

**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 November 20, 2020 Order Re: Procedures and Deadlines for Prehearing Submissions, Staff to the Colorado Water Conservation Board (“Staff”) submits the following testimony. Staff’s witnesses are Linda Bassi and Kaylea White.

A. Introduction

In the 2020 legislative session, the General Assembly passed, and Governor Polis signed, House Bill 20-1157 (“HB 1157”), which became effective on September 14, 2020. HB 1157 amended section 37-83-105, C.R.S., which governs temporary loans of water for instream flow (“ISF”) use. Relevantly, HB 1157 directed the Board to promulgate rules to implement provisions of the bill that apply to temporary loans of water for ISF use to improve the natural environment to a reasonable degree.

At the hearing set for January 26, 2021, Staff will ask the Board to adopt proposed revisions to the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program (“ISF Rules”) and the Rules’ Statement of Basis and Purpose. The revisions address the requirements of HB 1157 and establish procedures to implement the bill, and make non-substantive updates to references to the CWCB

website and to Colorado Parks and Wildlife. The CWCB first adopted the ISF Rules in 1993, and has since amended those rules several times, most recently in 2009, to reflect changes in the law governing the ISF Program.

B. Background on this rulemaking process

After the legislature adopted HB 1157, Staff and the Attorney General's Office coordinated on drafting revisions to the ISF Rules to reflect HB 1157's changes to section 37-83-105, C.R.S. Staff held two stakeholder meetings on the draft Rules in August 2020, received written comments on the draft Rules, and met with some interested parties in July, August, and September 2020. Staff revised the draft Rules in response to public input before providing the proposed Rules to the Board at its September 2020 meeting, when it authorized Staff to initiate the formal rulemaking process. The Notice of Proposed Rulemaking and proposed revised Rules were published in the Colorado Register on October 25, 2020.

Eight applications for party status were submitted to the Hearing Officer on or before the November 13, 2020 deadline. One party, Mesa County, did not submit a Prehearing Statement and is no longer a party to this proceeding. In their Prehearing Statements, every party, except the City of Aurora ("Aurora"), asked the Board to adopt the proposed revised Rules that were published in the Colorado Register. Staff and the Attorney General's Office met with representatives of Aurora on December 15, 2020 to discuss Aurora's comments on the proposed revisions to the Rules. The Hearing Officer held a prehearing conference on December 17, 2020. On December 21, 2020, Aurora withdrew its application for party status. Rebuttal

statements were timely filed by all parties except Trout Unlimited, The Nature Conservancy, and the Colorado River Water Conservation District.

C. The proposed revisions to the Rules

Staff asks that the Board adopt the revised ISF Rules as noticed and published in the Colorado Register on October 25, 2020, and the proposed Statement of Basis and Purpose. See Exhibits CWCBStaff-5 and CWCBStaff-6 to CWCB Staff Prehearing Statement. The proposed revisions are consistent with the requirements of HB 1157 and the existing ISF Rules, and will enable the proper implementation of section 37-83-105, C.R.S. (2020) regarding temporary loans of water for ISF use. The proposed revisions update a reference to the CWCB's website and references to Colorado Parks and Wildlife, which is referred to as the Division of Wildlife in the existing ISF Rules, and revise Rules 6.k and 6.m to implement HB 1157.

The proposed revisions are as follows: **Rule 4c.** is revised to update the CWCB website address. **Rules 6f.(2); 7d.; 8i.(3)(f), (h), and (l)(iii); and 11c.** are revised to update references to Colorado Parks and Wildlife ("CPW").

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 a temporary loan as an "applicant." Rule 6k.(1) has been split into Rule 6k.(1) and 6k.(2) to address expedited and temporary loans separately. **Rule 6k.(1)** addresses expedited loans, describing: (a) the timing of 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 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 accept and execute an agreement for the expedited loan of water; and take any administrative action necessary to put the loaned water to ISF use. **Rule 6k.(1)(d)** confirms 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 clarifies that if the applicant objects to the Director's rejection of a loan offer, that decision will 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 new provision that addresses renewable loans of water for temporary ISF use. **Rule 6k.(2)(a)** limits the amount of time renewable loans may be exercised 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 in determining whether to direct Staff to proceed with a proposed renewable loan, and provide direction on how to 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 operations the Board must consider when evaluating a proposed renewable loan for potential injury. **Rules 6k.(2)(f) and (g)** describe the actions Staff will take when Staff is directed to move forward with a proposed renewable loan, including coordinating with the applicant in preparing and submitting documentation, providing written notice as required by statute, executing an agreement for the loan (provided that the State Engineer determines no injury will result from the proposed loan), and taking any administrative action necessary to put the loaned water to ISF use. **Rule 6k.(2)(h)** provides that the CWCB's use of loaned water shall not extend beyond the subject decreed ISF 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. **Rule 6k.(2)(i)** 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)(j)** sets forth the Board's process for considering public comment, and deciding whether to authorize Staff to coordinate with an applicant on applying for 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), taken directly from HB 1157, provides that water rights loaned to the Board as 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 provided for in statute.

Rule 6m. is revised to exclude expedited and temporary loans from the process in ISF Rules 11a-11c, and to address the hearing process for renewable loans, which differs from the hearing process for other acquisitions of water for ISF 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.

D. Public comments and CWCB Staff's responses

Due to space limitations, Staff paraphrases the public comments received on the proposed revisions to the ISF Rules. All written comments Staff received are posted on the CWCB website. In response to the City of Aurora's August 14, 2020 comments, Staff rejected language regarding additional factors for Board consideration to Rule 6e. because those factors were outside of the scope of rulemaking; however, Staff included "on a decreed instream flow reach" in Rule 6k., as requested by Aurora.

In a July 29, 2020 email, Jan Crawford asked Staff to consider economics associated with ISFs, citing economic benefits from recreation and tourism as reasons why the ISF Rules should make it easier, not harder, to keep water in streams. These comments did not request any changes to the proposed Rules.

In response to July 29, 2020 comments from Bill Wombacher on behalf of ACWWA, ECCV, United, and Legacy Water, Staff: (1) reinstated “or rejects” in Rule 6k.(1)(e); (2) rejected requested language to Rule 6k.(2)(g), after discussion with Mr. Wombacher; and (3) rejected requested language to Rule 6a. because such request was outside of the scope of the rulemaking.

In response to the Colorado Water Trust’s July 29, 2020 comments, Staff revised the first sentence of Rule 6k.(2)(h) to directly reflect language from HB 1157 regarding reapplication for up to two additional ten-year periods of a renewable loan.

Staff received comments dated July 29, 2020 from Rio Blanco County, the Rio Blanco Water Conservancy District, and the White River and Douglas Creek Conservation Districts (“County and Districts”) that contained overlapping comments. Because some of these comments pertained to ISF appropriations rather than temporary loans, Staff met with the County and Districts on August 24, 2020 to discuss those comments. One item discussed was their concerns about notice of ISF appropriations and proposed acquisitions, including temporary loans. Staff did not make any further revisions regarding notice of temporary loans as HB 1157 already provides for increased notice requirements, which are included in the proposed Rules. Staff will work with the County and Districts on ways to reach more stakeholders on proposed ISF appropriations.

Regarding the comments pertaining to the proposed Rules, Staff changed “may” to “shall” in Rule 6k.(2)(j) (“The Board shall consider any public comment and objections to the renewal provided at the public meeting.”), as requested. The County and Districts also requested including additional factors in Rule 6e., which is outside

of the scope of this rulemaking. The County and Districts suggested replacing “improve” with “sustain” in Rule 6k.(2)(d); Staff did not make this change because “improve” is a statutory term. The County and Districts requested the addition of “without detriment to existing rights or ability to develop decreed water rights” after all references to “to preserve and improve the natural environment to a reasonable degree.” Staff rejected that language because it is inconsistent with the legal standard applicable to temporary loans, which is that they “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.” § 37-83-105(2)(b)(II.5), C.R.S. (2020).

In response to the Upper Yampa Water Conservancy District’s September 3, 2020 comments, Staff added “and will review any other biological or scientific evidence presented to the Board;” to Rule 6k.(2)(d)(i). Staff also added Rule 6k.(2)(h), as requested by the District, describing limits on the CWCB’s use of loaned water.

E. Conclusion

Staff recommends that the Board adopt the amended ISF Rules as noticed and published in the Colorado Register on October 25, 2020, and the proposed Statement of Basis and Purpose.

Dated this 12th day of January, 2021.

CERTIFICATE OF SERVICE

I hereby certify that I have duly served the copies of the foregoing **Written Testimony of the Staff to the Colorado Water Conservation Board** upon all parties herein by email, this 12th day of January, 2021, addressed as follows:

Hearing Officer

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Rulemaking Parties

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/s/

Margaret Popick