



**COLORADO**

**Colorado Water  
Conservation Board**

Department of Natural Resources

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Jared Polis, Governor

Dan Gibbs, DNR Executive Director

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**TO:** Colorado Water Conservation Board Members

**FROM:** Linda Bassi, Chief  
Kaylea White, Senior Water Resource Specialist  
Stream and Lake Protection Section

**DATE:** July 15, 2020

**AGENDA ITEM:** 6. Proposed Revisions to Rules Concerning the Colorado Instream  
Flow and Natural Lake Level Program, 2 CCR 408-2

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**This is an informational item with no Board action required.**

## Background

This year, the General Assembly passed and Governor Polis signed House Bill 20-1157 (HB 1157), which has an effective date of September 13, 2020. HB 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 1157 directs the Board to promulgate rules to implement certain provisions of the bill. See page 6, section (VIII)(3) of HB 1157, attached to this memo. The CWCB staff is working with the Attorney General's Office on drafting revisions to the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program (ISF Rules). In addition to addressing the requirements of HB 1157, the revisions also would update: (1) a reference to the CWCB's website in ISF Rule 4c.; and (2) references to Colorado Parks and Wildlife (CPW) throughout the ISF Rules, which currently refer to "the Colorado Division of Wildlife" or "DOW."

## 1. The Rulemaking Process

### a. Meetings with Stakeholders

Rulemaking by Colorado state agencies is governed by section 24-4-103, C.R.S. (2019). Section 24-4-103(2) requires agencies contemplating rulemaking to invite a representative group of stakeholders with an interest in the subject matter of the rules to meet informally to discuss and provide input on the proposed revised rules. Staff has scheduled such a meeting on August 3, 2020 and has provided notice to persons on the ISF Subscription Mailing list, requested Colorado Water Congress to forward the notice to persons on the State Affairs Committee, and posted notice on the CWCB website. Staff is also working on scheduling another such meeting in conjunction with the Colorado Water Congress summer conference in late August. Both meetings will be held remotely.

### b. Formal Rulemaking Process

Subsequent to holding public stakeholder meetings on proposed revised Rules, staff will request authorization from the Board to initiate the formal rulemaking process by submitting



a notice of public rulemaking hearing to the Secretary of State for publication in the Colorado Register. The notice must include: (1) the date and time of the rulemaking hearing and prehearing conference; (2) information on public participation; (3) a description of the subjects and issues involved; (4) the authority under which the rule is proposed; and (5) a copy of the proposed revised ISF Rules. The Board must hold the hearing no less than twenty days after publication of the notice. After the Board adopts the Rules, it must request an Attorney General opinion on the Rules and submit that opinion and the adopted Rules to the Secretary of State and the Office of Legislative Legal Services. After receiving approval from the Office of Legislative Legal Services, the Secretary of State will publish the Rules, which will become effective twenty days after the date of publication.

## 2. Proposed Revised Rules

The nonsubstantive proposed revisions to the ISF Rules would update: (1) the reference to the CWCB's website in ISF Rule 4c.; and (2) references to Colorado Parks and Wildlife (CPW) throughout the ISF Rules, which currently refer to "the Colorado Division of Wildlife" or "DOW."

The remaining proposed revisions to the ISF Rules would amend ISF Rules 6k. and 6m. to implement HB 1157, and include:

- a. Definitions of expedited and renewable loans;
- b. Notice requirements for both types of loan;
- c. Procedure for evaluating and requesting approval of expedited loans, and for Board review and potential ratification of Director's decision on such loans;
- d. 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 ISF Rule 6m(5). if requested;
- e. Steps the Board must take for proposed renewable loans that would improve the natural environment to a reasonable degree, including: (1) 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 (2) giving preference for loans of stored water, when available, over loans of direct flow water;
- f. 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;
- g. Staff process for coordinating with water rights owner on requesting approval from the State Engineer of a proposed renewable loan (after Board review and decision); and
- h. Process for Board review and approval of renewing a loan for a second or third ten-year period.

Attachments:

**Exhibit 1 - House Bill 20-1157**



# 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 LOANSTO 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

Exhibit 1  
Agenda Item #6  
July 15-16, 2020

*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

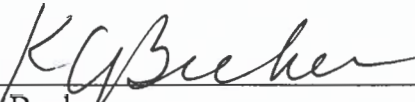
(c) THE BOARD'S DETERMINATION, AFTER A HEARING ON THE

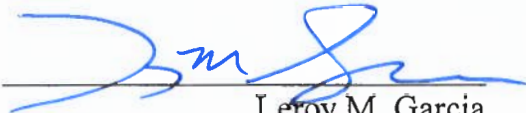


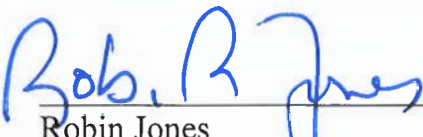
MATTER, IF REQUESTED, WHETHER TO ACCEPT THE PROPOSED LOAN.

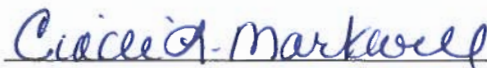
**SECTION 2. Act subject to petition - effective date - applicability.** (1) This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August 5, 2020, if adjournment sine die is on May 6, 2020); except that, if a 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.

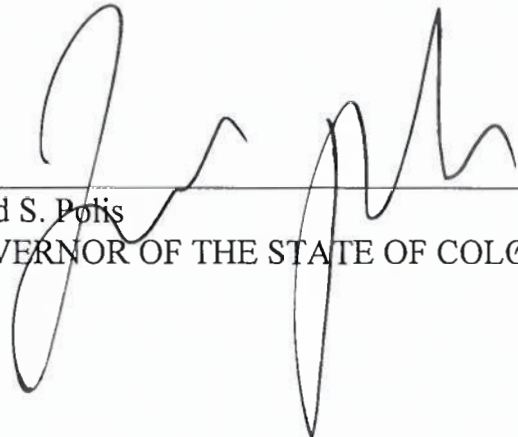
  
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KC Becker  
SPEAKER OF THE HOUSE  
OF REPRESENTATIVES

  
\_\_\_\_\_  
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)

  
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Jared S. Polis  
GOVERNOR OF THE STATE OF COLORADO