

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 Notably, in 1999, the Board repealed the existing Rule 5 in its entirety, and, among other things, adopted a new Rule 5 to establish a public notice and comment process for instream flow water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 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 from 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.

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.