



December 5, 2025

Water Resources Program
Washington Department of Ecology
(submitted via web portal)

Re: Comments on the DRAFT - Development Schedules for Water Right Changes and Transfers Policy and Interpretive Statement - POL-1280
(<https://apps.ecology.wa.gov/publications/documents/2511105.pdf>)

The Center for Environmental Law & Policy (CELP) provides these comments on the Washington Department of Ecology (Ecology)'s Draft Development Schedules for Water Right Changes and Transfers Policy and Interpretive Statement (Policy 1280).

CELP is a statewide 501(c)(3) nonprofit organization whose mission is to protect, preserve, and restore Washington's waters through education, advocacy, policy reform, and public interest litigation.

CELP supports efforts to streamline regulatory processes, provide for adaptive measures and provide clarity for various stakeholders where there is no adverse impact on protection of water resources for fish, wildlife and the public interest. However the draft policy raises several concerns that we would like see addressed.

Section 1.2 contains the statement, "However, a changed certificate (with or without a development schedule) is not required to show beneficial use under the new authorization before obtaining a superseding certificate." CELP does not believe Ecology has authority to issue a superseding certificate absent proof that the change was done in fact, both for the construction of works and for the use of water. It is upon a showing satisfactorily to Ecology that any appropriation or change has been perfected in accordance with the provisions of Chapter 90.03 RCW that Ecology then has a duty to issue a superseding certificate or change authorization as the case may be. The development schedule can and will certainly consider the needs of the applicant, but it is encumbant on Ecology to ensure a change is commenced within a reasonable time as prescribed by Ecology, is carried out with diligence, and is "completed within the time prescribed by the department".

Also in Section 1.2, the background section, contains a policy statement, "When considering development schedules for changes to permits, Ecology will issue a superseding permit that has the development schedule from the original permit in it." Why a new approval would have an

old development schedule is confusing at best, but to mandate it with this potentially binding language creates burden on Ecology to conduct decision making in the public interest. We encourage a wholesale reconsideration of the proposed policy item.

In Section 2, in the first sentence, Ecology references *Department of Ecology v. Theodoratus*ⁱ [i]as the legal authority to require a development schedule as part of a change approval. We agree that case and case law provides a legal foundation and perhaps go much further in conferring state authority. Generally, an agency which has authority to issue or deny permits clearly has authority to condition them. The conditions of the original permit however do not necessarily create a vested right to proceed under those conditions where approval of a change to a water right is requested and approval by Ecology is discretionary. *Theodoratus* states, “The Department thus has authority to condition any extension to satisfy any public interest concerns which arise, provided, of course, that it also must comply with all relevant statutes.” CELP assert that when an application is made to change or amend a permit or water right certificate, the entire permit or right is subject to scrutiny under public interest considerations, especially those added to statutes after the original permit was issued. Not only must Ecology do the tentative determination of validity to determine whether a water right first exists in order to be changed, it must also consider the public interest related to instream flows and endangered fish stocks when considering development schedules.

The failure of any approved water right changes to be pursued with diligence is to the detriment of junior water rights and instream flows. When the Department determines whether to extend the period of time for completion of a project under RCW 90.03.320, it must consider the “good faith” of the appropriator and the public interest. This requirement raises policy concerns about the availability of water resources given water supply and precipitation trends as well as increasing demands, and it helps to eliminate speculation and uncertainty in the management of limited water resources.

Defacto changes are brought up in Policy 1280 as an example of when a superseding document would be issued directly. The text of Policy 1280 would benefit from a definition of “defacto change” and criteria to judge whether a change application is a defacto change, and not simply an unauthorized use looking to gain legal status. We support Ecology’s efforts to streamline and simplify processes when reasonable but not at the expense of ensuring certificates reflect facts on the ground.

Also in Section 2, Policy 1280 indicates two stated purposes. One purpose is, “Providing a period of time (sic) to orderly transition from one place of use, purpose of use, or point of diversion or withdrawal to another.” CELP believes this to be reasonable. However another stated purpose of the Policy 1280 is, “Allowing timelines for construction activities necessary for the change that may support a determined future development (DFD) or other exemption or exception from relinquishment...”ⁱⁱ CELP encouraged Ecology to not use this Policy 1280 to conflate or commingle two seemly disparate water right issues with a purpose, apparently, to assist a water right holder with an apparent forfeiture to defeat a relinquishment order. There is no need for this policy to address what qualifies as a DFD. There is a need in the policy however to clearly state the development schedule and to ensure reasonable progress and due diligence are shown by the water user to perfect the change.

As a policy statement the Draft Policy 1280 provides little substantive criteria or factors for Ecology staff to use in decision-making or information for an applicant to provide that is different than stated in POL-1050ⁱⁱⁱ. The policy should provide guidance to staff on the information needed for the decision, and the criteria to determine a development schedule. We recognize all changes to water rights are not the same, but there should be guidance to program staff to make consistent decisions.

Thank you for the opportunity to comment,

A handwritten signature in black ink, appearing to read "Chris Wilke", with a horizontal line extending from the end of the signature.

Chris Wilke
Executive Director
Center for Environmental Law and Policy
cwilke@celp.org

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

ⁱⁱ Department of Ecology, Public Review Draft - Development Schedules for Water Right Changes and Transfers Policy and Interpretive Statement, Publication 25-11-105, page 4, second bullet in the first paragraph

ⁱⁱⁱ Department of Ecology, Water Resources Program, Draft Policy and Interpretive Statement - Extension of Time on Permits, 1991, Rev. 2021 apps.wa.gov/ecology/docs/WaterRights/wrwebpdf/pol1050r.pdf