

NOTICE OF PUBLIC RULEMAKING HEARING BEFORE THE COLORADO WATER CONSERVATION BOARD

I. NATURE OF PUBLIC RULEMAKING HEARING

Pursuant to section 24-4-103, C.R.S., this is a notice of a public rulemaking hearing before the Colorado Water Conservation Board (“Board”) for consideration of amendments to the Board’s Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 (“Rules”). The amendments primarily affect Rule 6k. (Temporary Loans of Water to the Board) and Rule 6m. (Public Input on Proposed Acquisitions).

The Board is amending the Rules to: (1) address the requirements of House Bill 20-1157; (2) update a reference to the Board’s website; and (3) update references to Colorado Parks and Wildlife (“CPW”).

II. DESCRIPTION OF THE SUBJECTS AND ISSUES INVOLVED

HB 20-1157 amends section 37-83-105, C.R.S. (2019), which governs temporary loans of water for instream flow (“ISF”) use. Among other things, HB 20-1157 directs the Board to promulgate rules to implement certain provisions of the bill.

Board Staff (“Staff”) drafted proposed changes to the Rules, solicited written comments from interested parties, and held public (a.k.a. stakeholder) meetings on August 3 and August 18, 2020, to allow interested parties to provide input on the proposed changes. At its September 16, 2020 meeting, the Board appointed a hearing officer and authorized Staff and the Hearing Officer to proceed with the formal rulemaking process. The formal rulemaking process is initiated by filing a notice of rulemaking hearing with the Secretary of State and publication in the Colorado Register.

Staff will retain a record of the rulemaking pursuant to section 24-4-103(8.1), C.R.S. The initial proposed rule amendments submitted to the Secretary of State are available on the Board’s website.

The proposed revisions to the Rules update: (1) the reference to the Board’s website in Rule 4c.; and (2) references to CPW throughout the Rules. The revisions also amend Rules 6k. and 6m. to implement HB 20-1157, and include:

- A. Definitions of expedited and renewable loans. The proposed amendments describe the two different types of loans, the requirements for each type of loan application, notice requirements and allowed ISF uses of loaned water for each type of loan, and the Board Director’s delegated authority for each type of loan;
- B. Procedures for evaluating and requesting approval of expedited loans, and for Board review and potential ratification of the Board Director’s decision on such loans;
- C. For renewable loans, the 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 Rule 6m.(5), if requested. The proposed amendments to

- the Rules also describe the steps the Board must take for renewable loans that would improve the natural environment to a reasonable degree, including 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 giving preference for loans of stored water, when available, over loans of direct flow water;
- D. 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;
 - E. Staff process for coordinating with a water rights owner on requesting approval from the State Engineer of a proposed renewable loan (after Board review and decision);
 - F. Process for Board review and approval of renewing a loan for a second or third ten-year period; and
 - G. Notice requirements for hearings on renewable loans.

The language of the proposed amendments to the Rules, and a proposed statement of basis and purpose and specific statutory authority for the amendments, are available on the Board's website at <https://cwcb.colorado.gov/instream-flow-rules-revisions-hb-20-1157>, and are available upon request of Staff. Please contact Linda Bassi at (303) 866-3441, extension 3204 or at linda.bassi@state.co.us for further information.

III. SPECIFIC STATUTORY AUTHORITY

The statutory authority for promulgating the Rules and any amendments thereto is found at section 37-60-108, C.R.S. The Board's authority for the Colorado Instream Flow and Natural Lake Level Program is found at section 37-92-102(3), C.R.S.

HB 20-1157 revised section 37-83-105, C.R.S., pertaining to temporary loans of water to the Board for ISF use, and directed the Board to promulgate rules to implement certain provisions of the bill.

IV. PARTY STATUS

The Notice of Rulemaking Hearing will be published in the Colorado Register on October 25, 2020. Applications for party status will be accepted through November 13, 2020. Applications for party status should be submitted to the Board's Hearing Officer, Amy Beatie, by email to amy.beatie@coag.gov. Applications for party status shall include: (1) the name of the person, persons or entity seeking party status; (2) a contact person, if different from IV.(1); (3) the appropriate mailing address, phone number, and email address for the contact person listed in IV.(2); (4) the interest of the person(s) or entity in the proposed amendments to the Rules; and (5) a description of the general nature of the evidence or information to be presented in the course of the proceedings. Staff is automatically a party to the rulemaking proceeding and need not file an application for party status.

V. PRE-HEARING CONFERENCE

Prior to the rulemaking hearing, the Hearing Officer will hold a pre-hearing conference. After November 13, 2020, when all party status applications have been received, the Hearing Officer will issue an order notifying all parties of the date, time, and location or call-in information for the first pre-hearing conference. The order will also provide any other deadlines and procedures that are appropriate at the time. Participation in the pre-hearing conference may be available by telephone or video conference at the Hearing Officer's discretion; participation will likely only be available by remote participation.

Each applicant for party status must submit a pre-hearing statement in order to participate in the pre-hearing conference.

VI. RULEMAKING HEARING

Date, Time, and Location

DATE: January 26, 2021

TIME: 9:00 a.m. (or as otherwise directed by the Hearing Officer)

LOCATION: Via telephone or video conference. Participation information will be provided at a later date: (1) on the Board's website at <https://cwcb.colorado.gov/> and (2) by order of the Hearing Officer to the people or entities who have applied for party status.

Procedures

The role of the Board's Hearing Officer is to provide orderly procedures for the rulemaking; ruling on substantive issues is a Board responsibility. The Hearing Officer will issue orders designed to streamline and clarify processes consistent with this Notice of Proposed Rulemaking and as permitted by law.

The Board may ask questions of any person appearing before it.

The Board will consider alternative proposals related to the proposed amendments, subject to the procedures established by the Hearing Officer.

The Board may modify the proposed amendments to the Rules from those published in the Colorado Register.

After the conclusion of the rulemaking hearing and after consideration of the relevant matters presented, the Board, through its Hearing Officer, will render its decision to the parties to the hearing.

Hearing Participation

At the hearing, parties shall be afforded the opportunity to submit written data, views, or arguments, and to present the same orally, unless the Board deems it unnecessary. The submittal of such material and summations, either in writing or orally, shall be as directed by the Hearing

Officer or the Board.

If alternative amendments to the proposed amendments to the Rules are requested by a party, the Board encourages those amendments to be included in the written materials, along with a proposed statement of basis and purpose of the alternative amendments.

Once any written material is submitted, the material becomes part of the administrative rulemaking record and the property of the Board and will not be returned to the person(s) or entity submitting the material.

The Hearing Officer will decide the timing and order of oral presentations by the parties, if any. Any person who is not a party to the hearing but wishes to provide comment may do so in writing prior to the date of the hearing. The Board strongly encourages all interested persons to submit comments in writing; however, a short period of time at the rulemaking hearing (a total of 30 minutes or less) will be reserved for oral comments by interested persons who do not have party status.

VII. ADOPTION OF THE RULES

The Board will consider all information presented at the hearing.

The Board may modify the proposed amendments to the Rules in adopting amendments to the Rules.

The final amended Rules, as adopted by the Board, shall become effective no sooner than twenty (20) days after publication in the Colorado Register.

VIII. ADMINISTRATIVE RULEMAKING RECORD

The administrative rulemaking record, including the proposed rule amendments, submitted applications for party status, pre-hearing statements, and all other written materials to be considered by the Board in this rulemaking, will be available following the conclusion of these proceedings and upon request to kimberly.ricotta@state.co.us, and at the Board's office at 1313 Sherman Street, Room 718, Denver, CO 80203, during normal business hours (8:00 a.m.-5:00 p.m.), once state agencies are again open to the public.

DATED this 14th day of October, 2020.



Rebecca Mitchell
Director
Colorado Water Conservation Board
1313 Sherman Street, Rm. 718
Denver, CO 80203