File 3
Comments on First Draft of the *Guidance for Use Attainability Analysis* released by Ecology on May 24, 2004

Letter 1:
Sapere Consulting
Letter 2:
Sierra Club, Upper Columbia River; Center for Justice; Lake Spokane Protection Association; Trout Unlimited – Spokane Falls Chapter
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Snohomish County Public Works
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Washington Forest Protection Association
Letter 8:
Washington State Water Resources Association

August 13, 2004

Dr. Scott Smyth
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Cheryl Niemi
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Dear Ms. Niemi;

Sapere Consulting submits the attached comments for the draft version 1.0 (v1.0) of the Use Attainability Analysis Guidance for Washington State published for public review on May 2004. We appreciate all the time and effort the employees at the Water Quality Program took to develop the draft documentation. The extensive work that goes into such guidance documents is not taken lightly by us.

To provide some background, Sapere Consulting does extensive risk- and system-based analysis and development facilitation. Sapere provides consulting services for utility and irrigation districts in the State of Washington, specifically in the area of project impacts on water quality and we intend to stay involved with developments at the State level to ensure we provide the best service possible.

Sincerely,

Dr. Scott Smyth

enc: Comments on Draft v1.0 of the UAA Guidance for Washington State

Comments on Draft v1.0 of the UAA Guidance for Washington State

August 13, 2004

Sapere Consulting, Inc.

Introduction

The general opinion of the guidance document was that it is very useful, but that two main areas were not explained to the degree necessary. Our extensive technical facilitation work with in the area of identification of, and corrective action for, impact of client projects on soil, ground and surface water led us to two main comments: 1) guidance on how UAA development facilitation should occur; and 2) a basis for a reasonable implementation time given resource limitations of Washington State or the UAA developer. Developing criteria for the facilitation would, in the end, save both the State and whomever is developing the UAA time and money.

Secondly, the lack of guidelines on how to reasonably define a system where a UAA applies is ignored somewhat in the draft and should be discussed more thoroughly given the comments in the presentation meeting. In applying for any waiver for non-attainment or a use removal or subcategory, the key is defining what system the UAA applies. A system is a description of the water and its barriers where the UAA focuses that can be scientifically and socially isolated and for lack of a better word, modeled. In this context, the model would only have to deal with background level input parameters and thus be isolated from other "systems" and all but anomalous input parameter values.

In some cases, definition of boundaries for a system might seem easy, but in most, defining the system will be the most difficult part. Definition of the watershed or river or stream segment where a given UAA applies, also establishes the scientific and economic data required and how many UAA documents are required. Granted no definitive guidelines can be established, but basic guidance for how to define a system and some examples will help.

Comments

We recommend an approach where the system definition is a priority over the development process framework. Said another way, we recommend the following approach (or another of a similar nature) be documented in the guidelines starting with the definition of the system as a necessary piece prior to compiling existing data in preparation of the factilitation process. The process would be to 1) define the system; 2) compile existing information about that system; 3) check to ensure existing information is sufficient to start facilitated development; 4) initiate facilitated development based on the defined process in the guidelines; etc.

Defining Systems

One of the continual problems with every project related to management of a natural resource is defining the system. The boundaries of the system define what scientific evidence is required and to what extent other parties should be involved. A case in point comes to mind from the presentation meeting where a representative from the City of Seattle was wrestling with the idea of presenting a UAA per stream. UAA development would be easier with some guidance of what is required to define each boundary for the system proposed by a UAA whether it is physical or virtual.

We recommend a system approach for every UAA development process because once that is done, in our experience, all other questions are typically answered such as scientific evidence requirements or existing use evidence. In order to do a system approach, another flow chart (i.e., process description) is required prior to the existing Figure 1 in the draft v1.0 guidance document. This flow chart (or text explanation) provides evidence and examples of how to establish a "system" that you must then explain for the UAA.

For example, if a city in the state does not meet water quality attainment in a river where waste water is being discharged, what is the system that is affected by the discharge and should be defined by the UAA? Is the area of the river 100 meters to each side of the discharge point(s) or is it to the location down the river where the water quality standards are actually attained on average? In those cases where swimmers get sick after a storm event because of waste water discharge from the city further downstream covered by the UAA or not?

In the guidance document, in Figure 1 and text states that "downstream" uses and existing uses must be protected. That is good in theory, however, applying that rule systematically depends on how the system is defined. Is the system in every case the point of interest in the UAA and every downstream location during all times of year (e.g., during isolated storm events)? Also, in the section of the draft discussing grouping multiple water bodies on page 9 next to Figure 1, Grouping multiple waterbodies in one UAA, the idea is expressed as possible for "...waterbodies having similar physical, chemical, and biological characteristics...". Unfortunately, this does not make the definition of the system including multiple water ways easier.

Our comment, however, begs the question of how can a system be defined then? The definition is on a case-by-case basis as appropriately stated in the presentation meeting, but a process should be established that guarantees each entity starting the UAA development consistently proposes a coherent system on which the UAA focuses. Again, this seems necessary to establish equal treatment from the State and consistent results from the entities presenting the UAA.

Questions to guide a UAA process to define a system and its boundaries might include:

1. What are the limits for the proposed boundaries (distances between existing and designated uses that might establish a "segment", margins of defining chemical content that establish grouping of streams in the same watershed, physical boundaries like water height above and below a dam, only one UAA is affordable, etc.)?
2. As an extension of #1, what are the boundaries made out of and how arbitrary

are they (e.g., physical or logical)?

3. What times are the boundaries in place (e.g., all the time, in the summer, etc.) and how do they vary with time (e.g., in a systematic way or random)?
4. What evidence exists to define the boundaries in #1 and #2 and does it stand review, or does more need to be gathered (e.g., existing studies, an unproven anecdote from a resident biologist, previously challenged and upheld legal review, etc.
5. What are the risks associated with defining the system this way (e.g., increased chance of UAA acceptance, failure to get budget needed, possible legal action)?

In our experience, by providing even broad scope questions about defining a system for such things as a UAA, time and effort are saved by forcing entities to realize what they are undertaking and whether they are willing to live with the scientific, economic, and social limits in their organizations to do even the definition component of the process.

Facilitation of UAA Development

Throughout the presentation meeting in May 2004, organizations interested in submitting a UAA document(s) were encouraged to come and talk with Ecology on a case by case basis. Granted this is *one* step to the approach to insure sound development of the UAA, however, a more basic layout of how this facilitation should proceed would be appropriate in the guidance document. The end goal for providing this kind of facilitation guidance is to avoid duplication and also to provide a basic idea of how third-party companies (i.e., consulting companies) should approach the process.

First, a basic flow chart of how facilitation can, to the best of Ecology's experience, be started including but not limited to:

1. who are the contacts by position, not by name which may change?
2. what should be done first (e.g., call to setup a meeting with ecology or present a very rough proposal of the UAA envisioned)?
3. what might be the first pieces of information that would be useful (e.g., current scientific data, current use information and data to reflect that use pattern, etc.)?
4. what historical evidence is available that such a UAA can indeed be useful and what is the cost of such a UAA?

Such guidance is useful to facilitate a process that obviously is going to result prior and after use of a flow chart presented in Figure 1, A Summary flowchart of the decisions in a use attainability analysis. Interpretation of each "yes" or "no" decision depends upon the end goal of each participant and how a system is defined (see **Systems** comments above). Thus, prior to each person "calling up" Ecology to start the process, it seems more appropriate to provide a systematic approach to the *how* of reaching each conclusion mutually as stated earlier.

The lack of a base process to work with Ecology brings to mind questions that are not

easily answered: what process is needed for Washington State to feel comfortable to even ascertain whether a "yes" or "no" decision can be made?; and how will the State guarantee all parties are treated equally without establishing a facilitation process?

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August 13, 2004

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Re: Comments – Ecology's Draft Use Attainability Analysis (UAA) Guidance for Washington State, Version 1.0, May 2004

Dear Ms. Niemi,

The undersigned organizations submit the following comments on the Department of Ecology's May 2004 Draft Use Attainability Analysis Guidance for Washington State. We appreciate your extending the comment deadline and giving us the opportunity to meet with you in Eastern Washington prior to our submittal. This comment document provides general comments on conceptual issues, followed by specific comments identified by page number.

Sierra Club, Upper Columbia River; Center for Justice; Lake Spokane Protection Association; Trout Unlimited – Spokane Falls Chapter

1. **Global Aspects of Water Quality Standards.** Eighteen months ago, Ecology circulated amendments to the state water quality standards that changed the standards from a classification to a use-based system. At that time, concerned citizens questioned whether the change would effectively eliminate the protections afforded to Washington's water bodies via the narrative criteria element of the standards, which provide umbrella-like protections for differing uses. As you know, narrative standards were the basis for the State and U.S. Supreme Court decisions in the Jefferson County/Elkhorn case, and the Pend Oreille PUD case, in which the fact of fisheries use in those rivers formed a basis for imposing flow requirements on water quality permits, even though lack of flow is not a defined pollutant under the Clean Water Act.

   Citizen concerns are playing out in this guidance, which contains virtually no mention of narrative standards. Instead, water quality standards are reduced to specific uses and the numeric criteria necessary to support them. While there is some support for the idea that a described use should encompass a whole community of uses, a blurring of that concept occurs throughout the document.

As Ecology revisits this draft guidance, we urge you to undertake a fundamental re-assessment of how state water quality standards are supposed to work. It was promised that narrative standards would not disappear. Yet the guidance contains no discussion of how to approach the qualitative aspect of narrative standards, including assessing the overall general health of aquatic ecosystems. By failing to instruct UAA petitioners even that narrative standards exist and may afford and require greater protections than the numeric criteria, whole aspects of water quality protection are left off the plate.

In a similar fashion, this document virtually ignores the anti-degradation requirements of state and federal law. As you know, anti-degradation is an "anti-backsliding" provision that is intended to protect water quality that is better than that required by designated uses. Federal regulations require that states develop programs to implement their anti-degradation policies. Unfortunately, what little discussion the guidance contains on this topic seems to indicate that Ecology mistakenly believes that water quality can in fact be degraded to the lowest level necessary to support an existing or attainable use. This is contrary to federal law.

The fundamental concept behind the Clean Water Act is to maintain and restore high levels of water quality and not simply allow the quality of our rivers, streams and lakes to degenerate to the lowest common denominator. We ask that you re-assess the UAA guidance document in light of anti-degradation requirements and explicitly address how uses may be changed in a manner that does not lead to further degradation of state waterways.

2. **Stronger Introduction Needed.** Under the Clean Water Act (CWA), states were mandated to restrict and ultimately eliminate the discharge of pollutants into our nation's waters and to achieve high water quality by 1985. 33 USC § 1251. Yet, according to every 303(d) list that Ecology has issued, a significant portion of our state waters remain critically impaired. Washington's water quality standards are designed to reverse this trend and to protect and improve the health of our rivers, streams and lakes.

   Because a UAA seeks to downgrade these protections, it is imperative for the UAA Guidance Document to stress that the ultimate goal of a UAA is protection and enhancement of water quality and <u>not</u> evasion of standards. Hence it would seem that the introduction should explain the

regulatory and legal context for UAA petitions. At a minimum, the introduction should explain that Washington's water quality standards define water quality goals by designating the uses to be made of specific water bodies and then setting criteria necessary to protect these uses. It should further note that it is entirely illegal to remove existing uses, and that compliance with these standards is mandatory and may not be circumvented except under certain prescribed circumstances. Ecology should give warning at the outset that lowering standards is not an easy task, largely because there is a rebuttable presumption that the designated uses are attainable. Hence, showing the opposite, which is the goal of a UAA, is a costly and heavy burden. Only if this burden is met by credible, scientific information should a discharger seek to modify water quality standards. Ecology should emphasize the difficulties of this task up front by providing the reader with a concise explanation of the requisite steps that must be taken in order to remove or modify a use. In fact, Ecology's publication "Frequently Asked Questions about Use Attainability Analysis" does this quite effectively.

Instead of explaining the enormity of the task at the outset, the guidance appears to sanction modifications or downgrades as the norm. (The guidance waits until page 23 to lay out the steps to successful modification.) On page 2, the guidance states: "There are a number of approaches an entity can take to comply with water quality standards. These approaches are in general based on (1) improved treatment and disposal options and (2) modifications to water quality standards." Here, Ecology essentially conflates compliance via improvements with lowering of the standards, and thus sends the message that evading current standards is on a par with compliance. The guidance should clarify from the beginning that modifications through UAAs are subject to the CWA's goals and hence, as with all standards, must protect existing uses, prevent degradation, and restore the water's health. Because the standards are already designed to do this, modifications will be rare.

Page 3 provides: "UAAs are *generally* undertaken in areas where the designated uses for the water body are suspected to be inaccurate." Once again, this statement infers that many of the designated uses are suspect and should be changed. This contrasts with the Document's later statements that, given the huge costs involved and the low likelihood of success, UAAs should be undertaken with extreme caution and only after extensive consultation with Ecology, Tribes and other affected parties.

3. **Expanded Scope of Guidance.** The guidance document should be focused not just on explaining how a UAA should be conducted, but also on what the public can expect from the Department of Ecology as it reviews and processes UAAs. The guidance provides some discussion about expectations for public participation. The guidance should, however, be much clearer about the level of public outreach that will be required both of the UAA petitioner and Ecology, both during the UAA development period and after the UAA is submitted to Ecology. In this respect, we urge you to internalize within the document the concept that your constituency in the UAA process is not merely those parties who wish to alter designated uses for Washington's waterways, but also the public that owns, uses, and enjoys those waters. We are particularly concerned that the guidance encourages would-be petitioners to consult early and often with Ecology, but contains no provisions explicitly requiring public participation at that stage. We think a requirement that UAAs be formally announced and that public input be sought early on, both by the UAA petitioner and by Ecology, is appropriate and necessary – particularly for the process of identifying existing uses. Ultimately, this document should serve as a very clear guide to the public as to how UAAs will be processed by Ecology, from the point of initial contact by a would-be petitioner to the point of approval or denial by EPA. We would not be surprised if you find, in systematically thinking about public participation in UAAs, that rulemaking is necessary to establish requirements and procedures for this process.

4. **Threshold requirements.** One frustrating aspect of UAAs is the potential for abuse by petitioners who are hell-bent on submitting a petition, perhaps in the hopes of creating momentum for the process, regardless of the futility of their efforts. As discussed above, the introduction should be improved to indicate the rarity of the success of UAAs. Beyond that effort, however, Ecology should establish threshold requirements that will convey to UAA sponsors the complexity and difficulty of the process and serve to prevent the waste of public resources on UAA proposals that are doomed to failure. While Ecology cannot stop anyone from trying, the guidance should encompass standards that are effective in discouraging futile and frivolous efforts.

5. **Existing Use Policy**. Throughout the document Ecology defers to EPA's definition of existing uses. In so doing, Ecology is making a huge policy choice by default. Rather than simply electing to utilize EPA's definition (i.e., that an existing use is one that was in existence on or after November 1975), Ecology should undertake an explicit analysis of whether a more stringent state definition of existing uses is appropriate for Washington state. As with all aspects of the Clean Water Act,

Ecology may adopt standards that define existing uses more "strictly", which in this instance would mean more expansively, than that required by federal regulation. Whether to do so is a policy decision of some significance, given the current, intense effort to restore salmon runs to many of Washington's rivers. In some systems, including the Spokane, salmon were extirpated before 1975. The scope and definition of water quality standards should most certainly not be used as a basis to preclude restoration of salmon to this basin – a discussion that is now in nascent stages. We urge you to revisit the question of whether the state definition of existing uses should parallel the federal definition, or whether it is appropriate to utilize a more expansive definition that reflects Washington state needs and laws.

6. **Guidance Discussion of Existing Uses is Confusing.** The focus of a UAA is twofold, identifying existing uses and exploring the attainability of designated uses. Unfortunately, the guidance uses the term "existing uses" inconsistently and sometimes incorrectly.

On page 5, the Guidance Document states: "An existing use is the highest quality use that has occurred in the water body after November 28, 1975." Page 4 provides: "If the designated use currently exists and is supported at an optimal level by the quality of the water, then that use may not be downgraded." And further down, "Existing uses cannot be removed, even with a UAA. Existing uses include uses that are only partially supported (the use may be negatively impacted by current conditions, but the use is still present in the water body)." These statements are contradictory and only the third is consistent with federal law.

By federal definition, 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. 40 CFR 131.3(e). The federal regulations do not differentiate between an "optimally" supported, "partially supported" or "highest quality" existing use. Rather, the only qualification is that the use was "actually attained" on or after November 28, 1975. Further, the federal regulations prohibit removing existing uses, whether or not the use is the highest quality use or supported at an optimal or partial level or whether the use is currently present. 40 CFR §§ 131.10, .12. See also 63 Fed. Reg. 36,742, 36,748 (July 7, 1998) (All existing uses must be protected and may not be downgraded).

In addition, the guidance often seems to confuse "current" uses with "existing" uses. This is particularly troubling. The CWA requires States to make our waters better, not simply maintain the status quo. In order to do this, States must examine the water body's potential as evidenced, in part, by past "existing uses." A UAA must at a minimum document all existing uses, including those within the past thirty years that may not be current, and show by credible, scientific evidence that the proposed modification will not eliminate these uses. This may be a difficult task but it must be done. No UAA can be accepted that does not credibly document all existing uses and show that these will be protected. Ecology needs to emphasize this duty. *See EPA Water Quality Standards Handbook*, Edition 2d (1994), Chapter 4.4.2 (No activity is allowed under the antidegradation policy that would partially or completely eliminate an existing use…).

Further, Ecology fails to provide guidance as to how to determine whether an existing use is "actually attained" and hence requires protection. Moreover, when discussing this issue, the guidance appears to focus on current uses and not all existing uses. *See* page 28. EPA's *Handbook*, however, provides some clues, at least as to aquatic protection use. "Non-aberrational resident species must be protected, even if not prevalent in number or importance. Water quality should be such that it results in no mortality and no significant growth or reproductive impairment of resident species. Any lowering of water quality below this full level of protection is not allowed." *Handbook, supra*. Ecology must provide more guidance so that "existing use" analysis is thorough and credible, not only for aquatic life use but for human use as well, and includes analysis of past and current existing uses.

The EPA *Handbook* goes on to explain that protecting aquatic life requires protecting the aquatic community which supports that life. Protecting a use necessarily involves more than just setting effluent limitations. It requires protecting the habitat, flora and fauna that support that use; thus credible UAA analysis must look at the ecosystem as a whole. The guidance should place more emphasis in this area.

7. **Subcategorization of uses is limited.** The federal regulations prohibit modifying or downgrading existing uses, yet the guidance appears to sanction modifying existing uses through sub-categories if the use is not optimally supported. This is contrary to law. Under the federal antidegradation policy, all "existing uses" of a water body and the level of water quality necessary to protect those existing uses be maintained and protected." 40 C.F.R. § 131.12(a)(1). EPA has consistently stated that this

provision establishes the "absolute floor of water quality in all waters of the United States." Water Quality Standards Regulation, 48 Fed. Reg. 51,400, 51,403 (Nov. 8, 1983); *accord* Water Quality Standards Regulation (Advance Notice of Proposed Rulemaking), 63 Fed. Reg. 36,742, 36,781 (July 7, 1998). This means that "the water quality in the water body may be lowered only to the point at which the water quality is sufficient to protect and maintain all existing uses, and that it is not permissible to allow water quality to be lowered to the extent that any existing use is impaired." Proposed Water Quality Guidance for the Great Lakes System, 58 Fed. Reg. 20,802, 20,886 (Aug. 16, 1993). The federal regulations allow for removing a designated use if it is not an existing use, or for creating subcategories of a use if the State can show that attainment of the use is not feasible under delineated circumstances. 40 CFR § 131.10(g). As an existing use is by definition "actually attained," only non-existing, designated uses are susceptible to sub-categorization or modifications. See 69 FR 41720-01, 2004 Proposed Rules, EPA 40 CFR Part 131 ("States, Territories, and authorized Tribes may remove a designated use that is not an existing use if it conducts a use attainability analysis to demonstrate that the designated use is not attainable").

8. **Federal requirements re attainability analysis.** In discussing feasibility analysis under 40 CFR § 131.10(g), the guidance states: "The six factors above should be examined to determine both the unattainable designated uses and the attainable uses in a water body." This analysis does not apply to existing uses which by definition are attainable. Throughout the document, Ecology should ensure that the reader understands these analyses apply to designated uses that are not also existing uses.

9. **Flows & Water Quality.** The draft guidance asks the wrong question: "Can flows be regulated to improve water quality?" By putting the question of flows in this context, Ecology sidesteps discussion of the necessity of flow to manage water quality in our rivers, and the multiple mechanisms that may be utilized to improve flows and thereby improve water quality. As you know, flows are often a critical component of water quality, providing dilution services, moderating temperature and dissolved oxygen, and preserving overall uses of a stream including aquatic habitat and recreational uses. Unfortunately, inadequate flow is a ubiquitous problem in Washington's rivers, due largely to over-appropriation of water rights and now, increasingly, due to climate change.

Thus the question posed in the guidance should be a much more general one: How does flow figure in a petition to amend uses under the water quality standards? This question is important because UAA development may require analysis of one or more flow-restoration mechanisms to determine whether (1) uses are existing but not current, (2) uses are attainable and (3) the economic and social impacts preclude attainability.

Ecology does retain authority to establish and regulate flows, through the Instream Flow Resources Protection Program (WAC 173-500), through 401 certification licensing of hydropower facilities, through permit mitigation conditions and potentially through operation of the public trust doctrine, which has been explicitly held to protect the environmental integrity of navigable rivers in Washington. A whole host of non-regulatory tools are also available, including the use of water markets, water banks, trust water rights, ESA enforcement orders, consent decrees and habitat conservation plans, implementation of tribal treaty water rights, reclaimed water programs, stormwater management, HB 2514 watershed plans, and so forth.

If a UAA petitioner asserts that a particular use is not attainable simply because of inadequate flow, this is just the beginning of the inquiry. In systems where flow is a limiting factor, UAA petitions must contain analysis of both the reasons for flow depletion and the mechanisms -- regulatory, market, planning or otherwise – that are available to correct the problem. Rarely if ever should flow be the basis for changing a water quality standard.

10. **Economic Analysis.** The economic analysis associated with feasibility studies must consider the costs, whether monetarily quantifiable or not, of allowing the water body to remain polluted or to worsen. In addition, the analysis must be realistically framed. The costs associated with clean-up will inevitably vary depending on the time frame chosen. It took many, many years to pollute our waters. It will take many years for these waters to heal. Aggressive clean-up strategies may be cost prohibitive and engender widespread resistance, while more passive restoration efforts may be the opposite and more effective in the long term. Similarly, consultants hired to perform these analyses may have vested interests in downplaying truly innovative clean-up technologies developed by other companies. Nevertheless, under the CWA, States must eliminate the discharge of pollutants into our navigable waters. 33 USC §§ 1251, 1281(g). Hence, Ecology should provide guidance to

ensure that the economic analysis undertaken to justify lowered standards is thorough and not simply calculated to prevent innovation and change.

Moreover, there may be sound policy reasons to refuse to lower standards even where a UAA makes a facially competent claim that compliance is economically unfeasible. As history shows, necessity is the mother of invention. Thus, where polluters are required to meet stringent standards, demand for alternative technologies grows and solutions appear. Thus, Ecology should approach feasibility studies with caution given the overall goal of the CWA and should fashion requirements to require UAA drafters to thoroughly explore alternatives.

11. **Public involvement.** The public must have an opportunity to participate in the process in a meaningful way long before the UAA is submitted to Ecology. The public is a rich resource of information concerning existing uses. The guidance should require UAA drafters to document the groups contacted, including minority groups, immigrants and migrants who may use the waters in unique ways and unexpected places, as well as the investigative techniques employed in determining how these groups use and have used our waters. The public should also be given full disclosure as to the interests of the UAA drafters, the goals of the UAA, the costs involved, and the environmental consequences of lowering standards in time to effectively investigate and challenge the assumptions made by a proposed UAA.

12. **Ecology should impose requirements on UAA process.** Ecology appears to believe that it has no authority to require a UAA drafter to take specific steps. However, Ecology has complete discretion whether or not to adopt a UAA. By law, Ecology must conduct a UAA only when it designates uses that do not include Section 101(a)(2) uses, desires to remove a Section 101(a)(2) use or creates a sub-category of Section 101(a)(2) uses. 40 CFR 131.10(j). But where Ecology decides to adopt a UAA, the UAA essentially becomes Ecology's. Hence, Ecology must then bear both the burden of proof and the costs of rule-making. Thus, it is incumbent on Ecology to detail the steps Ecology deems essential to a credible, scientifically defensible product.

Ecology does this in the section on Net Ecological Benefit (NEB). On page 22, the guidance lists seven conditions that *must* be demonstrated in order for an NEB UAA to be approved. There would seem to be no reason why Ecology could not similarly specify requisite or threshold conditions which must be completed before Ecology will consider a UAA.

13. **More detail needed re Ecology's authority to reject UAAs.** On page 23, the guidance sets forth the formal steps which must occur before a use is eliminated or modified. The guidance should include more detail about how time intensive and costly the process is so that the potential drafter understands why Ecology will not go forward with a document that stands little chance of success.

14. **Tribal consultation.** We recognize that this section of the document should be developed in consultation with the northwest Indian Tribes. We do wish to comment, however, that this is a critical element of the UAA process. Northwest Tribes are co-owners and co-managers of the water resources that flow in Washington state. Many tribes have adopted water quality standards that provide them with authority over waters adjacent to, or upstream and downstream of those governed under state standards. Tribes may exercise effective vetoes over UAAs. It is to be expected that Tribes will not wish to consult directly with UAA petitioners. Thus, UAA procedures should contain mechanisms by which Ecology engages with Tribes on a government-to-government basis early in the process (assuming Tribes agree) to avoid useless waste of public resources on UAAs that will ultimately conflict with tribal standards and rights.

15. **Organization.** It might be helpful to review overall organization. For example, the guidance scatters definitions of existing uses and information about existing uses throughout the document. It even has two sections entitled "Determining Existing Uses", pages 28 and 40. An organizational restructuring could clarify the topic for the reader.

16. **Specific Comments.**

P. 1: "may include an assessment of physical, chemical, biologic and economic factors . . ." Physical, chemical and biologic values of rivers are all protected under the Clean Water Act. If a UAA proposes to remove a use, shouldn't all three be required to be addressed? This sentence makes it sound like one or more is optional.

P. 3: The bottom cell in the "Tools Table" should reflect that water quality standards are subject to triennial review.

P. 3: "Designated uses are the uses specifically written out for protection in the water quality standards . . ." Designated uses are umbrella terms that are intended to cover not only the specific

items that are listed, but many other uses that are encompassed within those terms, e.g., reference to salmonids encompasses entire aquatic life communities. This concept needs to be clearly explained.

P. 4: The bullets are very confusing. Second bullet refers to "highest attainable 'existing use'". Shouldn't this be highest "attained" existing use? Third bullet says a seasonal use can be established, and then says it cannot be established for aquatic life uses. Confusing.

P. 5: reference to "other types of credible data" needs examples and explanations. This issue of how to identify existing and attainable uses is a critical point but receives virtually no attention in the guidance. The discussion on Data Sources should be referenced, and that discussion should be beefed up.

P. 5: Can (may) an existing use be downgraded? This is an example where the guidance adopts the federal definition of existing use without examining whether the state definition should reach further back in time. This policy decision should be explicitly addressed by Ecology. Further, shouldn't the idea of utilizing enhanced water pollution control options come first in listing options for downgrading? If such controls will work, wouldn't that normally be the route taken, rather than resort to variances, etc.?

P.7: What are the components. . .? Paragraph 2 should say modeling can be used to "predict a scenario in which human sources of pollutants are removed . . . etc."

P.8: Figure 1 – The decision point in which one asks "Are the existing and attainable uses better represented by using a new use subcategory, a seasonal use, a special condition, or the next lowest designated use" is confusing. Is this consistent with the statement that sub-categories cannot be developed for aquatic uses? Is it consistent with the statement on page 12 that the designated uses for aquatic life in Washington CANNOT be applied seasonally?

P.10: The one sentence describing how to determine existing uses is wholly inadequate. This is one area in which the public must be consulted. Much more detailed requirements for analyzing existing uses should be established. There should probably be some sort of checklist, and a requirement that the petitioner provide a detailed description of its efforts to determine existing uses. Ecology review of this part of the UAA is also critical since the state has failed to identify all existing uses for water bodies in Washington and the first time an analysis of uses may occur is in the UAA review process.

P.12: "What are seasonal uses?" Again, confusing. If creating a seasonal use requires removal or downgrading in other seasons, then it really is not a seasonal use, is it?

P.13: In the frog/salamander example, perhaps the parenthetical following should state "unless new water body specific uses and criteria are developed *that protect frogs and salamanders*".

P.13: The paragraph discussing discrete categories is confusing. If a new designation of use does not protect discrete uses, why would Ecology adopt a new designated use category? Isn't this an example where the agency would "just say no?"

P.14: There is no discussion in this section on "regulatory approach" concerning the anti-degradation requirement. Is it Ecology's policy that water quality can be degraded down to the designated use? Isn't that illegal? Perhaps there should be reference to the anti-deg requirement and how Ecology implements it, as required by federal law.

P.16: ". . . the water body would be almost incapable of supporting the use altogether." If the water body is capable of supporting the use, it cannot be downgraded unless attainability analysis shows widespread economic and social impact, correct?

P.18: "Should uses be applied in small or large areas?" What is troubling about this discussion is the failure to acknowledge that rivers, by their nature, change over time. As rivers meander, avulse, etc., aquatic and human use of those rivers change. How does the UAA process recognize this very plain fact of hydrology? If spawning "only occurs" in one area right now, is it helpful or accurate to assume that that will be the situation into the future? The standards are intended to protect aquatic ecosystems. Encouraging UAA petitioners that they may be able to narrow water quality protection in a small areas place fails to recognize the "bigger picture" of river ecology and should be avoided.

P.20: Coordinating UAAs with TMDLs. The statement that "UAAs *assure* that the attainable use is designated in the WQS" is a simplistic statement that sets the tone that UAAs are the norm. Please edit. UAAs are an exceptional tool to downgrade water quality standards only in those rare circumstances when standards have overestimated the uses supported by a given water body.

Pp. 20-21: The statements that "Ecology might be asked to postpone or interrupt an ongoing TMDL . . ." and that "decisions on how to coordinate . . . will likely be made on a waterbody-by-waterbody basis" should be followed by an explanation that Ecology is conducting TMDLs on a timeline set forth by court order pursuant to consent decree and that Ecology will not delay TMDLs in favor of UAAs because of these legal requirements. The fact is, TMDLs will likely trigger a number of UAA petitions, as dischargers try to find some way to get around having to comply with water quality based effluent limitations and non-point controls. Given the multi-year timeline required to process UAAs, however, it is simply not feasible or acceptable for Ecology to delay TMDL development and implementation while the UAA process plays out.

Pp. 22-23: Public and intergovernmental review of UAAs. As discussed above, there must be explicit, step-wise requirements for public participation, review and comment in both the UAA

petition development and Ecology's response to the petition. This section fails to set forth steps that will inform the public about when those opportunities will arise.

P.22: What is the regulatory basis for the seven conditions which must be demonstrated for an NEB? Is there federal guidance?

Again, we thank you for the opportunity to provide these comments. Please feel free to contact Bonne Beavers at Center for Justice (509-835-5211) or Rachael Paschal Osborn (509-328-1087) if you have any questions or require clarification on any of these comments.

Yours truly,

Rachael P. Osborn for:

Bonne Beavers
Center for Justice

Rachael Paschal Osborn
Sierra Club – Upper Columbia River Group

Mike Petersen
The Lands Council

Nancy McKelvey
Trout Unlimited – Spokane Falls Chapter

Galen Buterbaugh
Lake Spokane Protection Association

cc:

U.S. Environmental Protection Agency
Northwest Indian Fisheries Commission
Upper Columbia United Tribes
Columbia River Indian Tribes Fisheries Commission

Snohomish County

Public Works
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August 13, 2004

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

Subject: Comments on *Draft Use Attainability Analysis Guidance for Washington State*

Dear Ms. Niemi:

Snohomish County Surface Water Management has reviewed the May 2004 "Draft Use Attainability Analysis Guidance for Washington State." We appreciate the opportunity to review the guidance document. The draft document is a necessary clarification of a complex issue. Local governments will require this guidance as we implement TMDLs and stormwater permit requirements. The following is a list of our specific comments by page number.

Page 7. While the components that make up a Use Attainability Analysis (UAA) are listed, it is still unclear how much analysis is actually required for each component. We are concerned that extensive water body assessments, waste load allocations and modeling, and economic analyses would put an undue burden on local governments in pursuing a change in classification of a water body. The requirements for a waste load allocation are not discussed. Sources of nonpoint pollutants are often unknown and cannot be quantified. It is also not clear if receiving waters would also require modeling to predict pollutant loading.

Page 10. Determining what uses are attainable seems to imply a detailed knowledge of sources and the ability to control them. This is a challenge when it comes to waterbodies flowing through stormwater influenced or dominated land uses. Please give more guidance on unattainable designated uses. For example, would bacteria from wildlife constitute "naturally occurring pollution"? Also, please give examples or guidance on what would constitute "human pollution activities" that would be considered human caused conditions that would prevent attainment of use.

Page 23. Please give more guidance on what constitutes or is required for an economic analysis. Is a study of how employment in the immediate area will be affected appropriate or sufficient?

Page 23. When considering technology-based limits for point sources we often discuss treatment processes for dischargers such as factories and wastewater treatment plants. Stormwater is considered a point source for TMDL development, but the sources of pollutants in stormwater are nonpoint and the methods of treatment for pollutants such as bacteria are not well defined.

Page 40. The guidance states, "The focus of this assessment is to determine whether primary contact recreation is an existing use." We need guidance on determining whether extraordinary

primary contact recreation is an existing use. The entire focus of this section seems to be looking at the distinction between primary and secondary, rather than extraordinary and primary.

Page 42. Are the harvesting activities discussed under 'extraordinary primary contact recreation' considered only for marine species? Also, please define "minimal" in "extremely high quality waters with minimal sources of bacteria."

Page 44. What data sources are required for a UAA? Other than actual monitoring data, what sources are required to document extraordinary primary contact as a use? For North Creek in WRIA 8, the North Creek Watershed Management Plan lists King County Metro as the only source of data for North Creek before 1975. The plan also shows that North Creek, which is classified for extraordinary primary contact, has consistently exceeded primary contact standards since 1974. In determining whether North Creek should be designated as extraordinary primary contact or primary contact, would additional data be required?

Thank you for the opportunity to comment on the guidance document. If you have questions about our comments, please call me at (425) 388-6410, or Kathy Thornburgh at (425) 388-3464, extension 4542.

Sincerely,

Joan M. Lee, P. E.
Director, Surface Water Management Division

cc: Peter Hahn, Director, Department of Public Works

Spokane Tribal Natural Resources
P.O. Box 100 • Wellpinit, WA 99040 • (509) 258-9042 • fax 258-9600

MEMORANDUM

July 27, 2004

Department of Ecology
P.O. Box 47600
Olympia WA 98504-7600

Dear Cheryl Niemi:

On behalf of the Spokane Tribal Department of Natural Resources we appreciate the sincere efforts that Department of Ecology has made in seeking input from the tribal organizations as you develop Use Attainability Analysis guidance.

The Spokane Tribe, as well as Ecology, is relatively new to the UAA process and have been breaking new ground as the Spokane River UAA is being developed. I will try to characterize the Tribes concerns as it relates to the current UAA and hope that this can be used in refining the UAA guidance document.

The Spokane Tribal Water Quality Standards were signed by EPA in 2003, and although many of the criteria are similar to the State's standards, these are specifically to protect Tribal waters. When the UAA process began the Tribe was concerned that Ecology, having limited experience, would not know what to do with the UAA and ultimately the Tribes standards downstream would continue to be violated. We were notified and contacted by the UAA group early in the process and have assigned personnel specifically to the dissolved oxygen on the Spokane River but have not received correspondence pertaining to our initial consultation. We suggest that the UAA group, or their consultants, be required to record and distribute comments they have received from tribal governments. We have commented on the technical aspects of the UAA (without recommendations) as far as our experience allowed.

There is concern that Ecology will be forced to adopt changes to their standards while downstream interests (The Spokane Tribe) will be overrun. A letter was written to EPA expressing our concern of changes to upstream standards on Tribal waters. We understand that EPA ultimately has to approve changes to water quality standards and will evaluate all tribal waters before making that determination.

We feel that it is important for the UAA initiators to contact affected tribes and at least give them the opportunity to be involved in the process. Ecology should also contact potentially affected tribes on decisions that they make regarding a UAA. The guidance should provide various mandatory check-points to the initiators before they can advance further into the process. There should also be time constraints on each stage of the process so other related projects are not delayed. Ecology should not be handed a document having no prior knowledge of its direction.

We thank you for the opportunity to comment and hope this will assist in the development of the UAA guidance document.

Sincerely,

Brian Crossley
Water & Fish Program Manager
Spokane Tribe of Indians
PO Box 480
Wellpinit WA 99040

SUNNYSIDE
VALLEY
IRRIGATION
DISTRICT

SERVING AGRICULTURE SINCE 1906

August 10, 2004

Cheryl Niemi
Water Quality Program
Department of Ecology
P.O. Box 47600
Olympia, WA 98594-7600

Re: Comments on Use Attainability Analysis – May 2004

Dear Ms. Niemi:

I am the District Manager of the Sunnyside Valley Irrigation District and the General Manager of the Sunnyside Division of the Yakima Reclamation Project. This organization has enjoyed an excellent working relationship with the Department of Ecology both in Olympia and at the regional level in Yakima regarding water quality issues.

We have been closely following the development of the proposed new water quality standards particularly the change from class based standards to use based standards. While meeting numerical standards is always a challenge, the transition to use based standards is particularly troubling because it also classifies intended uses. The facilities the Sunnyside Division operates and maintains contain no natural water courses and convey agricultural runoff. This is difficult to explain to fisheries agencies who are already asserting jurisdiction on project waterways.

With the use designations our task will be much more difficult. This concern was raised early in the process to update the water quality standards. Representatives from the Department of Ecology repeatedly represented the UAA process as a way to identify the correct use designation for artificial water courses. Unfortunately the proposed Use Attainability Analysis Guidance Document offers no such remedy.

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We have hired Dr. Rick Cardwell to review the above referenced document and offer comments. Enclosed are his comments which I have reviewed and endorse as representing the position of the Sunnyside Valley Irrigation District and the Sunnyside Division Board of Control.

Please contact me if you have questions.

Sincerely,

James W. Trull

James W. Trull
District Manager

enclosure

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 Existing Uses (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 173-201A-440).*

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 unacceptable 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.

United States Department of the Interior

BUREAU OF RECLAMATION
Pacific Northwest Region
1150 North Curtis Road, Suite 100
Boise, Idaho 83706-1234

IN REPLY
REFER TO:

PN-6500
ENV-1.10

AUG 13 2004

VIA ELECTRONIC MAIL AND U.S. MAIL

Department of Ecology
Water Quality Program
AUG 16 2004

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

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

Dear Ms. Niemi:

The Bureau of Reclamation appreciates the opportunity to comment on your May 2004 document entitled: "*Draft Use Attainability Analysis Guidance for Washington State.*" We look forward to working with you and your staff on this important subject. As you know, Reclamation owns several dams in Washington and we are very concerned about completion of guidance that can address how water quality uses/standards can be changed when compliance with current criteria is not attainable.

We have reviewed the draft guidance and our comments are enclosed. If you have any questions please contact Dr. David Zimmer at 208-378-5088, or email him at dzimmer@pn.usbr.gov.

Sincerely,

Karl Wirkus
Regional Manager,
Resources and Technical Services

Enclosure

August 11, 2004
Bureau of Reclamation Comments – May, 2004 Draft Use Attainability Analysis (UAA) Guidance

General Comments

1. As a general observation, the draft UAA Guidance Document appears to be written from a regulator's perspective, and focuses more on providing full protection for existing uses, rather than acknowledging that there are real practicability problems associated with some standards and Total Maximum Daily Load (TMDL) allocations, and assisting stakeholders in complying with the Clean Water Act (CWA) in these very difficult circumstances. The incomplete information or lack of information available when uses were first set by the Department of Ecology (DOE) should be kept in mind as the guidance is prepared, to assure the bar is not set unreasonably high on the level of study needed to correct the sometimes poorly documented original designations. In addition, it would be helpful if the guidance addressed all means of standards modification including site specific criteria, to help the user determine if a UAA or other process is most appropriate.

2. The draft guidance document and public hearing presentations suggest that the DOE does not plan to conduct UAA, but rather would act on studies conducted by others in the regulated community who wish to have standards relaxed. We would recommend that DOE routinely conduct UAA studies prior to development of TMDLs for 303(d) listed stream segments where designated uses are poorly documented or 40 CFR 131.10(g) conditions are known to apply. This would clean up use designations, assure that appropriate water quality criteria and TMDL targets are applied, and protect existing uses.

3. Dam owners/operators in Washington have been assured for some time that UAA, as provided for under the Federal Clean Water Act, is a viable means to secure CWA compliance where attaining numeric water quality criteria and TMDL allocations are technically or economically infeasible. The current draft does not clearly delineate how removal or modification of uses allowed under 40CFR 131.10(g)(4) can be achieved. The guidance document should provide a clear pathway for compliance with water quality standards with dams, diversions, and hydrologic modifications in place, both where designated uses are being supported but numeric criteria are unattainable, and in situations where designated uses do not exist.

4. The section describing the relationship between Threatened and Endangered Species and UAAs warrants additional discussion, because the relationship between use attainability analysis and Endangered Species Act (ESA) compliance is complicated by various considerations:

> Changing a water quality standard does not necessarily affect listed species or critical habitat even where such species and habitat are present. This would be particularly true where a standard is to be modified to recognize a pre-existing activity (e.g., an existing dam and reservoir operation). In such cases there may be no effect of any kind (i.e., direct, indirect, cumulative, interdependent, or interrelated) on species or habitats resulting from the changed standard. The new standard would simply allow for existing water quality (i.e., "baseline conditions") to continue.

However, it is possible that in some cases a continuation of existing water quality conditions may contribute to future adverse modification of critical habitat and/or other adverse affects on listed species. In most cases, a Federal action agency (such as Reclamation in the case of dam and reservoir operations) would normally consult with the Fish & Wildlife Service (FWS) or National Marine Fisheries Service (NOAA) on the effects of its activities independent of any request to change water quality standards. This highlights the need for careful, case-by-case analysis of such proposed changes.

If a new activity (e.g., a new industrial development) is being proposed, and if a change in water quality standards is being sought to accommodate that new development, then there obviously may be adverse affects on listed species or critical habitat. However, it should be recognized that such adverse affects would result from the development, not from the new standards.

There is a significant distinction to be drawn between Sections 7(a)(1) and 7(a)(2) of the ESA as they relate to UAAs. The proposed guidance should make clearer this distinction. It should be understood that Federal actions which would jeopardize the continued existence of listed species are not allowable under the law (except in highly unusual circumstances). However, the law does not prohibit activities "that could negatively affect the recovery of a threatened and endangered species." If it is the intent of the DOE to prohibit such proposed change in uses as a matter of policy, the UAA guidance should clearly state this. However, it should also be recognized that in some cases, where a UAA has demonstrated that there is no practical way to improve existing water quality conditions (such as those resulting from a pre-existing dam and reservoir operation), it may be necessary to modify a recovery plan to reflect on-the-ground realities.

5. The section on Economic Analyses for UAAs should include some provision for changing uses based on an analysis of both benefits and costs. The issue at Federal dams is often not whether the cost of complying with standards causes widespread economic and social hardship, but whether actions to make incremental improvements in water quality to a level still in non-compliance with water quality standards is a good expenditure of public funds. Actions should result in substantial biological and water quality benefits, as well as pass the hardship test for costs.

6. Reclamation is currently involved with other stakeholder interests in an Oregon workgroup to develop UAA Guidance for the State of Oregon. Because a number of mainstem Columbia River hydroelectric dams are located in both Oregon and Washington, we believe that Washington's draft guidance should be closely coordinated with the ongoing Oregon process to assure efficient consideration of uses in both states.

Specific Comments

1. Page 3, Table on Water Quality Standards Modification Tools—This table should be modified to clarify how water quality standards applicable to the Columbia River hydrosystem, which supports aquatic resources, but can not meet numeric criteria, might be modified to provide for CWA compliance.

2. Page 4, First and Second Bullets under "The Focus of a UAA is Dual"—The citation should be: 40 CFR131.**10**(g).

3. Page 5, Can an existing use be downgraded?—What is the definition on "best use" and what are the guidelines in determining it?

4. Page 5, Next to Last Sentence—Add "diversions, or other types of hydrologic modifications," after the word "dam" [see 40 CFR131.10(g)(4)]

5. Page 6, Top Paragraph—The decision to consult is made only by the action agency (EPA in this case). Declaring that actions that may negatively affect an ESA species "would be unlikely to be approved" is not necessarily true. Consultations with NOAA Fisheries and FWS result in Biological Opinions that can include "reasonable and prudent alternatives" (if the proposed action is likely to jeopardize the continued existence of the species or adversely modify critical habitat) and "reasonable and prudent measures" that are designed to reduce take of the listed species. It is very likely that a change in use standards or relaxed numeric criteria for an individual water body would not jeopardize a species when considering the entire area occupied by the species (commonly referred to a Distinct Population Segment or Ecologically Significant Unit).

6. Page 8, Figure 1, Summary Flow Chart—The flow chart should be modified to include all forms of standards modification, and should specifically address how CWA compliance may be achieved when aquatic resource uses are present, but numeric criteria cannot be attained. We suggest adding boxes in the flowchart that provide a clear pathway for a UAA for dams, diversion or other hydrologic modifications (see 40 CFR 131.10(g)(4)) that cannot attain compliance with current standards.

7. Page 10-11 Discussion of Attainable and Unattainable Uses—There is a need to clarify how a determination of "unattainability" would be made when *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.*

8. Page 15-16, Specific Examples—This section should be expanded to include an example of a hydroelectric and/or storage dam where downstream releases cannot meet salmon and trout spawning, non-core rearing, and migration criteria, but the ESA listed use is supported at some level less than optimum. The example should explain how the dam owner/operator may achieve CWA compliance through a UAA or other standards modification process.

9. Page 25, Calculating the Economic Impacts—Federal dam owners are required to consider both costs and benefits in post-authorization implementation studies including pollution control investigations, according to guidelines established pursuant to the Water Resources Planning Act of 1965. These analyses would include consideration of the economic and environmental benefits, as well as the costs of controlling pollution.

10. Page 26, Use-Specific Guidance for UAAs—It would be helpful in this section to address how hydroelectric and storage dam uses fit within the use framework of Washington water quality standards and the UAA process.

11. Page 26, What are the existing uses in a waterbody?—The concept of partially supported uses is introduced here, but this condition should be addressed throughout the report.

12. Page 29, Determining the Biological Potential of the Area—The concept of determining the human caused effects as well as the potential natural conditions if all human effects were removed appears to be an inappropriate process in the case of dams and hydrologic modifications under 40 CFR 131.10 (g)4. In the case of federally authorized dams, we would maintain that the dams should be part of the baseline analysis.

13. Pages 30-31, Determining Attainable Uses—This section should address attainability under circumstances where a use exists, but under less than perfect, or optimal water quality conditions. The guidance should explain how the user may bring this type of condition into CWA.

14. Page 48, Part 8. Ecology Review and Actions—The sentence stating *Ecology's review of the UAA will be dependent on available staff resources* should be deleted. If stakeholders compile a report for review and approval by Ecology staff, as indicated in Part 7, Ecology should be required to act on that submittal within 60 days, regardless of staff availability.

Washington Forest Protection Association

June 24, 2004

Cheryl Niemi
Washington Department of Ecology
PO Box 47600
Olympia, WA 98504
Cnie461@ecy.wa.gov

Regarding: *Draft Use Attainability Analysis Guidance for Washington State*

Dear Cheryl:

Thank you for the early opportunity to comment on the *Draft Use Attainability Analysis Guidance for Washington State* and for the informative introduction to the document provided at the May 24th meeting. The Washington Forest Protection Association represents landowners who grow and harvest timber on approximately 4 million acres in Washington State.

Members of the WFPA and other private forest landowners are subject to the provisions of the Forest Practices Rules (WAC 222). The Forest Practices Board is responsible for ensuring that public resources, including water quality, are protected during forest practices activities. Ecology has a seat on the Board and has authority to veto rule changes if Ecology finds that the rule changes will not protect water quality or meet existing water quality standards. The current forest practices rules are designed to meet water quality standards for existing and downstream uses, and systems are in place for determining where fish habitat exists on forested lands. Current Forest Practices rules require a model-based approach for determining fish habitat in forested water bodies and require site potential tree height buffers to protect against temperature increases and sediment delivery as required by water quality standards. There is also a process in place to modify the water type if data indicates that fish use is not occurring. It is important to forest landowners that the current water typing system and protection requirements on forested lands not be superseded by the UAA process.

Our comments on the UAA guidance are below and follow the page numbers of the *DRAFT – Version 1.0, May 2004, Draft Use Attainability Analysis Guidance for Washington State*.

- Page 1. We suggest attaching the federal regulations regarding UAAs or noting them at the very beginning of the guidance document. The federal guidelines are such a

guiding factor on the analysis that seeing them first in the document will be helpful for potential applicants.

- Page 1. You suggest that initial discussions with applicants should involve Ecology and EPA. We suggest that you also encourage applicants to involve other stakeholders if it is clear that others will be interested in the UAA. We further suggest close coordination with EPA during the development of the UAA guidance.

- Page 2. Individual rulemaking on each UAA may place a large administrative burden on Ecology and EPA. Exploring a more efficient way to conduct and approve UAAs, will be a worthwhile endeavor. If Ecology intends to continue working on the draft guidance over the summer, we suggest it is imperative to host stakeholder meetings to identify ways to improve efficiency and reduce the significant burden these UAAs may place on Ecology and EPA. One suggestion is to tie the UAA results to regular revisions of the water quality standards which will reflect site specific criteria variances, other variances and UAA applications.

- Page 2. Under step 8, it is noted that Ecology will proceed "if resources are available". We strongly suggest defining what this statement means. The phrase occurs elsewhere in the document as well and, as written, appears to indicate that if Ecology does not have resources, the UAA will not be considered for rulemaking even if the use revisions have merit based on the application. Discussion of how EPA will respond administratively to UAA applications is also important. This discussion may not need to be part of the guidance, but the discussion should be had between the agencies before the guidance is broadly distributed for potential use by applicants.

- Page 3. Please attach the Tools document. Potential applicants should aware of the three options available to them if their water body is not likely to attain the designated uses in the water quality standards.

- Page 5. Please clarify if the criteria for upgrading a use are as stringent as the criteria for downgrading a use. The guidance suggests that it is easier to upgrade uses. Since it is likely that both types of errors will occur, the guidance should treat both errors equally.

- Page 5. We are concerned with the need for ESA consultation when the use is determined to be unattainable in the watershed. This discussion comes up elsewhere in the document as well. We do not understand how USFWS or NMFS could insist on an unattainable use simply because the area has been designated as important for ESA listed species; especially if the use is limited by naturally occurring conditions in the watershed. Detailed discussion and guidance regarding this consultation requirement will help people to better understand it. As presently drafted, the requirement heightens concern regarding the ability to meet ESA requirements.

- Page 6. A discussion of how uses are specified is needed (i.e. what criteria are used to specify uses and how stringent those criteria are). Since the agency sets the criteria, it would be helpful to explain how that process works. We are also concerned that the

burden for correcting unattainable use designations in a water body lies entirely with the applicant. Many of these uses are designated based on modeled information, not actual field identification. As such, it is likely that the model will have errors and the errors should be corrected by the agencies if they are identified based on simple methods (such as natural fish blockages being identified in the field).

- Page 11. Number 5 under the federal requirements states "(5) physical conditions related to the natural features of the water body, such as lack of proper substrate, cover, flow; depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life protection uses." These physical criteria are easily identifiable in many cases. A UAA should not be necessary if the applicant has field verified evidence that the use specified is unattainable due to physical conditions or natural features of the water body.

- Page 11. Under what are subcategories of uses? One sentence reads: "While the U.S. Environmental Protection Agency (USEPA) does not require UAAs for states to assign more stringent subcategories of uses, it may be while conducting a UAA that it becomes apparent that more stringent subcategories of uses need to be protected in a water body." This connotes a "one way system" biased toward raising the bar for water quality while making it difficult to modify the use downward. It should be equally as simple to determine that a use is unattainable as it is to determine that the use is attainable.

- The examples beginning on page 15 are very helpful and illustrative.

- Page 16. If a party is unable to meet the temperature standard but is still meeting the designated use, it is unclear whether this water body would be on the 303(d) list. If a higher temperature supports a use then is it possible to revise the temperature standard, but not the use? The guidance should answer these questions.

- Page 21. If a TMDL indicates an unattainable use designation, then a UAA should not be necessary. Since TMDLs are designed to generate data about water bodies, the data generated by a TMDL should be sufficient for a use designation change if it is determined through the TMDL assessment that the designated use is unattainable. Discussions surrounding how to use data generated by TMDLs will improve the guidance.

- Page 29. A suggestion is made to examine the potential of the stream to meet a designated use in the absence of human effects. It is impossible to assess pre-human disturbance in water bodies. The guidance should more realistically reflect what can be assessed in the water body with regard to reference conditions. The guidance also suggests that reference conditions can serve as indicators for other areas that are similar in physical, biological and chemical makeup. These reference conditions should also serve as justification for a change in designated uses under the UAA process.

- Page 32. Please provide a link to the Comprehensive Monitoring Strategy.

- Page 39. Consulting landowners in the area will be a useful indicator of whether recreational use occurs in a given water body.

- Page 45. Please attach the *Guidelines for Preparing Quality Assurance Project Plans for Environmental Studies."*

- A list of acronyms would be helpful for applicants.

- EPA Region 10 has approved only one UAA. This approved UAA should be attached to the guidance and used as an example of the types of information that EPA is looking for in a completed application.

- Clarification of what evidence constitutes an existing use would also be helpful. A working definition of the term should appear in the glossary.

- Exploration of a way to "fast track" simple use attainability decisions is needed. Since the water quality standards were developed without specific field knowledge in many cases, there will be times where the standards are obviously wrong and a complex and lengthy data gathering effort will not be necessary to make this determination. Given that the burden of proof lies almost exclusively with the applicant pursuant to the guidance and current water quality standards; there should be agency recognition of the possibility of errors associated with use designations.

- Understanding that EPA is working with Ecology on the core/non-core areas we suggest that the guidance specify where these questionable areas are so that potential applicants are aware of those areas where a UAA may be necessary given the uncertainty of actual use designations in the water bodies.

Thank you for this opportunity to comment on the *Draft Use Attainability Analysis Guidance for Washington State, Version 1.0, May 2004.* I look forward to additional meetings and opportunities to discuss the guidance, and appreciate the efforts Ecology has made to date to develop useful guidance for those individuals and companies who may wish to pursue Use Attainability Analysis. If you have any questions regarding this comment submission, please call me at 360-705-9284.

Sincerely,

Heather Rowton
Environmental Project Manager

Cc: Melissa Gildersleeve, Ecology
Mark Hicks, Ecology

Washington State Water Resources Association

WSWRA
WASHINGTON STATE WATER RESOURCES ASSOCIATION

EXECUTIVE OFFICE - 606 COLUMBIA STREET N.W. - SUITE 100 - OLYMPIA, WA 98501 - (360) 754-0756 - FAX (360) 586-4205 - E-mail: wswra@olywa.net

August 11, 2004

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

Dear Ms. Niemi,

COMMENTS ON DRAFT USE ATTAINABILITY ANALYSIS GUIDANCE DOCUMENT

I am commenting on Department of Ecology's "Draft Use Attainability Analysis Guidance for Washington State." (Draft Guidance) The Washington State Water Resources Association represents over 100 irrigation districts in Washington State providing irrigation water supply to over 1 million acres of irrigated agriculture. Presently, irrigation facilities are listed on the Department of Ecology's 303(d) list of water quality impaired water bodies. Because of this we have a significant interest in the Department's Use-based Water Quality Standards and the process for removing use designations or modifying use-based standards to reflect the proper uses of irrigation water and the standards attached to them.

It is our members' assertion that manmade water conveyance facilities are not like natural waters in purpose or character and therefore should not be subject to established water quality standards. Furthermore, federal clean water act requirements may be in conflict with the authorized purposes of federal reclamation projects and may lead to measures that impact the operations of the districts and may place a substantial economic burden on the district water users.

As a very general comment, the Guidance Document is difficult to read and confusing. A more user-friendly approach would be preferable.

It appears clear throughout the Draft Guidance that Ecology is not inclined to pursue Use Attainability Analyses. Ecology staff has indicated that the Department does not have sufficient funding to conduct UAA's and consequently prefers to focus efforts on establishing TMDL's to apportion loading limits on pollutant contributors. Similarly, water users lack the financial resources to conduct UAA's independently. Water quality laws expressly place the burden of conducting and approving UAA's on the delegated agency. Abdicating this role for financial reasons is inappropriate. Instead, Ecology should reprioritize its allocation of funding to better address the need for UAA's.

In the past, Ecology staff has pointed to UAA's as the off-ramp or solution to improperly designated uses for specific water bodies. This promised solution was used as justification for why the use-based water quality classifications were superior to the former class-based system. Without a true opportunity to use the UAA process the use-based system does not represent an improvement over the class-based system. Instead, we have a water quality classification system that is different in name only while maintaining the same rigid inflexibility of the past.

The current process for determining and allocating "attainable" uses allows Ecology to list any use that is merely theoretically attainable regardless of whether or not that use exists in a particular water body. By setting so-called "attainable" uses by default, lacking a clear indication that a use exists in a water body, Ecology places the burden on the water users to prove that a use does not exist (proving the negative). This will be financially onerous for water users. It would be more appropriate for the burden to be on the agency to provide objective evidence of a particular use prior to such designation. Ecology may find this method of operation in its best interest given its responsibility for conducting UAA's to rectify mistaken use designations.

Ecology should not be allowed to designate water bodies for uses that are illegal. Placing a recreational use designation on irrigation canals that are posted as "no trespassing" may create liability for the state in the event that the public views the designation as a license or invitation to use restricted facilities for that purpose.

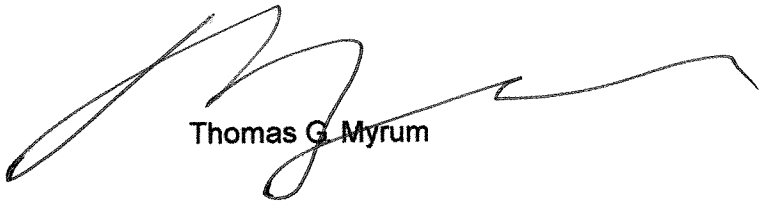
The Guidance document notes that Endangered Species Act consultations will be necessary before approving and adopting a UAA. This added level of scrutiny could determine the success or failure of the UAA. Therefore it is recommended that the consultation begin as the UAA is initially developed, not after it is completed.

Several WSWRA member irrigation districts have provided comments on this document. The WSWRA supports any comments sent individually by its member irrigation districts.

WSWRA asks that Ecology develop a clear process for conducting UAA's that is responsive to the operational realities of irrigation districts. We also ask that Ecology make UAA's an agency and program priority and dedicate the necessary funding to insure that they are completed expeditiously.

Thank you for this opportunity to comment on the Draft Guidance. Please include me in your review of the Final UAA Guidance Document.

Sincerely,



Thomas G. Myrum