

Port Gamble S'Klallam Tribe (Claire Newman)

This email and the attachment here constitute Port Gamble S'Klallam Tribe's comments on Ecology's update to POL 1280. Given the nature of the Tribe's comments on this policy, I integrated the comments as margin comments, questions, and redlines in the draft.

My understanding from our call on Monday is that Ecology has decided not to confirm completion of a water right change or application of water consistent with the change, but rather it will rely on later compliance actions by Ecology if the holder is found to be out of compliance with the change. This shift in policy is concerning to the Tribe given Ecology's historic lack of resources for compliance and the likelihood that non-compliant water use will fall through the cracks. The Tribe's other concern is the considerable vagueness of the policy.

Finally, based on your presentation on the policy update at the WRAC, the Tribe understands that Ecology is updating many of its policies based on *Foster* and several other decisions. Since the policies and processes they outline are interrelated, it would be more effective for Ecology to update these policies at the same time rather than piecemeal, even if it takes longer to do so. Updating them at the same time would ensure more coherent and comprehensive review, revision, and public comment.

Thank you for the opportunity to comment.

Regards,

Claire Newman

Claire Newman

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NOTE: Word file was converted to PDF for upload into SmartComments (BB).



Public review draft:
Development Schedules for Water Right Changes and Transfers
Policy and Interpretive Statement

Policy Number: POL-1280

Program Name: Water Resources Program

Date Issued: 08/10/2009

Date(s) of Substantive Updates: N/A. Public comment version.

Contact: Water Resources Program Policy Support Section

References: *Statute:* RCW 90.03.320, 90.03.380, 90.03.386, 90.03.390, 90.03.470, 90.14.140, 90.14.160-180, 90.44.100, 90.44.105, and 90.66.065.

Administrative Rule: WAC 173-153-130 and 173-153-160.

Policy: POL-1050, Extensions of Time on Permits.

Purpose: To describe the process and criteria for setting development schedules for water right changes and transfers, including evaluating requests for extensions and how they differ from development schedules for new water right permits.

Application: This policy applies to development schedules and requests for extensions for change and transfer authorizations.

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

[PORT GAMBLE S'KLALLAM TRIBE'S COMMENTS TO ECOLOGY'S UPDATE TO POL-1280](#)

ADA Accommodation

To request ADA accommodation, call Ecology at 360-407-6872 or visit <https://ecology.wa.gov/accessibility>. People with impaired hearing may call Washington Relay Service at 711. People with speech disability may call TTY at 800-833-6384.

Public Review and Comment

Use the online comment form to submit comments during the public comment period on this draft.

Section 1: Definitions and Background

1.1 Definitions

The following definitions are intended for informational purposes only to promote a common understanding of terms used throughout this policy and are not meant as legal definitions.

Change development schedule: The time allowed for a water right holder to transition from an existing authorized use to a newly 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 exemption 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 reasonable justification why additional time is necessary to begin construction, complete construction, and/or apply water to beneficial use under the change authorization.

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.

Public interest evaluation: The consideration of impacts to the public at large that would result from a requested action such as extending a development schedule. General guidelines for consideration of the public interest are set forth in the water resources fundamentals in RCW 90.54.020. As applicable, considerations should include environmental impacts, with emphasis on protection, restoration, and recovery of threatened and endangered species; implications for public health and safety; aesthetic, recreational, economic effects; and impacts on publicly owned resources and facilities. The public interest can also be presumed to be reflected in watershed plans, groundwater area management programs, related water supply plans, water conservation plans, Ecology administrative rules, and local land use plans and development regulations.

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

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

Commented [CN1]: Many of the comments below address uncertainty and hedging in the policy which will cause confusion in its application. Overall, if a policy is vague it signals that Ecology has more work to do to analyze current policy and practices and how to align policy updates with the law.

Commented [CN2]: I recommend including a definition of "waste" since a change development process should be intended to avoid waste.

Commented [CN3]: The ROE should specify whether Ecology is treating the change as a de facto change or a change requiring a change development schedule so that it is clear to Ecology staff and to the public which track the change is following.

Commented [CN4]: Please cite to an RCW, WAC, or policy for the definition or explanation of ROE.

ROE should be made its own term within the definition section.

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Superseding document: A replacement or augmenting water right document that contains changes or corrections to the original or prior water right document. The type of superseding document issued depends on the type of water right document being changed:

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

1.2 Background

This policy ~~mostly~~ most often applies to development schedules for changes to water right certificates. 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. Information unique to change development schedules for permits or other types of water rights will be specifically identified.

Commented [CN5]: What is the reason for this difference in Ecology's treatment of a change permit and a change certificate?

Much of the information for extensions of time for new water right permits described in RCW 90.03.320 and POL-1050, Extension of Time on Permits, also apply to the change development schedule process in this policy. However, extensions of time for new water right permits described in those documents and change development schedules for certificates described in this policy differ when it comes to showing beneficial use. A new water right permit is required to show beneficial use through proof of appropriation before a certificate is issued. 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. This is because the change approval process for a certificate already ~~involves~~ requires a determination of extent and validity to determine ~~determining~~ the water right quantities that are perfected and valid for change.

Commented [C6]: This assertion needs to be supported by citation to statute or case law. RCW 90.03.330 does not support the assertion that an applicant for a change certificate need not re-perfect. RCW 90.03.330(1) discusses the initial perfection, not perfection under the change. So, beneficial use may have been shown under the first-issued certificate but not the change certificate.

It is Ecology's job to ensure a change is commenced within a reasonable time as prescribed by Ecology, is carried out with diligence, and "completed within the time prescribed by the department.

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

If Ecology is shifting the burden to applicants and relying on later enforcement action to capture any inconsistent use Ecology must be prepared to properly staff its compliance department and attorney general division.

Section 2: Purpose and Ability to Issue Change Development Schedules

Ecology is able to issue an administrative development schedule as part of a change approval.² Change development schedules aid in compliance with the water code by:

- Providing a period to orderly transition from one place of use, purpose of use, or point of diversion or withdrawal to another.
- Allowing timelines for construction activities necessary for the change that may support a determined future development (DFD) or other exemption or exception from relinquishment³ while transitioning to the new use (see Section 9.1, Determined Future Development).
- Avoiding waste, as water use changes that are longer than necessary make water unavailable or there is uncertainty regarding availability for junior water users.

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 develop new points of diversion or withdrawal, put facilities in place for water delivery and use, and put the water to the new beneficial use. Once the change is complete and a superseding document is issued, the use of water under the previous authorization must be stopped.

2.1 Fees

RCW 90.03.470(6) provides that extensions of time for change development schedules are subject to the same fees as extensions of time for beginning construction work, completion of construction work, or application of water to a beneficial use under a water right permit.⁴

2.2 Water Conservancy Boards

Water conservancy board (WCB) rule WAC 173-153-130(6)(f)(iii) describes that the report of examination (ROE) must address if there is a need for “a schedule for development and completion of the water right transfer.” However, the change ROE from the WCB may or may not include a development schedule based on the project-specific circumstances. For example, a WCB might not include a change development schedule if it is a change that has already physically occurred (i.e., a “de facto change”). Ecology is able to modify or remove the change development schedule in a WCB change ROE. Section 3, When to Use Change Development Schedules, describes project-specific circumstances and considerations in these situations.

Commented [CN7]: This is the only place that “administrative development schedule” is used in the Policy. Adding new terms such as “administrative development schedule” is confusing. All terms of art should be included in the definition section and then used consistently and precisely throughout the document.

Commented [CN8]: Do you mean to say here, “allowing period of non-use during construction activities necessary for the change?” This would be clearer and more consistent with RCW 90.14.140. If Ecology is going to allow periods of non-use, it should be explicit about it.

Commented [CN9]: Is Ecology’s interest in supporting exemptions from relinquishment? Water is either put to beneficial use, relinquished, or an exemption applies, otherwise, it is waste that injures junior water users. “Other exemption” is far too vague for something as important as relinquishment. RCW 90.14.140(2)(c) does not say “or other exemption or exception from relinquishment”. Subsection 2 does.

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

³ ~~RCW 90.14.140(2)(c)~~

⁴ See Focus On: Extension for Water Right Permits and Change Authorizations at <https://apps.ecology.wa.gov/publications/documents/0611004.pdf>.

Section 3: When to Use Change Development Schedules

3.1 Issuance of a Superseding Document Without a Development Schedule for De Facto Changes
Ecology ~~will use standard approach is to~~ issue a superseding document without a change development schedule following the end of the appeal period of the ROE ~~(or resolution of an appeal). This includes scenarios~~ when:

- A superseding document is requested by the applicant.⁵
- ~~The change has already physically occurred, commonly called a de facto change (see POL-1120, Conducting Tentative Determinations of Water Rights), and all conditions for approval of the change are met.~~
- ~~The ROE states that a change development schedule is not required.~~
- ~~The applicant intends to immediately~~The ROE requires the applicant to transition from the existing beneficial use to the new use within [specific timeframe] and any construction related activities and other agencies are responsible for other construction related approvals, e.g. State Environmental Policy Act. are covered review and approval by other agency actions.

~~However, Ecology does have the discretion to~~ will issue an change authorization (in the form of a ROE) with a development schedule on a case-by-case basis as necessary to ensure efficient application of the water to the changed beneficial use (see Section 3.2, Determining the Need for a Change Development Schedule). Ecology may issue a change development schedule when:-

- ~~Requested by the applicant.~~
- ~~Time is needed before using water under the new authorization.~~
- ~~Construction is needed to use water under the new authorization.~~

~~In all cases when a superseding document is issued, all use of water inconsistent with the change authorization must stop.~~

3.2 Determining the Need for a Change Development Schedule

The change development schedule benefits the applicant by allowing continued use of the water for a limited period of time under the original authorization (such as purpose or place of use) while new construction occurs. This flexibility of water use is not available if Ecology were to immediately issue a superseding document. When practical, Ecology will work with the

Commented [CN10]: Make it clear in this section that a change development schedule is only unnecessary for de facto changes, but otherwise, change development schedules are necessary. This should be specified in the ROE.

If there is some third middle category, that should be clearly laid out in the policy.

Commented [CN11]: RCW 90.03.380(1)(d): If it shall appear that such transfer or such change may be made without injury or detriment to existing rights, the department shall issue to the applicant a certificate in duplicate granting the right for such transfer or for such change of point of diversion or of use.

This statute does not preclude Ecology from conditioning the change in the ROE in a way that requires the applicant to put the water to use consistent with the change by a date certain, among other conditions it may impose.

Commented [CN12]: Include terms of art in the definition section. POL 1120 does not define de facto change either. That policy states: "Such unauthorized changes to existing water rights are commonly referred to as "de facto, or after-the-fact changes"

Commented [CN13]: Ecology decision making should be transparent and efficient. To do that the ROE should specify whether Ecology is treating the change as a de facto change or a change requiring a change development schedule so that it is clear to Ecology staff and to the public which track the change is following.

Commented [CN14]: This is vague and unhelpful to Ecology staff, applicants, and the public.

Commented [CN15]: This is far too vague.

Formatted: Paragraph

Commented [CN16]: This edit is consistent with section 5.1 below which states that schedules must be "non-speculative."

⁵ RCW 90.03.380(1)(d)

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applicant prior to the issuance of the ROE to determine if a change authorization should include a change development schedule.

Ecology considers several factors when deciding whether a change development schedule is a reasonable condition for a change decision, including:

- The applicant's preference.
- Time is needed before using water under the new authorization.
- Construction is needed to use water under the new authorization.
- The scope of the proposed change.
- The timing of the proposed change.
- Whether the change is dependent on construction work or is already complete.

Commented [CN17]: Is the "time" factor generally related to construction? If so, combine this bullet point with the construction bullet point.

Commented [CN18]: Describe explicitly what is a scope of a change that would warrant a change development schedule

Commented [CN19]: This is confusing. Earlier in the policy it was clear that if the change has already occurred, then it's a de facto change and does not require a change development schedule.

In many cases, construction is needed to complete a change. These construction activities could include developing new pumps and pipes, irrigation systems, power supply, new wells or diversions, or other activities. 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 to comply with water measurement and metering requirements (RCW 90.03.360, 90.44.450, and chapter 173-173 WAC).
- Construction to comply with fish screening requirements (RCW 77.55.040).
- Construction related to mitigation requirements contained within the ROE.

Commented [CN20]: This type of specificity is most helpful.

Section 4: Documenting Change Development Schedules

A change development schedule is recorded in a: _____

- Superseding permit when making changes to a water right permit.
- Change or Transfer Authorization (issued in the form of a ROE) when making changes to a water right certificate, a certificate of change, or water right claim.

Commented [CN21]: This is confusing. Doesn't an applicant need to be aware of a change development schedule at the ROE stage? Waiting for it to appear in the superseding document would be too late?

Ecology issues superseding certificates when making changes to "pumps-and-pipes" certificates, but these would not include a development schedule. _____

Commented [CN22]: This contradicts Section 5.5 of the Policy below.

Section 5: Length of Change Development Schedules

When setting a change development schedule, Ecology will assign a reasonable time period to transition beneficial uses based on conditions at the time the change is approved. RCW 90.03.320 describes criteria for setting development schedules for new permits that are also applicable for change development schedules:

“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.”

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, Family Farm Water Act transfers, and municipal changes.

5.1 Permanent Changes and Transfers (RCW 90.03.380 and 90.44.100)

When warranted (see Section 3, When to Use Change Development Schedules), 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. The permit extension criteria of RCW 90.03.320 apply to the development schedule for a changed permit exceeding the original permit development schedule. If the change development schedule is no longer than the original development schedule, no further analysis is required.

Commented [CN23]: Specify when additional review is needed.

5.2 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. Seasonal and short-term temporary changes (e.g., less than 5 years) do 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 to document required construction activities.

5.3 Consolidation of Rights for Exempt Wells (RCW 90.44.105)

When establishing a change development schedule for consolidating groundwater permit-exempt wells with an existing groundwater right, Ecology considers the scope of the project

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and the requirements of RCW 90.44.105. These include requirements to decommission and prohibit future groundwater permit-exempt wells on the property.⁶

5.4 Family Farm Water Act Transfers (RCW 90.66.065)

When setting a change development schedule for a transfer of a Family Farm Water Act 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 Water Act 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 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. Short-term Family Farm Water Act lease transfers (and those that can be done under RCW 90.03.390) do not need a development schedule. At the end of the term, the temporary change authorization cancels and beneficial use reverts to the original authorization. Long-term or renewable Family Farm Water Act lease transfers can be performed under RCW 90.03.380. However, the change authorization should be conditioned to clarify how the Family Farm Water Act uses will resume if the lease is terminated (e.g., a subsequent change could be filed).

Family Farm Water Act permit changes, other than leases, are treated like permanent changes and transfers as described in Section 5.1, Permanent Changes and Transfers.

5.5 Municipal Changes and Transfers (RCW 90.03.386)

Changes to municipal water rights could include “pumps-and-pipes” certificates that have both perfected and unused (“inchoate”) portions of the water right. During the change process these rights are evaluated to determine the quantity of the water right that is valid for change, which includes the perfected portions and may include inchoate portions. RCW 90.03.320 and POL-2030, Municipal Water Law, describe the requirements for the tentative determination of extent and validity process for municipal water rights and how inchoate portions of “pumps-and-pipes” certificates are determined valid for change.

When inchoate water is considered valid, Ecology will work with the applicant to set a reasonable change development schedule that is consistent with the original intent and scope of the remaining project. When setting a change 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.

Commented [CN24]: The Policy should describe whether consolidation occurs in scenarios in which permit exempt wells are already drilled and water used or whether the exempt wells are brand new (i.e. usage has not been established).

How is the average withdrawal of the well determined if permit exempt wells are not metered? Is Ecology estimating usage if the permit exempt wells have not been used yet or even if they have? Does Ecology consider well records? How closely does it examine them?

Commented [CN25]: It is not clear what the purpose or point of this section is. The first paragraph is purely background.

⁶ See Ecology POL-1230, Consolidation of Rights for Exempt Groundwater Withdrawals: <https://apps.wa.ecology.wa.gov/docs/WaterRights/wrwebpdf/pol1230.pdf>.

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The length of the change development schedule should consider planning documents approved by the Department of Health that describe construction activities, capital improvements, and timelines required to put the water to beneficial use. Ecology should consider provisions that will provide documentation of the change development schedule for future water system planning purposes.

Section 6: Phases of Change Development Schedules

A change development schedule included in the change ROE includes a schedule for the following 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**.
- **Request for Superseding Document** – The date by which the water user completes the authorized change and Ecology verifies the change.

Commented [CN26]: This should also expressly include the date by which the applicant must submit documentation to Ecology verifying completion.

As noted in Section 1.2, Ecology does not require proof of appropriation for a change or transfer of a water right certificate. However, similar to the process for a new permit, where change development schedules are used Ecology may require the water user to provide evidence that the change is complete, and upon receipt of that evidence issue appropriate documentation of the change. This phase would include receiving a Request for Superseding Document form from the applicant, after which Ecology may perform a field visit to ensure the project is completed consistent with the change authorization. Once this verification occurs, a superseding document is issued that describes the completed project.

Commented [CN27]: As discussed with Melchert on 12/8/25, this new policy pushes the burden on to the applicant and is less proactive about monitoring beneficial use. A short term gain in staff time on the front work may result in more work and more expense for Ecology's compliance department to untangle a history of water use inconsistent with the ROE after the fact.

Section 7: Actions for Incomplete Change Development Schedules

If the change verification phase of the development schedule shows that the change was not completed consistent with the change authorization, then further permitting work **or a relinquishment or partial relinquishment** may be necessary. Additional permitting work typically begins with technical assistance to the applicant, but may also include:

- **Providing technical assistance**.
- Using enforcement to bring the applicant into compliance either before or after approving or rejecting the **change application** (e.g., if the applicant is not in

Commented [CN28]: This is redundant with the sentence above.

Commented [CN29]: Does Ecology mean here, "rejecting issuance of a superseding document"? The application was already approved much earlier in the process.

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compliance with a metering provision under the previous or newly changed authorization).

- Either issuing a relinquishment order or canceling the change authorization, after making a tentative determination on the extent and validity of the right, and issuing a superseding document if partial relinquishment has occurred.
- The water right holder filing additional changes to conform the authorization to actual use (e.g., an annual consumptive quantity determination may be needed in the case of addition of purposes of use or additional acres of irrigation).
- Withdrawal of the Change Verification form by the right holder to allow continuation of development and compliance with approval conditions may be necessary. An extension in time for the change development schedule must be requested by the right holder (see Section 8, Extensions for Change Development Schedules).

Commented [CN30]: Is this the same as “rejecting the change application” above? “Canceling the change authorization” is more clearly stated.

7.1 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 separate portions (e.g., an "A" and a "B" portion) with separate development schedules. Separate water right certificates would be issued following completion of each portion of the project.

Section 8: Extensions for Change Development Schedules

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

- Good cause for the extension.
- Due diligence of the applicant.
- Good faith of the applicant.
- Public interest.
- Nature and scope of the project.
- Beneficial use of the water right.

Commented [CN31]: Cite to RCW, WAC or policy defining good cause.

Ecology has interpreted RCW 90.03.320, in POL-1050, and applies a similar process to extensions for development schedules for changes or transfers.

Change development schedules typically will specify a project completion date when water will no longer be used under the previous authorization. They may also include a Beginning of Construction and Completion of Construction date, depending on the scope of the project. The

Commented [CN32]: Again, this is too speculative and does not provide clear direction for staff or certainty for applicants.

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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 region section manager can use discretion based on case law, statutes, regulations, and policies to judge whether good faith, due diligence, and good cause has been shown and to determine the public interest affected by an extension.

Commented [CN33]: This is extremely broad

8.1 Format of an Extension Approval or Denial

Decisions on extensions to change development schedules are issued as appealable administrative orders that 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. For more details on extensions see POL-1050.

8.2 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 the change development schedule, including any extensions granted for good cause, Ecology may cancel the change authorization. Each cancellation decision will depend on the facts of a given situation and the status of the water right.

For a permit this could include any existing development schedules for the original permit and consideration of only partial cancellation for the portion not completed consistent with the change authorization. For a certificate this could include conducting a tentative determination of extent and validity and cancelling the entire change authorization or issuing a superseding document for the portion being put to beneficial use and ordering partial relinquishment for the portion of the certificate that has relinquished due to non-use without an exemption/exception.

Section 9: 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 non-use. 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, etc.) and may help support a case for a DFD or other exemption/exception from relinquishment.

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, unless one of the exemptions to relinquishment in RCW 90.14.140 excuses the non-use to avoid relinquishment of the portion of the right not put to beneficial use. If the water right holder expects to use less than their full right for five consecutive years, they should contact Ecology and/or private legal counsel in advance for technical assistance on the applicability of relinquishment exemptions.

9.1 Determined Future Development (RCW 90.14.140(2)(c))

A change development schedule does not automatically qualify as a DFD exemption from relinquishment. However, it may help support the case for a DFD exemption from relinquishment for projects that take more than five years to complete. To qualify for a DFD, the project must also satisfy a number of criteria outlined in case law⁷, such as:

- The plan must be put forth by a party with vested interest in the water right.⁸
- 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.

For projects seeking a DFD exemption from relinquishment, 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.

Commented [CN34]: This is unclear. A DFD should be known and express at the outset, no something that is used in hindsight to justify non-use and waste. This is consistent with the statement below that "If the water right holder expects to use less than their full right for five consecutive years, they should contact Ecology". If there is a schedule in place, a water user will know they are not going to meet the deadline in advance of it.

Commented [CN35]: Please see the comment above.

Commented [CN36]: Consider repeating that "The holder is responsible for requesting extensions." Why should a holder receive an exemption if they did not request an extension?

Commented [CN37]: This is vague and unhelpful to Ecology staff and permit/certificate holders.

⁷ See *R.D. Merrill Co. v. Pollution Bd* (137 Wn.2d 118, 969 P.2d 459, 1999); *City of Union Gap and ARBP v. Ecology* (Court of Appeals, #26555-2-III, 2009); *Protect Our Water v. Islanders for Responsible Water Mgmt.* (PCHB No. 03-102, 2004); *Pacific Land Partners, LLC v. Ecology* (PCHB No. 02-037, 2005); *Wirkkala, et al. v. Ecology* (PCHB Nos. 94-171,94-172,94-173 & 94-174, 1994);

⁸ *City of Union Gap and ARBP v. Ecology*, 118 Wash. App. 519, 195 P.3d 580 (2008).

Title: Development schedules for changes

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 extent and validity of the water right.

9.2 Municipal Water Supply Purpose (RCW 90.14.140(2)(d))

Municipal water supply purpose rights 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.

Commented [CN38]: Is the conversion authorized by the development schedule or by the underlying authorization of a change?

9.3 Temporary Trust Water Right Donations (RCW 90.14.140(2)(h))

For scenarios involving longer development schedules that may involve extended periods of nonuse, water right holders may consider temporarily donating their water rights to the state Trust Water Rights Program. While held in trust, water rights contribute to streamflows and are exempt from relinquishment due to nonuse. Temporary trust water right donations may be canceled at any time at the water right holder's discretion. For more information about trust water right donations, please refer to POL-1010, Administration of the Trust Water Rights Program.

Commented [CN39]: Is this permitted even on an extension when the applicant has not met the initial development schedule?