

Chapter 173-165 WAC

CERTIFIED WATER RIGHT EXAMINERS

NEW SECTION

WAC 173-165-010 Purpose and authority of this chapter. The purpose of this chapter is to establish procedures for implementing RCW 90.03.665, Certified water right examiners--Fees--Rules. The statute authorizes certified water right examiners to conduct final proof examinations of permitted water uses to support department of ecology (ecology) decisions on whether to issue water right certificates. The statute requires permittees, as explained herein, to hire a certified water right examiner to complete a proof examination. RCW 90.03.665 requires ecology to establish and maintain a list of certified water right examiners through a defined certification process. RCW 90.03.665(11) authorizes ecology to adopt rules appropriate to carry out the purposes of the statute.

NEW SECTION

WAC 173-165-020 Definitions. The definitions included in this chapter are intended solely for the implementation of this chapter. This applies to the definitions in this section and those in WAC 173-165-100, Compliance and enforcement.

"Client" means the water right permit or change authorization holder (permittee) that hires the certified water right examiner.

"CWRE" stands for "certified water right examiner" and, when used for clarification in this chapter, denotes elements of the CWRE process and function, such as the CWRE coordinator, certification under this chapter, the list of certified water right examiners, or the proof examinations, reports, and recommendations made by certified water right examiners under this chapter.

"Permitted water use" means a water use under a water right permit or change authorization.

"Permittee" means the person or entity that holds the water right permit or change authorization.

"Program" means ecology's water resources program or its

successor.

"Proof report of examination" means the detailed account submitted by the certified water right examiner to ecology to support ecology's decision as to whether to issue a water right certificate.

NEW SECTION

WAC 173-165-030 Certified water right examiner responsibilities. (1) Certified water right examiners must qualify and apply as individuals and maintain their qualification under WAC 173-165-050 and RCW 90.03.665(2) throughout the period of their application and certification.

(a) If a person qualifies as a certified water right examiner through a hydrogeology, professional engineering, or land surveyor license in the state of Washington, he/she must maintain that licensure to remain qualified as a certified water right examiner unless they satisfy one of the other criteria in RCW 90.03.665(2).

(b) Certified water right examiners must notify ecology within two business days if:

(i) Notified their license as a professional engineer, land surveyor, or registered hydrogeologist is suspended or revoked; or

(ii) No longer a qualified water conservancy board commissioner.

(2) The certified water right examiner must follow the rules of professional performance. The applicant must review the rules of professional performance as provided by ecology and acknowledge by returning a copy with his or her signature.

(3) Certified water right examiners must maintain the validity of their CWRE certification throughout the period that they accept clients, perform proof examinations, and submit proof reports of examination, or ecology may revoke their certification. Maintaining a valid certification includes, but may not be limited to:

(a) Maintaining CWRE qualification under RCW 90.03.665 and WAC 173-165-050.

(b) Completing and showing proof of eight hours of approved continuing education annually, as defined in WAC 173-165-090.

(c) Paying CWRE certification renewal fees in a timely manner, as defined in WAC 173-165-080(4).

(d) Complying with the conditions of any suspension order or probation agreement.

(4) A CWRE certification applies only to an individual, and not to any associate, business, organization, or other entity. The certified water right examiner must perform all aspects of the proof examinations and reporting, including field visits, technical evaluation, and preparing the proof reports of examination.

(a) If an entity employs a certified water right examiner,

other employees of the same entity cannot perform the duties under RCW 90.03.665 or this chapter using the certified water right examiner's certification.

(b) Two or more certified water right examiners, regardless of whether they share a common employer, may perform work related to the same permit or change authorization only with the written permission of the client.

(5) Upon review of client water rights, certified water right examiners are responsible for submitting proof reports of examination to the appropriate ecology regional office for ecology's review and decision making. The proof report of examination must be complete and legible, and:

(a) In the form authorized by ecology. Ecology will not accept changes to the authorized forms.

(b) Compliant with permit or change authorization conditions, state water law, and regulations.

(c) Adequately supported by data, calculations, computations, and photographs.

(6) Certified water right examiners are responsible for the billing of clients and collection of fees. The state of Washington shall not be liable for a person's compensation as a certified water right examiner. The client shall pay any charges directly to the certified water right examiner, or his/her employer or chosen representative.

NEW SECTION

WAC 173-165-040 Fees. As authorized under RCW 90.03.665, ecology may establish and collect fees for the examination, certification, and renewal of certification for certified water right examiners. Table 1 summarizes ecology's fee structure related to CWRE examination and certification under this chapter.

Table 1

Type of fee	Amount	Due
Application	No fee to apply	Applicants should NOT include any fee when submitting their application
Examination	\$300	At least two weeks prior to the testing date
Certification fee	\$200	Prior to receiving certification

Type of fee	Amount	Due
Certification renewal fee	\$100	Annually, prior to expiration of the current certification
Additional late fee for renewal up to 30 days after expiration	\$50	Within 30 days following expiration of the certification
Additional late fee for renewal 31 to 90 days after expiration	\$100	Within 90 days of expiration

NEW SECTION

WAC 173-165-050 Minimum qualifications for CWRE certification. (1) To be a certified water right examiner, you must meet at least one of the following qualifications:

(a) Licensed in Washington state as a:

- (i) Professional engineer;
- (ii) Professional land surveyor; or
- (iii) Hydrogeologist.

(b) An eligible water conservancy board commissioner, which does not include alternates, current with all training requirements as required in RCW 90.80.040 and chapter 173-153 WAC; or

(c) Holding five years applicable experience as defined in subsection (2) of this section, including at least three years of experience defined in subsection (3) of this section.

(2) The five years of applicable work experience includes direct individual and practical experience related to one or more of the following:

(a) Conducting water right proof examinations in Washington or another state, or performing comparable work in evaluating the beneficial use of water.

(b) Preparing water right documents for use in the adjudication of water rights.

(c) Working in private industry evaluating water right applications and preparing reports of examination for cost recovery or cost reimbursement contracts.

(d) Evaluating state water right applications, conducting field investigations for water right permits, and preparing reports of examination.

(e) Preparing or reviewing records of decision for county conservancy boards.

(3) The five years of work experience must include at least three years of any one of the following:

(a) Evaluating new water right applications or applications

for change or transfer for compliance with applicable rules and statutes.

(b) Conducting field investigations and preparing tentative determinations of water rights related to water use.

(c) Verifying beneficial use of water.

(d) Regulating water rights as a stream patrolman or watermaster (RCW 90.03.070) or watermaster assigned to regulate water use within federal reclamation projects.

(e) Conducting proof examinations for issuance of certificates of water rights.

(f) Other qualifying experience, substituted year for year, as determined by ecology.

(4) Qualified applicants must maintain at least one of their qualifications throughout the duration of the application and certification periods. (See WAC 173-165-030.)

NEW SECTION

WAC 173-165-060 Application process. Submitting a completed application is the first step of the CWRE examination.

(1) Applicants should verify that they meet minimum qualification requirements under RCW 90.03.665(2) and WAC 173-165-050 prior to applying.

(2) Applicants must complete and submit to ecology an application for certified water rights examiner in an ecology-approved application form. Ecology will not accept changes to the application form.

(3) Ecology will not consider an application complete until receipt of:

(a) A completed application form without omissions, signed by the applicant.

(b) Any other documentation requested by ecology.

(4) Ecology will review each application based on RCW 90.03.665(2) and WAC 173-165-050.

(5) Ecology will notify applicants in writing whether their application is approved.

(a) If their application is approved, ecology will provide the applicant information on testing opportunities and submitting the required examination fee.

(b) If the applicant does not appear to meet the minimum qualifications or the application is not complete, ecology will return the application.

(c) If an applicant had a CWRE certification previously revoked under WAC 173-165-100, ecology may reject their application without regard to whether the applicant otherwise meets the minimum qualifications. In such cases, ecology may consider the following before approving the application:

(i) Whether five years has elapsed since the CWRE certificate was revoked.

(ii) The status of the applicant's qualifications including any professional licensure or water conservancy board membership.

(iii) The status of the incident(s) that originally required revocation of the CWRE certification.

(6) Application materials are considered public records and are subject to the Public Records Act, chapter 42.56 RCW.

NEW SECTION

WAC 173-165-070 Examination process. (1) Applicants must:

(a) Qualify for testing through the application process defined in WAC 173-165-060.

(b) Submit the three hundred dollar examination fee at least two weeks prior to the testing date.

(2) For applicants with a disability, ecology will provide accommodations consistent with the Americans with Disabilities Act. Applicants should make their request for accommodations as early as possible to provide reasonable notice.

(3) Ecology will notify applicants by mail of their examination result as either pass or fail.

(4) If an applicant fails the examination, he/she may:

(a) Repeat the examination no sooner than thirty days after testing.

(b) Apply to retake the examination by submitting a written request and the three hundred dollar examination fee to ecology.

(5) Review of past examinations is not permitted.

NEW SECTION

WAC 173-165-080 Certification. (1) Ecology will issue the CWRE certificate and add the certified water right examiner's name to the CWRE list on ecology's web site within thirty days upon completion of the following:

(a) The applicant shows proof of qualifications through the application process;

(b) The applicant passes the CWRE examination;

(c) The applicant submits a signed copy of the rules of professional performance, as prescribed by ecology; and

(d) Ecology receives the two hundred dollar certification fee.

(2) The CWRE certificate allows the holder to conduct proof examinations in accordance with RCW 90.03.665 and submit proof reports of examination to support ecology decisions on whether to issue water right certificates.

(3) The CWRE certificate does not constitute professional

licensure for any related field including hydrogeology, engineering, or land surveying.

(4) **Certification renewal.**

(a) CWRE certifications expire annually.

(b) Ecology will issue a renewal reminder letter to the certified water right examiner at the address of record, at least sixty days prior to the expiration of the current certification. The letter will provide the following information:

(i) The status of his/her continuing education credits.

(ii) Whether the certification is in good standing under RCW 90.03.665 and this chapter.

(iii) Whether proof of qualifications is required.

(iv) Directions for submitting the certification renewal fee and other required documentation.

(c) To renew certification, the certified water right examiner must submit to ecology, as directed in the renewal reminder letter and postmarked no later than the expiration date:

(i) A one hundred dollar renewal fee;

(ii) Proof of any remaining continuing education credits due;

(iii) Proof of qualifications, if required; and

(iv) A certification renewal form or a letter requesting renewal of the CWRE certification.

(d) If a certified water right examiner does not renew his/her certificate by the expiration date, the certification expires and becomes invalid.

(i) The list of certified water right examiners on ecology's web site will indicate that the certification has expired.

(ii) There is a maximum ninety-day grace period after the expiration date for the certified water right examiner to renew the certification. Associated late fees will apply during the grace period as required under (e) of this subsection.

(iii) Late renewal during the ninety-day grace period will not delay the date the new certification will expire, or change the anniversary date regarding annual continuing education requirements.

(e) If the certified water right examiner fails to renew his/her certification by the expiration date as required under (c) of this subsection, the following late fees will apply:

(i) Renewal between one to thirty days after expiration of the certificate includes a late fee of fifty dollars, in addition to the one hundred dollar renewal fee.

(ii) Renewal between thirty-one to ninety days after expiration of the certificate includes a late fee of one hundred dollars, in addition to the one hundred dollar renewal fee.

(f) If a certified water right examiner fails to renew their certification before the end of the ninety-day grace period:

(i) Ecology will remove their name from the list of certified water right examiners.

(ii) They must notify all current clients in writing of their ineligibility, and submit a copy of the letter to ecology.

(iii) They must successfully reapply, retest, and pay all related fees to become recertified.

NEW SECTION

WAC 173-165-090 Continuing education. (1) Each certified water right examiner must complete eight hours annually of continuing education in the water resources field.

(2) Ecology will provide information on continuing education opportunities for certified water right examiners on the internet. Ecology may grant credit for completing related training not listed on our web site at the discretion of the CWRE coordinator.

(3) Certified water right examiners may submit proof of their continuing education credits to the CWRE coordinator at any time.

(4) Ecology will notify certified water right examiners of their qualifying education status in their certification renewal letter.

(5) Ecology will not renew the CWRE certification until receipt of evidence that the certified water right examiner has completed the required continuing education hours.

(6) Ecology will apply continuing education hours earned in the following order:

(a) Overdue hours needed to renew certification during the ninety-day grace period.

(b) Hours needed for the next certification renewal.

(7) Certified water right examiners may not carry over continuing education hours for future credit in excess of the annually required eight hours.

NEW SECTION

WAC 173-165-100 Compliance and enforcement. (1) Ecology is authorized to take all actions under this rule to examine, certify, investigate, and enforce this rule against certified water right examiners and CWRE applicants. However:

(a) Certified water right examiners are independent contractors and not ecology employees.

(b) Ecology is not responsible for the direct supervision of a certified water right examiner.

(c) Ecology is not responsible for the contractual relationship between certified water right examiners and their clients.

(2) Nothing in this chapter is intended to prevent ecology from taking immediate action if it is critical to the safety of the public, agency staff, and others; or is critical to the protection of the water resource as otherwise authorized by law.

(3) **Informal actions.** Ecology will pursue compliance with RCW 90.03.665(4) with the following informal methods, which are not appealable:

(a) Ecology staff will spot-check the work of certified water right examiners to ensure the public is competently served.

(b) Staff may provide technical assistance or training.

(c) Ecology may issue verbal or written warnings, such as to advice on poor performance, give notice of one or more customer complaints, or to request actions to prevent violations before they occur (RCW 90.03.605 (1)(b)).

(4) **Formal actions.** Ecology will formally pursue compliance with RCW 90.03.665(4) by issuing an administrative order to suspend or revoke a CWRE certification. An order is a formal requirement to correct or prevent a documented violation and is an appealable action. Orders are issued by certified mail to the certified water right examiner's address on record or delivered in person.

(a) **"Suspension," "suspend," or "suspending"** means temporary postponement or limitation of a certified water right examiner's certification authorities.

(i) Suspension is for a temporary period not to exceed one year.

(ii) Suspension is intended for the certified water right examiner to improve poor performance, resolve client complaints, or to acquire additional training, or ecology may suspend a certified water right examiner as a temporary measure during a compliance investigation.

(iii) Certified water right examiners may renew their CWRE certification during the period of suspension, if they are in compliance with the suspension order and the conditions of any probation agreement, and meet the conditions of renewal under WAC 173-165-080(4).

(b) **"Revocation," "revoke," or "revoking"** means a CWRE certification is completely invalidated with sanctions.

(i) A revoked CWRE certification cannot be renewed.

(ii) When a CWRE certification is revoked, to become recertified, the person:

(A) Must wait at least five years before ecology can accept their reapplication.

(B) Must reapply, retest, and be recertified, as well as pay all associated fees.

(iii) Even after the five years has passed, ecology may choose to reject the reapplication regardless of whether the applicant otherwise meets minimum qualifications (WAC 173-165-060 (5)(c)).

(5) RCW 90.03.665(4) authorizes ecology to suspend or revoke the certification of a certified water right examiner based on failure to acquire continuing education credits, poor performance, excessive complaints from their clients, or malfeasance. For the purposes of this chapter:

(a) **"Poor performance"** means work products or work behaviors that fail to meet accepted standards of professional behavior and performance, such as:

(i) Repeated submittal of incomplete, inaccurate, insufficiently detailed, or otherwise unacceptable proof reports of examination.

(ii) Extensive delays in submitting proof reports of examination after completion of the proof examination.

(iii) Failure to abide by the rules of professional

performance or to meet statutory requirements.

(b) "**Excessive complaints**" means complaints that go beyond what is proper, normal, or reasonable. If ecology receives two or more complaints for an individual certified water right examiner in any twelve-month period, ecology may consider the number and nature of the complaints, and the frequency in relation to the number of proof examinations completed by the certified water right examiner in determining whether complaints are excessive.

(c) "**Malfeasance**" means wrongdoing or misconduct, such as an act that gives rise to civil liability for damages arising out of professional conduct; or that is harmful, or contrary to law; or that is a violation of professional standards or ethical rules; or an act in violation of a public trust.

(d) "**Compliance investigation**" means an informal or formal investigation by ecology or the CWRE investigative committee of a certified water right examiner to ensure that the public is being competently served, or in response to client complaints, indications of poor performance, or when ecology suspects malfeasance. Compliance investigations may include:

(i) Spot checking the work of the certified water right examiner.

(ii) Interviewing past and current clients.

(iii) Reviewing previous proof reports of examination.

(iv) Documenting patterns of behavior.

(v) Holding a meeting with the certified water right examiner to discuss concerns and possible options for dealing with the problem.

(vi) Other actions ecology or the CWRE investigative committee deems appropriate.

(e) "**CWRE investigative committee**" means a group that may be formed to investigate or to review corrective action proposals if ecology suspects malfeasance, receives excessive complaints from clients, or finds a pattern of poor performance. The committee may be convened on an as-needed basis at any time and may include:

(i) The CWRE coordinator.

(ii) Regional water right permitting staff.

(iii) Other program staff or managers.

(iv) Other ecology staff or managers.

(v) Assistant attorney(s) general.

(vi) Others with expertise appropriate to the process.

(6) Client complaints, issues of poor performance, and any indications of malfeasance should be referred to the CWRE coordinator. The CWRE coordinator may work with regional permitting staff and program management to determine whether further action is appropriate, such as:

(a) Meet with the certified water right examiner to discuss concerns and possible options for dealing with the problem.

(b) Provide technical assistance.

(c) Issue a verbal or written warning.

(d) Perform a preliminary (informal) or formal compliance investigation.

(e) Convene the CWRE investigative committee.

- (f) Consult with an assistant attorney general.
- (g) Present issues to agency senior management.
- (h) File a police report.
- (i) Other steps as appropriate for the complaint.

(7) When ecology or the CWRE investigative committee does a formal compliance investigation of a certified water right examiner, the certified water right examiner will be notified in writing as to the results of the investigation.

(8) When investigating a potential act of malfeasance, ecology may suspend the CWRE certificate until the final investigation is complete.

(9) Ecology may immediately revoke the certification of a certified water right examiner found liable or convicted for malfeasance in a court of law.

(10) Ecology will determine whether to suspend or revoke a CWRE certification.

(a) The CWRE coordinator or designee will discuss the recommendation, including the results of any investigation made, with program management.

(b) Ecology is ultimately responsible for the content of the order to suspend or revoke a CWRE certification.

(c) The suspension or revocation is effective as of the date of formal notification to the certified water right examiner.

(11) After suspending a CWRE certification, ecology may enter into a probation agreement that would allow the certified water right examiner to continue to perform some or all CWRE services during the period of suspension.

(a) A probation agreement will be the equivalent of a conditional certification.

(b) The probation agreement will identify the following:

(i) Requirements for the certified water right examiner to fulfill the agreement, such as additional continuing education of a specific subject.

(ii) The length of time for the suspension before ecology will revoke the CWRE certification for failure to meet the agreement.

(iii) Any requirements for retesting.

(iv) Any other elements specific to the case.

(c) Any probation agreement will be signed by the certified water right examiner and ecology program manager or designee.

(12) The certified water right examiner under suspension must abide by the terms of the suspension order and any probation agreement, and satisfy all remedial requirements, in addition to any statutory requirements, or ecology may revoke the certification as described in subsection (6) of this section.

(13) The certified water right examiner under suspension must continue to maintain certification according to the renewal deadlines identified in WAC 173-165-080(4), or ecology may revoke the certification as described in subsection (4)(b) of this section.

NEW SECTION

WAC 173-165-110 Appeals. All final written decisions of the department of ecology pertaining to certified water right examiners and CWRE applicants under this chapter shall be subject to review by the pollution control hearings board in accordance with chapter 43.21B RCW.

NEW SECTION

WAC 173-165-120 Permittee rights and responsibilities. (1) A permittee may develop all or a portion of the project and put water to beneficial use in compliance with their water right permit or change authorization. Development of the project and the measure of the beneficial use may be less than authorized, but may not exceed the authorized quantity or conditions of use.

(2) Once the project development ends and beneficial use of the water is established under the water right permit or change authorization, the permittee shall submit a notarized proof of appropriation form to the appropriate ecology regional office.

(3) Ecology will review the proof of appropriation form and respond in writing directing the permittee to hire a certified water right examiner. Ecology may waive the requirement to secure the services of a certified water right examiner if ecology has conducted the proof examination or determines that one is not necessary to issue a certificate of water right.

(4) As directed by ecology, the permittee must secure the services of a certified water right examiner from the ecology-maintained CWRE list on ecology's web site to perform the proof examination and submit a proof report of examination to ecology.

(5) Ecology will send the permittee a copy, if during the first thirty days from receipt of the documents ecology returns the proof report of examination to the certified water right examiner for correction.

(6) Until ecology has made a final decision (WAC 173-165-130), the permittee may withdraw the proof report of examination submitted by the certified water right examiner at any time during ecology's review period.

(a) To withdraw the CWRE proof report of examination, the permittee must submit to ecology the request to withdraw in writing, including the effective date and future intent of water use.

(b) Upon written withdrawal by the permittee, ecology will cease review of the proof report of examination.

(7) Within thirty days of withdrawing the proof report or examination, the permittee must:

(a) Schedule a technical assistance meeting with the regional water resources program; and

(b) Define a course of action for moving the water right permit from proof of appropriation stage to certification under RCW 90.03.330.

(8) Should the permittee not comply with this section, ecology may:

(a) Cancel all or a portion of the water right permit or change authorization; or

(b) Issue a final determination through an administrative order based on the information submitted, per WAC 173-165-130(4).

NEW SECTION

WAC 173-165-130 Ecology review and final decision making.

(1) Ecology will not accept proof reports of examination from a certified water right examiner whose certificate is expired, revoked, or otherwise invalid. Ecology has a maximum of sixty days to make the final decision on the CWRE proof report of examination unless otherwise requested in writing by the permittee as allowed under RCW 90.03.665(6).

(2) Ecology may return the proof report of examination for correction to the certified water right examiner and the permittee within thirty days of ecology's initial receipt of the documents.

(a) Ecology's initial review will be comprehensive to identify all deficiencies.

(b) Ecology shall document on the proof report or examination the date ecology returned the report to the certified water right examiner for revision.

(c) If a proof report of examination is returned to the certified water right examiner and permittee for correction, ecology's sixty-day clock stops.

(d) The certified water right examiner should return the corrected report within ninety days for ecology to complete its review. On receipt of the corrected report from the certified water right examiner, ecology has thirty days to issue a final decision regarding certification of the water right.

(e) If the certified water right examiner returns the corrected report later than ninety days, ecology will determine it to be a new report and ecology's sixty-day review period begins again.

(3) If during the sixty-day review period, the permittee submits a request to withdraw the proof report of examination, so long as ecology has not yet made a final decision on certification of the water right, ecology will cease their review. Ecology may consider the withdrawal as evidence of intended permit cancellation if a permittee fails to:

(a) Schedule a technical assistance meeting with regional program staff; and

(b) Define a course of action for moving the water right permit from proof of appropriation stage to certification under RCW

90.03.330, as required under WAC 173-165-120(6).

(4) Within sixty days, ecology will make a final determination regarding the proof report of examination by:

(a) Issuing a recommendation to certify the beneficial use of water in a final administrative order.

(i) After the thirty-day appeal period, ecology will prepare the water right certificate based on their review of the CWRE proof report of examination and any other information within the record, and request certificate and recording fees from the permittee.

(ii) Ecology will issue the water right certification upon receipt of certificate and recording fees.

(b) Defining a course of action for moving the water right permit or change authorization to certification under RCW 90.03.330.

(c) Canceling the permit by issuing an administrative order that identifies the reasons for permit cancellation.

(d) Taking other actions deemed appropriate based on the CWRE proof report of examination and findings.

(5) If ecology's final decision on the proof report of examination is in conflict with the certified water right examiner's recommendation, ecology will identify in its administrative order the reasons for modifying or reversing the CWRE recommendation.