

WATER RIGHTS

Resource Contact: Coordination & Hydrology Section

Effective Date: 10-23-90

Revised: 10-23-90

References: Chapter 90.03 RCW  
Chapter 90.44 RCW  
Chapter 508-12 WAC

Purpose: To ensure statewide consistency, conformity with state law, and equality of service to the public in the administration of water rights.

Application: This policy applies to all applications to appropriate water and applications for change of water right received pursuant to Chapter 90.03 and 90.44 RCW.

1. Administration of applications will be consistent statewide

To ensure conformity with state law, equality of service to the public, and consistency between regions all applications to appropriate water and applications for change of water right will be processed in accordance with the procedure on water rights processing (PRO-1000).

2. Processing applications is region specific

Procedural differences exist among the regions in the processing of applications to appropriate water and applications for change of water right. These differences exist because of historical work patterns and expertise of the personnel. Procedural differences are hereby authorized, as long as regional procedures are in agreement with and further the purposes of this policy.

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Hedia Adelsman  
Program Manager  
Water Resources Program

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**POL-1005 WATER RESOURCES PROGRAM POLICY**

**INTERNET POSTING OF REPORTS OF EXAMINATION**

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- Contact: Policy and Planning Section Effective Date: 1-1-07
- References: RCW 90.03.290 and RCW 90.54.020(10)
- Purpose: To encourage the use of the Department of Ecology (Ecology) internet site for posting draft reports of examination to obtain public comments prior to issuing the final decision.
- Application: This policy clarifies when draft and final reports of examination are posted on Ecology's internet site.

**Background:**

Public notice of applications is a key procedural element of the permit application process intended to protect the rights of existing water right holders, and ensure that interests of other citizens are considered during evaluation of applications. Comments about an application by third parties received during the statutory notice period are often helpful to identify areas of contention or concern and guide an investigation. The legal notice requirement is provided in RCW 90.03.280.

One of the Water Resources Program's (WRP) goals is to improve both the quality and consistency of decisions made in response to applications for new permits and changes to existing water rights. In recent years, the WRP has made efforts to improve its training program for staff assigned to review applications and recommend approval or denial of applications for permits and changes or transfers. Part of the effort includes improving the tools the staff and decision makers rely on. Another part is development of clear guidance and policy to facilitate more consistent decisions.

Improved quality and consistency can be achieved by intensifying the program's efforts to ensure that reports of examination are factually correct. Investigation procedures are an important consideration. So is external review and comment on proposed decisions. Affordable technology is available to improve notice to, and communication with, parties potentially interested in water right application decisions.

Reports of Examination of the past decade are typically much more complex than those issued 20 or more years ago. In the past 5 years, an overwhelming fraction of decisions made by the WRP related to applications seeking changes to existing rights and permits,

## INTERNET POSTING OF REPORTS OF EXAMINATION

rather than to applications for new water right permits. The Legislature requires Ecology to consider other laws like the Growth Management Act and the Watershed Management Act when it acts on water right applications. In some cases, Ecology's decision must be consistent with plans that implement the other statutes. This trend toward consistency across local planning and agency decisions is likely to continue as efforts to obtain maximum benefits associated with the use of water for out-of-stream purposes is balanced with protection of instream aquatic resources.

Mitigation and/or management plans are a relatively common way to respond to water users' attempts to adapt their uses of water to avoid interference with existing water rights and minimum instream flows adopted by rule. Permit conditions to implement these plans often include mandatory monitoring and evaluation protocols. The WRP desires a structured process to obtain and consider comments from affected parties regarding mandatory conditions or limitations before a final decision is made.

### **Policy:**

Draft reports of examination relating to applications for permits to appropriate surface water or ground water, for reservoir permits, or for changes of surface water or ground water rights will be posted to Ecology's internet site. Applications for seasonal changes to water rights and temporary and preliminary permits will generally not be posted for comment prior to a final decision. Final reports of examination will be normally posted on the Program's internet pages within 10 working days of signature by the section manager.

### **Procedures:**

(1) Ecology will post on its internet site a copy of its draft report of examination relating to any application for a permit to appropriate surface water or ground water, for a reservoir permit, or for any change of surface water or ground water right. The draft report is not a final decision and may not be appealed.

(2) Comments may be submitted in writing or by e-mail to Ecology but they must be received by Ecology within 30 days of the internet posting in order to be considered by Ecology.

(3) Ecology will not issue a final decision on the application until after the 30 day comment period has elapsed. Ecology will consider comments it receives and may incorporate them into the final report, but is not obligated to do so. Ecology will not provide a separate written response to comments received on the draft report of examination. If the section manager determines that changes to a draft report of examination in response to comments received are of sufficient scope or significance to warrant it, he or she may choose to re-post the revised draft for comment.

POL-1005

INTERNET POSTING OF REPORTS OF EXAMINATION

(4) Ecology will generally within 10 working days of its final decision post a copy of the final decision on its internet site for at least 60 days. Notwithstanding the posting of final decisions on the internet site, appeals of final decisions to the Pollution Control Hearings Board must be filed in accordance with the provisions of RCW 43.21B.



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Ken Slattery

**Program Manager**

**Water Resources Program**

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## POLICY FOR PROVIDING ASSISTANCE TO APPLICANTS FOR WATER RIGHTS TO OBTAIN AND DEVELOP WATER SUPPLIES

Resource Contact: Policy and Planning Section

Effective Date: 08/28/98

Revised: NEW

References: Chapter 443, Laws of 1997 (SSB 5505), assistance for applicants for water rights to obtain and develop water supplies. Amended RCW 43.21A.064.

Purpose: To assist persons seeking new water rights, for purposes consistent with the land use permitted for the area in which the water is to be used and the population forecast for the area under RCW 43.62.035, to obtain and develop water supplies.

Application: All persons seeking to obtain new water rights for purposes that are consistent with land uses permitted for the area in which the water is to be used and the population forecast for the area under RCW 43.62.035.

1. Ecology to assist water right applicants to obtain and develop water supplies

Upon the request of an applicant for a water right, Ecology will provide assistance in obtaining or developing an adequate and appropriate supply of water if the proposed use of water is consistent with:

- a. the land use permitted for the area in which the water is to be used;
- b. the population forecast for the area under RCW 43.62.035; and
- c. if the applicant is a public water supply system, any applicable land use, watershed and water system plans.

2. Ecology to search its records

Upon receipt of a request for assistance, Ecology will inform the applicant of its intent to conduct a search of its records for existing water rights by the township, range, and section of the client's proposed point of diversion or withdrawal. The applicant may request in writing an expanded scope of search.

3. Ecology to provide listing of its records

Ecology will provide the applicant with a listing of all water rights in the client's specified search area resulting from the search of its records.

4. Ecology to provide documents

If requested by the applicant, Ecology will provide copies of any documents describing water rights (certificates, claims and accompanying maps) identified by the search of its records, along with instructions for understanding that information.

5. Ecology to contact Department of Health

Ecology will also contact the appropriate Department of Health Drinking Water Operations Regional Office about any public water systems in the vicinity of the request that might be capable of providing water to meet the needs of the applicant.

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Keith E. Phillips  
Program Manager  
Water Resources Program

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Resource Contact: Policy/Technical Support  
Section

Effective Date: 12/19/94  
Revised: NEW

References: Chapter 90.03 RCW, Chapter 90.44 RCW

Purpose: To provide a simple, consistent response to water right related issues when considering the use of saltwater. For the purposes of this policy, seawater has the same meaning as saltwater.

Application: This policy applies to all water resource staff when responding to inquiries or inspecting diversions or withdrawals of saltwater from a marine water body.

#### POLICY FOR THE DIVERSION OR WITHDRAWAL OF SALTWATER

1. At this time, a water right permit under Chapter 90.03 or Chapter 90.44 RCW will not be required for the diversion/withdrawal of saltwater from a marine water body.

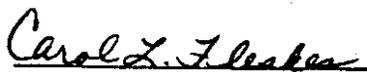
State jurisdiction exists for the appropriation of saltwater from a marine water body. However, the withdrawal and use of saltwater is relatively new and limited in the state of Washington. Because of this, no allocation plan has been developed for the use of saltwater. Ecology will not require a permit for this type of diversion or withdrawal at this time.

2. Water users must be advised to take extreme care to protect against the induction of saltwater into fresh water aquifers.

If a below ground withdrawal facility is planned, it must be constructed seaward of the mean low low water elevation, and be shallow in depth. The information concerning water elevation can be obtained from the Washington State Tidal Datum Plane Book. Water users should be advised to consult with Ecology's Water Division prior to beginning construction of the project.

3. State jurisdiction exists for enforcement against contamination of an aquifer due to saltwater intrusion.

When the use of saltwater is determined to be detrimental to the public interest, Ecology may enforce to protect public health, interest, and the safety of the environment.



Carol L. Fleskes  
Water Resources Program Manager

**POL 1017**

**WATER RESOURCES PROGRAM POLICY REGARDING  
COLLECTION OF RAINWATER FOR BENEFICIAL USE**

Resource Contact: Policy and Planning Section                      Effective Date: October 09, 2009

References: RCW 90.03; RCW 90.54

Purpose: To 1) clarify that a water right is not required for on-site storage and use of rooftop or guzzler collected rainwater, and (2) identify the Department of Ecology's intent to regulate the storage and use of rooftop or guzzler collected rainwater if and when the cumulative impact of such rainwater harvesting is likely to negatively affect instream values or existing water rights.

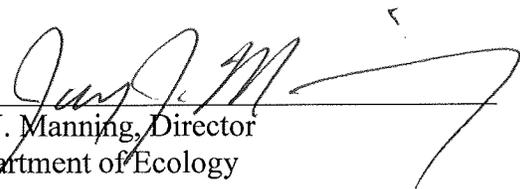
Application: This Interpretive Statement applies to the water right permit requirement in RCW 90.03 and the authority to regulate rainwater harvesting systems.

*This policy supersedes any previous Policy/Interpretive Statement, Focus Sheet or other stated Ecology viewpoint with which it may conflict.*

After carefully considering existing legal authorities, Ecology has determined that existing law may be reasonably interpreted not to require a permit for the on-site storage and use of rooftop or guzzler collected rainwater. This Interpretive Statement clarifies Ecology's current interpretation.

**The Department's Rooftop/Guzzler Collected Rainwater Policy**

**The on-site storage and/or beneficial use of rooftop or guzzler collected rainwater is not subject to the permit process of RCW 90.03.** If and when the department determines that rooftop or guzzler rainwater harvesting systems are likely to negatively affect instream values or existing water rights, local restrictions may be set in place to govern subsequent new systems. To qualify as rooftop collected rainwater, the roof collecting the rainwater must be part of a fixed structure above the ground with a primary purpose other than the collection of rainwater for beneficial use. A guzzler is a device used to catch and store rainwater to provide drinking water for wildlife, livestock or birds.

  
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Jay J. Manning, Director  
Department of Ecology

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Resource Contact: Coordination & Hydrology Section

Effective Date: 10-31-91

Revised: 10-31-91

## CONSUMPTIVE AND NONCONSUMPTIVE WATER USE

References: Chapter 173-500 WAC

Purpose: To expand upon the definition of consumptive and nonconsumptive water use as defined in WAC 173-500-050.

Application: These classifications of water use apply to water right appropriations and adjudicated certificates issued pursuant to chapters 90.03 and 90.44 RCW.

The consumptive and nonconsumptive classifications of water are important when assessing the quantity of water allocated. Water used consumptively diminishes the source and is not available for other uses; whereas nonconsumptive water use does not diminish the source or impair future water use.

### 1. Consumptive Use of Surface and Ground Water

Consumptive water use causes diminishment of the source at the point of appropriation.

Definition: Diminishment is defined as to make smaller or less in quantity, quality, rate of flow, or availability.

By-pass reach defined. A water use may be consumptive to a specific reach of a stream when water is diverted, used, and returned to the same source at a point downstream not in close proximity to the point of diversion. The stream reaches between the point of withdrawal and point of discharge is the by-pass reach.

### 2. Nonconsumptive Water Use, Surface Water

Surface water use is nonconsumptive when there is no diversion from the water source or diminishment of the source. Additionally, when water is diverted and returned immediately to the source at the point of diversion following its use in the same quantity as diverted and meets water quality standards for the source, the water use is classified as nonconsumptive. Examples of this classification include the following:

- a. Water use in hydroelectric projects when the water is not diverted away from the natural confines of the river or stream channel. These hydroelectric projects are commonly called run-of-the-river projects.
- b. Water use in some beautification ponds and fish hatcheries when the outflow is returned to the point of diversion, i.e., there is no bypass reach in the system. The

continuous use of water by such a facility does not result in diminishment of the source; inflow is equal to outflow.

These facilities normally require water to fill or charge the system once a year. The water used to fill or hydraulically charge such a system is consumptive and does cause a diminishment of the source. Water use to fill these facilities will be allowed, subject to instream flows and existing rights, when water is available.

Exception to 2.B. Water use can be classified as nonconsumptive when the water is returned to the same pool from which it is diverted and the pool's water elevation is not changed by the initial start-up and stopping of the diversion.

Definitions:

A pool in a river system is a body of water which has the same water surface elevation, within 0.05 of one foot, at any point between the point of diversion and the point of discharge.

A pool in a lake system is the body of water with no flow restriction between the diversion point and the point of discharge and the velocity of the water at both points is the same or within ten (10) percent of each other. If the diversion point and the discharge point are separated by a restrictive, natural or artificial, channel the water bodies are considered separate and distinct.

Some of the above described projects may cause an increase in bank storage, evaporation rate, or preclude others uses of the water body in the vicinity of the project. The Department recognizes the consumptive nature of these factors. However, due to the complexity of quantifying these factors, it is the Department's policy to classify the project's water use as nonconsumptive.

3. Nonconsumptive Water Use, Ground Water

Ground water use is nonconsumptive when there is no diminishment of the source. In order not to diminish the source, the withdrawn water is injected or infiltrated immediately back to the aquifer. The water must be returned in the same quantity and quality (excluding temperature change) at a point in close proximity to the withdrawal wells. An example of this use is a heat pump.

Before issuing a permit which proposes to use injection wells, ensure that the applicant can obtain an injection well permit if required by the Water Quality Program. See Chapter 173-218 WAC.

4. CONCURRENT USE OF GROUND AND SURFACE WATER

Combined use of ground and surface water use may be classified nonconsumptive if the quantity of water captured is returned in close proximity to the source immediately after use.

Direct hydraulic continuity between the source and point of discharge must be unequivocal.

When a project proposed nonconsumptive combined use of surface and ground water, the draft report of exam shall be sent to the section supervisor of the Hydrology and Coordination Section for review and comment.

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Hedia Adelsman  
Program Manager  
Water Resources Program

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Resource Contact: Policy and Planning Section

Effective Date: 1-21-04

## PRIORITY PROCESSING—WATER BUDGET NEUTRAL PROJECTS

References: Chapter 173-152 WAC, Chapter 173-500 WAC

Purpose: To clarify the definition of nonconsumptive water use in the context of priority processing of competing applications under WAC 173-152-050.

Application: Ecology adopted Chapter 173-152 WAC in order to identify criteria for priority processing of competing applications. WAC 173-152-050(2) provides that an “application may be processed prior to competing applications if the department determines:

- (a) Immediate action is necessary for preservation of public health or safety; or
- (b) The proposed water use is nonconsumptive and if approved would substantially enhance or protect the quality of the natural environment.”

This policy clarifies when projects may be considered nonconsumptive in the context of priority processing ahead of competing applications, consistent with the “no diminishment” nonconsumptive use definition in WAC 173-500-050.

Definitions: The following definitions are intended within this policy:

1. “Nonconsumptive Use” is a type of water use where either there is no diversion from a source body, or where there is no diminishment of the source.
2. “Water Budget Neutral Project” means a project where diversions or withdrawals of waters of the State are proposed in exchange for discharge of at least an equivalent amount of water from other water rights, donation of water rights into trust, relinquishment of other water rights, or other mitigation projects that result in no diminishment of the source.

Nonconsumptive Water Use, Priority Processing under Chapter 173-152 WAC. The following examples are intended to clarify the Department’s policy in classifying a project as nonconsumptive pursuant to WAC 173-152-050(2)(b):

1. A project entailing the issuance of a nonconsumptive water right permit (i.e., where there is no diversion or diminishment of the source).
2. A project where the direct use of waters of the State is proposed in exchange for discharge of at least an equivalent amount of reclaimed water under a Chapter 90.46 RCW permit.

NEW: 1-21-04

3. A water budget neutral project (e.g., a project which includes a consumptive water use component that is offset by some other commensurate reduction in water use so that the project, as a whole, causes no diminishment of the source).



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Joe Stohr  
Program Manager  
Water Resources Program

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NEW: 1-21-04

Resource Contact: Policy and Technical Support Section

Effective Date: 10/7/94

Revised: 12/2/94

References: Chapter 90.03 and 90.22 RCW

## POLICY FOR CONVEYING STOCKWATER AWAY FROM STREAMS TO PROTECT WATER QUALITY

**Purpose:** To provide a simple, consistent response to water right related issues when conveying stockwater away from streams to protect water quality and stream habitat.

**Application:** This policy is to provide guidance to all water resources staff when responding to inquiries or inspecting surface water diversions intended to remove livestock from streams for the purpose of protecting water quality and stream habitat. This policy does not apply to stockwatering relating to feedlots and other activities that are not related to stock grazing land at more than the lands carrying capacity.

1. Ecology shall encourage conveyance of stockwater away from streams for the purpose of protecting water quality.

The Department of Ecology recognizes that removing livestock from streams will protect water quality and improve vegetative zones associated with stream banks. The change of water right process (90.03.380 RCW) will not be required when small amounts of water consistent with historic practice are diverted (screened and piped) to nearby stockwater tanks for consumption by livestock. If a float or demand type valve is not used, the tank overflow must return to the same source, at or near the point of diversion. The stock tank must serve no greater number of stock than historically range that parcel of property. The quantity consumed from the stock tank should not exceed the quantity consumed if the stock drank directly from the stream.

2. Systems designed to convey stockwater to a stock tank must have a minimum impact to the bypassed reach of the stream.

Stockwater tanks shall be located close to the surface water source, and have as short a bypass reach as possible, not more than is necessary to provide gravity flow. The purpose in modifying an existing direct access to the stream by stock must be to afford protection to the water body, stream bank, and associated vegetative zone.

The decision to divert stockwater from the stream and into a tank does not constitute an adjudication of any claim to the right to the use of the water as between the claimant and the state, or as between one or more water use claimants and another or others.

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Carol L. Fleskes  
Water Resources Program Manager

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POL-1030 WATER RESOURCES PROGRAM POLICY

Resource Contact: Policy Planning Section

Effective Date: 10-31-91

Revised: 09-13-01

References: RCW 90.03.290 and RCW 90.44.060

PRELIMINARY PERMITS

**Purpose:** To provide guidance to Program personnel in the use of preliminary permits. Preliminary permits require applicants to conduct studies, surveys, and investigations necessary to provide the information Ecology needs to properly assess the subject application.

**Application:** This policy applies to all preliminary water right permits issued pursuant to Chapters 90.03 and 90.44 RCW.

1. Preliminary permits

Preliminary permits are issued to retain a priority date and establish a formal timeline and data collection plan when additional information is needed to make a permit decision. The preliminary permit requires the applicant to make surveys, investigations, or conduct studies to satisfy the information needs of the department.

Program personnel issuing a preliminary permit must fully inform the applicant that issuance of a preliminary permit carries a risk for the applicant. The applicant's risk is that failure to comply with the permit requirements will result in cancellation of the permit and rejection of the application. Once issued, the substance of the preliminary permit will significantly direct and prescribe future consideration of the application.

Preliminary permits also may authorize drilling and testing of ground water wells. Preliminary permits issued for such purposes should clearly state that water use for purposes other than those authorized by RCW 90.44.050 is prohibited.

A preliminary permit does not authorize the beneficial use of water.

2. Use of preliminary permits

When the department does not have adequate information to address water availability, detriment to public welfare, beneficial use, impairment of existing rights, or other relevant questions at the time the application or application for change of water right is filed, and the necessary information might be obtained by surveys or investigations conducted by the applicant, a preliminary permit may be appropriate.

The decision to issue a preliminary permit is discretionary; there is no requirement that a preliminary permit be issued. If a preliminary permit is issued, Ecology personnel should ensure, as much as possible, that the work proposed to be done under the preliminary permit can be done in the time allowed and will not be out of date when a permit decision is made. Do not issue a preliminary permit if it is clear the information needs or studies to be done cannot be done in the three-year period allowed by statute. The preliminary permit should be as detailed and specific as possible. Generally, the permittee will not collect any information not identified or specifically required by the preliminary permit. However, the permittee is not precluded from collecting data not required by the preliminary permit.

In a very few cases, data collection and analysis under a preliminary permit will create additional questions or information needs not identified in the preliminary permit. In such cases, Ecology may issue a second, separate and distinct, preliminary permit. However, issuance of an additional preliminary permit does not extend the three-year time period authorized by statute for completion of work required under a preliminary permit for a specific application. If Ecology issues a preliminary permit which, for whatever reason, does not accurately ask for the necessary information, the department shall issue a new preliminary permit requesting the correct information.

3. Application process

A complete water right application or application to change a water right form, either new or pending, and the application fee, must be filed to begin the process.

When public notice of the proposed appropriation is to be published is at the discretion of the regional section supervisor. If a preliminary permit is issued for drilling and testing, public notice may be advertised upon successful demonstration of the well capacity.

If an appropriation is proposed to be developed upon completion of the preliminary permit requirements, public notice should take place immediately.

When a preliminary permit is going to be used, the regional staff person should make a written recommendation to the regional section manager stating why a preliminary permit is justified. The recommendation is for record-keeping only.

4. Format of a preliminary permit

A preliminary permit is issued in letter format and signed by the regional manager. At a minimum the letter shall:

- a. Identify the applicant, application number, scope of the project and its attributes (i.e. source of water, point of diversion or withdrawal, etc.);
- b. State the specific conditions of the data collection plan;
- c. Require a showing of work done under the preliminary permit and progress reports if warranted;
- d. Contain an expiration date (not to exceed three years);
- e. State that no beneficial water use is authorized;
- f. Require wells to be constructed in accordance with chapter 173-160 WAC, and require capping of ground water wells, if applicable; and
- g. Contain a statement that if the applicant fails to comply with the terms of the preliminary permit, the preliminary permit and the application or applications on which it is based shall be canceled pursuant to RCW 90.03.290.

Issuance of a preliminary permit is an appealable action. As an appealable action, preliminary permit letters shall contain the standard paragraph regarding appeals.

5. Time duration

Preliminary permits authorize investigations and surveys for a time period of not more than three years. The time period authorized shall be reasonable for the work required. All preliminary permits issued will contain a specific expiration date.

The permittee may request, prior to the preliminary permit expiration date, additional time to comply with the preliminary permit. Additional time beyond the initial three years may be granted with the approval of the Governor or designee and only upon a showing of work done under the preliminary permit. The showing of work must also establish the good faith, intent, and ability of the permittee to conduct the studies and provide the information. In no case shall a preliminary permit, with an extension, exceed five years in duration.

The preliminary permit terminates automatically at the end of the stated investigation period or, if an extension is granted in writing by the department, at the end of the extension period.

6. Termination of preliminary permit

The department must review, in a timely manner, any information generated under the preliminary permit, and make a decision whether or not the terms of the preliminary permit have been complied with. The department's decision also must be communicated in writing to the permittee in a timely manner.

When a permittee complies with the terms of the preliminary permit, the department will make a decision on the underlying application.

If the permittee fails to comply with the terms of the preliminary permit, the preliminary permit and the application or applications on which it is based shall be canceled pursuant to RCW 90.03.290.

7. Combined use of a preliminary permit and a permit for temporary use

If water use is necessary to obtain information required by a preliminary permit, the applicant must request a temporary permit, pursuant to RCW 90.03.260 (See POL-1035). A permit for temporary water use shall be issued in conjunction with the preliminary permit to authorize the beneficial water use.

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Joe Stohr, Manager  
Water Resources Program

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## TEMPORARY AND EMERGENCY DROUGHT PERMITS

Resource Contact: Coordination and Hydrology Section

Effective Date: 10-31-91

Revised: 09-10-92

References: RCW 90.03.250, RCW 90.44.060, RCW 43.83B.405, Chapter 173-166 WAC

Purpose: To provide guidance to Program personnel in the use of temporary and emergency drought permits to appropriate water.

Application: This procedure applies to all temporary permits issued pursuant to Chapters 90.03 and 90.44 RCW, and emergency drought permits issued pursuant to chapter 173-166 WAC.

1. Use of temporary permits

Temporary permits authorize water use during the pendency of an application review when requested.

The four tests for issuance of a permit (water availability, public interest, impairment of existing rights, and beneficial use of the water) must be considered prior to granting a temporary permit. Requirements of the State Environmental Policy Act (SEPA) must be satisfied.

Temporary permits are not to be used to circumvent the backlog. The issuance of a temporary permit during the pendency of application review is to make a decision on the application out of priority sequence. A temporary permit should only be issued when you are confident that a permit will be approved in a reasonable time, but circumstances do not allow the complete deliberative process to issue a final decision.

Temporary permits should not be used solely to legitimize an illegal water user, pending a decision on their application.

Temporary permits are not to be used to authorize drilling of ground water wells for testing aquifer characteristics, use a Preliminary Permit (POL-1030).

2. Application process

A complete water right application form and examination fee is required in addition to a request for a temporary permit. All applicants who request a temporary permit must justify in writing why a temporary permit should be granted. The application is processed through public notice in accordance with POL-1000.

Requests for temporary permits are evaluated with respect to the following criteria:

- Imminent threat to public health and safety,
- Economic emergency caused by unforeseen natural events, and
- High degree of public interest.

Regional staff shall make a written recommendation to the regional section supervisor concerning all applications for temporary permit.

3. Format of a temporary permit

Temporary permit may be issued in letter format, signed by the regional section supervisor. At a minimum the permit shall state:

- Applicant's name, application number, source, quantity of water for use, and place of use,
- The specific conditions and an expiration date,
- A statement that if the applicant fails to comply with the terms of the temporary permit it may be revoked, and
- A statement that the issuance of a temporary permit in no way guarantees a standard permit will be issued.

Issuance and revocation of a temporary permit is an appealable action. As an appealable action, temporary permit letters shall contain the following paragraph:

Any person wishing to appeal this action may obtain review by submitting a written request, within thirty (30) days of receipt of this order, to the Washington Pollution Control Hearings Board, 4224 6th Avenue SE, Building 2, Rowe Six, P.O. Box 40903, Lacey; Washington 98504-0903. Concurrently send to the Director of the Department of Ecology, Mail Stop 7600, P.O. Box 47600, Olympia, Washington 98504-7600, a copy of the request for review. These procedures are consistent with the provisions of Chapter 43.21B RCW and the rules and regulations adopted thereunder.

4. Time duration

The time duration for temporary permits will be during the pendency of the application review.

Temporary permits may be revoked for failure to comply with the terms of the permit.

5. Status of a temporary permit

Temporary permits issued during the pendency of an application review are generally superseded by a standard permit and are part of the permanent record.

If upon complete analysis, a permit will not issue, the temporary permit is canceled, the standard permit denied, and the application rejected.

6. Drought relief and emergency drought permits

Whenever a drought is declared pursuant to RCW 43.83B.405, the issuance of emergency permits shall be in agreement with RCW 43.83B.410, in addition to this policy. See Chapter 173-166 WAC.

For emergency permits issued pursuant to Chapter 173-166 WAC the process is generally the same as temporary permits, with the following:

- The application is for a previously established activity conducted under a valid permit or certificate, within a geographic area declared to be in drought;
- The applicant is projected to receive less than seventy-five percent of normal water supply as a result of drought conditions and is expected to experience undue hardships as a result;
- Water obtained through the issuance of an emergency permit must be put to beneficial use in lieu of water which is unavailable because of drought conditions;
- Decision will be provided to the applicant within fifteen days of receipt of the application; and
- Compliance with public notice and SEPA requirements is waived.

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Hedia Adelsman  
Program Manager  
Water Resources Program

**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.

## PERMITS FOR SHORT-TERM WATER USE

Resource Contact: Coordination and Hydrology Section

Effective Date: 09-10-92

Revised: New

Purpose: To provide guidance to Program personnel in the use of permits to authorize short-term water use.

Application: This procedure applies to all permits issued pursuant to chapters 90.03 and 90.44 RCW that authorize the short-term use of water.

1. Permits for short-term water use

Permits for short-term water use authorize water use in emergency situations or for short-term, nonrecurring projects of no more than four months duration. Regional section supervisors shall use their discretion in evaluating emergency situations. Examples of short-term water uses are hydrostatic testing of pipelines, water use associated with construction activities, and dust control.

Entities wishing to use water with no intent to appropriate the water on a long-term basis are issued this type of authorization.

2. Application process

A complete water right application form and examination fee is required.

Advertising the application for public notice is at the discretion of the regional section supervisor. Generally, advertising the application is advised.

Verbal requests and/or authorizations for permit for emergency use are permissible, but they must be followed up in writing. Only persons with signature authority to sign permits can give verbal authorizations.

The four tests for issuance of a permit (water availability, public interest, impairment of existing rights, and beneficial use of the water) must be considered prior to granting a permit.

Staff shall make a written recommendation to the regional section supervisor concerning all applications for permits for short-term water use. This recommendation is not necessarily a report of examination, but should justify why a permit should issue.

3. Format of a permit for short-term use

A permit for short-term water use may be issued in letter format, signed by the regional section supervisor. The letter shall state the specific conditions of the permit including:

- Applicants name, application number,
- The source, place of use, quantity of water, and time of use,
- An expiration date,
- A statement that if the applicant fails to comply with the terms of the permit, the application upon which it is based may be rejected and the permit revoked, and
- No long-term appropriation as contemplated by chapter 90.03 RCW is taking place.

No permit fee is required.

4. Time duration

The time duration for short-term permits will vary for each proposal; generally short-term is less than four months. The time duration for short-term may be modified based on the specific circumstances of a project.

All permits issued for short-term water use will contain an expiration date. Permits for short-term water use will be revoked for failure to comply with the terms of the permit.

5. Special considerations

No permits for short-term water use are to be issued when the source of water is closed.

No impairment of instream flows established by rule or administratively under RCW 75.20.050 are to be authorized.

For short-term use of ground water, the short-term permit should contain an admonishment pertaining to water use in excess of 5000 gallons per day after the expiration of the short-term permit.

6. Status of applications submitted for a short-term permit

During the active stage of permits for short-term water use, the application and permit should be filed by Section, Township, Range within each Water Resource Inventory Area for the source of water.

Applications for permits for short-term water use are rejected upon expiration of the short-term permit which issues. A permanent record (within WRATS) of permits for short-term water use is now developed; however, a record of the action may be maintained in regional office.

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Hedia Adelsman  
Program Manager  
Water Resources Program

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USE OF TERMS THAT CLARIFY RELATIONSHIPS BETWEEN WATER RIGHTS

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Contact: Policy and Planning Section Effective Date: 3-9-06

References: Chapter 90.03 RCW; Chapter 90.44 RCW

Purpose: To provide guidance to staff in the administration of water rights that share purposes of use, points of diversion or withdrawal, and/or places of use. Clarification is provided on the use of the terms *primary, supplemental, alternate, standby/reserve, additive, non-additive* and *source*.

Application: This policy applies to three (3) areas of water rights administration:

1. Interpreting existing water right records: to provide direction when staff are making tentative determinations (see POL 1120; RCW 90.03.380, -390, -397; and RCW 90.44.100), reviewing water system planning documents, and quantifying or administering water rights.
2. Updating existing water right records: to assist permit writers in modifying or translating an existing right to reflect the terminology described in this policy. This “translation” is a change in vocabulary only -- the original intent is not altered -- and may take the form of a superseding water right document or other administrative action.
3. Issuing new water rights (under RCW 90.03.290 and 90.44.060): to clarify the terms and conditions of use.

Document Organization:

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- o Location of terms in water right record
- o Interpreting and updating existing water rights
- o “Supplemental”
- o The effect of relinquishing, abandoning or revoking a right which shares a purpose or place with another

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- o Standby/Reserve and Alternate Water Rights

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## **Background**

Throughout the state's history of issuing water rights, water right holders have sought to increase the amount of water they divert, or their source flexibility, by acquiring new water rights. Water resources staff has issued water rights using various terms to describe the use of water rights that share purposes of use, points of diversion or withdrawal, and/or places of use. These terms, especially *supplemental* and *primary*, have been used inconsistently.

A brief look back at the use of the term *supplemental* shows the kind of confusion created by inconsistent usage. In early water rights (pre-1945), *supplemental* was used in reference to stored water used to *supplement* surface water sources. Ecology began using the term more frequently following the enactment of the ground water code (Chapter 90.44 RCW) in 1945. At that time, many ground water declarations described a user's historic dependence on both surface and ground water sources to meet a particular purpose of use. This second source was described as *supplemental* to the first. In later years, Ecology began using the term *supplemental* to describe the increased cumulative quantities of water issued to municipal water suppliers and agricultural users.

(The term *supplemental* should no longer be used, because of its historic ambiguity. Refer to the "Supplemental" section below for guidance on interpreting its usage.)

The multitude of terms and their inconsistent use has led to confusion when quantifying, issuing and administering water rights. This policy provides definitions and directions for use of these long-standing terms. Consistent use of these terms by Ecology staff and water right holders will provide a foundation for better administration of water rights.

## **Definitions: relationship terms**

The following terms will be used to describe the relationship between water rights, both new and existing, that share purposes of use, points of diversion or withdrawal, and/or places of use. These terms are to be applied to both the original as well as all related subsequent rights. The terms are used in the text of ROEs and on the cover page of ROEs, permits and certificates to clarify quantity relationships among water rights.

Note: The following abbreviations and acronym are used throughout the document:

Qa: annual quantity of water, expressed in acre-feet (ac-ft)

Qi: instantaneous quantity of water, expressed in gallons per minute (gpm) or cubic feet per second (cfs)

ROE: Report of Examination

gpcd: gallon per capita per day

USE OF TERMS THAT CLARIFY RELATIONSHIPS BETWEEN WATER RIGHTS

**Additive**: A water right for either annual or instantaneous quantities of water that are added to an existing water right.

*For example*: a well (Water Right G2-11111) is reconstructed and a larger pump installed to allow a water system to meet fireflow needs and accommodate additional homes. A second water right (G2-22222) is issued for additional  $Q_a$  and  $Q_i$  from the well, which is **additive** to G2-11111.

**Alternate**: A water right that can be used either instead of, or simultaneously with, another water right. Alternate rights authorize a substitute point of diversion or withdrawal under a second water right to meet or augment an existing water right. The water user is allowed to determine which right to use. An alternate water right generally does not have an annual quantity that is additive to other water rights, and can have an instantaneous quantity that is either additive or non-additive depending on the needs of the project. Alternate water rights are typically associated with municipal water supply purpose of use.

*For example*: a municipality was issued Water Right G2-33333 for Well 1. During the summer, the well does not produce enough instantaneous flow to meet the peak demands of the system. Water Right G2-44444 is issued for additive instantaneous quantity from Well 2, which is a deeper, better producing well. Well 2 can be used simultaneously or **alternately** with Well 1, but the sum of water from the two sources cannot exceed the total annual quantity originally issued under Well 1.

**Non-additive**: A water right for either annual or instantaneous quantities of water that does not increase the water available in existing water rights.

*For example*: in the “alternate” example above, Water Right G2-44444 was issued for additive instantaneous quantity, and **non-additive** annual quantity.

**Primary water right**: A water right that must be used to the fullest extent possible before a standby/reserve water right can be exercised.

*For example*: Water Right S2-55555 was issued for irrigation of an orchard from Rushing Stream. However, in late summer, the stream dries up and water is unavailable. Water Right G2-66666 is issued to authorize a well to supply irrigation needs only when the **primary** right (S2-55555) can't be used. Water Right S2-55555 must be used to the extent water is available from Rushing Stream before G2-66666 can be used to augment the supply.

**Source**: A point of diversion or withdrawal authorized by a water right, not to be confused with a “same body of groundwater” under RCW 90.44.100, “same source of supply” under RCW 90.03.265 or other such references.

**Standby/Reserve:** A water right that can only be used when the primary water right goes unfilled or cannot satisfy an authorized use during times of drought or other low flow periods. A primary right must be used to the extent available before a standby/reserve right is used.

*For example:* as referenced in the definition of “primary” above, the well that was constructed under Water Right G2-66666 is issued as **Standby/Reserve**, to be used when the primary right cannot be exercised (in whole or in part). (“Standby” and “Reserve” are addressed in RCW 90.14.140(2)(b) under relinquishment exemptions.)

**Supplemental:** A water right designation formerly used to describe the relationship between water rights. Historically, the term has been used to refer to rights that are now to be described as additive, standby/reserve, alternate, or non-additive. *To avoid further confusion, the term supplemental will no longer be used.* (See section below on “Supplemental” for detail on interpreting its use in existing rights.)

## **Reviewing existing water rights**

### **Location of terms in water right record**

The terms *primary*, *supplemental* and others may be found in one or more locations on a water right record. It may be clearly marked on the face of the document, or designated in the provisions. On older water rights the intent may be described in the application, referenced within the ROE, or referenced in other water right files, and such intent or provision is applicable to the water right certificate.

### **Interpreting and updating existing water rights**

In the course of making tentative determinations, reviewing water system planning documents, and in day-to-day water rights administration (e.g. permit management, issuance of superseding documents, etc.), staff will need to interpret existing water rights. The key factors necessary for correctly interpreting water rights are:

- a. Overlapping characteristics among water rights (e.g. source, place of use, purpose of use, period of use, ownership).
- b. The amount of water, both instantaneous and annual, embodied in each right.
- c. The amount of water that can be reasonably put to beneficial use for each right (subject to other applicable statutes including the 2003 Municipal Water Law).

As staff work with existing water rights, they should update water right records to use terms consistent with those defined in this document. This update/“translation” could be in the form of a superseding certificate, letter to a water right holder or other regulatory agency, notation in the file, or other correspondence, depending on the circumstances.

USE OF TERMS THAT CLARIFY RELATIONSHIPS BETWEEN WATER RIGHTS

If Ecology acts in the form of a change decision, issuance of a superseding document or order, or other agency action that formally interprets a right, it will do so as an appealable action. Before issuing an appealable action, Ecology will discuss the interpretation with the water right holder.

Because these terms have been used inconsistently in the past, this will require a case-by-case review of the water right record to determine the original intent of the project, and the basis of quantities specified on the water right. A permit writer should not assume that a term used yesterday means the same thing as it would today. In some cases, a relationship term may not have been used but was clearly intended given the intent of the project.

*In most cases*, the definitions provided here will be adequate to translate historic terms into the current language. However, if staff encounters a unique situation that is not well captured by the definitions here, the limitations or restrictions among the water right(s) should be clearly described, without resort to the use of the term “supplemental,” to preserve the intent of the original water right.

**Example: understanding original intent**

A water system holds two water right certificates, G2-77777 from Well 1 for 300 gpm and 80 ac-ft, and G2-88888 from Well 2 for 200 gpm and 50 ac-ft. A few years later, a third water right certificate G2-99999 is issued for Well 3 in the amount of 350 gpm and 200 ac-ft. Certificate G2-99999 does not include any allocation designations on its cover, nor does the previously issued Permit. However, within the ROE, there is a statement that says “*The amount of water available under all water rights cannot exceed 200 acre-feet per year.*”

This statement, embedded in the ROE, is very significant. It shows that the third right was intended to be additive for only 70 ac-ft per year, and non-additive for the remaining 130 ac-ft. This statement was also a factor in the water availability determination and the impairment analysis performed when issuing G2-99999. Since the intent of G2-99999 appears to have been for municipal source flexibility, we would conclude that the instantaneous withdrawal rate was intended to be additive.

**“Supplemental”**

By far, the most common relationship term used by Ecology is *supplemental*. Therefore, staff will be faced with the translation of this term into current terminology more often than any other term. The following table describes the three most common ways the term *supplemental* has been used, and shows the appropriate term to use now. Again, the water right file will determine which is the appropriate translation based on the intent of the project

## USE OF TERMS THAT CLARIFY RELATIONSHIPS BETWEEN WATER RIGHTS

as authorized, which must be preserved in an administrative action.

Reminder: The term *supplemental* should no longer be used in water right documents.

<b>Historical Meaning of <i>Supplemental</i>:</b>	<b>Replace with:</b>
<i>A water right that could be used only when the primary right was unavailable, also called “emergency” in the past.</i>	Standby/Reserve
<i>A water right that is used to “add” quantities (<math>Q_i</math> or <math>Q_a</math>) to another right and increase the amount of water diverted.</i>	Additive (or conversely, Non-additive)
<i>A water right that is intended to provide an additional point of diversion or withdrawal to the original water right for source flexibility.</i>	Alternate

### **The effect of relinquishing, abandoning or revoking a water right which shares a purpose or place with another water right**

Primary/additive water rights, and non-additive water rights that are issued as standby/reserve or alternate (historically “supplemental”), are fundamentally linked based on the water right holder’s ability to use the combined rights to meet the projects needs. In general, water rights with non-additive quantities cannot be changed to rights with additive quantities. However, over time, events may occur that change the physical relationship of the rights. In some cases, these events can be recognized through changes to the water rights, so long as the withdrawals under the combined rights are not exceeded.

For Standby/Reserve Rights: Standby/reserve water rights are intended to be used only intermittently and only to the extent that the primary water right is unavailable. Therefore, removing a standby/reserve designation from a right has the potential to increase withdrawals from a source beyond what was contemplated in the initial authorization.

- Removing the standby/reserve limitation in instances where the primary right will continue to be exercised is not permissible. Such a determination would enlarge the rights that were intended to serve a single project<sup>1</sup>.
- Removing the standby/reserve limitation in instances where cancellation or relinquishment of a primary water right has occurred due to nonuse will typically result in relinquishment of the standby/reserve right as well. A standby/reserve right is only exempt from relinquishment under RCW 90.14.140(2)(b) to the extent that the diversionary or withdrawal facilities are maintained in good operating condition for use in times of drought or other low flow period. If the project itself is no longer in existence as evidenced by the lack of any beneficial use under the primary right, then

<sup>1</sup> e.g. *Schuh v. Department of Ecology* (1983).

## USE OF TERMS THAT CLARIFY RELATIONSHIPS BETWEEN WATER RIGHTS

- the purpose for which the standby/reserve right issued will also likely be extinguished.
- Removing the standby/reserve limitation in instances where the beneficial use has continued, and the applicant proposes to relinquish the primary right and use the standby/reserve water right continuously in-lieu of the primary right, will be considered on a case-by-case basis. Such instances would likely be made in the context of an application for change and all applicable statutory tests for change must be met, including impairment. In addition to impairment limitations, the Qi and Qa on the standby/reserve water right cannot be enlarged beyond that originally issued and the standby/reserve water right retains its original priority date.

For Alternate Water Rights: In contrast to standby/reserve water rights, alternate water rights were intended to add flexibility to water systems. Because the water right holder always had the option of full utilization of this right (in lieu of another), the potential to increase withdrawals under the right which might result in impairment is diminished. Indeed, full utilization of an alternate right was typically considered in the initial impairment analysis. Thus, there are situations where the re-designation of a right from non-additive to additive is possible as long as the total additive quantities contained in both water right authorizations are preserved. Such instances must be considered on a case-by-case basis, and could be made in the context of a change application or other administrative action.

*For example:* A water system holds two water rights - surface water certificate S2-55555 for community supply in the amount of 1 cfs and 500 acre-feet per year from a spring, and ground water certificate G2-77777 in the amount of 450 gpm and 500 acre-feet per year – issued as alternate. Certificate G2-77777 includes the following provision, “Withdrawal under Certificate S2-55555 and Certificate G2-77777 shall not to exceed 500 acre-feet per year.” There is no restriction directing the purveyor to use the sources in any particular combination. The water system files an application for change on G2-77777 because the spring source has been destroyed due to a landslide and the purveyor has abandoned any plans to redevelop the source. The purveyor voluntarily relinquishes S2-55555 as a condition of the change. Ecology concludes that the statutory tests for change are met in this case and issues a Superseding Certificate G2-77777 for the well without the alternate designation.

### **Issuing New Water Rights**

This section provides direction to water resources staff on the use of relationship terms when issuing a new water right.

When a new water right is issued that will share an attribute with an existing right, the permit writer needs to determine which term(s) best describes how the new right will be used in conjunction with the existing one, and provide clear documentation on the choice of the relationship term selected. This requires an understanding of the original project (supplied by the first water right) and the new proposal, which may be entirely separate or may augment the original project.

## USE OF TERMS THAT CLARIFY RELATIONSHIPS BETWEEN WATER RIGHTS

The original water right should now also have a relationship designation included to link it with the new water right. For example, if there is a second right that is additive, the initial water right is now also considered “additive,” since it has been *added to*. In this way, anyone reviewing the original water right will know that there is a related water right. Ecology will track these water right inter-relationships through notations in the file, through its water right tracking system database, and through the issuance of superseding documents when appropriate. Tracking additive water rights is also important for compliance with metering provisions on each water right and annual metering data submittals for water rights sharing a source.

Relationships between water rights can generally be characterized as sharing a *quantity*, *place of use* or a *source* of water. Permit writers should ask the following questions to determine the correct relationship term(s):

1. **Is additional water required for the proposed project (Qi or Qa)?** Where additional water quantities are needed beyond those authorized in the original water right, and it is appropriate to grant a second water right, the permit writer should identify the right as *additive*. Depending on the project needs and the existing water right authorizations, “additive” may refer to only Qi, only Qa, or a portion or combination of both.
2. **Are additional sources required for the proposed project?** If the original source will be used, only the terms additive and non-additive are needed. If the new water right will authorize additional sources, the permit writer also needs to designate the right as either *alternate* or *standby/reserve*.
  - a. **Is source flexibility required for the proposed project?** When source flexibility is needed for the project, the new water right should issue as an *alternate* water right to the original authorization. This gives the water right holder the ability to use either water right to meet the needs of the project. Source flexibility is often needed for municipal water suppliers.
  - b. **Is the new water right meant to be used continuously or only as a backup or emergency water right in case the original water right is unavailable?** If the new water right is to be exercised only when the original water right goes unfulfilled, than a *standby/reserve* water right should be issued. In this case, the original water right becomes a *primary* water right and must be used before the subsequent water right.

### **Standby/Reserve and Alternate Water Rights**

Any *standby/reserve* or *alternate* water right should clearly identify the conditions under which the source of supply may be used. Since these conditions form the basis of the impairment analysis, they should be defined in the provisions of the ROE, and they should be

## USE OF TERMS THAT CLARIFY RELATIONSHIPS BETWEEN WATER RIGHTS

carried through the permit and certificate stages. Additionally, the water right permit and certificate should clearly indicate if the quantities to be allocated are intended to be additive or non-additive (in whole or in part).

RCW 90.03.330(4) requires that Ecology issue a water right certificate only for the perfected portion of a permit put to actual beneficial use. Accordingly, permits with quantities designated as *standby/reserve* or *alternate* shall remain in permit phase until beneficial use occurs consistent with the terms and conditions of the permit, subject to the due diligence requirements in RCW 90.03.320. In these cases it may be appropriate for a longer development schedule to allow for perfection of *standby/reserve* and *alternate* water rights. *For example:* Farmer Dale's 40 acres is served by Kiwi Irrigation District (KID) which routinely supplies 3 ac-ft/ac of irrigation water. KID's supply is curtailed below 3 ac-ft/ac on average once every 5 years, but it has always supplied at least 1 ac-ft/ac of irrigation water even in the worst drought on record. During the 2005 drought, Farmer Dale applies for a standby/reserve water right from an emergency well he drilled to supply his farm. Ecology grants a standby/reserve water right permit, G4-88888, for 80 ac-ft based on a 2 ac-ft/ac shortfall in KID supply, the worst on record. Ecology provides a 15 year development schedule on the permit because droughts occur infrequently. In 2005, KID's shortfall is only 1 ac-ft/ac, and Farmer Dale uses 40 ac-ft from the well. Provided the well is maintained in good operating condition and is ready to serve for the next drought, the permit remains in good standing in its developments schedule until either 80 ac-ft are perfected, until Farmer Dale files a proof of appropriation form for the amount of water actually put to beneficial use, or until Ecology determines that the permit is no longer in good standing under the criteria in RCW 90.03.320.

### **Sample scenarios**

The following examples may assist staff in issuing new water rights and translating terms based on review of the water right record.

Note: It is important to remember that *a designation may be added retroactively* – that is, once an original water right is joined by a second water right, the first water right now has a relationship designation. For example, when a second water right increases the amount of water available for the same purpose as an original, both the original right and the second right are designated as “Additive.”

#### **Scenario 1**

The Town of Kumquat is permitted to withdraw 100 gpm and 150 ac-ft from Well 1 from Water Right G1-11111. *Since there are no related water rights at this time, this water right received no relationship-term designation.*

Five years later, the Town needs to drill a new well so it can provide routine maintenance on the first well and as an emergency back-up source. The Town doesn't plan to typically run

## USE OF TERMS THAT CLARIFY RELATIONSHIPS BETWEEN WATER RIGHTS

both wells at the same time on a day-to-day basis, but during fires or other emergencies they may. The Town is not growing very fast and Water Right G1-11111 provides an adequate annual quantity (Qa) to meet future needs. Ecology issues the Town Water Right G1-22222, which authorizes Well 2 to be drilled, 100 gpm to be pumped and 150 ac-ft to be withdrawn. *This water right is an alternate water right. The Qi is additive (which allows for the Town to pump 200 gpm) and the Qa is non-additive (which means that the Town remains limited to 150 ac-ft per year). Water Right G1-11111 now receives a designation: it has additive quantities.*

Ten years later, a new factory opens in Kumquat bringing new jobs and growth. The Town applies for a new permit, G1-33333. They need additional Qi and Qa to serve the new growth from their 2 existing wells. Water Right G1-33333 issues to the Town for 300 gpm and 50 ac-ft which may be withdrawn from Wells 1 and 2. *The Qi is additive for 300 gpm. The Qa is additive for 50 ac-ft.* Since both wells are authorized under G1-33333, the term “alternate” is not appropriate. *The Town can now use its two wells to produce a total of 500 gpm, and 200 ac-ft per year.*

The following table summarizes the water right picture for the Town.

Water Right	Source	GPM (Qi)	Ac-ft/Year (Qa)		Comment
			Additive	Non-additive	
G1-11111	Well 1	100	150		
G1-22222	Well 2	100		150	Issued as Alternate to G1-11111
<i>Sub-total</i>		<i>200</i>	<i>150</i>		
G1-33333	Wells 1 & 2	300	50		
<b>Total</b>		<b>500</b>	<b>200</b>		

*The Town can now use its two wells to produce a total of 500 gpm and 200 acre-feet per year. However, each well may only produce a maximum of 400 gpm. The Town could file change applications on G1-11111 and G1-22222 to consolidate Well 1 and 2 under each right, provided the statutory tests for change are met.*

## **Scenario 2**

Staff is reviewing the Town of Turnip’s first Comprehensive Water System Plan. The Town has two water rights. Water Right G3-11111 issued in 1960 for 300 gpm and 448 ac-ft from the Town Well No. 1. In 1980, the Town received a second water right, G3-22222 for Well No. 2 for 500 gpm and 627 ac-ft from the Town Well No. 2. Certificate G3-22222C describes these quantities as *supplemental* to existing rights.

Staff reviews the complete water right record to determine the correct terms to use. The ROE for G3-11111 describes the intent of the project as serving a population 500 people by 1980 at 800 gpcd. The ROE for G3-22222 was written in 1979 and describes 350 people living in the Town in 1979 using approximately 314 ac-ft and the Town is planning for 700

## USE OF TERMS THAT CLARIFY RELATIONSHIPS BETWEEN WATER RIGHTS

people by the year 2000. The ROE for G3-22222 indicates that a total of 500 gpm and 627 ac-ft are needed to serve the 2000 year projection.

Based on the review of the record in this case, staff concludes that the Town's water rights should be interpreted as follows.

Water Right	Source	GPM (Qi)		Ac-ft/Year (Qa)		Comment
		Additive	Non-additive	Additive	Non-additive	
G3-11111	Well 1	300		448		
G3-22222	Well 2	200	300	179	448	Alternate to G3-22222
Total		500		627		

*The Town of Turnip is authorized to produce 500 gpm and 627 acre-feet per year from these alternate water rights. Well 1, however, contains lower Qi and Qa limitations under G3-11111 than Well 2 does under G3-22222. The system could file a change application on G3-22222 to add well 1 if additional source flexibility on Well 1 were desired (e.g. pumping Well 1 at 500 gpm instead of 300 gpm), and provided the statutory tests for change are met. .*

### **Scenario 3**

Farmer Bob is permitted to withdraw 0.45 cfs (200 gpm) and 80 ac-ft for irrigation of 20 acres from Little Creek from Water Right S4-44444. *Since there are no related water rights at this time, this water right received no relationship-term designation.*

Farmer Bob has a problem getting a reliable supply from Little Creek. In the late summer, flows drop so he doesn't always get the 200 gpm he needs to irrigate his crop. Farmer Bob applies for a new permit for a well, which is authorized under G4-55555. G4-55555 authorizes 200 gpm and 80 ac-ft for irrigation of the same 20 acres covered in S4-44444. *This right issues as a standby-reserve water right with non-additive quantities. With the issuance of Water Right G4-55555, Water Right S4-44444 now receives a relationship-term designation: it is a primary water right with additive quantities. Farmer Bob can use the well only when he is unable to fully exercise his surface water right. He remains limited to 200 gpm and 80 ac-ft per year for the irrigation of 20 acres.*

Years later, Farmer Bob buys his neighbor's 50 acres of sage brush and wants to expand his farming operation. Farmer Bob receives a permit for G4-66666 which authorizes 400 gpm and 200 ac-ft from his well (G4-55555) for irrigation of 50 acres. *Because this water right is for a new project for a new place of use from the same source, the Qi and Qa are additive to G4-55555, whose metered pumping will be tracked in Ecology's metering database. A total of 400 gpm can be pumped from the well when Little Creek is available, and a total of 600*

## USE OF TERMS THAT CLARIFY RELATIONSHIPS BETWEEN WATER RIGHTS

*gpm can be pumped from the well when Little Creek is unavailable.*

Water Right	Source	GPM (Qi)		Ac-ft/Year (Qa)		Comment
		Additive	Non-additive	Additive	Non-additive	
S4-44444	Little Creek	200		80		
G4-55555	Well 1		200		80	Issued as Standby/Reserve
<i>Sub-total</i>		<i>200</i>		<i>80</i>		
G4-66666	Well 1	400		200		Unique place of use
Total		600		280		

*Farmer Bob is authorized by these water rights to pump up to 200 gpm from Little Creek and 400 gpm from his well. When the creek is not available in whole or in part as a source, Water Right G4-55555 (which is issued as a Standby/Reserve Right) allows for an additional 200 gpm to be pumped from the well. The total annual withdrawal authorized by these rights is 280 ac-ft per year for the irrigation of 70 acres.*

#### **Scenario 4**

Farmer Sam was issued Water Right G2-33333 for 900 gpm and 200 ac-ft for irrigation of 100 acres of wheat. Subsequently, Water Right G2-44444 was issued from the same well for 0 gpm and 200 ac-ft *supplemental* to irrigate apples on the same 100 acres.

The permit writer is reviewing a change to a point of withdrawal request to another well on the property for both water rights because the well has collapsed. From the record it is clear that the intent of Permit G2-44444 was to allocate additional water to meet a higher crop duty. Following the change, Water Right G2-33333 would issue for 900 gpm and 200 ac-ft (additive quantities) for irrigation of 100 acres. Water Right G2-44444 would issue for 900 gpm (non-additive) and 200 ac-ft (additive) for irrigation of 100 acres.

Note: Occasionally Ecology has described either a Qi or a Qa quantity as “0” when additional Qi or Qa is not needed to satisfy a purpose of use. In the future, the “0” Qi or Qa will be considered a *non-additive* quantity. In this scenario, certificate G2-44444 should be issued for 900 gpm non-additive and 200 ac-ft additive.

Water Right	Source	GPM (Qi)		Ac-ft/Year (Qa)	Comment
		Additive	Non-additive		
G2-33333	Well 1	900		200	
G2-44444	Well 1		900	200	
Total		900		400	

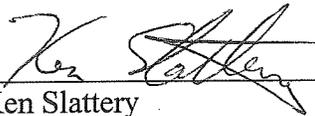
## USE OF TERMS THAT CLARIFY RELATIONSHIPS BETWEEN WATER RIGHTS

*Farmer Sam is authorized to pump 900 gallons per minute and 400 acre-feet per year for the irrigation of 100 acres.*

**Scenario 5**

Farmer Doug applied for a right to use a new well. The permit writer is considering how to issue the new water right Permit G2-99999. Farmer Doug owns 100 acres, 50 acres of which receive irrigation water from a local irrigation district. The District diverts surface water from Apple Creek under the authority of surface water certificate S2-11111, and Farmer Doug owns District shares in the amount of 100 gpm and 200 ac-ft. Farmer Doug wants to use the well on the District lands whenever the District doesn't provide enough water for his crop. Farmer Doug also wants to use the well to plant on the remaining 50 acres that don't receive water from the District.

Given the dual purposes for which the well will be used, the permit writer needs to be very clear in both the ROE and certificate. For the lands covered by district irrigation water, the water right should be described as *standby/reserve* and the Qi and Qa should be *non-additive* to district water (the *primary* water right). For the lands not covered by district irrigation water, the water right Qi and Qa stands alone and *receive no relationship-term designation* because the additional 50 acres do not share a place of use with another right.

  
\_\_\_\_\_  
Ken Slattery  
Program Manager  
Water Resources Program

*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.*

**EMERGENCY WATER SOURCE AUTHORIZATION**

Contact: Policy and Planning Section

Effective Date: 9-29-06

References: RCW 43.70.310, RCW 90.03, RCW 90.44, RCW 90.54.020(3)(a), WAC 173-152-050 (2)(a).

**Purpose:**

To provide guidance to program personnel in the permitting of emergency water supply sources for use by public water systems during catastrophic emergencies.

**Application:**

Public water system officials are becoming increasingly aware that their existing water supply sources may be vulnerable to a large scale catastrophic disaster. Many of these system managers are interested in developing new sources of water for use only during such emergency events. This policy applies to requests for emergency water source development and use necessary for the preservation of public health and safety. This policy is related only to those circumstances in which emergency ground and/or surface water sources may be used by public water systems during a catastrophic event that disrupts or renders unusable existing potable/domestic and fire flow water supplies and/or associated facilities. This policy does not apply to instances where the submission of a change application under RCW 90.03.380 would be appropriate.

Nothing in this policy is intended to restrict access to water sources in emergency situations where loss of life or property is imminent.

Public Water Systems should plan for and develop emergency water supply sources in a manner consistent with applicable state and federal Emergency Response Planning laws, regulations, and guidelines.

The use(s) of emergency water sources by public water systems should occur in a manner consistent with the Emergency Response Plan component of a Water System Plan that has been prepared and approved under state and federal laws, regulations, and guidelines.

**1. Emergency Water Source Use (Defining Qualifying Emergencies)**

Emergency water source use by public water systems may occur pursuant to catastrophic events that disrupt, compromise, damage, or otherwise affect existing public water supplies and related transmission, distribution, storage, fire flow, and treatment facilities in a manner that risks the public health and safety of local and transient populations.

Authorization for emergency water source use under this policy does not extend to water shortages caused by drought conditions, or to emergency conditions that may be effectively relieved through use of emergency water interties. Inadequate water rights for

a public water system to serve existing hook-ups or to accommodate future population growth or other future uses do not constitute a public health or safety emergency.

Emergency supply sources may not be used to circumvent the water right permitting process, nor used for any beneficial uses that occur outside the context of an actual emergency event (described above).

Emergency source water may only be put to beneficial use in lieu of water supplies and/or sources that are unavailable due to emergency conditions.

Identification and intended use of emergency water sources should be clearly documented by public water systems within Comprehensive Water System Plans, Small Water System Plans, and/or Emergency Response Plans prepared consistent with applicable State Board of Health requirements, Department of Health statutes, guidelines, and regulations, and federal law.

## 2. Application process

Emergency water sources may include ground water and/or surface water supply sources, used independently or conjunctively, depending on need, volume, and availability. Separate applications must be submitted for each source.

Requests for emergency supply sources will be processed prior to competing applications as outlined in WAC 173-152-050 (2)(a). A complete water right application form and examination fee is required. Evaluation of requests for emergency water sources will follow Water Resources Policy 1000 – Water Right Administration Policy, including assessments of water availability, public interest, impairment of existing rights, and beneficial use of the water, prior to granting a permit.

If a request is made for a source of supply from a closed or limited source, an evaluation of the effect of the withdrawal and an assessment of the public interest in allowing a withdrawal from a closed or limited source will be made. A permit may be authorized in a situation where it is clear that overriding consideration of the public interest, as defined under RCW 90.54.020(3)(a), will be served. If a finding of Overriding Consideration of Public Interest is made, a permit may be issued to allow use of the source for emergency use as described in this policy.

Permits and certificates will be issued as ‘Standby – Reserve’, with non-additive quantities. The permit will remain in ‘permit phase’ until it is perfected. Provided that the source and infrastructure is maintained in ready-to-serve status to respond to an emergency, and the water system is actively including that source and permit in their emergency planning, extensions are permissible in accordance with Water Resources Policy 1050 – Extension of Time on Permits.

### 3. Construction and Development of Emergency Water Source Facilities

Public water systems planning to install emergency water supply sources should submit an application for a water right permit. A preliminary permit may be issued, pursuant to RCW 90.03.290, to undertake drilling, testing, and studies and other appropriate activities to determine the reliability of a candidate well or wells for emergency supply purposes.

For emergency groundwater supply sources, emergency supply wells should be developed in accordance with all appropriate state laws and regulations relating to well design, wellhead protection, monitoring, sampling, and metering. For emergency surface water supply sources, intake structures should be metered and designed to meet Department of Fish and Wildlife screen design criteria and other relevant state, local, and federal permit requirements.

The planning, design, and construction of emergency water sources is subject to meeting applicable State Environmental Policy Act requirements, unless exempt under WAC 197-11-880 or another exemption.

### 4. Authorization to Utilize Emergency Water Source

Emergency Water Source use may occur pursuant to:

- Governor's Emergency Declaration;
- Determination of a local (government) Incident Response Commander or other authorized local official(s) that emergency conditions have so damaged or compromised existing water supplies and/or related facilities, as well as access to and use of emergency interties (if existing), that public health and safety are at risk, and thereby warrant the use of emergency water source(s).

Incident Response Commanders or other officials responsible for authorizing emergency source use should notify the appropriate regional offices of the Department of Ecology and the Department of Health prior to authorizing use of an emergency source. If such contact is not feasible, notice should be provided as soon as possible thereafter.

Emergency water source use should occur only within the service area of the local government and/or public utility.

### 5. Time Duration

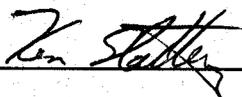
The time duration for the use of emergency water sources will vary according to the severity of the emergency event and resulting condition(s), the response and recovery capability of public water systems and local governments, and the status of public health and safety risks and conditions.

When the water supply emergency no longer exists, use of emergency water sources should be immediately terminated and the Department of Ecology and Department of Health so notified.

The public water system officials should prepare a report consistent with Department of Health guidelines documenting the volume of water consumed, the quality of the water produced, the manner in which the water was used and/or consumed, and the reliability and ability of the emergency sources in meeting emergency need(s). This report should be submitted to the Department of Ecology and the Department of Health within 3 months after formal termination of locally or state declared emergency conditions.

5. Enforcement Action

Formal or informal enforcement action may be taken against public utilities that make beneficial use of emergency sources during non-emergency conditions. Procedures for initiating and completing formal enforcement actions are contained in PRO-2005.



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Ken Slattery  
Program Manager  
Water Resource Program

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EXTENSION OF TIME ON PERMITS

Resource Contact: Policy and Planning Section

Effective Date: 10-31-91

Revised Date: 1-20-06

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

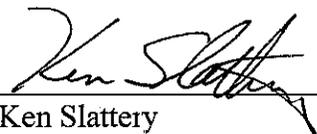
If the time allowed for beginning construction, completing construction, or putting water to beneficial use expires and the permit holder fails to request an extension, the department will initiate cancellation of the permit. Ecology will attempt to contact the permit holder by mail or telephone if the 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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Ken Slattery  
Program Manager  
Water Resources Program

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Resource Contact: Coordination  
& Hydrology Section

Effective Date: 11-22-91  
Revised: 11-22-91

References: Chapter 90.14 RCW

## RECISION AND RELINQUISHMENT OF WATER RIGHTS

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

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

### Definitions:

Relinquishment, an administrative procedure pursuant to Chapter 90.14 RCW used when a water right has reverted to the State because of nonuse without sufficient cause or due to voluntary action of the property owner.

Recision, an administrative procedure to rescind all or a portion of a certificate of water right or change certificate, where the perfected right is not in agreement with the state issued certificate of water right.

### 1. RELINQUISHMENT AFFECTS PERFECTED WATER RIGHTS ONLY

Relinquishment is pursued on perfected water rights only and the water right has been diminished or extinguished because use has lapsed without sufficient cause for a period of five consecutive years or the water right has been abandoned.

Abandonment is an indication of intent to relinquish a water right coupled with non-use of the water. Within an abandonment, the non-use of water does not have to last five years, rather a shorter time period may indicate the non-use. When a water right is to be relinquished based on abandonment, the burden of proof to demonstrate abandonment is on the Department.

When a water right is to be relinquished based on non-use for five consecutive years without sufficient cause, the burden of proof to show sufficient cause for non-use is on the water right holder.

If the documented right, in whole or in part, was never perfected, an order of recision is issued. See number 4 below.

2. SUFFICIENT CAUSE FOR NON-USE OF A WATER RIGHT

Sufficient cause for the non-use of a water right for a period of five or more consecutive years is limited to those causes listed in RCW 90.14.140.

3. VOLUNTARY RELINQUISHMENT

Voluntary relinquishment by the right holder should be pursued for water rights which have been diminished or extinguished because use has lapsed without sufficient cause for a period of five consecutive years or the water right has been abandoned prior to initiation of an involuntary relinquishment. Use Ecology form ECY 040-1-100.

4. INVOLUNTARY RELINQUISHMENT

Involuntary water right relinquishment is a two step procedure.

First a show cause order is issued stating it appears a water right has reverted to the State because of nonuse without sufficient cause or due to voluntary action of the property owner and that the right will be declared relinquished upon failure to show cause as to why the right should not be relinquished.

The show cause order must contain 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, a statement that unless sufficient cause can be shown on appeal the water right will be declared relinquished and that the order is appealable to Pollution Control Hearings Board.

A copy of the show cause order must also be posted at the point of diversion referenced in the show cause order.

Secondly, if the show cause order is not appealed or upheld on appeal, a relinquishment declaration is issued. The relinquishment declaration shall declare the right relinquished and shall specifically reference the show cause order.

5. WATER RIGHT HOLDER TO BE ADVISED TO APPEAL SHOW CAUSE ORDER

The water right holder's opportunity for appeal is when the show cause order is issued. In those cases where an amicable settlement of the issues appears feasible, the applicant shall be advised to still file an appeal of the show cause order with the PCHB to preserve appeal rights should settlement efforts fail.

6. RECISION ORDERS FOR STATE DOCUMENTS

Recision is used to achieve conformity between the perfected right gained through beneficial use and the state issued document. 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 right existed to be relinquished. The Attorney General's Office advises that Ecology could issue orders which rescind a presumed right, i.e., one which is not fully developed and thus was never perfected.

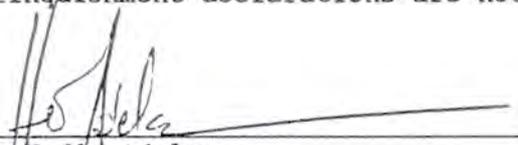
Recision orders are not mentioned in Chapter 90.14 RCW.

Recision does not apply to claims filed pursuant Chapter 90.14 RCW.

7. FORMAT OF RELINQUISHMENT AND RECISION DOCUMENTS

The show cause orders, and recision orders are formal orders issued by the Department and are appealable actions.

Relinquishment declarations are not appealable actions.



Hedia Adelsman  
Program Manager  
Water Resources Program

## ADMINISTRATIVE POLICY FOR RECORDING THE AGREED DIVISION OF WATER RIGHTS AMONG MULTIPLE PROPERTY OWNERS

Resource Contact: Policy and Planning Section

Effective Date: July 3, 2003

Revised: January 20, 2006

References: RCW 90.03.380(1); RCW 90.54.030(1) and (4); RCW 90.14.010;  
RCW 43.21A.090(7); and WAC 508-12-200.

**Purpose:** To document generally applicable procedures that the Department of Ecology uses to track and record the agreed division of a water right where multiple property owners own land to which the water right is appurtenant.

In Ecology's 2002 Report to the Legislature "*Improving the Administration of Water Right Records*", the Department of Ecology identified a need to correlate water right ownership information with real property information. Benefits of this correlation include increased efficiency when notification is required for proposed actions, facilitation of water marketing, improved access of water right information by the public, and increased certainty in vested property rights. The referenced statutes provide that a water right is appurtenant to the land on which beneficial use occurs, and that Ecology is authorized to track and provide records of such appurtenancy.

**Application:**

This policy and the procedures below generally apply to water right certificates where beneficial use has occurred and the water right has become appurtenant to the land on which beneficial use occurs. This policy does not apply to the following types of water rights:

- Water right permits and water right applications. Generally, permits and applications for water rights are not perfected property rights subject to RCW 90.03.380. However, ownership and interest in these documents may be assigned pursuant to RCW 90.03.310 (see also WAC 508-12-200).
- Water rights where there is a shared character to the right, including but not limited to those issued to municipalities, irrigation districts, and partnership ditches. Nothing in this policy prevents a water right holder from seeking a change via RCW 90.03.380, RCW 90.44.100 or other applicable statutes, which may, in addition to a change, clarify the right's ownership among multiple property owners.
- Water right claims, certificates of change on claims, and certificates of change on vested rights for which no original certificate exists, unless there is an active change application pending on the water right claim. Nothing in this policy prevents a water right holder from seeking a change via RCW 90.03.380, RCW 90.44.100 or other applicable statutes, which may, in addition to a change, clarify the right's ownership among multiple property owners.
- Water rights where division of property has occurred in a manner not consistent with

historic water use, or in which historic water use has not been consistent with the original right. Nothing in this policy prevents a water right holder from seeking clarification as to the apportionment of the water right among multiple property owners via RCW 90.03.380, RCW 90.44.100 or other applicable statutes.

**Evaluation:**

Where multiple property owners own a portion of land to which a single water right is appurtenant, said property owners may apply and receive from the Department of Ecology, a superseding document describing their share of the original water right. These superseding documents will clarify the apportioning of said rights as agreed to by all the property owners who own the subject property within the authorized place of use of the original right.

Agreements documenting this apportioning shall reflect the historic beneficial use of water on the property. It shall be the responsibility of each property owner to verify that his or her "share" of the original right reflects the historic beneficial use of water on the property.

Requests to confirm the division of a water right may be made at the time the change in ownership of the property occurs (effective on the property closing date), or may be after such property transfer has occurred. The administrative issuance of superseding documents reflecting this division does not authorize a change pursuant to RCW 90.03.380, RCW 90.44.100, or other applicable statutes, including changes that may have occurred in the past but outside the terms and conditions of the original water right.

The following steps summarize how the Department of Ecology will document the division of water rights covered by this policy.

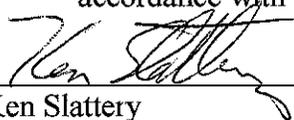
1. All property owners owning land to which the original water right is appurtenant must agree as to how the water right is to be divided based on historic beneficial use. Confirmation of a division of a water right in a manner other than historic beneficial use is not covered by this policy.
2. Such agreement will be documented by said property owners' signatures on Ecology's standard *Request for Administrative Confirmation of Division of a Water Right (Form ECY 070-88)*. In the event that all property owners' signatures are not provided, but where clear documentation by court decree, property transfer deed, or other document establishes the division of such rights, Ecology may at its sole discretion waive this comprehensive signatory requirement. In this event, Ecology shall notify the property owner for which signature is absent by certified mail, and will not issue superseding documents pursuant to this policy until thirty (30) days from receipt of the certified mail return receipt. In the event that a response to said letter is provided within this timeframe, Ecology will consider such response in its decision to issue superseding documents.
3. The *Request for Administrative Confirmation of Division of a Water Right* form shall be accompanied by property transfer deeds, county tax parcel identification records, and any additional information needed to demonstrate ownership of the lands within the authorized place of use of the original water right.
4. Upon receipt of clear documentation as required by this policy and all statutory recording

fees from each property owner requesting the division, Ecology will issue superseding documents to each property owner consistent with the agreed division of the right on the request form. Where certificated water rights are divided, superseding certificates shall issue. Where certificates of change on adjudicated or certificated rights are divided, superseding certificates shall issue. Where certificates of change on water right claims or vested rights are divided, the file shall be amended and the signed *Request for Administrative Confirmation of Division of a Water Right* form shall be included in the file to serve as the superseding document.

5. Ecology's confirmation of the division of a water right is administrative in nature, and will not include an evaluation of the extent and validity of the water right to be divided. A water right is valid to the extent that it has been put to beneficial use consistent with the terms and conditions of the authorization. Language to this effect will be included on each superseding document; said language shall remain on a superseding document until the extent and validity of the right embodied by the superseding document is determined. Example language is provided below:

"The division of Certificate S1-123456C into Superseding Certificate S1-123456(A)C, S1-123456(B)C, and S1-123456(C)C shall not be construed as validation as to the extent of Certificate S1-123456C as originally authorized. The amounts provided on the superseding portions of said water right reflect agreement among the owners of the described place of use, but are not confirmed by Ecology in this recording of the division of said right. The actual amounts authorized by the superseding certificates are subject to the historic beneficial use of Certificate S1-123456C."

6. Ecology will not update or add new conditions to a water right as a part of the administrative documentation of the division of that water right.
7. If following the division of the right, a property owner seeks to use water in a manner other than that authorized by the superseding water right document; said property owner shall file a change pursuant to RCW 90.0.380, RCW 90.44.100, or other applicable statutes.
8. As part of an evaluation for change or transfer, Ecology will make a tentative determination as to the extent and validity of the portion of the original water right proposed for change and embodied by the superseding water right document issued in accordance with this policy.



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Ken Slattery  
Program Manager  
Water Resources Program

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.

## NOTIFICATION OF WATER RIGHT APPLICATIONS TO INDIAN TRIBES

Resource Contact: Coordination and Technical Services Section

Effective Date: 2-12-90

Revised: 2-12-90

## References:

Purpose: To further the state's government to government relations with federally recognized tribes located in the state of Washington with respect to the cooperative management of water resources within the state.

Application: This policy applies only to water right applications received pursuant to chapters 90.03 and 90.44 RCW.

1. Notify the appropriate Indian tribe

The Department of Ecology, Water Resources Program, will notify the appropriate Indian tribe of water right activities which affect waters that border, flow through, or are within the exterior boundaries of their Indian reservation, their usual and accustomed fishing areas, or traditional use areas. Notification concerning new water right applications and applications to change existing water rights will be sent to the appropriate tribe.

2. Notification is tribal specific

Each tribe has specific concerns related to water resource management. Separate and different procedures exist for each tribe because the tribes have expressed different needs. For example, some tribes do not want to be notified of ground water applications while others do not want to be notified of any proposed appropriation less than 1 cubic foot per second of water. Tribes can revise their geographic areas of interest at any time. Please see PRO-1105A for tribal specific procedures.

3. Tribal comments

A sixty-(60) day tribal review and response time on each water right application will be provided. If for some reason comments cannot be provided within sixty (60) days, additional time may be provided upon written request. The justification for delayed commenting on a particular water right application should be based on inaccessibility of the project site due to weather and/or inability to assess impacts due to current hydrology.

Tribal comments should be substantive in nature. They should relate specifically to fish biology, fish management, wildlife, or habitat issues and impacts. Current information, based on field investigations, is preferred. Projected impacts of a proposed appropriation should be site specific and quantified to the extent possible.

4. Consideration of comments received from Indian tribes

The tribe's commenting official will be contacted by the regional office if clarification of tribal comments is required. An effort will be made to work out any differences, related to the factual situation of the application, between the regional office and the commenting official for the tribe. Tribal comments will be addressed in the report of examination. A copy of the report of examination will be provided to the tribe on any application upon which the tribe submitted substantive comments. If the tribe's response on any application is "no comment," a copy of the report of examination for that application will not be sent to the tribe.

5. Dispute resolution with Indian tribes

If differences of opinion cannot be worked out between the regional office and the commenting official for the tribe, the section supervisor will seek guidance from the program manager. The dispute resolution process will be exhausted before a report of examination is issued. See procedure PRO-1043A for dispute resolution process. A report of examination, which significantly deviates from the substantive comments provided by the tribe, may be issued only upon approval of the program manager.

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Hedia Adelsman  
Program Manager  
Water Resources Program

**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.

**POL 1120 WATER RESOURCES PROGRAM POLICY FOR CONDUCTING TENTATIVE DETERMINATIONS OF WATER RIGHTS**

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Resource Contact: Policy and Planning Section                      Effective Date: August 30, 2004  
Revised: NEW

References: RCW 43.27A.190; RCW 90.03.290, 90.03.380, 90.03.390 & 90.03.397;  
RCW 90.44.100 & 105; RCW 90.14.130; and POL 1070 and 1200

Purpose: To define tentative determinations and describe situations in which a tentative determination of a water right is required. The policy sets forth methods and tools which can be used to conduct a tentative determination.

Application: This policy is applicable to the investigation of changes or transfers to existing water rights and enforcement actions.

**This policy supercedes any previous policy statement with which it conflicts.**

Definition. The following definition is intended within this policy:

**“Tentative determination,”** means a determination of the extent and validity of an existing water right established pursuant to either chapter 90.03 RCW or 90.44 RCW, or claimed pursuant to chapter 90.14 RCW. Such determinations are tentative, as final determinations of the extent and validity of existing water rights can only be made by Superior Court through a general adjudication of water rights.<sup>1</sup>

Evaluation.

1. Who makes a tentative determination?

The department of Ecology or a water conservancy board may make a tentative determination.

2. What is a tentative determination?

A tentative determination is a water conservancy board’s or the department of Ecology’s finding of the amount of water perfected and beneficially used under a water right that has not been abandoned or relinquished due to non-use. In a proposal to change or transfer a water use, a tentative determination may include a decision as to the portion of

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<sup>1</sup> Recent court cases have concluded that the department’s authority on making tentative determinations is limited to establishing the degree to which water use complies with the attributes of the water right, rather than adjudicating between water users. See *Rettkowski v. Department of Ecology*, 219 122 Wn. 2d 219, 858 P. 2d 232; *R.D. Merrill v. Pollution Control Hearings Board* 137 Wn. 2d 118, 969 P.2d 459 (1999); *Okanogan Wilderness League v. Town of Twisp* 133 Wn. 2d 769, 947 P. 2d 732 (1997) and *Public Utility District Number One of Pend Oreille County v. Department of Ecology* 70372-8 (2002).

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the water right that is eligible for change, for instance, in some cases only consumptively used water may be eligible for change. A tentative determination is conducted for all uses associated with the entire certificate, permit or claim. In situations where forfeiture of water is not an issue, a simplified tentative determination may be needed.

3. Under what circumstances should a tentative determination be conducted?

A tentative determination is made in association with Ecology's and water conservancy boards' permitting activities. A tentative determination is required when:

- a. Evaluating uses associated with an existing surface water right that is the subject of an application for change or transfer under RCW 90.03.380, 90.03.390 or 90.03.397;
- b. Evaluating uses associated with an existing groundwater right that is the subject of an application for change, transfer, or consolidation under RCW 90.44.100, 90.44.105, or 90.03.380;
- c. Evaluating water uses appurtenant to the existing and proposed place of use under an application for change or application for a new water right;
- d. Evaluating water uses that may be considered as potentially impaired under an application for change or application for a new water right;
- e. Evaluating existing water uses associated with water rights pursuant to RCW 90.14.130 or other regulatory statutes that results in a departmental order.

4. When, for example, is a tentative determination not warranted?

- a. When the department administratively recognizes the division of a water right resulting from a property sale or transfer pursuant to the provisions of POL 1070.
- b. When consolidating exempt wells under an existing water right permit or certificate pursuant to RCW 90.44.105<sup>2</sup>.
- c. When a water right is donated pursuant to RCW 90.42.080(1)(b) & 5, and 90.42.040(9)<sup>3</sup>.
- d. When a water right is acquired as a result of a water conservation project pursuant to RCW 90.42.040(7)<sup>3</sup>.
- e. When a replacement well is installed pursuant to RCW 90.44.100.

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<sup>2</sup> The water quantities associated with the exempt well are established by RCW 90.44.105 or by agreement with the Department of Health.

<sup>3</sup> Chapter 90.42 RCW contains various requirements for determining the extent and validity of trust water right acquisitions. See *Washington Water Acquisition Program, Finding Water to Restore Streams* (March 2003, Publication No. 03-11-005).

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5. What is a simplified tentative determination?

A simplified tentative determination may be conducted when a tentative determination or other actions confirming beneficial use of the water right has recently occurred. Under these circumstances, an investigation of the complete history of the water right is not required. Instances where simplified tentative determinations can be conducted include:

- a. The existing water right has had recent departmental action, such as the issuance of a change approval within the last 5 years;
- b. The existing water right was confirmed as part of an adjudication or other court action that determined the extent and validity of the right within the last 5 years;
- c. The existing water right is for a municipal water supply in accordance with RCW 90.03.330(3).

6. How are tentative determinations conducted?

Generally, tentative determinations include an examination of the record of historic water use. Year-by-year demonstration of water use may not be required for the evaluation. However, yearly water use records may be appropriate if such records are available, if there are allegations of non-use, or if the proposed action prompts a closer examination of the water right record. For instance, water right changes which involve adding irrigated acres to an existing water right or adding an additional purpose of use require an assessment of the most recent five years of continuous water use.<sup>4</sup> For simplified tentative determinations (conducted on water rights where forfeiture of water is not an issue), year-by-year demonstration of water use is generally not required.

- a. Examine the available materials to verify the applicant's assertions of historic beneficial use of water. The agency may require adequate information be provided by the applicant, may conduct its own investigation, or may do both. Evidence of the extent of the beneficial use, water quantities used, and other characteristics of the water use may include direct water measurement and observation by the investigator, declarations and affidavits of parties with personal knowledge of historic water use on the subject property, water meter records<sup>5</sup>, power records, crop or product sales records, water billing records, population estimates, county assessor records, aerial or other historic photographs, remote sensing imagery, crop irrigation guides, water duty publications, land use or tax records, field surveys and other data.
- b. Materials should be reviewed so that a reasonable, objective conclusion can be made as to project intent and initiation, the date of first use of the water, the period and rate of

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<sup>4</sup> See POL 1210 and PRO 1210 for guidance on establishing water use and estimating the annual consumptive quantity of a water right.

<sup>5</sup> Ecology prefers metered water use data when available (Chapter 173-173 WAC).

development of the original water use, the history associated with any expansion or contraction of water use, and the quantity of water appropriated on both an instantaneous and annual basis, the place of use and the purpose of use. The review should investigate whether the materials support a pattern of consistent water use to determine if subsequent to the perfection of the water right, some or all of the water right has been forfeited or abandoned. A prolonged period of non-use should be a signal to the investigator to request additional information from the applicant or to assemble additional materials that may provide a clearer picture of historic water use. Although there are numerous tools and methods available for reviewing historic use of water under a water right, generally tentative determinations require taking the following steps:

- i. *Evaluate the instantaneous and annual quantities of water diverted or withdrawn and put to beneficial use, including determinations of consumptive and nonconsumptive use.* Any evidence that supports the applicant's assertions of water use should be examined. The investigator should work with the applicant to assemble the information necessary to determine historic beneficial use. The tentative determination will consider whether the water quantities diverted or withdrawn are consistent with a reasonable water use in accordance with *Ecology v. Grimes*.<sup>6</sup>
- ii. *Verify the source of water.* Verification of the existing water source, through a site visit and/or hydrologic or hydrogeologic evaluation, should be done in conjunction with evaluating historic records of diversion or withdrawal quantities.
- iii. *Determine the location of the diversion or withdrawal facilities.* Determine the location of the existing diversion or withdrawal facilities and consider whether the location of the facilities have changed since establishment of the water use. Additionally, consider whether there have been modifications to the original facility that may imply that the water quantities available through the existing system differ from water quantities available through any previous system. Historic information or site observations of remnant portions of old diversion or withdrawal systems should alert the examiner that additional information may be necessary to clarify any previous modifications of use.
- iv. *Determine the place of use and extent of beneficial use.* Determine the location of the place of water use. Consider whether the place of use has changed since the water use was established. Consider whether the original water diversion or withdrawal facility could have supplied water to the existing place of use.

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<sup>6</sup> See *Ecology v. Grimes*, 121 Wn.2d 459, 852 P.2d 1044 (1993)

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- v. *Determine the purpose of use.* Determine the purposes of use to which the water has been historically applied and the quantities of water beneficially used for each purpose of use. Consider whether the existing water uses are consistent with historic water uses.
  - vi. *Determine the period of use associated with each beneficial use.* Determine the period of use for each of the recognized beneficial uses.
  - vii. *Determine the date of priority of the water right recognized through a tentative determination.* The date of priority has little import in evaluating the application, since applications for change or transfer and applications for permit can not result in the impairment of *any* existing water right. The priority date is determined by considering the history of establishment of the water use, assertions by the water user, and applicable laws but is necessary to complete the final paperwork at completion of the change/transfer.
- c. The investigator should use best professional judgment in determining the amount of data needed and in making a tentative determination of the extent and validity of a water right.
7. Tentative determinations in the face of unauthorized changes to water rights.
- a. In some situations, changes to historic uses associated with water rights have been made in the diversion or use of water without first obtaining authorization for the changes pursuant to chapters 90.03 and 90.44 RCW. Such unauthorized changes to existing water rights are commonly referred to as “de facto, or after-the-fact changes”.
  - b. When evaluating unauthorized changes to water rights<sup>7</sup>, the department generally considers beneficial use to be the measure of the right, even if some attributes of the right may not be consistent with the current authorization<sup>8</sup>. However, determining whether the beneficial use is associated with the right proposed for change can be difficult depending on the unauthorized changes that have occurred. For example, an unauthorized change in point of diversion may be relatively easy to investigate, whereas an unauthorized change in purpose or place of use may be very difficult to investigate.
  - c. Use of water in a manner inconsistent with one’s water right authorization may not result in forfeiture or abandonment of that right, provided such use is beneficial and not wasteful.<sup>9</sup> Consideration of unauthorized water use as representing beneficial use of the water right is determined on a case by case basis, through careful examination of the

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<sup>7</sup>If a permit writer determines that an unauthorized change has occurred that is not the subject of the current application for change, an application and public notice amendments are required.

<sup>8</sup> Several courts have considered the relative weight of beneficial use and unauthorized changes with conflicting decisions (e.g. *Ecology v. Abbott* (1985); *Ecology v. Grimes* (1993); *Russell Smith v. Water Resources Dept. (Oregon)* (1998); *Ecology v. Acquavella (Lavinal)* (2003); *USA and Pyramid Lake Paiute Tribe of Indians v. Alpine Land & Reservoir Co. and Nevada State Engineer* (2003). The permit writer should consider the circumstances of the specific situation in determining the relative weight of beneficial use and appurtenancy.

<sup>9</sup> Ecology may use enforcement actions to encourage compliance with RCWs 90.03.380 and 90.44.100.

**POL 1120 WATER RESOURCES PROGRAM POLICY FOR CONDUCTING  
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specific facts associated with the water right file. Determinations of beneficial use of the water right must be reviewed and approved by the appropriate regional section head.

- i) If the investigation does not support the extent of the original right to the satisfaction of the permit writer and the regional section head, then the permit writer must conclude that the water right, in whole or in part,
  - (1) was not perfected; or
  - (2) has been forfeited; or
  - (3) was abandoned.
- ii) If the investigation supports the extent of the original right to the satisfaction of the permit writer and the regional section head, then the permit writer may include, in whole or in part, the beneficial uses that were not previously authorized within the tentative determination (see POL 1200).

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Joe Stohr  
Water Resources Program Manager

## POLICY FOR THE EVALUATION OF CHANGES OR TRANSFERS TO WATER RIGHTS

Resource Contact: Policy and Planning Section

Effective Date: January 8, 1999

Revised: NEW

References: RCW 90.03.380 authorizes the department to approve applications for change or transfer to existing rights; RCW 90.03.390 authorizes the department to approve temporary changes or transfers to existing rights under certain conditions; RCW 90.44.100 authorizes the department to approve certain amendments to existing groundwater rights; and RCW 90.44.105 authorizes consolidation of wells under certain conditions. Several court cases and an Attorney General's opinion referenced in this policy also establish or clarify important legal principles.

Purpose: To document generally applicable policies that the Department of Ecology will use in implementing RCW 90.03.380, RCW 90.03.390, RCW 90.44.100 and RCW 90.44.105. These statutes authorize the department to consider applications to transfer the place of use, change the point of diversion, and/or the purpose of use of existing water rights, as well as the addition of irrigated acres or the addition of uses to existing water rights documented by certificates, permits and water right claims.<sup>1</sup>

Application: This policy relates to the evaluation of applications for change or transfer of water right by Ecology or by county conservancy boards pursuant to RCW 90.03.380, 90.03.390, 90.44.100 or 90.44.105 and to add irrigated acres or additional purposes of use to a water right.<sup>2</sup> POL-1230 addresses the consolidation of wells under RCW 90.44.105 and must be followed in addition to this policy.

**This policy supercedes any previous policy statement with which it conflicts.**

1. Definitions:

**“Amendment,”** means the modification, in whole or in part, of a groundwater permit or certificate allowing the construction of additional or replacement well(s) or consolidation of rights associated with uses exempt from permit requirements by RCW 90.44.050 with a legal use or uses that are not exempted under RCW 90.44.050.

**“Change,”** means a modification or combination of modifications, in whole or in part, of

<sup>1</sup> See Department of Ecology v. Abbott, 103 Wn. 2d 686, 694 P.2d 1071 (1985)

<sup>2</sup> See POL-1210 for additional policy if it is proposed to add new uses or irrigated acres.

the point of diversion or withdrawal, purpose of use, or a transfer of water right, or other limitation or circumstance of water use. Within this policy, “change” also includes the meaning of “amendment” and the meaning of “transfer”.

**“Impair” or “impairment”** means 1) to adversely impact the physical availability of water for a beneficial use that is entitled to protection, including earlier filed applications, and/or 2) to prevent the beneficial use of the water to which one is entitled, and/or 3) to adversely affect the flow of a surface water course at a time when the flows are at or below instream flows levels established by rule.

**“Reasonably efficient practices,”** means those practices including, but not limited to, methods of conveyance, use, and disposal of water which are reasonable and appropriate under the circumstances to bring about beneficial water use without waste<sup>3</sup>.

**“Return flow,”** means any water that is appropriated using reasonably efficient practices and subsequently returns to the stream from which it is diverted, or to some other stream, to a body of groundwater, or that would do so if not intercepted by some obstacle or another appropriation.

**“Seasonal change,”** means any temporary change or transfer proposal or its approval to change, amend, or transfer the place of use or point of diversion/withdrawal of water right for a specified part of the year. A seasonal change is subject to this policy and is proposed in the same manner as any other modification of a water right.

**“Temporary change,”** means to change, amend, or transfer the place of use or point of diversion/withdrawal of water right for a limited period of time or until a specified circumstance is met. A temporary change is subject to this policy and is proposed in the same manner as any other modification of a water right.

**“Transfer,”** means a modification, in whole or in part, of the place of use of a water right.

**“Water waste,”** means water that is diverted or withdrawn in excess of the amount required for beneficial use based upon reasonably efficient practices. The waste of water is a violation of the water code and is subject to regulation by the department.

2. Seasonal changes or transfers and temporary changes or transfers are subject to this policy.

Evaluation of seasonal or temporary changes and transfers must follow this and other applicable policy. Seasonal or temporary changes shall not be issued to permanent projects as a means of avoiding the application processing waiting period. See PRO-

1000 for processing guidance concerning seasonal and temporary changes or transfers.

3. The water right proposed to be changed will investigated.

- (a) The department will investigate the water right and make a tentative determination of the extent to which a water right actually exists and is valid for change<sup>3</sup>. The tentative determination shall consider the legal authority to have perfected a right, the means by which the right was originally established, the historical development and use of water, and the practices employed to divert, convey and use water. The tentative determination shall not recognize a water right in excess of the amount historically put to beneficial use in compliance with state water law and applicable rules. No water quantities shall be recognized beyond the amount necessary to accomplish the beneficial use employing reasonably efficient practices. Water use in excess of the quantities necessary using reasonably efficient practices constitute water waste.
- (b) The department may require information beyond that required in the application from the applicant necessary to evaluate the application for change or transfer. The department will provide a reasonable time for the applicant to submit the required information.
- (c) The department will determine, in accordance with Policy 1060, whether the water right has been abandoned as a matter of common law or is subject to relinquishment as provided by Chapter 90.14 RCW.
- (d) Reasonably efficient practice evaluations are made on a case by case determination that may recognize that water is diverted in a quantity that compensates for inefficiencies, not exceeding those which are typical for the diversion/distribution systems being employed. An evaluation of reasonably efficient practices includes consideration of prevailing local practices and custom; and the adequacy of system maintenance.<sup>4</sup>

4. Consideration for evaluating change proposals

- (a) Impairment considerations: Any proposed change or aspect of a proposed change is subject to denial or conditioning if it would impair any other water right or any previously filed application. To evaluate the potential for impairment to occur, a tentative determination of the extent and validity of the other potentially conflicting water rights must be made. Any tentative determination will be made in the manner outlined by this policy for a tentative determination of the water right proposed for change or transfer.

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<sup>3</sup> See Rettkowski v. Department of Ecology, 122 Wn.2d 219, 858 P.2d 232 (1993).

<sup>4</sup> See Ecology v. Grimes, 121 Wn.2d 459, 852 P.2d 1044 (1993).

- (b) Public interest considerations: An application cannot be approved if approval would directly conflict with any statute or rule or would be a detriment to the public interest.
- (c) Historic use considerations: A water right or portion thereof that has not been previously put to beneficial use may not be changed.<sup>5</sup> Exceptions can be considered with regard to changing the point of withdrawal or place of use authorized by a groundwater permit.
- (d) Exempt Groundwater withdrawals: A groundwater right based upon a beneficial use pursuant to the exemption from permit requirements provided under RCW 90.44.050 may not be authorized for change unless such authority is specifically granted to the department by statute. A groundwater right for the purposes and water quantities described by the groundwater exemption from permit that predates the state groundwater code, RCW 90.44, for which a permit or certificate has not issued may not be authorized for change unless such authority is specifically granted to the department by statute.<sup>6</sup> One such authority is contained within RCW 90.44.105, which authorizes the consolidation of permit exempt groundwater uses with another groundwater right that is based upon a permit or certificate.<sup>7</sup>
- (e) Enlargement: The amount of water appropriated, either on an instantaneous basis or cumulatively during a period of use, cannot be increased through a water right change. The acreage authorized to be irrigated under a water right, as tentatively determined by the department is a limitation under the right to irrigate and may only be increased in accordance with RCW 90.03.380 (1).<sup>8</sup> Policies and procedures relating to adding additional irrigated acres are contained in POL 1210 and PRO-1000.
- (f) Season or period of use: The department may authorize changes in the season of use of water if, in addition to any other applicable public interest or impairment consideration for a change<sup>9</sup>:
  - (i) Altering the period of use is related to and necessary to effect another proposed change in the right (e.g. changing the purpose of use);

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<sup>5</sup> See Okanogan Wilderness League v. Town of Twisp, 133Wn, 2d 769, 947 p.2d 732 (1997).

<sup>6</sup> See AGO 1997 No. 6.

<sup>7</sup> See Policy No. 1230.

<sup>8</sup> See Schuh v. Ecology, 100 Wn. 2d 180, 667 P.2d 834 (1984); Kummer v DOE, PCHB No. 85-188 (1987); Benningfield v DOE, PCHB No. 87-106 (1987). RCW 90.03.380 was amended in 1997 to allow conserved water to be used on additional land if the amount consumptively used would not be increased.

<sup>9</sup> See R. D. Merrill Co., et. al. Vs State, Pollution Control Hearings Board, et. al., No. 64607, (Slip op., January 7, 1999)

- (ii) The net effect on streamflows and instream values must be neutral or positive. A reduction in streamflows during part of the year may be allowed if it is offset by an increase in streamflows during another time of year provided that the overall net effect on instream resources is positive. Ecology will consult with the state Department of Fish and Wildlife and other fishery and habitat managers as appropriate for assistance in making determinations related to effects on water bodies.
- (iii) Mitigation of any impacts to existing rights or streamflows is the responsibility of the party requesting the change. Mitigation proposals should be provided in writing as part of the application. Mitigation proposals may also be received after impacts to existing rights or instream flows are identified. The department will consider reasonable and credible mitigation proposals in accordance with existing law.
- (g) Limitations in the change of return flows: A change to a water right may not generally cause a reduction in return flow without a balancing reduction in the diverted or withdrawn water quantity. Any reduction in return flow may not impair another water right dependent upon that return flow or have an adverse effect to the receiving water source. This policy statement does not preclude the recapture and reuse of water by the original appropriator for authorized use(s).

The following are typical examples of return flows when water is used employing reasonably efficient practices:

- (1) Water applied to land in excess of the soil water holding capacity.
- (2) Water lost in conveyance that, if not intercepted, would return to a water source.
- (3) Water discharged at the end of a diversion system that, if not intercepted, would return to a water source.
- (4) Water discharged as operational spill(s) that, if not intercepted, would return to a water source.
- (5) Water that is used for fish by-pass purposes.
- (6) Effluent from a sewage treatment system that has historically been discharged to a fresh water body.

5. Changes, if approved, may include conditions.

Conditions to ensure that the beneficial water use continues to be exercised in water quantities not greater than those historically perfected and reasonably necessary, without

an increase in annual consumptive quantity, and without impairment of existing rights or detriment to the public interest may be placed upon any approval of a change. Conditions may include, as appropriate, metering requirements, limitations in season of use, instream flow protection requirements, limitations on the crops to be grown, or specifications for system design and/or operation.

6. Mitigation.

The department must consider an applicant's proposals to mitigate adverse effects on other water rights, streamflows, and/or the public interest if submitted prior to the issuance of a decision.<sup>10</sup>

7. A Report of Examination will document the investigation and an order shall document the decision and authorize the change to occur if approved.

The department will consider and address in a report of examination, as appropriate, at least the following:

- (a) A description of the water right proposed for change or transfer and the tentative determination as to the validity and quantification of right(s), together with a description of the historical/water use information that was considered;
- (b) A description of any protests, objections or comments including comments provided by other agencies, Indian Tribes, or interested parties and the department's analysis of each issue raised.
- (c) A discussion explaining compliance with the State Environmental Policy Act.
- (d) An analysis of the effect of the proposed change or transfer on other water rights, pending applications, and instream flows established under state law;
- (e) A narrative description of any other water rights or other water uses associated with either the right as currently authorized or the right as proposed to be changed and an explanation of how those other rights or uses will be exercised in harmony with the right proposed to be changed;
- (f) An analysis of the effect of the transfer on the public interest;
- (g) Any recommendation or conclusion that an existing water right or portion of a water right has been forfeited due to non-use;
- (h) A description of the results of any geologic/hydrologic investigations that were considered;

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<sup>10</sup> See Department of Ecology v. Theodoratus, No. 64527-2, (Slip Op., July 2, 1998)

- (i) A list of conclusions drawn from the information related to the transfer proposal and a complete description of the department's decision;
- (j) Conditions and limitations recommended for placement on an approval or other corrective action necessary to maintain the water use in compliance with state laws or rules;
- (k) A description of any requirement to mitigate adverse effects on other water rights, the water source, or the public interest;
- (l) A schedule for development and completion of the change or transfer if approved in part or in whole, that includes a definite date for completion of the change and the application of water to authorized beneficial use.

An order documenting the decision of the department shall be issued with the Report of Examination. If the proposed change is approved, the order represents authority to proceed with the change under the conditions and as provided within the decision and Report of Examination.

8. Documentation of a completed authorized change or transfer.

The appropriate document certifying that the change or transfer was accomplished as authorized shall not be issued until the change or transfer has been physically completed and water fully put to use to the extent necessary in accordance with the authorization<sup>11</sup>. See PRO-1000 for guidance concerning the documentation of a completed change or transfer of a water right.

/s/ Keith E. Phillips

Keith Phillips

Water Resources Program Manager

**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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<sup>11</sup> See Procedure PRO-1000.

POLICY FOR THE EVALUATION OF CHANGES TO ENABLE IRRIGATION OF  
ADDITIONAL ACREAGE OR THE ADDITION OF NEW PURPOSES OF USE TO EXISTING  
WATER RIGHTS

Resource Contact: Policy and Planning Section

Effective Date: 07/12/04

Revised: 2/8/06

References: RCW 90.03.380(1); RCW 90.44.100; GUID-1210.

Purpose: To document generally applicable procedures that the Department of Ecology will use in reviewing water right change applications pursuant to RCW 90.03.380(1) that enable irrigation of additional acreage or the addition of new purposes of use to existing water rights.

Applications to change a water right may be approved if the following conditions apply:

- There will be no increase in annual consumptive quantity (ACQ).
- There will be no impairment of other water rights.

Application: This policy and the procedures below apply to change applications involving the addition of irrigated lands or new purposes to a water right.

- Ecology interprets the "addition of new uses" under RCW 90.03.380(1) to mean the addition of a previously unauthorized purpose(s) of use, while retaining an existing purpose of use. If an existing purpose of use will not be retained, changing a water right to one or more new purposes of use does not trigger an annual consumptive quantity determination.<sup>1</sup>
- Acres may be added to partially perfected groundwater irrigation permits through a change in manner of use under RCW 90.44.100, so long as the permit is good standing based on the criteria in RCW 90.03.320 and as long as the ACQ is not exceeded for the perfected portion of the permit and the acres being added. The undeveloped acreage may continue to be developed consistent with the schedule approved by Ecology. Changes to add purposes of use to groundwater permits can only be authorized following perfection of the permit because it alters the intent of the original project which is prohibited (e.g. R.D. Merrill Co. v. PCHB). Changes triggering ACQ for surface permits can only be authorized following perfection of the permit as required under RCW 90.03.380.

This policy supplements:

- POL-1200, Policy for the Evaluation of Changes or Transfers to Water Rights.

<sup>1</sup>POL 1070 allows Ecology to recognize the agreed division of a water right where multiple land owners own land to which the water right is appurtenant. Where Ecology has recognized such a division and a change is filed on a portion of the original right, the permit writer only performs an ACQ evaluation on the portion of the original right proposed for change and only if such an evaluation is required by statute as described herein.

- Procedure PRO-1210 Calculating and Applying the Annual Consumptive Quantity (ACQ)

**Procedures to evaluate applications to change a point of diversion are not contained in this policy. This policy supersedes any previous policy statement with which it conflicts.**

Definitions: The following definitions are intended within this policy:

- "Annual Consumptive Quantity" means the estimated or actual annual amount of water diverted pursuant to the water right, reduced by the estimated annual amount of return flows, averaged over the two years of greatest use within the most recent five-year period of continuous beneficial use of the water right.
- "Diversion" means to divert water from one course to another. Diversion, when used without qualification, includes the diversion of surface water and the withdrawal of ground water.
- "Return Flows" means waters that, after having been diverted for a beneficial use, escape control of the water right holder and return to a public water body. Return flows may include, for example, waters lost through conveyance systems inefficiency or waters used for a beneficial purpose that are not fully consumed by the purpose of use.

Evaluation:

- 1) The application process to add irrigated acres or the addition of new purposes of use is the same as for any other change proposal, but it also includes additional steps, noted below.
  - a) The applicant uses Ecology's standard application for change of water right form and the change is processed in accordance with Procedure PRO-1000 and other applicable rules and policies.
  - b) Ecology evaluates the application in accordance with Policy POL-1200, general change policies, in addition to this policy, and PRO-1210.
- 2) Calculate the amount of water available to irrigate additional acres or to add the new purpose(s) of use(s). This calculation should include the following elements of water use:
  - a) The annual quantity of water authorized for use under the water right
  - b) The amount of water put to beneficial use
  - c) The estimated return flow
  - d) The annual consumptive quantity<sup>2</sup>
- 3) Determine the extent and validity of the right proposed for change, including whether the right has been:
  - a) Beneficially used
  - b) Relinquished
  - c) Abandoned.

<sup>2</sup> e.g., Water that is transpired by plants at the place of use, water that escapes from a reasonably efficient conveyance system or from the place of use but does not become return flows and water that is contained within a product or within a production byproduct.

4) Determine the annual consumptive quantity by following these steps:

- a) Determine the annual quantity of water diverted or withdrawn for each of the five years of continuous beneficial water use, taking into consideration the following types of data:
  - Measurement data
  - Evaluation of existing records
  - Estimation (see PRO – 1210).
- b) Verify that the annual quantity determined as diverted or withdrawn in any year does not exceed the maximum quantity of the authorized water right for the purposes of determining the annual consumptive quantity.
- c) Determine the return flow from each of the five years, then subtract the return flow for each year from the corresponding total annual quantity of water diverted or withdrawn. This represents the consumptive use for each of the five years.
- d) Select the two highest years of consumptive water use and average the two highest years (See PRO-1210). This is the annual consumptive quantity defined in RCW 90.03.380.
- e) Review the proposed project's consumptive use to determine its feasibility within the limits of the determined annual consumptive quantity.
  - Historic use may be used to estimate future use if the manner and extent of that use will remain unchanged. Any changes to a portion of that use should be evaluated for potential effects on the use as a whole. The consumptive portion of elements that are changed may be estimated in accordance with PRO-1210.
  - The estimated annual consumptive use for the new or expanded uses is the sum of existing unchanged uses, existing changed uses, and new or expanded uses. This use cannot exceed the annual consumptive quantity of the existing water right.

5) A decision approving a change must include:

- a) A determination of the extent and validity of the right;
- b) A finding that no other rights will be impaired;
- c) Limitations to ensure that the annual consumptive quantity is not exceeded as a result of the change;
- d) Metering provisions to verify compliance with the terms of the changed right.

  
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Ken Slattery  
Program Manager  
Water Resources Program

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**POLICY FOR IMPLEMENTING THE CONSOLIDATION OF RIGHTS FOR EXEMPT GROUND WATER WITHDRAWALS**

Resource Contact: Policy and Planning Section

Effective Date: 01/11/99

Revised: NEW

References: Chapter 446, Laws of 1997 (SSB 5785), Consolidation of exempt ground water rights. Now codified as RCW 90.44.105.

Purpose: To establish procedures the Department of Ecology (Ecology) will use to assist ground water right certificate and permit holders seeking to consolidate that right with a right or rights established under the ground water exemption in complying with Chapter 446, Laws of 1997.

Application: These procedures apply to all holders of water right permits and certificates of ground water right issued pursuant to chapter 90.44 RCW.

1. Amendment of a ground water right permit or certificate

Any person that holds a valid right to withdraw public ground waters may, with Ecology's approval, consolidate that right with one or more rights established under the exemption from the water right permitting process specified in RCW 90.44.050 without affecting the priority of any of the water rights being consolidated provided the statutory criteria specified in RCW 90.44.105 are satisfied. This process may be in lieu of the ground water right amendment process specified in RCW 90.44.100.

2. Application to Ecology

Any person seeking to consolidate a valid right to withdraw public ground waters with a right established under the ground water exemption must first make application to Ecology. The application must be filed on a change of water right application form provided by Ecology.

3. Ecology review of application, publication, and comment period

Ecology will review the application in the same manner as it does other applications for change. Once Ecology has all the necessary information and prior to Ecology making a determination on an application for such a consolidation amendment, the applicant seeking the consolidation must publish notice of the application in a newspaper of general circulation in the county or counties in which the well or wells for the right or rights to be consolidated are located. Preparation of the notice must be in compliance with the provisions of RCW 90.03.280. The notice must then be published once a week for two consecutive weeks. The applicant is responsible for providing evidence of the publication of the notice to the department. The comment period will be for thirty (30) days beginning on the date the second notice is published.

4. Basis for determination on proposed consolidation

Ecology will only issue a consolidation amendment after determining that, in lieu of meeting the conditions required for an amendment under RCW 90.44.100:

- a. The well from which water for the right established under the exemption is withdrawn taps the same body of public ground water as the well for the valid right to withdraw public ground waters;
- b. The applicant has made suitable arrangements to discontinue use of the well established under the exemption upon approval of the consolidation amendment to the permit or certificate;
- c. The applicant has made arrangements to properly decommission the well or wells using rights established under the exemption in accordance with Chapter 18.104 RCW and relevant Ecology rules;
- d. The applicant has entered into legally enforceable agreements, such as property title notes or locally-adopted ordinances, that bind present and future owners of the land through appropriate title limitations that prohibit the construction of another well or wells to serve the area previously served by the right established under the exemption; and
- e. Other existing rights, including ground and surface water rights and minimum stream flows adopted by rule, will not be impaired as a result of the consolidation.

5. Quantification of the right or rights to be consolidated

The maximum amount of water that can be consolidated from any right established under the exemption is that amount beneficially used by that water user, not to exceed 5000 gallons per day. Ecology will use the following procedure to determine the amount of water to be added to the applicant's permit or certificate once the use established under the exemption is discontinued:

- a. The amount will be the average withdrawal from the well, in gallons per day, for the most recent five-year period preceding the date of the application if the applicant has submitted credible supporting evidence and established that the amount used is consistent with the average amount of water used for similar use or uses in the general area in which the exempted use is located. Ecology will not use that amount if it finds:
  - (i) Credible evidence of nonuse of the well during the required period, or
  - (ii) Credible evidence that the exempted use of water or the intensity of the use of the land supported by water from the exempted use is substantially different than such uses in the general area in which the source is located.

- b. If credible evidence in support of the above amount is lacking, the amount will be eight hundred gallons per day for each residential connection, up to a maximum of five thousand gallons per day, or, in the alternative, an amount to be established by Ecology, in consultation with the Washington State Department of Health, that is reflective of average household and small-area landscaping water uses in that region of the state.

6. Presumption for approval

Ecology will accord a presumption favoring approval of a proposed consolidation if the requirements above are met and the discontinuance of the exempt use is consistent with one or more of the following:

- a. An adopted coordinated water system plan under chapter 70.116 RCW,
- b. An adopted comprehensive land use plan under chapter 36.70A RCW, or
- c. Another comprehensive watershed management plan applicable to the area containing an objective of decreasing the number of existing and newly developed small ground water withdrawals.

7. Prioritization of applications for consolidation

Ecology will make reviewing and deciding upon applications for consolidation of rights established using the ground water exemption a priority and will make decisions on consolidation applications within sixty days of whichever of the following events is later:

- a. The end of the comment period following publication of the notice by the applicant, or
- b. The date on which compliance with the state environmental policy act is completed.

The applicant and Ecology may extend the time for making a decision by prior mutual agreement.

8. Ecology procedures for consolidation, applicant's showing of compliance, and recording fees.

Ecology will, upon making a determination that the proposed consolidation meets the statutory criteria specified in RCW 90.44.105, prepare the appropriate superseding documents effecting the consolidation. Prior to Ecology's issuance of a superseding permit or certificate, the permittee or certificate holder must show compliance by submitting to Ecology a water well report from a licensed well contractor verifying that the well or wells for which the rights have been consolidated have been properly decommissioned.

The applicant may need to pay fees for the issuance of superseding documents. Fees payable to Ecology are set in RCW 90.03.470. Fees payable to the County Auditor for the recording of documents are specified in RCW 36.18.010.

9. Ecology response to showing of compliance

Ecology will issue a Report of Examination that summarizes its determinations pertaining to the consolidations. Based upon that Report of Examination, Ecology will send the applicant a superseding document reflecting the consolidation of that right with the right or rights established under the exemption. If the superseding document is a certificate, Ecology will forward the superseding certificate to the appropriate County Auditor for recording.

Ecology will revise its records to reflect the consolidation. The superseding right will reflect the different priority dates for those rights that have been consolidated. For each right to be consolidated, Ecology will assign as the priority date the date of first occupancy of the residence unless provided with compelling information that actual use of water commenced at an different date, in which case that date will be assigned as the priority date. The annual quantity for the superseding right will be increased by the amount of water determined to be used per day multiplied by the number of days per year the right had been used. The period of use for the irrigation component of any right established under the exemption will be considered to be from April 1 to October 31 of the year. The increase, if any, to the withdrawal rate for the superseding right will be based upon an evaluation by Ecology of the patterns of pumping and water usage from the wells for which the rights are being consolidated.

/s/ Keith E. Phillips

Keith E. Phillips  
Program Manager  
Water Resources Program

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# Water Quality, Water Resources, and Shorelands & Environmental Assistance Programs Joint Policy

## *Chapter 1*

*WQP Policy 1-28*  
*WRP Policy 1255*

*Resource Contacts:* WQP-Susan Braley  
WRP-Chris Maynard, SEA-Loree' Randall

*Effective:* August, 2010

*Revised:*

*References:* RCW 90.48.260, 90.22,  
90.54.020, 90.56

## **Roles and Responsibilities for Federal Energy Regulatory Commission (FERC) Hydropower Projects**

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Purpose:	Provide agreed-upon policy, protocols, and procedures between Ecology program staff that take part in the 401 certification process for FERC hydropower projects.
Application:	Review and approval of hydropower project 401 certification applications and implementation of 401 certifications to ensure that project will comply with applicable provisions of the state and federal law.

### **1. Background**

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Applicants for a federal license or permit that may result in a discharge to navigable waters must submit to the federal permitting agency a certification from the state that the discharge will comply with state water quality standards and other applicable requirements of state law [Section 401 of the federal Clean Water Act (CWA)]. The Legislature has designated the Department of Ecology (Ecology) to issue this certification (RCW 90.48.260).

Examples of applicable state laws include:

- State Water Pollution Control Act – Chapter 90.48 RCW
- State Water Quality Standards – Chapter 172-201A WAC
- Minimum Flows and Levels Act – Chapter 90.22 RCW
- Water Resources Act – Chapter 90.54.020 RCW
- Discharge of Oil – Chapter 90.56 RCW

Hydropower projects seeking a license from FERC must obtain a Section 401 Water Quality Certification (401 Certification) from the state before FERC can issue a licensing decision. In addition to the CWA requirements, other state laws and authorizations may also pertain to FERC hydropower projects and must be complied with:

- Washington Water Code – Chapter 90.03 RCW
- Washington Coastal Zone Management (CZM) Program
- State Environmental Policy Act (SEPA)
- Shoreline Management Act (SMA)

In 2007, the state Legislature amended RCW 90.16.050 to increase the annual fees for a hydropower license (Chapter 286 of the laws of 2007). The legislation provided authorization to the Washington Department of Fish & Wildlife (WDFW) and Ecology to spend these funds to provide reasonable and necessary oversight of FERC-issued hydroelectric project licenses. In addition, the statute now requires a biennial report that the Legislature will use to consider extending this fee structure when it sunsets in 2017.

Water power license fees provide funding for:

- Water Quality Program taking part in the FERC relicensing process, negotiating and implementing the 401 Certification conditions (2.0 FTE);
- Water Resources Program producing and assessing in-stream flow studies, determining in-stream flow requirements for 401 Certifications, and implementation (0.5 FTE).
- WDFW assisting in developing and implementing 401 Certifications by providing technical fish and aquatic habitat expertise, including instream flow modeling and evaluation (2.3 FTE).

## **2. Ecology Program Responsibilities with FERC**

The Water Quality (WQ), Shorelands and Environmental Assistance (SEA), and Water Resources (WR) programs have responsibilities related to FERC hydropower 401 Certifications for constructing, re-licensing, and decommissioning hydropower facilities.

FERC processes (preliminary reviews, pilot projects, licensing, exemptions, amendments to licenses, and relicensing) are coordinated at Ecology's regional level, with program staff at headquarters providing technical assistance and support as needed. The regional FERC hydropower project team includes the principal decision maker who will sign the 401 Certification, the contact person, and specialists from the various programs.

Once the applicant has filed for a preliminary permit with FERC, designated regional program staff will ensure that all the other programs receive notification of the filing.

Specific responsibilities of each program are described in the sections below.

### ***Water Quality (WQ) Program***

- The WQ Program is responsible for issuing 401 Certifications for FERC hydropower projects involving dams,<sup>1</sup> including decommissioning, to ensure that water quality standards will be met. This includes developing and issuing the 401 Certification and any amendments, and coordinating with other relevant program staff.
- The WQ Program manages and regulates activities that may impact water quality to ensure that the water body's "designated uses" are met, such as aquatic life uses, primary and secondary contact recreation, water supply, aesthetics, and navigation.
- The WQ Program is responsible for oversight and coordination efforts on FERC projects to ensure that the hydropower fees are being spent in accordance with the 2007 legislation. This includes:
  - Overseeing the contract with WDFW to conduct FERC work paid for through the hydropower fees.
  - Coordinating with WR and WDFW on the biennial report to the Legislature on Water Power License Fees.
  - Performing other coordination duties required for information sharing, improving coordination between agency staff and industry, and resolving conflicts.

### ***Shorelands and Environmental Assistance (SEA) Program***

- SEA Program staff have lead responsibility for issuing 401 Certifications for all FERC hydropower energy projects that are not dams.<sup>2</sup> This includes developing and issuing the 401 Certification and any amendments, and coordinating with the other relevant program staff.
- The SEA Program is responsible for CZM Federal Consistency decisions if needed for all types of FERC hydropower projects.
- SEA Program staff will provide any needed technical assistance regarding SEPA, SMA, and wetlands issues.

### ***Water Resources (WR) Program***

- The WR Program evaluates and establishes instream flows as part of the 401 Certification and settlement agreement development and implementation.

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<sup>1</sup> These projects are typically defined as major hydropower dams impounding over 10 acre feet of water or that generate greater than fifty horsepower (hp).

<sup>2</sup> Examples of projects not considered a dam include tidal power and fresh water micro-hydrokinetic applications. These involve slower-moving turbines or other devices placed in tidal currents and in rivers, below dams, and in irrigation canals.

- The WR Program issues water right permits for use of surface waters to store and use such waters for power production (Washington Water Code 90.03 RCW).
- The WR Program collects and tracks hydropower license fees.

### **3. Initial Contact for new Hydropower Projects**

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Prior to the preliminary permit stage for FERC hydropower projects, interested applicants will be directed to the Office of Regulatory Assistance Information Center (ORA IC) to determine what permits and/or authorizations the applicant would need for its project. ORA IC staff will direct the applicant to the appropriate program staff for further assistance based on project-specific needs.

### **4. Protocols for Ecology Program Involvement in FERC Hydropower Projects**

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The issuance of a 401 Certification for a FERC hydropower project should include all aspects of the project scope, not just for operation of the dam. For example, anticipated needs for future in-water work requiring a CWA 404 permit from the Corps of Engineers should be built into the 401 Certification issued for the FERC License. This eliminates the need to amend the 401 Certification later.

Below are established roles of the three Ecology programs for processing 401 Certification applications for FERC hydropower projects. Program Managers may make exceptions to these assigned responsibilities for more complex projects.

- The WQ regional section manager signs and issues the 401 Certification and assigns a regional WQ staff person to be the 401 Coordinator for hydropower projects with dams.
- The SEA regional section manager signs and issues 401 Certifications and assigns a regional SEA staff person to be the 401 Coordinator for hydropower projects that are not dams.
- The project 401 Coordinator is the lead point of contact for issues having to do with the 401 Certification. Other Ecology staff working on technical project issues should include the project 401 Coordinator in any communications with the applicant.
- The project 401 Coordinator consults within the agency and with other state agencies to ensure compliance with the water quality standards and other water quality-related laws.
- Staff members in the Watershed Management Section of the WQ Program provide technical assistance and support to the regional project 401 Coordinator on water quality standards issues.
- Regional SEA staff members provide technical expertise and support on any issues involving CZM decisions, SEPA decisions, SMA, and wetlands issues.

- Regional WR staff members provide technical expertise and support on water rights issues in relation to the 401 Certification.
- Headquarters WR staff evaluate and define minimum instream flows. This includes water right applications after consulting with WDFW, tribes, and others as necessary; and negotiations to establish instream flows for FERC processes including licensing, exemptions to licenses, and oversight of operating conditions.
- The project 401 coordinator drafts the 401 Certification and works with other staff to determine conditions in the 401 Certification.

## **5. Conflict Resolution**

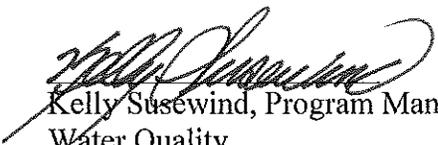
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The project 401 coordinator is responsible for resolving conflicting issues at the staff level that will lead to conditions in the 401 Certification. If agreement cannot be reached, the following conflict resolution process will be employed to resolve any conflicts:

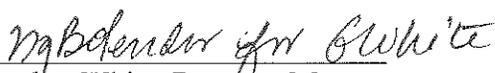
- Issues between programs that cannot be resolved at the staff level will be elevated to the appropriate regional section managers.
- Issues that cannot be resolved at the section level will be elevated to the Regional Management Team (RMT), including the Regional Director as appropriate. The RMT will work with appropriate regional and headquarters staff to fully understand the conflicting issue, and options to reach resolution.
- Program staff should clearly state any questions regarding legal authority to RMT so that, if needed, the attorney general's office can provide advice to resolve issues.
- If conflicts cannot be resolved at the regional level, then the relevant program managers will decide on a path forward.
- Ultimately, the Deputy Director will make the final decision where programs cannot agree on a final resolution.

## **6. Program Management Approval**

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 Kelly Sussewind, Program Manager  
 Water Quality

  
 Ken Slattery, Program Manager  
 Water Resources

  
 Gordon White, Program Manager  
 Shorelands and Environmental Assistance

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**POLICY TO REPLACE AN EXISTING WELL OR TO ADD AN ADDITIONAL WELL(S)**

Resource Contact: Policy and Planning Section

Effective Date: 09/30/99

Revised: NEW

References: Chapter 316, Session Law of 1997 (ESHB 2013, 1997 Regular Session) related to full and complete development of existing ground water right permits or certificates codified at RCW 90.44.100(3).

Purpose: To assist water right permit or certificate holders in complying with Chapter 316, Session Laws of 1997 and to state how Ecology will administer the law.

Applicability: To replace an existing well(s) or to add an additional well(s) to water right permits or certificates issued pursuant to chapter 90.44 RCW.

1. How can a ground water right permit or certificate be amended?

The ground water code provides the holder of a valid statutory water right permit or certificate two different ways to obtain an amendment to their water right permit or certificate to replace or add an additional well. The two different ways are:

- a. The water right permit or certificate holder may file an application for change of water right in accordance with RCW 90.44.100, or
- b. In certain circumstances, an amendment is statutorily granted (an application for change of water right is not required) upon a showing of compliance with RCW 90.44.100(3).

2. What is a Showing of Compliance with RCW 90.44.100(3)?

The showing of compliance documents the additional or replacement well(s) (see 3(a) through 3(g) of this policy statement) complies with the law regarding water rights and well construction requirements (See chapter 18.104 RCW and chapter 173-160 WAC).

An affidavit, with supporting information, signed by the water right permit or certificate holder and filed with the Department of Ecology's regional office would constitute a showing of compliance. See chapter 173-152 WAC for a description of the geographic areas served by each region.

3. How can a water right permit or certificate holder show compliance with RCW 90.44.100(3)?

A water right permit or certificate holder can show compliance with RCW 90.44.100(3) by sending a written affidavit to Ecology that identifies the water right permit or certificate proposed for amendment and addresses those attributes of the water right or well required by law to be the same for the new well(s) as the original well. The affidavit must document the instantaneous and annual use of water pursuant to the right from initial perfection of the right through the present. (Water rights are established by the actual application of water to a beneficial use.) In addition, the affidavit must include information about the well(s) constructed pursuant to the right, including the location (by Section, Township, Range); diameter and depth of the well(s); the length and position (in feet below land surface) and commercial specifications of all casing; static water elevation; and the length of screening and perforated zone in the casing for the well(s) to be replaced or that additional well(s) will be added to. The affidavit must verify that:

- a. The new well(s) or replacement well(s) taps the same body of public ground water as the original well(s);
- b. In the case of a replacement well(s), the use of the original well(s) has been discontinued and the original well(s) has been properly decommissioned as required under chapter 18.104 RCW and chapter 173-160 WAC;
- c. The combined withdrawal of water from a replacement well(s) or from a new additional well(s) and the original well(s) authorized by the water right certificate or permit has not enlarged the valid water right conveyed by the original water right certificate or permit to the extent it (the certificate) has been developed. In asserting the amendment will not enlarge a valid water right, meter data or other information demonstrating the use of water should be provided;
- d. The use of the new or replacement well(s) does not interfere with or impair water rights with an earlier priority date;
- e. The new or replacement well(s) is located no closer than the original well(s) to a well(s) or surface water body it might interfere with;
- f. The well(s) construction meets all construction requirements contained in the original water right including but not limited to depth, casing, sealing, and also shall be in compliance with chapter 18.104 RCW and chapter 173-160 WAC; and
- g. The new or replacement well(s) is located within the area described as the point of withdrawal in the public notice published for the original application for water right, or the most current published legal description in the file.

4. Does Ecology have a recommended format for a showing of compliance?

Yes. Ecology has a form entitled "Showing of Compliance with RCW 90.44.100(3)," the form has the number [ECY 040-74](#). You are not required to use the form. However, the statute requires the same information (as requested by the form) be submitted to Ecology to demonstrate compliance.

5. What will Ecology do in response to a showing of compliance?

If the showing of compliance conforms with the law, Ecology will make the affidavit attesting to compliance with RCW 90.44.100(3) a part of Ecology's public record associated with the water right permit or certificate. No superseding water right certificate will be issued to the certificate holder, because Ecology will not have evaluated the validity of the information supplied by the certificate holder or the historical development under the asserted right. A superseding permit will be issued to the holder of a water right permit who amends a permit pursuant to RCW 90.44.100(3).

If the showing of compliance does not appear to conform with the law, Ecology will return the affidavit along with an explanation of why the affidavit does not appear to comply with the law. The project proponent can clarify or change the affidavit and resubmit the affidavit to Ecology.

6. Can a water right permit or certificate holder request technical assistance from Ecology to show compliance with RCW 90.44.100(3)?

Yes. At the discretion of a person seeking to amend a water right permit or certificate pursuant to RCW 90.44.100(3), a written request for technical assistance in order to comply with the law may be filed with Ecology's regional office. See chapter 173-152 WAC for a description of the geographic areas served by each region. The written request for technical assistance should demonstrate why the water right permit or certificate holder believes a statutorily granted amendment under RCW 90.44.100(3) is appropriate and must provide supporting evidence (See RCW 90.44.100(3)(a) through RCW 90.44.100(3)(g)).

7. What issues need to be addressed in the notice or request to Ecology for technical assistance?

The issues to address in the request for technical assistance are the same as those listed in 3(a) through 3(g) of this policy. The proponent must identify the water right permit or certificate proposed for amendment and then address each of the points in 3(a) through 3(g).

8. What will Ecology do in response to a request for technical assistance?

Ecology will review the information provided for the proposed new or replacement well(s) and will respond, either verbally or in writing, to the notification. Ecology's role in regard to technical assistance is to (a) advise, based on the information at hand, that it either does or does not appear the proposed amendment complies with the law and (b) specify the manner of well(s) construction if necessary to comply with the well construction statute (chapter 18.104 RCW). The burden to comply with the law rests with the water right permit or certificate holder asserting an amendment pursuant to RCW 90.44.100(3).

In providing technical assistance, Ecology will inform the proponent of the change that it can not advise as to whether the water right sought to be amended is valid. Any written correspondence will contain the following sentences: *Nothing in this correspondence should be construed by you as affirming the validity of any water right. Ecology is providing information as to whether or not the amendment appears to conform to the statutory mandates of RCW 90.44.100(3).*

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Keith E. Phillips  
Program Manager  
Water Resources Program

**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.

**POL-1280 WATER RESOURCES PROGRAM POLICY**

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

**CONTACT:** Policy and Planning Section Effective Date: 8/10/2009

**REFERENCES:** RCW 90.03.320, RCW 90.03.380, RCW 90.03.386, RCW 90.03.390, RCW 90.03.470, RCW 90.14.140, RCW 90.14.160 - 180, RCW 90.44.100, RCW 90.44.105, RCW 90.66.065, WAC 173-153-130, and WAC 173-153-160, POL 1050

**CASE LAW:** 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)  
Department of Ecology v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998)  
Merritt, et al. v. Ecology, PCHB Nos. 98-140, 98-202, 98-272 & 98-273 (1999)

**PURPOSES:** 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 guidance supersedes any previous Guidance, Policy, Interpretive Statement, Focus Sheet or other stated Ecology viewpoint with which it may conflict.

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## DEFINITIONS

These definitions apply to this policy:

**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 90.54.020. 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.

**Perfect 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 Change<sup>1</sup> reflects changes to a Water Right Claim or a prior Certificate of Change.

#### **AUTHORITY FOR CHANGE DEVELOPMENT SCHEDULES**

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. Theodoratus<sup>2</sup>) 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.

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<sup>1</sup> 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 part of an application for change investigation is not an adjudication of the claim.

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

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 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”.

### **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 90.44.100) 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 *de facto 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.
- 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.

#### 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 RCW 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. 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

Change development schedules for municipal<sup>3</sup> 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:

- 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.

#### 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.
- 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.

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<sup>3</sup> Similar considerations may also be appropriate for non-municipal domestic transfers.

## **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.

## **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 superceding 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 nonuse of the right is not excused, the original right may have been relinquished.

**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))<sup>4</sup>**

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 law<sup>5</sup>

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<sup>4</sup> See RCW 90.38 and RCW 90.42 for specific requirements for trust water.

<sup>5</sup> 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*, CITATION to Court of Appeals (2008), *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), *Wirrkala, et al. v. Ecology*, PCHB Nos. 94-171, 94-172, 94-173 & 94-174 (1994).

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.

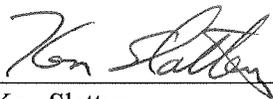
There are many types of projects with sufficient scope to qualify as a DFD, that would justify lengthy change development schedules. For example, developing water for municipal water supply purposes, commercial and industrial projects, resorts, power projects, large irrigation projects, and others may 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.<sup>6</sup>
- 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 and the conditions under which the holder may legally exercise the water right.



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Ken Slattery  
Program Manager  
Water Resources Program

**Special Note:** *These policies and procedures guide water resources program staff in administering laws and regulations, to ensure consistency. These policies and procedures are not formal administrative regulations adopted through a rule-making process. In some cases, the policies may not reflect later changes in statute or judicial findings, but they indicate Ecology'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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<sup>6</sup> City of Union Gap and ARBP v. Ecology, Court of Appeals, #26555-2-III (2009)

**DEFINING AND DELINEATION OF WATER SOURCES**

Contact: Policy and Planning Section

Effective Date: February 15, 2007

References: RCW 90.03.265, 90.03.290, 90.03.380, 90.03.390; RCW 90.44.020-030, 90.44.100, 90.44.105, 90.44.130, 90.44.400-430; RCW 90.46.130; RCW 90.54.020(9); Chapters 173-100, 173-150, 173-152 & 173-154 WAC

Purpose: To provide a consistent framework for determining the source of water in water resources permitting, rulemaking, and other administrative actions.

Application: Applies to Water Resources Staff<sup>1</sup> when evaluating:

- Surface water to surface water right transfer applications.
- Surface water to groundwater or groundwater to surface water right transfer applications.
- Whether a groundwater change proposing a replacement or additional well taps the *same body of public groundwater* under RCW 90.44.100.
- The boundaries of groundwater areas, sub-areas, or depth zones under the groundwater management provisions of Chapter 90.44.130 RCW, and Chapter 173-100 WAC.
- Which applications share the *same source of supply* for a cost-reimbursement agreement for expedited review under RCW 90.03.265.
- The number of competing applications within the *same water source or source of water* for processing under Chapter 173-152 WAC (Hillis Rule).
- Impairment of water rights within the *source of supply* for reclaimed water proposals under RCW 90.46.130.

**Background:**

The allocation and administration of water rights in Washington State is based on the Prior Appropriation Doctrine which holds that the “first in time is first in right.” Under this doctrine, holders of earlier (senior) water rights are able to use their full right before a junior right holder may use any water during periods of short supply. Seniority or priority is based on when the application for a water right was submitted to Ecology, or in the case of vested water rights, when water was first put to beneficial use.

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<sup>1</sup> This policy is intended for Ecology staff. Other consultants, local government or the general public who use this policy for guidance on Ecology source determinations should contact regional Ecology offices with inquiries about existing management of a particular source of water.

The priority of a water right has meaning only within the specific *water source*. For surface water rights, the state has historically defined the source as the stream or lake from which water is diverted. This can include one or more streams or other water bodies managed together. For groundwater, the source has been historically defined as the aquifer or aquifer system from which groundwater is withdrawn.

During much of the 20<sup>th</sup> century, Ecology and predecessor agencies managed surface water and groundwater separately. Eighty-two surface drainage systems (basins) in the state have been adjudicated since 1918 with varying consideration of groundwater. Similarly, in the last 30 years, Ecology has adopted numerous instream flow rules to protect aquatic resources, with varying consideration of groundwater in managing surface water. Increasingly though, the state has recognized that the two are connected and considered both surface water and groundwater together.

Hydrogeological science has long recognized that interactions between surface water and groundwater often indicate they should be treated as a single entity. This recognition was made law in Washington through the passage of the Water Resources Act of 1971 (Chapter 90.54 RCW). Chapter 90.54.020(9) RCW requires full recognition of the natural interactions between surface and ground waters in Ecology's administration of allocation and use programs.

As Washington State enters the 21<sup>st</sup> century, population growth and competing water interests have increased consideration of water source interactions, including:

- Listing of threatened or endangered species has resulted in more applications to transfer surface water rights to groundwater.
- Implementation of more stringent surface water treatment standards has resulted in more applications by municipalities to transfer surface water rights to groundwater.
- Permitting of new groundwater rights and drilling of exempt groundwater wells has reduced surface water availability for senior water right holders.
- Aquifers in some areas of the state are declining, resulting in increased applications for change to other, usually deeper, aquifers.
- Some local watershed planning efforts have emphasized conjunctive management of surface and groundwater rights, while others have focused on developing instream flow rules to protect aquatic resources.
- Many adjudications have not included groundwater. This results in clarification of surface water rights but leaves the relative extent and priority of groundwater rights in question. This has been a barrier to managing the two together even when there is strong evidence showing it would be prudent.

Ecology finds itself in a transition period where its historic management efforts have been primarily associated with surface water rights. In the future, the need to manage groundwater will increase. In many basins, Ecology will need to manage surface water and groundwater together. Meanwhile, we must still make permitting decisions requiring source designations. Many of these are based on basic hydrogeology overlain by administrative or regulatory requirements. The purpose of this policy is to

describe how Ecology should define and delineate water sources for permitting and other decisions.

### Definitions:

*Conjunctive management:* A water resource management scheme in which surface water and groundwater in hydraulic connection are managed as a single source of water.

*Effective barrier to hydraulic flow:* Geologic or hydrologic features that substantially reduce or prevent the flow of water, including (1) Geological materials of sufficiently low permeability to effectively prevent the flow of water, (2) Topographic and hydrologic divides that direct water into independent flow regimes, and (3) Geological structural boundaries, such as faults and folds, which prevent the flow of water.

*Flow Regime:* The pattern in space and time of water flow, both underground (groundwater) and above ground (surface water).

*Groundwater body:* Water contained within geological materials that allow for storage and flow, with recognizable boundaries or effective barriers to hydraulic flow.

*Recharge area:* The geographical area from which a body of water draws its supply. Recharge areas include watersheds, sub-areas within a watershed, and groundwater catchment areas.

*Source of water:* Surface waters and/or groundwater in hydraulic connection, meeting the following four conditions:

1. They share a common recharge area.
2. They are part of a common flow regime.
3. They are separable from other water sources by effective barriers to hydraulic flow.
4. They are an independent water body for the purpose of water right administration, as determined by Ecology.

*Surface water body:* A stream, lake, wetland, spring or other water feature in which surface land features contain and direct the flow of water in contact with the atmosphere.

*Water right administration:* Refers to Ecology's authority regarding the allocation and management of water resources in the State of Washington. Includes, but is not limited to:

- The investigation, issuance, and enforcement of water rights.
- The establishment and enforcement of Instream Flow Rules and rules adopted through Watershed Plans.
- The management and enforcement of court issued adjudication decrees.

Typically, water right administration begins at the Water Resources Inventory Area (WRIA) level (first order), followed by major tributary river systems (second order), and then at the level of lesser tributary streams (third order).

## Determination of Source

### Who Makes Source Determinations?

Most source determinations require the application of geologic and hydrogeologic principles. Therefore, licensed hydrogeologists<sup>2</sup> should have primary responsibility in defining or designating sources of water. In some cases, other technical staff may be responsible for such analysis. Ecology's goal is to make technically sound, defensible and consistent permitting and other administrative decisions within the overall administrative framework present in a basin.

### When Are Source Determinations Required?

The following are seven primary permitting actions where Ecology has a statutory requirement to determine the extent of a source of supply.<sup>3</sup>

- Surface to Surface Transfers. Under RCW 90.03.380 points of diversion are to be transferred “without loss of priority” provided there is no impairment of existing rights. Retaining priority implies that both points use the same source of supply. If changing a water right reduces the water available to a junior water user during periods of low flow, such reduction is considered impairment. Ecology could deny such a change based on impairment. Alternatively, it may be possible to prevent impairment by making the priority date of the transferred water right junior, in whole or in part, to the impaired rights.
- Surface to Ground Transfers (or Ground to Surface Transfers). Ecology derives its authority to transfer diversion and withdrawal points between surface and groundwater bodies from RCW 90.03.380, 90.44.020-030, 90.44.100 and 90.54.020(9).

Adding wells under RCW 90.44.100 requires Ecology to make “findings as prescribed in the case of an original application.” This includes both the public interest and water availability tests. Water availability within the source was evaluated at the time the water right issued. However, local water availability within a large source can vary and must be considered in a surface water to groundwater change.

- Same Body of Public Groundwater: When adding wells to groundwater rights (RCW 90.44.100), or when consolidating exempt wells with an existing permit or certificate (RCW 90.44.105), the wells must draw from the *same body of public groundwater*. The same body test preserves the existing priority scheme. The priority system provides certainty to water users as they plan for their projects knowing the reliability of the water supply during times of shortage.

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<sup>2</sup> Licensed under Chapter 18.220 RCW and Chapter 308-15 WAC.

<sup>3</sup> Additionally, in the context of water system plan review, watershed planning, instream flow development and other water resource management efforts, Ecology may make source determinations.

- Groundwater Body Designation and Delineation: Chapter 90.44.130 RCW gives authority to Ecology to delineate the boundaries of groundwater bodies and to sub-divide these bodies into sub-areas and depth zones in order to protect senior appropriators. Similar authority for the designation and delineation of groundwater areas is found under Chapter 173-100 WAC. Chapters 173-150 and 173-154 WAC contain regulations for protecting groundwater withdrawals. These statutes and rules provide a mechanism for Ecology to define with certainty a particular source management scheme.
- Cost Reimbursement Proposals: Historically, Ecology had to work on applications for both new water rights and changes to existing water rights in the order they were filed. However, in the late 1990s, requests for new rights and transfers came in faster than Ecology could process them, creating a large backlog of pending applications.

In response, the Legislature passed several laws aimed at relieving this backlog. One statutory change authorized Ecology to consider transfer applications separately from applications for a new water right.<sup>4</sup> Another allowed applicants to seek faster review of their application through a cost-reimbursement agreement (RCW 90.03.265). This allows the applicant to expedite the processing of their application by paying the cost of processing all other earlier applications from the *same source of supply*.

- Chapter 173-152 WAC (aka Hillis Rule): Ecology adopted Chapter 173-152 WAC in 1998 to clarify, in part, its criteria for processing applications for new water rights and transfers.<sup>5</sup> The rule's intent is to provide for orderly processing of water right applications in the order filed, except for extraordinary situations. Ecology processes applications in the order they are received within the *same source of water*, subject to several exceptions. These exceptions allow for the priority processing of applications:
  - a. In the case of a new application when public health and safety is at risk, and where the change or transfer if approved would result in providing water supplies to meet the general needs of the public for regional areas.
  - b. In the case of a new application where a proposed use is nonconsumptive and if approved would substantially enhance or protect the quality of the natural environment, and where the change or transfer if approved would substantially enhance the quality of the natural environment.
  - c. Where changes or transfers were filed by participants in an adjudication and action on the change or transfer was necessary to ensure timely action by the Court.
- Impairment Determinations for Water Reclamation Projects: Reclaimed water is water that has historically been disposed of as waste, but is now treated to a higher water quality standard for use for a beneficial purpose. Reclaimed water may be from treated wastewater, agricultural industrial process water, and industrial reuse water.

The Legislature intended reclaimed water to be an alternative water source to offset potable water needs. However, exclusive right to the reclaimed water is only granted if no other

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<sup>4</sup> E.g., the “two-lines” bill, codified in RCW 90.03.380(5).

<sup>5</sup> This rule was adopted in response to the Supreme Court decision in *Hillis v. Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997).

water right would be impaired. This is possible if no one else has relied on the historic wastewater disposal, or if the water supply impacts are adequately compensated or mitigated. In order to assess whether existing water users will be impaired, a same *source of supply* determination must be made and then an analysis of impairment within that source of water completed.

### How Are Source Determinations Made (Management and Technical Considerations)?

Source determinations consider both management and technical issues. Regulatory, adjudicatory or planning decisions at the local level can affect source boundaries. Technical considerations are rooted in geology and hydrogeology. Both aspects include best professional judgment. In the technical arena, such judgment is founded in scientific principles. In the management arena, such judgment may reflect local values, or criteria set by a court, legislative body or regulatory agency.

#### *Water Right Administration Considerations*

Staff making source determinations must consider the existing management framework of the watershed or basin in which they are working. The following regulatory, adjudicatory and local management choices may affect permitting decisions:

- Water Right Adjudications: Adjudication by a superior court provides certainty to water right holders of the extent and validity of their water rights and their relative priority amongst other water rights from that source. Most of the adjudications completed in Washington State apply to small tributary streams where competition for the limited resource has been long-standing. Many adjudications only considered rights associated with a surface water source. Although increased withdrawal of groundwater in continuity with these streams unquestionably affects water availability for adjudicated surface water rights, the courts have created a regulatory structure for curtailment during times of water shortage only for the adjudicated rights. In time, groundwater also may be adjudicated and the management scheme altered. Until that occurs however, Ecology may only regulate amongst water users where certainty in priority is established to settle disputes or allegations of impairment.<sup>6</sup>

*The implications of an adjudicated water source on permitting actions is that source determinations tend to be narrower than what a purely technical deliberation might conclude, in order to ensure that senior water users are not impaired.* For example, if a junior adjudicated surface water right holder seeks to transfer a water right to a well, Ecology must conclude that the well could be regulated in the same manner as the surface diversion in order to approve the change without impairing existing rights. This management scheme may prevent a transfer that would otherwise be possible based solely on technical considerations.

Historically a call for curtailment of the junior water right would result in immediate curtailment of the surface diversion. If the same call at the proposed well site would result in

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<sup>6</sup> In the meantime, where disputes arise amongst water right holder where certainty in priority is not known, injured parties must seek a judicial remedy for relief (e.g. *Rettkowski v. Ecology*, 122 Wn.2d 219, 858 P.2d 232 1993).

continued impacts to the stream after ceasing the withdrawal, then these impacts act to the detriment of the senior water user.

- **Adoption of Instream Flow Rules:** Ecology is charged with protecting existing aquatic and natural resources for the benefit of the public. Ecology adopts instream flow rules designed to protect and preserve instream resources and values, including fisheries interests and recreation. An instream flow rule creates a water right with a priority date based on the effective date of the rule. Water rights issued after that date are subject to curtailment when the flow is not met. This is true even if the newly issued water rights are based on applications filed before the instream flow rule was adopted.

The presence of an instream flow rule in a basin is another water right administration consideration that can affect source determinations beyond what a purely technical deliberation might yield. *As in the case of an adjudicated basin, transfers from surface to groundwater of water rights junior to the instream flow must be limited to those instances where management of the water right during times of curtailment will not impair the instream flow.*

- **Adoption of Groundwater Area and Subarea Management Rules:** Several rules have been promulgated by Ecology under the authority of RCW 90.44.130 and Chapter 173-100 WAC, which establish groundwater management areas and subareas in many locations within the state. Numerous separate and distinct bodies of groundwater (i.e., sources) are designated within these rules. When making source determinations, these administratively defined groundwater bodies should be considered as separate sources in a manner similar to sources designated through Instream Flow Rules.
- **Adopted Watershed Plan Rules:** Local government has a significant role in shaping existing resource management and future water allocations through the Watershed Planning Act (Chapter 90.82 RCW). Each Water Resource Inventory Area (WRIA) plan must include a water budget. In this way, local government can influence future water resource decisions in their watershed. Ecology is a partner in this process. We provide technical and regulatory assistance as the plan is created, and later help implement planning recommendations. These can include rules that create reserves of water for future uses, establish instream flows, close streams or basins to new uses, and other measures.

Much like Ecology, local governments undertaking watershed plans are faced with determining how to allocate the remaining water resources while protecting existing water right holders. In this way, rules adopted to implement a watershed plan can affect Ecology's permitting decisions and source determinations. *For example, a rule adopted as part of a watershed plan recommending conjunctive management of the resource (surface water and groundwater aquifers together) may lead to broader source determinations than those based on adjudication.*

- **Other Water Right Administration Considerations:** Reservation of waters by the federal government, tribal reserved rights, interstate and international compacts, and other regulatory schemes can affect source determinations. Staff should become familiar with management issues in a particular basin before starting technical deliberations in defining a source of water.

## *Technical Considerations*

Once the management scheme of a particular area is known, qualified Ecology staff apply hydrogeologic principles in defining a source of water. All source determinations are made on the basis of best professional judgment by qualified staff and should be consistent with the management scheme adopted or set for the area. In the absence of an existing management scheme, staff shall make permitting decisions that will not impair existing rights.

Although each of the five source determination requirements addressed in this policy use slightly different language, they all are based on the concept of the *source of water* for the water right. A source of water is a body or bodies of water which:

- Are hydraulically connected.
- Share a common recharge (catchment) area.
- Share a common flow regime.
- Are isolated from other sources by the presence of effective barriers to hydraulic flow.

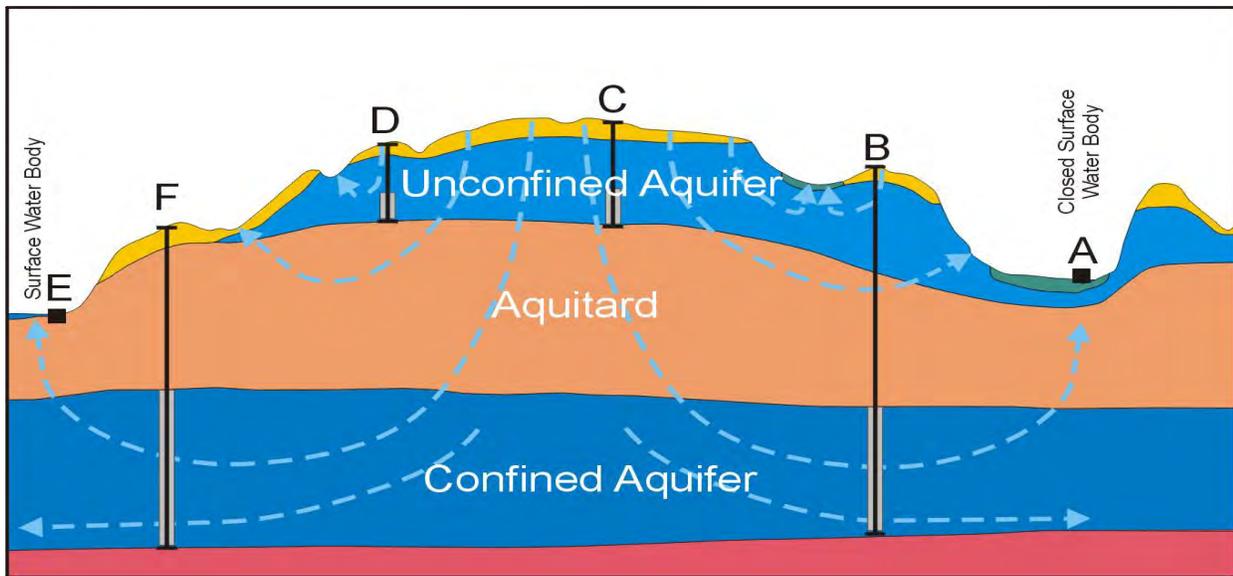
Staff base source of water determinations on sufficient information and data, which in their judgment is necessary to render a sound, defensible decision. They may consider area topography, mapping of geologic structures, well log information, water level measurements in the area, aquifer characteristics, and other factors. Ecology staff should refer to Water Resources Program Technical Guidance that provides a greater depth of technical detail for in defining and determining sources of water.

Additionally, the *Report of the Technical Advisory Committee on the Capture of Surface Water by Wells* (1998) and the *Procedural Guidelines for Hydrogeologic Investigations* (1993) may be useful in providing a technical foundation for source determinations. The types of technical information used in making a source designation can include hydrological and hydrogeological studies, reports, computer models, aquifer tests, and stream and groundwater hydrographs.

In instances where information on source is either not known or is unclear, Ecology can issue preliminary permits pursuant to RCW 90.03.290 (2) to gather more information before a source determination is made.

### **Implications of Source Management (Examples)**

The following examples are offered to instruct staff on how different source management choices can affect source determinations and permitting decisions. Consider the following illustration.



### Example 1

Assume in this example that conjunctive management of surface and groundwater supplies has been adopted at the basin level and the aquitard is not an effective barrier to groundwater flow. In this case, staff should consider the drawing as depicting two *sources of water*, separated in the center by a hydrologic divide (or other barrier to groundwater flow). The following permitting decisions might result from such a management scheme (assuming all other statutory tests for change are met):

- Surface water to groundwater changes from A to B or C may be permissible because they would be considered the same *source of water*.
- Surface water to groundwater changes from A to D or F are not permissible because they would be considered different *sources of water*.
- Because Well C is located near the hydrologic divide, best professional judgment is required to determine the source of water. Assuming it is in the source on the right-hand side of the illustration, Wells C and B are in the same body of public groundwater.
- Because of the hydrologic divide, Wells C and B are not in the same body of public groundwater as Wells D or F.
- Processing under Hillis or through cost reimbursement contracts must consider competing applications at A, B and C, but not at D, E or F.
- A proposed water reclamation project supplied by Well C and discharging wastewater at location A would consider the potential for impairment of existing water rights at A, B and C.

### Example 2

Using the same illustration, assume in this example that surface water has been adjudicated and instream flows adopted, and that the aquitard has been determined to be a barrier to groundwater flow. In this case, staff should consider the drawing as depicting four separate *sources of water*, separated in

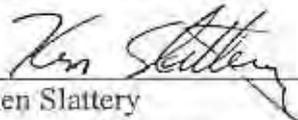
the center by a hydrologic divide (or other barrier to groundwater flow) and separated vertically by the aquitard. The following permitting decisions might result from such a management scheme (assuming all other statutory tests for change are met):

- Surface water to groundwater changes from A to C are permissible provided A can be managed in its historic manner. Generally, water rights senior in the adjudicated management scheme and senior to the instream flow can be moved further away from surface sources than junior water rights, because junior water rights are subject to immediate curtailment during times of water shortage.
- Surface water to groundwater changes from A to B are not permissible because they are not in the same *source of water*.
- Wells B and C are not in the same body of public groundwater.
- Processing under Hillis or through cost reimbursement contracts must consider competing applications at A and C, but not at B, and vice versa.
- A proposed water reclamation project supplied by Well C and discharging wastewater at location A would consider the potential for impairment of existing water rights at A and C.

### Summary

The management scheme in place can affect the size and number of sources of water for permitting decisions. In general, conjunctive management results in fewer, larger designated sources of water. As a result, more projects involving surface to ground transfers and same body of public groundwater determinations can be permitted. However, that same management choice can increase the number of applications considered in cost reimbursement agreements, and water rights in Hillis determinations and reclaimed water impairment analyses.

Conversely, a more highly regulated basin may result in more numerous, smaller sources of water. As a result, fewer projects involving surface to ground transfer and same body of public groundwater determinations are possible. Gains include needing to consider fewer applications in cost reimbursement agreements, and fewer water rights in Hillis determinations and reclaimed water impairment analyses.



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**WATER RIGHT PERMITS FOR FIRE FIGHTING OR PROTECTION.**

Contact: Policy and Planning Section

Effective Date: March 14, 2008

Revised: NEW

References:

RCW 43.21A; RCW 43.27A; RCW 76.04; RCW 90.03; RCW 90.44;  
WRP Policy POL-1045 Emergency Water Source Authorization

Purpose:

To guide program staff in defining water uses related to fire fighting and fire protection, and to provide guidance as to when a water right permit is required.

Application:

This policy is applicable statewide for:

- Determining permitting requirements for water uses associated with firefighting and fire protection.
- Providing general guidance to interpret existing water right records.

Nothing in this policy is intended to restrict access to water sources in emergency situations where loss of life or property is imminent.

Definitions:

**Fire Fighting Facility** means any building or place that provides fire fighting service and is used primarily for storing and maintaining fire fighting equipment and/or housing fire fighting personnel. Water may be used within the facility for training fire fighting personnel, and testing and maintaining fire fighting equipment.

**Fire Fighting Water Use** means the use of water to contain, suppress, and extinguish a fire which is an immediate threat to persons or property. It also includes the temporary use of water for drinking and sanitation by fire fighting personnel as needed during the act of fire suppression and extinguishment.

**Fire Protection** is a beneficial water use associated with the ongoing use of water to reduce fire risks. It includes irrigating buffer areas, storing water for fire use, and supplying fire hydrants within developments. Fire protection water use also includes the use of water within a fire fighting facility for training fire fighting personnel, and testing and maintaining fire fighting equipment.

## Policy

1. The diversion or withdrawal and use of water for containing, suppressing and extinguishing a fire is essential to the public welfare and **does not require** a water use authorization from the Department of Ecology. This includes the use of water from hydrants for fire fighting purposes, although the water system maintaining the hydrant may require a permit for other water use purposes.
2. The use of water for fire protection **requires** a water right.
  - a. Groundwater withdrawals of not more than 5,000 gallons per day, as authorized under the groundwater permit exemption, may be used to serve a fire fighting facility, or up to ½ acre of lawn or noncommercial garden may be irrigated as a buffer area for fire protection purposes (90.44.050 RCW).
  - b. Water use for fire fighting facilities and for fire protection purposes, if not a permit exempt use of water, require a water right. Any water right will be issued for “fire protection” as the beneficial use.
3. The use of water within a federal fire fighting facility located on federal land does not require a water right from the state if covered by a federal reserved water right associated with the federal land reservation.



Ken Slattery  
Program Manager  
Water Resource Program

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 Ecology’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 Ecology.

**PRIORITY PROCESSING OF HEAT PUMP APPLICATIONS**

- Contact: Policy and Planning Section Effective Date: May 14, 2007
- References: Chapters 90.03 and 90.44 RCW and Chapters 173-152, 173-200, and 173-218 WAC.
- Purpose: To guide program staff on the priority processing of applications for heat pump use under Chapter 173-152 WAC, and managing water use associated with heat pump systems.
- Application: This policy applies to all water right applications and applications for water right change or transfer related to heat pump use.

**Heat Pump Water Use Is a Beneficial Use:**

Using water to dissipate heat or as a source of heat is a beneficial use of water.

**Water Rights for Heat Pumps:**

A water right permit is required for heat pumps that use:

- Surface water.
- Groundwater in conjunction with single domestic, group domestic, or industrial uses of more than 5,000 gallons per day.

The 5,000-gallon per day threshold is not an average value. If groundwater use exceeds 5,000 gallons on any one day, a water right permit is required.

Applications for heat pump water use are assessed in the same manner as other water right requests. However, Ecology gives priority processing to applications that qualify under WAC 173-152-050(2) (b).

**Classification of Water Use:****A. Single domestic, group domestic, or industrial**

The use of water in a heat pump is “*single domestic*” if associated with a single residence.

The use of water in a heat pump is “*group domestic*” if associated with either a group of residences or as part of a group domestic use.

The use of water in a heat pump is “*industrial*” if associated with an industrial or commercial interest.

**B. Consumptive and Nonconsumptive**

Classification of water use in a heat pump shall be in agreement with “*POL-1020, Consumptive and Nonconsumptive Water Use.*”

Permits may require system configurations that ensure nonconsumptive water use in water-short regions or where a consumptive water right might impair existing water rights.

### Priority Processing of Applications for New Water Rights

If the proposed water use is nonconsumptive and if approved would substantially enhance or protect the quality of the natural environment, the application will be eligible for priority processing under Chapter 173-152-050(2)(b).

### Priority Processing of Applications for a Water Right Change or Transfer

If the change or transfer, if approved, would substantially enhance the quality of the natural environment, the application will be eligible for priority processing under Chapter 173-152-050(3)(a).

### Special Considerations for Groundwater ReInjection

Discharge to an aquifer other than the source aquifer is a consumptive use.

Ecology shall make any judgment as to the ability of the source aquifer to accept discharge water and not create wet areas through groundwater mounding.

An injection well shall be designed to accept discharge water in an efficient manner at the same rate of flow as produced by the source. The design will also consider the decreasing efficiency of the injection well over time.

### Coordination with the Water Quality Program

When Ecology or an applicant proposes injection or infiltration of groundwater used in a heat pump, the permit writer shall contact the Water Quality Program and ensure that the owner/operator has registered the proposed injection well (see Chapter 173-218 WAC).

Ecology's Underground Injection Control Program allows re-infiltration of return flows from heat pumps or air conditioners through registered injection wells to the source aquifer. The water may contain no new chemical or product, and must not impair beneficial uses of groundwater or surface water.



Ken Slattery  
Program Manager  
Water Resources Program

Special Note: *These policies and procedures ensure consistency by guiding Water Resources Program staff in the administration of laws and regulations. These policies and procedures are not formal regulations adopted through a rule-making process. In some cases, the policies may not reflect later changes in statutory law or judicial findings. Still, they reflect Ecology's practices and interpretations of laws and regulations at the time adopted. If you have any questions regarding this policy, please contact Ecology's Water Resources Program.*

WATER RESOURCES PROGRAM POLICY/INTERPRETIVE  
STATEMENT ON WHEN TO PERFORM A MAXIMUM NET  
BENEFITS ANALYSIS

Resource Contact: Policy & Planning Section

Effective Date: 1/31/05

Revised: NEW

References: Chapters 90.22, 90.54, 90.82 RCW; RCW 90.03.005; RCW 90.03.345

Purpose: To specify the circumstances under which the Department of Ecology (Ecology) will, and will not, perform maximum benefits analyses in conjunction with watershed planning, instream flow setting, water right permitting, and other program activities.

Application: This policy applies to all Water Resources Program activities, such as rulemaking to establish reservations of water, other rulemaking, watershed planning, instream flow setting, water right permitting, and other program activities.

Definitions: “Maximum net benefits” is defined in statute as “total benefits less costs including opportunities lost.”<sup>1</sup> This concept treats water as a valuable asset and, within the context of Washington’s present water allocation system, is intended to ensure that Washington citizens, as a whole, get as much value as possible from “the waters of the state.”

Background: The Water Resources Act of 1971, Chapter 90.54 RCW, declares certain fundamentals for using and managing state waters, including a list of uses that the Legislature has deemed beneficial (e.g. domestic, commercial, industrial, fish and wildlife maintenance, etc.). In addition, RCW 90.54.020(2) provides that

[a]llocation of waters among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state. Maximum net benefits shall constitute total benefits less costs including opportunities lost.

Other fundamentals, however, include the state’s duty to protect and enhance the rivers, streams, and lakes of the state,<sup>2</sup> and to ensure safe and adequate supplies of potable water to satisfy human domestic needs.<sup>3</sup> Generally, the state may not approve an allocation that would conflict with this mandate.<sup>4</sup> The state is not obligated to perform a maximum net benefits analysis in fulfilling this duty.

For rivers, streams and lakes, the specific requirements are as follows:

RCW 90.54.020(3) The quality of the natural environment shall be protected and, where possible, enhanced as follows:(a) Perennial rivers and streams of the state shall be retained with the base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their

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<sup>1</sup> RCW 90.54.020(2).

<sup>2</sup> RCW 90.54.020(3)(a)

<sup>3</sup> RCW 90.54.020(5)

<sup>4</sup> However, in “situations where it is clear that overriding considerations of the public interest will be served,” withdrawals of water that would conflict with these fundamentals may be authorized (RCW 90.54.020(3)(a)).

POLICY/INTERPRETIVE STATEMENT ON WHEN TO PERFORM A MAXIMUM BENEFITS ANALYSIS

natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.

(b) Waters of the state will be of high quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry. Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served.

For potable water supplies, the requirements are:

RCW 90.54.020(5) Adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs.

1. Ecology will implement the maximum net benefits provision solely in the context of rule-making associated with allocations of water and decisions to approve watershed plans that include reservations that allocate water. This includes:
  - a. Development of rules pursuant to RCW 90.54.050(1) to create a “reservation” for a particular use or uses other than for the purpose of satisfying human domestic needs;<sup>5</sup> and
  - b. Development of rules that would quantify the remaining water available for appropriation within a basin, particularly if the rule would tentatively commit a large quantity of water or a major share of the water resources of the basin, to future new appropriations.
  - c. Ecology’s approval of a watershed plan developed under RCW 90.82 that contains a reservation for a particular use or uses other than for the purpose of satisfying human domestic needs.
2. Ecology will *not* perform a maximum net benefits analysis in the following situations:
  - a. When considering an application for a new water right under RCW 90.03.290 or RCW 90.44.060, or an application for change, transfer or amendment under RCW 90.03.380 or RCW 90.44.100,
  - b. When water is appropriated (or retained) to provide for minimum water flow or levels or minimum instream flows under Chapters 90.22, 90.82 or 90.54 RCW. These water flows or levels can be established for instream flows (RCW 90.22.010) or for “stockwatering requirements” for other than

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<sup>5</sup> RCW 90.03.345 states, in part: “The establishment of reservations for water for agriculture, hydroelectric energy, municipal, industrial, and other beneficial uses under RCW 90.54.050(1)...shall constitute appropriations...with priority dates as of the effective dates of their establishment.”

POLICY/INTERPRETIVE STATEMENT ON WHEN TO PERFORM A MAXIMUM BENEFITS ANALYSIS

feedlots.<sup>6</sup> (RCW 90.22.040); and

- c. When parties use water under the groundwater exemption identified in 90.44.050. These uses include:

... any withdrawal of public ground waters for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand gallons a day...or for an industrial purpose in an amount not exceeding five thousand gallons a day ...

3. Ecology adopts this policy to explain how it will apply such an analysis in future rulemaking.

As Ecology gains experience in applying the analysis during rulemaking, it may determine that revisions to this policy are appropriate. In that case, it will make such revisions as it deems useful or necessary.

/s/ Joe Stohr  
Joe Stohr, Manager  
Water Resources Program

1/19/05  
Date

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<sup>6</sup> RCW 90.22.040 states, in part: "It shall be the policy of the state, and the department of Ecology...to retain sufficient minimum flows in streams, lakes or other public waters to satisfy stockwatering requirements for stock on riparian grazing lands which drink directly therefrom..." and: "The policy hereof shall not apply to stockwatering relating to feed lots and other activities which are not related to normal stockgrazing land uses."

**2003 Municipal Water Law Interpretive and Policy Statement**

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**Contact:** Program Development and Operations Support Section Effective Date: February 5, 2007  
Revised Date: May 7, 2012

**References:** Chapter 90.03 Revised Code of Washington

**Purpose:** To describe and provide interpretation of parts of the Municipal Water Law, and describe generally applicable procedures that the Department of Ecology (Ecology) will use in identifying and managing municipal water rights.

**Application:** This interpretive and policy statement is a review of the applicable sections of the state Water Code (Ch. 90.03 RCW) that were amended or added by the 2003 Municipal Water Law. The document describes how Ecology intends to apply the various sections of the law to municipal water rights and management.

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The 2003 Municipal Water Law (SECOND ENGROSSED SECOND SUBSTITUTE HOUSE BILL 1338; Chapter 5, Laws of 2003; 58th Legislature; 2003 1st Special Session; MUNICIPAL WATER SUPPLY--EFFICIENCY REQUIREMENTS) clarifies municipal water rights.  
[http://www.ecy.wa.gov/programs/wr/rights/Images/pdf/2E2SHB\\_1338.pdf](http://www.ecy.wa.gov/programs/wr/rights/Images/pdf/2E2SHB_1338.pdf)

Ecology has chosen to develop this Interpretive and Policy Statement (IPS) for carrying out the 2003 Municipal Water Law under the authority of the Administrative Procedure Act (RCW 34.05.230). This IPS clarifies the Department of Ecology's position and management approach for carrying out that law. This IPS supersedes earlier statements relating to the Municipal Water Law and has been issued subsequent to the Washington Supreme Court's decision in *Lummi Indian Nation v. State of Washington*, Washington Supreme Court No. 81809-6, which held that all sections of the Municipal Water Law are constitutional on their face, and thus valid and operative.

This document's primary audience is those interested in, and affected by, management of water rights for municipal supply purposes. It clarifies Ecology's approach in interpreting and implementing the law. It enables Ecology staff to have a common understanding and consistency of application.

Wherever possible, Ecology's goal is to be consistent in review and decisions on municipal water supply issues. While the following statements address many situations, exceptions based on case-by-case review may arise that do not conform to these statements. This interpretive and policy statement interprets the 2003 Municipal Water Law but is not a formal rule adopted through a rulemaking process. Thus, pursuant to RCW 34.05.230(1) this interpretive and policy statement is advisory only.

This document is organized by sections of the Water Code (Ch. 90.03 RCW) added or amended by SESSH 1338. Each of the sections states what Ecology believes the section addresses, what it means, and how Ecology will apply that section.

**RCW 90.03.015(3) & (4) DEFINITIONS of “Municipal Water Supplier” and “Municipal Water Supply Purposes”.** This section defines water rights that are for municipal water supply purposes.

1. Municipal water suppliers can hold water rights for municipal water supply purposes.
2. Municipal water suppliers can hold water rights that are not for municipal water supply purposes.
3. Ecology evaluates conformance with the definitions in this section on an individual water right basis. In reviewing individual water rights however, relationships between water rights must be identified and given consideration. Such relationships between water rights include but are not limited to “alternate” and other linkages (as more fully described in paragraph 9 below).
4. If one purpose of use on a water right is for a municipal water supply purpose, then another purpose of use under the same water right is for a municipal water supply purpose when it is a use generally associated with a municipality.
5. Beneficial purposes of use generally associated with a municipality include but are not limited to residential, governmental or governmental proprietary, commercial, industrial, irrigation of parks and open spaces, institutional, landscaping, fire flow, water system maintenance and repair, and the uses described in RCW 90.03.550.
6. If a municipal water supplier holds one water right that is for municipal water supply purposes, other water rights held by the municipal water supplier may or may not qualify as rights for municipal water supply purposes.
7. If a municipal water supplier holds or acquires a water right not for municipal water supply purposes, the purpose of use may be changed to municipal water supply purposes under RCW 90.03.380. The statutory tests for a change must be satisfied. Also, the beneficial use following the change must meet a definition in this section. Changes under RCW 90.03.380 require a tentative determination of the extent and validity of the water right proposed for transfer or change.
8. In general, agricultural irrigation purpose of use and dairy purpose of use water rights held or acquired by a municipal water supplier cannot be conformed as rights for municipal water supply purposes. These purposes are not generally associated with the use of water within a municipality. Water rights for other purposes of use may also fall into this exclusive group. These situations will be considered by Ecology on a case-by-case basis. [See “conformed water right” definition in the section concerning RCW 90.03.560, below.] Water rights for non-municipal purposes that cannot be conformed can still be changed to municipal purposes by filing and having approved an application for a water right change or amendment.
9. Ecology interprets the statute as requiring active compliance by conformance with the beneficial use definitions in RCW 90.03.015(4). Examples of conformance with the definitions include but are not limited to the following:
  - a. Conformance with the definition occurs where a water right holder uses water for one or more of the categories of beneficial use included in the definition of a water right for municipal water supply purposes (e.g. the residential connection or nonresident population thresholds under RCW 90.03.015).
  - b. If the water right holder is a public water system participating in the water system planning process, then conformance with the definition occurs when the water right is identified as being held for

existing customers, future growth or supply needs, standby/reserve, backup or emergency, or other reasonable future use in a water system plan (WAC 246-290-100), project report (WAC 246-290-110), construction document (WAC 246-290-120), source approval (WAC 246-290-130), existing system as-built approval (WAC 246-290-140), or coordinated water system plan (WAC 246-293) as approved by the Department of Health, or a small water system management program (WAC 246-290-105) as required by the Department of Health.

- c. A water right authorized for one or more of the categories of beneficial use included in the definition of municipal water supply purposes that has been integrated or consolidated through Ecology action(s) or statutory procedure(s) (e.g. new permit, change decision, replacement or new additional well, showing of compliance under RCW 90.44.100(3), consolidation of rights for exempt wells under RCW 90.44.105) such that two or more water rights or water sources have alternate, well field, non-additive (formerly “supplemental”), or other relationships will be recognized as in conformance with the definitions.
- d. If a water right does not meet the definition of a water right for municipal water supply purposes for 5 or more years, or does not otherwise qualify for the relinquishment exception under RCW 90.14.140(2)(d), then the water right would be valid only to the extent it had been beneficially used during that period, with any non-use resulting in relinquishment of the right unless the non-use is excused by one of the other exemptions to relinquishment provided under RCW 90.14.140.

**RCW 90.03.015(4)(a) DEFINITIONS – Defines Required Number of Residential Connections and Non-Residential Population for Municipal Water Supply Rights.** The statutory definitions in this subsection do not exactly match the Department of Health rules for Group A water systems under WAC 246-290-020.

1. In this section, we provide examples of water systems that might or might not be considered municipal water suppliers holding water rights for municipal water supply purposes. Whether or not the particular system is considered municipal or not depends on the specific fact pattern.
2. RCW 90.03.015(4)(a) provides statutory definitions for municipal water suppliers holding water rights for municipal water supply purposes. These definitions overlap Department of Health rules for Group A water systems, but they are not exactly the same.
3. All municipal water suppliers under this section are Group A water systems. However, not all Group A water systems are municipal water suppliers.
4. One difference between the definition in this section and Department of Health rules for Group A water systems is the statute requires 15 or more *residential* connections. The Department of Health rules consider both *residential* and *non-residential* connections. Therefore, a water right serving 15 homes would be for municipal water supply purposes but a water right serving 14 homes and a business would not. It does not meet the “municipal” definition, because it does not meet the “*residential*” criterion. However, both would be Group A water systems.
5. The statute does not define the term *residential service connection*. Ecology considers this term to be as defined in Department of Health rules for Group A community water systems in WAC 246-290-020. The definition reads: “service connections used by year-round residents for one hundred eighty or more days within a calendar year”. This is a subset of Department of Health’s general definition of a service connection in WAC 246-290-010, i.e. a connection to a public water system serving both residential and

non-residential populations. By contrast, the Municipal Water Law only considers residential service connections.

6. Ecology interprets the term “connection” in a manner consistent with Department of Health rules. This includes provisions for alternative means of calculating the number of connections for a Group A water system. This can include counting “equivalent residential units” within a building. The determination on number of residential units (connections) is done on a case-by-case basis.
7. In general, the following Group A water systems could be examples of municipal water suppliers because the statutory definitions are equivalent to those adopted in rule by the Department of Health: a city, subdivision, mobile home park, or water association. The decisions on whether systems hold water rights for municipal supply purposes depend on the particular factual situations.
8. Another difference between the statutory definition and Department of Health rules for Group A water systems is the statute does not include a definition for *residential populations* but Department of Health rules do.

For example, under WAC 246-290-020, a water system can be classified as a Group A community system if it serves at least 25 residents for 180 or more days within a calendar year. This is regardless of the number of connections. A water right serving such a system would not be for municipal water supply purposes under this section because the statute does not contain an equivalent definition. There are stand-alone Group A community water systems that, under particular factual situations, may not be municipal water suppliers because of this difference. These types of systems could include some colleges, nursing homes, or other residential facilities.

9. The Municipal Water Law does not include a minimum service connection requirement for nonresidential connections. RCW 90.03.015(4)(a) defines a water right for municipal water supply purposes in terms of nonresidential populations (residential use of water for a nonresidential population of, on average, at least twenty-five people for at least sixty days a year). Therefore, this category includes some Group A non-community systems and excludes others, depending upon particular factual situations.
10. Ecology interprets the phrase “residential use of water for a nonresidential population” to mean that the full range of residential water uses (e.g. drinking, cooking, cleaning, sanitation) are provided under the water right. Further, such service is for temporary domiciles for non-residents (an average of 25 or more people living there for more than 60 days per year). Examples of Group A non-community systems that might hold water rights for municipal water supply purpose under this section under particular factual situations could include vacation homes and temporary farm worker housing.
11. The following Group A non-community systems would not typically hold rights under RCW 90.03.015(4)(a) for municipal water supply purposes under the residential water use for a non-resident population definition:
  - schools,
  - daycares,
  - churches,
  - campgrounds,
  - fairgrounds,
  - restaurants,
  - businesses and
  - factories.

Actual determination of whether such systems hold water rights for municipal supply purposes will depend upon the particular factual situations.

12. Group B water systems are also defined in WAC 246-290-020 and are public water systems smaller than Group A systems, either in terms of connections or population. Water rights serving Group B water systems do not qualify as water rights for municipal water supply purposes under RCW 90.03.015(4)(a).

**RCW 90.03.015(4) (b) *Governmental Entities and Governmental Purposes.*** Defines water rights for municipal water supply purposes for a specific group of governmental entities.

1. The governmental entities listed in this subsection constitute an exclusive list. Those entities are:
  - cities,
  - towns,
  - public utility districts,
  - counties,
  - sewer districts, or
  - water districts.

If an entity is not on the list, it is not a municipal water supplier for the purpose of this subsection. For example, neither a port district nor an irrigation district qualify as municipal water suppliers under RCW 90.03.015(4)(b)).

2. Governmental and governmental proprietary purposes generally refer to those purposes listed at the end of RCW 90.03.015(4), including, but not limited to:
  - commercial,
  - industrial,
  - irrigation of parks and open spaces,
  - institutional,
  - landscaping,
  - fire flow,
  - water system maintenance and repair, or
  - related purposes.
3. A governmental or non-governmental entity not qualifying as a municipal water supplier under this subsection (e.g. a port district or irrigation district) may qualify under another subsection of RCW 90.03.015. However, domestic use rights issued to or acquired by a city, town, public utility district, county, sewer district, or water district that do not qualify as municipal under the more specific requirements of RCW 90.03.015(4)(a) cannot qualify under the more general “governmental or governmental proprietary purposes” standard of RCW 90.03.015(b).
4. When considering whether a water right qualifies for a governmental purpose under this section (e.g. irrigation of parks), Ecology considers the entity that was originally issued the water right, as well as the current owner of the right.

For example, if a water right was issued for irrigation of parks (or another governmental purpose) to a “governmental entity”, then the right is for a municipal water supply purpose. However, if the same right were issued to a non-governmental entity (e.g. a private developer) and later acquired by a “governmental entity”, then the right would need to be changed to municipal water supply purposes

under RCW 90.03.380. The right as issued did not then qualify as a municipal water supply purpose water right.

5. Municipal water rights held by entities listed in RCW 90.03.015(4) (b) may include agricultural irrigation as a governmental purpose under an existing municipal water supply purpose water right, if such an entity has statutory authority to provide agricultural irrigation water and the entity has used the right, at least in part, for agricultural irrigation since the time the right was issued.

***RCW 90.03.260(4) & (5) Applications - Numbers of Connections and Population.*** These subsections provide that the maximum population or number of connections specified on an application or any subsequent water right documents for a municipal water supply right is no longer a limitation of the water right. The municipal water supplier must have an approved water system plan or an approval from the Department of Health to serve a specified number of service connections to not be subject to this limit. These subsections do not relate to water rights documented by statements of water right claims.

1. If a water system serving 15 or more existing residential service connections has a water right for community or multiple domestic supply, and the number of connections has been authorized by the Department of Health, the water right is for municipal water supply purposes and any population or connection limitations that may appear in water right documents are not limiting. Rather, the maximum instantaneous quantity ( $Q_i$ ) and annual quantity ( $Q_a$ ) are the controlling numbers.
2. If a water system serving less than 15 existing residential service connections has a water right that issued for a project proposing more than 15 residential service connections, and any number of connections specified on the application or any subsequent water right documents is 15 or greater, then such a water right may be conformed as a right for municipal water supply purposes under RCW 90.03.560. This conformance must follow actual physical service to at least 15 residential service connections.
3. If a water system serving less than 15 existing residential service connections has a water right that issued for a project proposing fewer than 15 residential service connections, and any number of connections specified on the application or any subsequent water right documents is 14 or less, then the number of connections specified on the application or any subsequent water right documents is a limitation on the water right<sup>1</sup>. Only a sufficient quantity of water necessary to serve those connections is authorized.
4. If a water system that qualifies as a municipal water supplier under RCW 90.03.015(3) physically consolidates another water system into its distribution system, or takes ownership of another water system and acquires a community or multiple domestic supply water right that was held by the acquired water system for a project proposing fewer than 15 residential service connections, then the number of connections specified on the application or any subsequent water right documents of the acquired system is not limiting, so long as the municipal water supplier receives a water system plan or other approval from the Department of Health to serve an authorized number of connections.

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<sup>1</sup> "Such a water right does not qualify as a right for municipal supply purposes. Changing the purpose of use of such a water right to municipal supply purposes would require approval of an application to change the purpose of use of the right, which, under RCW 90.44.100, is not permissible for an unperfected inchoate groundwater right."

5. If a water system is providing water for residential use to a nonresidential population numbering *less* than an average of 25 people for sixty or more days per year, under a water right issued for a project proposing residential use of water to a nonresidential population for an average of *greater* than 25 people for sixty or more days per year, then such a water right may be conformed as a right for municipal water supply purposes under RCW 90.03.560 following actual service to an average of 25 or more people for sixty or more days per year.
6. If a water system is providing water for residential use to a nonresidential population numbering *less* than an average of 25 people for sixty or more days per year, under a water right issued for a project *proposing* residential use to a nonresidential population for an average of *less* than 25 people for sixty or more days per year, then the population intended to be served by the water right is a limitation on the water right and only a sufficient quantity of water necessary to serve that population is authorized.

**RCW 90.03.330(2)**     ***Appropriation Procedure – Water Right Certificate: Exceptions to Prohibition of Revocation or Diminishment of a Municipal Water Supply Purpose Water Right.***  
 This section provides that Ecology may not revoke or diminish a water right for municipal water supply purposes documented by a certificate covered under RCW 90.03.330(3) except:

- when issuing certificates under RCW 90.03.240,
- issuing certificates following changes, transfers, or amendments under RCW 90.03.380 or 90.44.100, or
- if Ecology determines a certificate was issued with ministerial errors or obtained through misrepresentation.

1. Apart from the exceptions listed in this section, Ecology cannot rescind or diminish a certificate for municipal water supply purposes and/or revert a certificate to permit status.
2. A certificate for municipal water supply purposes may be revoked or diminished if the revocation or diminishment results from a general adjudication of water rights in superior court conducted pursuant to RCW 90.03.110 - 245.
3. When processing an application for change, transfer, or amendment of a water right documented by a certificate covered under RCW 90.03.330(3), Ecology may revoke the certificate, or issue a certificate for a quantity less than that on the original certificate. Revocation or diminishment may occur based on:
  - the tentative determination of validity and extent of the water right,
  - to prevent impairment of other existing water rights, or
  - to prevent detriment to the public welfare (for ground water changes under RCW 90.44.100).

[See RCW 90.03.330(3), below, for discussion relating to tentative determination of validity and extent.]

4. Upon determining that a certificate for municipal water supply purposes has been issued with ministerial errors, Ecology may revoke the certificate and issue a superseding certificate containing modifications only to the extent necessary to correct the ministerial errors.

5. Upon determining that a certificate for municipal water supply purposes has been issued through misrepresentation, Ecology may revoke the certificate and issue a superseding certificate containing modifications only to the extent necessary to correct the misrepresentation.

**RCW 90.03.330(3)** *Appropriation Procedure – Water Right Certificates.* This subsection provides that water rights for municipal water supply purposes documented by certificates issued prior to September 9, 2003 with maximum quantities based on system capacity (known as “pumps and pipes” certificates) are “rights in good standing.”

1. “Pumps and pipes” certificates were issued based on the system capacity measure, rather than on the basis of actual beneficial use. These water rights include inchoate quantities that have not yet been exercised. *See Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). Such rights may continue to be exercised to serve new growth. Ecology is not authorized to revoke or diminish water rights for municipal supply purposes documented by such “pumps and pipes” certificates, except under the circumstances set forth in RCW 90.03.330(2), discussed above.
2. RCW 90.44.100 authorizes changes of points of withdrawal and places of use for inchoate ground water rights. In the context of exceptions provided under RCW 90.03.330(2), such as when a conservancy board or Ecology evaluates an application for change or transfer of a water right documented by a “pumps and pipes” certificate and must perform a tentative determination of the validity and extent of the water right, an assessment must be performed to determine whether any of the inchoate quantity specified in the certificate remains valid. This requirement is based on the proposition that by including the term “in good standing” for such certificates, the Legislature intended that holders of such rights would still have to meet other water law principles, such as reasonable diligence in project development, to keep the rights in good standing.

In assessments under RCW 90.03.330(2), to determine if inchoate quantities remain in good standing, the conservancy boards and Ecology will consider at least the following parameters:

- a. The original intent described in water right documents, including the nature of the project that the applicant sought to pursue through issuance of the permit;
- b. Whether the water right holder has exercised reasonable diligence to complete the project sought to be developed through the water right<sup>2</sup>, and
- c. Whether or not approval of the change would be contrary to the public interest. Public interest analysis can involve consideration of whether the proposed change or transfer is speculative in nature. As an example, evidence of speculation could be no continued involvement by the selling municipal water supplier in the water use served by the receiving entity. Additional evidence could be no discussion or rationale for the transfer indicated in planning documents, such as a water system plan.

Inchoate portions of water rights for municipal supply purposes found to be in good standing through this assessment (mentioned above), are eligible for change or transfer. This approach may, among other things, allow for the inchoate portion to be transferred to another municipal water supplier or integrated into a regional water system.

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<sup>2</sup> RCW 90.03.320 provides guidance on factors to consider when evaluating whether a water right permittee has exercised reasonable diligence.

For inchoate surface water rights, the additional requirements in RCW 90.03.570 must be met before changes and transfers may be approved. Further, RCW 90.03.380 and 90.44.100 authorize changes and transfers of perfected surface and ground water rights for municipal supply purposes when the criteria of those statutes are met.

**RCW 90.03.330(4)** *Issuance of Certificates – Beneficial Use Requirement.* This section requires that for water rights represented by permits, after September 9, 2003, water right certificates may only be issued that document maximum quantities based on actual beneficial use of water.

1. Ecology will issue certificates, upon proof of appropriation by permit holders, based only on actual beneficial use of water, rather than system capacity. Such certificates will not include quantities of inchoate water.
2. Ecology will consider a permit holder's request to split a partially developed permit by issuing a certificate for the developed portion and issuing a superseding permit for the inchoate portion with a development schedule. The permit holder must demonstrate reasonable diligence in working toward full development.
3. In reports of examination authorizing changes and transfers of water rights for municipal supply purposes, Ecology may specify development schedules. The schedule may include an estimated date of final development. Extensions may be granted as described in Ecology Policy POL-1050. Upon completion of development, Ecology will issue superseding water right certificates.

**RCW 90.03.386(1)** *Coordination between Department of Health and Department of Ecology.* This section requires coordinated review and approval procedures to ensure compliance and consistency with water system plans/small water system management programs. Ecology and the Department of Health developed a Memorandum of Understanding (MOU) to outline the agencies' roles and responsibilities.  
<http://www.ecy.wa.gov/programs/wr/rights/Images/pdf/SignedDOHMOU5107.pdf>

**RCW 90.03.386(2)** *Place of Use and Determinations of "Not Inconsistent" with Specified Local Plans.* This section provides that a municipal water supplier's authorized place of use on its water right or rights can change to its current service area, provided that:

- o a planning or engineering document describing the service area has been approved by the Department of Health;
- o the municipal water supplier is in compliance with the terms of its water system plan or small water system management program; and
- o the alteration of the water right place of use is "not inconsistent" with other local planning documents (see section 5(2) of Municipal Water Law Agency Responsibilities Outline - June 23, 2006 created by DOH and Ecology relating to implementation of this section  
[http://www.ecy.wa.gov/programs/wr/rights/Images/pdf/mwl\\_62306\\_agncyrespons\\_fnl\\_dft.pdf](http://www.ecy.wa.gov/programs/wr/rights/Images/pdf/mwl_62306_agncyrespons_fnl_dft.pdf)

Ecology and the Department of Health included detailed implementation and coordination information from this document into an MOU that outlines the agencies' roles and tasks.

<http://www.ecy.wa.gov/programs/wr/rights/Images/pdf/SignedDOHMOU5107.pdf>

**RCW 90.03.386(3)** *Water Conservation as a Part of an Approved Water System Plan / Small Water System Management Program.* This section describes the responsibility for a municipal water supplier to implement a water use efficiency/water conservation program. It directs Ecology to consider such implementation when considering development schedules for municipal water supply rights.

1. Ecology supports the Department of Health's rule on water use efficiency/water conservation for municipal water suppliers. Ecology generally intends to be consistent with the Department of Health's water conservation requirements, but believes there may be exceptions when more stringent requirements may be necessary.
2. Ecology has statutory mandates to encourage conservation and eliminate waste. In some cases, Ecology may base water allocation decisions on conservation criteria more stringent than those in the Department of Health's rule. Such instances may include, but are not limited to:
  - o evaluations of applications for water right permits under RCW 90.03.290,
  - o waste of water determinations under RCW 90.03.005,
  - o coordination with watershed planning efforts under Chapters 90.54 and 90.82 RCW,
  - o drought permitting under Chapter 43.83B RCW,
  - o general adjudications of water rights, or
  - o settlements of administrative appeals and court cases.

Many factors could come into play when making the determination for more stringent conservation requirements. Ecology will address these instances on a case-by-case basis.

For example, Ecology could require more stringent conservation measures when issuing a new water right permit authorizing a withdrawal from a watershed with instream flows established by rule. In its decision, Ecology could determine that water is not available, or that it would impair other existing water rights or be contrary to the public interest, to allow water use at a level that would be allowed under the DOH rule. With proper mitigation and a requirement to conserve additional water over what the DOH rule might require, Ecology could be able to approve the application and issue a permit.

3. In its review of water system plans and related documents, Ecology might comment on those areas within its jurisdiction, including those listed above in number 2.
4. When Ecology believes it must be more stringent than DOH's water use efficiency rules, Ecology will consult with DOH before imposing more stringent conditions.
5. Ecology policy POL-1050 provides guidance on the agency's criteria for extending development schedules for all water rights, including those for municipal water supply purpose. Under this policy, Ecology may

require additional conservation provisions and conditions at the time of a permit extension for a municipal water supply purpose right. See the policy at:  
<http://www.ecy.wa.gov/programs/wr/rules/images/pdf/pol1050r.pdf>

**RCW 90.03.550**      ***Municipal Water Supply Purposes – Beneficial Uses.***

1. Beneficial uses of water under a municipal water supply purposes water right may include water withdrawn or diverted under such a right and used for:
  - o Uses that benefit fish and wildlife, water quality, or other instream resources or related habitat values;
  - o Uses that are needed to implement environmental obligations called for by:
    - a watershed plan under Ch. 90.54 RCW or Ch. 90.82 RCW,
    - a federal habitat conservation plan,
    - a hydropower license of the federal energy regulatory commission, or
    - a comprehensive irrigation district management plan.

**RCW 90.03.560**      ***Municipal Water Supply Purposes – Identification. “Conforming Documents” and Municipal Water Right Changes and Transfers.*** Water rights meeting the definition under RCW 90.03.015 are for municipal water supply purposes. The water right documents can be conformed to correctly identify the purpose of use.

1. A “conformed water right” is one in which water right documents have been amended by the department to properly indicate it is for municipal water supply purposes. For a qualifying right, this can occur during the process of changing some other attribute of the water right under RCW 90.03.380 or 90.44.100. This can also occur when a municipal water supplier requests a correction of the listed purpose of use, pursuant to this section and not just during a change or transfer.
2. Purposes of use that can be conformed to a municipal water supply purpose generally include those identified in RCW 90.03.015 and RCW 90.03.550.
3. A municipal water supplier can hold or acquire water rights for non-municipal purposes (e.g. agricultural irrigation and dairy purposes of use). However, these rights may not be conformed to a municipal water supply purpose of use under this section. They must undergo a purpose of use change under RCW 90.03.380 to become municipal purpose rights.



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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.



EVALUATING MITIGATION PLANS

Contact: Program Development and Operations Support Effective Date: February/20/2013

References: RCW 90.03.255, RCW 90.03.290, RCW 90.03.380, RCW 90.42.100, RCW 90.44.055, RCW 90.44.060, RCW 90.44.100, RCW 90.46, RCW 90.54.010, RCW 90.54.020, RCW 90.74, WAC 173-152, and Appendix H of the DOH/DOE Joint Review Procedures Memorandum of Understanding.

Purpose: It is Department of Ecology (Ecology) policy that adverse effects to the state’s water resources are best mitigated in-kind, in-time, and in-place. In certain situations, Ecology may accept mitigation that is out-of-kind, out-of-time, or out-of-place. This policy informs water right applicants about the requirements for mitigation plans, and guides Water Resources Program staff in evaluating mitigation plans submitted with applications for new water rights or changes to existing water rights.

Application: This policy describes procedures used to evaluate mitigation plans, the parameters of mitigation proposals, and the types of acceptable mitigation. This policy applies to all mitigation plans related to the approval or denial of water right applications under existing statutes and rules, and does not address the use of permit-exempt wells. Watershed plans that contain provisions for providing water and habitat-related offsets to streamflow depletions have been adopted in some Water Resource Inventory Areas (WRIAs), and in some instances Ecology has incorporated these provisions into instream flow and water management rules. Prospective water users in those WRIAs should consult those WRIA-specific guidance documents and rules.

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## Definitions

“Adaptive management” means a systematic approach for maintaining or improving resource conditions by observation and monitoring, then applying that knowledge to modify water use or mitigation actions.

“Consumptive use” of water is a use that diminishes the water source,<sup>1</sup> and includes such uses as:

- Transpiration by plants and animals.
- Evaporation that occurs after water has been diverted or pumped from the source.
- Conveyance losses from a reasonably efficient distribution system that do not become return flows.
- Water contained within a product or byproduct.

“Impair” or “Impairment” means to interrupt or interfere with the physical availability of water, or degrade the quality of the water, that would:

- 1) Prevent an existing water right holder from fully beneficially using the water right;
- 2) Require an existing groundwater right holder or surface water right holder to make significant modifications in order to beneficially use the water right;
- 3) For an instream flow water right established by rule, cause the flow of the stream to fall below the instream flow more frequently, for a longer duration, or by a greater amount than was previously the case; or
- 4) As provided in WAC 173-150, interrupt or interfere with a groundwater right that is withdrawn from a qualifying withdrawal facility (see WAC 173-150-030(7) and (8), 173-150-040, and 173-150-060).

“In-kind” mitigation or “water-for-water” mitigation refers to offsetting the adverse effects of a new diversion or withdrawal with an equal quantity of suitable quality water, such as through retiring or placing into the Trust Water Rights Program an existing water right with comparable consumptive quantity; discharging reclaimed water; through a stream augmentation scheme; or through cessation of a use.

“In-place” mitigation refers to measures whose benefits occur at the same location as the adverse effects of a proposal.

“In-time” mitigation refers to measures whose benefits closely mimic the quantity and timing of the adverse effects of a proposal on a water source. Staff making determinations on the adequacy of the timing of mitigation must consider the existing management framework of the watershed or basin and the effects of timing on a source.

“Mitigation” means measures that offset adverse effects on a water source to eliminate impairment and/or detriment to the public interest.

“Mitigation plan” is a written document developed by the water right applicant or through joint discussions between a water right applicant and Ecology. A mitigation plan describes the effects of a proposed water use and presents a proposal to alleviate those effects. This plan should also include any assurances needed to ensure the effectiveness of the proposed mitigation.

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<sup>1</sup> WAC 173-500-050

“Out-of-kind mitigation” refers to mitigating for a new water use by making water quality or habitat improvements, removing fish barriers, or providing other “non-water” improvements as opposed to physically replacing the water lost through the new proposed use.

“Performance based permits” are those that outline specific goals and include conditions or criteria that must be met in order to maintain permit validity under the statutory criteria.

“Pumped flow augmentation” refers to mitigating for a new water use by augmenting streamflow with groundwater that is pumped from a nearby aquifer.

“Reclaimed water” is water derived in any part from wastewater with a domestic wastewater component that has been adequately and reliably treated, so that it can be used for beneficial purposes. Reclaimed water is not considered wastewater.

“Resource management techniques” are enhancements to the natural environment that make water available or offset the impact of a diversion or withdrawal. Creating, restoring, or enlarging ponds, wetlands, and reservoirs, or artificially recharging aquifers, are examples of resource management techniques. Resource management techniques can be acceptable forms of mitigation.

“Return flow” is water diverted or withdrawn for irrigation or other use that returns to the stream or aquifer from which it is diverted or withdrawn, or to some other stream or aquifer, or that would do so if not intercepted by some obstacle.

“Stormwater” is snow melt and rainfall that runs off surfaces such as rooftops, paved streets, highways, and parking lots.

“Stream Augmentation” refers to increasing the quantity of streamflow above what would otherwise occur.

“Wastewater” means water-carried wastes from residences, buildings, industrial and commercial establishments, or other places, together with such groundwater infiltration and inflow as may be present.

“Water banks” are a mechanism to market the transfer of surface water, groundwater, and water storage entitlements that makes water available for new uses.

## **Background**

Water Resources Program staff frequently evaluate mitigation plans submitted with applications for new water rights or changes to existing water rights. Mitigation plans may allow Ecology to approve applications that otherwise would be denied for failure to meet statutory or permitting requirements. This policy provides guidance on evaluating and implementing mitigation plans, as well as the monitoring and reporting associated with these plans, and clarifies how Ecology reviews mitigation plans in the context of specific statutory permitting requirements.

Mitigation plans can be submitted at the same time that a new water right application or a water right change application is filed. Plans can also be submitted later if the applicant is notified that water is not

available or impairment would cause denial of the application. The Washington Water Code currently allows Ecology to approve, but not to impose mitigation for a new water right or a change to an existing water right unless agreed to or proposed by the applicant.<sup>2</sup> Water right applicants may submit mitigation proposals to support an application, such as to avoid impairment or when water would otherwise not be available. In both these cases, Ecology would be required to deny the application if an adequate mitigation plan was not proposed by the applicant and approved by Ecology.

In some areas of the state, specific rules apply with respect to the evaluation and consideration of mitigation. Some Water Resource Inventory Areas (WRIAs) have adopted watershed plans that contain provisions for providing water and habitat-related offsets to streamflow depletions. Ecology has incorporated these provisions into instream flow and water management rules (*see* WAC 173-500). Technical guidance to develop mitigation that is proportionate to the adverse effects of a proposed appropriation has been developed in some watersheds. Prospective water users in areas with adopted watershed plans should consult those WRIA-specific guidance documents and rules.

Although this policy addresses mitigation under the four part test for issuing a water right, other situations may require mitigation. For example, under WAC 173-152-050, some applications may receive priority processing if the proposed use will be nonconsumptive and substantially enhance or protect the quality of the natural environment. The nonconsumptive prong of this two-part test must be met with water-for-water mitigation, but the substantial enhancement prong may be met by other means.

### **Authority to Evaluate Mitigation Plans**

Ecology's authority to accept mitigation plans developed in support of water right applications is found in case law and statute<sup>3</sup>.

- Mitigation plans may be submitted to propose compensatory mitigation within a watershed under RCW 90.74.
- Ecology must consider both the benefits and costs, including environmental effects, of any water impoundment or other resource management technique that is included as a component of the application under RCW 90.03.255 or RCW 90.44.055.
- Facilities that reclaim water under RCW 90.46.130 may be required to provide compensation or otherwise mitigate impairment of any existing water rights downstream from any former freshwater discharge point.
- Under SEPA substantive authority, Ecology may require mitigation to avoid adverse environmental impacts (*see* RCW 43.21C).

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<sup>2</sup> See RCW 90.03.255 and 90.44.055.

<sup>3</sup> Case Law includes:

PCHB 05-137 Squaxin Island Tribe v Miller Land & Timber; PCHB 97-146 OHA v. DOE and Battle Mt Gold Company; PCHB NO. 03-155 Burke and Coe v. DOE; and Mountainstar Resort Development LLC; PCHB NO. 01-160 Airport Communities Coalition v. Ecology & Port of Seattle; PCHB NO. 02-037 Pacific Land Partners LLC v. DOE; PCHB 03-030 Yakama Nation v DOE; PCHB 03-155 Mountainstar v DOE; PCHB 96-102 Manke Lumber Co v DOE. Statutes include RCW 90.03.255 and RCW 90.44.055.

- In 2009, Ecology and the Department of Health (DOH) modified the Memorandum of Understanding (MOU) for coordinating review and permitting procedures for public water systems. Appendix H of the MOU outlines how mitigation can be provided that meets public water system reliability criteria.
- Ecology may issue preliminary permits under RCW 90.03.290(2)(a) to require an applicant to provide information on which to base a mitigation plan.
- Mitigation plans may be offered as evidence of a water budget neutral project proposed for priority processing under WAC 173-152-050(2)(g).
- Water rights deposited in the trust water program can be used to mitigate for water resource impacts under RCW 90.42.100(2)(a).

### **Mitigation Plan Requirements**

Mitigation plans must include a structured approach for implementing, monitoring, and maintaining the mitigation for as long as water is withdrawn or diverted. Provisions of the water right authorization will stipulate that it is the water right holder's responsibility to implement, maintain, monitor, and report on the effectiveness of the mitigation proposal.

Mitigation plans must:

- Identify the source(s) of supply for the proposed use and for the proposed mitigation water, if applicable.
- Estimate the consumptive quantity of water that will be depleted by the proposed use from the source requiring mitigation. In the case of a change application, the quantity diverted or withdrawn and used consumptively by the existing use must be established.
- Identify water rights that will be affected by the proposed diversion or withdrawal.
- Be based on a detailed hydrological analysis, which may include an analytical or numerical model.
- Evaluate the reliability of the mitigation proposal, including identification of the sources of uncertainty and how any uncertainties were accounted for.
- Provide a plan for measuring, monitoring, and reporting to ensure compliance with all permit conditions.
- Have contingency measures or an adaptive management plan that will be followed if the mitigation is determined to be inadequate following implementation.
- Identify other permits required to put the mitigation plan into effect.

## Evaluation of Mitigation Plans

Ecology evaluates mitigation proposals on a case-by-case basis, relying on the information and analysis provided by the applicant and best professional judgment.

However, other factors must also be considered when deciding if a mitigation plan fully addresses statutory requirements for permitting. For example, new water rights for either surface water or groundwater must meet the four-part test of water availability, beneficial use, public interest (also referred to as being non-detrimental to the public welfare), and impairment<sup>4</sup>.

Ecology considers that water is not available for further appropriations when:

- Water is physically not available, including circumstances where the proposed source does not produce enough water to reliably meet the needs of the proposed beneficial use.
- Water is not legally available at a particular time or place, such as where proposed withdrawals will capture water from surface or groundwater sources that have been closed to new appropriations, or from streams where instream flows are not being met.
- Proposed diversions or withdrawals will cause impairment.

Ecology must deny an application for a new water right when water is not physically available, not legally available, or when a proposed withdrawal or diversion would cause impairment of existing water rights or be detrimental to the public interest. These same tests apply to groundwater changes and transfers, but for surface water changes and transfers the public interest test does not apply. For water right applications that are not exempt from the State Environmental Policy Act (SEPA) process, Ecology may also require mitigation to address identified environmental impacts through SEPA substantive authority. The "State Environmental Policy Act" heading below provides more detail on SEPA and the water right application process.

In certain situations, Ecology may accept mitigation that is out-of-kind, out-of-time, or out-of-place. If an existing water right may be impaired by the proposed new use or change, the owner of the potentially impaired water right can waive claims of impairment or otherwise help shape the form of mitigation. If Ecology determines an application for a water right will not impair another's right, Ecology may issue that water right even if another water right holder does not agree.

The following table indicates the types of mitigation that might be appropriate for given situations.

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<sup>4</sup> RCW 90.03.290(3) The department shall make and file as part of the record in the matter, written findings of fact concerning all things investigated, and if it shall find that there is water available for appropriation for a beneficial use, and the appropriation thereof as proposed in the application will not impair existing rights or be detrimental to the public welfare, it shall issue a permit stating the amount of water to which the applicant shall be entitled and the beneficial use or uses to which it may be applied: PROVIDED, That where the water applied for is to be used for irrigation purposes, it shall become appurtenant only to such land as may be reclaimed thereby to the full extent of the soil for agricultural purposes. But where there is no unappropriated water in the proposed source of supply, or where the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, having due regard to the highest feasible development of the use of the waters belonging to the public, it shall be duty of the department to reject such application and to refuse to issue the permit asked for.

**Table 1: Types of Mitigation Appropriate for Given Situations**

<b>Impairment or Circumstance</b>	<b>Is In-Kind, In-Time, or In-Place Mitigation Appropriate?</b>
Impairment – to an existing Water Right	Generally in-kind, in-time, and in-place mitigation is necessary. Mitigation may not be required if water right holders that may be potentially affected waive claims of impairment of their water rights through an agreement with the project proponent.
Impairment – to a State Instream Flow Water Right	Generally, in-kind, in-time, and in-place mitigation is necessary, but in appropriate circumstances involving a benefit to the public, the state may waive impairment to an instream flow through a determination of an overriding consideration of the public interest (OCPI) determination ( <i>see</i> <u>RCW 90.54.020</u> ).
Impairment – to a State-Held Trust Water Right	The terms of the trust agreement determine the state’s ability to accept out-of-kind, out-of-time, or out-of-place mitigation for impacts to a trust water right.
Failure of the Public Interest test	Taken as a whole the project must be in the public interest. However, there may be instances where some aspect of a project may be contrary to the public interest, and in those instances Ecology may require mitigation for those effects. There is opportunity for out-of-kind, out-of-time, or out-of-place mitigation to meet the public interest test. In appropriate circumstances involving a benefit to the public, Ecology may make a determination of OCPI.
Failure of the Water Physically or Legally Available tests	When water is not physically and/or legally available, in-kind, in-time, and in-place mitigation must generally be provided. In appropriate circumstances involving a benefit to the public, Ecology may make a determination of OCPI.
To address adverse environmental impacts under SEPA substantive authority	Ecology may require mitigation for identified impacts through SEPA substantive authority.
To qualify as a substantial enhancement or protection of the quality of the natural environment	Some applications may be priority processed if the proposed use will be nonconsumptive and substantially enhance or protect the quality of the natural environment ( <i>see</i> <u>WAC 173-152-050(2)(c)</u> ). The nonconsumptive prong of this two-part test must be met with water-for-water mitigation, but the substantial enhancement prong may be met by other means.
To achieve Water Budget Neutral status	Some applications may be priority processed if impacts are offset by an equal amount of water ( <i>see</i> <u>WAC 173-152-050(2)(g)</u> and <u>WAC 173-152-020(18)</u> ).

Factors to consider when evaluating mitigation plans include:

- Effectiveness of the proposed mitigation
  - Will the mitigation completely offset adverse effects?
  - Will water rights provided for mitigation be protected by placing water into the Trust Water Program?
  - Does the circumstance require in-kind mitigation?

- Timing and/or quantities of mitigation
  - Will the timing and/or quantities of mitigation water eliminate impairment of existing water rights and offset adverse effects during a time of year when water is not available from surface or groundwater sources that have been closed to new appropriations, or from streams where instream flows are not being met?
  - Will the mitigation quantities be sufficient and will the mitigation be effective in-time?
  
- Location of mitigation
  - Will the plan mitigate where the impairment occurs?
  - Will the mitigation be effective in-place?
  
- Uncertainty and reliability
  - What assumptions and sources of data were used to estimate quantities, locations and timing of adverse effects of the new water use?
  - How representative are any models and assumptions used of actual site conditions?
  - How has uncertainty been accounted for to ensure the mitigation plan is successful?
  
- Water quality
  - Will the mitigation water be the same or better quality than the water appropriated for the proposed use?
  - Will the mitigation increase the likelihood of adverse water quality effects?
  
- Sustainability
  - Will mitigation schemes be self-sustaining?
  - If maintenance will be required, will an appropriate management and maintenance plan be in place?
  - Will monitoring plans, performance bonds, or assurances be in place to ensure sustainability of the mitigation?
  - What resources will be available to the applicant to ensure mitigation is maintained?
  
- Enforceability of the mitigation
  - Will assurances be in place in order for the mitigation to continue during the duration of the proposed water use?
  - What will be the consequences of failure of the mitigation plan?
  - Will agreements, land covenants, or other legal instruments be in place?
  
- Ecology workload considerations
  - What resources would Ecology require to ensure mitigation is maintained?
  
- Existing laws, rules, and plans
  - Are there adopted instream flows, closures, or WRIA or Watershed Plans affecting the watershed that need to be considered?
  - Are fish listed under state or federal Endangered Species Act present?
  - Will measures be in place that prohibit water provided for mitigation to be used for any other purpose?

- Review of the mitigation plan by interested parties
  - Have interested parties, such as tribes or other water right holders, had an opportunity to review and provide input on the proposed mitigation plan?
  - Was the mitigation plan adequately described in any required SEPA documentation?

### Mitigation Strategies

The following are examples of mitigation strategies that may allow a new permit or change authorization to proceed. In some cases, combinations of these strategies may be necessary.

#### Water Right Management Strategies

- Transferring a senior water right(s) to offset approval of a junior water right.
- Placing water rights in the State Trust Water Program to offset the proposed use's effects to stream flows or to groundwater levels.
- Using permanent split-season lease agreements with an upstream water right holder to supply instream flows during dry or low flow seasons.
- Acquiring a water right(s) in exchange for approval of another water right.

If a water right or rights are acquired for use as mitigation, the mitigation plan should outline a method of protecting those rights for the duration of the proposed water use. Water rights that are acquired to offset adverse effects or in exchange for approval of a new or changed water right should be placed into the Trust Water Rights Program whenever possible to preserve the priority date and ensure protection. Generally, placing a valid water right used at the same location and at the same time of year (in-kind, in-place, and in-time) into the Trust Water Rights Program is preferred because these measures require active management only to ensure that the water is not taken without authorization. If an acquired water right cannot be protected, it may be necessary to acquire additional rights, develop an adaptive management strategy, or use a combination of other methods.

Not all water rights are equivalent, which may affect their ability to be used as mitigation. The usefulness or suitability of acquired water rights in a mitigation plan can be diminished or eliminated by many factors including:

- If the water right is an undeveloped permit or claim.
- If the water right is subject to a Family Farm Water Act provision.
- If the water right has quantities that are non-additive.
- If the water right is interruptible or has a junior priority date.

#### Physical Construction Strategies

- Permanent system changes that redistribute water.
- Constructing infiltration pond(s) or subsurface infiltration galleries.
- Putting augmentation facilities in place (such as constructing a pumped flow augmentation project).
- Storing surface water or groundwater for release during low flow periods.
- Removing fish barriers.

#### Monetary Investment Strategies

- Conservation fund to buy water rights (privately funded).
- Habitat preservation easements.

## **Acceptable Mitigation**

A hierarchy of effectiveness influences Ecology's acceptance of various forms of mitigation. Those forms having the greatest chance of offsetting the effects from the proposed water use require the least amount of justification and analysis. Conversely, those proposals with the greatest uncertainty regarding the methods of analyses, long-term effectiveness, comparable benefits, and so on (identified under the heading "Other potential types of mitigation" below), will require greater amounts of justification and analysis and may not be acceptable.

The following list of mitigation strategies is in approximate order of acceptability (the first three preferred) and must be coupled with Ecology's authority in Table 1:

### **Preferred types of mitigation:**

1. **In-kind, in-time, and in-place** mitigation is always preferred. If the estimated volume or timing or location of the adverse effects is uncertain, the applicant may propose water-for-water mitigation that replaces more than predicted effects. For example, the applicant could propose year-round mitigation when adverse effects may only occur seasonally. Where physical construction is involved (e.g. storage), mitigation of instream effects may be maximized out-of-time in consultation with Ecology and external stakeholders. However, if existing water rights are affected, in-time releases may be required.
2. **Water bank** mitigation and other forms of pooled mitigation may be considered for out-of-priority water use (i.e. senior rights acquired to serve junior rights). This type of mitigation can also be used to offset adverse effects of permit-exempt well use. Due to the basin-wide changes that occur with this type of mitigation, sophisticated analyses and extensive mitigation plans are typically required.
3. **Out-of-time or out-of-place** mitigation can be acceptable if it provides an equal or greater benefit to the environment (e.g. a more critical stream reach will have increased flow) than would be achieved through water-for-water or pooled mitigation. If there is uncertainty in the comparability between historical use and the new use, this uncertainty may be managed by the applicant providing a safety factor whereby more water rights than the proposed water use are acquired, or a development schedule with an adaptive management strategy that allows the applicant to prove that the mitigation works through actual implementation. Out-of-time and out-of-place mitigation plans should also be acceptable to the state Department of Fish and Wildlife (WDFW), and the concerns of other interested parties such as affected tribes or senior water right holders should be taken into account.

### **Other potential types of mitigation:**

4. **Reclaimed water or return flows** (wastewater or storm water) can be used to augment streamflow. The effectiveness of this type of mitigation depends on the artificial maintenance of stream flows and, in the case of reclaimed water, assurances that the reclaimed water will continue to be treated to reclaimed water standards and be of appropriate quality for augmentation purposes. Therefore, it is allowed only where the water budget is well-defined, the risk of failure is very low, and there are sufficient control measures to ensure compliance as long as water is withdrawn or diverted. Wastewater or storm water releases can be considered where properly permitted and where control

measures are in place to protect water quality. Reports of Examination, and water right permits and certificates should contain provisions to ensure water withdrawals stop whenever mitigation flows are unavailable.

5. **Out-of-kind** mitigation could be a “Monetary Investment” strategy. Examples of this sort of mitigation include habitat restoration or enhancement that is protected through a restrictive covenant or easements, for as long as water is withdrawn or diverted. Because of the uncertainty regarding tradeoffs involved in this type of mitigation, the action(s) or investment(s) being offered must represent a clear and substantial benefit to the environment. Ecology should also take into account the potential cumulative impact of additional out-of-kind mitigation proposals affecting the same source. Due to the challenges in evaluating these proposals, Water Resource Program staff should consult with WDFW to seek their agreement. The concerns of other interested parties such as affected tribes or senior water right holders should be taken into account. Use of out-of-kind mitigation likely must be coupled with in-kind mitigation to be acceptable. In appropriate circumstances involving a benefit to the public, Ecology may make a determination of OCPI.
6. **Pumped flow augmentation** as mitigation is least preferred. First, because pumping the augmentation water itself typically also reduces streamflow, it is more difficult to achieve a true gain. Second, as this type of mitigation depends on a very artificial means of stream flow maintenance, and always includes long term maintenance and operation requirements, there are significant risks that this augmentation will not occur for as long as water is withdrawn or diverted. Pumped flow augmentation must not threaten the sustainable yield of the aquifer or impair other water rights, and is more acceptable as a seasonal, rather than continuous form of mitigation. Pumped flow augmentation can be allowed only where the water budget is well defined, the risk of failure is very low, and there are sufficient control measures to ensure compliance for as long as water is withdrawn or diverted. As effects to streamflow are hard to predict and difficult to measure, proposals should include recommendations to augment streamflow in quantities greater than the estimated effects, especially if the effects are very small.

Some mitigation proposals may involve mixing and matching more than one type of mitigation. Out-of-time, out-of-place, or out-of-kind mitigation may be coupled with water-for-water mitigation to avoid detriment to the public interest or perceived effects under substantive authority of the State Environmental Policy Act (SEPA). When combining different types of mitigation, the applicant may need to submit multiple applications for water right permits, applications to change existing water rights, amendments to pending applications, and SEPA studies or documents, as appropriate.

When evaluating mitigation plans it also must be recognized that some Water Resource Inventory Areas (WRIAs) have rules that differ. Specifically, where Instream Resource Protection Plans (IRPPs) have been established, requirements for issuing permits vary. “Out-of-kind” mitigation may not be an option in some basins. Due to the site specific nature of this issue, Ecology staff will need to provide specific guidance to applicants in WRIAs with adopted IRPPs.

### **Mitigating Impairment of Existing Water Rights**

In its findings for a new water right or change authorization, Ecology will make decisions regarding the adequacy of a mitigation plan’s ability to prevent impairment of existing rights. Mitigation may not be required if the owner of the potentially impaired water right waives claims of impairment or otherwise

helps shape the form of mitigation. An applicant may consult directly with potentially affected water right holders and negotiate agreements to secure their consent to a proposed project. If an applicant pursues such negotiations, and an agreement is relied upon for issuance of a new use of water or change of use of water, Ecology will require written confirmation from the affected water right holder.

### **Consultations**

Ecology will not render decisions on the adequacy of proposed mitigation plans until all required consultations with external stakeholders have been completed. Water Resources Program staff will consult with other agencies or entities with permitting authority or relevant expertise. Ecology will also consult with tribes in accordance with established policies and procedures and intergovernmental agreements. While acceptance of a mitigation plan by other entities is not a legal requirement for Ecology, it is preferred.

For proposals that affect instream flows, staff will consult with WDFW and affected parties and tribes. In evaluating mitigation for effects on adopted instream flows, Ecology will consider the:

- Particular instream flow.
- Quantity and location of stream reaches affected.
- Quality of the fish habitat affected.
- Fish species affected.
- Water quality effects.
- Volumes affected.
- Timing and frequency of changes to flow regimens.
- Existing watershed agreements.
- Potential reduction in flow, or losses from use of water reserved for future public water supply.
- Instream biological needs.
- Other factors as appropriate.

For proposals concerning public water systems, Ecology will consult with the Department of Health (DOH) consistent with Appendix H of the MOU between Ecology and DOH, and coordinate permitting decisions as appropriate.

For proposals where reclaimed water is proposed for mitigation purposes, the Water Resources Program will consult internally with Ecology's Water Quality Program, and externally with the generator of the reclaimed water and DOH.

Ecology will document the results of its consultations in writing, typically in its permitting decision and in its SEPA threshold determination.

### **Dealing With Risk and Uncertainty**

Before a mitigation plan can be approved, Ecology must be confident that the plan will meet the stated objectives. Many mitigation proposals will involve some degree of uncertainty. Identifying, assessing, acknowledging, and accounting for uncertainty often will dictate what must be included in a mitigation plan and what qualifies as acceptable mitigation. Ecology must take into account whether the mitigation

actually offsets adverse effects and how easily the plan can be implemented. Ecology may deny mitigation plans that are contrary to the public interest, or that would impair existing water rights, or adversely affect water resources of the state. Where risks and uncertainty are elevated, the applicant may propose higher mitigation ratios (e.g. cessation/retirement of historical water use in an amount that is more than the full measure of the new proposed use).

Water right permitting requires managing for risk to resources and other water rights, and managing for uncertainty in the analysis of those risks and the effectiveness of proposed mitigation. For example, in many areas of the state Endangered Species Act-listed fish species are threatened, and the risks to these resources must be taken into account under the impairment or public interest tests. Various methods of analyses offer different degrees of certainty. For example, many mitigation schemes will be based on conceptual, analytical, or numeric groundwater modeling. Using models to predict the extent and timing of potential adverse effects includes some level of uncertainty. The effectiveness of a given mitigation technique or strategy can also vary. The applicant bears the responsibility of adapting their proposed project to address uncertainty.

In addition, Ecology will consider the:

- Extent and validity of water rights used for mitigation.
- Accuracy of the methods used to measure quantities of water or effects.
- Adequacy of site characterization.
- Completeness and validity of data.
- Long-term effectiveness of the mitigation.
- Concerns expressed by interested parties.
- Adequacy of financial assurances.

#### Adaptive Management

Due to the uncertainty inherent in mitigating water right impairment, every mitigation plan must identify actions to be taken if monitoring shows failure of any aspect of the mitigation. An adaptive management strategy that allows an applicant to prove that mitigation works during actual implementation may be appropriate when changing conditions could affect a mitigation plan. When designing an adaptive management process, observation and monitoring is essential to guide actions and produce changes to a mitigation plan. Reactions to adaptive management will typically be specific to a proposal, but may include reduction or termination of water use under specific conditions, or consideration of substitute or different mitigation methods. Formal requests to substitute different mitigation methods can be considered, however Ecology is under no obligation to approve a new or modified mitigation plan.

#### Financial Assurances

The objective of financial assurances is to ensure operational mitigation over the life of the project. If necessary to address uncertainty and risk, the applicant must provide financial assurances to guarantee that the applicant will have the funds to continue the mitigation in the event of a default. Financial assurances are expected to be in place as long as the underlying water right is in use, but may be required for a time frame determined by Ecology based on adaptive management or documented reduced risk(s) over time. Acceptable mechanisms may include trust funds, bonds guaranteeing performance, irrevocable letters of credit, government securities, or other proof of financial responsibility. The applicant must provide an acceptable level of financial assurance, and the water use documents must contain provisions allowing Ecology to terminate the water use if Ecology determines that mitigation is at risk due to failure to maintain financial assurances.

### Performance Based Permits

To address uncertainty and risk associated with mitigated water rights, Ecology may issue performance based permits. Such permits can authorize phasing of a project or tie development limits with proof of mitigation implementation. Ecology will not issue a certificate of water right until satisfied that the mitigation is successful.

### State Environmental Policy Act

As a general rule, Ecology's decisions on water right permit applications are subject to the SEPA process, though appropriations of one cubic-foot per second or less of surface water, or of 2,250 gallons per minute or less of groundwater, for any purpose, are categorically exempt from a SEPA threshold determination. This SEPA exemption covers the permit and certain activities related to the water diversion and distribution system (*see e.g.* WAC 197-11-800(4)). In addition, the legislature has enacted a substantial exemption for certain irrigation projects diverting 50 cubic feet per second or less (*see* RCW 43.21C.035).

Ecology will consider both the benefits and costs to the existing environment when evaluating an application for a new water right, water right transfer, or change to an existing water right that includes a mitigation plan or a resource management technique.<sup>5</sup> To address environmental impacts for projects that are not categorically exempt from the SEPA process, Ecology may use SEPA to shape mitigation strategies, and solicit comments on mitigation plans. When not the SEPA lead agency, Ecology can submit comments to the lead agency on the adequacy of a mitigation plan. All agencies with jurisdiction may choose to require mitigation for identified impacts through their SEPA substantive authority.

If an applicant proposes a mitigation plan associated with the water right application following approval of SEPA when Ecology is not lead agency, Ecology will contact the lead agency, provide the new information, and request additional environmental review. Ecology may supplement the SEPA record if new environmental impacts are found and mitigation is proposed to address them. Ecology may use SEPA substantive authority to condition the water right decision based on the SEPA document and any comments received whether or not Ecology is the lead agency for the proposal.

### Permit Provisions

Ecology will establish provisions based on the required elements of a mitigation plan and include those provisions in any Report of Examination, permit, certificate, or change authorization. These elements must address all actions necessary to implement, maintain, monitor, and report on the effectiveness of a

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<sup>5</sup> As required in RCW 90.03.255 and RCW 90.44.055, Ecology will "take into consideration the benefits and costs, including environmental effects, of any water impoundment or other resource management technique that is included as a component of the application. The department's consideration shall extend to any increased water supply that results from the impoundment or other resource management technique, including but not limited to any recharge of groundwater that may occur, as a means of making water available or otherwise offsetting the impact of the diversion of surface water (or withdrawal of groundwater-RCW 90.44.055) proposed in the application for the water right (or amendment in the same water resource inventory area-RCW 90.44.055), transfer, or change."

mitigation proposal for as long as water is withdrawn or diverted. These documents must also contain conditions to terminate or suspend a proposed water use if a mitigation plan ends or fails to be effective, or if there is a failure to maintain financial assurances for the mitigation. If a water use is suspended, it may not resume until the mitigation plan can be rendered effective and/or financial assurances are restored.

Every mitigation plan places some burden on Ecology to track, coordinate, and enforce the mitigation to ensure that water is available and existing water rights are not impaired. Therefore, provisions should be tailored to reduce effects on staff resources to the greatest extent possible. Some examples of provisions include:

- Stream flow measurement or groundwater level data coordinated with annual metering data submittals due on January 31<sup>st</sup> of each year.
- Periodic evaluation of mitigation adequacy and compliance with consumptive use limits for public water systems coordinated with water system plan updates due every six years.
- A structured approach for implementing, maintaining, monitoring, and reporting on the effectiveness of a mitigation proposal for as long as water is withdrawn or diverted.
- One-time performance standards (such as submittal of agreements, covenants, and trust water conveyances) under mitigation plans coordinated with permit maintenance schedules already tracked by Ecology, such as Beginning of Construction, Completion of Construction, and Proof of Appropriation, or Project Completion steps.



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**Special Note:** These policies and procedures illustrate existing law and encourage consistency to guide water resources program staff in administering laws and regulations. These policies and procedures are not formal administrative regulations adopted through a rule-making process. Therefore, while this policy provides general guidance, it is not intended to supersede the applicable statutes and rules or control in all situations where staff may exercise discretion as to how best to apply the law.

The policies indicate Ecology's practices and interpretations of laws and regulations at the time they are adopted and may not reflect later changes in statute or judicial findings. If you have any questions regarding a policy or procedure, please contact the department.