

Statement of Basis and Purpose

In 1973, the General Assembly enacted Senate Bill 97, creating the Colorado Instream Flow and Natural Lake Level Program ("ISF Program"), to be administered by the Colorado Water Conservation Board ("Board" or "CWCB"). The Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 ("Rules"), initially adopted in 1993, codify and establish procedures for the Board to implement the ISF Program.

In 2020, the Board amended the Rules to: (1) address the requirements of House Bill 20-1157 (codified at section 37-83-105, C.R.S.); (2) update a reference to the CWCB's website; and (3) update references to Colorado Parks and Wildlife ("CPW"). The statutory authority for the Rules and the 2020 revisions to the Rules is found at sections 37-60-108, 37-83-105(3), and 37-92-102(3), C.R.S. (2020).

For the 2020 revisions, the Board revised Rule 4c. to update the CWCB website address, and amended Rules 6f.(2); 7d.; 8i.(3)(f), (h), and (l)(iii); and 11c. to update references to Colorado Parks and Wildlife ("CPW"). The Board also revised Rules 6k. and 6m. to address requirements of House Bill 20-1157 regarding temporary expedited and renewable loans of water to the Board for instream flow ("ISF") use.

Specifically, 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 an expedited or renewable loan as an "applicant." The language of Rule 6k.(1) previously pertained to all temporary loans of water but now is split into Rule 6k.(1) and 6k.(2) to address expedited and temporary loans separately. Rule 6k.(1) now addresses expedited loans, describing: (a) limitations on 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 though applicant is ultimately responsible for submitting documentation and requesting approval, 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: (i) accept and execute an agreement for the expedited loan of water; and (ii) take any administrative action necessary to put the loaned water to instream flow use. Rule 6k.(1)(d) revisions confirm 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 now clarifies that if applicant agrees the loan offer should be rejected, that decision does not have to 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 completely new provision that addresses renewable loans of water for temporary instream flow use. Rule 6k.(2)(a) identifies timing limitations on the exercise of renewable loans 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 for reviewing, considering public comment, and directing Staff whether to move forward with a proposed renewable loan, and provide direction on how

a person can 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 water activities the Board must consider any potential injury to when evaluating a proposed renewable loan. Rules 6k.(2)(f) and (g) describe the actions the Board authorizes and directs Staff to take when the Board directs Staff to move forward with a proposed renewable loan, including coordinating with the applicant in preparing and submitting documentation and providing written notice as required by statute, though the applicant is ultimately responsible for these acts, and provided that the State Engineer determines no injury will result from the proposed loan, executing an agreement for the loan and taking any administrative action necessary to put the loaned water to instream flow use. Rule 6k.(2)(h) provides that the CWCB's instream flow use of loaned water shall not extend beyond the subject decreed instream flow 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, shall provide written notice. Rule 6k.(2)(j) sets forth the Board's process for reviewing, considering public comment, and deciding whether to authorize Staff to coordinate with an applicant on applying for a 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) is taken directly from HB20-1157 and provides that water rights loaned to the Board pursuant to 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 defined or described in statute.

In 2020, the Board also amended Rule 6m. to exclude expedited and temporary loans from the process in Rules 11a-11c, and to address the hearing process for renewable loans, which differs from the hearing process for other acquisitions of water for instream flow 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.