

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

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

**WRITTEN TESTIMONY OF STAFF TO THE COLORADO WATER
CONSERVATION BOARD**

Pursuant to the Hearing Officer’s June 9, 2025 Order Re: Hearing Procedures and Remaining Deadlines, Staff to the Colorado Water Conservation Board (“CWCB Staff” or “Staff”) submits the following written testimony, which will be presented by Kaylea White, Senior Water Resource Specialist with the CWCB:

A. Introduction

In the 2024 legislative session, the General Assembly passed, and Governor Polis signed Senate Bill 24-197 (“SB 197”), which became effective on August 7, 2024. SB 197 amended section 37-83-105, C.R.S., which governs temporary loans of water for instream flow (“ISF”) use. Among other things, SB 197 directed the Board to promulgate rules, as applicable, for the CWCB’s review and acceptance of loans of stored water for instream flow use.

At the hearing set for July 17, 2025, CWCB Staff will ask the Board to adopt proposed revisions to Rule 6k of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program (“ISF Rules”) and the Statement of Basis and Purpose for the Rules. The revisions address the requirements of SB 197 for the CWCB to promulgate rules regarding the necessary steps for review and acceptance of loans of

stored water for reaches of stream where the Board does not hold a decreed ISF water right under 37-83-105(1)(c). The CWCB first adopted the ISF Rules in 1993, and has amended those rules several times to reflect changes in the law governing the Instream Flow Program. The most recent revisions to the ISF Rules occurred in 2021.

B. Background on this rulemaking process

After the legislature adopted SB 197, CWCB Staff and the Attorney General's Office coordinated on drafting revisions to the ISF Rules to reflect this most recent change to section 37-83-105, C.R.S. Staff held two stakeholder meetings on the draft Rules in December 2024 and January 2025, received written comments on the draft Rules, and met with interested parties. Staff made several revisions to the draft Rules in response to public input prior to providing the proposed Rules to the Board at its March 19-20, 2025 meeting, when the Board authorized Staff to initiate the formal rulemaking process. The Notice of Public Rulemaking and proposed revised Rules were published in the Colorado Register on April 10, 2025.

Three applications for party status were submitted to the Hearing Officer on or before the due date of May 1, 2025. In its Prehearing Statement, Colorado Parks and Wildlife (CPW) requested an edit to the proposed revised Rules that were published in the Colorado Register. In response, CWCB Staff met with a representative of CPW along with a representative of the Division of Water Resources (DWR) to discuss CPW's requested edit. The requested edit has been accepted by CWCB staff and all parties, and has been included on the final revisions that Staff will present to the Board at this hearing.

The Hearing Officer held a prehearing conference on June 9, 2025. Supplemental statements were filed on or before the due date of June 26, 2025 by CWCB and CPW.

C. The proposed revisions to the Rules

Staff recommends that the Board adopt the revised ISF Rules that were noticed and published in the Colorado Register on April 10, 2025 and the proposed Statement of Basis and Purpose, as both were edited with CPW's suggestions. See Exhibits A and B to CWCB Staff's Supplemental Prehearing Statement. The recommended proposed rule amendments are consistent with the requirements of SB 197 and the existing ISF Rules and will enable the proper implementation of section 37-83-105(1)(c) pertaining to loans of stored water for use in stream reaches without a decreed instream flow water right.

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. Revisions to the rule include adding reference to CWCB authority and requirements to accept loans made pursuant to section 37-83-105(1)(c) (See Rule 6k). The revisions add a requirement that the documentation submitted to DWR for loans under section 37-83-105(1)(c) include an analysis of historical diversions to storage and/or releases of the loaned water right for its decreed beneficial uses, as relevant (see Rule 6k(1)(b)(i) and 6k(2)(f)(i)). The revisions add a process for the Board to make findings regarding flow rate(s), time period(s), and reach(es) of stream, by requesting and reviewing a biological analysis by CPW, and other evidence presented for loans under section 37-83-105(1)(c) (see Rule 6k(1)(d) and 6k(2)(d)). Finally, the revisions add a restriction on use, for loans under section 37-83-105(1)(c), which use shall not extend beyond the

flow rate(s), time period(s), and reach(es) of stream determined by the Board to be necessary to preserve and improve the natural environment to a reasonable degree (see Rule 6k(2)(h)).

D. Public comments and CWCB Staff's responses

All written comments that Staff received are posted on the CWCB website. In response to general oral comments by various entities, CWCB Staff included some grammatical edits. In response to written comments from the DWR dated December 20, 2024, CWCB Staff included the language that was requested by DWR in the draft that was presented to the Board and published in the Colorado Register. Subsequently, CPW contacted CWCB Staff to discuss a concern with the language that had been previously suggested by DWR. At that point, staff from CWCB, CPW and DWR convened a video conference to discuss the concern. In that conference the three parties agreed on a few edits to the language. Once the other parties had a chance to review the suggestions, and all parties agreed, the new edits were incorporated in the final draft of the revised rules and the Statement of Basis and Purpose. The CPW edits are shown as highlighted language in Exhibits C and D to the CWCB Staff Supplemental Prehearing Statement. Those edits are included in the Exhibits A and B to the CWCB Staff Supplemental Prehearing Statement.

E. Conclusion

CWCB Staff recommends that the Board adopt the amended ISF Rules and the proposed Statement of Basis and Purpose, which include the CPW edits, attached to CWCB Staff's Supplemental Prehearing Statement as Exhibits A and B.

Dated this 3rd day of July, 2025.

*WRITTEN TESTIMONY OF STAFF TO THE
COLORADO WATER CONSERVATION BOARD*

PHIL WEISER
Attorney General

A handwritten signature in dark ink, appearing to read 'Jen Mele', is positioned above the printed name.

JEN MELE, #30720
First Assistant Attorney General
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Water Conservation Board
*Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that I have duly served the copies of the foregoing **WRITTEN TESTIMONY OF STAFF TO THE COLORADO WATER CONSERVATION BOARD** upon all parties herein by email, this 3rd day of July, 2025, addressed as follows:

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/s/ Sarah Glover

Sarah Glover