

POL-1280

DEPARTMENT OF ECOLOGY WATER RESOURCES PROGRAM
POLICY AND INTERPRETIVE STATEMENT

**DEVELOPMENT SCHEDULES FOR WATER RIGHT
CHANGES AND TRANSFERS**

- Effective Date: 8/10/2009
- Revised Date: 9/10/2014
- Contact: Policy and Planning Section
- References: *Statute:* RCW 90.03.320, 90.03.380, 90.03.386, 90.03.390, 90.03.470,
90.14.140, 90.14.160-180, 90.44.100, 90.44.105, and 90.66.065
Administrative Rule: WAC 173-153-130 and 173-153-160
Policy: 1050
- Purpose: To document the use of development schedules for authorizations for change or transfer of a water right, and describe the applicable procedures used in evaluating requests for an extension of time in any of the development phases. To assure that changes and transfers are pursued diligently. To assure that actual water usage and the departments records are consistent.
- Application: This policy applies to development schedules and requests for extensions of time for change or transfer authorizations.

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

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1. Definitions

Change Development Schedule: A period of time that allows a water right holder to make an orderly transition from an existing authorized use to a new authorized use. It may be determined through negotiation with the applicant, and is specified within the Report of Examination (ROE).

Determined Future Development (DFD): The Supreme Court in R.D. Merrill Co. v. Pollution Control Board (1999) defined DFDs as development plans that must be fixed – conclusively and authoritatively – within five years of the last date of beneficial use, and affirmative steps toward the realization of fixed development plans must occur within 15 years of the last beneficial use. A DFD is an exception from relinquishment provided in RCW 90.14.140(2)(c).

Due Diligence: A measure of prudence and activity as is reasonably expected under the facts of the specific or individual request.

Good Cause: A legally sufficient reason for non-use of water that is not arbitrary or irrational under the facts of the specific case. Good cause for non-use of water 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 a project with due diligence and to put the allocated water to beneficial use in a timely manner.

Inchoate Right: A water right that has not yet been put to beneficial use, in part or in whole. An inchoate water right is an incomplete appropriative right in good standing.

Public Interest: The balance of positive and negative effects 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 90.54.20. The public interest can also be presumed to be reflected in watershed plans, ground water management area programs, related water supply plans, water conservation plans, administrative rules, and local plans and ordinances.

Perfected Right: A water right that has been put to beneficial use.

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 of people.

Relinquishment: The statutory process whereby an unused water right is forfeited. A water right may be relinquished in whole or in part by an extended period of voluntary non-use under RCW 90.14.160 - 180. Exceptions to relinquishment are outlined in RCW 90.14.140.

Superseding Document: An updated water right document that replaces or augments the original document and contains the changes or corrections to the water right document. The type of superseding document issued depends on the type of water right document being changed:

- A Superseding Permit is issued for changes to a Water Right Permit.
- A Superseding Certificate (also termed a "certificate in duplicate" under RCW 90.03.380) reflects changes to a Certificate of Water Right.
- A Certificate of Change¹ reflects changes to a Water Right Claim or a prior Certificate of Change.

2. Authority for Change Development Schedule

Case law and statute form the basis of Ecology's authority to condition a change approval with a development schedule. Numerous court cases (such as Department of Ecology v. Theodoratus²) allow Ecology to include reasonable conditions in its decisions to ensure compliance with the water code. Change development schedules aid in compliance with the water code by:

- Providing an orderly transition period from one place or type of use or point of diversion or withdrawal to another.
- Requiring timelines for construction activities necessary for the change.

Development schedules for new permits and change authorizations allow time for starting and completing necessary construction, and for putting the water to beneficial use. Ecology uses the same processes and criteria for setting the development schedule and granting extensions for change development schedules as for new permits (see Water Resources Program Policy POL-1050 - Extension of Time on Permits), as codified in RCW 90.03.320.

When an amendment is issued to a groundwater permit or certificate, a showing of compliance with the terms of the amendment, as in the case of an original permit, is required under RCW 90.44.100(2). This provision gives Ecology the authority to set a schedule for making the showing required under RCW 90.44.080.

Ecology's authority to charge fees for applying for each extension of time is found in RCW 90.03.470(6), which provides that extensions of time for change development schedules are subject to the same fees as are extensions of time for beginning construction work, completion of construction work, or application of water to a beneficial use under a water right permit. In all cases, an application fee of fifty dollars is required.

Additional authority is found in the Water Conservancy Board rule WAC 173-153-130(6)(f)(iii), which requires the Report of Examination to include "a schedule for development and

¹ When a water right claim is changed, the Certificate of Change Ecology issues should contain language that makes clear to the applicant that the validity of a claim can only be determined by a Superior Court adjudication. Any tentative determination made by Ecology on a claim as a part of an application for change investigation is not an adjudication of the claim.

² Department of Ecology v. Theodoratus. 135 Wn.2d 582, 957 P.2d 1241 (1998)

completion of the water right transfer, if approved in part or in whole, that includes a definite date for completion of the transfer and application of the water to an authorized beneficial use".

3. Use of Development Schedules

Ecology's policy is to issue a change or transfer authorization (issued in the form of a Report of Examination or superseding permit) with a development schedule to cover stages of an orderly transition between uses, track required construction activities, and confirm completion of the change consistent with the findings in the Report of Examination (ROE). Under certain conditions, a superseding document may be issued immediately following the end of the appeal period of the ROE (or resolution of an appeal).

A change development schedule can provide short-term flexibility in how and where water is used. This period is intended to cover the time needed to install new points of diversion or withdrawal, put facilities in place for water delivery and use, and begin beneficial use of water. During the period of the development schedule, water may be used under the original water right, the newly authorized use, or a combination of the two - provided the total instantaneous and annual quantities of water authorized are not exceeded. Use of a development schedule allows an applicant a degree of flexibility of water use not available if we immediately issued a superseding document.

However, to prevent speculation and to avoid confusion on appurtenancy when multiple land owners are involved, Ecology will work with applicants to condition the change or transfer authorization with appropriate reporting requirements and other conditions as necessary when development schedules are authorized.

Phases of a Development Schedule

A development schedule included in the Report of Examination includes a schedule for the three phases of the applicant's project:

- Beginning of Construction – The date by which construction necessary to convert to the new authorized use should have begun.
- Completion of Construction – The date by which all infrastructure needed to convert to the new authorized use should have been installed.
- Proof of Appropriation – The date by which the water must be put to beneficial use consistent with the ROE.

After receiving a Proof of Appropriation form, Ecology typically performs a field visit called a *project verification* to verify the project was completed consistent with the change authorization. Once this verification occurs, a superseding document is issued that describes the completed project.

Determining the Need for a Development Schedule

A number of factors are considered when deciding whether a change development schedule is a reasonable condition for a change decision. These factors may include:

- The scope of the proposed change.
- The timing of the proposed change.
- The applicant's preference.
- Whether the change is dependent on construction work or is already complete.

In many cases, construction is needed to complete a change. Ecology has an interest in making sure the construction meets statutory requirements and is consistent with the change authorization. Examples include:

- Drilling wells to meet same body of public groundwater criteria (RCW 90.44. I00) and minimum standards for construction and maintenance of water wells under Chapter 18.104 RCW and Chapter 173-160 WAC.
- Construction work to comply with water measurement and metering requirements (RCW 90.03.360, 90.44.450 and Chapter 173-173 WAC).
- Construction work to comply with fish screening requirements (RCW 77.55.040).
- Construction related to mitigation requirements contained within the ROE.

The change development schedule benefits the applicant by allowing continued use of the water under the original authorization (such as purpose or place of use) while new construction occurs. These construction activities could include development of new pumps and pipes, irrigation systems, power supply development or other activities.

Immediate Issuance of a Superseding Document

While the use of development schedules is common, there are instances when a superseding document can be issued immediately. Examples include:

- When the change has already physically occurred, called a defacto change (see POL 1120 - Conducting Tentative Determinations of Water Rights), and all conditions for approval of the change or transfer are met.
- The applicant intends to immediately transition from the existing beneficial use to the new use and any construction related activities are covered by other agency actions. For example, a farmer may plan to change the point of diversion to another already existing point of diversion within one year's time, and the other point of diversion is already complying with a metering order.

- After a surface water right change application has been approved and the applicant requests issuance of a "certificate in duplicate" in accordance with RCW 90.03.380(1). However, the applicant may face risk of relinquishment of the changed water right if they do not transition to the new beneficial use in a timely manner.
- When requested by the applicant. Use of water under the previous authorization will no longer occur.

Ecology will decide on a case-by-case basis if it is reasonable to include a development schedule on a water right change. Upon issuance of a superseding document, all use of water inconsistent with the change authorization must cease.

4. Term of Development Schedules

As for new permits, the criteria described in RCW 90.03.320 for change development schedules is considered:

“The department, in fixing the time for the commencement of the work, or for the completion thereof and the application of the water to the beneficial use prescribed in the permit, shall take into consideration the cost and magnitude of the project and the engineering and physical features to be encountered, and shall allow such time as shall be reasonable and just under the conditions then existing, having due regard for the public welfare and public interests affected.”

Also described in RCW 90.03.320 and in case law is the requirement that the applicant pursue their project with diligence. In setting a change development schedule, the permit writer should assign a reasonable time period to transition beneficial uses based on conditions at the time the change is approved and assuming the project is pursued with due diligence. Because the change development schedule can authorize multiple beneficial uses for the water right simultaneously (the old authorization and the new authorization), there is an inherent risk of speculation, which is prohibited in the Water Code. Overly-lengthy development schedules that are inconsistent with the project scope are not permissible.

Another factor in setting the length of a development schedule is the statutory authorization for the change. The following sections describe considerations for permanent and temporary changes, consolidations, and family farm act transfers.

Permanent Changes and Transfers (RCW 90.03.380 and 90.44.100)

Permanent changes and transfers will typically result in a change development schedule unless the change has already occurred and conditions for approval are already met, or the scope and intent of the project do not warrant one, or, for change of a surface water right, the applicant requests issuance of a "certificate in duplicate" in accordance with RCW 90.03.380(1). Ecology will work with the applicant to establish a reasonable and non-speculative schedule to implement the change. Change development schedules for permits may require additional review. If the development schedule for a changed or transferred permit exceeds the original permit development schedule, the permit extension criteria of RCW 90.03.320 apply. If the change or

transfer development schedule is no longer than the original development schedule, no further analysis is required.

Temporary Changes and Transfers (RCW 90.03.390)

For temporary changes, Ecology considers the term of the temporary change and the scope of the project. Some seasonal and temporary changes may require no construction at all, and will not need a development schedule. In these cases, the change authorization would simply expire and the original authorization would resume. In longer term temporary changes there may be a change development schedule to allow for and document required construction activities.

Consolidation of Rights for Exempt Wells (RCW 90.44.105)

When establishing a change development schedule for consolidating permit-exempt wells with an existing water right, Ecology considers the scope of the project and the requirements of RCW 90.44.105. These include requirements to decommission exempt wells and for legally enforceable agreements prohibiting future permit-exempt wells on the property.

Family Farm Act Transfers (RCW 90.66.065)

When setting a change development schedule for a transfer of a Family Farm Act water right, Ecology considers the scope of the project and the requirements of RCW 90.66.065. RCW 90.66.065(2)(b) provides that family farm permits may be transferred to any other purpose of use if under a lease agreement. The legislative notes clarify that such leases must be temporary in order to give weight to the intent of the voter initiative to preserve agriculture in family farms.

Ecology considers the term of the lease when setting the change development schedule. Shorter Family Farm Act lease transfers can be done under RCW 90.03.390 with a development schedule consistent with the term of the transfer. At the end of the term, the temporary change authorization cancels and beneficial use reverts to the original authorization. Longer or renewable Family Farm Act lease transfers can be performed under RCW 90.03.380. However, the change authorization should be conditioned to clarify how the Family Farm Act uses will resume if the lease is terminated (e.g. a subsequent change could be filed).

Family Farm Permit changes and transfers other than leases are treated like permanent changes and transfers as described above.

Municipal Changes and Transfers (RCW 90.03.386)

Change development schedules for municipal transfers should observe the requirement under RCW 90.03.386 to coordinate approval procedures with the Department of Health (DOH) to ensure compliance and consistency with water system planning documents. Coordination with DOH could include notifying and working with DOH:

- To consider changes for new or existing municipal systems.
- On construction activities documented in plans necessary for the change to occur.
- For planning projections on the time required to put the water to beneficial use.

- To condition the change authorization to include provisions that will provide documentation for future water system planning purposes.

To establish the term of the change development schedule for requested municipal water right changes and transfers, Ecology will:³

- Make a tentative determination of the extent and validity of the water right (see POL 1120), including a determination of the "perfected" and unused portions of the water right.
- Apply the criteria of RCW 90.03.320 (due diligence) to determine if any unused portion of the water right certificate or permit is in good standing as an inchoate water right. This finding is necessary when the certificate was issued prematurely (see Theodoratus, 1998). In the case of a permit, a review of diligence is also appropriate.
 - In applying the criteria of RCW 90.03.320, Ecology must consider if extensions would have been granted from the day the certificate was issued to the present day, based on the actions of the applicant. Ecology must also consider whether the unused portion of the water right has been perfected with due diligence. If such a finding is made, the unused portion is inchoate and included in the tentative determination. If Ecology determines all or part of the unused quantity does not meet the criteria in RCW 90.03.320, then the unneeded, unused quantity is not valid for change.
 - If an inchoate quantity from a pumps-and-pipes certificate is valid and necessary to complete the project, the development schedule will be documented in a superseding permit. The perfected portion of the right may be included in the permit, or it may be authorized in a certificate. The applicant will be consulted in these cases.
- When inchoate water is considered valid, Ecology will work with the applicant to set a reasonable development schedule that is consistent with the scope of the remaining project. When setting a development schedule, Ecology will work with the applicant to differentiate, where possible, work to complete the change from work required to complete the original project.

5. Implementing a Development Schedule

A development schedule is recorded in a:

- Superseding Permit when making changes to a Water Right Permit.
- Superseding Permit when making changes to a pumps-and-pipes certificate.

³ Similar considerations may also be appropriate for non-municipal domestic transfers.

- Change or Transfer Authorization (issued in the form of a Report of Examination) when making changes to a Water Right Certificate, a Certificate of Change or Water Right Claim.

6. Completing an Authorized Change

When the applicant files a Proof of Appropriation form notifying Ecology that their project is complete, Ecology will conduct an inspection to ensure that all construction is finished and the water has been put to beneficial use. If the project has been completed consistent with the change authorization, Ecology will issue a superseding document.

If the inspection shows that the change was not completed consistent with the change authorization, then further permitting work may be necessary. Options may include:

- Using technical assistance and enforcement to bring the applicant into compliance.
- Issuing a relinquishment order if more than 5 years of nonuse without sufficient cause has occurred.
- Canceling the change authorization, making a tentative determination on the extent and validity of the right, and issuing a superseding document if partial relinquishment has occurred.
- Filing additional changes to conform the actual use to what is authorized (e.g. an annual consumptive quantity determination may be needed in the case of addition of purposes of use or additional acres of irrigation).
- In limited circumstances, withdrawal of the Proof of Appropriation form by the right holder to allow continuation of development and compliance with approval conditions may be necessary. An extension in time of development must be requested by the right holder.

Changes to a Water Right Permit

In the case where a portion of an existing permit was changed, Ecology may:

- Issue a superseding permit, if the change development schedule includes the time necessary to complete both the authorized changes and the original project.
- Split the permit into an "A" and a "B" portion with separate development schedules. Following completion of each portion of the project, a water right certificate would issue.

7. Extensions to Development Schedules for Changes and Transfers

When evaluating requests for time extensions to change development schedules, Ecology relies on the requirements of RCW 90.03.320, including:

- Due diligence of the applicant.

- Good faith of the applicant.
- Public interests affected.
- Nature and scope of the project.
- Beneficial use of the water right.

Ecology has interpreted RCW 90.03.320, in Policy 1050 Extension of Time on Permits.

Change development schedules typically specify a project completion date when water should be put to full beneficial use. They may also include a Beginning of Construction (BC) and Completion of Construction (CC) date, depending on the scope of the project. The holder of a change or transfer authorization may request an extension of time to any of the development phases required in the approval.

The holder is responsible for requesting extensions. Every request for an extension of time for a development phase must be in writing and accompanied by the required fee. Requests for extensions must include:

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

The regional section manager can use discretion to judge whether good faith, due diligence, and good cause has been shown and to determine the public interests affected by an extension.

In considering due diligence, if extensions in the development schedule have been granted previously, Ecology may consider the record of those extensions and the degree of effort made by the responsible party to meet any commitments, whether proposed by themselves or imposed by Ecology.

Numerous extension requests may indicate an intent to speculate or lack of diligence. Ecology staff should use increased scrutiny on extension requests where several have already been granted.

Format of an Extension Approval or Denial

Decisions on extensions of change development schedules are issued in as administrative orders. Orders granting or denying extensions will clearly outline the reasons for the decision. If approved, the order will also contain a new development schedule, and any provisions imposed as a condition of the extension approval. Approval or denial of an extension request must be signed by the regional section manager and contain approved appeal language.

Decisions on extension requests are appealable actions. An appeal can be made by the water right holder or another interested party. For more details on extensions see Policy 1050.

Cancellation of a Change or Transfer Authorization

If the responsible party fails to complete the change or transfer as authorized within the time allotted in a provided for change development schedule, including any extensions granted for good cause, the agency may be required to cancel the change or transfer authorization. There is no single rule for how the agency should effect a cancellation of a change or transfer authorization, and how cancellation occurs will depend on the facts of a given situation and the status of the water right. For example, if a change is to a water right permit, the inquiry will likely be one similar to development of the original permit- whether there has been due diligence in development of the permit. If not, cancellation of all or a portion of the authorization may be appropriate. In those situations where only a portion of the change has not been developed with diligence under a change development schedule, the remedy may be cancellation of that portion of the authorization with certification of the remaining portion of the permit that has been put to beneficial use.

In those situations where a water right certificate is involved, the facts of the particular situation will drive the particular outcome of the cancellation as well. In any given scenario, it is likely necessary for the agency to do a tentative determination of the extent and validity of the water right, which may include evaluating prior uses, as well as uses authorized under the change. If a new use under an approved change is only partly developed and non-use of the right is discovered that is not excused from relinquishment, it may be appropriate for the agency to issue a superseding document for that portion of the right that is being put to beneficial use, while issuing an order of partial relinquishment of the remainder of the right. In other scenarios, for example where no new use has been developed under the authorized change, it may be appropriate to cancel the change authorization, at which point the right would revert back to its originally stated purposes. In this scenario, if non-use of the right is not excused, the original right may have been relinquished.

8. Relationship of Change Development Schedules to Relinquishment and Abandonment

Change development schedules or extensions by themselves do not constitute an exemption from relinquishment or protect a water right authorization from abandonment. Beneficial use requirements remain in effect during a development schedule unless there is a statutory exemption for nonuse. The change development schedule merely provides more options to the water right holder on where or how the beneficial use can occur (the old or new place of use, purposes of use, and so on).

The water right holder must put the full amount of water to beneficial use at least once every five years, regardless of the time allotted to complete the project. If the water use falls below the authorized quantity for five consecutive years during the development of the project, one of the exemptions to relinquishment in RCW 90.14.140 must excuse the nonuse to avoid relinquishment of the portion of the right not put beneficial use. If the water right holder expects to use less than their full right for five consecutive years, they should contact Ecology or private

legal counsel in advance for technical assistance on the applicability of relinquishment exemptions.

Trust Water Rights (RCW 90.14.140(2)(H))⁴

Trust water rights under Chapters 90.38 and 90.42 RCW are exempt from relinquishment. Ecology can accept water rights into trust by purchase, lease, gift or other appropriate means (other than condemnation) on a temporary or permanent basis. For longer change development schedules where ongoing beneficial use is not possible, the trust water program can both benefit the environment (enhance stream flow) and protect against relinquishment, under conditions agreed to between Ecology and the water right holder.

Municipal Water Supply Purpose (RCW 90.14.140(2)(D))

Water rights claimed for municipal water supply purposes are exempt from relinquishment.

A conversion of use to municipal water supply authorized by a change development schedule can be covered under this relinquishment exemption, so long as the water right is held by a municipal water supplier, has been changed to municipal supply purposes, - is used for municipal purposes, and the project is pursued with diligence.

Determined Future Development (RCW 90.14.140(2)(C))

Water rights that are claimed for a determined future development intended to take place either within fifteen years of July 1, 1967, or the most recent beneficial use of the water right (whichever date is later), are exempt from relinquishment. The DFD relinquishment exemption has been interpreted in case law⁵ and is highly fact-specific. If Ecology determines that the project should take less than five years to complete when pursued with reasonable diligence, then the DFD exemption may not apply.

There are many types of projects with sufficient scope to qualify as a DFD that would justify lengthy change development schedules. For example, developing water for municipal water supply purposes, commercial and industrial projects, resorts, power projects, large irrigation projects, and others may qualify as a DFD.

If the scope of the project will take more than five years to complete, the change development schedule does not automatically qualify as a determined future development. The project must also qualify for a number of criteria outlined in case law, such as:

- The plan must be put forth by a party with vested interest in the water right.⁶

⁴ See chapters 90.38 and 90.42 RCW for specific requirements for trust water.

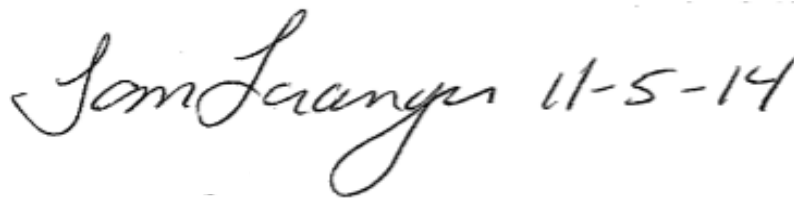
⁵ See *R.D. Merrill Co. v. Pollution Bd* (137 Wn.2d 118, 969 P.2d 459, 1999); *City of Union Gap and ARBP v. Ecology* (Court of Appeals, #26555-2-III, 2009); *Protect Our Water v. Islanders for Responsible Water Mgmt.* (PCHB No. 03-102, 2004); *Pacific Land Partners, LLC v. Ecology* (PCHB No. 02-037, 2005); *Wirkkala, et al. v. Ecology* (PCHB Nos. 94-171,94-172,94-173 & 94-174, 1994);

⁶ *City of Union Gap and ARBP v. Ecology*, Court of Appeals, #26555-2-III (2009).

- The water right holder must have a firm and definitive plan.
- The plan must be fixed prior to the end of the five-year period of nonuse.
- Some affirmative steps towards realization of the fixed and definitive plan must be evident within 15 years of the last beneficial use.

While processing a change application, Ecology determines if the DFD exemption applies and factors this into the tentative determination of the extent and validity of the water right. In this instance, the change development schedule sets out the period needed to transition to the new use, including tracking of the project's progress. For example, a submittal by the applicant (e.g. Completion of Construction) should be required within 15 years of nonuse to ensure that the "affirmative steps" criteria in R.D. Merrill have been met.

The DFD exemption no longer applies if the water right holder ceases to develop the right under the fixed and determined plan or if the plan changes substantially. In such cases, Ecology makes a tentative determination on the present validity and extent of the water right.

A handwritten signature in cursive that reads "Tom Loranger" followed by the date "11-5-14".

Tom Loranger
Program Manager
Water Resources Program

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.

To request ADA accommodation, call Ecology at 360-407-6831 or visit <https://ecology.wa.gov/accessibility>. People with impaired hearing may call Washington Relay Service at 711. People with speech disability may call TTY at 800-833-6384.