

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”). The statutory authority for these Rules is found at sections 37-60-108 and 37-92-102(3), C.R.S. (2008). The purpose of these Rules, initially adopted in 1993, is to codify and establish procedures for the Board to implement the ISF Program.

The Board has amended the Rules several times since 1993 to reflect changes in the statutes related to the ISF Program. Notably, in 1999, the Board repealed the existing Rule 5 in its entirety, and, among other things, adopted a new Rule 5 to establish a public notice and comment process for instream flow water right appropriations. In 2003, the Board amended Rule 6 to implement the provisions of Senate Bill 02-156 by identifying factors that the Board will consider when determining whether to acquire water, water rights, or interests in water, and by establishing procedures for notice, public input, and, if necessary, hearings. In 2004, the Board amended Rule 6 to implement House Bill 03-1320, codified at section 37-83-105, C.R.S. (2003), to allow for emergency loans of water for instream flows. The Board also amended Rule 6 to enable the Board to finalize an acquisition within a two-meeting time frame, if necessary. In 2005, the Board amended Rule 6 to implement House Bill 05-1039, establishing how the Board and its staff will respond to offers of water for temporary instream flow use and expedite use of loaned water for instream flow purposes.

In 2009, the Board amended Rule 6 to adopt criteria specified in House Bill 08-1280 (codified at sections 37-92-102(3), 37-92-103 and 37-92-305, C.R.S.) for evaluating proposed leases or loans of water, and to incorporate H.B. 1280’s requirements for: (1) specific conditions that must be met as part of the CWCB’s approval of a proposed loan or lease of water; (2) provisions that must be included in all agreements for loans or leases of water under section 37-92-102(3); and (3) actions that the Board must take in connection with loans or leases of water. Rule 6 does not incorporate those provisions of H.B. 1280 that direct the water courts or the Division of Water Resources to take certain actions in regard to water acquisitions by the Board for instream flow use.

Specifically, the 2009 Rules 6a., 6c., 6e, 6j., 6k., 6l., and 6m. clarify the Board’s evaluation process, Board funding for water leases and purchases, and public input for proposed acquisitions of water, water rights or interests in water for instream flow use. Rule 6f. identifies additional factors for loans and leases of water, and Rules 6g. and 6h. describe recording requirements and water reuse provisions to be included in contracts or agreements for water acquisitions. Rule 6i. incorporates H.B 1280’s requirements regarding water court applications filed by the Board to obtain a decreed right to use acquired water for instream flow purposes. Regarding the historical consumptive use quantification referred to in Rule 6i.(1), the Board will not object to a water rights owner requesting a term and condition from the water court that the historical consumptive use determination shall not apply to the water right at the expiration of the lease or loan.

In 2009, the Board also amended Rules 8e.—h. (De Minimis Rule) to recognize priority administration of the CWCB’s instream flow water rights and clarify that the

decision not to file a statement of opposition under this Rule does not constitute: (1) acceptance by the CWCB of injury to any potentially affected instream flow water right; or (2) a waiver of the CWCB's right to place an administrative call for any instream flow water right. Rule 8e.(1) sets forth what type of notice the CWCB will provide to water court applicants and to the Division Engineer when it elects not to file a statement of opposition to a water court application under this Rule.

Finally, in 2009, the Board amended Rule 8i.(3) (Injury Accepted with Mitigation) to provide notice to water users of: (1) the information they must submit to the CWCB when requesting that the CWCB enter into a pretrial resolution under which it will accept injury with mitigation; (2) the factors the CWCB will consider in evaluating an injury with mitigation proposal; and (3) the terms and conditions the CWCB will require in decrees incorporating injury with mitigation.

In general, it is the policy of the CWCB to consider injury with mitigation proposals only when no other reasonable water supply alternatives can be implemented. Exceptions to the policy may be granted when the proponent can demonstrate that the proposed mitigation will result in significant and permanent enhancements to the natural environment of the subject stream or lake existing at the time the proponent proposes the injury with mitigation.