BEFORE THE COLORADO WATER CONSERVATION BOARD
STATE OF COLORADO

IN THE MATTER OF REVISIONS TO COLORADO WATER CONSERVATION BOARD'S RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM, 2 CCR 408-2

PREHEARING STATEMENT OF COLORADO PARKS AND WILDLIFE

Colorado Parks and Wildlife (CPW) submits this Prehearing Statement in the rulemaking hearing to consider revisions to Colorado Water Conservation Board (CWCB)'s Rules Concerning the Colorado Instream Flow and Natural Lake Level Program (Rules).

I. Statement of CPW's Interest

CPW's mission is to perpetuate the wildlife resources of the state, provide a quality state park system, and provide enjoyable and sustainable outdoor recreation opportunities that educate and inspire current and future generations to serve as active stewards of Colorado's natural resources. CPW has a statutorily prescribed role in support of CWCB's Instream Flow and Natural Lake Level Program, and partners with CWCB to effectuate temporary loans of water to CWCB for the instream flow loan program. The proposed revisions to Rule 6.k will expand CPW's ability to partner with CWCB for loans of water pursuant to Section 37-83-105(1)(c), C.R.S. The proposed revisions are also related to CPW's role to provide biological expertise in support of CWCB's programs. CPW is a party in this hearing to support CWCB's programs, to provide biological expertise and recommendations as needed, to ensure that any amendments to the Rules remain consistent with CPW's role to provide biological data and support to CWCB, to review and respond to testimony submitted by other parties or public comment, and to ensure that any

revisions adopted by the Board are consistent with section 37-83-105, C.R.S., and the intent of the ISF Program.

II. Background

During the 2024 session of the Colorado General Assembly, the legislature passed SB 24-197, which, among other things, added provisions to section 37-83-105, C.R.S., pertaining to CWCB's instream flow loan program (ISF loan program). The added provisions expand the ISF loan program to allow the owner of a decreed storage water right to loan water to the CWCB to preserve or improve the natural environment to a reasonable degree for a stream reach for which the board does not hold a decreed instream flow water right. CWCB staff (Staff) initiated this rulemaking in order to adopt rules to implement the expanded ISF loan program.

III. Statement of Position and Comments on Proposed Rules

The purpose of the instant proceeding is for the Board to adopt rules to incorporate revisions to the ISF loan program pursuant to, and as directed by, SB 24-197. CPW generally supports the Rule revisions proposed by Staff and believes they are consistent with SB 24-197 and the intent of the ISF Program. CPW proposes one minor modification explained below.

To carry out its mission, CPW's policies and programs include efforts to develop and protect a wide range of aquatic resources. CPW owns water rights and interests in water which it uses in support of its programs, for the benefit of the public, for use on its properties, and to sustain fisheries across the state. CPW has participated in the ISF Program in a variety of ways and benefited from its own and other participants' use of the legal tools allowed by the program, including use of water under the ISF loan program. CPW is also statutorily directed to provide

recommendations to the CWCB in support of the CWCB's ISF Program. The proposed Rules incorporate CPW's role to provide a biological analysis for loans made pursuant to Section 37-83-105(1)(c), C.R.S, of stored water for use in stream reaches in which the Board does not hold a decreed instream flow water right. Thus, CPW has reviewed the proposed revisions to the Rules as a water user, a beneficiary of the ISF program, an entity that uses the ISF loan program with its own water rights, and as an agency that will have a significant role in implementing the proposed Rules.

The ISF loan program, when implemented appropriately to preserve or improve the natural environment to a reasonable degree, is an important mechanism that can advance CPW's mission to protect, preserve, enhance, and manage wildlife for the use, benefit, and enjoyment of the Coloradans and visitors to Colorado. CPW also believes that the intent of SB 24-197 is to make the ISF loan program more widespread and flexible without the requirement of an underlying decreed instream flow water right, while maintaining adequate protections for water users.

A. Overview of Staff's Proposed Changes to Rule 6.k

Staff have proposed a number of revisions to Rules 6.k to address changes to the CWCB's loan program under section 37-83-105(1)(c), C.R.S. In the proposed revisions, Staff amended the Rules to add the ability to use stored water for loans benefitting stream reaches in which the Board does not hold a decreed instream flow water right, including:

i. The ability to operate this type of loan under both expedited and renewable loan processes;

ii. A requirement that the Board will request and review a biological analysis from CPW concerning the extent to which the proposed loan will preserve or improve the natural environment to a reasonable degree, and review any other biological or

scientific evidence presented to the Board;

iii. A requirement that the Board make findings on flow rate(s), time period(s), and reach(es) of stream appropriate to preserve or improve the natural environment to a reasonable degree with the loaned water;

iv. An additional requirement that loan documentation shall include an analysis of historical releases of the loaned water right for its decreed beneficial uses.

Staff's proposed revisions to the Rules are tailored to implement changes enacted through SB 24-197 while providing sufficient clarity and certainty to applicants and other water users as to how the provisions will be implemented. The proposed revisions incorporate CPW's role under the added provisions of SB 24-197 which remains consistent with its role under the prior ISF loan program and within the ISF Program more broadly. Finally, the proposed Rule revisions provide direction to Staff and the Board on how to implement the statutory changes.

B. Requested Clarification to Rules 6.k.1.b and Rule 6.k.2.f

CWCB Staff have proposed an addition to clarify what information should be provided to the State Engineer along with an offer of an expedited or renewable loan. In both Rule 6.k.1.b and Rule 6.k.2.f, Staff's edits add:

> . . .In the case of loans made pursuant to Section 37-83-105(1)(c), C.R.S., such documentation shall include an analysis of historical releases of the loaned water right for its decreed beneficial uses.

CPW owns water rights which are decreed for many different beneficial uses, including storage rights for in-reservoir use, as well as for release for subsequent beneficial use. Typically, water rights that are decreed solely for in-reservoir use will not have a record of historical releases in the same manner as a water right that is stored primarily for subsequent release and use. CPW

is not opposed to including clarification regarding what information may be relevant for the State Engineer to review in order to make a determination regarding injury for the expanded ISF loan program. However, CPW proposes minor edits to this provision to recognize that water storage rights decreed for different purposes may have different patterns of diversions and releases, and therefore some analysis may not be relevant for evaluating all water rights.

> . . .In the case of loans made pursuant to Section 37-83-105(1)(c), C.R.S., such documentation shall include an analysis of historical diversions to storage and/or releases of the loaned water right for its decreed beneficial uses, as relevant.

CPW is providing a redline of Staff's proposed revisions and Statement of Basis and Purpose attached as Exhibits A and B.

IV. Witness List

CPW may call the individuals identified below to provide testimony at the hearing:

- Katie Birch, Instream Flow Program Coordinator, Colorado Parks and Wildlife
- Elizabeth Joyce, Senior Assistant Attorney General, Office of the Attorney General

Ms. Birch and Ms. Joyce may provide testimony regarding CPW's experience with the ISF loan program, CPW's role in providing support to Staff for the CWCB, and the language of the proposed Rules and any proposed amendments. CPW reserves the right to update its witness list as this proceeding progresses.

V. Open Legal Questions

CPW has not identified any open legal questions. CPW reserves the right to update its position on this issue as the proceeding progresses.

VI. Relief Requested

CPW requests adoption of the proposed Rules substantially similar to the published and noticed proposed Rules, as modified consistent with CPW's requested clarification.

VII. Time Requested at the Hearing

At this time, CPW requests five minutes to provide testimony. CPW reserves the right to amend its request as the proceeding progresses.

VIII. Exhibit List

CPW is providing copies of Exhibit A and B to this PHS as Exhibits CPW-1 and CPW-2. CPW may rely on exhibits or evidence included in the administrative record for this proceeding, including information presented by other parties, or as needed for demonstrative or rebuttal purposes. CPW reserves the right to update its exhibit list as this proceeding progresses.

Submitted this 30th day of May, 2025.

FOR COLORADO PARKS AND WILDLIFE

Matt Nicholl, Assistant Director for Aquatics
Wildlife Branch Colorado Parks and Wildlife
6060 Broadway
Denver, Colorado 80216

CERTIFICATE OF SERVICE

I hereby certify that I have duly served the copies of the foregoing **Prehearing Statement of Colorado Parks and Wildlife** upon all parties herein by email, this 30th day of May, 2025, addressed as follows:

Hearing Officer

Jackie Calicchio Senior Assistant Attorney General Colorado Attorney General's Office 1300 Broadway, 7th Floor Denver, CO 80203 720-508-6250 Jackie.calicchio@coag.gov

Rulemaking Parties

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Colorado Water Trust Josh Boissevain 1317 17th Street #766 Denver, CO 80202 720-570-2897 jboissevain@coloradowatertrust.org	Western Resource Advocates, Conservation Colorado, the National Audubon Society, and Trout Unlimited John Cyran 2260 Baseline Road Boulder, CO 80302 303-746-3802 john.cyran@westernresources.org

/s/ Elizabeth M. Joyce

DEPARTMENT OF NATURAL RESOURCES

Colorado Water Conservation Board

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

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.

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 Colorado 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. In the case of loans made pursuant to Section 37-83-105(1)(c), C.R.S., an owner of a decreed storage water right may loan water to the CWCB to preserve or improve the natural environment to a reasonable degree for stream reaches in which the Board does not hold a decreed instream flow water right. The Board may exercise both expedited and renewable temporary loans of water for instream flow use for a period not to exceed 120 days in 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 working days after receiving an offer of an expedited loan of water to the Board for temporary instream flow use, the Director will provide a response to the applicant. If the proposed loan appears to be appropriate for instream flow use, 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), C.R.S. In the case of loans made pursuant to Section 37-83-105(1)(c), C.R.S., such documentation shall include an analysis of historical diversions to storage and/or historical releases of the loaned water right for its decreed beneficial uses, where relevant;

ii. provide the written 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; and

iii. provide notice to all Persons on the ISF Subscription Mailing List for the relevant water division.

(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, C.R.S., 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 of a temporary loan of water for instream flow use under this Rule 6k.(1).

(d) 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 reach(es) at any time during the expedited loan term. For any expedited loan, the CWCB ~~, and~~ shall comply with any terms and conditions imposed by the State Engineer to prevent injury. In addition, for loans made pursuant to Section 37-83-105(1)(c), C.R.S, of stored water for use in stream

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reaches in which the Board does not hold a decreed instream flow water right, the Board will:

i. request and review a biological analysis from CPW concerning the extent to which the proposed loan will preserve or improve the natural environment to a reasonable degree, and review any other biological or scientific evidence presented to the Board; and

ii. make findings on flow rate(s), time period(s), and reach(es) of stream appropriate to preserve or improve the natural environment to a reasonable degree with the loaned water.

(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 (b) and (c) above, the Board shall vote either to ratify or overturn the Director's decision.

(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, or loans to preserve or improve the natural environment to a reasonable degree made pursuant to Section 37-83-105(1)(c), C.R.S, of stored water for use in stream reaches in which the Board does not hold a decreed instream flow water right, the Board will:

i. request and review a biological analysis from CPW concerning the extent to which the proposed loan will improve the natural environment to a reasonable degree, or loans to preserve or improve the natural environment to a reasonable degree made pursuant to Section 37-83-105(1)(c), C.R.S., 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, and for loans made pursuant to Section 37-83-105(1)(c), C.R.S, make findings on the flow rate(s), time period(s), and reach(es) of stream to preserve or improve the natural environment to a reasonable degree with the loaned water; and

iii. for loans made pursuant to Section 37-83-105(1)(b), C.R.S., give preference to loans of stored water, when made 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' 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.

(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), C.R.S. In the case of loans made pursuant to Section 37-83-105(1)(c), C.R.S., such documentation shall include an analysis of historical diversions to storage and/or historical releases of the loaned water right for its decreed beneficial uses, where relevant;

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ii. provide the written 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.(2)(f)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;

iii. provide notice to all Persons on the ISF Subscription Mailing List for the relevant water division; and

iv. make best efforts to publish notice of the proposed plan in an appropriate legal newspaper of general circulation in each county in which the loan will be implemented and from which the loaned water has been historically used.

(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), or in the case of loans made pursuant to Section 37-83-105(1)(c), C.R.S, of stored water, such rate(s), time period(s), and reach(es) as determined by the Board to be necessary to preserve or improve the natural environment to a reasonable degree, 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 described in section 37-83-105(2)(b)(II), C.R.S.

(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), C.R.S.; and (2) provide the written notice required by section 37-83-105(2)(b)(II), C.R.S.

(3) Water rights loaned to the Board pursuant to expedited or renewable loans are not precluded from concurrent or subsequent inclusion in other programs, such as water conservation, demand management, compact compliance, or water banking programs or plans, as are or may be subsequently defined or described in statute. The applicant will inform the Board of inclusion of the loaned water right in any such program during the loan period.

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), C.R.S., 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), C.R.S., for the water division in which the proposed loan is located; (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; and (3) provide notice to all Persons on the ISF Subscription Mailing List for the relevant water division. 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).

(g) Any Party may present testimony or offer evidence identified in its prehearing statement regarding the proposed acquisition.

(h) 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.

(i) The Board will not apply the Colorado Rules of Evidence at hearings on proposed acquisitions.

(j) 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.

(k) The Board may take final action at the hearing(s) or continue the hearing and/or deliberations to a date certain.

(l) 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.

(m) When necessary, the Board may modify this hearing procedure schedule or any part thereof as it deems appropriate.

6n. <u>Board Action to Acquire Water, Water Rights or Interests in Water</u>.

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.

Statement of Basis and Purpose, and Specific Statutory Authority

Brief History of Previous ISF Rulemaking:

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 ("ISF Rules"), initially adopted in 1993, codify and establish procedures for the Board to implement the ISF Program.

The Board has amended the Rules several times since 1993 to reflect changes in the statutes related to the ISF Program. Notably, in 1999, the Board repealed the existing Rule 5 in its entirety, and, among other things, adopted a new Rule 5 to establish a public notice and comment process for instream flow water right appropriations. In 2003, the Board amended Rule 6 to implement the provisions of Senate Bill 02-156 by identifying factors that the Board will consider when determining whether to acquire water, water rights, or interests in water, and by establishing procedures for notice, public input, and, if necessary, hearings. In 2004, the Board amended Rule 6 to implement House Bill 03- 1320, codified at section 37-83-105, C.R.S. (2003), to allow for emergency loans of water for instream flows. The Board also amended Rule 6 to enable the Board to finalize an acquisition within a two-meeting time frame, if necessary. In 2005, the Board amended Rule 6 to implement House Bill 05-1039, establishing how the Board and its staff will respond to offers of water for temporary instream flow use and expedite use of loaned water for instream flow purposes.

In 2009, the Board amended Rule 6 to adopt criteria specified in House Bill 08-1280 (codified at sections 37-92-102(3), 37-92-103 and 37-92-305, C.R.S.) for evaluating proposed leases or loans of water, and to incorporate H.B. 1280's requirements for: (1) specific conditions that must be met as part of the CWCB's approval of a proposed loan or lease of water; (2) provisions that must be included in all agreements for loans or leases of water under section 37-92-102(3); and (3) actions that the Board must take in connection with loans or leases of water. Rule 6 does not incorporate those provisions of H.B. 1280 that direct the water courts or the Division of Water Resources to take certain actions in regard to water acquisitions by the Board for instream flow use.

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).

Basis and Purpose for 2025 Rulemaking:

This statement pertains to the 2025 amendments to the Rules to implement the requirements of Senate Bill 24-197 (codified at section 37-83-105(1)(c), C.R.S. Specifically, Rule 6k., titled "Temporary (Expedited and Renewable) Loans of Water to the Board,"

defines temporary (expedited and renewable) loans; describes allowable uses for each type of loan and time periods for which they may be exercised; and though applicant is ultimately responsible for submitting documentation and requesting approval, the rule outlines actions staff will take in coordination with an applicant to request approval from the State Engineer. Under previous law and the previous Rule 6k., CWCB already had an established authority to accept loans of stored water for ISF use to preserve or improve the natural environment to a reasonable degree in stream reaches for which **CWCB holds** decreed ISF water rights. Senate Bill 24-197 added authority for CWCB to accept loans of stored water for ISF use to preserve or improve the natural environment to a reasonable degree in stream reaches for which **CWCB does not hold** decreed ISF water rights, therefore the 2025 ISF Rule revisions are promulgated to regulate the limited additional authority wherein stored water may be used in reaches without a decreed ISF right.

Specifically, the 2025 ISF Rule revisions in Rules 6k(1)(b) and 6k(2)(f) now specify that a loan made pursuant to Section 37-83-105(1)(c), C.R.S requires the submittal of specific documentation to include an analysis of historical diversions to storage and/or historical releases of the loaned water right for its decreed beneficial uses, where relevant, in addition to the existing statutory requirement of sections 37-83- 105(2)(a)(I) and (2)(b)(I), C.R.S to provide data regarding "time, place, and types of use of the loaned water right," and "an estimate of the historic consumptive use." Rules 6k(1)(d) and 6k(2)(d) state that for any loan made pursuant to Section 37-83-105(1)(c), C.R.S, the Board will request a biological analysis form CPW and make findings on flow rates appropriate to preserve or improve the natural environment to a reasonable degree in the reaches of stream wherein CWCB does not hold existing decrees for instream flow use. Rule 6k(2)(h) clarifies that loans made pursuant to Section 37-83-105(1)(c), C.R.S, use of the stored water is limited to the rates, time periods, and reaches determined by the Board to be necessary to preserve or improve the natural environment to a reasonable degree.

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Specific Statutory Authority

Amendments to the ISF Rules are adopted pursuant to section 37-60-108, C.R.S., 37-83-105, C.R.S., and section 37-92-102(3), C.R.S. and consistent with the rulemaking requirements of the State Administrative Procedures Act, section 24-4-103, C.R.S.