

## CHAPTER 389

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**WATER AND IRRIGATION**


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**HOUSE BILL 09-1129**

BY REPRESENTATIVE(S) Looper, Balmer, Baumgardner, Bradford, Curry, Fischer, Frangas, Gardner B., Hullinghorst, Labuda, Lambert, Liston, May, McGihon, Murray, Pace, Priola, Rice, Roberts, Swalm, Tipton, Acree, Court, Gerou, Kerr A., Kerr J., Massey, McNulty, Nikkel, Schafer S., Stephens, Summers, Vaad, Waller;  
 also SENATOR(S) Romer, Harvey, Cadman, Gibbs, Heath, Keller, King K., Kopp, Lundberg, Mitchell, Scheffel, Schultheis, Schwartz, Shaffer B., Spence, White, Williams.

**AN ACT**

**CONCERNING AN AUTHORIZATION OF PILOT PROJECTS FOR THE BENEFICIAL USE OF CAPTURED PRECIPITATION IN NEW REAL ESTATE DEVELOPMENTS, AND MAKING AN APPROPRIATION IN CONNECTION THEREWITH.**

*Be it enacted by the General Assembly of the State of Colorado:*

**SECTION 1.** 37-60-115, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

**37-60-115. Water studies - rules - repeal. (6) Precipitation harvesting pilot projects.** (a) THE BOARD SHALL, IN CONSULTATION WITH THE STATE ENGINEER, SELECT THE SPONSORS OF UP TO TEN NEW RESIDENTIAL OR MIXED-USE DEVELOPMENTS THAT WILL CONDUCT INDIVIDUAL PILOT PROJECTS TO COLLECT PRECIPITATION FROM ROOFTOPS AND IMPERMEABLE SURFACES FOR NONPOTABLE USES. THE PURPOSE OF THE PILOT PROJECTS SHALL BE TO:

(I) EVALUATE THE TECHNICAL ABILITY TO REASONABLY QUANTIFY THE SITE-SPECIFIC AMOUNT OF PRECIPITATION THAT, UNDER PREEXISTING, NATURAL VEGETATION CONDITIONS, ACCRUES TO THE NATURAL STREAM SYSTEM VIA SURFACE AND GROUND WATER RETURN FLOWS;

(II) CREATE A BASELINE SET OF DATA AND SOUND, TRANSFERABLE METHODOLOGIES FOR MEASURING LOCAL WEATHER AND PRECIPITATION PATTERNS THAT ACCOUNT FOR VARIATIONS IN HYDROLOGY AND PRECIPITATION EVENT INTENSITY, FREQUENCY, AND DURATION, QUANTIFYING PREEXISTING, NATURAL VEGETATION CONSUMPTION, MEASURING PRECIPITATION RETURN FLOW AMOUNTS,

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*Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.*

IDENTIFYING SURFACE VERSUS GROUND WATER RETURN FLOW SPLITS, AND IDENTIFYING DELAYED GROUND WATER RETURN FLOW TIMING TO RECEIVING STREAMS;

(III) EVALUATE A VARIETY OF PRECIPITATION HARVESTING SYSTEM DESIGNS;

(IV) MEASURE PRECIPITATION CAPTURE EFFICIENCIES;

(V) QUANTIFY THE AMOUNT OF PRECIPITATION THAT MUST BE AUGMENTED TO PREVENT INJURY TO DECREED WATER RIGHTS;

(VI) COMPILE AND ANALYZE THE DATA COLLECTED; AND

(VII) PROVIDE DATA TO ALLOW SPONSORS TO ADJUDICATE PERMANENT AUGMENTATION PLANS AS SPECIFIED IN PARAGRAPH (c) OF THIS SUBSECTION (6).

(b) AN APPLICANT FOR A DEVELOPMENT PERMIT, AS THAT TERM IS DEFINED IN SECTION 29-20-103, C.R.S., FOR A NEW PLANNED UNIT DEVELOPMENT OR NEW SUBDIVISION OF RESIDENTIAL HOUSING OR MIXED USES MAY SUBMIT AN APPLICATION TO THE BOARD TO BECOME A SPONSOR OF ONE OR MORE OF THE TEN PILOT PROJECTS AUTHORIZED BY THIS SECTION. THE BOARD SHALL ESTABLISH CRITERIA AND GUIDELINES FOR APPLICATIONS AND THE SELECTION OF PILOT PROJECTS, INCLUDING THE FOLLOWING:

(I) AN APPLICATION FEE AND, FOR PILOT PROJECTS THAT ARE SELECTED, AN ANNUAL REVIEW FEE;

(II) THE INFORMATION TO BE INCLUDED IN THE APPLICATION, INCLUDING A DESCRIPTION OF THE PROPOSED DEVELOPMENT AND THE PROPOSED PRECIPITATION HARVESTING SYSTEM;

(III) SELECTION OF PILOT PROJECTS TO REPRESENT A RANGE OF PROJECT SIZES AND GEOGRAPHIC AND HYDROLOGIC AREAS IN THE STATE, WITH NO MORE THAN THREE PILOT PROJECTS BEING LOCATED WITHIN ANY SINGLE WATER DIVISION ESTABLISHED IN SECTION 37-92-201;

(IV) THE REQUIREMENT THAT THE PROPOSED DEVELOPMENT MEET ANY APPLICABLE LOCAL GOVERNMENT WATER SUPPLY REQUIREMENT THROUGH SOURCES OTHER THAN PRECIPITATION HARVESTING;

(V) GIVING PRIORITY TO PILOT PROJECTS THAT:

(A) ARE LOCATED IN AREAS THAT FACE RENEWABLE WATER SUPPLY CHALLENGES; AND

(B) PROMOTE WATER CONSERVATION.

(c) NOTWITHSTANDING ANY LIMITATIONS REGARDING PHREATOPHYTES OR IMPERMEABLE SURFACES THAT WOULD OTHERWISE APPLY PURSUANT TO SECTION 37-92-103 (9) OR 37-92-501 (4) (b) (III), EACH OF THE TEN PILOT PROJECTS SHALL:

(I) DURING THE TERM OF THE PILOT PROJECT, OPERATE ACCORDING TO A SUBSTITUTE WATER SUPPLY PLAN, IF APPROVED ANNUALLY BY THE STATE ENGINEER PURSUANT TO SECTION 37-92-308 (4) OR (5). UNTIL THE PILOT PROJECT SPONSOR APPLIES TO THE WATER COURT FOR A PERMANENT AUGMENTATION PLAN, THE PILOT PROJECT SHALL BE REQUIRED TO REPLACE AN AMOUNT OF WATER EQUAL TO THE AMOUNT OF PRECIPITATION CAPTURED AND MEASURED FROM ROOFTOPS AND IMPERMEABLE SURFACES FOR NONPOTABLE USES.

(II) (A) APPLY TO THE APPROPRIATE WATER COURT FOR A PERMANENT AUGMENTATION PLAN PRIOR TO COMPLETION OF THE PILOT PROJECT OR FILE A PLAN WITH THE STATE ENGINEER TO PERMANENTLY RETIRE THE RAINWATER COLLECTION SYSTEM, WHICH PLAN SHALL BE REVIEWED AND APPROVED PRIOR TO THE CESSATION OF AUGMENTATION. AS A CONDITION OF APPROVING THE RETIREMENT OF A PILOT PROJECT, THE STATE ENGINEER SHALL HAVE THE AUTHORITY TO REQUIRE THE PROJECT SPONSOR TO REPLACE ANY ONGOING DELAYED DEPLETIONS CAUSED BY THE PILOT PROJECT AFTER THE PROJECT HAS CEASED. ANY SUCH PERMANENT AUGMENTATION PLAN SHALL ENTITLE THE SPONSOR TO CONSUME WITHOUT REPLACEMENT ONLY THAT PORTION OF THE PRECIPITATION THAT THE SPONSOR PROVES BY A PREPONDERANCE OF THE EVIDENCE WOULD NOT HAVE ACCRUED TO A NATURAL STREAM UNDER PREEXISTING, NATURAL VEGETATION CONDITIONS. THE SPONSOR SHALL BE REQUIRED TO FULLY AUGMENT ANY PRECIPITATION CAPTURED OUT OF PRIORITY THAT WOULD OTHERWISE HAVE ACCRUED TO A NATURAL STREAM.

(B) AFTER A MINIMUM OF TWO YEARS OF DATA COLLECTION AND UPON APPLICATION TO THE APPROPRIATE WATER COURT FOR A PERMANENT AUGMENTATION PLAN, THE PILOT PROJECT SPONSOR SHALL FILE AN APPLICATION FOR APPROVAL OF A SUBSTITUTE WATER SUPPLY PLAN PURSUANT TO SECTION 37-92-308 (4). FOR ANY SUBSTITUTE SUPPLY PLAN APPLICATION FILED UNDER SECTION 37-92-308 (4), A PILOT PROJECT SPONSOR MAY SEEK APPROVAL FROM THE STATE ENGINEER BASED ON REPLACING ONLY THE NET DEPLETION CAUSED BY THE CAPTURE OF PRECIPITATION. THE NET DEPLETION SHALL BE CALCULATED AS THE AMOUNT OF PRECIPITATION CAPTURED MINUS THE HISTORICAL CONSUMPTIVE USE FROM PREEXISTING, NATURAL VEGETATION COVER ON THE IMPERMEABLE AREA AS DEMONSTRATED BY ANALYSIS OF THE DATA COLLECTED BY THE SPONSOR DURING THE PILOT PROJECT.

(d) EACH SPONSOR SHALL SUBMIT AN ANNUAL PRELIMINARY REPORT TO THE BOARD AND THE STATE ENGINEER SUMMARIZING THE INFORMATION SET FORTH IN PARAGRAPH (a) OF THIS SUBSECTION (6). THE BOARD AND THE STATE ENGINEER SHALL BRIEF THE WATER RESOURCES REVIEW COMMITTEE CREATED IN SECTION 37-98-102 ON THE REPORTED RESULTS OF THE PILOT PROJECTS BY JULY 1, 2014. EACH SPONSOR SHALL SUBMIT A FINAL REPORT TO THE BOARD AND THE STATE ENGINEER BY JANUARY 15, 2019. THE BOARD AND THE STATE ENGINEER SHALL PROVIDE A FINAL BRIEFING TO THE WATER RESOURCES REVIEW COMMITTEE BY JULY 1, 2019.

(e) THIS PARAGRAPH (e), PARAGRAPHS (a), (b), AND (d), AND SUBPARAGRAPH (I) OF PARAGRAPH (c) OF THIS SUBSECTION (6) ARE REPEALED, EFFECTIVE JULY 1, 2020.

**SECTION 2.** 37-92-308 (4) (a) (IV) and (4) (b), the introductory portion to 37-92-308 (5) (a), and 37-92-308 (5) (b), Colorado Revised Statutes, are amended

to read:

**37-92-308. Substitute water supply plans - special procedures for review - water adjudication cash fund - legislative declaration.** (4) (a) Beginning January 1, 2002, if an application for approval of a plan for augmentation, rotational crop management contract, or change of water right has been filed with a water court and the court has not issued a decree, the state engineer may approve the temporary operation of such plan, contract, or change of water right as a substitute water supply plan if the following conditions are met:

(IV) The state engineer, after consideration of the comments received, has determined that the operation and administration of such plan will replace all out-of-priority depletions in time, location, and amount and will otherwise prevent injury to other water rights and decreed conditional water rights, including water quality and continuity to meet the requirements of use to which the senior appropriation has normally been put, pursuant to section 37-80-120 (3), and will not impair compliance with any interstate compacts. NOTWITHSTANDING ANY LIMITATIONS REGARDING PHREATOPHYTES OR IMPERMEABLE SURFACES THAT WOULD OTHERWISE APPLY PURSUANT TO SECTION 37-92-103 (9) OR 37-92-501 (4) (b) (III), FOR ANY PRECIPITATION HARVESTING PILOT PROJECT SELECTED PURSUANT TO SECTION 37-60-115 (6) THAT HAS FILED AN APPLICATION FOR A PERMANENT AUGMENTATION PLAN IN WATER COURT, THE OUT-OF-PRIORITY DEPLETIONS SHALL BE THE NET DEPLETION AS DEFINED IN SECTION 37-60-115 (6) (c) (II) (B). AS A CONDITION OF APPROVING A SUBSTITUTE WATER SUPPLY PLAN FOR A PILOT PROJECT PURSUANT TO THIS SUBSECTION (4), THE STATE ENGINEER SHALL HAVE THE AUTHORITY TO REQUIRE THE PROJECT SPONSOR TO REPLACE ANY ONGOING DELAYED DEPLETIONS AFTER THE WATER USE PLAN ASSOCIATED WITH A PRECIPITATION HARVESTING PILOT PROJECT HAS CEASED. The state engineer shall impose such terms and conditions as are necessary to ensure that these standards are met. In making such determinations, the state engineer shall not be required to hold any formal hearings or conduct any other formal proceedings, but may conduct a hearing or formal proceeding if the state engineer finds it necessary to address the issues.

(b) A substitute water supply plan approved pursuant to this subsection (4) shall not be approved for a period of more than one year; except that an applicant may request the renewal of a plan by repeating the application process described in this subsection (4). If an applicant requests a renewal of a plan that would extend the plan past three years from the initial date of approval, the applicant shall demonstrate to the state engineer that the delay in obtaining a water court decree is justifiable and that not being able to continue operating under a substitute water supply plan until a decree is entered will cause undue hardship to the applicant. A PROJECT SPONSOR FOR A PRECIPITATION HARVESTING PILOT PROJECT SELECTED PURSUANT TO SECTION 37-60-115 (6) SHALL DEMONSTRATE TO THE STATE ENGINEER THAT AN ADDITIONAL YEAR OF OPERATION UNDER THE PLAN IS NECESSARY TO OBTAIN SUFFICIENT DATA TO MEET THE COLORADO WATER CONSERVATION BOARD'S CRITERIA FOR EVALUATING THE PILOT PROJECT. If an applicant requests renewal of a plan that would extend the plan past five years from the initial date of approval, the applicant shall demonstrate to the water judge in the applicable water division that the delay in obtaining a decree has been justifiable and that not being able to continue operating under a substitute water supply plan until a decree is entered will cause undue hardship to the applicant. Approval of a plan pursuant to subsection

(5) of this section shall be deemed to be approval under this subsection (4) for purposes of calculating the number of years since the initial date of approval.

(5) (a) Beginning January 1, 2002, for new water use plans involving out-of-priority diversions or a change of water right, if no application for approval of a plan for augmentation or a change of water right has been filed with a water court and the water use plan or change proposed and the depletions associated with such water use plan or change will be for a limited duration not to exceed five years, EXCEPT AS OTHERWISE PROVIDED IN SUBPARAGRAPH (II) OF PARAGRAPH (b) OF THIS SUBSECTION (5), the state engineer may approve such plan or change as a substitute water supply plan if the following conditions are met:

(b) (I) EXCEPT AS OTHERWISE PROVIDED IN SUBPARAGRAPH (II) OF THIS PARAGRAPH (b), a substitute water supply plan approved pursuant to this subsection (5) shall not be approved for a period of more than one year; except that an applicant may request the renewal of a plan by repeating the application process described in this subsection (5). However, in no event shall any plan approved pursuant to this subsection (5) or any water use included in such plan be approved or renewed for more than five years.

(II) A PROJECT SPONSOR FOR A PRECIPITATION HARVESTING PILOT PROJECT SELECTED PURSUANT TO SECTION 37-60-115 (6) MAY REQUEST RENEWAL OF A PLAN THAT WOULD EXTEND THE PLAN PAST FIVE YEARS FROM THE INITIAL DATE OF APPROVAL IF THE PROJECT SPONSOR DEMONSTRATES TO THE STATE ENGINEER THAT AN ADDITIONAL YEAR OF OPERATION UNDER THE PLAN IS NECESSARY TO OBTAIN SUFFICIENT DATA TO MEET THE COLORADO WATER CONSERVATION BOARD'S CRITERIA FOR EVALUATING THE PILOT PROJECT OR AN APPLICATION FOR A PERMANENT AUGMENTATION PLAN IS PENDING BEFORE THE WATER COURT. AS A CONDITION OF APPROVING A SUBSTITUTE WATER SUPPLY PLAN FOR A PILOT PROJECT PURSUANT TO THIS SUBSECTION (5), THE STATE ENGINEER SHALL HAVE THE AUTHORITY TO REQUIRE THE PROJECT SPONSOR TO REPLACE ANY ONGOING DELAYED DEPLETIONS AFTER THE WATER USE PLAN ASSOCIATED WITH A PRECIPITATION HARVESTING PILOT PROJECT HAS CEASED.

**SECTION 3. Appropriation.** In addition to any other appropriation, there is hereby appropriated, out of any moneys in the Colorado water conservation board construction fund created in section 37-60-121 (1) (a), Colorado Revised Statutes, not otherwise appropriated, to the department of natural resources, Colorado water conservation board, special purpose, for the water conservation program, for the fiscal year beginning July 1, 2009, the sum of fourteen thousand two hundred eighty dollars (\$14,280), or so much thereof as may be necessary, for the implementation of this act.

**SECTION 4. Safety clause.** The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: June 2, 2009