

WATER RESOURCES PROGRAM POLICY AND INTERPRETIVE STATEMENT
THE RESCISSION AND RELINQUISHMENT OF WATER RIGHTS

Contact: Program Development and Operations Support Section Effective Date: 11/22/91
Revised: XXXX

References: *Chapters:* 90.14, 90.16, 90.38, 90.42, 90.92 RCW
RCWs: 90.03.015, 90.03.110, 90.03.130, 90.03.245, 90.03.250, 90.03.330,
90.03.380, 90.14.130, 90.14.140, 90.14.150, 90.14.180, 90.40.030, 90.44.100,
90.44.520, 90.46.150
WAC: 173-128A
POL: 1050, 1120, 1280, 2030

Purpose: To ensure statewide consistency in the relinquishment of water rights and use of rescission orders.

Application: This policy applies to all show cause orders and relinquishment declarations issued pursuant to Chapter 90.14 RCW and all administrative rescission orders.

This policy supersedes any previous policy statement with which it conflicts.

PART 1: Definitions

- “Abandonment” is nonuse of a water right combined with an intent to abandon the water right.¹ This is based on a common law doctrine for extinguishment of water rights that are unused, rather than a doctrine that was created by statute.
- “Relinquishment” occurs when a water right has reverted to the state because of nonuse for five or more successive years without sufficient cause that excuses the nonuse. There can be full or partial relinquishment of a water right. The law relating to relinquishment was created by statute.
- “Rescission” is an administrative procedure to revoke a certificate of a water right or change certificate, where the quantity of water that was perfected through actual beneficial use of water is not in agreement with the maximum quantity specified in the state-issued certificate of water right.

¹ “Abandonment is the intentional relinquishment of a water right.” *Cornelius v. Washington Department of Ecology*, 182 Wn.2d 574, 603, 344 P.3d 199 (2015) (citing *Okanogan Wilderness League v. Town of Twisp*, 133 Wn.2d 769, 947 P.2d 732 (1997)).

PART 2: Relinquishment

A. Applicability

Water rights documented by certificates and water rights documented by statements of claims are subject to relinquishment. In accordance with RCW 90.14.150 and RCW 90.14.180, water rights documented by permits are not subject to relinquishment.²

- Water rights documented by permits become subject to relinquishment on the date they are certificated; meaning that five years of consecutive nonuse without sufficient cause or exemption (see Part 2B) may be evaluated starting on the date that the certificate is issued.
- If a water right documented by a certificate was never fully perfected through actual beneficial use of water, only the perfected portion may be subject to relinquishment. The unperfected portion may be subject to rescission (see Part 3).

The relinquishment provisions in Washington water law were codified in RCW 90.14.130 - .180 in 1967. Therefore, water rights that are documented by permits or statements of claims are not subject to relinquishment for nonuse of water that occurred before 1967.

B. Statutory Sufficient Causes that Excuse Nonuse of Water and Preclude Relinquishment

Five or more consecutive years of partial or full nonuse of a water right triggers partial or full relinquishment of the right unless there is sufficient cause to excuse the nonuse. Nonuse of a water right in a given year that is excused because of qualification for an exception to relinquishment will “re-start” the five-year relinquishment timeframe.

Under RCW 90.14.140, there are several categories of reasons that may serve as “sufficient cause” to explain why a water right has not been beneficially used and shield the right from relinquishment.³

Note that since the statute was originally enacted in 1967, the Legislature has added additional statutory sufficient causes. Ecology interprets that each sufficient cause is valid prospectively from the date it became effective. In other words, new sufficient causes are not applied retroactively.

RCW 90.14.140 lists the following sufficient causes (exceptions) from relinquishment:

² Note that although permits are not subject to relinquishment, they are still subject to cancellation if they are not pursued in compliance with their development schedules; see POL 1050.

³ RCW 90.14.140 includes two categories of relinquishment exceptions. RCW 90.14.140(1) states that there is sufficient cause to excuse nonuse when it “occurs as a result of” several listed exceptions. This means that nonuse must be actually caused by the listed reason for nonuse. In contrast, RCW 90.14.140(2) lists exemptions from relinquishment that do not require that nonuse occur as a result of the exception.

RCW 90.14.140 Section	Statutory Sufficient Cause	Description, Explanation, and Sample Case Law
RCW 90.14.140(1)		
(a)	Water unavailability	<p>“Drought or other water unavailability”</p> <ul style="list-style-type: none"> Per <i>Ege v. Ecology</i>, PCHB No. 05-033 (2006), to qualify for this exemption water right holders must show that the nonuse of water was due to actions “reasonably outside their control” and they took “reasonably diligent steps” to beneficially use the water.
(b) and (c)	Military duty	<p>“Active service in the U.S. Armed Forces during military crisis”</p> <p>“Non-voluntary service in the Armed Forces of the United States” (aka, a military draft)</p>
(d)	Legal proceedings	<p>“Operation of legal proceedings”</p> <ul style="list-style-type: none"> Per <i>R.D. Merrill Co. v. Pollution Control Hearings Bd.</i>, 137 Wn.2d 118, 969 P.2d 459 (1999), the legal proceedings must directly prevent the water right holder from using the water.
(e) and (f)	Special federal or state programs	<p>Federal or state agency leases or purchase options for lands or water rights that reduce or prevent the use of the right by the owner.</p> <p>Federal laws or voluntary enrollment in a federal program imposing land or water use restrictions, acreage limits, or production quotas.</p> <ul style="list-style-type: none"> Example: Participation in the Conservation Reserve Enhancement Program
(g) through (k)	Irrigation issues	<p>Temporarily reduced irrigation due to varying weather conditions, as long as water diversion and delivery facilities remain able to support the full beneficial use of the water right.</p> <p>Temporarily reduced water use for irrigation resulting from the terms of a contract or similar agreement in which an electricity provider buys back electricity needed either to divert or withdraw the water or to use the water for irrigation purposes.</p> <p>Use of water conservation measures as part of the Yakima River Basin Water Enhancement Project, so long as the conserved water is reallocated in accordance with the provisions of P.L. 103-434.</p> <p>Use of measured or reliably estimated return flows in place of water from the primary source of supply.</p>

		Reduced use of irrigation water due to crop rotation when the temporary change of crop type is warranted based on sound farming practices, and a portion of the water right is put to beneficial use.
(l)	Change applications	<p>“Waiting for a final determination from the department of ecology on a change application filed under RCW 90.03.250, 90.03.380, and 90.44.100.”</p> <ul style="list-style-type: none"> To exercise this exemption, the water user must be unable to legally use their water right without approval of the change application.⁴ For example, an inability to divert water from the original place of diversion due to a geographic change in the river would likely qualify.
RCW 90.14.140(2)		
(a)	Power development purposes	Water rights for production of hydropower, as long as annual license fees are paid in accordance with chapter 90.16 RCW.
(b)	Standby or reserve water rights	<p>Water rights used only in times of drought or other low flow periods, so long as withdrawal or diversion facilities remain in good operating condition.</p> <ul style="list-style-type: none"> Per RCW 90.44.520, reduced irrigation water use from an aquifer within the Odessa ground water subarea (as defined in chapter 173-128A WAC) due to drought or low flow period also qualifies.
(c)	Determined future development	<p>Water rights claimed for determined future development uses, to take place within fifteen years of the most recent beneficial use of the water right.</p> <ul style="list-style-type: none"> For guidance, see POL-1280, Dept. of Ecology v. City of Union Gap and Ahtanum Ridge Business Park 147 Wn.2d 440, 458, 54 P.3d 1194 (2002), and R.D. Merrill Co. v. Pollution Bd., 137 Wn.2d 118, 969 P.2d 459 (1999).
(d)	Municipal water supply	<p>Water rights “claimed for municipal water supply purposes.” See POL-2030 for details on municipal water supply issues and how water rights may qualify for this exception by meeting the definition of “municipal water supply purposes” under RCW 90.03.015.</p> <ul style="list-style-type: none"> Note: While water for municipal water use is exempt from relinquishment, it is still subject to abandonment for

⁴ This interpretation is predicated on this exception being located in RCW 90.14.140(1), which states that there is sufficient cause to excuse nonuse when it “occurs as a result of” several listed exceptions. The provisions in RCW 90.14.140(1) require that the nonuse of water is attributable to the exception at issue. *See R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 141, 969 P.2d 459 (1999).

		nonuse when coupled with shown intent to abandon the water right. For legal guidance on how municipal water rights may be affected by abandonment, see <i>Okanogan Wilderness League v. Town of Twisp</i> , 133 Wn.2d 769, 947 P.2d 732 (1997).
(e)	State water rights held by the United States for development of reclamation projects	Waters not subject to appropriation under the applicable provisions of RCW 90.40.030.
(f)	Water right leases for use on other land	Ecology-approved changes where the water right is used on other lands, if the person leasing the water right makes beneficial use of the right. This applies to permanent, seasonal, and/or temporary changes.
(g)	Agricultural process water	Agricultural industrial process water used for all or a portion of the right as authorized under RCW 90.46.150.
(h)	Trust water	Trust water rights established under chapters 90.38 or 90.42 RCW. Only the portion of the water right that is put into the State Trust Water Right Program is protected from relinquishment.
(i)	Walla Walla	Water rights identified in a local water plan in the Walla Walla basin (chapter 90.92 RCW), provided that the right is banked or subject to an agreement not to divert under chapter 90.92 RCW. <ul style="list-style-type: none"> Note: chapter 90.92 RCW is set to expire in 2021.

C. Voluntary Relinquishment

The administrative process of formally relinquishing a water right may be voluntary. The administrative process may be pursued by either party:

- The water right holder may initiate voluntary relinquishment; or
- Ecology may request that the water right holder pursue voluntary relinquishment when the water right holder acknowledges that the right has been relinquished and does not wish to contest the relinquishment.

Voluntary relinquishment should be documented on form ECY 040-1-100.

D. Involuntary Relinquishment

Ecology and conservancy boards investigate historical use of a water right when conducting a tentative determination of extent and validity while processing a change application. During a tentative determination, Ecology or a conservancy board may find that all or a portion of a water right has been relinquished and is not valid and, therefore, not eligible for change or transfer. See POL-1120 for guidance on tentative determinations.

In addition, a court may find involuntary relinquishment of a water right when it determines the validity of a water right during a general adjudication of water rights pursuant to RCW 90.03.110 - .245.

Under RCW 90.14.130, Ecology is authorized to issue administrative relinquishment orders. Involuntary water right relinquishment involves a three-step procedure:

1. When Ecology has sufficient evidence that a water right may have been relinquished, Ecology will issue a *show cause letter*, stating that:
 - a. It tentatively appears that the water right has been relinquished and reverted to the state because of nonuse without sufficient cause; and
 - b. The right will be declared relinquished upon failure to sufficiently show why the right should not be relinquished.

During this process, Ecology may provide technical assistance to the water right holder, which may involve site visits and phone conversations.

2. If the water right holder does not respond to the show cause letter and show sufficient cause as to why the water right should not be relinquished, Ecology will issue a *relinquishment order* in accordance with RCW 90.14.130. The order must contain:
 - a. A description of the water right, including the point of diversion, place of use, the amount of water involved, the purpose of use, the apparent authority upon which the right is based;
 - b. A statement that unless sufficient cause can be shown on appeal the water right will be declared relinquished;
 - c. That the order is appealable to the Pollution Control Hearings Board; and
 - d. That if the order is appealed, relinquishment of the water right is stayed until the case is resolved.⁵

When possible, Ecology will post a copy of the relinquishment order at the point of diversion or withdrawal.

3. Following close of the appeal period, Ecology may file notice with the county that the water right has been relinquished.

In an appeal, Ecology bears the initial burden of proof to show that five consecutive years of nonuse of a water right has occurred. Once Ecology has shown that five or more years of nonuse occurred, the burden of proof shifts to the water right holder to show that the nonuse is excused because it qualifies for a statutory good cause.

PART 3: Rescission

Rescission is used to achieve conformity between the portion of a water right that has been perfected through beneficial use and the quantity written on the state-issued document. Whereas

⁵ Per RCW 90.03.130, relinquishment of the water right will occur if the relinquishment order is not appealed. If it is appealed, the water right holder retains their right to use the water unless and until the order is upheld by the Pollution Control Hearings Board or a court.

relinquishment applies to water rights that have been perfected and certificated, rescission applies to a portion of a certificated water right that has not been perfected.⁶ In situations where Ecology can prove that a right was never developed to the extent documented by a state issued certificate of water right, relinquishment would be inappropriate, as no perfected right that could be subject to relinquishment would exist.

- Rescission does not apply to claims filed pursuant to chapter 90.14 RCW.
- RCW 90.03.330(3) precludes rescission of “pumps and pipes” certificates documenting water rights for municipal water supply purposes that were issued based on system capacity rather than actual beneficial use of water. *Therefore, rescission does not apply to municipal “pumps and pipes” certificates; see POL-2030 for details.*

Ecology may issue superseding documents in circumstances where rescission and/or relinquishment of the water right is warranted.

PART 4: Appeals

Relinquishment orders and rescission orders are formal orders issued by the Department and are appealable actions. The water right holder has 30 days from receipt of the order to file an appeal with the Pollution Control Hearings Board.

In many cases, a water right holder may choose to work with Ecology amicably to resolve issues. Even when this occurs, a water right holder may still want to file an appeal of the order within the 30-day deadline as to preserve their appeal rights should settlement efforts fail.

PART 5: Abandonment

Abandonment occurs when there is an indication of intent to give up a water right coupled with nonuse of the water. Abandonment does not require a minimum duration of nonuse; that is, the nonuse could last fewer or greater than five years. However, long periods of nonuse raise a presumption that a water right has been abandoned (*Okanogan Wilderness League v. Town of Twisp*, 133 Wn.2d 769, 781,947 P.2d 732 (1997)).

When a water right is to be extinguished based on abandonment, the burden of proof to demonstrate abandonment is on Ecology. In general, the burden of proof required to show abandonment is quite high, making it difficult (and rare) for Ecology to make such a determination. *See Public Utility Dist. No. 1 of Pend Oreille County v. Department of Ecology*, 146 Wn.2d 778, 799-802, 51 P.3d 744 (2002).

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⁶ This situation occurs in circumstances where Ecology (or its predecessor agencies) historically issued a water right certificate for a quantity of water exceeding the amount actually perfected through the use of water.

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Special Note: These policies and procedures are used to guide and ensure consistency among water resources program staff in the administration of laws and regulations. These policies and procedures are not formal administrative regulations that have been adopted through a rule-making process. In some cases, the policies may not reflect subsequent changes in statutory law or judicial findings, but they are indicative of the department's practices and interpretations of laws and regulations at the time they are adopted. If you have any questions regarding a policy or procedure, please contact the department.

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