File 1

Comments on First Draft of the *Guidance for Use Attainability Analysis* released by Ecology on May 24, 2004

Letter 1:
American Rivers; American Whitewater; Center for Environmental Law and Policy; Lake Spokane Protection Association; Lands Council, The; Northwest Ecosystem Alliance; Northwest Environmental Advocates; People for Puget Sound; Puget Soundkeeper; Sierra Club; Trout Unlimited - Spokane Chapter; Washington Environmental Council; Washington Trout

Letter 2:
Chelan County Public Utility District No. 1

Letter 3:
City of Bothell

Letter 4:
City of Seattle – City Light and Public Utility District

Letter 5:
Chehalis Confederated Tribes

Letter 6:
City of Bellevue Utilities

Letter 7:
Department of Energy, Bonneville Power Administration

Letter 8:
East Columbia Basin Irrigation District; Quincy-Columbia Basin Irrigation District; South Columbia Basin Irrigation District

Letter 9:
Everett Public Works

American Rivers; American Whitewater; Center for Environmental Law and Policy; Lake Spokane Protection Association; Lands Council, The; Northwest Ecosystem Alliance; Northwest Environmental Advocates; People for Puget Sound; Puget Soundkeeper; Sierra Club; Trout Unlimited - Spokane Chapter; Washington Environmental Council; Washington Trout

August 13, 2004

Cheryl Niemi
Surface Water Quality Standards Unit
Water Quality Program
Washington Department of Ecology
Olympia, WA 98504

RE: Preliminary Draft Use Attainability Analysis (UAA) Guidance for Washington State

Dear Ms. Niemi,

The undersigned thirteen organizations are writing to provide comments on the Washington Department of Ecology's (Ecology) first draft guidance for Use Attainability Analyses under forthcoming state water quality regulations. Thank you for the opportunity to comment. Please note that some of the undersigned organizations will also submit separate, more detailed comments.

I. Ecology must place the UAA program at the bottom of its list of priorities.

Ecology's primary responsibility is to protect the waters of the state of Washington. By design, the UAA process seeks the opposite: to allow an interest that stands to gain from a reduction in stream protections to initiate and frame a process to reconfigure stream protections. While the UAA guidance provides these vested interests with an application process to challenge stream protections, Ecology is still behind in providing protection to Washington's waters and the uses – including threatened and endangered species – that depend upon them.

Although EPA regulations allow for UAAs, reducing protection is fundamentally at odds with the outstanding need to improve water quality to levels required by law. Ecology must put UAA reviews at the bottom of its list of priorities. As Ecology staff have stated in public hearings and testimony,[1] dedicated staff time and funding for water quality programs are limited to a degree that makes it nearly impossible for the agency to accomplish existing program work. With Ecology's programs already taxed, new program work must be evaluated carefully for its service to the public interest. Lacking budgetary support and additional staff, and considering the onerous review process required for UAA proposals, Ecology should embark upon UAAs only after finding that the outcome is worth diverting staff time and energy away from the agency's principal charge of restoring streams and protecting them from degradation.

II. The public and Tribes must have a substantive role in a robust and demanding preliminary review of any UAA proposal.

To ensure this efficient use of public resources, the public and Tribes must be a part of the preliminary review process. While the guidance incorporates consultation with affected Tribes – which we support – it does not contemplate early public involvement. We wish to emphasize that UAAs are initiated by an application or petition from a vested interest polluting a publicly owned waterway. Should a preliminary review demonstrate that the probable outcome of further review is not in the so-called applicant's best

[1] e.g. Before the Federal Energy Regulatory Commission, Nov. 7 2002, Washington, DC, p. 154, 161. http://www.ferc.gov/industries/hydropower/indus-act/nov7transcript.pdf; again in Tacoma, WA, November 22, 2002, p. 69, 72. http://www.ferc.gov/industries/hydropower/indus-act/nov22transcript.pdf; and again in Seattle, WA, June 6 & 7, 2002, p. 3. http://www.ferc.gov/industries/hydropower/gen-info/license-workshop/nwc_summary.pdf.

interests, the UAA process would be brought to a halt. Because the UAA process is motivated entirely by its value to a single interest, procedural accommodations must be made to give the public an opportunity to provide input into study design, policy implications, and data analysis well in advance of a formal public comment period. The public's role is not only substantively important with regard to accurately identifying historical uses; it will also help assure that the proposed UAA is worthwhile, in the public interest, and a good use of Ecology's limited resources.

The preliminary review process must be efficient and establish high standards for further review. The UAA should be an extraordinary, rarely used process that requires as much clarity as possible up front. For example, the guidance should explicitly state that, unless UAA petitioners can demonstrate with straightforward and incontrovertible evidence that a use is neither existing nor attainable, they will be discouraged from submitting a petition. The federal regulations are equally clear that it is Ecology that shoulders the burden of proving that designated uses are neither existing nor attainable. Ecology can avoid needless expenditures by making clear in the guidance that the bar is set extremely high for UAA applications.

III. It is inappropriate for Ecology to consider eliminating designated uses when they have not yet identified all existing uses in Washington's streams.

One of the greatest problems with the guidance at this point is Ecology's failure to make clear how the UAA process must protect existing uses. For example, the guidance improperly suggests that if uses are not present today, they do not require protection as existing uses – defined by federal regulation as present in 1975 or thereafter. It also suggests that Ecology may ignore wildlife, drinking water, and fish harvest uses in doing UAAs when this is a direct contradiction of the requirement to protect existing uses.

We think a more appropriate way to approach this issue is simply not to entertain UAA petitions until such time as Ecology has fully and accurately documented all of the existing uses in Washington's waters or has adopted a formal and strict methodology for evaluating existing uses. Without thorough confirmation that existing uses have been properly identified and protected, it is wholly inappropriate for Ecology to allow interested parties to petition Ecology to change designated uses. The way in which the current guidance reads would allow unidentified existing uses to be degraded, contrary to federal law, because it does not require Ecology or the applicant to identify all existing uses.

IV. Ecology must explicitly state that a UAA process may not delay or halt other protection-based processes under its authority.

In its guidance, Ecology raises the issue of how UAAs may be used to delay the development of Total Maximum Daily Load (TMDL) clean-up plans. We urge you to explicitly state that UAAs cannot bring TMDLs or any protection-based processes to a standstill. In fact, these processes are necessary in order for Ecology to make conclusions that would support a UAA that downgrades uses. With respect to TMDLs, Ecology is under federal court order to complete these cleanup plans on a strict schedule and within a specified number of years. Similarly, Ecology cannot delay hydropower relicensing proceedings or other federal permit processes to await the outcome of a UAA petition.

In conclusion, we have grave concerns about Ecology's undertaking a new program the stated purpose of which is to reduce protections for Washington's waters. Given widespread water quality and flow problems, numerous threatened and endangered aquatic species, and still unprotected existing uses in our streams, we think offering UAAs to relieve polluters of controls is unacceptable without extraordinary procedural and substantive safeguards and proper placement at the bottom of Ecology's programmatic priority list. Washington's water quality goals must remain at least as high as its currently designated uses; otherwise, we can expect no better than the constant eroding of our stream protections and the quality of our state waters.

Sincerely,

Brett Swift
American Rivers

John Gangemi
American Whitewater

Karen Allston
Center for Environmental Law and Policy

Galen Buterbaugh
Lake Spokane Protection Association

Mike Petersen
Lands Council

Lisa McShane
Northwest Ecosystem Alliance

Nina Bell
Northwest Environmental Advocates

Bruce Wishart
People for Puget Sound

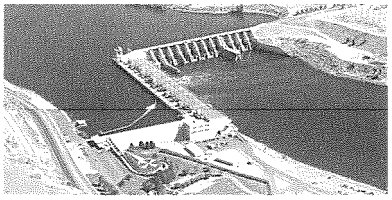
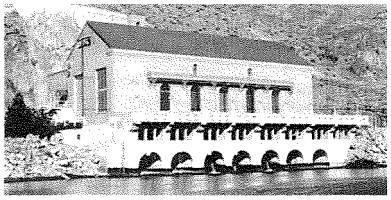
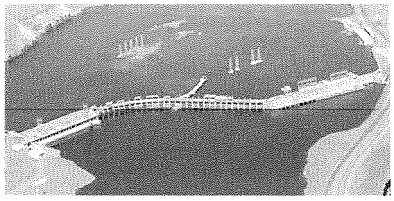
Sue Joerger
Puget Soundkeeper

John Osborn, MD
Sierra Club

Nancy McKelvey
Spokane Chapter, Trout Unlimited

Josh Baldi
Washington Environmental Council

Kurt Beardslee
Washington Trout

PUBLIC UTILITY DISTRICT NO. 1 *of* CHELAN COUNTY
P.O. Box 1231, Wenatchee, WA 98807-1231 • 327 N. Wenatchee Ave., Wenatchee, WA 98801
(509) 663-8121 • Toll free 1-888-663-8121 • www.chelanpud.org

August 10, 2004

Ms. Cheryl Niemi
Department of Ecology
Water Quality Program
P.O. Box 47600
Olympia, WA 98504-7600

Dear Ms. Niemi:

Chelan County Public Utility District No. 1 (Chelan PUD) appreciates the opportunity to comment on the Department of Ecology's May 2004 "Draft Use Attainability Analysis Guidance for Washington State." We look forward to working with Ecology on this important and complex subject. In particular, we would appreciate the opportunity to participate in one or more workshops with Ecology, much like the workshop that Ecology recently held regarding its Guidance document on the overall section 401 certification process. We would prefer that any workshops be held after a revised draft of the Guidance document has been issued.

Chelan PUD owns and operates three hydroelectric dams licensed by the Federal Energy Regulatory Commission (FERC), the Lake Chelan Project, the Rocky Reach Project, and the Rock Island Project. The Lake Chelan Project is nearing completion of the relicensing process, the Rocky Reach Project is in the midst of the process, and the Rock Island Project is not due to be relicensed until 2028. As you know, a dam may not be relicensed by FERC unless Ecology certifies under section 401 of the Clean Water Act that there is reasonable assurance that the project will comply with applicable water quality standards. Therefore, the process for assuring that the applicable water quality standards are set appropriately is of the utmost importance to Chelan PUD and its customers.

We have ten main comments on the draft Guidance document:

1. The scope of the Guidance document should be broadened to include all available tools for modifying water quality standards. Although the Guidance document briefly discusses site specific standards, special conditions, and variances as tools for modifying water quality standards, it focuses almost entirely on one tool, Use Attainability Analyses (UAAs). We recommend that the Guidance document more equally discuss all four tools, so that entities considering a request to modify a standard can meaningfully compare the available options. In addition, we request that Ecology explain the relationship between these four tools and its triennial review of water quality standards. For example, could a triennial review serve as a

vehicle for establishing a site-specific standard for a particular project? We understand that expanding the scope of the Guidance document would require a substantial additional investment of Ecology staff resources, but suggest that such a step is necessary in order to provide clear and predictable guidance on this critical process.

2. The Guidance document should fulfill the commitment made by Ecology in the Lake Chelan section 401 certification and settlement agreement by providing a clear and predictable process for modifying numeric standards. In the case of the Lake Chelan Project, Ecology and Chelan PUD worked closely together to resolve a regulatory paradox: what should be done when strict compliance with a numeric water quality standard would not provide additional biological benefits? In that case, the only way to achieve the numeric temperature standard in a bypassed reach was to set very high minimum flow requirements. Those high minimum flows, however, would not have furthered achievement of the biological objectives, namely to increase useable fish habitat.

The solution constructed by Ecology and Chelan PUD (and written into the Lake Chelan Settlement Agreement and the section 401 certification) is a rigorous 10-year adaptive management plan that seeks to benefit fish through the achievement of well-defined biological objectives. At the end of the 10-year period, if the biological objectives have been met, but the temperature criteria has not been met, Ecology committed to "initiate a process to modify the applicable standards through rulemaking or such alternative process as may otherwise be authorized under applicable state and federal law." *Lake Chelan Section 401 Certification at 6.* Similarly, if some or all of the biological objectives have not been met, but Chelan PUD has taken all known, reasonable, and feasible measures to achieve those objectives, Ecology committed to "initiate a process to modify the applicable water quality standards to the extent necessary to eliminate non-compliance with such standards." *Lake Chelan Section 401 Certification at 7.*

Working together, Ecology and Chelan PUD successfully defended this approach before the Pollution Control Hearings Board (PCHB). In a landmark decision, the PCHB rejected the argument that strict compliance with the numeric water quality criteria is required by the Clean Water Act. Specifically, it stated that "Appellants' contention that the Clean Water Act requires strict adherence with numeric water quality criteria is an incorrect reading of the requirements of section 401 of the Clean Water Act." *PCHB Findings of Fact, Conclusions of Law, and Order, at 25.* Instead, the PCHB held that the "primary aim of the section 401certification is to meet the state water quality standard by complying with the intent and substance of the standard rather than its numeric form." *PCHB Findings of Fact, Conclusions of Law, and Order, at 15.*

In doing so, the PCHB embraced the adaptive management approach, including the initiation of a process for modifying the numeric standard at the end of the 10-year period. "This Board has previously recognized that in some cases 'correction may not be practically achievable, and may require site-specific water quality criteria to be established for the Project." *PCHB Findings of Fact, Conclusions of Law, and Order, at 48, citing Friends of the Cowlitz v. Ecology (2003).*

Ecology's commitment to modify water quality standards where it is sensible to do so can only be kept if it establishes a process that is clear and predictable.[1] In its current form, the draft Guidance document is neither clear nor predictable. Instead, the process set forth in the Guidance document is so narrowly drawn that it is unlikely that the Lake Chelan Project, or any other hydroelectric project, will be able to successfully complete the process.

For example, Figure 1 (p. 8) is a flowchart of the decisions to be made in a UAA analysis. According to the flowchart, if "existing uses match the designated uses," the designated uses assigned to the water body are to be retained and, by implication, no modification of the standard may occur. However, it is very likely that there will be situations where, for example, salmon are both existing and designated uses, but one or more numeric water quality criteria are being exceeded. In such a situation, instead of opening the door to a possible modification of the numeric criteria (consistent with the protection of the existing and designated uses), the flowchart leads to a dead end.

Rectifying this aspect of the Guidance document will require several steps. First, we suggest that, fairly early in the document, Ecology describe the approach taken in the Lake Chelan Project case, and cite at least some of the above-quoted language from the PCHB decision. This will make clear that the PCHB and Ecology are "on the same page" in focusing on biological results instead of strict compliance with numeric water quality criteria, thereby setting the tone for the remainder of the Guidance document. Second, we recommend that Ecology expressly state that in cases like Lake Chelan Project it will initiate a process for modifying the relevant numeric water quality criteria. This would be a clear signal to other hydroelectric project owners across Washington that the Lake Chelan Project approach is fully supported by Ecology, thereby encouraging them to work with Ecology on rigorous adaptive management plans that benefit fish and other natural resources. Finally, the modification process itself must have a clear and predictable result so that, where appropriate, it can be employed without an undue expenditure of time and resources.

3. In particular, the Guidance document needs to clarify the scope and application of site-specific criteria and special conditions. The table on page 3 of the Guidance document states that "A site specific criteria must demonstrate that local biota are less sensitive to a pollutant than the biota used to establish the national or state criteria." This is an unduly narrow interpretation of the factual basis for a site-specific criteria, and raises a number of questions. First, what if the local fish and other aquatic species are not "less sensitive" than the test species, but simply respond to a condition differently in the project area? For example, if you place relatively lows levels of total dissolved gas (TDG) into a shallow test pool, the test fish are likely to develop gas bubble trauma. However, when the same species of fish are exposed to much

[1] The recent TMDL for the lower Columbia River also endorses the modification of water quality criteria where appropriate. It states that "Changing water quality standards is a separate process and is not one of this TMDL's implementation strategies. However, the authors of this report support the evaluation of the appropriateness of the water quality standards for these four specific sites on the river in terms of TDG impacts to aquatic species. Any revision would proceed through the normal scientific review of the standard to ensure full beneficial use protection." *Oregon Department of Environmental Quality and Washington State Department of Ecology. Total Maximum Daily Load (TMDL) for Lower Columbia River Total Dissolved Gas, 2002. Page 71.*

higher levels of TDG near a Columbia River dam, the predicted symptoms occurs only very rarely because the fish inhabit deeper water, which protects them from the adverse effects of TDG. Moreover, in those very rare instances in which symptoms appear, studies show that fish quickly recover in the natural environment. It is not that the local fish are less sensitive, but that they are less impacted because of a variety of physical and behavioral differences between the natural environment and artificial laboratory conditions.

The second question raised by the "less sensitive biota" test is how it relates to the concept of irreversible human-induced effects. The Guidance document notes on page 19 that "A distinction between natural conditions, irreversible human-induced sources, and controllable sources is required for the evaluation of a use based on this regulation," but there is no clear definition of irreversible human impacts. Chelan PUD recommends that this be corrected by clearly stating that economically viable hydroelectric dams are irreversible human impacts.

We assume that Ecology shares our view that it is the health of fish and other aquatic species in the project area that matters, and that water quality criteria should not mandate costly project modifications that provide little or no benefit to fish. We therefore recommend that the table on page 3 be revised to clearly indicate that a site-specific criterion or special condition may also be established in a wide variety of factual contexts beyond where the local aquatic species are less sensitive. Specifically, a site-specific standard or special condition should be available where the existing and designated uses that the numeric criteria is designed to protect are supported. For example, a numeric temperature criterion designed to support fish should be modified where there is substantial biological evidence that the modified criterion would continue to support fish. This approach is fully consistent with the EPA rule that "States must adopt those water quality criteria that protect the designated use." 40 C.F.R. § 131.11(a). As this regulation indicates, the goal is to tailor water quality criteria to the needs of designated uses, not to bring projects into compliance with numeric criteria for its own sake, regardless of the consequences. Without a clear and predictable set of mechanisms for modifying water quality criteria, this goal will be stymied, and tens of millions of dollars will be spent without any biological benefit.

Site specific criteria must also be employed where the existing criteria is not reasonable and feasible. As noted above, the PCHB recently held that in the event of an exceedance of certain numeric criteria, "correction may not be practically achievable, and may require site specific water quality criteria to be established for the Project." *Friends of the Cowlitz v. Ecology (2003)*, the Washington Water Pollution Control Act strongly supports this conclusion. Instead of absolutely mandating compliance with numeric criteria, it requires "the use of all known, available and reasonable methods by industries and others to prevent and control the pollution of the waters of the State of Washington." RCW 90.48.010 (emphasis added). Similarly, the Clean Water Act provides that water quality standards "shall be established taking into consideration their use and value for public water supplies, agricultural, industrial and other purposes." 33 U.S.C. § 1313(c)(2). Therefore, the tailoring of numeric water quality criteria to the protection of existing and designated uses must also avoid requirements that cannot be achieved through the use of known, available, and reasonable methods.

The Guidance document should also clarify the distinction between a site-specific standard and a "special condition." Please also describe how each of these tools is to be applied in the context of a section 401 certification for a hydroelectric project.

4. The Guidance document should incorporate the outcome-based approach used in the Habitat Conservation Plans (HCPs) for the Rocky Reach Project, the Rock Island Project, and Douglas PUD's Wells Project. In addition to the adaptive management approach for the Lake Chelan Project, Chelan PUD, along with Douglas PUD, recently completed 11-years of negotiations and regulatory approvals to reach a 50-year agreement that will contribute to the recovery of Columbia River salmon and steelhead. That process resulted in HCPs for Chelan PUD's Rocky Reach and Rock Island Projects, and for Douglas PUD's Wells Project. The HCPs comply with the Endangered Species Act (ESA) by meeting the highest possible biological objective – no net impact. The signators to the HCPs include NOAA Fisheries, the Washington Department of Fish & Wildlife, the U.S. Fish & Wildlife Service, the Colville Confederated Tribes, and Chelan PUD. FERC recently incorporated the HCPs into the existing licenses for the Projects, and the Rocky Reach HCP is the foundation for the relicensing of that Project.

Although the HCPs are primarily aimed at satisfying the ESA by protecting listed salmonids, they are also applicable to meeting those water quality standards that are designed to protect those same salmonids. This common goal – protecting Columbia River salmonids – closely links the ESA and Washington's water quality standards, and the HCPs serve as the vehicle for achieving that goal. With the broad support of all of the federal and state resource agencies, the HCPs do so by eschewing prescriptive regulation in favor of objective, enforceable outcomes that help in the recovery of salmon. This approach is entirely consistent with the Lake Chelan decision and the EPA guidance discussed in comment No. 7, below, and will also help avoid what might otherwise be duplicative and/or inconsistent regulatory results under two statutes that share a common purpose.

We therefore recommend that the Guidance document acknowledge the use of HCPs for hydroelectric dams, and incorporate their benefits into the process for modifying numeric water quality criteria. Specifically, the Guidance document should provide a clear process for determining the extent to which an HCP provides reasonable assurance of compliance with water quality standards for designated uses encompassed by the HCP. This process should include an evaluation of how the HCP, which requires the implementation of reasonable and feasible measures to achieve its biological objectives, is also meeting the objectives of the water quality standards that support the same designated uses. The biological objectives established in the HCP should also be given deference in determining the attainable uses of a water body.

This process should begin with the preparation of the section 401 certification. In concluding that there is reasonable assurance of compliance with water quality standards, the section 401 certification should explicitly rely on the implementation of the HCP. The adaptive management approach mandated in the certification should be consistent with the requirements of the HCP as they apply to designated uses, such as salmonids.

Then, at the end of the adaptive management process, if a hydroelectric project is still not meeting numeric criteria, but the designated uses that the standard is intended to protect are being effectively protected under an HCP and any other adaptive management elements contained in the section 401 certification, this should militate strongly in favor of modifying the numeric criteria.

5. The Guidance document should provide flexibility so that it may be refined as Ecology and the regulated community gain experience in the use of UAA/site-specific standard processes. To the best of our knowledge, Ecology has never completed a UAA process. This suggests that the Guidance document should avoid detailed requirements that may not later be supported by experience. Instead, we suggest that the Guidance document build on what we have learned so far, but avoid prescriptive answers to questions that have not been fully explored. Among other things, this may help Ecology avoid litigation if it decides to take a different approach than that contained in this Guidance document. It would also leave room for the development of less cumbersome means of modifying water quality standards.

6. The Guidance document should clarify that the "substantial and widespread economic and social impacts" test need not be applied to UAA analysis of dams. EPA regulations establish a series of conditions that provide a justification for removing or otherwise modifying a designated use 40 C.F.R. § 131.10(g). Ecology correctly states on p. 10 of the Guidance document that, "Only one of these conditions must be met in order to pass the test for unattainability." In the case of dams, the applicable condition for removing or otherwise modifying a designated use is likely § 131.10(g)(4), which states that:

> Dams, diversions, or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use.

Therefore, EPA has specifically recognized that it may be necessary to modify the water quality standards applicable to existing dams through the UAA process because of their unique status and the benefits they provide. Moreover, there is no requirement that the "substantial and widespread economic and social impact" condition in § 131.10(g)(6) must be met for dams. Nevertheless, the current draft of the UAA Guidance could be construed as applying the (g)(6) conditions because it states in the discussion on p. 23 of "*Economic analyses for UAAs*" that, "Where human activities (pollution, dams, mining, etc.) contribute to the limitation of what uses are attainable, economic and social factors associated with repairing the stream must be examined in determining what is attainable." Ecology should clarify that the "substantial and widespread economic and social impact" test need not apply to dams.

Ecology's economic focus in a UAA process should be on whether an additional step toward compliance with a numeric criteria provides sufficient biological benefits to justify the costs. Where the biological benefits are small or non-existent, the additional cost should not be imposed even if the project owner could conceivably bear it by passing on these costs on to electricity ratepayers. Such an approach is consistent with the guidance in EPA's Water Quality Standards Handbook which, in the case of non-point sources such as hydroelectric dams, states that "Attainable uses are, at a minimum, the uses that can be achieved when cost effective and

reasonable best management practices are imposed." *Water Quality Standards Handbook-Second Edition 1994 at § 2.4.*

7. The Guidance document should cite to EPA guidance documents that support an approach that focuses on biological objectives. The current draft of the Guidance document does not provide a complete picture of EPA's guidance on the issue of strict compliance versus biological objectives. In order to provide a solid footing for the Guidance document, there should be additional citation to those instances in which EPA has offered guidance that supports an outcome-based approach.

As noted by the PCHB in the Lake Chelan Project decision, EPA Region 10 issued a guidance document in 2003 regarding how the temperature water quality standard should be implemented. The PCHB decision quotes the EPA guidance as follows:

> Meeting temperature WQS, however, should be viewed as part of larger fish recovery efforts to restore habitat. Wherever practicable, implementation actions to restore water temperatures should be integrated with implementation actions to improve habitat in general, and should be targeted first toward those reaches within in basin that will provide the biggest benefit to fish. *PCHB Findings of Fact, Conclusions of Law, and Order. at 27 (citing EPA Region 10 Guidance for Pacific Northwest State and Tribal Temperature Water Quality Standards at 2 (April 2003)).*

The PCHB went on to say that: "This guidance is consistent with the concepts in Elkhorn II [the Supreme Court's Jefferson County decision] and WAC Chapter 173-201A that water quality standards are not established for their own sake, but rather, for the purpose of protecting and restoring designated uses." Id.

The EPA guidance document further states that:

> The new use could be described as a "compromised" or "degraded" salmonid use. It should be noted that a "compromised" or "degraded" level of use may be appropriate during part of the year (e.g., summer), but that an unqualified, healthy salmonid use may be attainable other times of the year and therefore may be the appropriate use then. Examples of factors at 40 C.F.R. § 131.10(g) that could preclude attainment of the use include: human caused conditions or sources of pollution that cannot be remedied or would cause more environmental damage to correct than to leave in place; dams, diversions or other types of hydrologic modifications that cannot be operated in such a way as to result in the attainment of the use; and controls more stringent than those required by sections 301(b) and 306 of the CWA that would result in substantial and widespread economic and social impact.

Ecology's UAA Guidance should similarly describe how the water quality standards can be modified when the numeric criteria or natural background provisions specified for a designated use cannot be attained with reasonable and feasible measures. It should also make clear that the attainment of biological objectives (or, as EPA puts it, the "biggest benefit to the fish") will be the primary objective of a UAA, site-specific standard, or special condition.

8. The use of the Net Ecological Benefit principle should not be limited to the discharge of wastewater into streams located in arid areas. The appendix to the draft Guidance document develops an analytic framework based on "net ecological benefit," and applies it in the context of wastewater discharges into streams located in arid areas. Ecology does so pursuant to EPA regulations, which provide that a designated use may be removed if "[h]uman caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied." § 131.10(g)(3)

This is a sound concept that should be applied broadly to the modification of water quality criterion, not just to UAA's conducted in arid areas related to the discharge of wastewater. In addition to being authorized by EPA regulations, such an approach is called for by the Washington State Aquatic Resources Mitigation Act (ARMA), which requires Ecology to consider whether a "mitigation plan provides equal or better biological functions and values compared to existing conditions..." RCW 90.74.010(2). As noted by the PCHB in the Lake Chelan Project case, *Washington's Water Pollution Control Act, RCW 90.48 et seq.*, specifically provides that ARMA is applicable to the section 401 certification of FERC-licensed hydropower projects. *PCHB Findings of Fact, Conclusions of Law, and Order, at 50.* The PCHB contrasted the above-quoted ARMA language to the strict application of numeric criterion, and cited ARMA as an additional legal basis for upholding the Lake Chelan section 401 certification. *PCHB Findings of Fact, Conclusions of Law, and Order, at 50.* Therefore, the application of the net ecological benefit concept should be broadened, particularly to include dams.

9. The Guidance document should acknowledge that recreation and hydropower development are existing beneficial uses, subject to the same protection against degradation as other beneficial uses. Pursuant to the requirements of the CWA and EPA regulations, Washington's water quality standards contain an "antidegradation policy" that requires that, "existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses shall be allowed." WAC 173-201A-070(1) Fish and wildlife, hydroelectric power development, and recreation are all among the uses of water that have been declared beneficial under Washington law. RCW 90.54.020(1) provides that:

> Uses of water for domestic, stock, watering, industrial, commercial, agricultural, irrigation, **hydroelectric power production,** mining, fish and wildlife maintenance and enhancement, **recreational,** and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waterways of the state, are declared to be beneficial.

(Emphasis added.) In 2002, the PCHB stated, in reviewing a section 401 certification of a dam, that "Other beneficial uses relevant to the project and issues in this case include the protection and maintenance of fish resources and the production of hydropower." *Friends of the Cowlitz v. Ecology, 2002 WL 31840091.* See also *Wirkkala v. DOE, PCHB Nos. 94-171, 94-172, 94-173 & 97-174 (Nov. 2, 1994) (available at 1994 WL 905454).*

Consequently, Ecology must implement the UAA process in a manner that does not "interfere with or become injurious to existing beneficial uses." This does not mean that Ecology

must avoid the slightest impacts to recreation and hydropower production; it simply means that Ecology must engage in a careful balancing process that protects all existing beneficial uses, including recreation and hydropower production.

10. The Guidance document should acknowledge the recent statutory limitation on the responsibility of hydropower projects to mitigate or remedy water quality problems. In 2003, the Washington State Legislature amended Washington's Water Pollution Control Act, particularly RCW 90.48.422. Among other things, it now provides that: "With respect to federal energy regulatory commission licensed hydropower projects, the department [Ecology] may only require a person to mitigate or remedy a water quality violation or problem to the extent there is substantial evidence such person has caused such violation or problem." For example, under this statute it is unlawful for Ecology to require a hydroelectric licensee to remedy an exceedance of numeric temperature or TDG criteria that has been caused by a third party. This new legislative mandate should be cited in the Guidance document, and there should be a discussion of how it affects the pathways toward modification of water quality criteria.

In closing, the establishment of a clear and predictable process for modifying water quality standards is essential to the efficient administration of Ecology's responsibilities under section 401 the Clean Water Act. Setting aside the other activities that require certification under section 401, Ecology's responsibilities regarding the many hydropower projects in this State are daunting. In the case of hydropower projects that do not comply with numeric water quality criteria, Ecology will be responsible for overseeing the adaptive management approach called for by the PCHB in the Lake Chelan Project case, as well as the process of modifying numeric water quality criteria at the end of each adaptive management process, where it makes sense. Only by working together and investing the time and effort at the front end can we minimize the workload impact on the staffs of Ecology and hydropower project owners over the coming years. More importantly, we will be able to preserve both the aquatic resources of our State and the low-cost electric power enjoyed by its citizens. We look forward to working with you toward those goals.

Sincerely,

Gregg Carrington
Director of Licensing

Niemi, Cheryl

From: Maureen Meehan [Maureen.Meehan@ci.bothell.wa.us]
Sent: Friday, August 13, 2004 4:15 PM
To: Niemi, Cheryl; Hicks, Mark
Subject: UAA comments from the City of Bothell

Cheryl and Mike,

I am submitting comments from the City of Bothell on the UAA Draft Document.

The document contains extensive lists of the types of data that a municipality or other entity must collect and submit for a UAA but fails to provide clear guidance on what is not needed. The result is that from municipalities understand pursuit of a UAA is cost prohibited in that Ecology offers no minimum and leaves open the option to require endless new data be collected. The draft should be revised to provide clear guidance for completing a UAA at a minimum cost and identify how Ecology will limit additional data requests.

Since the original designations were purportedly based on scientific and historic data, this data should be available from Ecology for municipalities wishing to have a UAA reevaluated. Ecology should reevaluate new information in its triennial review of its WQS for uses that don't make sense and are non-attainable. An example is that new data indicates that the majority of fecal coliform loading in North Creek comes from birds and wildlife not humans and domestic pets. Another is that the stream is designated extraordinary contact where local knowledge indicated that the stream has never been more than secondary contact.

Additionally the draft document's examples are extreme situations not representative of what many Western Washington Cities are faced with; such as extraordinary vs. something less than secondary contact. The guidance needs to clarify how a UAA can be used to distinguish clearly between extraordinary and excellent and excellent and secondary. For fecal coliforms extraordinary vs excellent represents a 100% change in the limits and exponentially increases the cost of implementing a TMDL, yet analytically speaking the numbers are very close. Specific guidance is needed for situations where the standards are so close.

Ecology needs to be transparent in their motives. It appear by the extraordinary requirement and open endedness of this UAW that Ecology is trying to prevent anyone from undertaking a UAA. Municipalities that have tried to pursue a UAW have been dis-swayed by unclear information and lack of access to the people responsible for decision making. Once again, a North Creek example. This stream is too shallow for swimming which should cause it to become secondary contact rather than extraordinary, but municipalities are being told that Ecology now has determines that children could splash themselves, ingest water and become ill, there for the designation is extraordinary. Since complete submergence defines primary contact this appears to be a arbitrary designation to prevent municipalities from pursing a UAA.

The draft needs to provide guidance for a clear, un-ambiguous and transparent process that municipalities can use to pursue an UAA. Responsible staff for UAAs, time lines for triennial reviews, and opportunities for providing information to the decision makers for alternatives to UAAs should be included in the document.

Sincerely,
Maureen Meehan

City of Bothell

Maureen Meehan
Storm & Surface Water Coordinator
(425) 486-2768 ex: 4425
cell (425) 471-4690

City of Seattle

City of Seattle – City Light and Public Utility District

Gregory J. Nickels, Mayor

Seattle City Light
Jorge Carrasco, Superintendent

Seattle Public Utilities
Chuck Clarke, Director

Department of Ecology
Water Quality Program
AUG 20 2004

August 13, 2004

Cheryl Niemi
Department of Ecology
Water Quality Program
P.O. Box 47600
Olympia, WA 98504-7600

Dear Ms. Niemi:

City of Seattle's comments on Washington State Department of Ecology's "Use Attainability Analysis Guidance for Washington State" - May 2004 DRAFT

On behalf of the City of Seattle, thank you for the opportunity to comment on the draft "Use Attainability Analysis (UAA) Guidance for Washington State" regarding evaluation of the uses of water bodies protected by state surface water quality standards. For those who may seek to revise the state's surface water quality standards to better reflect local conditions, additional Guidance will be invaluable. We appreciate the efforts by WDOE to undertake this effort to develop better guidance on this complex topic, and we respectfully offer the following comments.

We wish to note at the outset that EPA has recently undertaken a major national initiative to establish improved guidance, training, information sharing and pilot projects on several key elements of the water quality program, including UAAs. This initiative will be undertaken across the United States in a variety of forums over the next year. We wish to encourage Ecology to examine the relationship of its effort to prepare improved guidance with the larger effort of EPA to do the same – but on a larger and more comprehensive scale. We furthermore suggest that perhaps the Ecology efforts should be rescheduled and tiered to follow the EPA work – to benefit from it and avoid the risks of significant inconsistencies.

In addition, we offer the following more specific comments on the draft Guidance.

Coordination and Process

1. **The coordination of 303(d) listings, TMDL studies and UAA changes to water quality standards is complex and challenging – the Guidance does not provide the regulated community with a process to do this.** We strongly encourage Ecology to provide further policy guidance on how it will endeavor to establish a sensible sequencing of TMDLs, UAAs and the exercise of specific regulatory requirements pertaining to 401 water quality certifications. On p. 20, the draft Guidance states: "In a perfect world all uses would first be assessed and then appropriately designated in the WQS, after which 303(d) listing would occur, followed by TMDLs." In the real world, this logical sequence of regulatory proceedings does not happen very often. In the absence of "the perfect world," and in consideration of the increased scope and added complexity of these water quality programs, please explain how these separate and

700 Fifth Avenue, PO Box 34023, Seattle, WA 98124-4023
Tel: (206) 684-3000, TTY: (206) 233-7241, Fax: (206) 625-3709
An equal employment opportunity, affirmative action employer. Accommodations for people with disabilities provided upon request.

overlapping processes will be coordinated by Ecology, outlining the procedural approaches to be taken in different, real scenarios.

2. **The Guidance should provide flexibility in its UAA and use change processes as Ecology and the regulated community learn lessons from pilot projects, information exchanges, and case-specific solutions.** In recognition of the increased scope and added complexity of water quality programs, and our understanding that Ecology has not yet completed a UAA-based change of use, we believe there is a clear need for Ecology to consider innovation and flexibility and avoid prescriptive answers and rigidity in this Guidance document. We support an approach by Ecology that remains receptive to lessons learned and retains a willingness to refine the Guidance as we move forward.

   Above we have noted that EPA has recognized the need for further guidance and explanation to help states and tribes set water quality goals and implement water quality programs and has initiated action to do so. EPA's Office of Science and Technology (OST) has developed the *July 2004 DRAFT Designated Use Plan* to help states and tribes manage designated use issues. In addition to other support activities specified in this *Plan*, OST will be conducting four 2 ½ day technical workshops around the country with co-regulators (states and tribes). These workshops will be focused on four common situations where designated use changes may offer solutions:

   (1) permit limits cannot be met,
   (2) newly adopted criteria cannot be met,
   (3) there is insufficient specificity for criteria, and
   (4) water quality targets in TMDLs cannot be achieved.

   These actions by EPA to support states and tribes underscore that Ecology should build a Guidance document on what we know now, but explicitly recognize that we are all poised to learn more soon. It's important to avoid details now that may not later be supported by experience.

3. **The Guidance should be expanded to include all available program and policy tools to modify water quality standards.** While we appreciate the considerable effort by Ecology to develop this Draft UAA Guidance, there are numbers of other regulatory tools available to modify water quality standards (site-specific criteria modifications, variances and special conditions). Ecology does mention these other tools in the Guidance, but the focus is clearly on UAAs. We understand that expansion of this Guidance would be a major undertaking for Ecology, requiring a considerable amount of staff resources to accomplish. But in order for the regulated community to select the best available tool for a given situation, all available tools and their processes must be understood. Therefore, we suggest that Ecology expand the Guidance document to include all regulatory tools available to modify water quality standards.

4. **The Guidance should clearly state the process Ecology plans to undertake for review of UAAs and modifying uses in the regulations.** Statements on p. 48 and p. 49 of the Guidance regarding available staff resources at Ecology for review of UAAs are confusing. The statement on p. 48 says: "Ecology's review of the UAA will be dependent on available staff resources." A subsequent statement on p. 49 says: "...the formal review of the final document should be able to be accomplished in a relatively short timeframe (within 3 months)." These statements are not

congruent and are a matter of concern. If the statement on p. 48 is accurate, this would be very discouraging and not acceptable to those who have committed the resources to undertake the rigorous task of submitting a scientifically-defensible UAA. The regulated community needs Ecology to commit staff resources to the UAA review and rule revision processes.

5. **The Guidance should explain how other sources of pollutant loading would be factored into final rulemaking decisions.** The Guidance states (p. 7) that a pollutant source assessment must be done "... to predict the amount of reduction in pollutant loading necessary to achieve protection for the designated uses(s)." In regard to wasteload allocation and the contribution of other sources to the pollutant load, please explain Ecology's process for allocating pollutant reductions when there is more than one source of pollutant loading and how this relates to final rulemaking decisions.

Existing Uses and Attainability

6. **The Guidance should clarify what information is required to show that a use is or is not "existing" and "attainable" and provide more information on Ecology's interpretations of the six conditions used to determine removal or modification of designated uses.** Federal water quality regulations make provision that states may remove or modify designated uses in the state water quality standards that are not existing and not attainable. The federal regulations [40 CFR 131.10(g)] have established six (6) conditions to be considered by states when determining whether a designated use can be removed. If only one (1) of the six (6) conditions exists, the designated use is considered unattainable and can be removed from the standards. The draft Guidance is not sufficiently clear on the type, quality and quantity of information that a petitioner should prepare in support of a robust UAA. Please clarify what information or data would be required to show that a use is or is not existing or attainable. Providing examples of both removal and modification would be helpful as well.

   In regard to the federal regulations [40 CFR 131.10(g)], we request that Ecology provide additional guidance on the meanings/interpretations of the following, underlined aspects of 4 of the 6 conditions:

   a) "Dams, diversions, or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition..." [40 CFR 131.10(g)(4)];
   b) "Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied..." [40 CFR 131.10(g)(3)];
   c) "Natural, ephemeral, intermittent, or low flow conditions or water levels prevent the attainment of the use..." [40 CFR 131.10(g)(2); and
   d) "Controls more stringent than those Sec. 301 (b) and 306 of the Act would result in substantial and widespread economic and social hardship" [40 CFR 131.10(g)(6)].

   Please provide examples of each.

   Related to condition (6) above, the draft Guidance states (p. 5): "Federal regulations allow cost to be considered in only two situations when downgrading a use. The first has to do with dams, the

second with private or public entities." Given the statement on p. 10 of the Guidance that "Only one of these conditions must be met in order to pass the test for unattainability," please clarify how condition (4) relates to condition (6), if at all.

7. **In regard to "attainability," we request clarification on the specific factors, criteria and standards Ecology will use to establish that urbanization is a "human-caused condition that cannot be remedied."** Full restoration of natural aquatic life communities may not be feasible in some heavily urbanized areas; this reality is acknowledged in EPA guidance cited in Ecology's draft at page 52. (See page 23-24 of *Guidance on Implementing the Water Quality-based Provisions of the CSO Control Policy -July 2001.)*

8. **We request that Ecology reconsider the position that Washington's aquatic life uses "cannot be applied seasonally" and that "aquatic life uses for both fresh and marine waters cannot be applied on a seasonal basis."** Pages 4 and 12. It is quite possible that in a given season, some designated uses do not exist and are unattainable. Ecology acknowledges on page 9 that a UAA may establish "subcategories of aquatic life uses, or seasonal divisions of these categories... (e.g., separate spawning and rearing criteria that are applied on the basis of when those life-stages actually occur in a waterbody)." What are the options for establishing seasonal aquatic life uses? Please explain how it is "still possible to set seasonally based aquatic life uses." Page 12. Examples would make the options more concrete.

9. **We request that Ecology consider substituting "uses" for "biota" in the matrix for Site-Specific Criteria at page 3.**

<u>Miscellaneous</u>

10. **The Guidance should provide a Glossary of terms.** We support the intent of Ecology to provide a "Glossary" of terms. At a minimum, include the following terms: attainable, equilibrium, existing use, highest attainable use, highest quality use, natural conditions, natural potential water quality, natural sources, optimal level, pollutant, pollutant source assessment, pollution, scientifically defensible, seasonal use, site-specific criteria, special condition, source, subcategories, use protection goal and variances.

11. **The Guidance should provide consistent regulatory terminology across water quality programs.** The use of different terms in the different contexts <u>for presumably the same thing</u> is confusing. An example of this confusion is the use of the term "waterbody" in the draft UAA Guidance and use of the term "segment" in the 303(d) list; we presume that "waterbody" is actually a larger body of water than "segment." We recommend that Ecology indicate synonymous terms and cross-link the water quality programs when appropriate, either in the Glossary and/or within text.

12. **Please check the links that have been cited.** For example, the website links to the EPA Water Quality Standards Guidance and the July 7, 1998, ANPRM are incorrect at pages 52-53.

In closing, we would like to emphasize that we welcome more opportunity to participate in the UAA Guidance development. This review-and-refine involvement is important to the regulated community

and we encourage Ecology to conduct a second meeting for further discussion of comments received statewide. It would be most productive to receive the comments (or a summary of the key comments) prior to the meeting, and then conduct the meeting with presentation of the comments and the Ecology responses, when possible. Based on the nature of the comments received, Ecology might consider a workshop-type format where repeated questions could be answered and clarifications made in an introductory session.

Thank you again for this opportunity to comment on the draft UAA Guidance for Washington State. The City of Seattle is interested in continuing work with WDOE on development of this Guidance document, as we view this as an important tool for effective water quality management. Should you have any questions about this letter, please call Barbara Greene at (206) 615-1091.

Sincerely,

Nancy Glaser, Director
Environment & Safety Division
Seattle City Light

Sally Marquis, Director
Resource Planning
Seattle Public Utilities

HCP:sd

cc: Melissa Gildersleeve, WDOE
John Gross, Kalispel Tribe
Helen Rueda, EPA
Jean Parodi, WDOE
Paul Turner, WDOE

CONFEDERATED TRIBES of the CHEHALIS RESERVATION

Department of Ecology
Water Quality Program
AUG 18 2004

August 13, 2004

Ms. Cheryl Niemi
Surface Water Quality Standards Unit
Water Quality Program
Washington Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600
E-Mail: cnie461@ecy.wa.gov

RE: Draft Use Attainability Analysis Guidance

Dear Ms. Niemi,

The Confederated Tribes of the Chehalis Reservation appreciate this opportunity to provide comments on the Washington Department of Ecology's (WDOE) draft guidance for conducting use attainability analyses. As you may be aware, the aboriginal territory of the Chehalis Tribe pervades and transcends the Chehalis basin. While the Tribe's Reservation is located between the cities of Oakville and Rochester, its reserved rights include the water quality and fish habitat needed to sustain the present and future needs of the Tribe. Accordingly, the Tribe has a strong interest in assuring proper management of fish habitat and water quality throughout the Chehalis basin and other western Washington water-bodies.

While we understand the desire for WDOE to produce guidance on this and other management topics, we believe it is premature for WDOE to promulgate use attainability guidance. Washington's water quality standards are still up in the air and until key issues surrounding the adequacy and interpretation of these standards are resolved, it is not possible to determine when compliance with such standards is no longer reasonable or feasible. Even aside from any Clean Water Act determinations of the "reasonableness" and "feasibility" of protecting and improving fish habitat, WDOE must also exercise its authorities in a manner consistent with other federal laws, including the reserved rights of Indian tribes.

P.O. BOX 536 • OAKVILLE, WA. 98568
AC 360-273-5911 • FAX 360-273-5914

At this time, there is not a consensus between the Chehalis Tribe and WDOE regarding the adequacy of state water quality standards and beneficial use designations (including "core" and "non-core" habitat designations). We are concerned that the "core" and "non-core" distinctions may be used as a means of providing reduced protection to habitat that is important for fully protecting the salmonid beneficial use (as required by the Clean Water Act) and protecting and rebuilding the fish populations needed to meet the Tribe's reserved rights. Accordingly, we are not prepared to endorse a use attainability analysis (UAA) process that relies on those distinctions.

Burden of Proof – The UAA guidance fails to properly place the burden of proof. Federal guidance makes clear that uses may only be removed or down-graded if it can be demonstrated that it is not feasible to attain the uses. *See e.g.*, 40 CFR § 131(g). This failure to properly allocate the burden of proof is reflected, for example, by the guidance permitting applicants to lump watersheds with similar characteristics together and to apply "representative" data to all of them. *See* UAA Guidance at 9. While WDOE states that it does not recommend this approach, *id.*, it still opens the door. Without question, one cannot demonstrate that a use cannot be attained in a given water-body in the absence of information from that water-body. Stated differently, to meet the burden of proof required by federal law, at a minimum, stream-specific information is necessary. WDOE's failure to specifically set out the burden of proof opens the door to all kinds of mischief that could be avoided by being clear at the outset.

Existing Uses and Attainable Uses – Industry advocates have eloquently voiced their frustration with water quality standards that seem to call for water quality conditions that do not appear to be attainable in some streams. Their solution often seems to call for either weakening the water quality standards or re-designating the beneficial uses so that less protective water quality standards apply. In either scenario, it is the beneficial use that suffers.

Just because it seems like it may be impossible to reduce temperature or turbidity in a stream to the point where it will fully meet water quality standards, doesn't mean that the standard should be reduced or tossed out. First, for the vast majority of water-bodies in this state, we simply do not have sufficient data to be able to say that under no circumstances will X

stream ever be able to meet Y standards. The time-scale for channel morphology evolution is such that it is very difficult to say that a water-body can never achieve a given standard. Moreover, due to the reluctance of many industry groups to implement and/or revise best management practices, there are many experiments that simply have not been conducted. Second, streams that do not respond to the best current actions for protecting water quality may simply be more difficult to cleanse or protect from pollution. That does not mean we should stop trying to do our best to protect them or that they should be considered less worthy of protection.

An analogy that may be useful is to think of streams as students. Under the same instructional standards, some will excel and some won't. Some are more capable of excelling than others. Recognizing the importance of all students, we do not write off the bottom half or third of the class or lower our standards of excellence. Instead, we try different instructional methods – best management practices – to try to raise their level of achievement. And despite centuries of practice, we are ever mindful of the capacity of students to surpass our expectations.[1] Given the importance of streams to sustaining life and commerce, we would be well-advised to apply the lessons we have learned from other important endeavors, such as educating our youth.

Due to decades of poor management and/or mis-placed priorities, many streams have been degraded. This has resulted in significant impacts on fish habitat productivity. Given the chronic lack of long-term monitoring information and the state of our knowledge about the capacities of streams to heal, it is very difficult, if not impossible, to reliably determine what characteristics a stream may have 10-50 years from now, if we were to apply improved management practices.

The key problems that undermine the current draft of the UAA are that it presumes we know what conditions water-bodies are capable of attaining and that it is legitimate to lower our water quality standards and beneficial use designations to reflect the current conditions in streams. As discussed above, we simply do not presently have the data or the expertise to be able to conclusively determine what conditions a given water-body is capable of attaining. Accordingly, in the absence of definitive knowledge,

[1] There are numerous examples of mediocre students eventually rising to positions of responsibility or making significant contributions to society.

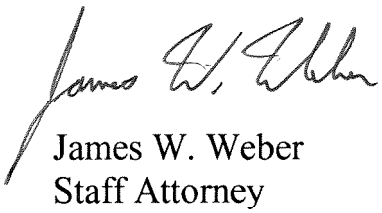
the Clean Water Act requires that we must presume that water quality standards can be achieved and beneficial uses attained.

Coordination with the Chehalis Tribe – We note and appreciate that the UAA guidance calls for WDOE to coordinate with Tribes as it reviews any UAAs that have been submitted. While we this is an important step in the right direction, we also recommend that any entity seeking to down-grade beneficial use designations or otherwise decrease the level of water quality protection, should be advised to consult at the outset of the study with affected managers. In the case, of UAAs in at least the Chehalis watershed, the Chehalis Tribe must be consulted. It will be far easier to address the Tribe's concerns if consultation occurs prior to initiation of the UAA.

Again, we appreciate this opportunity to provide comments. We believe that the exercise of developing this guidance has been helpful; however we do not believe that it is ready for adoption. As mentioned above, problems with the new water quality standards need to be addressed before the full ramifications of any UAA guidance can be assessed. In addition, the UAA guidance fails in at least the following areas: (1) it does not properly allocate the burden of proof; (2) it does not appropriately emphasize the presumption in favor of water quality protection and restoration; (3) it does not fully explore the need to employ more stringent BMPs and other control measures before diluting water quality standards and/or use designations; and (4) it does not fully recognize our severely limited ability to assess stream potential.

At the end of the day, we have already demonstrated our ability to degrade water quality and fish habitat productivity. Water quality standards and use attainability should place the emphasis on ensuring protection of what we have and improving what we have not managed properly in the past. We look forward to working with you to these ends. If you have any questions regarding these comments, please do not hesitate to contact me at (360) 273-9941.

Sincerely,



James W. Weber
Staff Attorney

August 6, 2004

Ms. Cheryl Niemi
Department of Ecology
Water Quality Program
P.O. Box 47600
Olympia, WA 98504-7600

Subject: Comments re: May 2004 Draft Use Attainability Analysis Guidance for WA

Dear Cheryl:

Thank you for this opportunity to comment on Washington State Department of Ecology's May 2004 Draft Use Attainability Analysis (UAA) Guidance for Washington State.

The comments below are brief. We would welcome the opportunity to sit down and discuss them in more detail.

1. Bellevue suggests and requests that Ecology's Water Quality Partnership process be utilized for on-going discussions with interested parties on designated uses and the draft UAA guidance.

   For example, Bellevue (and hopefully Ecology) found the two-way communication, the ability to discuss all sides of an issue and brainstorm solutions with interested parties provided by Ecology's WQ Partnership process on the (proposed) Standards to be very useful and effective. It seems the same review and discussion process would be as useful and effective in revising the UAA Guidance.

2. Bellevue's understanding is that Ecology anticipates one additional public review cycle on the draft guidance. Bellevue requests at least two additional public review cycles. This request is made, in part, due to this first draft (May 2004) being a work-in-progress, i.e. an incomplete first draft, and to allow public comments to be more fully explored and addressed by Ecology and interested parties.

Designated Uses in Current (and Proposed) Washington Surface WQ Standards

Designated uses were assigned to a large number of Washington's waterbodies without credible information. This was not uncommon for States to do when first required by the Clean Water Act (CWA) to designate uses to waterbodies. Many States, with EPA approval, are revising their Standards through various processes so that the designated uses assigned to waterbodies in the Standards are actually either existing (defined by CWA as existing after November 28, 1975) or attainable uses for a waterbody.

There are a variety of ways to apply this "adaptive management" of designated uses to the Standards. For example, as previously discussed with Ecology staff, Colorado acknowledges that

> "An additional reason for revising classifications will be where previous classifications had no basis in fact and did not reflect actual beneficial uses. Such corrections to classifications shall not be considered downgrading."

The Environmental Protection Agency (EPA – Region 8) requires that Colorado document a solid technical basis for why the designated use assigned to the waterbody does not exist and is not attainable and EPA does not care if this process is called a UAA.

Another example, Ohio EPA has a program that employs biological, chemical and physical monitoring and assessment techniques in systematic biological surveys conducted in order to meet three major objectives, including "*to determine if use designations assigned to a given water body are appropriate and attainable.*" (http://www.epa.state.oh.us/dsw/bioassess/ohstrat.html)

3. Bellevue suggests and requests that Ecology recognize in the draft guidance that a significant number of designated uses were originally assigned to waterbodies without complete information and the designated use(s) may not be an existing use(s) or attainable use(s) in the waterbodies to which they are assigned; in these cases, removal or modification of designated uses would not be considered a downgrade.

Application of the Federal Requirements in the UAA Process

The requirements and explanation in the draft guidance for documenting, as required under 40 CFR 131.10 (g), a condition (out of the 6 possible conditions) that precludes a use from either having been an existing use or being an attainable use for a waterbody seem unduly complicated.[1]

4. Bellevue suggests and requests that Ecology staff step back from the process described in the draft UAA guidance and determine a structure and format that makes the UAA process transparent and straight forward in application (as Bellevue believes is possible). The data requirements and the process described in the draft seem unnecessarily complicated for any decision to be reached. For example, Ohio EPA uses a process that can range from simple to more complex, depending on the designated uses, as described below:

> "Ohio EPA procedures for reviewing use designations range from simple to complex. Simple cases are determined by definitions contained in the *Ohio Administrative Code*. Simple cases are, for example, public water supplies, which include all those waters located within 500 yards of a public water supply intake or agricultural water supply, which is generally applicable to all waters of the state.
>
> Intermediate cases require evaluation but no specialized expertise. These may include primary contact recreation use, which are waters deep enough to support swimming and/or canoeing, and secondary contact recreation use, which are those waters not deep enough to support swimming or canoeing.
>
> Complex cases require evaluation with specialized expertise. In these cases, aquatic life uses are determined through the biosurvey program. These are based upon the potential biota of the water body given the physical habitat, flow conditions and other variables. Biosurveys are needed when there is reason to suspect that existing Aquatic Life Use Designations need to be evaluated." (source – see attached pdf file)

Ohio WQS Defined PDF_chap3.pdf

[1] And vice-versa – for documenting that a designated use is existing or attainable.

UAA as the First Step in the "TMDL Process"

Ecology staff expressed their belief that a UAA was not a necessary step in the Total Maximum Daily Load (TMDL) process and that the "focus of the UAAs and TMDLs are different" (page 21 of draft Guidance).

The National Research Council (of the National Academy of Sciences) published a report, at the request of Congress, that examines the scientific basis of the TMDL program, Assessing the TMDL Approach to Water Quality Management.[2] The report states that "if the standards are flawed (as many are), **all subsequent steps in the TMDL process will be affected** (emphasis added)." This report then documents the significant and necessary role that UAAs have as a first step in the TMDL process.

Attached is a discussion paper that references this report in describing the basis for the National Association of Flood and Stormwater Management Agencies' (NAFSMA) TMDL Program position (and role Use Attainability Analyses have in the Program). The Association of Public Works Agency (APWA) also supports this discussion paper and TMDL Program position.

C:\Data\2002
NAFSMA TMDL Positic

5. Bellevue suggests and requests Ecology to recognize the relationship and critical role that Use Attainability Analyses have in TMDLs in the UAA draft guidance (i.e., UAA as the first step in the TMDL process) for the reasons cited in the referenced NRC 2001 TMDL report and the NAFSMA discussion paper.

Thank you for consideration of these comments. Bellevue would welcome the opportunity to discuss them further with Ecology.

Sincerely,

Phyllis Varner
Surface Water Quality Supervisor
City of Bellevue Utilities, Environment Division
pvarner@ci.bellevue.wa.us
ph. 425-452-7683
cc: Damon Diessner, Assistant Director

[2] National Research Council (NRC), of the National Academy of Sciences (NAS), Assessing the TMDL Approach to Water Quality Management, National Academy Press, Washington, D.C., 2001 (http://www.nap.edu/catalog/10146.html)

Department of Energy

Bonneville Power Administration
P.O. Box 3621
Portland, Oregon 97208-3621

POWER BUSINESS LINE

August 11,2004

In reply refer to: PGF-6

Cheryl Niemi
Department of Ecology
Water Quality Program
P.O. Box 47600
Olympia, WA 98504-7600

Subject: Comments on Department of Ecology's May 24, 2004
"Draft Use Attainability Analysis Guidance for Washington State"

Dear Ms Niemi,

The Bonneville Power Administration (BPA) appreciates the opportunity to comment on the Department of Ecology's May 2004 "Draft Use Attainability Analysis Guidance for Washington State." The Guidance is designed to help in evaluating the attainment of designated uses protected under Washington's water quality standards.

BPA is a power marketing agency within the United States Department of Energy. BPA markets the power produced by the Federal Columbia River Power System (FCRPS) which includes federal hydroelectric dams on the Columbia River and its tributaries operated by the Army Corps of Engineers and the Bureau of Reclamation. Through the FCRPS, BPA supplies about half of the electric power consumed in the Pacific Northwest. BPA also provides capital and operation and maintenance funding to the Corps and Reclamation for the FCRPS, including funding related to mitigating impacts of the FCRPS on fish and wildlife. As a result, BPA has a significant interest in the FCRPS, its operations, and in measures taken to address environmental compliance of the FCRPS, including efforts to comply with water quality standards pursuant to the Clean Water Act. Our general and specific comments follow, below.

General

Ecology has done a good job in articulating the UAA process in general and, in particular, the process for effluent-dependent systems. For example, the suggestions for monitoring strategies, including a Quality Assurance Project Plan (QAPP) and use of the most current fish and aquatic life information, will strengthen the technical integrity of UAA proposals submitted to Ecology. Nonetheless, BPA has concerns about the guidance particularly for what it does not include:

The draft Guidance document does not address FCRPS dams. As we have noted in past correspondence (see, e.g., November 5, 2002 letter to Mr. John Iani Re: Preliminary Draft Columbia/Snake Rivers Mainstem Temperature Total Maximum Daily Loads), we are concerned with the failure of water quality regulators to consider all relevant uses and values when establishing standards and TMDLs; the same concern arises here in terms of the UAA guidance. The Guidance does not establish either a UAA path, or alternatives, to appropriately address the compliance with water quality standards of the large, congressionally - authorized multi - purpose FCRPS dams. Where attaining numeric water quality criteria and TMDL allocations is technically or economically infeasible for the FCRPS, a viable means to secure Clean Water Act compliance is imperative.

Alternative Processes

We recommend that Ecology revise the UAA Guidance to show alternative approaches, such as a path to requesting site - specific criteria or waivers if a use change is not considered feasible. The process in the Figure 1 summary flowchart (p. 8) doesn't connect with the Decision Tree for Selecting Water Quality Standards Exception Tools handed out at the May 24, 2004 meeting in Olympia. The Decision Tree appears to be based on a point source effluent discharge into a mixing zone after treatment. It allows development of site – specific criteria for a waterbody if the numeric criteria are technically wrong. The Decision Tree's track for site – specific criteria ends in an assumption of a toxicity problem perhaps resolved by modifying an NPDES permit. There is no provision for a waiver of the water quality standards in either flowchart (unless "special condition" means waiver). If the UAA Guidance will not address waivers and site–specific criteria to any practical extent, Ecology must indicate how and when it will establish those processes and how they will address the existence of large dams.

We request that the Guidance explain how use "subcategories" with less stringent criteria will be established. The summary flowchart (p. 8) asks if a use is attainable based on the six factors in 40 CFR 131.10(g). If not attainable the state can consider a new use subcategory or a special condition as part of a UAA. The EPA rules note that these subcategories can carry less stringent criteria, see 40 CFR 131.10(j)(2). Is there a list of subcategories and criteria from which to choose, or are they developed on an ad hoc basis depending on study results? The Guidance should explain the difference between special condition and site – specific criteria.

The Guidance and meeting handouts are not clear as to whether a process to establish site – specific criteria is independent as stated on page 18, or if it is assumed to be sequential and pursued only if a UAA concludes that the use cannot be changed.

Ecology should not assume that developing site–specific criteria is time-consuming and expensive; Ecology should allow for alternatives that can take advantage of existing information. The site– specific criteria discussion on p. 18 emphasizes a 2 – year minimum process and the high cost of modifying numeric or narrative criteria based on biological and / or

chemical composition at a site. The implied common solution under this approach appears to be improved treatment technology for a wastewater effluent. For situations where best management practices will apply (such as those projected for FCRPS dams in the December 2003 Water Quality Plan), the process and costs may differ considerably. Extensive documentation of past and existing conditions under various FCRPS flow scenarios is available. Sources include fish studies and temperature and TDG monitoring over the last few decades. If the site–specific criteria process has some flexibility, Ecology may be able to reduce its costs of evaluating summer temperature exceedances at dams since no new treatment technologies will be involved for temperature. Most construction and operational changes for TDG have been identified and implemented.

Ecology should work closely with the EPA / Oregon DEQ UAA work group since the Oregon framework intends to address dams. The EPA / Oregon DEQ UAA work group is currently at the framework stage and will benefit from the extensive effort invested by Washington. The group has been urged to select a Federal dam as a pilot UAA. We encourage Ecology to work closely with the EPA / Oregon UAA work group in addressing UAA or alternative remedies for addressing dams.

Specific Comments

- The terms listed below should be included in the Glossary. Glossary entries should indicate whether they are taken directly from the Clean Water Act or other legislation or whether they are policy definitions. We suggest that Ecology ensure its glossary is consistent with glossaries from Washington's WQS, Oregon's recently approved temperature standards revisions, EPA's proposed revisions to the Oregon standards, and EPA's State and Tribal Temperature guidance project. Definitions may be similar but having to choose from multiple definitions will force any inconsistencies to be addressed.

Anthropogenically - Caused, Human - Caused Contaminants
Human effects (measured from when?)
Natural Factors, Natural Features or Natural Conditions
Site-Specific Criteria
Special Condition
Thermal Potential (measured against what? Pre - European conditions? Modified river?)
UAA -- from 40 CFR 131.3 and elaborate if necessary; 48 FR 51401
Variance
Waiver
Water Quality Standard

- P. 2, #6 -- The Guidance needs to address expected levels of monitoring for the UAA and alternative processes. This is particularly important for situations unrelated to effluent – dependent systems. The Guidance should offer some boundaries on the level of monitoring required in the UAA and alternative approaches. How much is enough and when does it end? Since the FCRPS has many years of water quality, flow, and fish passage data, such data should reduce the need for new or additional monitoring efforts.

- At p. 2, #8 – In this step where Ecology considers rulemaking, the caveat that a rulemaking will be undertaken "if resources are available" is a concern, particularly as to timing. If Ecology concludes that it will have insufficient resources for UAA review, the applicant may have performed intensive data collection and instream monitoring needlessly. Ecology should budget the resources necessary to complete its regulatory work, including rulemaking. At a minimum, it should provide a system to ensure funding of specific UAA reviews once started through completion.

- The UAA process flow chart should establish critical milestones for Ecology and EPA reviews.

- There should be no presumption in the Tools Document linked to p. 3 that the UAA proponent will fund ongoing monitoring to justify continuation of a use change after it is granted. For use changes and site – specific criteria, the summary table states "Once adopted they remain in effect indefinitely." The Guidance should confirm that future monitoring is a state responsibility.

- P. 3 -- The chart indicates that "The same factors used to determine if a use can be removed under a UAA can be used to grant a variance." Can the same factors be used to grant a wavier or support site - specific criteria?

- On p. 4 the phrase " the designated use is occurring at less than optimal level" defers to natural features as the cause for unsuitable natural temperatures but hints that a new subcategory can be created in the WQS. The next sentences need clarification, e.g., "subcategories may exist, and be fully supported at levels below current water quality criteria. This modification can only occur if the subcategory of use reflects the highest attainable "existing use" as defined further below." This implies adoption of a new criterion. Or is this a path to recognizing existing water quality, that is, site – specific criteria?

- P. 5, bottom -- This section clearly states that costs can be considered in only two situations when downgrading a use. One of them is dams and the other is private or public entities. The second case needs clarification as to why private or public entities can consider costs.

- P. 5, -- The "Can an existing use be downgraded?" section appears to have a contradiction. A statement is made that an existing use cannot be downgraded if credible information exists that documents the use after November 28, 1975 even if the use is not currently present. The next sentence suggests that "Options in this case would be to develop a UAA to downgrade the existing use (if the designated use is a higher quality than the existing use), or look at alternative tools for meeting the standards, such as site - specific criteria, variances and enhanced water pollution control options."

- P. 11, -- Culverts are characterized as remediable physical barriers which prevent attainment. Does Washington consider dams, or at least some smaller dams, remediable barriers? If so will the final Guidance offer a distinction between remediable or non-remediable, or will that be a case – by – case decision?

- UAA proponents will use water quality models to a level sufficient to support their request and state rulemaking. Do Ecology and EPA expect to employ their own model(s) as part of their review process? The Guidance should require, or at least encourage, that all participants agree on an appropriate level of modeling to allow a sound decision. For total dissolved gas at FCRPS dams, for example, all agencies use the SYSTDG spreadsheet model. There should be a similar agreement on which temperature or other water quality models should be used (or preferred) for specific conditions. We recommend that the regulators participate in the proponent's monitoring and modeling activities to whatever extent is necessary to understand the work. Such collaborations tend to be successful in resolving issues and promoting efficiencies.

In closing, we believe there are alternative approaches such as site-specific criteria and variances that need to be addressed before the Guidance is issued. It will be worth the extra effort for Ecology to work with the stakeholders now to address the existence and effects of large dams instead of delaying for a year. We look forward to working with Ecology on developing clear and efficient protocols for addressing the concerns raised in our review of the Draft Guidance. We also encourage close work with EPA and the Oregon DEQ UAA work group that is in the beginning stages of developing just such a protocol. If you have questions about these comments, please contact either, myself at 503-230-5914 or John Piccininni at 503-230-7641.

Sincerely,

Jim Irish
Water Quality Manager
Federal Hydro Projects - PGF-6
Bonneville Power Administration
(503) 230-5914
"A successful person is one who can lay a firm foundation with the bricks that others throw at him or her."

EAST COLUMBIA BASIN IRRIGATION DISTRICT
P.O. Box E – 55 North 8th Avenue
Othello, WA 99344 (509) 488-9671

SOUTH COLUMBIA BASIN IRRIGATION DISTRICT
P.O. Box 1006 – 1135 E. Hillsboro, Suite A
Pasco, WA 99301 (509) 547-1735

QUINCY-COLUMBIA BASIN IRRIGATION DISTRICT
P.O. Box 188 – USBR Building
Quincy, WA 98848 (509) 787-3591

August 11, 2004

East Columbia Basin Irrigation District: Quincy-Columbia Basin Irrigation District: South Columbia Basin Irrigation District

Cheryl Niemi
Department of Ecology
Water Quality Program
PO Box 47600
Olympia, WA 98504-7600

Re: Comments on Draft Use Attainability Analysis Guidance for the State of Washington

Dear Ms. Niemi,

The Columbia Basin Project Irrigation Districts appreciate the opportunity to comment on Washington State's proposed Use Attainability Analysis (UAA) Guidance Document. General and specific comments of the Districts' consultant, Rick Cardwell, of Parametrix, Inc., and further comments of the Districts regarding application of the UAA process on federal reclamation projects in the State of Washington are enclosed with this letter.

One of the Guidance goals is to provide a clear process for the applicant. The draft document is generally difficult to read, follow and comprehend. Overall, one had to wonder if it would guide anybody anywhere. Ecology should strongly consider changing the proposed document to more of a user friendly, easy to follow cookbook type of format. The draft guidance, bounces the reader around by referring to various codes of federal regulations, is not precise as to what is actually needed to accomplish a UAA and muddies the water further by incorporating confusing discussions on aspects of the Clean Water Act, State water quality standards and how they should be used to determine uses whether existing or not.

The Directors of the Columbia Basin Project Irrigation Districts are of the opinion that the Clean Water Act was passed by Congress to protect naturally occurring water bodies such as rivers, lakes and streams. Congress did not intend to regulate through the Clean Water Act federal reclamation project water appropriated, stored and conveyed through man-made (i.e., constructed) irrigation facilities. Ecology continues to ignore that these waters once appropriated are not naturally occurring water bodies and has developed proposed use based standards and a proposed UAA process in conflict with the federal reclamation project purposes established by Congress.

In 1999, the Columbia Basin Project Irrigation Districts, the United States Bureau of Reclamation, the Washington State Department of Ecology and the United States Environmental Protection Agency entered into a Memorandum of Understanding (MOU) to address water quality issues associated with man-made irrigation facilities specifically

within the Columbia Basin Project which included investigation into UAA's. Based on information gained through MOU activities the last four years, it is clear to the Districts that the State's proposed UAA process should be consistent with the primary purposes of the Columbia Basin Federal Reclamation Project and facilitate management practices necessary to maintain the operation of federal reclamation facilities for the intended purposes.

The proposed UAA process is unusable on the Columbia Basin Federal Reclamation Project. The primary use of Columbia Basin Project water in constructed conveyance facilities such as canals, laterals, wasteways, and drains is agricultural. The proposed UAA process will result in the protection of uses which were never intended and which interfere with the management of the project water supply and the construction, operation, and maintenance of federal reclamation project facilities. This type of regulation puts an undue economic burden on Columbia Basin Project farmers.

The Columbia Basin Project Irrigation Districts actively participated in Ecology's various proceedings related to the conversion from class based to use based water quality standards. Throughout the several years long activity the Districts expressed skepticism that use based standards would be appropriate or workable for the most or all Columbia Basin Project waterways. Ecology repeatedly reassured the Districts and the Bureau of Reclamation and others that it would develop a workable UAA process which would insure the successful implementation of use based standards. The UAA Guidance that has been proposed reinforces the Districts' skepticism about the switch from class based to use based water quality standards.

The comments enclosed with this letter are offered by the Columbia Basin Irrigation Districts in an effort to persuade Ecology that reconsideration of the proposed UAA process as it applies to federal reclamation projects should be timely made in order to avoid legislative or judicial intervention in our collective efforts to attain reasonably achievable water quality standards for federal reclamation projects.

Sincerely,

Richard L. Erickson
Secretary-Manager
East Columbia Basin Irrigation District

Keith E. Franklin
General Manager
Quincy Columbia Basin Irrigation District

Shannon McDaniel
Secretary-Manager
South Columbia Basin Irrigation District

cc: Board of Directors for Columbia Basin Irrigation Districts
Attorney for Columbia Basin Irrigation District
USBR Area Manager

Cardwell Comments on Ecology's May 1, 2004 Draft (1.0) UAA Document

The following represent general and specific comments. General comments appear first, followed by specific comments. Some of the specific comments repeat general comments, as they reference the specific passage where the comment applies.

General Comments

1. **Ecology Should Consider Conducting Demonstration UAAs Before Completing this Guidance:** Ecology needs to conduct UAAs before finalizing this guidance. Preparing this document without having undergone the entire process will turn the first few UAAs into costly experiments for everyone. Conducting two demonstration UAAs in different types of waterbodies would be informative. A categorical UAA applied to irrigation drains and wasteways in eastern Washington would be one good candidate, because if a UAA cannot be conducted expeditiously on these, then it will be difficult to apply to perennial streams. Storm drains and waterbodies with downstream uses by threatened and endangered species are additional candidates.

2. **Comments and Interim and Provisional:** We assume Ecology will allow other agencies and the public to comment on the next draft, as this one remains to be finalized. For example, some sections remain to be written (e.g., can flows be regulated, p. 20).

3. **Ecology's Final Review Draft Should Be Stand-Alone:** It would be very helpful to the user community if Ecology could append or link all critical documents, so that the final review UAA draft is stand-alone. For example, EPA's (1995) guidance on economic impact analysis appears essential to this document, as Ecology states that it will review a UAA relative to the information needs of the EPA (1995) guidance. Appending EPA (1995) would be very helpful, especially given that reviewers have to read EPA (1995) before being able to comment on the economic impact analysis section.

4. **Clarity, Readability, and Redundancy**

   4.1. The document appears to have been written in parts and then consolidated. This creates substantial redundancy. For example, the first 21 pages appear to be answers to frequently asked questions, wherein pages 21 and following provide additional detail concerning the same subjects.

   4.2. Ecology should consider rewriting the document so that it can be understood by the public, resource managers, and technical people. Currently, there are many passages that are difficult to understand, even by trained scientists.

5. **Tone of Document:** The document contains numerous passages suggesting that conduct of a successful UAA will be complex, time-consuming, "very costly", and with uncertain outcomes. This language will discourage many from conducting a UAA.

6. **Operational Definitions of Uses:** Exactly what criteria will Ecology and EPA use to operationally define a use? Are these definitions accepted by the other agencies (e.g., NOAA Fisheries, USFWS, WDFW) and tribes, which will be consulted and influence

UAA outcomes? Two examples are offered. For example, a variety of macroinvertebrates can occur even in ephemeral streams that are dry for more than 6 months of the year. Fish in some instances are attracted to irrigation discharges because of the flows and temperatures. The macroinvertebrates in the example represent sustainable populations if they reproduce and sustain themselves in these habitats every year. On the other hand, fish occurrence should not constitute use. Sustainable, reproducing populations should be a key attribute in the definition of use, and would be compatible with EPA's guidelines for developing national water quality criteria (Stephan et al. 1985). Ecology should define every use in terms of the specific criteria that will be used to judge whether the use is attainable.

7. **Uncertain Outcomes:** More emphasis should be placed on establishing exit ramps so that users can determine, at frequent intervals, whether to continue or conclude specific analyses and the overall UAA. There is no reason for a UAA to proceed to completion, only to be rejected. The decision criteria should be explicit and defined at the outset of a UAA, and generic decision criteria should be contained in this guidance.

8. **Decision Trees, Process Flow Diagrams, and Scoping:**

   8.1. Consideration should be given to adding more detail to the guidance through the use of decision trees and process flow diagrams. These would outline the steps in the entire UAA process, and would help everyone understand the UAA criteria, decision point, and overall process.

   8.2. A formal initial "scoping" process would be useful, such as used in environmental impact statements, because this would be a good point at which to gain input from Ecology, EPA, the tribes, other agencies, and the public on what is needed. This early-on scoping would allow the applicant to decide whether to proceed with a UAA and if so, its cost, and the timeline.

   8.3. The guidance concerning recreational uses appeared to be the most informative, because it identified the key questions (p. 39) and the criteria (p. 40), and then followed with specifics on key UAA aspects.

9. **Models:** A variety of models likely will be used in each UAA, but model acceptance depends on a number of factors, especially selection of data, assumptions and models that are acceptable to Ecology, EPA and the other agencies and tribes that will review model results. Ecology and EPA should, in consultation with the reviewing agencies, define minimum data quality for the models, because if the data and assumptions are not acceptable, the model results will not be accepted. In addition, it will be important for Ecology to define the maximum uncertainty acceptable in model predictions?

10. **Role of Other Agencies in the Decision-Making Process**

    10.1. Although the document strongly recommends consultation with EPA and Ecology, several passages indicate other agencies also will be consulted and may, in the case of the Endangered Species Act, have veto power. Specifically which agencies and tribes would be stakeholders and decision makers? Has Ecology obtained their input, and even if Ecology has, is their input definitive, as none of

these institutions have ever been participated in a UAA? This is another example of the need for Ecology to sponsor a couple of UAAs so all entities become familiar with the process and start defining their roles and information requirements.

10.1.1. For example, P. 9, ¶ 1 indicated other agencies actually have veto power.

"Taking this approach, however, creates more risks of the UAA being rejected (by the various state and federal agencies charged with resource protection)..."

10.1.2. As another example, consider P. 21:

"...procedurally any change in the [water quality] standards will be examined by EPA and the federal resource agencies to determine whether a formal ESA consultation is needed. Thus, any proposed change in uses that could negatively affect the recovery of a threatened or endangered species would be unlikely to be approved."

11. **Information Requirements:** The information requirements for UAA are set extremely high. Moreover, the same level of analysis appears necessary regardless of the waterbody's size or the value of its resources. Rather, the requirements should be proportional to the value of the aquatic resources. The amount of information required for a UAA is a policy judgment, not a scientific one. What should be required is sufficient scientific, engineering and economic data and analysis to satisfy the questions.

12. **Demonstration of No Impacts on Downstream Uses**: The Guidance needs to specify what criteria will be used for such a demonstration. These criteria should be clear; for example, no violation of water quality criteria downstream that are attributable to the upstream modifications.

13. **Comprehensive Monitoring Strategy:** One example of an unreasonable performance bar is Ecology's recommendation (p. 32) that the analytical tools used in UAAs be equivalent to those described in the Comprehensive Monitoring Strategy. The language suggests that all the analyses conducted in CMS's should be applied to UAAs. If so, this is an unreasonable requirement because all CMS sampling and analyses may not be required in every UAA. Also, is this another example where one size fits all in terms of UAA requirements?

14. **One Size Fits All and Ecological Net Benefit**

14.1. The scope of a UAA for a stormwater ditch or an irrigation drain appears to be the same as reclassifying a reach of the lower Snohomish, Hoh, or Yakima rivers. It should not be so. Rather, the complexity and cost of the UAA should be proportional to the value of the uses to be protected.

14.2. Ecology appears to constrain the Ecological Net Benefit analysis to effluent-dominated streams. But could not this same type of analysis be applied to irrigation drains and wasteways? They are not effluent dominated, but they are manmade structures that preclude the attainment of aquatic life uses.

15. **What Specific Criteria and Information are Needed to Define <u>Existing Uses</u> (as of November 28, 1975) versus Current Uses**: Consider, for example, the case of salmon and trout and char usage. Does use constitute (1) mere occurrence, (2) the presence of suitable habitat (what defines suitable habitat), or (3) the presence of self-sustaining populations of salmon, trout or char?

16. **Impairment Due to Natural Conditions**

    16.1. WAC 173-201A-260 seems to provide more flexibility than suggested by the UAA document: WAC 173-201A-260(a) states:

    > *"It is recognized that portions of many water bodies cannot meet the assigned criteria due to the natural conditions of the water body. When a water body does not meet its assigned criteria due to natural climatic or landscape attributes, the natural conditions constitute the water quality criteria."*

    16.2. It was difficult to find the location in the document where this natural condition was addressed.

17. **Nonpoint Sources of Pollution regarding section on Effluent-Dominated Ecosystems**: Net Ecological Benefit implies application to point source discharges, because, for example, it refers to pretreatment and removal of a discharge. Does this UAA document address non-point sources of pollution, and if so, generally or in specific instances.

18. **Net Ecological Benefit:** If all seven conditions must be met, then Ecology needs to evaluate whether the requirements are achievable and hence realistic. We recommend Ecology make a determination of whether irrigation canals, drains and wasteways qualify, and if not, what types of waterbodies are thought to qualify.

19. **Impairment due to Human Structural Changes**

    19.1. WAC 173-201A-260(b) states:

    > *When a water body does not meet its assigned criteria due to human structural changes that cannot be effectively remedied (as determined consistent with the federal regulations at 40 CFR 131.10), then alternative estimates of the attainable water quality conditions, plus any further allowances for human effects specified in this chapter for when natural conditions exceed the criteria, may be used to establish an alternative criteria for the water body (see WAC <u>173-201A-440</u>).*

    19.2. It was difficult to identify where this provision is addressed other than effluent dominated systems (p. 21). Should it not apply to other systems; for example, irrigation drains and wasteways

20. **Upgrading a Designated Use:** Ecology says that no information is required to upgrade a use, but requires a "*very costly*" and comprehensive study to downgrade an unattainable use. The same burden of proof should be required in both instances, as the upgraded use may have unintended ecological as well as economic and social consequences, and these need to be understood in advance. For irrigation drains and wasteways, for example, upgrading a use (e.g., from aquatic life to noncore salmonid rearing) could have very significant economic and social consequences to farmers.

Consider, for example, the water requirements and effects on crops of trying to maintain riparian vegetation along an irrigation drain. Consider the hydraulic consequences of trying to add large woody debris to irrigation drains, which are managed for flood control and to drain excess water off irrigated farmland.

21. **Page 13, Para. 4 re. "*Even though the specific fish uses of spawning, core rearing, and migration are used to describe these uses, the uses are stream-uses not fish-species uses and not specific fish-life stage uses*" [emphasis as used in document]**

    21.1. This is a policy rather than a scientific judgment because the use being protected (overall stream health) is not definable or measurable by any scientific metric. Rather, the use is an qualitative, intangible value. Historically, attributes of stream health, such as temperatures required for core rearing or spawning of salmon, have been defined in terms of scientific data defining the tolerances and preferences of specific life stages and species of fish. The water quality standards for temperature, for example, are species and life-stage specific because they are based on scientific data that are commensurately specific.

    21.2. Ecology is correct in asserting that successful core rearing of juvenile salmon, for example, depends on the existence of an aquatic ecosystem adapted to the prescribed temperatures. But it did not present and may not possess any data defining what specific metrics are needed to protect the health of aquatic organisms other than salmon, trout and char.

    21.3. Ecology must assume that if the water quality standards are met for the category and subcategory uses, then the category uses are being protected. This language appears to be erecting another barrier, a barrier that may be impossible to circumvent, by saying that you can't increase the temperature, such as from 17.5 to 18 C, for non-core rearing of salmon and trout, without endangering the organisms upon which the fish depended at 17.5 C. Does the Agency have scientific data supporting this assertion?

22. **Dams and Other Diversions and Hydraulic Structures:** Is Ecology seeking to regulate dams? Does this also apply to irrigation diversions and their associated hydraulic structures? By specifying dams in the UAA process, Ecology appears to be. It is our understanding that it is EPA's policy not to regulate dams under the Clean Water Act. For example, dams do not require NPDES permits. It is our understanding that two federal courts (National Wildlife Federation v. Gorsuch, 693 F.2d 156 1982; and Gorsuch and Consumers in Catskill Mountains Chapter of Trout Unlimited v. City of New York, 2001 WL 1267391 October 23, 2001) have deferred to EPA's judgment on this issue.

23. **Documentation of Fish Occurrence versus Sustainable Species Populations (Page 36):** The basic question we are posing is whether the mere observation of one salmonid or a group of salmonids in a waterbody constitutes use by salmonids, according to the Clean Water Act. We understand that the CWA specifically seeks to protect balanced, indigenous populations, and therefore the mere occurrence of fish or salmonids implies nothing about sustainable populations. This is because fish can be attracted to a feature (e.g., flow) without being able to sustain a population in the stream.

Specific Comments

Specific comments are tied to the Page (P), Para (¶) and Line of the document. The first paragraph, whether partial or whole, is counted as the first one on each page.

P1, ¶4, Line 4 re. Other interested parties: What does this phrase mean? Does it mean interested State and federal agencies, tribes, and the public? Could clarification be added? Secondly, what is the role of these other parties in the decision making?

P1, Step 5 re. QAPP: Can Ecology spell out QAPP and reference the section (page 37) where it is discussed.

P4, ¶2, first bullet, Line 1: The CFR designation appears incorrect. I found the information at 40 CFR 131.10(g). Suggest correcting citations.

P5, ¶1, Line 1 upgrading a designated use: Ecology says that no information is required to upgrade a use, but requires potentially a "very costly" and comprehensive study to downgrade an unattainable use. The same burden of proof should be required, as the upgraded use will remove some features from society and the environment, and these need consideration. For irrigation drains and wasteways, for example, upgrading a use (e.g., from aquatic life to noncore salmonid rearing) could have very significant economic and social consequences to farmers.

P5, ¶2, Line 5 re. very expensive: Ecology makes this statement in several places. Nowhere did we find Ecology saying that UAAs can be performed inexpensively, or that the scope and cost of a UAA should be proportional to the value of the uses being protected.

Page 5, Last ¶, Line 2 re. dams: Shouldn't other structures be referenced, according to 40 CFR 131.10(g), such as diversions and other types of hydrologic modifications?

P9, ¶1, Last line re. grouping waterbodies: The irrigation districts strongly believe that many irrigation drains and wasteways, which are engineered hydraulic structures, could be covered with a categorical UAA. This statement appears premature and presumptive, and Ecology should consider deferring judgment until it meets with users to discuss the scope of each UAA.

P12, ¶1, Last Sentence: This sentence is unclear; it seems to imply that a seasonal use affects the designated uses in other seasons.

Page 13, ¶4, L4-5: Ecology should clarify the language here. The new water quality standards for temperature and dissolved oxygen, are species and life stage (function) specific, because the data upon which they were derived are similarly specific. Although many species of plants and animals co-occur in colder streams, for example, that does not mean they have the same temperature and dissolved oxygen requirements. Co-occurrence, which is simply correlation, is not scientific evidence of cause and effect, which is a necessary condition for setting standards by subcategories.

Page 13, Last ¶: This paragraph lays out a process that is complicated and subjective. It would be very useful if Ecology could develop a protocol and decision tree to clarify the process.

Page 14, Number 1: Core and non-core need to be defined.

Page 14, Number 2: How is spawning defined? Is it observation of the fish's presence, the fish's attempts to spawn, the hatching of eggs, or the presence of a self-sustaining population? Doesn't the CWA require a self-sustaining species population? In other words, the CWA and water quality standards seek to protect populations by ensuring they are suitably productive (i.e., by setting standards based on productivity metrics: growth, survival and reproductive success).

P15, 2nd Paragraph re. protecting non-fish bearing headwater streams: Ecology is making policy without enough hard data when it concludes that headwater streams are important "because" they are important to downstream uses. An extension of such logic could apply to any stream, including an irrigation drain or stormwater ditch, because all of these contain aquatic macroinvertebrates that are known to drift and hence become available to organisms living downstream. So every upstream aquatic environment affects downstream uses, physically, chemically, and biologically. How does Ecology intend to justify applying this concept without data and only to headwater streams?

P16, ¶3, Line 2 re. great care: How does Ecology interpret a subjective phrase like "Great care"?

P16, ¶3, Line 7 re. special condition: Unclear what a special condition is. Is it a subcategory? How does such a condition work in the regulatory process?

P16, ¶4, Line 4: What is the alternative if this is inappropriate? Are models acceptable for defining the highest attainable use or only actual field measurements? How reliable must the models be to facilitate Ecology acceptance?

P16, ¶4, 2nd to last line: What quantities is Ecology thinking of when they say that "*...almost incapable of supporting the use altogether.*" (upper 95, 99, 99.9 percentiles)?

P16, Last ¶, Number (2): Further specification would be helpful. Would this demonstration of downstream uses be accomplished by mixing zone studies (for toxics) or by measurement of downstream transport of food (organic carbon) and macroinvertebrate drift? The food supply issue can never be addressed because fish and predators switch prey based on availability. Rather, salmonids do not eat only the most pollution-sensitive organisms; they also do quite well on more pollution-tolerant species like chironomids and baetid mayflies, which are more tolerant. Ecology is supposing that the structure of the aquatic community in one reach needs to be maintained in downstream reaches to maintain a use, such a core rearing. This is incorrect, as the taxonomic structure of stream communities changes naturally with elevation and gradient.

Page 18, Para. Following Section "Do all sources..." Last Sentence re. economic effect to any source: This is not workable as written, because it is well known that virtually any anthropogenic action will affect water quality, whether they are impervious surfaces, irrigation practices, tillage, point and nonpoint sources of chemical use, etc. Therefore, this provision needs to be more specific to be realistic.

Page 18, 2nd Para. Following "How are site-specific criteria...", Last Sentence re. Development of a site-specific criterion: This statement is not true if the recalculation procedure focuses on warmwater rather than coldwater stream species. There are places in eastern Washington where cold water species are poorly adapted to ambient conditions. In such cases, the warmwater aquatic life provision is more appropriate.

Page 18, Last ¶, Last Line: Need to specify references so the readers know what Ecology is referring to.

Page 19, ¶1, First Three Lines: Need to clarify. Is it reasonable to infer that a UAA is not specifically required when a waterbody does not meet criteria due to natural climatic or landscape attributes? Please clarify, as this language suggests no change in use is required.

Page 19, ¶1, Line 6 re. perceived: Suggest substituting "*has been documented*", as "*perceived*" is a subjective rather than objective term. All UAA decisions need to be based on data and scientific studies rather than subjective information like expert opinions.

Page 19, ¶3, Lines 4-5 re. A distinction between natural conditions, irreversible human-induced sources, and controllable sources is required... References are needed to guide the reader on how this is done. The site-specific criterion guidance published by EPA is not helpful in this regard.

Page 21, Last ¶, Line 1: Should the title be changed to avoid implying that the net ecological benefit concept applies only to effluent dominated systems? It would seem that many irrigation canals, drains, wasteways, and stormwater drains may qualify.

Page 22, ¶2 regarding seven conditions. Must all seven conditions be met? Would "*met*' be more descriptive than demonstrated?

Page 22 re. Seven conditions, Number 3, Line 2: Suggest changing *may* to *will*, because *may* requires a much less burden of proof than *will*. Also, does a pesticide qualify when the residue exceeds a toxicological threshold? Usually such thresholds are set very conservatively to screen out substances, and do not definitively define whether there is harm. Is "harm" subject to a greater standard of proof, such as an actual demonstration?

Page 23, ¶4, 2nd Bullet re. Dams: Does Ecology regulate dams under UAAs? We thought EPA does not regulate dams under the CWA. Do irrigation canals, drains and wasteways, which involve hydraulic structures, also qualify?

Page 24, 2nd to Last ¶: What would be a sufficient demonstration of financial impact, if this is not sufficient?

Page 28, Last ¶: Ecology should answer these questions. For example, is one fish in a waterbody suitable evidence of use, and if not, what kind of evidence is sufficient. If water quality criteria seek to protect balanced, indigenous populations, shouldn't the definition be focused on sustaining species populations within a balanced community of aquatic organisms?

Page 29, ¶4, 2nd to Last Sentence: How much detail is required in developing this comparison? For example, should it include periphyton, algae, macroinvertebrates and

fish, or only macroinvertebrates and fish. Ecology's bioassessment program may be a guide, for if it is developing data only for fish and macroinvertebrate communities, then study of those communities should suffice for a UAA.

Page 29, ¶5, Line s4-5 regarding Reference Sites: This language works well for perennial streams, but what about manmade waterbodies? Ecology should consider how these concepts apply to irrigation drains, irrigation wasteways and stormwater channels. When Ecology refers to "*disturbance*" here, does it mean human disturbance? How do you apply this language to drains and wasteways carved out of the desert and supplied with water from sites far upstream, when there are no comparable, "least disturbed" waterbodies nearby?

Page 36 re. Fish Distribution and Use: These maps may be a place to start, but should not be used by Ecology as providing sufficient information for defining whether a waterbody contains salmon, steelhead, and trout including bull trout. This is because the data represents instances of where fish have been observed. The mere occurrence of salmonids or fish does not mean these populations are sustainable. The fish may be hatchery strays, as hatchery straying may be notable in some areas (Hayes and Carmichael 2002). Also, the fish simply may have been attracted to the water flow or temperature.

Page 39 regarding "Information Assessment": Ecology should consider developing a generic report outline so that everyone will know what type of data are required, and the order in which these data are presented

Page 39 regarding Section on Recreational Use: This information was very helpful. It appears this section was written by someone else. It is more detailed and specific and clear. Analogous information to this should be written for the other sections.

Page 49, ¶3 re. five bullets: These potential outcomes illustrate the value of having decision points, with exit ramps, at various steps in the process, certainly much earlier than after UAA completion. Without such ramps and decision milestones, it may be useful for applicants to submit bare bones UAA, which will conserve limited funds and may generate more detailed requirements from Ecology, EPA, the tribes and all other stakeholders. Then, at that point, the true UAA "scoping" will have taken place, allowing the applicant to decide whether to complete the UAA and the cost of doing so.

Page 55, ¶3 regarding restrictions to waterbodies having no persistent and bioaccumulative toxic substances. The language, as written, is unworkable, because DDT and/or its metabolites, mercury and selenium will be occur at analytically detectable concentrations in virtually all effluent-dependent waterbodies (EDW). The issue is whether these concentrations pose <u>unacceptable</u> risks to human health and the environment. This decision on acceptably cannot be based on whether conservative, screening-level toxicological thresholds or water quality criteria are exceeded in the EDW. These thresholds and criteria can be so conservative that only very clean (or diluted) waters comply. So, the basis should be on acceptability. But note that one will need to do a risk assessment in order to decide whether a EDW qualifies for UAA consideration, and hence this will require Ecology to decide which thresholds and criteria to apply.

Page 55, Last ¶ regarding requirement of minimum flows for designated use: This proposal appears to be an appropriation of water to maintain aquatic life. If the wastewater is an irrigation drain or sewage treatment plant, this suggests that water would always have to be flowing to protect the designated use, whether coldwater aquatic life or warmwater aquatic life. The requirement to maintain water year-around to preserve the designated use may be a major issue.

References

Michael C. Hayes and Richard W. Carmichael. 2002: Salmon Restoration in the Umatilla River: A Study of Straying and Risk Containment. Fisheries: Vol. 27, No. 10, pp. 10-19.

Stephan, C.E., D.I. Mount, D.J. Hansen, J.H. Gentile, G.A. Chapman, and W.A. Brungs. 1985. Guidelines for deriving numerical national water quality criteria for the protection of aquatic organisms and their uses. U.S. Environmental Protection Agency, Washington, D.C. NTIS No. PB85-227049. 98 pages.

Districts' Comments on the Application of the UAA Process on Federal Reclamation Projects in the State of Washington

1. The Department of Ecology, prior to designating a use on a federal reclamation project, should conduct and complete a UAA for any proposed use.

2. The UAA protocols should include if applicable for the proposed designated use, procedures for:

   2.1 Review of physical, chemical, biological, and economic and social factors affecting attainment of a use;

   2.2 Review of naturally-occurring pollutant concentrations and conditions affecting attainment of a use;

   2.3 Review of natural, ephemeral, intermittent, or low flow conditions of water levels affecting attainment of a use;

   2.4 Review of the site specific arid and semi-arid climatic conditions and landscape attributes affecting attainment of use;

   2.5 Review of human conditions that prevent attainment of a use including state laws, and that cannot be remedied or that would cause more damage or an in-proportionate cost to remedy then to leave in place;

   2.6 Review of hydrologic modifications such as man-made federal reclamation project facilities affecting attainment of a use;

   2.7 Review of physical conditions related to natural features such as lack of proper substrate, cover, flow, depth, pools, riffles and other morphology affecting attainment of a use;

   2.8 Identification and description of cost-effective and reasonable methods for non-point source pollutant control where such control would be needed to attain a use.

3. A use should not be designated unless it is demonstrated by the Department of Ecology through UAA that such use is actually existing and attainable or unless it is demonstrated that the adverse social and economic impacts of designating such use that is not actually existing are outweighed by the social and economic benefits resulting from the attainment of such use.

4. A use should not be designated which conflicts with federal reclamation project purposes established by Congress or which conflicts with the United States Bureau of Reclamation's existing and planned management and use of the project water supply or conflicts with the construction, operation, and maintenance of federal reclamation project facilities.

5. A use should not be designated by the Department of Ecology which directly or indirectly invites, permits, or otherwise authorizes public access to federal reclamation facilities contrary to liability and security concerns of the United States Bureau of Reclamation and the irrigation districts.

PUBLIC WORKS
EVERETT

Everett Public Works

Department of Ecology
Water Quality Program
AUG 17 2004

August 16, 2004

Cheryl Niemi
Washington St Dept of Ecology
Water Quality Program
P.O. Box 47600
Olympia, Washington 98504-7600

Subj.: Draft Use Attainability Analysis Guidance

Dear Ms. Niemi:

Thank you for the opportunity to comment on the draft Use Attainability Analysis (UAA) Guidance and for explaining the basics of the guidance at the May 24, 2004 meeting at your Lacey office.

The City of Everett is very interested in UAAs, since they could be a useful tool for addressing inappropriate stream classifications. Accordingly, the City of Everett has several general and specific comments. All of our comments are addressed in the attachment, except our main concern, which is addressed below.

The City's main concern is that the draft UAA guidance requires the same extensive procedure for streams with default classifications as for those with specific classifications. The requirements for changing the designated use should be less rigorous for streams with default classifications per the former WAC 173-201A-120 than for steams with specific classifications per the former WAC 173-201A-130.

As you know, no watershed specific data were originally used to assign most designated uses. Rather, the designated uses were assigned by default based upon their default classification from the former WAC 173-201A-120 or resulted from the specific classification originally under a class-based system in the former WAC 173-201A-130. The result of this default assignment of designated uses, in many cases, is application of inappropriate uses and unnecessarily stringent water quality criteria.

One example of inappropriate and unnecessarily stringent water quality criteria is the numerous small streams that had a default general classification of AA simply because they discharged to a lake. Under the new designated use system, these small streams were again assigned designated recreational uses by default. That is, class AA streams were assigned a designated use of

CITY OF EVERETT • 3200 Cedar Street • Everett, WA 98201 • (425) 257-8800 • Fax (425) 257-8882

extraordinary primary contact recreation, class A streams were assigned a designated use of primary contact recreation and class B streams were assigned a designated use of secondary contact recreation. The result is that, by default and without any watershed specific water quality data, or recreational use evaluation, any stream discharging to a lake must meet a water quality criteria for fecal coliforms of 50 CFUs per 100 ml.

Washington is the only state in the Western United States with water quality criteria for fecal coliform as low as 50 CFUs per 100 ml. The majority of western states have a fecal coliform criteria of 200 CFUs per 100 ml or higher. To protect human health at swimming beaches, the ten state standard is also 200 CFUs per 100 ml. The Seattle and King County Dept of Public Health uses a fecal coliform criteria of 200 CFUs per 100 ml for swimming beach closures. Clearly, a fecal coliform criteria of 50 CFUs in small streams with few opportunities for full body immersion is unnecessarily stringent given that public health agencies use a criteria of 200 CFUs per 100 ml for protecting human health at swimming beaches where full body immersion is common.

Another problem with the default designated uses is consistency. For example, in WRIA 8, North Creek has a designated recreational use of extraordinary primary contact recreation simply because it discharges to Lake Washington and, therefore, historically had a general classification of AA by default. The definition of primary contact recreation requires "...direct contact with the water to the point of complete submergence..." Opportunities for complete submergence are strongly correlated to the flow and depth of the water body. North Creek, with an average annual flow of only 36 cfs and a flow depth less than 12 inches for nearly all of its length (as documented during a meeting with Ecology staff on December 4, 2003), has very few opportunities for full body submergence. Yet, 33 of the 34 class A or class B streams in Washington State with available USGS data have a larger average annual flow than North Creek (see attached table). For some class A or class B streams, their average annual flow is hundreds or thousands times greater than North Creek. It is inconceivable that the need or justification for extraordinary primary contact recreation could be greater in North Creek than these much larger class A and class B streams where there really is sufficient flow and volume of water for complete submergence.

This inconsistency and inequity of designated uses is even more apparent when comparing North Creek to other WRIA 8 streams. North Creek, the Cedar River and Issaquah Creek all discharge to Lake Washington. The average annual flows of Issaquah Creek and the Cedar River are nearly four times and twenty times greater than North Creek, respectively. Not only do Issaquah Creek and the Cedar River have more recreational opportunities than North Creek, their potential influence on the concentration of bacteria in Lake Washington is much greater than North Creek. Yet, since Issaquah Creek and the Cedar River both were large enough to receive a specific classification by Ecology back in the 1970's, they both have a less stringent water quality criteria of 100 CFUs per 100 ml.

Clearly there are national, state and regional inconsistencies and inequities in how Ecology has assigned designated uses that should be addressed in the UAA guidance. Yet, there appears to be no mechanism for dealing with these inconsistencies and inequities in the draft UAA guidance.

Instead, it appears that all applicants will be required to go through the same rigorous eight-step procedure on page 2.

Instead of requiring all UAA applicants to go through the same eight step process, the UAA guidance should provide a much more simplified process for cases similar to North Creek. That is, the focus should be on evaluating if the stream has the physical characteristics (flow and depth) necessary to allow complete submergence compared to other streams in the same WRIA or across the state with less stringent water quality criteria. If, in fact, the stream does not have the physical characteristics to support complete submergence over much of its watershed, the changes in designated use should be approved as a matter of routine.

Again, thank you for the opportunity to comment on the draft UAA guidance. If you have any questions regarding the City of Everett's general comments or the attached specific comments please free to contact me at (425) 257-8855 or dmathias@ci.everett.wa.us.

Sincerely,

Dan Mathias

Dan Mathias, PE
Utilities Engineer

C.C. Larry Crawford, City of Everett CAA
Tom Thetford, City of Everett Utilities Director
Julie Sklare, City of Everett Water Quality Analyst

Comparison of Available USGS Flow Data for Class A and B streams to Class AA North Creek

Stream Name	Ave Annual Flow-cfs	Drainage Area sq mi	USGS Station
Chehalis River	8058	1761	12035002
Willapa River	637	130	12013500
Newaukum River	505	155	12025000
Satsop River	2,053	299	12035000
Wynoochee River	866	74.1	12036000
Humptulips River**	154*	130	12039005
Dungeness River	384	156	12048000
Deschutes River	263	89.9	12079000
Nisqually River	1433	2920	12086500
Clover Creek	7.2	6.25	12090400
Green River	1,489	440	12113350
Cedar River	665	184	12119000
Issaquah Creek	133	56.6	12121600
Skykomish River	3,954	535	12134500
Sultan River	749	94.2	12138160
Snoqualmie River	2,686	375	12144500
Snohomish River	9,589	1537	12150800
Stilliguamish River	1,897	262	12167000
Skagit River	16,610	3093	12200500
Nooksack River	3,804	786	12213100
Pend Oreille River	26,586	24900	12396500
Colville River	309	1007	12409000
Spokane River	6,732	4290	12422500
Okanogan River	2,974	7260	12445000
Methow River	1,547	1772	12449950
Crab Creek**	71	2228	12467000
Columbia River	191,456	237000	14105700
Yakima River	2,465	1594	12484500
Snake River	35,438	92960	13334300
Grande Ronde River	3,076	3275	13333000
Palouse River**	609	2500	13351000
Mill Creek	95	59.6	14013000
Walla Walla River**	571	1657	14018500
Cowlitz River	9,175	2238	14243000
North Creek	36	24.6	12126000

*-Flow on 8/4/04, historical flow not available.

**-Class B stream. All other streams, except North Cr, are class A.

City of Everett UAA Guidance Comments

:

General Comments

In a number of different places, the guidance paraphrases federal regulations, rather than directly quoting them. In some cases, the guidance even looks as if it is directly quoting federal regulations, yet the quotes are incorrect. In some of these cases the guidance results in incorrectly stating the position of the federal regulations. The entire guidance needs to be examined to make sure that all references to the federal requirements are accurately stated.

The guidance should distinguish between what is required by federal or state laws or regulations and what DOE is proposing as part of the UAA guidance. That way the reader can determine the portion of the guidance that can be changed in this review process. References should be embedded in the text to support all of the assertions Ecology makes in the guidance.

Specific Comments

List of definitions: Define subcategory of a designated use and naturally occurring pollution concentrations.

Page 2, step 8 in a UAA: Delete "...public and..." from the last sentence. The only way public acceptance of a UAA can be accurately determined is by going through the public review process. Furthermore, isn't it the legal and scientific justifications for a proposed change in designated use that should be the determining factors in proposing a rule change, rather than the anticipation of public acceptance?

Page 3, flow diagram: Shouldn't site specific criteria also be used to address general classifications that are inconsistent with the definition of the beneficial use, or would that fall under the second purpose for UAAs, i.e., revising designated uses? For example, North Creek has a default classification of extraordinary primary contact recreation even though the recreational opportunities in North Creek are not consistent with even the definition of primary contact recreation.

Page 4, 1st bullet item under focus of a UAA: This bullet item is incorrect. Neither 40CFR131.10(g) nor 40CFR131.3 state that existing uses include uses that are only partially supported.

Page 5, top paragraph, re "a UAA is not necessary to upgrade a designated use." The paragraph states, "In cases where uses would be upgraded, showing the existence or attainability of a use based on credible data or other types of credible information, is adequate to upgrade the use." This statement presents an interesting approach to evaluate proposed downgrades. For example, if a waterbody has a default designated use

of extraordinary primary contact recreation, but there is no creditable data to support a specific designated use of extraordinary primary contact recreation, then there should be a simplified means in the UAA guidance to accomplish the downgrade from extraordinary primary contact recreation to primary contact recreation or secondary contact recreation.

Page 5, "Can a use be downgraded or removed just because a criterion is not being met?" The answer is appropriate. However, the reverse should be true also. That is, meeting a higher water quality criterion (such as for extraordinary primary contact recreation) is not sufficient evidence to support upgrading to a higher designated use. There may well be non-water quality based reasons why a higher use was not appropriate.

Page 5, answer to "Are UAAs used only to lower protection under the water quality standards?" The last sentence in this answer is confusing. How can an economic analysis both show that a use can and cannot be attained? This paragraph also implies that a UAA must be comprehensive in terms of evaluating any existing or attainable uses. That is not necessary for all UAAs. There must be an opportunity to have a focused UAA that addresses limited and specific use issues. Ecology should not create complexity where it is not needed. Leave the opportunity for a simple approach wherever possible.

Page 5, answer to "Can an existing use be downgraded" The second sentence defines an existing use as the highest quality use that has occurred in the waterbody after Nov 28, 1975. This is inconsistent with 40CFR 131.3 which states that "Existing uses are those uses **actually attained** in the water body on or after November 28, 1975, whether or not they are included in the water quality standards." Therefore, anything in the draft guidance falsely based upon the premise that an existing use is the highest quality use that has occurred in the waterbody after Nov 28, 1975 should be removed from the guidance. It is also important that there be some guidance to address how to demonstrate that a use is actually attained such that some significant level of attainment is needed.

Page 5, answer to last question: The answer to the last question appears to be misleading. The first sentence states that federal regulations only allow cost to be considered in two cases. These two cases are stated to be 1) dams and 2) private or public entities. However, 40CFR 131.10 (g) states that states may remove designated uses if "Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place". The language in 40CFR 131.10 (g) certainly seems to imply a much broader use of cost than stated on page 5. Therefore, the cost criteria in the guidance should be revised to be consistent with 40 CFR 131.10(g).

Page 6, last paragraph under "What is a UAA?" The last paragraph states that "....the process does not allow for the removal of any .... attainable designated uses." The statement is incorrect. The requirement pertains only to uses that will be attained by implementing effluent limits required under sections 301(b) and 306 of the Act and by

implementing cost-effective and reasonable best management practices for nonpoint source control. (see 40 CFR 131.10(h)(2) There could be any number of extreme actions that could be taken to attain a designated use, but they may pass beyond what is required.

Page 8, figure 1: The large box on the left side of this flow chart instructs the user to determine the highest quality uses that have existed at anytime since 1975. Again this is inconsistent with the actual language in 40CFR 131.3 which states that "Existing uses are those uses **actually attained** in the water body on or after November 28, 1975, whether or not they are included in the water quality standards." Furthermore, how is "existed at anytime..." defined? For example, if a stream complied with water quality standards for dissolved oxygen for only one year since 1975 (perhaps due to an above normal rainfall year), does that mean that salmon spawning and rearing must be considered the existing use? Just as not attaining a standard is not the basis to remove a designated use, attaining a standard is not sufficient basis to assert that a use is actually attained. It is also important that there be some guidance to address how to demonstrate that a use is actually attained such that some significant level of attainment is needed.

There are two large boxes towards the right that each make the reference to "the next lower designated use" and the wording should be changed to read "a lower designated use". The reason is, a UAA could result in lowering a designated use more than just to the next lowest designated use.

Page 9: The first sentence of the first paragraph states that it is generally not recommended that similar water bodies be grouped together for conducting UAAs. Grouping of similar water bodies seems desirable, so why not delete "While generally not recommended..." from the first sentence? Retaining the current language will make it more difficult for applicants to obtain DOE approval to group water bodies.

Page 10, Type 2 attainable use: The statement in bold seems to preclude single purpose UAAs such as only evaluating whether a stream can attain primary contact recreational use. Does the statement in bold mean that an applicant must always evaluate the appropriateness of all designated uses in that stream? If so, this does not seem appropriate or equitable. This would mean that UAA proponents will be doing the work that DOE should have done a long time ago, namely adopting specific classifications for streams that now have general classifications.

Page 10, attainable uses: The sentence in the last paragraph states that once uses have been designated in state standards they must be considered attainable. The guidance should clarify if it applies to default designated uses, in which the default designated use is based upon a general classification? Considering that the original specific designated uses were made, without the benefit of UAAs, there is no basis to assert that designated uses must be considered attainable.

Page 10, unattainable designated uses: The citation of 40CFR 131.10(g) is not completely accurate. In 40 CFR 131.10 (g) the last words in the statement that precedes the 6 factors are "feasible because:" not "attainable." Some other wording also deviates

from a direct quote. It's best to quote the regulation directly and accurately to prevent inaccurate portrayals of federal requirements.

Page 11, first paragraph following six factors: Again, the guidance should be revised to allow single purpose UAAs.

Page 11, subcategories of use: The subcategories appear to be the most likely path to deal with general classification streams with unattainable designated uses. However, the fourth sentence in the first paragraph seems to close the door on adoption of new sub categories. Therefore, the fourth sentence should be deleted.

Page 12 How are attainable uses chosen? This section starts off by stating that a key issue is how to decide whether a UAA should target an existing designated use category or a use protection goal that is not a designated use. The discussion that follows was supposed to explain how this decision can be made. However, the discussion did not provide clarification on how to make this decision. The guidance should be revised to provide such clarification.

Page 14, regulatory approach: The first sentence in this section states that it is clear that the goal of a UAA is to protect the highest attainable use. However, I see nothing in 40CFR 131.10 that makes this clear. Please provide a reference to support the assertion that protection of the highest attainable uses must be the goal of a UAA.

Page 18, Do all sources of impairment to a waterbody need to be addressed in a UAA? This section states that all sources of impairment must be addressed in a UAA. However, this will not be appropriate if the physical conditions of the stream preclude the designated use, even without any water quality impairments. An example would be a stream designated as primary contact recreation or extraordinary primary contact recreation that is too small to allow complete submergence.

Page 19, How are economics taken into account in UAAS? The first sentence references when UAAs are based on the federal rule provisions. Does this mean that some UAAs will not be based upon 40CFR 131.10? If so, when would that occur?

Page 20, Coordinating TMDLs, UAAs and 303(d) listings: The last sentence on this page states that Ecology might be asked to postpone TMDLs to conduct a UAA. Are there criteria that indicate when Ecology would be willing to do so? Would Ecology also consider postponing issuances of NPDES permits to conduct a UAA? The guidance should be revised to include such criteria.

Page 28, Determining the Existing Uses: The second and third paragraphs seem contradictory. The second sentence in the second paragraph states that the biological integrity of a waterbody is a reflection of its physical and chemical conditions. Yet, the first sentence of the third paragraph states that aquatic life uses can be determined with biological surveys. Therefore, it is confusing what the guidance is suggesting regarding the role of biological information in determining existing uses. The third sentence in the

last paragraph poses a very significant question. That is "What threshold of use should be met in order to determine whether a use is existing? The next sentence seems to suggest that the presence or absence of a species should not be used at all in determining existing uses. Rather it is the biological, chemical and physical conditions alone that should be used to determine the existing uses. If this is indeed the message that the guidance is intending to convey, it should be stated explicitly, rather than posed as a question.

Page 29, Identifying Causes of Impairment: Wasteload allocations should not be required for every UAA. If a TMDL has been developed for the waterbody, the wasteload allocation from the TMDL should be used in the UAA. If a TMDL has been developed for the waterbody without a wasteload allocation, this suggests that a wasteload allocation is not appropriate for the waterbody and, therefore, a TMDL is not appropriate for a UAA either. If a TMDL has not been developed for the waterbody, a wasteload allocation still may not be necessary for the UAA. For example, if a designated use cannot be attained due to the physical conditions of the waterbody, a wasteload allocation is irrelevant. Please note that the preamble to the federal regulations say that "a .... UAA .... includes .... a wasteload allocation .... if appropriate." 48 FR 51401 A wasteload allocation is not always appropriate.

Page 39, Recreational Uses The first sentence in the first paragraph does not accurately quote the section of the CWA. It should be changed to read as follows:

> Section 101(a)(2) of the CWA sets out that "it is the national goal that wherever attainable, an interim goal of water quality which .... provides for recreation in and on the water be achieved ...."

The second sentence in the first paragraph should be deleted. It incorrectly implies that the CWA calls for primary contact recreation (activities that result in the immersion of eyes, ears, nose, and mouth) to be protected wherever attainable. The CWA makes no such assertion. Recreation as described in Washington's current regulations under secondary contact recreation satisfies the CWA goal, especially if that is all that is reasonably attainable.

Page 40, Designated Recreational Uses in the Water quality Standards: " Extraordinary protection against waterborne disease" should be defined and the regulatory or legislative basis for the definition should be provided. The regulatory and/or legislative basis for the definitions for "extraordinary primary contact recreation", "primary contact recreation" and "secondary contact recreation" should also be provided.

Page 40, determining the Existing Use: There are many streams in Washington in which the issue is whether extraordinary primary contact recreation is an existing use. Therefore, the second sentence should be changed to read, "The focus of this assessment is to determine whether extraordinary primary contact recreation or primary contact recreations are existing uses."

Page 41, Identifying Causes of Impairment: An assessment of impairments to the system should not be required for UAAs in which the designated use cannot be met due to natural low flow conditions. Compatibility of the designated use with other streams within the same region or WRIA should also be a criteria when determining existing uses. For example, if a small stream with a general classification of extraordinary primary contact recreation and few opportunities for complete submergence (such as North Creek) discharges to the same receiving water (such as Lake Washington) as a larger stream or river that is physically suited to complete submergence recreation activities and which also has a specific classification of primary contact recreation or secondary contact recreation (such as the Cedar River), then extraordinary primary contact recreation should be removed as an existing use for the smaller stream.

Page 42, Indicators that Characterize Recreational Uses in Washington: There are numerous small streams in Washington that have a general classification of extraordinary primary contact recreation that clearly do not provide any of the activities or qualities in the 3 bullets under extraordinary primary contact recreation. If the applicant demonstrates that a stream does not provide any of the three listed activities or qualities, is the UAA automatically approved? The second bullet is too broad; an argument could be made that any stream tributary to Puget Sound supports mussel or clam harvesting. WAC 173-201A-600(1)(a)(4) limits this application to tributaries to extraordinary quality marine waters, and not all marine waters. Therefore, the second bullet should be modified or deleted. The third bullet essentially says if the bacterial quality of the water is very good, then it functionally defines the use. That makes no sense.

A reference should be provided to support the positions stated in the last two sentences of the first paragraph under primary contact recreation. The risk of ingestion is higher when swimming than during water play. The volume of water that can be ingested from water play is not sufficient to cause illness. Even for swimming beaches, the 10 state standard for fecal coliform is equal to Ecology's fecal coliform criteria for secondary contact recreation. King County Health uses the 10 state standard for closure of public beaches. Therefore, it is simply inappropriate to use water play as a factor in deciding if a primary contact recreation use exists. Accordingly, the last two sentences in this paragraph should be deleted.

Page 43, Primary Contact Recreation: Children's waterplay is not an example of complete submergence, and therefore is inconsistent with the applicable definition. The fifth bullet at the top of page 43 should therefore be deleted. It is unclear what the intention is of the discussion on "Location" and the bulleted items that follow. Is the intention that the mere presence of the bulleted land uses adjacent to any waterbody will automatically require a designated use of primary contact recreation? If so, this is inappropriate.

Page 43, Physical Characteristics: The third and fourth sentences should be removed from the first paragraph. Wading and splashing do not meet the definition of primary contact recreation that is in the federal register and quoted in the guidance. Indeed, wading and splashing is very consistent with the definition of secondary contact

recreation; bacterial infection of eyes, ears, respiratory or digestive systems or urogenital areas are indeed normally avoided during wading and splashing. If Ecology has sufficient documentation to the contrary, that is, of medical cases to demonstrate that bacterial infection of eyes, ears, respiratory or digestive systems or urogenital areas are normally **not** avoided during wading and splashing, those references should be embedded in the text of the guidance. References with supporting data should also be cited to support the statement in the third sentence that low flows that would make swimming improbable for adults makes the waters even more attractive for younger children. Another consideration is that young children are themselves sources of bacteria, at times sufficient to produce exceedances of bacterial standards. Even if a shallow water, insufficient for complete submergence, meets bacterial standards before toddlers wade in, it is not expected to meet them after the wading and playing commences. A rather complicated regulatory loop may result where the principle difficulty will be to protect waders from the bacterial effects that they themselves contribute produce. All people, when swimming, are bacterial sources to varying degrees. That is precisely why public swimming pools are required to provide chlorination. The UAA guidance should allow consideration of swimmers and waders as sources.

Page 44, Primary Contact Recreation: "...provided the modifications to the natural system occurred after November 1975." should be added to the end of the bold statement at the top of this page.

Page 44, secondary contact recreation: To be consistent with the definition of secondary contact recreation in WAC 173-201A-020 and on pages 40 and 44, "very unlikely" should be changed to "normally avoided" in the 3rd bullet item.

Page 48, Part 7: It appears that the fifth bullet should be revised to read "Attainable uses-Contains a description...used to determine the **attainab**le uses".