)** The owner of any decreed water right may loan water to the Colorado water conservation board for use as instream flows:

**(I)** To preserve the natural environment to a reasonable degree pursuant to a decreed instream flow water right held by the board; or

**(II)** To improve the natural environment to a reasonable degree for a stream reach for which the board holds a decreed instream flow water right.

**(2)** (a) Water may be used for instream flows pursuant to a loan authorized under this section for a period not to exceed one hundred twenty days in a single calendar year, subject to the following:

**(I)** Prior to accepting the loan, the Colorado water conservation board shall compile a statement about the duration of the loan, a description of the original points of diversion, and other relevant information sufficient for the state engineer to determine that such loan does not injure existing decreed water rights.

**(II)** Consistent with current law, only the Colorado water conservation board is entitled to hold instream flow water rights and may accept proposed loans in accordance with section 37-92-102 (3).

**(III)** The loan shall not be accepted unless the state engineer determines that the Colorado water conservation board's temporary instream flow use will not injure existing water rights of others.

**(III.5)** Water rights loaned pursuant to this section are not precluded from concurrent or subsequent inclusion in a water conservation, demand management, compact compliance, or water banking program or plan, as is or may be subsequently defined or described in statute.

**(III.7)** An expedited loan approved to preserve the natural environment to a reasonable degree pursuant to this subsection (2)(a) has a term of up to one year. The loan period begins when the state engineer approves the expedited loan. If an expedited loan is approved, the applicant shall not reapply for an additional expedited loan of the water right.

**(IV)** (A) A renewable loan approved to preserve or improve the natural environment to a reasonable degree pursuant to this subsection (2)(a) must not be exercised for more than five years in a ten-year period and for no more than three consecutive years, for which only a single approval by the state engineer is required. The ten-year period begins when the state engineer approves the loan. An applicant may reapply for and the state engineer may approve a renewable loan pursuant to this subsection (2)(a) for up to two additional ten-year periods.

**(B)** If an applicant had previously been approved for and had exercised an expedited loan pursuant to subsection (2)(a)(III.7) of this section and subsequently applies and is approved for a renewable loan, the one-year loan period of the expedited loan counts as the first year of the five-year allowance for the subsequent renewable loan.

**(C)** In each year that a renewable loan is exercised, the applicant shall provide the written notice described in subsection (2)(b)(II) of this section.

**(V)** A party may file comments concerning potential injury to the party's water rights or decreed conditional water rights due to the operations of the loan of the water right with the state engineer by January 1 of the year following each year that the loan is exercised. The procedures of subsection (2)(b) of this section regarding notice, opportunity to comment, the state engineer's decision, and an appeal of the decision shall again be followed with regard to the party's comments. In an appeal to the water judge in the applicable water division of the determination made by the state engineer pursuant to this section, the applicant has the burden of proof that the loaned water right does not cause injury to other vested or conditionally decreed water rights. Any appeal of a decision by the state engineer concerning the loan pursuant to this section shall be made in accordance with the procedures set forth in subsection (2)(b) (VIII) of this section.

**(VI)** Rules promulgated by the Colorado water conservation board pursuant to subsection (3) of this section.

**(b)** In determining whether injury will occur, the state engineer shall ensure that the following conditions are met:

**(I)** The applicant has filed a request for approval of the loan with the state engineer, together with a filing fee in the amount of three hundred dollars. The state engineer shall transmit the fee to the state

treasurer, who shall deposit the fee in the water resources cash fund created in section 37-80-111.7 (1).

The request for approval must include:

- (A)** Evidence of the proponent's legal right to use the loaned water right;
- (B)** A statement of the duration of the proposed loan;
- (C)** A description of the original points of diversion, the return flow pattern, the stream reach, and the time, place, and types of use of the loaned water right;
- (D)** A description of the new proposed points of diversion, the return flow pattern, the stream reach, and the time, place, and types of use of the loaned water right; and
- (E)** A reasonable estimate of the historic consumptive use of the loaned water right;
- (II)** The applicant has submitted proof to the state engineer, in a form and manner determined by the state engineer, demonstrating that the applicant provided written notice of the request for approval of the loan by first-class mail or electronic mail to:
  - (A)** All parties on the substitute water supply plan notification list established pursuant to section 37-92-308 (6) for the water division in which the proposed loan is located; and
  - (B)** A registered agent of a ditch company, irrigation district, water users' association, or other water supply or delivery entity within whose system the water rights fall.
- (II.5)** The applicant has proven that the loan will not injure decreed water rights, decreed exchanges of water, or other water users' undecreed existing exchanges of water to the extent that the undecreed existing exchanges have been administratively approved before the date of the filing of the request for approval of the loan.
- (III)** The proposed use of the loaned water right is for agricultural irrigation purposes or for instream flow purposes by the Colorado water conservation board;
- (IV)** None of the water rights involved in the loan are adjudicated to or diverted at a well located more than one hundred feet from the bank of the nearest flowing stream;
- (V)** The state engineer has given the owners of water rights and decreed conditional water rights the opportunity to file comments on the proposed loan within the relevant time frame indicated in this subsection (2)(b)(V). The comments must include any claim of injury or any terms and conditions that should be imposed upon the proposed loan to prevent injury to a party's water rights and any other information the commenting party wishes the state engineer to consider in reviewing the proposed loan. The state engineer shall provide the parties entitled to notice under subsection (2)(b)(II) of this section:
  - (A)** Fifteen days after the date of mailing of notice for expedited loans authorized under subsection (2)(a)(III.7) of this section to provide comments on the proposed loan; and
  - (B)** Sixty days after the date of mailing of notice for renewable loans authorized under subsection (2)(a)(IV) of this section to provide comments on the proposed loan.
- (VI)** The state engineer, after consideration of any comments received, has determined that the operation and administration of the proposed loan will not cause injury to other decreed water rights, decreed exchanges, or undecreed exchanges as described in subsection (2)(b)(II.5) of this section and, for loans made pursuant to subsection (2)(a) of this section, will not affect Colorado's compact entitlements. The state engineer shall impose such terms and conditions as are necessary to ensure that

these standards are met. In making the determinations specified in this subsection (2)(b)(VI), the state

engineer need not hold any formal hearings or conduct any other formal proceedings, but may conduct a hearing or formal proceeding if the state engineer finds it necessary to address the issues.

**(VII)** The state engineer shall approve or deny the proposed loan within ten days after the period for comments on the proposed loan specified in subsection (2)(b)(V) of this section has expired.

**(VIII)** When the state engineer approves or denies a proposed loan, the state engineer shall serve a copy of the decision on all parties to the application by first-class mail or, if the parties have so elected, by electronic mail. Neither the approval nor the denial by the state engineer creates any presumptions or serves as a defense in any legal action that may be initiated concerning the loan. A party may file an appeal of a decision by the state engineer concerning the loan pursuant to this section to the water judge in the applicable water division within fifteen days after the date that the state engineer, following the state engineer's consideration of any comments submitted pursuant to subsection (2)(a)(V) of this section, serves the decision on the parties to the application. The applicant has the burden of proof to demonstrate that the loaned water right does not cause injury to other vested or conditionally decreed water rights, decreed exchanges, or undecreed exchanges as described in subsection (2)(b)(II.5) of this section. The water judge shall hear and determine the appeal on an expedited basis using the procedures and standards set forth in section 37-92-304 (3) concerning matters rereferred to the water judge by the water referee.

**(c)** All periods of time during which a loaned water right is used by the board for instream flow purposes shall be excluded from any historic consumptive use analysis of the loaned water right required under any water court proceeding.

**(3)** The Colorado water conservation board shall promulgate rules regarding the following necessary steps for its review and acceptance of loans for instream flow use pursuant to subsection (1)(b)(II) of this section:

**(a)** The board's review of the proposed loan, including a requirement that the board request and review a biological analysis from the division of parks and wildlife concerning the extent to which the proposed loan will improve the natural environment to a reasonable degree;

**(b)** A requirement that when considering a proposed loan, the board shall give preference to loans of stored water, when available, over loans of direct flow water; and

**(c)** The board's determination, after a hearing on the matter, if requested, whether to accept the proposed loan.

## History

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**Source:** L. 1899: p. 236, § 3. R.S. 08: § 3232. C.L. § 1712. CSA: C. 90, § 110. CRS 53: § 147-6-5.

**C.R.S. 1963:** § 148-6-5. **1993:** Entire section amended, p. 2396, § 1, effective June 5, 1994. (1)

**C.R.S. 1903.** § 140-0-0. **L. 2003.** Entire section amended, p. 2390, § 1, effective June 3. **L. 2004.** (1), IP(2)(b), (2)(b)(III), (2)(b)(VI), and (2)(b)(VII) amended, p. 1014, § 1, effective May 21. **L. 2005:** IP(2)(a) amended and (2)(a)(IV) and (2)(a)(V) added, p. 82, § 1, effective August 8. **L. 2007:** (2)(c) added, p. 48, § 1, effective August 3. **L. 2012:** IP(2)(b)(I) amended, (SB 12-009), ch. 197, p. 792, § 6, effective July 1. **L. 2020:** (1), IP(2)(a), (2)(a)(IV), (2)(a)(V), IP(2)(b), IP(2)(b)(I), (2)(b)(II), (2)(b)(V), (2)(b)(VI), (2)(b)(VII), and (2)(b)(VIII) amended and (2)(a)(III.5), (2)(a)(III.7), (2)(a)(VI), (2)(b)(II.5), and (3) added, (HB 20-1157), ch. 52, p. 179, § 1, effective September 14.

## ▼ Annotations

### Notes

**Editor's note:** Section 2 of chapter 52 (HB 20-1157), Session Laws of Colorado 2020, provides that the act changing this section applies to conduct occurring on or after September 14, 2020.

### Case Notes

#### ANNOTATION

**Law reviews.** For article, "The Effect of Water Law on the Development of Oil Shale", see 58 Den. L.J. 751 . For article, "Water Banking: A New Tool For Water Management", see 23 Colo. Law. 595 (1994). For article, "Private Means to Enhance Public Streams", see 33 Colo. Law. 69 (April 2004).

**The parties who are concerned in the exchange, the lender and the borrower, must each and all be the owners** of rights to the use of water for irrigation. Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 P. 37 (1905).

**If this section had purported to create rights which did not theretofore exist, or if it was to be interpreted** as permitting exchanges or loans of water without reference to the rights of other appropriators, it could not be upheld as a valid legislative enactment. Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 P. 37 (1905).

**This section does not apply to a rotational no-call agreement because such an agreement does not loan a water right;** rather, each party to the agreement diverts pursuant to its own decreed priority with the senior water right holders simply forbearing from asserting their priority. LoPresti v. Brandenburg, 267 P.3d 1211 (Colo. 2011).

**The provisions of this section only permit an exchange or loan of water** under conditions which do not injuriously affect the vested rights of other appropriators. Bowman v. Viridin, 40 Colo. 247, 90 P. 506 (1907).

**Under this section a complaint is fatally defective in an action to restrain defendants from interfering with plaintiff** using water loaned to him by other appropriators, which fails to allege that the water so loaned can and will be used by plaintiff without impairing the vested rights of defendants owning later priorities. Bowman v. Viridin, 40 Colo. 247, 90 P. 506 (1907).

**This section seems to recognize a temporary exchange or loan of water without first obtaining a decree.** Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 P. 37 (1905).

**Such right is subject to the qualification of impairing vested rights.** Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 P. 37 (1905).

COLORADO REVISED STATUTES

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## DEPARTMENT OF NATURAL RESOURCES

### Colorado Water Conservation Board

## RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM

### 2 CCR 408-2

*[Editor's Notes follow the text of the rules at the end of this CCR Document.]*

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#### 1. TITLE.

Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, hereafter referred to as the Instream Flow ("ISF") Program as established in §37-92-102 (3) C.R.S., shall be hereinafter referred to as the "ISF Rules."

#### 2. PURPOSE OF RULES.

The purpose of the ISF Rules is to set forth the procedures to be followed by the Board and Staff when implementing and administering the ISF Program. By this reference, the Board incorporates the Basis and Purpose statement prepared and adopted at the time of rulemaking. A copy of this document is on file at the Board office.

#### 3. STATUTORY AUTHORITY.

The statutory authority for the ISF Rules is found at §37-60-108, C.R.S. and §37-92-102 (3), C.R.S. Nothing in these rules shall be construed as authorizing the Board to deprive the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact.

#### 4. DEFINITIONS.

##### 4a. Agenda Mailing List.

The agenda mailing list consists of all Persons who have sent a notice to the Board Office that they wish to be included on such list. These Persons will be mailed a Board meeting agenda prior to each scheduled Board meeting.

##### 4b. Board.

Means the Colorado Water Conservation Board as defined in §§37-60-101, 103 and 104, C.R.S.

##### 4c. Board Office.

The Colorado Water Conservation Board's office is located at 1313 Sherman Street, 7th Floor, Denver, CO 80203. The phone number is (303) 866-3441. The facsimile number is (303) 866-4474. The Board's website is <http://www.cwcb.state.co.us>.

##### 4d. Contested Hearing Mailing List.

The Contested Hearing Mailing List shall consist of all Persons who have received Party status or Contested Hearing Participant status pursuant to Rules 5l. or 5m. This mailing list is specific to a contested appropriation.

#### **4e. Contested Hearing Participant.**

Any Person who desires to participate in the contested ISF process, but not as a Party, may obtain Contested Hearing Participant status pursuant to Rule 5m. A Person with such status will receive all Party documents. Contested Hearing Participants may comment on their own behalf, but may not submit for the record technical evidence, technical witnesses or legal memoranda.

#### **4f. CWCB Hearing Officer.**

The Hearing Officer is appointed by the Board and is responsible for managing and coordinating proceedings related to contested ISF appropriations, acquisitions or modifications, such as setting prehearing conferences and adjusting deadlines and schedules to further the Parties' settlement efforts or for other good cause shown. The Hearing Officer does not have the authority to rule on substantive issues.

#### **4g. Final Action.**

For purposes of Rule 5, final action means a Board decision to (1) file a water right application, (2) not file a water right application or (3) table action on an ISF appropriation; however, tabling an action shall not be construed as abandonment of its intent to appropriate.

#### **4h. Final Staff ISF Recommendation.**

Staff's ISF recommendation to the Board is based on Staff's data and report, and public comments and data contained in the official record.

#### **4i. ISF.**

Means any water, or water rights appropriated by the Board for preservation of the natural environment to a reasonable degree, or any water, water rights or interests in water acquired by the Board for preservation or improvement of the natural environment to a reasonable degree. "ISF" includes both instream flows between specific points on a stream and natural surface water levels or volumes for natural lakes.

#### **4j. ISF Subscription Mailing List(s).**

The ISF Subscription Mailing List(s) are specific to each water division. The ISF Subscription Mailing List(s) shall consist of all Persons who have subscribed to the list(s) by sending notice(s) to the Board Office that they wish to be included on such list for a particular water division. The Staff shall, at such times as it deems appropriate, mail to all Persons on the water court resume mailing list in each water division an invitation to be included on the ISF Subscription Mailing List for that water division. Persons on the list are responsible for keeping Staff apprised of address changes. Persons on the ISF Subscription Mailing List(s) shall receive agendas and other notices describing activities related to ISF recommendations, appropriations and acquisitions in the particular water division. Persons may be required to pay a fee in order to be on the ISF Subscription Mailing List(s).

#### **4k. Mail.**

For the purposes of the ISF Rules, mail refers to regular or special delivery by the U.S. Postal Service or other such services, electronic delivery (e-mail), or delivery by FAX transmission.

#### **4l. Party.**

Any Person may obtain Party status pursuant to Rule 5l. Only a Person who has obtained Party status may submit, for the record, technical evidence, technical witnesses or legal memoranda. Each Party is responsible for mailing copies of all documents to all other Parties and Contested Hearing Participants.

**4m. Person.**

Means any human being, partnership, association, corporation, special district, water conservancy district, water conservation district, municipal entity, county government, state government or agency thereof, and federal government or agency thereof.

**4n. Proper Notice.**

Means the customary public notice procedure that is provided each year by the Board in the preamble to the Board's January Board meeting agenda. This customary public notice procedure may include posting of the agenda at the Board office, filing legal notices when required, mailing to Persons on the Board mailing lists and posting notices on the Board's website.

**4o. Stacking.**

As used in Rule 6, the terms "stack" or "stacking" refer to an instance in which the Board holds more than one water right for the same lake or reach of stream and exercises the rights independently according to their decrees.

**4p. Staff.**

Means the Director of the Colorado Water Conservation Board ("CWCB Director" ) and other personnel employed by the Board.

**5. ORIGINAL APPROPRIATION PROCEDURE.**

**5a. Recommendation of Streams and Lakes for Protection.**

All Persons interested in recommending certain stream reaches or natural lakes for inclusion in the ISF Program may make recommendations to the Board or Staff at any time. Staff will provide a preliminary response to any Person making such a recommendation within 30 working days after receipt of the recommendation at the Board Office. Staff will collaborate with State and Federal agencies and other interested Persons to plan and coordinate collection of field data necessary for development of ISF recommendations. The Staff shall advise the Board, at least annually, of all new recommendations received and of streams and lakes being studied for inclusion in the ISF Program.

**5b. Method of Making Recommendations.**

All recommendations transmitted to the Board or Staff for water to be retained in streams or lakes to preserve the natural environment to a reasonable degree must be made with specificity and in writing.

**5c. Board Approval Process.**

Periodically, after studying streams and lakes for inclusion in the ISF Program, Staff will recommend that the Board appropriate ISF rights. The Board and Staff will use the following annual schedule for initiating, processing and appropriating ISF water rights:

**January**

- The January Board meeting agenda will list proposed ISF appropriations to be appropriated that year.

- Staff will provide data, engineering and other information supporting each proposed ISF appropriation to the Board prior to or at the January Board meeting.
- Staff will present its information and recommendation for each proposed ISF appropriation at the January Board meeting.
- The Board will take public comment on the proposed ISF appropriations at the January Board meeting.
- The Board may declare its intent to appropriate for each proposed ISF appropriation at the January Board meeting, provided that the particular ISF appropriation has been listed as being under consideration in a notice, mailed at least 60 days prior to the January Board meeting, to the ISF Subscription Mailing List for the relevant water division(s).
- Notice of the Board having declared its intent to appropriate will be distributed through the ISF Subscription Mailing List for the relevant water division(s).

### **March**

- The Board will take public comment on all ISF appropriations at the March Board meeting.
- Notice to Contest an ISF appropriation, pursuant to Rule 5k, must be submitted to the Board Office by March 31st, or the first business day thereafter.

### **April**

- Staff will notify all Persons on the ISF Subscription Mailing List(s) of contested ISF appropriations by April 10th, or the first business day thereafter.
- Notice of Party status or Contested Hearing Participant status, pursuant to Rules 5l. or 5m., must be submitted to the Board Office by April 30th, or the first business day thereafter.

### **May**

- Staff will report to the Board which ISF appropriations are being contested.
- The Board may set hearing dates for contested ISF appropriations.
- At the May Board meeting, the Board may take final action on all uncontested ISF appropriations.

### **July**

- A prehearing conference will be held prior to the July Board meeting for all contested ISF appropriations (Date specific to be determined by the Hearing Officer).
- Five working days before the prehearing conference, all Parties shall file at the Board office, for the record, any and all legal memoranda, engineering data, biological data and reports or other information upon which the Party will rely.

### **August**

- All Parties must submit written rebuttal statements, including testimony and exhibits, by August 15th, or the first business day thereafter. Except for such rebuttal and testimony provided at the hearing pursuant to Rule 5p.(2), the Board will not accept any statements, related documentation or exhibits submitted by any Party after the prehearing conference, except for good cause shown or as agreed upon by the Parties.

### **September**

- Staff will make its final recommendations to the Board, based upon its original report, all public comments, documents submitted by the Parties and all data contained in the official record, at the September Board meeting.
- Notice of the Final Staff ISF Recommendations will be sent to all Persons on the Contested Hearing Mailing List prior to the September Board meeting.
- Parties may choose to continue or withdraw their Notice to Contest an ISF appropriation at or before the September Board Meeting.
- The Board will hold hearings on all contested ISF appropriations.

### **November**

- The Board shall update the public on the results of any hearings through its agenda and may take final action on contested ISF appropriations.

When necessary, the Board may modify or delay this schedule or any part thereof as it deems appropriate.

### **5d. Board's Intent to Appropriate.**

Notice of the Board's potential action to declare its intent to appropriate shall be given in the January Board meeting agenda and the Board will take public comment regarding its intent to appropriate at the January meeting.

- (1) After reviewing Staff's recommendations for proposed ISF appropriations, the Board may declare its intent to appropriate specific ISF water rights. At that time, the Board shall direct the Staff to publicly notice the Board's declaration of its intent to appropriate.
- (2) After the Board declares its intent to appropriate, notice shall be published in a mailing to the ISF Subscription Mailing Lists for the relevant water divisions and shall include:
  - (a) A description of the appropriation (e.g. stream reach, lake location, amounts, etc.);
  - (b) Availability (time and place) for review of Summary Reports and Investigations Files for each appropriation; and,
  - (c) Summary identification of any data, exhibits, testimony or other information in addition to the Summary Reports and Investigations Files supporting the appropriation.
- (3) Published notice shall also contain the following information:
  - (a) The Board may change flow amounts of contested ISF appropriations based on information received during the public notice and comment period.

- (b) Staff will maintain, pursuant to Rule 5e.(3), an ISF Subscription Mailing List for each water division composed of the names of all Persons who have sent notice to the Board Office that they wish to be included on such list for a particular water division. Any Person desiring to be on the ISF Subscription Mailing List(s) must send notice to the Board Office.
  - (c) Any meetings held between Staff and members of the public will be open to the public. Staff may provide Proper Notice prior to any such meetings and may provide notice to Persons on the ISF Subscription Mailing List(s).
  - (d) Any Notice to Contest must be received at the Board office no later than March 31st, or the first business day thereafter. All Notices of Party status and Contested Hearing Participant status must be received at the Board office no later than April 30th, or the first business day thereafter.
  - (e) Staff will announce its Final Staff ISF Recommendation concerning contested appropriations at the September Board meeting and will send notice of the Final Staff ISF Recommendations to all Persons on the Contested Hearing Mailing List.
  - (f) The Board may take final action on any uncontested ISF appropriations at the May Board meeting.
- (4) After the Board declares its intent to appropriate, notice of the Board's action shall be mailed within five working days to the County Commissioners of the county(ies) in which the proposed reach or lake is located.
  - (5) Final action by the Board on ISF appropriations will occur no earlier than the May Board meeting.

**5e. Public Comment.**

- (1) The Board will hear comment on the recommended action to declare its intent to appropriate at the January Board Meeting.
- (2) ISF appropriations will be noticed in the Board agenda for each regularly scheduled subsequent meeting until the Board takes final action. Prior to March 31st, at each regularly scheduled Board meeting, time will be allocated for public comment. Subsequent to March 31st, the Board will accept public comment on any contested ISF appropriations or lake levels only at the hearings held on those appropriations pursuant to Rule 5j.
- (3) Staff will maintain an ISF Subscription Mailing List for each water division. Any Person desiring to receive information concerning proposed ISF appropriations for that water division must contact the Board Office to request inclusion on that ISF Subscription Mailing List.

**5f. Date of Appropriation.**

The Board may select an appropriation date that may be no earlier than the date the Board declares its intent to appropriate. The Board may declare its intent to appropriate when it concludes that it has received sufficient information that reasonably supports the findings required in Rule 5i.

**5g. Notice.**

Agenda and ISF Subscription Mailing List(s) notice shall be given pursuant to Rule 5d. and the public shall be afforded an opportunity to comment pursuant to Rule 5e. Notice of the date of final action on uncontested ISF appropriations shall be mailed to Persons on the ISF Subscription Mailing Lists for the relevant water divisions, maintained pursuant to Rule 5e.(3).

#### **5h. Final Board Action on an ISF Appropriation.**

The Board may take final action on any uncontested ISF appropriation(s) at the May Board meeting or any Board meeting thereafter. If a Notice to Contest has been filed, the Board shall proceed under Rules 5j. - 5q.

#### **5i. Required Findings.**

Before initiating a water right filing to confirm its appropriation, the Board must make the following determinations:

##### **(1) Natural Environment.**

That there is a natural environment that can be preserved to a reasonable degree with the Board's water right if granted.

##### **(2) Water Availability.**

That the natural environment will be preserved to a reasonable degree by the water available for the appropriation to be made.

##### **(3) Material Injury.**

That such environment can exist without material injury to water rights.

These determinations shall be subject to judicial review in the water court application and decree proceedings initiated by the Board, based on the Board's administrative record and utilizing the criteria of §§24-4-106(6) and (7), C.R.S.

#### **5j. Procedural Rules for Contested ISF Appropriations.**

- (1) Whenever an ISF appropriation is contested, the Board shall hold a hearing at which any Party may present evidence, witnesses and arguments for or against the appropriation and any Contested Hearing Participant or member of the public may comment. The hearing shall be a notice and comment hearing as authorized in §37-92-102(4)(a), C.R.S., and shall not be a formal agency adjudication under §24-4-105, C.R.S.
- (2) These rules are intended to assure that information is received by the Board in a timely manner. Where these rules do not address a procedure or issue, the Board shall determine the procedures to be followed on a case-by-case basis. The Board may waive the requirements of these rules whenever the Board determines that strict adherence to the rules is not in the best interests of fairness, unless such waiver would violate applicable statutes. For any such waiver, the Board shall provide appropriate justification, in writing, to Persons who have Party or Contested Hearing Participant status.
- (3) In a hearing on a contested ISF appropriation, a Party may raise only those issues relevant to the statutory determinations required by §37-92-102(3)(c), C.R.S. and the required findings in Rule 5i.

#### **5k. Notice to Contest.**

- (1) To contest an ISF appropriation, a Person must comply with the provisions of this section. The Board must receive a Notice to Contest the ISF appropriation by March 31st, or the first business day thereafter.

- (2) A Notice to Contest an ISF appropriation shall be made in writing and contain the following information:
  - (a) Identification of the Person(s) requesting the hearing;
  - (b) Identification of the ISF appropriation(s) at issue; and,
  - (c) The contested facts and a general description of the data upon which the Person will rely to the extent known at that time.
- (3) After a Party has filed a Notice to Contest an ISF appropriation, any other Person may participate as a Party or a Contested Hearing Participant pursuant to Rules 5l. or 5m.
- (4) Staff will notify all Persons on the relevant ISF Subscription Mailing List(s) of contested ISF appropriations by April 10th, or the first business day thereafter.

#### **5l. Party Status.**

- (1) Party status will be granted to any Person who timely files a Notice of Party Status with the Staff. Any Person filing a Notice to Contest shall be granted Party status and need not also file a Notice of Party Status. A Notice of Party status must be received by April 30th, or the first business day thereafter. A Notice of Party status shall set forth a brief and plain statement of the reasons for obtaining Party status, the contested facts, the matters that the Person claims should be decided and a general description of the data to be presented to the Board. The Board will have discretion to grant or deny Party status to any Person who files a Notice of Party Status after April 30th or the first business day thereafter, for good cause shown.
- (2) Only a Party may submit for the record technical evidence, technical witnesses or file legal memoranda. Each Party is responsible for mailing copies of all documents submitted for Board consideration to all other Parties and Contested Hearing Participants.
- (3) The Staff shall automatically be a Party in all proceedings concerning contested ISF appropriations.
- (4) Where a contested ISF appropriation is based fully or in part on another agency's recommendation pursuant to Rule 5a., that agency shall automatically be a Party in any proceeding.
- (5) All Parties, whether they achieved such status by filing a Notice to Contest or a Notice of Party Status, shall be afforded the same rights in the contested ISF appropriation proceedings. Specifically, but without limiting the generality of the foregoing sentence, any Person who filed a Notice of Party Status is entitled to raise issues not raised by any Person who filed a Notice to Contest.

#### **5m. Contested Hearing Participant Status.**

- (1) Any Person who desires to participate in the process, but not as a Party, may obtain Contested Hearing Participant status by filing a notice thereof at the Board Office prior to April 30th. A Person with such status will receive all Party documents specific to the contested appropriation. Contested Hearing Participants may comment on their own behalf, but may not submit for the record technical evidence, technical witnesses or legal memoranda. The Board will have discretion to grant or deny Contested Hearing Participant status to any Person who filed a Notice of Contested Hearing Participant Status after April 30th or the first business day thereafter, for good cause shown.
- (2) The request for Contested Hearing Participant status must be received by April 30th, or the first business day thereafter.

- (3) Staff shall notify all Parties and Contested Hearing Participants of the list of Contested Hearing Participants prior to May 31st. Thereafter, Parties shall also mail their prehearing statements and any other documents to Contested Hearing Participants.

#### **5n. Prehearing Conference.**

- (1) The Board will designate a Hearing Officer, who shall schedule and preside over prehearing conferences and assist the Parties with procedural matters, such as setting prehearing conferences and adjusting deadlines and schedules to further the Parties' settlement efforts or for other good cause shown. All prehearing conferences will be scheduled and held prior to the July Board meeting.
- (2) On or before five working days before the prehearing conference, each Party shall file 25 copies of its prehearing statement with the Board, and provide an electronic version when possible. The prehearing statement shall identify all exhibits, engineering data, biological data and reports or other information that the Party will rely upon at the hearing and shall contain:
  - (a) A specific statement of the factual and legal claims asserted (issues to be resolved) and the legal basis upon which the Party will rely;
  - (b) Copies of all exhibits to be introduced at the hearing;
  - (c) A list of witnesses to be called and a brief description of their testimony;
  - (d) Any alternative proposal to the proposed ISF appropriation;
  - (e) All written testimony to be offered into evidence at the hearing;and
  - (f) Any legal memoranda.

Each Party shall deliver a copy of its prehearing statement to all other Parties, Contested Hearing Participants, the Hearing Officer and directly to the Assistant Attorneys General representing Staff and the Board five working days before the prehearing conference. The Board will not consider information, other than rebuttal statements and testimony provided at the hearing pursuant to Rule 5p.(2), submitted by the Parties after this deadline except for good cause shown or as agreed upon by the Parties.

- (3) Any Contested Hearing Participant may also submit written comments 5 working days prior to the prehearing conference. Contested Hearing Participants who submit written comments for the Board's consideration shall provide 25 copies to the Board, and a copy to all other Contested Hearing Participants, Parties, the Hearing Officer and the Assistant Attorneys General representing Staff and Board, and provide an electronic version when possible.
- (4) The prehearing conference will afford the Parties the opportunity to address such issues as time available for each Party at the hearing, avoiding presentation of duplicative information, consolidation of concerns, etc. The Parties may formulate stipulations respecting the issues to be raised, witnesses and exhibits to be presented, and/or any other matters which may be agreed to or admitted by the Parties. At the prehearing conference, the Parties shall make known any objections to the procedures or evidence that they may raise at the hearing unless such objections could not have been reasonably determined at that time.
- (5) August 15th, or the first business day thereafter, is the last day for submission of written rebuttal statements, including testimony, legal memoranda, and exhibits. Twenty-five copies of such

materials must be provided to the Board, and an electronic version also provided, when possible. Except for such rebuttal and testimony provided at the hearing pursuant to Rule 5p.(2), the Board will not accept any statements, related documentation or exhibits submitted by any Party after the deadline set forth in Rules 5n.(2) and 5n.(3), except for good cause shown or as agreed upon by the Parties. The scope of rebuttal is limited to issues and evidence presented in the prehearing statements. Any documentation to be submitted pursuant to this subsection (5) shall be delivered to the Board and mailed to all Parties and Contested Hearing Participants by August 15th, or the first business day thereafter, unless the Parties agree otherwise.

#### **5o. Notice of Hearings on Contested ISF Appropriations.**

- (1) Staff shall mail notice of prehearing conference(s) on contested ISF appropriations to all Persons on the Contested Hearing Mailing List for the particular ISF appropriation. The notice shall specify the time and place of the prehearing conference and any procedural requirements that the Board deems appropriate.
- (2) The Board may postpone a hearing to another date by issuing written notice of the postponement no later than 7 calendar days prior to the original hearing date.

#### **5p. Conduct of Hearings.**

- (1) In conducting any hearing, the Board shall have authority to: administer oaths and affirmations; regulate the course of the hearing; set the time and place for continued hearing; limit the number of technical witnesses; issue appropriate orders controlling the subsequent course of the proceedings; and take any other action authorized by these Rules.
- (2) At the hearing, the Board shall hear arguments, concerns or rebuttals from Parties, Contested Hearing Participants and interested members of the public. The Board may limit testimony at the hearing. Without good cause, the Board will not permit Parties or Contested Hearing Participants to introduce written material at the hearing not previously submitted pursuant to these Rules. The Board, in making its determinations, need not consider any written material not timely presented.
- (3) Only the Board may question witnesses at the hearing except where the Board determines that, for good cause shown, allowing the parties to question witnesses may materially aid the Board in reaching its decision, or where such questioning by the Parties relates to the statutory findings required by §37-92-102(3)(c), C.R.S. The Board may terminate questioning where the Board determines that such questioning is irrelevant or redundant or may terminate such questioning for other good cause.
- (4) The hearing shall be recorded by a reporter or by an electronic recording device. Any Party requesting a transcription of the hearing shall be responsible for the cost of the transcription.

#### **5q. Final Board Action.**

The Board may take final action at the hearing or at a later date.

#### **5r. Statement of Opposition.**

In the event that any Person files a Statement of Opposition to an ISF water right application in Water Court, the Staff may agree to terms and conditions that would prevent injury. Where the resolution of the Statement of Opposition does not involve a change regarding the Board's determinations under Rule 5i. (including but not limited to the amount, reach, and season), the Board is not required to review and ratify the resolution. Staff may authorize its counsel to sign any court documents necessary to finalize this type of pretrial resolution without Board ratification.

### **5s. Withdrawal of Filing.**

If the Board elects to withdraw a Water Court filing, notice shall be given in the agenda of the Board meeting at which the action is expected to occur.

## **6. ACQUISITION OF WATER, WATER RIGHTS OR INTERESTS IN WATER FOR INSTREAM FLOW PURPOSES.**

The Board may acquire water, water rights, or interests in water for ISF purposes by the following procedures:

### **6a. Means of Acquisition.**

The Board may acquire, by grant, purchase, donation, bequest, devise, lease, exchange, or other contractual agreement, from or with any Person, including any governmental entity, such water, water rights, or interests in water that are not on the Division Engineer's abandonment list in such amounts as the Board determines are appropriate for stream flows or for natural surface water levels or volumes for natural lakes to preserve or improve the natural environment to a reasonable degree.

### **6b. 120 Day Rule.**

At the request of any Person, including any governmental entity, the Board shall determine in a timely manner, not to exceed one hundred twenty days, unless further time is granted by the requesting Person, what terms and conditions the Board will accept in a contract or agreement for the acquisition. The 120-day period begins on the day the Board first considers the proposed contract or agreement at a regularly scheduled or special Board meeting.

### **6c. Stacking Evaluation.**

The Board shall evaluate whether to combine or stack the acquired water right with any other ISF appropriation or acquisition, based upon the extent to which the acquired water will provide flows or lake levels to preserve or improve the natural environment to a reasonable degree.

If the Board elects to combine or stack the acquired water right, the details of how the water rights are to be combined or stacked with other existing ISF appropriations or acquisitions must be set forth in the application for a decree to use the acquired right for instream flow purposes.

### **6d. Enforcement of Acquisition Agreement.**

Pursuant to section 37-92-102(3), C.R.S., any contract or agreement executed between the Board and any Person which provides water, water rights, or interests in water to the Board shall be enforceable by either party thereto as a water matter in the water court having jurisdiction over the water right according to the terms of the contract or agreement.

### **6e. Appropriateness of an Acquisition.**

The Board shall evaluate the appropriateness of any acquisition of water, water rights, or interests in water to preserve or improve the natural environment. Such evaluation shall include, but need not be limited to consideration of the following factors:

- (1) The reach of stream or lake level for which the use of the acquired water is proposed, which may be based upon any one or a combination of the following: the historical location of return flow; the length of the existing instream flow reach, where applicable; whether an existing instream flow water right relies on return flows from the water right proposed for acquisition; the environment to

be preserved or improved by the proposed acquisition; or such other factors the Board may identify;

- (2) The natural flow regime;
- (3) Any potential material injury to existing decreed water rights;
- (4) The historical consumptive use and historical return flows of the water right proposed for acquisition that may be available for instream flow use;
- (5) The natural environment that may be preserved or improved by the proposed acquisition, and whether the natural environment will be preserved or improved to a reasonable degree by the water available from the proposed acquisition;
- (6) The location of other water rights on the subject stream(s);
- (7) The effect of the proposed acquisition on any relevant interstate compact issue, including whether the acquisition would assist in meeting or result in the delivery of more water than required under compact obligations;
- (8) The effect of the proposed acquisition on the maximum utilization of the waters of the state;
- (9) Whether the water acquired will be available for subsequent use or reuse downstream;
- (10) The cost to complete the transaction or any other associated costs; and
- (11) The administrability of the acquired water right when used for instream flow purposes.

The Board shall determine how to best utilize the acquired water, water rights or interest in water to preserve or improve the natural environment.

#### **6f. Factors Related to Loans and Leases.**

In addition to considering the factors listed above, for loans and leases of water, water rights and interests in water for ISF purposes under section 37-92-102(3),

- (1) The Board shall consider the extent to which the leased or loaned water will preserve or improve the natural environment to a reasonable degree, including but not limited to:
  - (a) Whether the amount of water available for acquisition is needed to provide flows to meet a decreed ISF amount in below average years; and
  - (b) Whether the amount of water available for acquisition could be used to and would improve the natural environment to a reasonable degree, either alone or in combination with existing decreed ISF water rights.
- (2) In considering the extent to which the leased or loaned water will preserve or improve the natural environment to a reasonable degree, the Board will request and review a biological analysis from the Colorado Division of Wildlife, and will review any other biological or scientific evidence presented to the Board.
- (3) If other sources of water are available for acquisition on the subject stream reach(es) by purchase or donation, the Board shall fully consider each proposed acquisition and give preference first to the donation and then to a reasonable acquisition by purchase.

- (4) The Board shall obtain confirmation from the Division Engineer that the proposed lease or loan is administrable and is capable of meeting all applicable statutory requirements.
- (5) The Board shall determine, through negotiation and discussion with the lessor, the amount of compensation to be paid to the lessor of the water based, in part, upon the anticipated use of the water during and after the term of the lease.
- (6) The Board shall consider evidence of water availability based upon the historical record(s) of diversion, the beneficial use of the subject water right, the location and timing of where return flows have historically returned to the stream, and the reason(s) the water is available for lease or loan.

#### **6g. Recording Requirements.**

- (1) All contracts or agreements for leases or loans of water, water rights or interests in water under section 37-92-102(3) shall require the Board to:
  - (a) Maintain records of how much water the Board uses under the contract or agreement each year it is in effect; and
  - (b) Install any measuring device(s) deemed necessary by the Division Engineer (1) to administer the lease or loan of water, (2) to measure and record how much water flows out of the reach after use by the Board under the lease or loan; and (3) to meet any other applicable statutory requirements.
- (2) All contracts or agreements for leases or loans of water shall provide for the recording of the actual amount of water legally available and capable of being diverted under the leased or loaned water right during the term of the lease or loan, with such records provided to the Division of Water Resources for review and publication.

#### **6h. Water Reuse.**

All contracts or agreements for the acquisition of water, water rights or interests in water under section 37-92-102(3) shall provide that the Board or the seller, lessor, lender or donor of the water may bring about beneficial use of the historical consumptive use of the acquired water right downstream of the ISF reach as fully consumable reusable water, pursuant to the water court decree authorizing the Board to use the acquired water.

- (1) The bringing about of beneficial use of the historical consumptive use of the water may be achieved by direct use, sale, lease, loan or other contractual arrangement by the Board or the seller, lessor, lender or donor.
- (2) The contract or agreement also shall provide that the Division Engineer must be notified of any agreement for such beneficial use downstream of the ISF reach prior to the use.
- (3) Prior to any beneficial use by the Board of the historical consumptive use of the acquired water right downstream of the ISF reach, the Board shall find that such use:
  - (a) Will be consistent with the Board's statutory authority and with duly adopted Board policies and objectives; and
  - (b) Will not injure vested water rights or decreed conditional water rights.

#### **6i. Applications for a Decreed Right to Use Water for ISF Purposes.**

The Board shall file a change of water right application or other applications as needed or required with the water court to obtain a decreed right to use water for ISF purposes under all contracts or agreements for acquisitions of water, water rights or interests in water under section 37-92-102(3), including leases and loans of water. The Board shall file a joint application with the Person from whom the Board has acquired the water or a Person who has facilitated the acquisition, if requested by such Person. The Water Court shall determine matters that are within the scope of section 37-92-305, C.R.S. In a change of water right proceeding, the Board shall request the Water Court to:

- (1) Verify the quantification of the historical consumptive use of the acquired water right;
- (2) Verify the identification, quantification and location of return flows to ensure that no injury will result to vested water rights and decreed conditional water rights;
- (3) Include terms and conditions providing that:
  - (a) The Board or the seller, lessor, lender, or donor of the water may bring about the beneficial use of the historical consumptive use of the changed water right downstream of the ISF reach as fully consumable reusable water, subject to such terms and conditions as the water court deems necessary to prevent injury to vested water rights and decreed conditional water rights; and
  - (b) When the Board has not identified such downstream beneficial use at the time of the change of water right, the Board may amend the subject change decree, if required by the Division Engineer, to add such beneficial use(s) of the historical consumptive use downstream of the ISF reach at the time the Board is able to bring about such use or reuse, without requiring requantification of the original historical consumptive use calculation;and
- (4) Decree the method by which the historical consumptive use should be quantified and credited during the term of the agreement for the lease or loan of the water right pursuant to section 37-92-102(3), C.R.S.

#### **6j. Limitation on Acquisitions.**

The Board may not accept a donation of water rights that were acquired by condemnation, or that would require the removal of existing infrastructure without approval of the current owner of such infrastructure.

#### **6k. Temporary Loans of Water to the Board.**

The Board may accept temporary loans of water for instream flow use for a period not to exceed 120 days in any one year, in accordance with the procedures and subject to the limitations set forth in section 37-83-105, C.R.S.

- (1) Within 5 working days after receiving an offer of a temporary loan of water to the Board for temporary instream flow use, the Director will provide a response to the proponent and, unless the proposed loan has no potential value for instream flow use, staff will coordinate with the proponent on preparing and submitting the necessary documentation to the State and Division Engineers required by sections 37-83-105(2)(a)(I) and (2)(b)(I), C.R.S., and providing the public notice required by section 37-83-105(2)(b)(II), C.R.S.
- (2) Provided that the State Engineer has made a determination of no injury pursuant to section 37-83-105(2)(a)(III), C.R.S., the Board hereby delegates authority to the CWCB Director to accept temporary loans of water for instream flow use in accordance with the procedures and subject to

the limitations set forth in section 37-83-105 and to take any administrative action necessary to put the loaned water to instream flow use.

- (3) Provided that the State Engineer's determination of non-injury is still in effect, the Director shall notify the proponent and the State Engineer whether the temporary loan is to be exercised in subsequent years. Such notification shall be provided within 5 working days of the Director being notified by the proponent that the water is available for use under the temporary loan. The CWCB's use of loaned water for instream flows shall not exceed the CWCB's decreed instream flow amount or extend beyond the CWCB's decreed instream flow reach at any time during the loan term, and shall comply with any terms and conditions imposed by the State Engineer to prevent injury. The purpose of this delegation is to expedite use of temporarily loaned water for instream flows by the Board.
- (4) At the first regular or special Board meeting after the Director accepts or rejects an offer of a loan of water to the Board for temporary instream flow use under (1) or (2) above, the Board shall vote either to ratify or overturn the Director's decision.
- (5) The Board, Director and staff will expedite all actions necessary to implement Rule 6k.

#### **6l. Funds for Water Right Acquisitions.**

The Board may use any funds available to it for costs of the acquisition of water rights and their conversion to ISF use. The Board shall spend available funds for such costs in accordance with section 37-60-123.7, C.R.S. and any other applicable statutory authority, and with applicable Board policies and procedures.

#### **6m. Public Input on Proposed Acquisitions.**

The Board shall follow the public review process in Rules 11a. - 11c. when acquiring water, water rights or interests in water, except for temporary loans or leases as provided in Rule 6k. above and except as provided below.

- (1) Prior to Board consideration of any proposed acquisition, Staff shall mail notice of the proposed acquisition to all Persons on the ISF Subscription Mailing List and the State Engineer's Substitute Supply Plan Notification List for the relevant water division, and shall provide Proper Notice. Such notice shall include:
  - (a) The case number adjudicating the water right proposed to be acquired, and the appropriation date, adjudication date, priority, decreed use(s), and flow amount of the water right proposed to be acquired, and approximately how much of the water right the Board will consider acquiring;
  - (b) The location of the stream reach or lake that is the subject of the proposal, including, when available, the specific length of stream reach to benefit from the proposed acquisition;
  - (c) Any available information on the purpose of the acquisition, including the degree of preservation or improvement of the natural environment to be achieved;
  - (d) Any available scientific data specifically supporting the position that the acquisition will achieve the goal of preserving or improving the natural environment to a reasonable degree; and
  - (e) In addition to (a) - (d) above, for leases and loans of water, water rights or interests in water under section 37-92-102(3), such notice shall include the proposed term of the lease or loan and the proposed season of use of the water under the lease or loan.

- (2) At every regularly scheduled Board meeting subsequent to the mailing of notice, and prior to final Board action, Staff will report on the status of the proposed acquisition and time will be reserved for public comment.
- (3) Any Person may address the Board regarding the proposed acquisition prior to final Board action. Staff shall provide any written comments it receives regarding the proposed acquisition directly to the Board.
- (4) Any Person may request the Board to hold a hearing on a proposed acquisition. Such a request must be submitted to the Board in writing within twenty days after the first Board meeting at which the Board considers the proposed acquisition, and must include a brief statement, with as much specificity as possible, of why a hearing is being requested.
- (5) At its next regularly scheduled meeting after receipt of the request for a hearing, or at a special meeting, the Board will consider the request and may, in its sole discretion, grant or deny such a request. All hearings scheduled by the Board shall be governed by the following procedures:
  - (a) A hearing on a proposed acquisition must be held within the 120 day period allowed for Board consideration of an acquisition pursuant to Rule 6b., unless the Person requesting the Board to consider the proposed acquisition agrees to an extension of time.
  - (b) The Board shall appoint a Hearing Officer to establish the procedures by which evidence will be offered.
  - (c) At least thirty days prior to the hearing date(s), the Board shall provide written notice of the hearing(s) to the Person proposing the acquisition, all interested parties known to the Board, and all Persons on the ISF Subscription Mailing List and the State Engineer's Substitute Supply Plan Notification List for the relevant water division. The Board also shall provide Proper Notice, as defined in ISF Rule 4n.
  - (d) Any Person who desires party status shall become a Party upon submission of a written Notice of Party Status to the Board Office. The Notice shall include the name and mailing address of the Person and a brief statement of the reasons the Person desires party status. The Board Office must receive Notice of Party Status within seven days after notice of the hearing is issued.
  - (e) The Hearing Officer shall set timelines and deadlines for all written submissions. Prehearing statements will be required, and shall include, but not be limited to, the following: 1) a list of all disputed factual and legal issues; 2) the position of the Party regarding the factual and legal issues; 3) a list identifying all of the witnesses that will testify for the Party, and a summary of the testimony that those witnesses will provide; and 4) copies of all exhibits that the Party will introduce at the hearing(s).
  - (f) Any Party may present testimony or offer evidence identified in its prehearing statement regarding the proposed acquisition.
  - (g) The Hearing Officer shall determine the order of testimony for the hearing(s), and shall decide other procedural matters related to the hearing(s). The Hearing Officer does not have authority to rule on substantive issues, which authority rests solely with the Board.
  - (h) The Board will not apply the Colorado Rules of Evidence at hearings on proposed acquisitions.
  - (i) The Board may permit general comments from any Person who is not a Party; however, the Board may limit these public comments to five minutes per Person.

- (j) The Board may take final action at the hearing(s) or continue the hearing and/or deliberations to a date certain.
- (k) Board hearings may be recorded by a reporter or by an electronic recording device. Any Party requesting a transcription of the hearing(s) shall be responsible for the cost of the transcription.
- (l) When necessary, the Board may modify this hearing procedure schedule or any part thereof as it deems appropriate.

#### **6n. Board Action to Acquire Water, Water Rights or Interests in Water.**

The Board shall consider the acquisition during any regular or special meeting of the Board. At the Board meeting, the Board shall consider all presentations or comments of Staff or any other Person. After such consideration, the Board may acquire, acquire with limitations, or reject the proposed acquisition.

#### **7. INUNDATION OF ISF RIGHTS.**

Inundation of all or a portion of an ISF stream reach or lake may be an interference with the Board's usufructuary rights that have been acquired by Board action. "Inundation" as used in this section is the artificial impoundment of water within an ISF or natural lake; "inundation" does not refer to the use of a natural stream as a conveyance channel as long as such use does not raise the waters of the stream above the ordinary high watermark as defined in §37-87-102 (1)(e), C.R.S.

#### **7a. Small Inundations.**

Staff may file a Statement of Opposition to inundations described in this section if it determines that the ISF right or natural environment will be adversely affected by the inundation. The Staff shall not be required to file a Statement of Opposition to applications proposing small inundations. Small inundations are those in which the impoundment is 100 acre-feet or less, or the surface acreage of the impoundment is 20 acres or less, or the dam height of the structure is 10 feet or less. The dam height shall be measured vertically from the elevation of the lowest point of the natural surface of the ground, where that point occurs along the longitudinal centerline of the dam up to the flowline crest of the spillway of the dam.

- (1) All structures proposed by any applicant on a stream reach shall be accumulated for the purpose of determining whether the inundations proposed by the applicant are small inundations. In the event the cumulative surface acreage, volume impounded, or dam height of all impoundments exceed the definition of a small inundation, Staff may file a Statement of Opposition to that application.
- (2) In the event that no Statement of Opposition is filed pursuant to the terms of this section, the Board shall be deemed to have approved the inundation proposed without a request by the applicant.

#### **7b. Application of Rule 7.**

The provisions of this rule will not be applied to the following water rights:

- (1) any absolute or conditional water right that is senior to an ISF right;
- (2) any senior conditional water right that seeks a finding of reasonable diligence;
- (3) any junior absolute or conditional water right which was decreed prior to July 10, 1990, or had an application for decree pending prior to July 10, 1990, unless the Board had filed a Statement of Opposition to the absolute or conditional water right application prior to July 10, 1990; or

- (4) any inundation of an ISF reach by water that does not have an absolute or conditional water right if the inundation occurred prior to July 10, 1990.

**7c. Request to Inundate.**

Any Person seeking permission to inundate shall timely submit a written request for permission to inundate to the Board Office. No requests for inundation will be considered or approved until the Person seeking permission to inundate files a water court application outlining their storage plans or files plans and specifications with the State Engineer for a jurisdictional dam pursuant to §37-87-105, C.R.S. The Board will consider the request to inundate in a timely manner.

**7d. Staff Investigation.**

After receiving the request to inundate, the Staff may seek the recommendations from the Division of Wildlife, Division of Parks and Outdoor Recreation, Division of Water Resources, United States Department of Agriculture and United States Department of Interior.

**7e. Required Information.**

In any written request to inundate, the requesting Person shall at a minimum include information on the following factors: the location of the inundation, the size of the inundation, impact of the inundation on the natural environment, any unique or rare characteristics of the ISF water right to be inundated, any regulatory requirements or conditions imposed upon the applicant by federal, state and/or local governments, all terms and conditions included in applicant's water court decree, and any compensation or mitigation offered by the Person proposing the inundation.

**7f. Determination of Interference.**

In response to the request to inundate, the Board shall determine whether the proposed inundation interferes with an ISF right. When making this determination, the Board shall consider, without limitation, the extent of inundation proposed and the impact of the proposed inundation on the natural environment existing prior to the inundation.

**7g. Consideration of Request to Inundate.**

If the Board determines that a proposed inundation interferes with an ISF right, the Board may then approve, approve with conditions, defer, or deny the request to inundate. In making this decision, the Board shall consider all relevant factors, including, but not limited to (1) the extent of inundation proposed; (2) the impact of the proposed inundation on the natural environment existing prior to the inundation; (3) the degree to which the beds and banks adjacent to the ISF right subject to the inundation are publicly or privately owned; (4) the economic benefits arising from the inundation; (5) the benefits to recreation and downstream ISF segments arising from the inundation; (6) the degree to which the proposed inundation will allow development of Colorado's allotment of interstate waters as determined by compact or adjudication; and, (7) any mitigation or compensation offered to offset adverse impacts on the ISF right. After considering all relevant factors, the Board shall take one of the actions set forth in Rules 7h. - 7k. below.

**7h. Approval.**

If the Board approves the request to inundate, any Statement of Opposition filed by the Board shall be withdrawn.

**7i. Conditional Approval.**

The Board may require certain conditions to be performed prior to approval. Failure to perform any condition will be a reason for denial.

#### **7j. Deferral.**

When it appears that other governmental agencies may impose terms and conditions upon the issuance of a permit to construct a facility which will cause an inundation, the Board may defer consideration of the request to inundate until all other governmental bodies have finalized the permit or approval conditions.

#### **7k. Denial of Request to Inundate.**

Requests for permission to inundate may be denied if in the discretion of the Board the request is inconsistent with the goals of the ISF Program. The Board may decide to deny a request for permission to inundate if it finds:

- (1) No compensation or mitigation would be adequate for the injury caused by the inundation; or
- (2) No compensation or mitigation acceptable to the Board has been proposed by applicant; or
- (3) The proposed inundation is inconsistent with the goals of the ISF Program.

#### **7l. Remedies.**

The Board may seek any administrative, legal or equitable remedy through state courts (including water courts), federal courts, city, county, state or federal administrative proceedings to resolve actual or proposed inundation of its ISF rights.

#### **7m. Board Has Sole Right to Protect ISF Rights from Interference.**

Only the Board may seek to prevent interference with an ISF right by inundation and only the Board may seek compensation or mitigation for such interference.

#### **7n. Public Review Process.**

The Board shall follow the public review process in Rules 11a. - 11c. prior to any Board decision on a request to inundate an ISF right.

### **8. PROTECTION OF ISF APPROPRIATIONS.**

The Board delegates the day-to-day management and administration of the ISF Program to Staff. Staff shall seek ratification of its decisions as set forth in Rules 8c., 8e.(2), 8i., and 8j.

#### **8a. Resume Review.**

Staff shall review the monthly resumes of all water divisions. The Staff shall evaluate each resume entry for the possibility of injury or interference to an ISF right.

#### **8b. Statement of Opposition.**

In the event Staff identifies a water right application in the resume that may injure an ISF right, Staff shall file a Statement of Opposition to that application. In the event Staff identifies a water right application in the resume that may interfere with an ISF right as contemplated in Rule 7, Staff may file a Statement of Opposition to that application.

#### **8c. Ratification of Statements of Opposition.**

At a Board meeting following the filing of the Statement of Opposition, Staff shall apprise the Board of the filing of a Statement of Opposition and the factual basis for the Staff action. At that time, the Board shall ratify the filing, disapprove the filing, or table the decision to a future meeting if more information is needed prior to making a decision.

**8d. Notice.**

Prior to ratification of a Statement of Opposition, the Staff shall mail the applicant a copy of the Board memorandum concerning the ratification and a copy of the agenda of the meeting in which the ratification will be considered. Following a Board action considering a Statement of Opposition, the Staff shall notify the applicant and/or its attorney in writing of the Board's action.

**8e. De Minimis Rule.**

In the event that Staff determines a water court application would result in a 1 percent depletive effect or less on the stream reach or lake subject of the ISF right, and the stream reach or lake has not been excluded from this rule pursuant to Rules 8f. or 8h., Staff shall determine whether to file a Statement of Opposition. Staff's decision not to file a Statement of Opposition does not constitute: (1) acceptance by the Board of injury to any potentially affected ISF water right; or (2) a waiver of the Board's right to place an administrative call for any ISF water right.

- (1) If Staff does not file a Statement of Opposition, Staff shall notify the Division Engineer for the relevant water division that it has not filed a Statement of Opposition, but that it may place an administrative call for the potentially affected ISF water right(s). Such a call could be enforced against the water right(s) subject of the application by the Division Engineer in his or her enforcement discretion. Staff also shall mail a letter to the applicant at the address provided on the application notifying the applicant: (a) of Staff's decision not to file a Statement of Opposition pursuant to this Rule; (b) that the CWCB may place a call for its ISF water rights to be administered within the prior appropriation system; and (c) that the Division Engineer's enforcement of the call could result in curtailment or other administration of the subject water right(s).
- (2) If Staff files a Statement of Opposition, Staff shall seek Board ratification by identifying and summarizing the Statement of Opposition on the Board meeting consent agenda pursuant to Rule 8c.

**8f. Cumulative Impact.**

In determining existence of a de minimis impact, Staff shall consider the existence of all previous de minimis impacts on the same stream reach or lake. If the combined total of all such impacts exceeds 1 percent, then Staff will file a Statement of Opposition regardless of the individual depletive effect of an application.

**8g. Notification of Staff Action.**

At a Board meeting following a Staff determination to apply the De Minimis rule, the Staff shall notify the Board about the factual basis leading to its application of the De Minimis rule.

**8h. Exclusion from De Minimis Rule.**

The Board may at any time exclude any stream reach or lake, or any portion thereof, from application of the De Minimis rule.

**8i. Pretrial Resolution.**

Staff may negotiate a pretrial resolution of any injury or interference issue that is the subject of a Statement of Opposition. The Board shall review the pretrial resolution pursuant to the following procedures:

**(1) No Injury.**

In the event the pretrial resolution includes terms and conditions preventing injury or interference and does not involve a modification, or acceptance of injury or interference with mitigation, the Board is not required to review and ratify the pretrial resolution. Staff may authorize its counsel to sign any court documents necessary to finalize this type of pretrial resolution without Board ratification.

**(2) No Injury/Modification.**

In the event the pretrial resolution addresses injury or interference through modification of the existing ISF decree, the process set forth in Rule 9 shall be followed prior to any Board decision to ratify the pretrial resolution.

**(3) Injury Accepted with Mitigation.**

In the event a proposed pretrial resolution will allow injury to or interference with an ISF or natural lake level (NLL) water right, but mitigation offered by the applicant could enable the Board to accept the injury or interference while continuing to preserve or improve the natural environment to a reasonable degree, and if the proposed pretrial resolution does not include a modification under ISF Rule 9, the Board shall:

- (a) Conduct a preliminary review of the proposed pretrial resolution during any regular or special meeting to determine whether the natural environment could be preserved or improved to a reasonable degree with the proposed injury or interference if applicant provided mitigation; and
- (b) At a later regular or special meeting, take final action to ratify, refuse to ratify or ratify with additional conditions.
- (c) No proposed pretrial resolution considered pursuant to this Rule 8i.(3) may receive preliminary review and final ratification at the same Board meeting.
- (d) The Board shall not enter into any stipulation or agree to any decretal terms and conditions under this Rule that would result in the Division of Water Resources being unable to administer the affected ISF or NLL water right(s) in accordance with the priority system or with Colorado water law.
- (e) To initiate CWCB staff review of an Injury with Mitigation proposal, the proponent must provide the following information in writing:
  - i. Location of injury to ISF or NLL water right(s) (stream(s) or lake(s) affected, and length of affected reach(es));
  - ii. Quantification of injury (amount, timing and frequency);
  - iii. Type of water use that would cause the injury;
  - iv. Analysis showing why full ISF or NLL protection is not possible;
  - v. Detailed description of the proposed mitigation, including all measures taken to reduce or minimize the injury;

- vi. Detailed description of how the proposed mitigation will enable the Board to continue to preserve or improve the natural environment of the affected stream of lake to a reasonable degree despite the injury;
  - vii. Identification and feasibility analysis of: (1) all water supply alternatives considered by the proponent in the context of this proposal; (2) all alternatives evaluated by the proponent to fully protect the potentially affected ISF or NLL water right, but rejected as infeasible; and (3) all alternatives evaluated by the proponent and designed to mitigate the injury to or interference with the affected ISF or NLL water right. This information shall address the environmental and economic benefits and consequences of each alternative; and
  - viii. A discussion of the reasonableness of each alternative considered.
- (f) After receipt and review of the required information, staff will consult with the DOW and with the entity that originally recommended the affected ISF or NLL water rights(s) (if other than DOW) to determine whether additional field work is necessary and to identify any scheduling concerns. Staff will request a recommendation from the DOW as to whether the proposed mitigation will enable the Board to continue to preserve or improve the natural environment of the affected stream or lake to a reasonable degree despite the injury, including a discussion of the reasonableness of the alternatives considered. CWCB staff will use best efforts to consult with affected land owners and managers regarding the proposal.
  - (g) Prior to bringing the proposal to the Board for preliminary consideration, staff will consult with the Division of Water Resources on whether the proposal would result in the Division of Water Resources being unable to administer the affected ISF or NLL water right(s) in accordance with the priority system or with Colorado water law.
  - (h) At the first meeting of the two-meeting process required by this Rule, staff will bring the proposal to the Board for preliminary consideration after completing its review of the proposal and its consultation with DOW. Staff will work with the proponent and interested parties to address any preliminary concerns prior to bringing a proposal to the Board. Preliminary consideration by the Board may result in requests for more information or for changes to the proposal. Staff will work with the proponent and interested parties to finalize the proposal and bring it back to the Board for final action at a subsequent Board meeting.
  - (i) The Board will consider the following factors when evaluating Injury with Mitigation proposals. Because Injury with Mitigation proposals may involve unique factual situations, the Board may consider additional factors in specific cases. Further, evaluation of each Injury with Mitigation proposal will require the exercise of professional judgment regarding the specific facts of the proposal.
    - i. Extent of the proposed injury:
      1. Location of injury – affected stream(s) or lake and length of affected reach(es);
      2. Amount, timing and frequency of shortage(s) or impacts to the affected ISF or NLL water right(s); and
      3. Potential impact to the natural environment of the affected stream reach(es) or lake from the proposed injury.

- ii. Benefits of the mitigation to the natural environment:
  - 1. The nature and extent of the benefits the mitigation will provide to the existing natural environment of the affected stream or lake;
  - 2. The scientific justification for accepting the mitigation; and
  - 3. Whether the mitigation will enable the Board to continue to preserve or improve the natural environment of the subject stream or lake to a reasonable degree.
  
- (j) Evaluation of proposed alternatives. The Board shall evaluate: (1) all water supply alternatives considered by the proponent in the context of this proposal; (2) all alternatives evaluated by the proponent to fully protect the potentially affected ISF or NLL water right, but rejected as infeasible; and (3) all alternatives evaluated by the proponent and designed to mitigate the injury to or interference with the affected ISF or NLL water right. In its evaluation, the Board shall consider the following factors:
  - i. Availability of on-site mitigation alternatives;
  - ii. Technical feasibility of each alternative;
  - iii. Environmental benefits and consequences of each alternative;
  - iv. Economic benefits and consequences of each alternative;
  - v. Reasonableness of alternatives;
  - vi. Administrability of proposed alternatives by the Board and the Division Engineer; and
  - vi. For mitigation alternatives, whether the mitigation was or will be put in place to satisfy a requirement or need unrelated to the Injury with Mitigation proposal.
  
- (k) The Board will consider mitigation on a different reach of stream or another stream (“off-site mitigation” ) as a last resort and will only consider mitigation in an area other than the affected stream reach if no reasonable alternative exists for mitigation on the affected stream reach. The Board only will consider off-site mitigation on stream(s) located in the same drainage as the affected stream. Factors that the Board may consider in looking at such a proposal include, but are not limited to, the degree and frequency of impact to the affected stream; the environmental benefits provided to the off-site stream by the mitigation; whether the proposal could, in effect, constitute a modification of the ISF water right on the affected stream; or whether the proposal could result in the Division of Water Resources being unable to administer the affected ISF water right(s) in accordance with the priority system or with Colorado water law.
  
- (l) Stipulations and water court decrees that incorporate Injury with Mitigation shall include, but not be limited to inclusion of, the following terms and conditions:
  - i. A provision that the proponent will not divert water or take any other action that would reduce flows in the affected stream or levels in the affected lake below the decreed ISF or NLL amount until the agreed-upon mitigation measures are in place and fully operational;
  - ii. A requirement that the structural components of the mitigation be maintained permanently;

- iii. A provision allowing CWCB or DOW staff access to the property on which structural components of the mitigation are located to inspect the structures at certain time intervals, and, if necessary, to perform biological stream or lake monitoring. This provision shall clearly define the reasonable nature, extent and timing of such access (i.e, advance notice, dates, times or season of access, coordination with proponent, and location and routes of access);
- iv. A term providing that if the proponent ceases to provide the agreed upon mitigation (such as removing structural components or failing to maintain them to a specified level, or ceasing to implement non-structural components), that the proponent will not divert water or take any other action that would reduce flows in the affected stream or levels in the affected lake below the decreed ISF or NLL amount because the Board will no longer accept the injury based upon the mitigation no longer being in effect -- in such case, if the Board places a call for the affected ISF or NLL water right, the Board will notify the Division Engineer that this provision of the decree now is in effect and that the Board is not accepting the injury;
- v. A requirement that the proponent install and pay operation and maintenance costs of (or commit to pay operation and maintenance costs if the CWCB installs) any measuring devices deemed necessary by the Division Engineer to administer the terms of the stipulation and decree implementing the Injury with Mitigation pretrial resolution; and
- vi. A term providing that the water court will retain jurisdiction to enforce the terms and conditions set forth above in subsections (i) - (vi), and any other terms and conditions specific to the Injury with Mitigation pretrial resolution, as a water matter.

**8j. Authorization to Proceed to Trial.**

In the event that a Statement of Opposition filed by the Board is not settled prior to the last regularly scheduled Board meeting prior to the trial date, Staff shall seek Board authorization to proceed to trial. In the event that Staff is authorized to proceed to trial, the Board may adjourn to executive session to discuss settlement parameters with its counsel. Staff is authorized to settle any litigation without Board ratification if the settlement terms are consistent with instructions given by the Board to its counsel.

**8k. Public Review Process.**

The Board shall follow the public review process in Rules 11a. - 11c. prior to consideration of a request to ratify a pretrial resolution pursuant to Rule 8i.(3).

**8l. Notice.**

At any time Staff verifies that an ISF water right is not being fulfilled as a result of water use against which the ISF water right is entitled to protection, the Staff shall provide Proper Notice, including a description of what the Board is doing in response to the situation.

**9. MODIFICATION OF ISF RIGHTS.**

The Board may modify any existing decreed ISF right according to the procedures set forth in this Rule. "Modification" of an ISF right within the meaning of this Rule includes a decrease in the rate of flow described in the existing ISF decree, segmenting an existing ISF reach into shorter reaches with the result of decreasing the rate of flow in any portion of an ISF reach, or subtracting water from an ISF right during any particular time period or season.

### **9a. Need for Modification.**

Modification may be requested by the Staff or by any Person who has filed a water right application on an ISF reach or who has applied for any governmental permit for facilities located in or near an ISF reach and who complies with Rules 9b. and 9c. Any request for modification, except by staff, shall be made in writing, submitted to Staff and such writing shall contain the following information:

- (1) name, address and telephone number of the Person seeking modification;
- (2) stream or lake subject of request;
- (3) modification requested;
- (4) reason for modification; and
- (5) the scientific data supporting the request.

### **9b. Need for Water.**

Any Person who requests a modification of an ISF right must, as a precondition to the Board's consideration of the request, establish a need for the water made available by the modification. Staff does not have to comply with this rule and any governmental entity seeking to implement the terms of an agreement specified in Rule 9f. does not have to comply with this section.

### **9c. Grounds for Modification.**

No request for modification may be considered until the applicant establishes that one of the following reasons for modification exists:

#### **(1) Mistake.**

An ISF right may be considered for modification if the requesting Person establishes that an error was made in the calculations upon which the original or supplemental appropriation or enlargement to an original appropriation was made.

#### **(2) Excessive Flow.**

An ISF right may be considered for modification if the requesting Person establishes that the ISF flow rate is in excess of the amount of water necessary to accomplish the purpose of the original, supplemental or enlarged ISF right when that right was appropriated.

### **9d. Recovery Implementation or Other Intergovernmental Agreement.**

An ISF right may be modified if such modification was agreed upon by the Board as part of the Recovery Implementation Program for the Endangered Fishes of the Colorado River Basin or any other agreement between the Board and another governmental entity. Modifications made as a part of the Recovery Implementation Program for the Endangered Fishes of the Colorado River Basin need not be subject to the public review process in Rule 9e. Criteria for modifications made in the ISF rights decreed as part of the Recovery Implementation Program for the Endangered Fishes of the Colorado River Basin will be established in the decrees governing such appropriations.

### **9e. Public Review Process of Requests for Modification.**

The Board shall adhere to the following public review process when considering requests for modification:

**(1) Notice.**

Notice of the proposed modification and the date of the public meeting at which it will first be considered shall be printed in the resume in the Water Court having jurisdiction over the decree that is the subject of the modification. The first public meeting of the Board at which the modification is to be considered shall occur at least sixty days after the month in which the resume is published. Notice shall also be published in a newspaper of statewide distribution within thirty to forty-five days prior to such first public meeting.

**(2) Public Meeting.**

If the Board decides at such first public meeting to give further consideration to the proposed modification, the Board shall announce publicly the date of a subsequent public meeting for such purpose. If the Board decides that it will not give further consideration to the proposed modification, it shall state, in writing, the basis for its decision.

**(3) Request for Delay.**

On the written request of any Person made within thirty days after the date of the first public meeting, the Board shall delay the subsequent public meeting for up to one year to allow such Person the opportunity for the collection of scientific data material to the proposed modification. The Board need not grant the request if it determines that the request is made solely to delay the proceedings.

**(4) Procedures.**

On the written request of any Person made within thirty days after the date of the first public meeting, the Board shall, within sixty days after such request, establish fair and formal procedures for the subsequent public meeting, including the opportunity for reasonable disclosure, discovery, subpoenas, direct examination, and cross examination. Subject to these rights and requirements, where a meeting will be expedited and the interests of the participants will not be substantially prejudiced thereby, the Board may choose to receive all or part of the evidence in written form.

**(5) Final Determination.**

The Board shall issue a final written determination regarding the modification that shall state its effective date, be mailed promptly to the Persons who appeared by written or oral comment at the Board's proceeding, and be filed promptly with the water court.

**10. ENFORCEMENT AGREEMENTS.**

The Board may attach conditions to an appropriation, decreased appropriation, or acquisition, and may enter into any enforcement agreements that it determines will preserve or improve the natural environment to a reasonable degree. The Board may enter into enforcement agreements that limit the Board's discretion in the protection, approval of inundation, modification or disposal of ISF right, and/or may delegate limited authority to act on the Board's behalf.

**10a. Ratification of Enforcement Agreements.**

No enforcement agreement shall be effective to limit the discretion of the Board until that agreement and all of its terms are reviewed and ratified by the Board. Upon ratification, the Director may execute the agreement and the agreement shall be binding upon the Board for the term set forth in the enforcement agreement.

**10b. Public Review Process.**

The Board shall follow the public review process set forth in Rules 11a. - 11c. prior to any Board decision to ratify an Enforcement Agreement.

## **11. PUBLIC REVIEW PROCESS.**

Except as otherwise provided in the ISF Rules, the Board shall follow the public review process set forth below prior to any Board decision requiring public review.

### **11a. Public Notice.**

Public notice of all Board actions under these Rules shall be provided through the agenda of each regular or special Board meeting.

### **11b. Public Comment.**

Except as otherwise provided in Rules 5k. and 6m., at a regular or special meeting, the Board shall consider public comment on the recommended ISF action prior to the Board action on the recommendation in any or all of the following manners:

- (1) Oral and/or written comments may be directed to Staff. When such comments are made, Staff may summarize these comments to the Board.
- (2) Oral and/or written comments, subject to reasonable limitations established by the Board, may be made directly to the Board during the public meeting.

### **11c. Public Agency Recommendations.**

Prior to taking an ISF action pursuant to Rules 5 or 6, the Board shall request recommendations from the Division of Wildlife and the Division of Parks and Outdoor Recreation. The Board shall also request recommendations from the United States Department of Agriculture and the United States Department of Interior. The Board may also request comments from other interested Persons or agencies as it deems appropriate.

Prior to taking an ISF action pursuant to Rules 7, 8, 9, or 10, the Board may request recommendations from the Division of Wildlife, the Division of Parks and Outdoor Recreation, the Division of Water Resources, the United States Department of Agriculture, the United States Department of Interior or other Persons as it deems appropriate.

### **11d. Board Procedures.**

At a regular or special Board meeting, the Board may, as necessary, adopt or amend procedures to supplement these rules.

## **12. SEVERABILITY.**

In the event that any section or subsection of these Rules are judged to be invalid by a court of law or are allowed to expire by the General Assembly, the remaining Rules shall remain in full force and effect.

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### **Editor's Notes**

#### **History**

Entire rule eff. 03/02/2009.

## **Annotations**

See *Aspen Wilderness Workshop v. Colorado Water Conservation Bd.*, 901 P.2d 1251 (1995).

# Colorado Register



**43 CR 20**

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# Introduction

The *Colorado Register* is published pursuant to C.R.S. 24-4-103(11) and is the sole official publication for state agency notices of rule-making, proposed rules, attorney general's opinions relating to such rules, and adopted rules. The register may also include other public notices including annual departmental regulatory agendas submitted by principal departments to the secretary of state.

"Rule" means the whole or any part of every agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy or setting forth the procedure or practice requirements of any agency. "Rule" includes "regulation". C.R.S. 24-4-102(15). Adopted rules are effective twenty days after the publication date of this issue unless otherwise specified.

The *Colorado Register* is published by the office of the Colorado Secretary of State twice monthly on the tenth and the twenty-fifth. Notices of rule-making and adopted rules that are filed from the first through the fifteenth are published on the twenty-fifth of the same month, and those that are filed from the sixteenth through the last day of the month are published on the tenth of the following month. All filings are submitted through the secretary of state's electronic filing system.

For questions regarding the content and application of a particular rule, please contact the state agency responsible for promulgating the rule. For questions about this publication, please contact the Administrative Rules Program at [rules@sos.state.co.us](mailto:rules@sos.state.co.us).

# Notice of Proposed Rulemaking

**Tracking number**

2020-00812

**Department**

400 - Department of Natural Resources

**Agency**

408 - Colorado Water Conservation Board

**CCR number**

2 CCR 408-2

**Rule title**

RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM

**Rulemaking Hearing****Date**

01/26/2021

**Time**

09:00 AM

**Location**

Via video conference, see <https://cwcb.colorado.gov>

**Subjects and issues involved**

The proposed revisions to the Rules will update: (1) the reference to the Boards website in Rule 4c.; and (2) references to Colorado Parks and Wildlife throughout the Rules. The revisions also amend Rules 6k. and 6m. to implement House Bill 20-1157, which addresses temporary loans of water for instream flow use.

**Statutory authority**

Sections 37-60-108, 37-83-105(3), and 37-92-102(3), C.R.S. (2020)

**Contact information****Name**

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**DEPARTMENT OF NATURAL RESOURCES**

**Colorado Water Conservation Board**

**RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM**

**2 CCR 408-2**

**4. DEFINITIONS.**

**4c. Board Office.**

The Colorado Water Conservation Board's office is located at 1313 Sherman Street, 7th Floor, Denver, CO 80203. The phone number is (303) 866-3441. The facsimile number is (303) 866-4474. The Board's website is <https://cwcb.colorado.gov>. <http://www.cwcb.state.co.us>.

**6. ACQUISITION OF WATER, WATER RIGHTS OR INTERESTS IN WATER FOR INSTREAM FLOW PURPOSES.**

The Board may acquire water, water rights, or interests in water for ISF purposes by the following procedures:

**6a. Means of Acquisition.**

The Board may acquire, by grant, purchase, donation, bequest, devise, lease, exchange, or other contractual agreement, from or with any Person, including any governmental entity, such water, water rights, or interests in water that are not on the Division Engineer's abandonment list in such amounts as the Board determines are appropriate for stream flows or for natural surface water levels or volumes for natural lakes to preserve or improve the natural environment to a reasonable degree.

**6b. 120 Day Rule.**

At the request of any Person, including any governmental entity, the Board shall determine in a timely manner, not to exceed one hundred twenty days, unless further time is granted by the requesting Person, what terms and conditions the Board will accept in a contract or agreement for the acquisition. The 120-day period begins on the day the Board first considers the proposed contract or agreement at a regularly scheduled or special Board meeting.

**6c. Stacking Evaluation.**

The Board shall evaluate whether to combine or stack the acquired water right with any other ISF appropriation or acquisition, based upon the extent to which the acquired water will provide flows or lake levels to preserve or improve the natural environment to a reasonable degree.

If the Board elects to combine or stack the acquired water right, the details of how the water rights are to be combined or stacked with other existing ISF appropriations or acquisitions must be set forth in the application for a decree to use the acquired right for instream flow purposes.

**6d. Enforcement of Acquisition Agreement.**

Pursuant to section 37-92-102(3), C.R.S., any contract or agreement executed between the Board and any Person which provides water, water rights, or interests in water to the Board shall be enforceable by either party thereto as a water matter in the water court having jurisdiction over the water right according to the terms of the contract or agreement.

**6e. Appropriateness of an Acquisition.**

The Board shall evaluate the appropriateness of any acquisition of water, water rights, or interests in water to preserve or improve the natural environment. Such evaluation shall include, but need not be limited to consideration of the following factors:

- (1) The reach of stream or lake level for which the use of the acquired water is proposed, which may be based upon any one or a combination of the following: the historical location of return flow; the length of the existing instream flow reach, where applicable; whether an existing instream flow water right relies on return flows from the water right proposed for acquisition; the environment to be preserved or improved by the proposed acquisition; or such other factors the Board may identify;
- (2) The natural flow regime;
- (3) Any potential material injury to existing decreed water rights;
- (4) The historical consumptive use and historical return flows of the water right proposed for acquisition that may be available for instream flow use;
- (5) The natural environment that may be preserved or improved by the proposed acquisition, and whether the natural environment will be preserved or improved to a reasonable degree by the water available from the proposed acquisition;
- (6) The location of other water rights on the subject stream(s);
- (7) The effect of the proposed acquisition on any relevant interstate compact issue, including whether the acquisition would assist in meeting or result in the delivery of more water than required under compact obligations;
- (8) The effect of the proposed acquisition on the maximum utilization of the waters of the state;
- (9) Whether the water acquired will be available for subsequent use or reuse downstream;
- (10) The cost to complete the transaction or any other associated costs; and
- (11) The administrability of the acquired water right when used for instream flow purposes.

The Board shall determine how to best utilize the acquired water, water rights or interest in water to preserve or improve the natural environment.

**6f. Factors Related to Loans and Leases.**

In addition to considering the factors listed above, for loans and leases of water, water rights and interests in water for ISF purposes under section 37-92-102(3),

- (1) The Board shall consider the extent to which the leased or loaned water will preserve or improve the natural environment to a reasonable degree, including but not limited to:

- (a) Whether the amount of water available for acquisition is needed to provide flows to meet a decreed ISF amount in below average years; and
  - (b) Whether the amount of water available for acquisition could be used to and would improve the natural environment to a reasonable degree, either alone or in combination with existing decreed ISF water rights.
- (2) In considering the extent to which the leased or loaned water will preserve or improve the natural environment to a reasonable degree, the Board will request and review a biological analysis from ~~the Colorado~~ Division of Parks and Wildlife (CPW), and will review any other biological or scientific evidence presented to the Board.
- (3) If other sources of water are available for acquisition on the subject stream reach(es) by purchase or donation, the Board shall fully consider each proposed acquisition and give preference first to the donation and then to a reasonable acquisition by purchase.
- (4) The Board shall obtain confirmation from the Division Engineer that the proposed lease or loan is administrable and is capable of meeting all applicable statutory requirements.
- (5) The Board shall determine, through negotiation and discussion with the lessor, the amount of compensation to be paid to the lessor of the water based, in part, upon the anticipated use of the water during and after the term of the lease.
- (6) The Board shall consider evidence of water availability based upon the historical record(s) of diversion, the beneficial use of the subject water right, the location and timing of where return flows have historically returned to the stream, and the reason(s) the water is available for lease or loan.

**6g. Recording Requirements.**

- (1) All contracts or agreements for leases or loans of water, water rights or interests in water under section 37-92-102(3) shall require the Board to:
- (a) Maintain records of how much water the Board uses under the contract or agreement each year it is in effect; and
  - (b) Install any measuring device(s) deemed necessary by the Division Engineer (1) to administer the lease or loan of water, (2) to measure and record how much water flows out of the reach after use by the Board under the lease or loan; and (3) to meet any other applicable statutory requirements.
- (2) All contracts or agreements for leases or loans of water shall provide for the recording of the actual amount of water legally available and capable of being diverted under the leased or loaned water right during the term of the lease or loan, with such records provided to the Division of Water Resources for review and publication.

**6h. Water Reuse.**

All contracts or agreements for the acquisition of water, water rights or interests in water under section 37-92-102(3) shall provide that the Board or the seller, lessor, lender or donor of the water may bring about beneficial use of the historical consumptive use of the acquired water right downstream of the ISF reach as fully consumable reusable water, pursuant to the water court decree authorizing the Board to use the acquired water.

- (1) The bringing about of beneficial use of the historical consumptive use of the water may be achieved by direct use, sale, lease, loan or other contractual arrangement by the Board or the seller, lessor, lender or donor.
- (2) The contract or agreement also shall provide that the Division Engineer must be notified of any agreement for such beneficial use downstream of the ISF reach prior to the use.
- (3) Prior to any beneficial use by the Board of the historical consumptive use of the acquired water right downstream of the ISF reach, the Board shall find that such use:
  - (a) Will be consistent with the Board's statutory authority and with duly adopted Board policies and objectives; and
  - (b) Will not injure vested water rights or decreed conditional water rights.

**6i. Applications for a Decreed Right to Use Water for ISF Purposes.**

The Board shall file a change of water right application or other applications as needed or required with the water court to obtain a decreed right to use water for ISF purposes under all contracts or agreements for acquisitions of water, water rights or interests in water under section 37-92-102(3), including leases and loans of water. The Board shall file a joint application with the Person from whom the Board has acquired the water or a Person who has facilitated the acquisition, if requested by such Person. The Water Court shall determine matters that are within the scope of section 37-92-305, C.R.S. In a change of water right proceeding, the Board shall request the Water Court to:

- (1) Verify the quantification of the historical consumptive use of the acquired water right;
- (2) Verify the identification, quantification and location of return flows to ensure that no injury will result to vested water rights and decreed conditional water rights;
- (3) Include terms and conditions providing that:
  - (a) The Board or the seller, lessor, lender, or donor of the water may bring about the beneficial use of the historical consumptive use of the changed water right downstream of the ISF reach as fully consumable reusable water, subject to such terms and conditions as the water court deems necessary to prevent injury to vested water rights and decreed conditional water rights; and
  - (b) When the Board has not identified such downstream beneficial use at the time of the change of water right, the Board may amend the subject change decree, if required by the Division Engineer, to add such beneficial use(s) of the historical consumptive use downstream of the ISF reach at the time the Board is able to bring about such use or reuse, without requiring requantification of the original historical consumptive use calculation; and
- (4) Decree the method by which the historical consumptive use should be quantified and credited during the term of the agreement for the lease or loan of the water right pursuant to section 37-92-102(3), C.R.S.

**6j. Limitation on Acquisitions.**

The Board may not accept a donation of water rights that were acquired by condemnation, or that would require the removal of existing infrastructure without approval of the current owner of such infrastructure.

**6k. Temporary (Expedited and Renewable) Loans of Water to the Board.**

Section 37-83-105, C.R.S. authorizes the Board to accept and exercise two types of temporary loans of water for ISF use: (1) expedited loans; and (2) renewable loans. Expedited loans have a term of up to one year and may be used to preserve the natural environment to a reasonable degree on a decreed instream flow reach. Renewable loans, which can be used to preserve or improve the natural environment on a decreed instream flow reach, may be exercised for up to five years in a ten-year period and for no more than three consecutive years, and may be renewed for up to two additional ten-year periods. The Board may ~~accept~~ exercise both expedited and renewable temporary loans of water for instream flow use for a period not to exceed 120 days in ~~any one a single calendar~~ year, in accordance with the procedures and subject to the limitations set forth in section 37-83-105, C.R.S. The owner of a decreed water right who has offered water to the Board for an expedited or renewable loan is referred to herein as an "applicant."

(1) Expedited Loans.

(a) An expedited loan approved to preserve the natural environment to a reasonable degree has a term of up to one year, with instream flow use not to exceed 120 days in a single calendar year. The loan period begins when the State Engineer approves the expedited loan. If an expedited loan is approved, the applicant may not reapply for an additional expedited loan of the subject water right.

(b) Within ~~five~~5 working days after receiving an offer of an expedited temporary loan of water to the Board for temporary instream flow use, the Director will provide a response to the ~~proponent~~ applicant. If the proposed loan appears to be appropriate and, unless the proposed loan has no potential value for instream flow use, staff will coordinate with the ~~applicant to~~proponent on:

i. preparing and submitting the necessary documentation to the State and Division Engineers required by sections 37-83-105(2)(a)(I) and (2)(b)(I), C.R.S., and

ii. providing the ~~written~~public notice required by section 37-83-105(2)(b)(II), C.R.S. and access to all documentation provided to the State Engineer under Rule 6k(1)(b)i, to: (1) all parties on the substitute water supply plan notification list established pursuant to section 37-92-308(6), C.R.S. for the water division in which the proposed loan is located; and (2) a registered agent of a ditch company, irrigation district, water users' association, or other water supply or delivery entity within whose system the water rights fall.

(c) Provided that the State Engineer has made a determination of no injury pursuant to section 37-83-105(2)(a)(III), C.R.S., the Board hereby delegates authority to the CWCB Director to accept expedited loans of water for instream flow use in accordance with the procedures and subject to the limitations set forth in section 37-83-105, to execute an agreement for the loan of the water, and to take any administrative action necessary to put the loaned water to instream flow use. ~~The purpose of this delegation is to expedite the Board's exercise use of a temporarily loaned of water for instream flow use under this Rule 6k.(1) by the Board.~~

(d) Provided that the State Engineer's determination of non-injury is still in effect, the Director shall notify the proponent and the State Engineer whether the temporary loan is to be exercised in subsequent years. Such notification shall be provided within 5 working days of the Director being notified by the proponent that the water is available for use under the temporary loan. The CWCB's use of loaned water for instream flows shall not exceed the CWCB's decreed instream flow rate(s), time period(s), and amount or extend beyond the CWCB's decreed instream flow reach(es) at any time during the expedited loan term, and shall comply with any terms and conditions imposed by the State Engineer to prevent injury. ~~The purpose of this delegation is to expedite use of temporarily loaned water for instream flows by the Board.~~

(e) At the first regular or special Board meeting after the Director accepts, or rejects over applicant's objection an offer of an expedited loan of water to the Board for temporary instream flow use under (4b) and/or (2c) above, the Board shall vote either to ratify or overturn the Director's decision.

(e)(f) The Board, Director and staff will expedite all actions necessary to implement Rule 6k.(1).

(2) Renewable Loans.

- (a) A renewable loan approved to preserve or improve the natural environment must not be exercised for more than five years in a ten-year period and for no more than three consecutive years, for which only a single approval by the State Engineer is required. Instream flow use may not exceed 120 days in a single calendar year. The ten-year period begins when the State Engineer approves the loan. If an applicant for a renewable loan has previously been approved for and has exercised an expedited loan using the same water right(s) that are the subject of the pending application, the one-year loan period of the expedited loan counts as the first year of the five-year allowance for the subsequent renewable loan.
- (b) The Board will use a two-Board meeting process to review, consider public comment, and direct Staff whether to move forward with proposed renewable loans of water for instream flow use to preserve or improve the natural environment to a reasonable degree.
- (c) Any Person may request the Board to hold a hearing on a proposed renewable loan. Such a request must be submitted to the Board in writing within twenty days after the first Board meeting at which the Board considers the proposed renewable loan, and must include a brief statement, with as much specificity as possible, of why a hearing is being requested. The Board shall conduct all hearings on renewable loans pursuant to Rule 6m.(5).
- (d) For renewable loans to improve the natural environment to a reasonable degree, the Board will:
  - i. request and review a biological analysis from Colorado Parks and Wildlife concerning the extent to which the proposed loan will improve the natural environment to a reasonable degree, and review any other biological or scientific evidence presented to the Board;
  - ii. make findings on flow rates appropriate to improve the natural environment to a reasonable degree with the loaned water; and
  - iii. give preference to loans of stored water, when available, over loans of direct flow water.
- (e) When evaluating a proposed renewable loan, the Board shall consider any potential injury to decreed water rights, decreed exchanges of water, or other water users' undeclared existing exchanges of water to the extent that the undeclared existing exchanges have been administratively approved before the date of the Board's consideration.
- (f) If the Board directs Staff to move forward with a proposed renewable loan, staff will coordinate with the applicant to:
  - i. prepare and submit the necessary documentation to the State Engineer required by sections 37-83-105(2)(a)(I) and (2)(b)(I); and
  - i.ii. provide the written notice required by section 37-83-105(2)(b)(II), and access to all documentation provided to the State Engineer under Rule 6k(2)(f)i, to: (1) all parties on the substitute water supply plan notification list established pursuant to section 37-92-308(6) for the water division in which the proposed loan is located; and (2) a registered agent of a ditch company, irrigation district, water users' association, or other water supply or delivery entity within whose system the water rights fall.
- (g) Board direction to Staff to move forward with a proposed renewable loan will include authorizing Staff to execute an agreement for the loan of water and to take any administrative action necessary to put the loaned water to instream flow use, provided that the State Engineer determines that no injury will result from the proposed loan.

- (h) The CWCB's instream flow use of loaned water shall not extend beyond the CWCB's decreed instream flow reach(es) at any time during the renewable loan term, and shall comply with any terms and conditions imposed by the State Engineer to prevent injury.
- (i) In each year that a renewable loan is exercised, the applicant, coordinating with Staff if necessary, shall provide the written notice required by section 37-83-105(2)(b)(II).
- (j) The applicant may reapply for a renewable loan, and the State Engineer may approve such loan for up to two additional ten-year periods. Prior to any such reapplication, at a properly noticed public meeting, Staff will inform the Board about the exercise of the loan during the previous ten-year period and request approval for the loan to continue for the additional ten-year period. The Board shall consider any public comment and objections to the renewal provided at the public meeting. If the Board authorizes renewal of the loan, staff will coordinate with the applicant to: (1) prepare and submit the necessary documentation to the State Engineer required by sections 37-83-105(2)(a)(I) and (2)(b)(I); and (2) provide the written notice required by section 37-83-105(2)(b)(II).
- (3) Water rights loaned to the Board pursuant to expedited or renewable loans are not precluded from concurrent or subsequent inclusion in a water conservation, demand management, compact compliance, or water banking program or plan, as is or may be subsequently defined or described in statute.

**6l. Funds for Water Right Acquisitions.**

The Board may use any funds available to it for costs of the acquisition of water rights and their conversion to ISF use. The Board shall spend available funds for such costs in accordance with section 37-60-123.7, C.R.S. and any other applicable statutory authority, and with applicable Board policies and procedures.

**6m. Public Input on Proposed Acquisitions.**

The Board shall follow the public review process in Rules 11a. - 11c. when acquiring water, water rights or interests in water, except for expedited and renewable temporary loans or leases as provided in Rule 6k. above and except as provided below.

- (1) Prior to Board consideration of any proposed acquisition, Staff shall mail notice of the proposed acquisition to all Persons on the ISF Subscription Mailing List and the State Engineer's Substitute Supply Plan Notification List for the relevant water division, and shall provide Proper Notice. Such notice shall include:
- (a) The case number adjudicating the water right proposed to be acquired, and the appropriation date, adjudication date, priority, decreed use(s), and flow amount of the water right proposed to be acquired, and approximately how much of the water right the Board will consider acquiring;
  - (b) The location of the stream reach or lake that is the subject of the proposal, including, when available, the specific length of stream reach to benefit from the proposed acquisition;
  - (c) Any available information on the purpose of the acquisition, including the degree of preservation or improvement of the natural environment to be achieved;
  - (d) Any available scientific data specifically supporting the position that the acquisition will achieve the goal of preserving or improving the natural environment to a reasonable degree; and

- (e) In addition to (a) - (d) above, for leases and loans of water, water rights or interests in water under section 37-92-102(3), such notice shall include the proposed term of the lease or loan and the proposed season of use of the water under the lease or loan.
- (2) At every regularly scheduled Board meeting subsequent to the mailing of notice, and prior to final Board action, Staff will report on the status of the proposed acquisition and time will be reserved for public comment.
- (3) Any Person may address the Board regarding the proposed acquisition prior to final Board action. Staff shall provide any written comments it receives regarding the proposed acquisition directly to the Board.
- (4) Any Person may request the Board to hold a hearing on a proposed acquisition. Such a request must be submitted to the Board in writing within twenty days after the first Board meeting at which the Board considers the proposed acquisition, and must include a brief statement, with as much specificity as possible, of why a hearing is being requested.
- (5) At its next regularly scheduled meeting after receipt of the request for a hearing, or at a special meeting, the Board will consider the request and may, in its sole discretion, grant or deny such a request. All hearings scheduled by the Board shall be governed by the following procedures:
- (a) A hearing on a proposed acquisition, except for renewable loans, must be held within the 120 day period allowed for Board consideration of an acquisition pursuant to Rule 6b., unless the Person requesting the Board to consider the proposed acquisition agrees to an extension of time.
- (b) The Board shall appoint a Hearing Officer to establish the procedures by which evidence will be offered.
- (c) For hearings on acquisitions other than renewable loans, At least thirty days prior to the hearing date(s), the Board shall provide written notice of the hearing(s) to the Person proposing the acquisition, all interested parties known to the Board, and all Persons on the ISF Subscription Mailing List and the State Engineer's Substitute Supply Plan Notification List for the relevant water division. The Board also shall provide Proper Notice, as defined in ISF Rule 4n.
- (d) For hearings on renewable loans, at least thirty days prior to the hearing date, the Board shall provide written notice of the hearing to the owner of the water right to be loaned and to: (1) all parties on the substitute water supply plan notification list established pursuant to section 37-92-308(6) for the water division in which the proposed loan is located; and (2) a registered agent of a ditch company, irrigation district, water users' association, or other water supply or delivery entity within whose system the water rights fall. Such notice shall include the process and deadlines for participating in the hearing.
- ~~(e)~~ Any Person who desires party status shall become a Party upon submission of a written Notice of Party Status to the Board Office. The Notice shall include the name and mailing address of the Person and a brief statement of the reasons the Person desires party status. The Board Office must receive Notice of Party Status within seven days after notice of the hearing is issued.
- ~~(e)~~ The Hearing Officer shall set timelines and deadlines for all written submissions. Prehearing statements will be required, and shall include, but not be limited to, the following: 1) a list of all disputed factual and legal issues; 2) the position of the Party regarding the factual and legal issues; 3) a list identifying all of the witnesses that will

testify for the Party, and a summary of the testimony that those witnesses will provide; and 4) copies of all exhibits that the Party will introduce at the hearing(s).

- (fg) Any Party may present testimony or offer evidence identified in its prehearing statement regarding the proposed acquisition.
- (gh) The Hearing Officer shall determine the order of testimony for the hearing(s), and shall decide other procedural matters related to the hearing(s). The Hearing Officer does not have authority to rule on substantive issues, which authority rests solely with the Board.
- (hi) The Board will not apply the Colorado Rules of Evidence at hearings on proposed acquisitions.
- (ij) The Board may permit general comments from any Person who is not a Party; however, the Board may limit these public comments to five minutes per Person.
- (jk) The Board may take final action at the hearing(s) or continue the hearing and/or deliberations to a date certain.
- (kl) Board hearings may be recorded by a reporter or by an electronic recording device. Any Party requesting a transcription of the hearing(s) shall be responsible for the cost of the transcription.
- (lm) When necessary, the Board may modify this hearing procedure schedule or any part thereof as it deems appropriate.

**6n. Board Action to Acquire Water, Water Rights or Interests in Water.**

The Board shall consider the acquisition during any regular or special meeting of the Board. At the Board meeting, the Board shall consider all presentations or comments of Staff or any other Person. After such consideration, the Board may acquire, acquire with limitations, or reject the proposed acquisition.

**7. INUNDATION OF ISF RIGHTS.**

...

**7d. Staff Investigation.**

After receiving the request to inundate, the Staff may seek the recommendations from ~~the Division of Colorado Parks and Wildlife, Division of Parks and Outdoor Recreation,~~ Division of Water Resources, United States Department of Agriculture and United States Department of Interior.

**8. PROTECTION OF ISF APPROPRIATIONS.**

...

**8i.(3) Injury Accepted with Mitigation.**

In the event a proposed pretrial resolution will allow injury to or interference with an ISF or natural lake level (NLL) water right, but mitigation offered by the applicant could enable the Board to accept the injury or interference while continuing to preserve or improve the natural environment to a reasonable degree, and if the proposed pretrial resolution does not include a modification under ISF Rule 9, the Board shall:

...

- (f) After receipt and review of the required information, staff will consult with ~~the DOW~~ Colorado Parks and Wildlife (CPW) and with the entity that originally recommended the affected ISF or NLL water rights(s) (if other than CPW~~DOW~~) to determine whether additional field work is necessary and to identify any scheduling concerns. Staff will request a recommendation from CPW~~the DOW~~ as to whether the proposed mitigation will enable the Board to continue to preserve or improve the natural environment of the affected stream or lake to a reasonable degree despite the injury, including a discussion of the reasonableness of the alternatives considered. CWCB staff will use best efforts to consult with affected land owners and managers regarding the proposal.

...

- (h) At the first meeting of the two-meeting process required by this Rule, staff will bring the proposal to the Board for preliminary consideration after completing its review of the proposal and its consultation with CPW~~DOW~~. Staff will work with the proponent and interested parties to address any preliminary concerns prior to bringing a proposal to the Board. Preliminary consideration by the Board may result in requests for more information or for changes to the proposal. Staff will work with the proponent and interested parties to finalize the proposal and bring it back to the Board for final action at a subsequent Board meeting.

...

- (l) Stipulations and water court decrees that incorporate Injury with Mitigation shall include, but not be limited to inclusion of, the following terms and conditions:

...

- iii. A provision allowing CWCB or CPW~~DOW~~ staff access to the property on which structural components of the mitigation are located to inspect the structures at certain time intervals, and, if necessary, to perform biological stream or lake monitoring. This provision shall clearly define the reasonable nature, extent and timing of such access (i.e, advance notice, dates, times or season of access, coordination with proponent, and location and routes of access);

#### **11c. Public Agency Recommendations.**

Prior to taking an ISF action pursuant to Rules 5 or 6, the Board shall request recommendations from ~~the Division of Colorado Parks and Wildlife and the Division of Parks and Outdoor Recreation~~. The Board shall also request recommendations from the United States Department of Agriculture and the United States Department of Interior. The Board may also request comments from other interested Persons or agencies as it deems appropriate.

Prior to taking an ISF action pursuant to Rules 7, 8, 9, or 10, the Board may request recommendations from ~~the Division of Colorado Parks and Wildlife, the Division of Parks and Outdoor Recreation,~~ the Division of Water Resources, the United States Department of Agriculture, the United States Department of Interior or other Persons as it deems appropriate.

## **NOTICE OF PUBLIC RULEMAKING HEARING BEFORE THE COLORADO WATER CONSERVATION BOARD**

### **I. NATURE OF PUBLIC RULEMAKING HEARING**

Pursuant to section 24-4-103, C.R.S., this is a notice of a public rulemaking hearing before the Colorado Water Conservation Board (“Board”) for consideration of amendments to the Board’s Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 (“Rules”). The amendments primarily affect Rule 6k. (Temporary Loans of Water to the Board) and Rule 6m. (Public Input on Proposed Acquisitions).

The Board is amending the Rules to: (1) address the requirements of House Bill 20-1157; (2) update a reference to the Board’s website; and (3) update references to Colorado Parks and Wildlife (“CPW”).

### **II. DESCRIPTION OF THE SUBJECTS AND ISSUES INVOLVED**

HB 20-1157 amends section 37-83-105, C.R.S. (2019), which governs temporary loans of water for instream flow (“ISF”) use. Among other things, HB 20-1157 directs the Board to promulgate rules to implement certain provisions of the bill.

Board Staff (“Staff”) drafted proposed changes to the Rules, solicited written comments from interested parties, and held public (a.k.a. stakeholder) meetings on August 3 and August 18, 2020, to allow interested parties to provide input on the proposed changes. At its September 16, 2020 meeting, the Board appointed a hearing officer and authorized Staff and the Hearing Officer to proceed with the formal rulemaking process. The formal rulemaking process is initiated by filing a notice of rulemaking hearing with the Secretary of State and publication in the Colorado Register.

Staff will retain a record of the rulemaking pursuant to section 24-4-103(8.1), C.R.S. The initial proposed rule amendments submitted to the Secretary of State are available on the Board’s website.

The proposed revisions to the Rules update: (1) the reference to the Board’s website in Rule 4c.; and (2) references to CPW throughout the Rules. The revisions also amend Rules 6k. and 6m. to implement HB 20-1157, and include:

- A. Definitions of expedited and renewable loans. The proposed amendments describe the two different types of loans, the requirements for each type of loan application, notice requirements and allowed ISF uses of loaned water for each type of loan, and the Board Director’s delegated authority for each type of loan;
- B. Procedures for evaluating and requesting approval of expedited loans, and for Board review and potential ratification of the Board Director’s decision on such loans;
- C. For renewable loans, the Board process for reviewing, receiving public input on, and directing Staff on whether to move forward with a proposed renewable loan, including a hearing under Rule 6m.(5), if requested. The proposed amendments to

- the Rules also describe the steps the Board must take for renewable loans that would improve the natural environment to a reasonable degree, including requesting and reviewing a biological analysis from CPW on the extent to which the proposed loan will improve the natural environment to a reasonable degree, and giving preference for loans of stored water, when available, over loans of direct flow water;
- D. Board consideration of potential injury to decreed water rights, decreed exchanges of water, or undecreed existing exchanges of water, to the extent that the undecreed existing exchanges have been administratively approved before the date of the Board's consideration;
  - E. Staff process for coordinating with a water rights owner on requesting approval from the State Engineer of a proposed renewable loan (after Board review and decision);
  - F. Process for Board review and approval of renewing a loan for a second or third ten-year period; and
  - G. Notice requirements for hearings on renewable loans.

The language of the proposed amendments to the Rules, and a proposed statement of basis and purpose and specific statutory authority for the amendments, are available on the Board's website at <https://cwcb.colorado.gov/instream-flow-rules-revisions-hb-20-1157>, and are available upon request of Staff. Please contact Linda Bassi at (303) 866-3441, extension 3204 or at [linda.bassi@state.co.us](mailto:linda.bassi@state.co.us) for further information.

### III. SPECIFIC STATUTORY AUTHORITY

The statutory authority for promulgating the Rules and any amendments thereto is found at section 37-60-108, C.R.S. The Board's authority for the Colorado Instream Flow and Natural Lake Level Program is found at section 37-92-102(3), C.R.S.

HB 20-1157 revised section 37-83-105, C.R.S., pertaining to temporary loans of water to the Board for ISF use, and directed the Board to promulgate rules to implement certain provisions of the bill.

### IV. PARTY STATUS

The Notice of Rulemaking Hearing will be published in the Colorado Register on October 25, 2020. Applications for party status will be accepted through November 13, 2020. Applications for party status should be submitted to the Board's Hearing Officer, Amy Beatie, by email to [amy.beatie@coag.gov](mailto:amy.beatie@coag.gov). Applications for party status shall include: (1) the name of the person, persons or entity seeking party status; (2) a contact person, if different from IV.(1); (3) the appropriate mailing address, phone number, and email address for the contact person listed in IV.(2); (4) the interest of the person(s) or entity in the proposed amendments to the Rules; and (5) a description of the general nature of the evidence or information to be presented in the course of the proceedings. Staff is automatically a party to the rulemaking proceeding and need not file an application for party status.

## V. PRE-HEARING CONFERENCE

Prior to the rulemaking hearing, the Hearing Officer will hold a pre-hearing conference. After November 13, 2020, when all party status applications have been received, the Hearing Officer will issue an order notifying all parties of the date, time, and location or call-in information for the first pre-hearing conference. The order will also provide any other deadlines and procedures that are appropriate at the time. Participation in the pre-hearing conference may be available by telephone or video conference at the Hearing Officer's discretion; participation will likely only be available by remote participation.

Each applicant for party status must submit a pre-hearing statement in order to participate in the pre-hearing conference.

## VI. RULEMAKING HEARING

### Date, Time, and Location

DATE: January 26, 2021

TIME: 9:00 a.m. (or as otherwise directed by the Hearing Officer)

LOCATION: Via telephone or video conference. Participation information will be provided at a later date: (1) on the Board's website at <https://cwcb.colorado.gov/> and (2) by order of the Hearing Officer to the people or entities who have applied for party status.

### Procedures

The role of the Board's Hearing Officer is to provide orderly procedures for the rulemaking; ruling on substantive issues is a Board responsibility. The Hearing Officer will issue orders designed to streamline and clarify processes consistent with this Notice of Proposed Rulemaking and as permitted by law.

The Board may ask questions of any person appearing before it.

The Board will consider alternative proposals related to the proposed amendments, subject to the procedures established by the Hearing Officer.

The Board may modify the proposed amendments to the Rules from those published in the Colorado Register.

After the conclusion of the rulemaking hearing and after consideration of the relevant matters presented, the Board, through its Hearing Officer, will render its decision to the parties to the hearing.

### Hearing Participation

At the hearing, parties shall be afforded the opportunity to submit written data, views, or arguments, and to present the same orally, unless the Board deems it unnecessary. The submittal of such material and summations, either in writing or orally, shall be as directed by the Hearing

Officer or the Board.

If alternative amendments to the proposed amendments to the Rules are requested by a party, the Board encourages those amendments to be included in the written materials, along with a proposed statement of basis and purpose of the alternative amendments.

Once any written material is submitted, the material becomes part of the administrative rulemaking record and the property of the Board and will not be returned to the person(s) or entity submitting the material.

The Hearing Officer will decide the timing and order of oral presentations by the parties, if any. Any person who is not a party to the hearing but wishes to provide comment may do so in writing prior to the date of the hearing. The Board strongly encourages all interested persons to submit comments in writing; however, a short period of time at the rulemaking hearing (a total of 30 minutes or less) will be reserved for oral comments by interested persons who do not have party status.

#### VII. ADOPTION OF THE RULES

The Board will consider all information presented at the hearing.

The Board may modify the proposed amendments to the Rules in adopting amendments to the Rules.

The final amended Rules, as adopted by the Board, shall become effective no sooner than twenty (20) days after publication in the Colorado Register.

#### VIII. ADMINISTRATIVE RULEMAKING RECORD

The administrative rulemaking record, including the proposed rule amendments, submitted applications for party status, pre-hearing statements, and all other written materials to be considered by the Board in this rulemaking, will be available following the conclusion of these proceedings and upon request to [kimberly.ricotta@state.co.us](mailto:kimberly.ricotta@state.co.us), and at the Board's office at 1313 Sherman Street, Room 718, Denver, CO 80203, during normal business hours (8:00 a.m.-5:00 p.m.), once state agencies are again open to the public.

DATED this 14th day of October, 2020.



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Rebecca Mitchell  
Director  
Colorado Water Conservation Board  
1313 Sherman Street, Rm. 718  
Denver, CO 80203

**DEPARTMENT OF NATURAL RESOURCES**

**Colorado Water Conservation Board**

**RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM**

**2 CCR 408-2**

**4. DEFINITIONS.**

**4c. Board Office.**

The Colorado Water Conservation Board's office is located at 1313 Sherman Street, 7th Floor, Denver, CO 80203. The phone number is (303) 866-3441. The facsimile number is (303) 866-4474. The Board's website is <https://cwcb.colorado.gov>. <http://www.cwcb.state.co.us>.

**6. ACQUISITION OF WATER, WATER RIGHTS OR INTERESTS IN WATER FOR INSTREAM FLOW PURPOSES.**

The Board may acquire water, water rights, or interests in water for ISF purposes by the following procedures:

**6a. Means of Acquisition.**

The Board may acquire, by grant, purchase, donation, bequest, devise, lease, exchange, or other contractual agreement, from or with any Person, including any governmental entity, such water, water rights, or interests in water that are not on the Division Engineer's abandonment list in such amounts as the Board determines are appropriate for stream flows or for natural surface water levels or volumes for natural lakes to preserve or improve the natural environment to a reasonable degree.

**6b. 120 Day Rule.**

At the request of any Person, including any governmental entity, the Board shall determine in a timely manner, not to exceed one hundred twenty days, unless further time is granted by the requesting Person, what terms and conditions the Board will accept in a contract or agreement for the acquisition. The 120-day period begins on the day the Board first considers the proposed contract or agreement at a regularly scheduled or special Board meeting.

**6c. Stacking Evaluation.**

The Board shall evaluate whether to combine or stack the acquired water right with any other ISF appropriation or acquisition, based upon the extent to which the acquired water will provide flows or lake levels to preserve or improve the natural environment to a reasonable degree.

If the Board elects to combine or stack the acquired water right, the details of how the water rights are to be combined or stacked with other existing ISF appropriations or acquisitions must be set forth in the application for a decree to use the acquired right for instream flow purposes.

**6d. Enforcement of Acquisition Agreement.**

Pursuant to section 37-92-102(3), C.R.S., any contract or agreement executed between the Board and any Person which provides water, water rights, or interests in water to the Board shall be enforceable by either party thereto as a water matter in the water court having jurisdiction over the water right according to the terms of the contract or agreement.

**6e. Appropriateness of an Acquisition.**

The Board shall evaluate the appropriateness of any acquisition of water, water rights, or interests in water to preserve or improve the natural environment. Such evaluation shall include, but need not be limited to consideration of the following factors:

- (1) The reach of stream or lake level for which the use of the acquired water is proposed, which may be based upon any one or a combination of the following: the historical location of return flow; the length of the existing instream flow reach, where applicable; whether an existing instream flow water right relies on return flows from the water right proposed for acquisition; the environment to be preserved or improved by the proposed acquisition; or such other factors the Board may identify;
- (2) The natural flow regime;
- (3) Any potential material injury to existing decreed water rights;
- (4) The historical consumptive use and historical return flows of the water right proposed for acquisition that may be available for instream flow use;
- (5) The natural environment that may be preserved or improved by the proposed acquisition, and whether the natural environment will be preserved or improved to a reasonable degree by the water available from the proposed acquisition;
- (6) The location of other water rights on the subject stream(s);
- (7) The effect of the proposed acquisition on any relevant interstate compact issue, including whether the acquisition would assist in meeting or result in the delivery of more water than required under compact obligations;
- (8) The effect of the proposed acquisition on the maximum utilization of the waters of the state;
- (9) Whether the water acquired will be available for subsequent use or reuse downstream;
- (10) The cost to complete the transaction or any other associated costs; and
- (11) The administrability of the acquired water right when used for instream flow purposes.

The Board shall determine how to best utilize the acquired water, water rights or interest in water to preserve or improve the natural environment.

**6f. Factors Related to Loans and Leases.**

In addition to considering the factors listed above, for loans and leases of water, water rights and interests in water for ISF purposes under section 37-92-102(3),

- (1) The Board shall consider the extent to which the leased or loaned water will preserve or improve the natural environment to a reasonable degree, including but not limited to:

- (a) Whether the amount of water available for acquisition is needed to provide flows to meet a decreed ISF amount in below average years; and
  - (b) Whether the amount of water available for acquisition could be used to and would improve the natural environment to a reasonable degree, either alone or in combination with existing decreed ISF water rights.
- (2) In considering the extent to which the leased or loaned water will preserve or improve the natural environment to a reasonable degree, the Board will request and review a biological analysis from ~~the Colorado~~ Division of Parks and Wildlife (CPW), and will review any other biological or scientific evidence presented to the Board.
  - (3) If other sources of water are available for acquisition on the subject stream reach(es) by purchase or donation, the Board shall fully consider each proposed acquisition and give preference first to the donation and then to a reasonable acquisition by purchase.
  - (4) The Board shall obtain confirmation from the Division Engineer that the proposed lease or loan is administrable and is capable of meeting all applicable statutory requirements.
  - (5) The Board shall determine, through negotiation and discussion with the lessor, the amount of compensation to be paid to the lessor of the water based, in part, upon the anticipated use of the water during and after the term of the lease.
  - (6) The Board shall consider evidence of water availability based upon the historical record(s) of diversion, the beneficial use of the subject water right, the location and timing of where return flows have historically returned to the stream, and the reason(s) the water is available for lease or loan.

**6g. Recording Requirements.**

- (1) All contracts or agreements for leases or loans of water, water rights or interests in water under section 37-92-102(3) shall require the Board to:
  - (a) Maintain records of how much water the Board uses under the contract or agreement each year it is in effect; and
  - (b) Install any measuring device(s) deemed necessary by the Division Engineer (1) to administer the lease or loan of water, (2) to measure and record how much water flows out of the reach after use by the Board under the lease or loan; and (3) to meet any other applicable statutory requirements.
- (2) All contracts or agreements for leases or loans of water shall provide for the recording of the actual amount of water legally available and capable of being diverted under the leased or loaned water right during the term of the lease or loan, with such records provided to the Division of Water Resources for review and publication.

**6h. Water Reuse.**

All contracts or agreements for the acquisition of water, water rights or interests in water under section 37-92-102(3) shall provide that the Board or the seller, lessor, lender or donor of the water may bring about beneficial use of the historical consumptive use of the acquired water right downstream of the ISF reach as fully consumable reusable water, pursuant to the water court decree authorizing the Board to use the acquired water.

- (1) The bringing about of beneficial use of the historical consumptive use of the water may be achieved by direct use, sale, lease, loan or other contractual arrangement by the Board or the seller, lessor, lender or donor.
- (2) The contract or agreement also shall provide that the Division Engineer must be notified of any agreement for such beneficial use downstream of the ISF reach prior to the use.
- (3) Prior to any beneficial use by the Board of the historical consumptive use of the acquired water right downstream of the ISF reach, the Board shall find that such use:
  - (a) Will be consistent with the Board's statutory authority and with duly adopted Board policies and objectives; and
  - (b) Will not injure vested water rights or decreed conditional water rights.

**6i. Applications for a Decreed Right to Use Water for ISF Purposes.**

The Board shall file a change of water right application or other applications as needed or required with the water court to obtain a decreed right to use water for ISF purposes under all contracts or agreements for acquisitions of water, water rights or interests in water under section 37-92-102(3), including leases and loans of water. The Board shall file a joint application with the Person from whom the Board has acquired the water or a Person who has facilitated the acquisition, if requested by such Person. The Water Court shall determine matters that are within the scope of section 37-92-305, C.R.S. In a change of water right proceeding, the Board shall request the Water Court to:

- (1) Verify the quantification of the historical consumptive use of the acquired water right;
- (2) Verify the identification, quantification and location of return flows to ensure that no injury will result to vested water rights and decreed conditional water rights;
- (3) Include terms and conditions providing that:
  - (a) The Board or the seller, lessor, lender, or donor of the water may bring about the beneficial use of the historical consumptive use of the changed water right downstream of the ISF reach as fully consumable reusable water, subject to such terms and conditions as the water court deems necessary to prevent injury to vested water rights and decreed conditional water rights; and
  - (b) When the Board has not identified such downstream beneficial use at the time of the change of water right, the Board may amend the subject change decree, if required by the Division Engineer, to add such beneficial use(s) of the historical consumptive use downstream of the ISF reach at the time the Board is able to bring about such use or reuse, without requiring requantification of the original historical consumptive use calculation; and
- (4) Decree the method by which the historical consumptive use should be quantified and credited during the term of the agreement for the lease or loan of the water right pursuant to section 37-92-102(3), C.R.S.

**6j. Limitation on Acquisitions.**

The Board may not accept a donation of water rights that were acquired by condemnation, or that would require the removal of existing infrastructure without approval of the current owner of such infrastructure.

**6k. Temporary (Expedited and Renewable) Loans of Water to the Board.**

Section 37-83-105, C.R.S. authorizes the Board to accept and exercise two types of temporary loans of water for ISF use: (1) expedited loans; and (2) renewable loans. Expedited loans have a term of up to one year and may be used to preserve the natural environment to a reasonable degree on a decreed instream flow reach. Renewable loans, which can be used to preserve or improve the natural environment on a decreed instream flow reach, may be exercised for up to five years in a ten-year period and for no more than three consecutive years, and may be renewed for up to two additional ten-year periods. The Board may ~~accept~~ exercise both expedited and renewable temporary loans of water for instream flow use for a period not to exceed 120 days in ~~any one a single calendar~~ year, in accordance with the procedures and subject to the limitations set forth in section 37-83-105, C.R.S. The owner of a decreed water right who has offered water to the Board for an expedited or renewable loan is referred to herein as an "applicant."

(1) Expedited Loans.

- (a) An expedited loan approved to preserve the natural environment to a reasonable degree has a term of up to one year, with instream flow use not to exceed 120 days in a single calendar year. The loan period begins when the State Engineer approves the expedited loan. If an expedited loan is approved, the applicant may not reapply for an additional expedited loan of the subject water right.
- (b) Within ~~five~~5 working days after receiving an offer of an expedited temporary loan of water to the Board for temporary instream flow use, the Director will provide a response to the ~~proponent~~ applicant. If the proposed loan appears to be appropriate and, unless the proposed loan has no potential value for instream flow use, staff will coordinate with the ~~applicant to~~ ~~proponent on~~:
- i. preparing and submitting the necessary documentation to the State and Division Engineers required by sections 37-83-105(2)(a)(I) and (2)(b)(I), C.R.S., and
  - ii. providing the ~~written~~public notice required by section 37-83-105(2)(b)(II), C.R.S. and access to all documentation provided to the State Engineer under Rule 6k(1)(b)i, to: (1) all parties on the substitute water supply plan notification list established pursuant to section 37-92-308(6), C.R.S. for the water division in which the proposed loan is located; and (2) a registered agent of a ditch company, irrigation district, water users' association, or other water supply or delivery entity within whose system the water rights fall.
- (c) Provided that the State Engineer has made a determination of no injury pursuant to section 37-83-105(2)(a)(III), C.R.S., the Board hereby delegates authority to the CWCB Director to accept expedited loans of water for instream flow use in accordance with the procedures and subject to the limitations set forth in section 37-83-105, to execute an agreement for the loan of the water, and to take any administrative action necessary to put the loaned water to instream flow use. ~~The purpose of this delegation is to expedite the Board's exercise use of a temporarily loaned of water for instream flow use under this Rule 6k.(1) by the Board.~~
- (d) Provided that the State Engineer's determination of non-injury is still in effect, the Director shall notify the proponent and the State Engineer whether the temporary loan is to be exercised in subsequent years. Such notification shall be provided within 5 working days of the Director being notified by the proponent that the water is available for use under the temporary loan. The CWCB's use of loaned water for instream flows shall not exceed the CWCB's decreed instream flow rate(s), time period(s), and amount or extend beyond the CWCB's decreed instream flow reach(es) at any time during the expedited loan term, and shall comply with any terms and conditions imposed by the State Engineer to prevent injury. ~~The purpose of this delegation is to expedite use of temporarily loaned water for instream flows by the Board.~~

(e) At the first regular or special Board meeting after the Director accepts, or rejects over applicant's objection an offer of an expedited loan of water to the Board for temporary instream flow use under (4b) and/or (2c) above, the Board shall vote either to ratify or overturn the Director's decision.

(e)(f) The Board, Director and staff will expedite all actions necessary to implement Rule 6k.(1).

(2) Renewable Loans.

- (a) A renewable loan approved to preserve or improve the natural environment must not be exercised for more than five years in a ten-year period and for no more than three consecutive years, for which only a single approval by the State Engineer is required. Instream flow use may not exceed 120 days in a single calendar year. The ten-year period begins when the State Engineer approves the loan. If an applicant for a renewable loan has previously been approved for and has exercised an expedited loan using the same water right(s) that are the subject of the pending application, the one-year loan period of the expedited loan counts as the first year of the five-year allowance for the subsequent renewable loan.
- (b) The Board will use a two-Board meeting process to review, consider public comment, and direct Staff whether to move forward with proposed renewable loans of water for instream flow use to preserve or improve the natural environment to a reasonable degree.
- (c) Any Person may request the Board to hold a hearing on a proposed renewable loan. Such a request must be submitted to the Board in writing within twenty days after the first Board meeting at which the Board considers the proposed renewable loan, and must include a brief statement, with as much specificity as possible, of why a hearing is being requested. The Board shall conduct all hearings on renewable loans pursuant to Rule 6m.(5).
- (d) For renewable loans to improve the natural environment to a reasonable degree, the Board will:
  - i. request and review a biological analysis from Colorado Parks and Wildlife concerning the extent to which the proposed loan will improve the natural environment to a reasonable degree, and review any other biological or scientific evidence presented to the Board;
  - ii. make findings on flow rates appropriate to improve the natural environment to a reasonable degree with the loaned water; and
  - iii. give preference to loans of stored water, when available, over loans of direct flow water.
- (e) When evaluating a proposed renewable loan, the Board shall consider any potential injury to decreed water rights, decreed exchanges of water, or other water users' undeclared existing exchanges of water to the extent that the undeclared existing exchanges have been administratively approved before the date of the Board's consideration.
- (f) If the Board directs Staff to move forward with a proposed renewable loan, staff will coordinate with the applicant to:
  - i. prepare and submit the necessary documentation to the State Engineer required by sections 37-83-105(2)(a)(I) and (2)(b)(I); and
  - i-ii. provide the written notice required by section 37-83-105(2)(b)(II), and access to all documentation provided to the State Engineer under Rule 6k(2)(f)i, to: (1) all parties on the substitute water supply plan notification list established pursuant to section 37-92-308(6) for the water division in which the proposed loan is located; and (2) a registered agent of a ditch company, irrigation district, water users' association, or other water supply or delivery entity within whose system the water rights fall.
- (g) Board direction to Staff to move forward with a proposed renewable loan will include authorizing Staff to execute an agreement for the loan of water and to take any administrative action necessary to put the loaned water to instream flow use, provided that the State Engineer determines that no injury will result from the proposed loan.

- (h) The CWCB's instream flow use of loaned water shall not extend beyond the CWCB's decreed instream flow reach(es) at any time during the renewable loan term, and shall comply with any terms and conditions imposed by the State Engineer to prevent injury.
- (i) In each year that a renewable loan is exercised, the applicant, coordinating with Staff if necessary, shall provide the written notice required by section 37-83-105(2)(b)(II).
- (j) The applicant may reapply for a renewable loan, and the State Engineer may approve such loan for up to two additional ten-year periods. Prior to any such reapplication, at a properly noticed public meeting, Staff will inform the Board about the exercise of the loan during the previous ten-year period and request approval for the loan to continue for the additional ten-year period. The Board shall consider any public comment and objections to the renewal provided at the public meeting. If the Board authorizes renewal of the loan, staff will coordinate with the applicant to: (1) prepare and submit the necessary documentation to the State Engineer required by sections 37-83-105(2)(a)(I) and (2)(b)(I); and (2) provide the written notice required by section 37-83-105(2)(b)(II).
- (3) Water rights loaned to the Board pursuant to expedited or renewable loans are not precluded from concurrent or subsequent inclusion in a water conservation, demand management, compact compliance, or water banking program or plan, as is or may be subsequently defined or described in statute.

**6l. Funds for Water Right Acquisitions.**

The Board may use any funds available to it for costs of the acquisition of water rights and their conversion to ISF use. The Board shall spend available funds for such costs in accordance with section 37-60-123.7, C.R.S. and any other applicable statutory authority, and with applicable Board policies and procedures.

**6m. Public Input on Proposed Acquisitions.**

The Board shall follow the public review process in Rules 11a. - 11c. when acquiring water, water rights or interests in water, except for expedited and renewable temporary loans or leases as provided in Rule 6k. above and except as provided below.

- (1) Prior to Board consideration of any proposed acquisition, Staff shall mail notice of the proposed acquisition to all Persons on the ISF Subscription Mailing List and the State Engineer's Substitute Supply Plan Notification List for the relevant water division, and shall provide Proper Notice. Such notice shall include:
- (a) The case number adjudicating the water right proposed to be acquired, and the appropriation date, adjudication date, priority, decreed use(s), and flow amount of the water right proposed to be acquired, and approximately how much of the water right the Board will consider acquiring;
  - (b) The location of the stream reach or lake that is the subject of the proposal, including, when available, the specific length of stream reach to benefit from the proposed acquisition;
  - (c) Any available information on the purpose of the acquisition, including the degree of preservation or improvement of the natural environment to be achieved;
  - (d) Any available scientific data specifically supporting the position that the acquisition will achieve the goal of preserving or improving the natural environment to a reasonable degree; and

- (e) In addition to (a) - (d) above, for leases and loans of water, water rights or interests in water under section 37-92-102(3), such notice shall include the proposed term of the lease or loan and the proposed season of use of the water under the lease or loan.
- (2) At every regularly scheduled Board meeting subsequent to the mailing of notice, and prior to final Board action, Staff will report on the status of the proposed acquisition and time will be reserved for public comment.
- (3) Any Person may address the Board regarding the proposed acquisition prior to final Board action. Staff shall provide any written comments it receives regarding the proposed acquisition directly to the Board.
- (4) Any Person may request the Board to hold a hearing on a proposed acquisition. Such a request must be submitted to the Board in writing within twenty days after the first Board meeting at which the Board considers the proposed acquisition, and must include a brief statement, with as much specificity as possible, of why a hearing is being requested.
- (5) At its next regularly scheduled meeting after receipt of the request for a hearing, or at a special meeting, the Board will consider the request and may, in its sole discretion, grant or deny such a request. All hearings scheduled by the Board shall be governed by the following procedures:
  - (a) A hearing on a proposed acquisition, except for renewable loans, must be held within the 120 day period allowed for Board consideration of an acquisition pursuant to Rule 6b., unless the Person requesting the Board to consider the proposed acquisition agrees to an extension of time.
  - (b) The Board shall appoint a Hearing Officer to establish the procedures by which evidence will be offered.
  - (c) For hearings on acquisitions other than renewable loans, At least thirty days prior to the hearing date(s), the Board shall provide written notice of the hearing(s) to the Person proposing the acquisition, all interested parties known to the Board, and all Persons on the ISF Subscription Mailing List and the State Engineer's Substitute Supply Plan Notification List for the relevant water division. The Board also shall provide Proper Notice, as defined in ISF Rule 4n.
  - (d) For hearings on renewable loans, at least thirty days prior to the hearing date, the Board shall provide written notice of the hearing to the owner of the water right to be loaned and to: (1) all parties on the substitute water supply plan notification list established pursuant to section 37-92-308(6) for the water division in which the proposed loan is located; and (2) a registered agent of a ditch company, irrigation district, water users' association, or other water supply or delivery entity within whose system the water rights fall. Such notice shall include the process and deadlines for participating in the hearing.
  - (~~e~~) Any Person who desires party status shall become a Party upon submission of a written Notice of Party Status to the Board Office. The Notice shall include the name and mailing address of the Person and a brief statement of the reasons the Person desires party status. The Board Office must receive Notice of Party Status within seven days after notice of the hearing is issued.
  - (~~f~~) The Hearing Officer shall set timelines and deadlines for all written submissions. Prehearing statements will be required, and shall include, but not be limited to, the following: 1) a list of all disputed factual and legal issues; 2) the position of the Party regarding the factual and legal issues; 3) a list identifying all of the witnesses that will

testify for the Party, and a summary of the testimony that those witnesses will provide; and 4) copies of all exhibits that the Party will introduce at the hearing(s).

- (fg) Any Party may present testimony or offer evidence identified in its prehearing statement regarding the proposed acquisition.
- (gh) The Hearing Officer shall determine the order of testimony for the hearing(s), and shall decide other procedural matters related to the hearing(s). The Hearing Officer does not have authority to rule on substantive issues, which authority rests solely with the Board.
- (hi) The Board will not apply the Colorado Rules of Evidence at hearings on proposed acquisitions.
- (ij) The Board may permit general comments from any Person who is not a Party; however, the Board may limit these public comments to five minutes per Person.
- (jk) The Board may take final action at the hearing(s) or continue the hearing and/or deliberations to a date certain.
- (kl) Board hearings may be recorded by a reporter or by an electronic recording device. Any Party requesting a transcription of the hearing(s) shall be responsible for the cost of the transcription.
- (lm) When necessary, the Board may modify this hearing procedure schedule or any part thereof as it deems appropriate.

**6n. Board Action to Acquire Water, Water Rights or Interests in Water.**

The Board shall consider the acquisition during any regular or special meeting of the Board. At the Board meeting, the Board shall consider all presentations or comments of Staff or any other Person. After such consideration, the Board may acquire, acquire with limitations, or reject the proposed acquisition.

**7. INUNDATION OF ISF RIGHTS.**

...

**7d. Staff Investigation.**

After receiving the request to inundate, the Staff may seek the recommendations from ~~the Division of Colorado Parks and Wildlife, Division of Parks and Outdoor Recreation,~~ Division of Water Resources, United States Department of Agriculture and United States Department of Interior.

**8. PROTECTION OF ISF APPROPRIATIONS.**

...

**8i.(3) Injury Accepted with Mitigation.**

In the event a proposed pretrial resolution will allow injury to or interference with an ISF or natural lake level (NLL) water right, but mitigation offered by the applicant could enable the Board to accept the injury or interference while continuing to preserve or improve the natural environment to a reasonable degree, and if the proposed pretrial resolution does not include a modification under ISF Rule 9, the Board shall:

...

- (f) After receipt and review of the required information, staff will consult with ~~the DOW~~ Colorado Parks and Wildlife (CPW) and with the entity that originally recommended the affected ISF or NLL water rights(s) (if other than CPW~~DOW~~) to determine whether additional field work is necessary and to identify any scheduling concerns. Staff will request a recommendation from CPW~~the DOW~~ as to whether the proposed mitigation will enable the Board to continue to preserve or improve the natural environment of the affected stream or lake to a reasonable degree despite the injury, including a discussion of the reasonableness of the alternatives considered. CWCB staff will use best efforts to consult with affected land owners and managers regarding the proposal.

...

(h) At the first meeting of the two-meeting process required by this Rule, staff will bring the proposal to the Board for preliminary consideration after completing its review of the proposal and its consultation with CPW~~DOW~~. Staff will work with the proponent and interested parties to address any preliminary concerns prior to bringing a proposal to the Board. Preliminary consideration by the Board may result in requests for more information or for changes to the proposal. Staff will work with the proponent and interested parties to finalize the proposal and bring it back to the Board for final action at a subsequent Board meeting.

...

- (l) Stipulations and water court decrees that incorporate Injury with Mitigation shall include, but not be limited to inclusion of, the following terms and conditions:

...

iii. A provision allowing CWCB or CPW~~DOW~~ staff access to the property on which structural components of the mitigation are located to inspect the structures at certain time intervals, and, if necessary, to perform biological stream or lake monitoring. This provision shall clearly define the reasonable nature, extent and timing of such access (i.e, advance notice, dates, times or season of access, coordination with proponent, and location and routes of access);

#### **11c. Public Agency Recommendations.**

Prior to taking an ISF action pursuant to Rules 5 or 6, the Board shall request recommendations from ~~the Division of Colorado Parks and Wildlife and the Division of Parks and Outdoor Recreation~~. The Board shall also request recommendations from the United States Department of Agriculture and the United States Department of Interior. The Board may also request comments from other interested Persons or agencies as it deems appropriate.

Prior to taking an ISF action pursuant to Rules 7, 8, 9, or 10, the Board may request recommendations from ~~the Division of Colorado Parks and Wildlife, the Division of Parks and Outdoor Recreation,~~ the Division of Water Resources, the United States Department of Agriculture, the United States Department of Interior or other Persons as it deems appropriate.

## Statement of Basis and Purpose

In 1973, the General Assembly enacted Senate Bill 97, creating the Colorado Instream Flow and Natural Lake Level Program (“ISF Program”), to be administered by the Colorado Water Conservation Board (“Board” or “CWCB”). The Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 (“Rules”), initially adopted in 1993, codify and establish procedures for the Board to implement the ISF Program.

In 2020, the Board amended the Rules to: (1) address the requirements of House Bill 20-1157 (codified at section 37-83-105, C.R.S.); (2) update a reference to the CWCB’s website; and (3) update references to Colorado Parks and Wildlife (“CPW”). The statutory authority for the Rules and the 2020 revisions to the Rules is found at sections 37-60-108, 37-83-105(3), and 37-92-102(3), C.R.S. (2020).

For the 2020 revisions, the Board revised Rule 4c. to update the CWCB website address, and amended Rules 6f.(2); 7d.; 8i.(3)(f), (h), and (l)(iii); and 11c. to update references to Colorado Parks and Wildlife (“CPW”). The Board also revised Rules 6k. and 6m. to address requirements of House Bill 20-1157 regarding temporary expedited and renewable loans of water to the Board for instream flow (“ISF”) use.

Specifically, Rule 6k. defines temporary (expedited and renewable) loans; describes allowable uses for each type of loan and time periods for which they may be exercised; and refers to the owner of a decreed water right who has offered water to the Board for an expedited or renewable loan as an “applicant.” The language of Rule 6k.(1) previously pertained to all temporary loans of water but now is split into Rule 6k.(1) and 6k.(2) to address expedited and temporary loans separately. Rule 6k.(1) now addresses expedited loans, describing: (a) limitations on the use of such loans; (b) the timing of the CWCB Director’s response to an offer of an expedited loan of water for temporary ISF use, and though applicant is ultimately responsible for submitting documentation and requesting approval, the actions staff will take in coordination with an applicant to request approval from the State Engineer of an expedited loan, including preparing and submitting documentation and providing written notice as required by the statute; and (c) the Board’s delegation of authority to the CWCB Director, provided that the State Engineer has determined that no injury will result from the expedited loan, to: (i) accept and execute an agreement for the expedited loan of water; and (ii) take any administrative action necessary to put the loaned water to instream flow use. Rule 6k.(1)(d) revisions confirm that the CWCB’s use of water under an expedited loan is subject to the CWCB’s decreed instream flow rate(s), time period(s) and reach(es) and any conditions imposed by the State Engineer to prevent injury. Rule 6k.(1)(e) describes the timing of the Board’s review and action on the CWCB Director’s decision regarding an offer of an expedited loan, and now clarifies that if applicant agrees the loan offer should be rejected, that decision does not have to be brought to the Board. Rule 6k.(1)(f) directs the Board, Director, and staff to expedite all actions necessary to implement expedited loans under Rule 6k.(1).

Rule 6k.(2) is a completely new provision that addresses renewable loans of water for temporary instream flow use. Rule 6k.(2)(a) identifies timing limitations on the exercise of renewable loans and provides that if an applicant for a renewable loan has previously been approved for and has exercised an expedited loan using the same water right(s) that are the subject of the pending application, the one-year loan period of the expedited loan counts as the first year of the five-year allowance for the subsequent renewable loan. Rules 6k.(2)(b) and (c) identify the Board process for reviewing, considering public comment, and directing Staff whether to move forward with a proposed renewable loan, and provide direction on how a person can request a hearing on a proposed renewable loan. Rule 6k.(2)(d) sets forth actions the Board will take when considering a proposed renewable loan to improve the natural environment to a reasonable

degree. Rule 6k.(2)(e) describes the types of water rights and water activities the Board must consider any potential injury to when evaluating a proposed renewable loan. Rules 6k.(2)(f) and (g) describe the actions the Board authorizes and directs Staff to take when the Board directs Staff to move forward with a proposed renewable loan, including coordinating with the applicant in preparing and submitting documentation and providing written notice as required by statute, though the applicant is ultimately responsible for these acts, and provided that the State Engineer determines no injury will result from the proposed loan, executing an agreement for the loan and taking any administrative action necessary to put the loaned water to instream flow use. Rule 6k.(2)(h) provides that in each year that a renewable loan is exercised, the applicant, coordinating with Staff if necessary, shall provide the written notice required by statute. Rule 6k.(2)(i) sets forth the Board's process for reviewing, considering public comment, and deciding whether to authorize Staff to coordinate with an applicant on applying for a renewal of an existing renewable loan for an additional ten-year period, including preparing and submitting documentation and providing written notice as required by statute.

Rule 6k.(3) is taken directly from HB20-1157 and provides that water rights loaned to the Board pursuant to expedited or renewable loans are not precluded from concurrent or subsequent inclusion in a water conservation, demand management, compact compliance, or water banking program or plan, as is or may be subsequently defined or described in statute.

In 2020, the Board also amended Rule 6m. to exclude expedited and temporary loans from the process in Rules 11a-11c, and to address the hearing process for renewable loans, which differs from the hearing process for other acquisitions of water for instream flow use only regarding to whom and when notice of a hearing will be provided. Rule 6m.(5)(d) has been added and provides that at least thirty days prior to the hearing date, the Board shall provide written notice of a hearing on a proposed renewable loan, including the process and deadlines for participating in the hearing, to the applicant and to the recipients specified in section 37-83-105(2)(b)(II), C.R.S.