

EXTENSION OF TIME ON PERMITS

Resource Contact: Policy and Planning Section

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References: RCW 90.03.320, RCW 90.03.360, 90.03.470, RCW 90.03.386, RCW 90.44.060,
RCW 90.44.450, WAC 173-130A-160, WAC 173-134A-080 (2)(i), WAC 508-12-030

Purpose:

To document the generally applicable procedures used in evaluating requests for an extension of time in any of the development phases of a permit.

Application:

This policy applies to all requests for extensions of time and the granting or denial of the request received pursuant to RCW 90.03.320 or 90.44.060. This policy also applies to the addition, modification, or deletion of conditions and provisions associated with any approval of an extension in time for the development of a permit.

Definitions:

Good cause – a legally sufficient reason that is not unreasonable, arbitrary, or irrational under the facts of the specific case. Good cause includes prevention or restriction of water use by operation of federal laws for a water right permit issued for a federal reclamation project.

Good faith – an honest intent and sincere desire as reflected by the actions taken to pursue the project with due diligence and put the allocated water to beneficial use in a timely manner.

Due diligence – a measure of prudence and activity as is reasonably expected under the facts of the specific or individual request.

Public interest – the balance of positive and negative impacts to the public at large that would result from a requested action such as extending a development schedule. Considerations should include environmental, aesthetic, recreational, public health and safety, economic effects, and impacts on publicly owned resources and facilities. General guidelines for consideration of the public interest are set forth in the water resources fundamentals in RCW 90.54.020. The public interest can also be presumed to be reflected in watershed plans, ground water area management programs, related water supply plans, water conservation plans, administrative rules, and local plans and ordinances.

Public welfare – the prosperity, well being, or convenience of the public at large, or of a whole community, as distinguished from the advantage of an individual or limited class.

1. Background

The purpose of the extension provisions in the statute is two-fold: 1) to accommodate reasonable requests for additional time in developing a water right authorization where unforeseen conditions have occurred; and 2) to discourage any attempt to retain priority on an undeveloped right with an intent to speculate or where there is a lack of diligence in developing a project.

A permit has a priority date based on the date the application to appropriate waters of the state is filed (RCW 90.03.340). The filing of an application evidences intent to develop a project and make use of water. The holder of a permit is entitled to put the water to beneficial use but must do so in accordance with the development schedule, i.e. in a timely manner.

The appropriation doctrine, upon which the state water code is based, requires maximum utilization of state water resources. If a permit holder is unable or unwilling to pursue an authorized project with diligence, that holder's authorization should be terminated and the water reallocated to other applicants who are willing and able to proceed.

When considering an extension it is important to consider the initial development schedule and any previous extensions to the development schedule. In determining the initial development schedule for a water right permit, the department, in consultation with the applicant, should have allowed time that is reasonable and just under the conditions existing at the time to complete the project. The original development schedule should have taken into consideration the cost and magnitude of the project, the engineering and physical features to be encountered, and the public welfare and public interests affected. The permit holder must use reasonable diligence, with no more delay than is necessary, to put the water to beneficial use. If the permit holder fails to comply with the terms of the permit or any extension, the permit may be cancelled.

2. Applying for Extensions of time

Every extension of time for a development phase of a permit must be requested in writing and accompanied by the required fee. The permit holder may request an extension of time to any of the three developmental stages, specifically the Beginning of Construction date (BC), the Completion of Construction date (CC), and the Proof of Appropriation date (PA). The applicant must show good cause for needing the extension, and demonstrate the due diligence and good-faith efforts made to comply with the original or updated construction schedule. The permit holder is responsible for ensuring that the permit is in good standing, and if necessary, for initiating requests for extensions.

The permit holder must demonstrate the reasons that the permit should be extended. Requests for extensions must include:

- The reason(s) for needing the extension.
- A description of efforts made since the permit issued or the last extension was granted.
- A proposed schedule for completing the development.

Additional information may be required, including but not limited to:

- Descriptions of other permits or authorizations required for the development and time lines for seeking or obtaining those permits or authorizations.
- Dates any project construction was started or completed.
- A description of the term and amount of financing required to complete the project.
- A description of the engineering and/or physical impediments encountered during construction.
- Actions related to the State Environmental Policy Act, or other environmental review.
- A farm plan document.
- An approved water system plan document, comprehensive plan, a county-approved comprehensive plan, or demand projection.
- An anticipated time schedule for completing construction and completing development of the water system, accompanied by an explanation as to how any identified impediments to meeting the current development schedule will be overcome.
- A corresponding document from a financial entity indicating pursuit of financial surety to begin/complete the project.
- Signed and executed contracts for completing construction and development.

If extensions in the development period have been granted previously, the record of those extensions and the degree of effort made by the holder of the authorization to meet any commitments, whether proposed by the authorization holder or imposed by the department, will be considered in determining whether due diligence and good faith effort have been demonstrated.

Numerous extension requests may indicate an intent to speculate or lack of diligence, and staff should consider with increased scrutiny extension requests for long-standing permits where several extension requests have already been authorized. However, staff should also consider whether the initial development schedule provided sufficient time given the scope and nature of the project and the criteria outlined in RCW 90.03.320. Ecology's historic practice of sometimes providing only one year each for beginning and completion of construction and proof of appropriation has led to some existing permits with numerous approved extension requests, not due to any lack of diligence on the part of the applicant, but rather because the scope of the original project was more complex than initially considered by Ecology's initial development schedule.

3. Granting extensions of time

For good cause and due diligence shown, the department shall extend any phase of the development schedule (BC, CC and PA dates), and shall grant a further period or periods of time as may be reasonably necessary, having due regard to the good faith of the applicant, the public interests affected, and the nature and scope of the project. The department shall not grant extensions if prohibited by law or rule (see WAC 173-130A-160 and WAC 173-134A-080 (2)(i)).

It is at the discretion of the regional section manager to judge whether good faith, due diligence and good cause has been shown by the permit holder, and to determine the public interests affected by an extension.

Department staff is responsible for evaluating the written extension requests and determining if the permit holder has properly documented a reasonable justification for the extension. Staff must verify whether the permit holder is meeting all conditions of the existing permit, and examine any issues related to the public interest that may be affected. Staff should differentiate between instances where unforeseen conditions have delayed project development, as opposed to a failure to properly plan and execute on the part of the water right holder. Accommodation of unforeseen conditions is the purpose of the extension statute whereas failure to pursue a project plan is an indication that the project is not being pursued with due diligence. Staff will ensure that adequate documentation to support the extension decision is contained within the file.

Construction of diversionary and conveyance works are indications that the project is being pursued with due diligence. Requests for extension at the BC stage where no progress has occurred on the permit should be closely scrutinized since the absence of any financial commitment or advancement towards development of the project can be an indication of speculation or lack of serious intent.

Time limitations used in extensions shall take into account the complexity of the project and the reasons why the permit or holder has failed to meet the original development schedule and any prior extensions. Development schedules on permits may be extended on a year-by-year basis, but longer time periods may be granted for good cause. Factors to consider when making a good cause determination may include:

1. Engineering problems and project complexity.
2. Litigation, such as right of way disputes that must be resolved at the pace of the body having jurisdiction.
3. Illness of the principal permit holder if directly related to the person's ability to pursue development of the project.
4. Financial problems encountered by permit holder, if associated with development and not the speculative value of the product planned after complete development.
5. Municipal water systems when justified by an approved water system plan.
6. Nature and scope of the project.
7. Local development patterns and local economic conditions.
8. Desire of permit holder to collect additional metering data for issuance of a certificate.

When granting any extension, specific goals may be set and required of the permit holder during the extension period. Specific requirements including but not limited to construction goals, financing achievements, other permit acquisitions, and scheduling can be imposed to ensure progress. Without adequate justification, substantive deviation from these requirements may result in cancellation of the permit at the expiration of an extended development period.

The extension in development period for any phase of development will be assumed to extend any future development phases by the same length of time unless it is specifically stated otherwise within the formal approval of the extension.

Granting extensions of time for municipal water supply purposes.

In evaluating the extension of time for permits issued for municipal water supply purposes, the following elements shall be taken into consideration:

- The term and amount of financing required to complete the project;
- Delays that may result from planned and existing conservation and water use efficiency measures implemented by the public water system;
- The supply needs of the public water system's service area; and
- Related water demand projections prepared by public water systems in accordance with state law.

Granting extensions of time for 'Group B' water supply purposes

In evaluating the extension of time for permits issued for public water supply purposes, the following elements may be taken into consideration:

- Progress on construction of the water system relative to the scope of the project.
- Firm status of remaining connections to be developed or served can be documented through deeds, sale agreements, and water share agreements.
- Clear evidence that full-build out of the system is viable and not speculative.
- Indication of readiness to serve.

Granting extensions of time for 'Family Farm Development Permits'

Family farm development permits may be issued to persons without any limit on the number of acres to be irrigated during a specified period of time for the development of the land into family farms. Family farm development permits may not have an initial development period greater than ten years for completion of the project and transfer of the project lands to persons qualifying to hold family farm permits. This time limit may be extended by the department for up to ten additional years upon a showing that an additional period of time is necessary for orderly development and transfer of the controlling interests.

4. Fees

The proper statutory fee must accompany the extension request. A separate request for extension must be made for each permit. A fee of \$50 is required per request for each application for an extension of time to begin construction, for completion of construction, or for completing application of water to a beneficial use.

5. Extensions may include new requirements and conditions

Conditions may be imposed on a permit extension beyond what was provided in the original permit and Report of Examination. When considering an extension request, the department will consider any information that was not available or considered when the permit was originally issued or extended.

As a condition of an extension, the Department of Ecology may require additional provisions and conditions including, but not limited to:

- Metering and reporting (RCW 90.03.360, RCW 90.44.450 and WAC 508-12-030).
- Conservation Planning
- Provisions to protect the public interest

6. Format of an extension approval

Extensions of additional time to perfect water use are issued in letter format. Letters authorizing extensions must clearly outline the reasons for granting the extension, and clearly outline goals, conditions, and provisions imposed as a condition of the approval, and/or information submittals that must be provided by the permit holder.

The issuance of an extension is an appealable action. The appeal can be from either the permit holder or other interested party. Approval of an extension request shall be signed by the regional section manager and shall contain approved appeal language.

The approval of an extension is indicated on the Progress Sheet within the appropriate water right file, and indicated on the most recent copy of the permit within the file, as well as in the WRTS database. However, a superseding document may be issued in situations where greater clarity is desired by the regional office.

7. Denying extensions of time

Denial of extensions on permits

Requests for an extension of time shall be denied if the applicant has not demonstrated good cause, and good faith and due diligence in meeting the development schedule, or if the project cannot be pursued further, even with additional conditions or provisions, without detriment to the public

interest, or if otherwise prohibited by law or rule. (See WAC 173-130A-160 and WAC 173-134A-080 (2)(i))

The issuance of a denial of an extension is an appealable action. The appeal can be from either the permit holder or other interested party. Denial of an extension request will document the reasons for the denial, and shall be signed by the regional section manager and contain approved appeal language.

8. Failure to Request an Extension

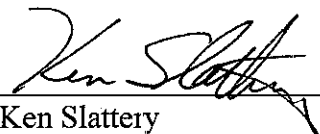
If the time allowed for beginning construction, completing construction, or putting water to beneficial use expires and the permit holder fails to request an extension, the department will initiate cancellation of the permit. Ecology will attempt to contact the permit holder by mail or telephone if the time has expired for beginning or completion of construction or for filing a proof of appropriation.

9. Cancellation/Certification

If an extension of time request is denied or an extension is not requested, the department will:

1. Initiate cancellation of the permit , and
2. Initiate certification of any developed portion of the permit .

Prior to cancellation of a permit, the permit holder must be sent a 60-day show cause letter. Show cause letters under RCW 90.03.320 must be followed by cancellation orders, which contain appropriate appeal language, and which must be sent to the permit holder by registered mail.



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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