

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

**IN THE MATTER OF REVISIONS TO COLORADO WATER CONSERVATION
BOARD'S RULES CONCERNING THE COLORADO INSTREAM FLOW AND
NATURAL LAKE LEVEL PROGRAM, 2 CCR 408-2**

PREHEARING STATEMENT OF COLORADO PARKS AND WILDLIFE

Colorado Parks and Wildlife (CPW) submits this Prehearing Statement in the rulemaking hearing to consider revisions to Colorado Water Conservation Board's Rules Concerning the Colorado Instream Flow and Natural Lake Level Program (Rules).

I. Statement of CPW's Interest

CPW's mission is to perpetuate the wildlife resources of the state, provide a quality state park system, and provide enjoyable and sustainable outdoor recreation opportunities that educate and inspire current and future generations to serve as active stewards of Colorado's natural resources. CPW also has a statutorily prescribed role to support the Colorado Water Conservation Board (CWCB or the Board) as it implements the Instream Flow and Natural Lake Level Program (ISF Program) by providing biological expertise and recommendations regarding CWCB's ISF Program, including permanent acquisitions and temporary loans or leases for instream flow purposes.

CPW is a party in this hearing to review the revisions to the Rules proposed by CWCB Staff (Staff) to the Board, to review and respond to testimony submitted by other parties or public comment, as needed, and to ensure that any revisions adopted by the Board are consistent with section 37-83-105, C.R.S., and the intent of the ISF Program.

II. Background

During the 2020 session of the Colorado General Assembly, the legislature passed HB 20-1157, to amend several provisions of section 37-83-105, C.R.S., which provides the CWCB authority to accept temporary loans of water for instream flow purposes (the ISF loan program). Prior to the passage of this legislation, the statute allowed water users to loan water to the CWCB for up to one hundred twenty days in up to three calendar years during a ten-year period, with no renewal. The amended statute expanded the ISF loan program to include both expedited and renewable loans. The amended statute provides that expedited loans are authorized for a term of one year, while renewable loans may operate in up to five years during a ten-year period and may be renewed for up to two additional ten-year periods. The amended statute also provides that CWCB may accept expedited loans to preserve the natural environment to a reasonable degree on stream reaches with a decreed instream flow water right. Renewable loans may be used for the purpose of preserving or improving the natural environment to a reasonable degree on stream reaches with a decreed instream flow water right.

III. Written Testimony

To carry out its statutory mission, CPW's policies and programs include efforts to develop and protect a wide range of aquatic resources. CPW owns water rights and interests in water which it uses in support of its programs, for the benefit of the public, for use on its properties, and to sustain fisheries across the state. CPW has both participated in the ISF Program in a variety of ways and benefited from other participants' use of the legal tools allowed by the program, including use of water under the ISF loan program. Finally, CPW is also statutorily directed to provide recommendations to the CWCB in support of the CWCB's ISF Program. Thus, CPW has

reviewed the proposed revisions to the Rules as a water user, a beneficiary of the ISF program, and as an agency that will assist in implementing the proposed Rules.

The ISF loan program, when implemented appropriately to preserve or improve the natural environment to a reasonable degree, is an important mechanism that can advance CPW's mission to protect, preserve, enhance, and manage wildlife for the use, benefit, and enjoyment of the Coloradans and visitors to Colorado. CPW also believes that the intent of HB 20-1157 is to make the ISF loan program more flexible for ISF loan program applicants, while maintaining adequate protections for water users.

The purpose of the instant proceeding is for the Board to promulgate rules to incorporate revisions pursuant to, and as directed and limited by, HB 20-1157. In addition to proposed revisions to the Rules to incorporate the substantive changes under HB 20-1157, Staff proposed limited updates to references within the Rules to make them consistent with changes to the CWCB's website and CPW's agency name change. CPW supports the Rule revisions proposed by Staff and believes they are consistent with HB 20-1157 and the intent of the ISF Program.

A. Proposed Changes to Rule 6.k and 6.m

Staff have proposed a number of revisions to Rules 6.k and 6.m to address changes to the CWCB's loan program under section 37-83-105, C.R.S, as implemented by HB 20-1157. In the proposed revisions, Staff drafted:

- i. Definitions of expedited and renewable loans;
- ii. Notice requirements for both types of loan;
- iii. Procedures for evaluating and requesting approval of expedited loans, and for Board review and potential ratification of the CWCB Director's decision on such

- loans;
- iv. A 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;
 - v. Steps the Board must take for proposed 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;
 - vi. A process for the Board's 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;
 - vii. A Staff process for coordinating with a water rights owner on requesting approval from State Engineer of a proposed renewable loan (after Board review and decision); and,
 - viii. A process for Board review and approval of renewing a loan for a second or third ten-year period.

Staff's proposed revisions to the Rules are narrowly tailored to implement changes enacted through HB 20-1157 while providing sufficient clarity and certainty to applicants and other water users as to how the provisions will be implemented and what limitations and restrictions will apply for the protection of other water users. The proposed revisions distinguish the roles of the CWCB, CPW, and the State Engineer under the added provisions of HB 20-1157, which remain consistent

with each entity's role under the prior ISF loan program and within the ISF Program more broadly. Finally, the proposed Rule revisions provide adequate direction to Staff and the Board on how to implement the statutory changes, including the relevant factors to be used to evaluate decisions to accept loans under the ISF loan program, while recognizing the Board's authority over final decision-making under the ISF loan program.

B. Proposed Changes to Rule 6.f, 7.d, 8.i, and 11.c

In 2011, the Colorado Division of Wildlife (DOW) and the Colorado Division of Parks and Outdoor Recreation (DPOR) merged into a single agency, known as Colorado Parks and Wildlife. As the successor in interest, CPW assumed the legal rights and obligations of DOW and DPOR. While many statutory references have been updated, because the CWCB has not engaged in an ISF rulemaking since 2011, the Rules still refer to the DOW and DPOR. In the proposed revisions to the Rules CWCB staff have included a number of updates to correct references to the merged agency. CPW supports the proposed changes to the Rules and appreciates the CWCB's efforts to make the Rules consistent with the merger and agency name change.

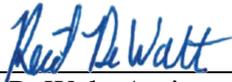
IV. Required Statements

- a) Position Statement: For the above stated reasons, CPW supports adoption of the proposed Rules.
- b) Witness List: At this time, CPW does not plan to present witnesses. CPW reserves the right to update its witness list as this proceeding progresses.
- c) Open Legal Questions: CPW has not identified any open legal questions. CPW reserves the right to update its position on this issue as the proceeding progresses.

- d) Relief Statement: CPW requests adoption of the proposed Rules.
- e) Amount of Time Desired at the Hearing: At this time, CPW is not requesting any time during the hearing to present witnesses. CPW reserves the right to request time as proceeding progresses.
- f) Exhibit list: CPW may rely on exhibits or evidence included in the administrative record for this proceeding, including information presented by other parties, or as needed for demonstrative or rebuttal purposes. CPW reserves the right to update its exhibit list as this proceeding progresses.

Submitted this 10th day of December, 2020.

FOR COLORADO PARKS AND WILDLIFE



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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the copies of the foregoing **Prehearing Statement of Colorado Parks and Wildlife** upon all parties herein by email, this 10th day of December, 2020, addressed as follows:

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/s/ _____