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## House Bill 16-1005

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**House Bill 16-1005**

## LEGISLATIVE REPORT

**House Bill 16-1005 (Colo. Rev. Stat. 37-96.5-101 (2016)) (Effective Date: Aug. 10<sup>th</sup>, 2016)** (allowing for rainwater collection limited to specific quantities on single- and multi-family residential properties for outdoor use on that property and providing that such collection cannot create a water right).

### INTRODUCTION

Colorado House Bill 16-1005 (2016 Colorado Session Laws 509)<sup>1</sup> (the “Rainwater Bill”, referenced hereinafter as the “Bill”) creates the state’s first exception to the general ban on rainwater collection. The Bill restricts collection to a specified amount on single- and multi-family residential properties. Residents may only collect Rainwater temporarily for outdoor usage.<sup>2</sup> Unlike previous efforts to implement rain water collection laws, the Bill contains critical language that protects the prior appropriation system. The Bill balances the delicate needs of water users by limiting rainwater collection to outdoor uses and requiring the State Engineers Office to monitor for discernable effects on downstream rights.

### BACKGROUND

Prior to the Bill, Colorado was among several states that banned collection of rainwater.<sup>3</sup> Those opposing collection argued the practice would injure downstream water rights by depleting water that would otherwise return to the watershed.<sup>4</sup> Previous attempts to end the rainwater collection ban failed because they did not account for the needs and concerns of downstream water rights holders. Citizens sought to end the ban because they saw the use as minimal in relation to other demands in the Colorado water system.

In 2007 the Colorado Water Conservation Board (CWCB) observed the effects of rainwater harvesting and suggested that the legislation be changed due

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1. H.B. 1005, 70th Gen. Assemb., 2d Reg. Sess., (Colo. 2016).

2. Allison P. Altaras, *Colorado Rain Barrel Bill Clears Final Hurdle*, OTTEN JOHNSON ROBINSON NEFF + RAGONETTI: ROCKY MOUNTAIN REAL ESTATE LAW (April 4, 2016), <http://www.rockymountainrealestatelaw.com/2016/04/colorado-rain-barrel-bill-clears-final-hurdle/>.

3. Peter Marcus, *Rain-barrel measure could wash away in Colo.*, DURANGO HERALD, May 3, 2015 [https://durangoherald.com/articles/88011-rain-barrel-measure-could-wash-away-in-colo](https://durangoherald.com/articles/88011-rain-barrel-measure-could-wash-away-in-colo;); see e.g. Mark Robinson, *UPDATE 2: Can Nevadans collect rain in barrels? No*, RENO GAZETTE-JOURNAL, May 28, 2015, <http://www.rgj.com/story/news/2015/05/26/ask-rgj-can-nevadans-collect-rain-barrels/27983037/> (explaining the complicated legal interpretation of precipitation capture in Nevada).

4. Jack Healy, *A thirsty Colorado is battling over who owns raindrops*, N.Y. TIMES, June 15, 2015 <http://www.nytimes.com/2015/06/16/us/a-thirsty-colorado-battles-over-the-destiny-of-its-raindrops-drought.html>.

to the minimal impact and the benefit from collecting rain water.<sup>5</sup> The CWCB's suggestion, droughts, and an increase in Colorado population created an opportunity to revisit the issue.

### DISCUSSION

The Bill delicately balances the different uses of water across the state. It satisfies senior and junior appropriators by allaying injury concerns while providing the Bill's proponents with a new water source. Its proponents see the Bill as an opportunity to show that rainwater collection and prior appropriation can coexist. The Bill accomplishes this balance through regulating the collection process, limiting quantities, specifying uses, preventing collectors from vesting water rights, and creating a preventative monitoring system that curtails the practice if harm to downstream users occur.

Despite the Bill's efforts to balance interests, some still voice the same concerns that have previously plagued efforts to introduce rainwater collection. Senator Jerry Sonnenburg (R.-Dist. 1) raised concerns regarding possible injury to those with vested rights downstream from rainwater collection. The Colorado Farm Bureau held concerns that rain barrel use would impede water rights of senior appropriators.<sup>6</sup> Sen. Sonnenberg criticized rain barrel use as potentially "stealing"<sup>7</sup> and expressed concerns over how much water the collection of precipitation. However, the prevailing belief is that the Bill's safeguards against such negative impacts will prevent these concerns from manifesting.<sup>8</sup>

The Bill only allows for rainwater collection from residential rooftops when certain conditions are met. The Bill allows for a maximum of two rain barrels for outdoor use on properties. Rain barrels are above-ground containers with sealable lids connected to a gutter or downspout. A barrel's storage capacity may not exceed 110 gallons. Collectors can use the collected precipitation only on the property where collected, for outdoor uses only. Rainwater may only be collected on single family residential properties or multi-family residential properties with four or fewer units. This excludes most apartment buildings and all commercial buildings. The Bill also encourages the state Department of Public Health and the Environment to develop best practices for nonpotable use of the collected precipitation to the extent practicable.

Next, there is a level of efficiency that the specified uses can help to reduce loss of usable water. Supporters of the bill see the outdoor use as beneficial because (i) collecting rainwater for later outdoor use merely alters the timing of return flows, not the actual availability of the water in the watershed and (ii) water that would have fallen on a paved or other impermeable surface and been lost to evaporation, thus harvesting and outdoor application of rainwater offsets

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5. Colorado Water Conservation Board, *Holistic Approach to Sustainable Water Management in Northwest Douglas County*, (January 2007) <http://cwcbweblink.state.co.us/WebLink/ElectronicFile.aspx?docid=105705&&&&dbid=0>.

6. Joey Bunch, *Colorado household rain barrel law takes effect Wednesday*, THE DENVER POST, Aug. 5, 2016 <http://www.denverpost.com/2016/08/05/colorado-household-rain-barrel-law-takes-effect-tuesday/>.

7. Healy, *supra* note 4.

8. See Jack Healy, *A thirsty Colorado is battling over who owns raindrops*, N.Y. TIMES, June 15, 2015 <http://www.nytimes.com/2015/06/16/us/a-thirsty-colorado-battles-over-the-destiny-of-its-raindrops-drought.html>.

potential losses to the system.<sup>9</sup> This keeps harvested rainwater separate from indoor (in many areas, municipal) water systems that would otherwise carry water to a septic field or water treatment plant rather than returning it to tributary streams as return flows. This protects those with downstream water rights premised on the availability of those return flows.

Importantly, water collectors do not get the opportunity to acquire a water right. The House added an amendment clarifying that rain barrels would operate in accordance with the prior appropriation principles enshrined in the state constitution. It specifies that the use of a rain barrel does not create a water right or allow a rain barrel user to place a "call" on the stream, leading to curtailment of junior water rights. This keeps a downstream user from worrying about the ability of a rain barrel user to hinder the appropriators' right to water.

Lastly the preventative monitoring creates an additional safeguard for appropriators. Water rights holders' concerns are mitigated because the Bill tasks the State Engineer's Office with monitoring rain barrel use and making future reports to both agriculture committees in the General Assembly on whether this has any discernable effect on downstream water rights.<sup>10</sup> The Bill grants power to the State Engineer to curtail rain barrel use if harm to downstream user rights occur.<sup>11</sup> Furthermore, no language in the bill suggest that a water rights holder cannot use a rain barrel to collect water under the provisions of the bill and use them for purposes specified in the bill. Nonetheless, for the time being, Colorado joins the rest of the country in allowing the collection of precipitation.

### CONCLUSION

There is longstanding controversy between rain barrel collection and prior appropriation in Colorado. The Bill represents legislative compromise where legislators saw an opportunity to craft a mutually beneficial law that could have significant, positive impacts moving forward.

*Written and sponsored by:* Rep. Daneya Esgar (D-Dist. 46), Rep. Jessie Danielson (D-Dist. 24), and Sen. Michael Merrifield (D-Dist. 11).

*Notable For:* Rep. Mark Scheffel (R-Dist. 4, Maj. Leader), Rep. Kevin Lundberg (R-Dist. 15), Rep. John Cooke (R-Dist. 13, Maj. Whip), Rep. Michael Merrifield (D-Dist. 11), Rep. Chris Holbert (R-Dist. 30).

*Notable Against:* Sen. Jerry Sonnenburg (R-Dist. 1), Sen. Ray Scott (R-Dist. 7), Sen. Kent D. Lambert (R-Dist. 9), Sen. (R-Dist. 23), Beth Martinez Humenik (R-Dist. 24), and Kevin Grantham (R-Dist. 2).

*Kole Kelley*

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9. See Jack Healy, *A thirsty Colorado is battling over who owns raindrops*, N.Y. TIMES, June 15, 2015 <http://www.nytimes.com/2015/06/16/us/a-thirsty-colorado-battles-over-the-destiny-of-its-raindrops-drought.html>.

10. Altaras, *supra* note 2.

11. Bunch, *supra* note 6.

