Response to Comments on the First Public Review Draft of Use Attainability Analysis Guidance

Comments on First Draft of the *Guidance for Use Attainability Analysis* released by Ecology on May 24, 2004
Public comments received by August 13, 2004

Comments were received from the following:

American Rivers
American Whitewater
Center for Environmental Law and Policy
Center for Justice
Chehalis Confederated Tribes
Chelan County Public Utility District No. 1
City of Bellevue Utilities
City of Bothell
City of Seattle – City Light and Public Utility District
Department of Energy, Bonneville Power Administration
East Columbia Basin Irrigation District
Everett Public Works
Grant Country Public Utility District
Kalispel Tribe Natural Resources Department
Kittitas County Water Purveyors
Lands Council, The
Lake Spokane Protection Association
Nooksack Indian Tribe
Northwest Ecosystem Alliance
Northwest Environmental Advocates
People for Puget Sound
Puget Soundkeeper
Quincy-Columbia Basin Irrigation District
Sapere Consulting
Sierra Club, Upper Columbia River
Snohomish County Public Works
South Columbia Basin Irrigation District
Spokane Tribal Natural Resources
Sunnyside Valley Irrigation District
Trout Unlimited - Spokane Chapter
Trout Unlimited – Spokane Falls Chapter
US Department of Interior, Bureau of Reclamation
Washington Environmental Council
Washington Forest Protection Association
Washington Trout
Washington State Water Resources Association

The comments on the draft were in some cases detailed and lengthy, and on many issues revealed strongly polarized viewpoints among the commenters. Comments included grammatical, organizational, and issue-specific recommendations.

This response to comments addresses 21 issues that were either frequently mentioned or that resulted in extremely polarized comments. These are:

1. Intent of the UAA guidance
2. Burden of proof
3. Structure of the guidance document
4. Required versus recommended UAA components
5. Public involvement
6. Ecology's resources and its impact on UAA review and action
7. Develop a different UAA process
8. Coordination of UAAs and TMDLs
9. Net Environmental Benefit
10. Economic analysis
11. UAAs and dams
12. Guidance on determining existing uses
13. Guidance on determining attainable uses
14. Antidegradation and UAAs
15. UAAs, site-specific criteria, and variances
16. Thresholds of use to demonstrate that a use is being attained
17. What uses need to be evaluated in a UAA?
18. ESA
19. Grouping Water bodies
20. Recreational Uses
21. Subcategories and water body-specific criteria

Not all issue-oriented comments that were received are addressed in this response, however in all cases the comments were considered, and many of the comments resulted in modifications to the draft text that should further clarify concepts or information. As the draft is further revised comments will be revisited and again considered. Editorial and organizational comments are not included in this response as the document will undergo further edits and organizational changes as it is developed, and these comments will be considered throughout the duration of the document development. The message here is that the comments received by Ecology will be reviewed again as this guidance is revised. The summary below paraphrases and summarizes the comments to save space and time, and all comments can be viewed in their entirety at Ecology's UAA website.

Each of the 21 issues addressed in this response is organized as shown in the following table:

Issue #	Lists the issue being addressed
Draft guidance:	This section briefly summarizes how the draft guidance addressed the issue.
Scope of Most Comments Received:	This section briefly summarizes the comments, and in general attempts to show the scope of the comments.
Discussion:	This section briefly discusses the issue and presents rationale for any changes or lack of changes based on the comments.

Change in Guidance:	This section describes whether and how the guidance was modified in response to the comments.

Response to comments

Issue #1	**Intent of the UAA guidance**
Draft guidance:	The intent of the draft guidance is to share Ecology's current thinking on the federal UAA requirements, and to help interested parties determine whether a UAA for their water body would be a good investment of resources.
Scope of Most Comments Received:	• The guidance encourages UAAs and will make it a common and easily used tool to give away uses to polluters • The guidance makes it look like UAAs are so difficult that they will never be successful
Discussion:	The intent of the guidance is to neither encourage or to discourage UAAs, but instead is to inform interested parties about federal UAA requirements and give them information to help determine whether a UAA would be appropriate for their water body. UAAs are a valid tool to modify the water quality standards.
Change in Guidance:	No change to encourage, discourage, require, or prohibit UAAs has been made to the draft guidance. A preface was added to the draft guidance that clarifies the intent of the guidance.

Issue # 2	**Burden of proof**
Draft guidance:	The draft guidance is based on the premise that the federal regulations on use attainability analysis must be met prior to Ecology moving ahead with any rule-making to modify a use. The information needed by Ecology to modify a use will be more or less detailed and comprehensive based on the individual water body being addressed. The guidance explains that in the case of upgrading a use, especially where the use is currently present in a water body, the information needed to demonstrate the presence of the upgraded use is less rigorous than the information needed to downgrade a use (demonstrate that a designated use is unattainable and not an existing use).
Scope of Most Comments Received:	• The burden of proof should be on Ecology to show that the designated uses are present before basing regulations on them • Upgrading a use requires the same burden of proof as downgrading a use • The burden of proof to downgrade a use is large, and needs to be clearly explained.
Discussion:	The federal regulations state that specific tests must be met in order to modify or remove a designated use.

	Washington has had specific uses designated in its water quality standards since at least the 1970s, and those uses have been approved by the USEPA as meeting the requirements of the Clean Water Act. The federal regulations lay out a specific process to modify designated uses in state water quality standards in 40CFR131.10(g). Because the state WQS contain USEPA approved designated uses the option of not using the designated uses until they have all been verified or modified is not available. The tool used to verify or modify designated uses is the federal UAA process. The process to modify or remove a use is spelled out in the federal requirements (40CFR131.10(g)), and requires a demonstration that the use is not existing or attainable. This is the basis of the draft UAA guidance. The amount of information needed to modify a use will vary from water body to water body: in some cases relatively simple UAAs will suffice while in others more complex analyses might be needed. In all cases the UAAs must fulfill the requirements of the federal regulations in order for Ecology to base a water quality standards rule-making on the study. In order to upgrade a use, credible information showing the existence or attainability of the use is required. This demonstration is likely to be an easier task than a demonstration that a use is not existing or attainable because the steps in the process can be far fewer. For instance, in a water body designated secondary recreation a series of photos demonstrating swimming, or other water contact activities associated with high levels of exposure by ingestion, occurring at a recent time could be enough information to support a designation of primary contact recreation. When evaluating information such as photos Ecology will work with the public to determine whether the use is a characteristic use of the area, and whether other issues, such as dangerous conditions (e.g., as encountered in irrigation supply canals) would make an upgrade inappropriate (in the case of recreation, an upgrade where dangerous conditions exist could be interpreted as encouraging recreational use in dangerous areas). In order to down grade a water body from primary to secondary recreation, information showing that the use is not existing (not attained since November 28, 1975) or attainable must be developed. This process could be fairly simple or complex, but in most cases will be a larger task than the upgrade example discussed above.
Change in Guidance:	Language emphasizing that Ecology will not move forward to rule-making based on a UAA that does not meet federal requirements has been added to the document.

Issue # 3	**Structure of the guidance document**
Draft guidance:	The draft is organized around a series of sequential steps that lead the reader through “layers” of information that progress from less complex to more complex. In some cases information is repeated in various places in order to remind the reader of important information needed to conduct a UAA. The guidance is somewhat lengthy and

	complex.
Scope of Most Comments Received:	• The guidance is too complex, the guidance should be simplified • More information and clarification is needed on many different issues such as flow, dams, attainability, existing uses, etc… • Specific guidance should not be developed until Ecology has conducted UAAs
Discussion:	The guidance is somewhat lengthy because the federal UAA requirements, when taken in the context of federal and state laws and regulations, is not a simple concept or process. Ecology's intent in writing the guidance is to share, as completely as possible, it's thinking on the federal UAA requirements with the goal of helping applicants to determine whether a UAA is a wise choice for their water body, and if so how it should be conducted to best meet the federal requirements. As such the guidance addresses, as much as possible, the different questions that might be asked during UAAs. Ecology considered shortening the guidance considerably, but thinks that it will be better for most applicants to start a UAA with the fullest possible picture of the federal UAA requirements that Ecology can provide for them rather then wait until their UAA is underway or completed, and money already spent, before fully discussing the complexities of the UAA process.
Change in Guidance:	The document was not reorganized in any major way, but areas where there was confusion about the process were in many cases rewritten to provide more clarity. A glossary, information on how flows should be considered in UAAs, and an enhanced section on TMDLs and UAAs have been added to the guidance. Other areas where more information was desired have in some cases been rewritten to provide clearer and more accurate, but still brief, information. The federal UAA regulations can result in requirements for simple or complex UAAs, and Ecology urges anyone who is contemplating a UAA to contact Ecology to discuss whether a UAA might be a good use of resources for their water body and for addressing their specific regulatory situation.

Issue # 4	**Required versus recommended UAA components**
Draft guidance:	The draft guidance in most cases does not contain requirements for dischargers or other parties contemplating UAAs. Instead, the guidance attempts to let the reader know the type of information that Ecology will need in order to change a water quality standard. Ecology is providing this information because interest in UAAs is at a high level in Washington, and Ecology thinks interested parties should know the information needed by Ecology to change a designated use before investing public or private funds in a UAA study.
Scope of Most Comments Received:	• Add explicit requirements - lengthy information is needed to modify a use and should be required of all UAA applicants. • Reduce requirements - the guidance contains too many requirements to make UAAs a viable tool
Discussion:	Ecology will continue to present the federal UAA requirements in the context of what types of information Ecology

	will need to support a rule change. Because the draft is a guidance document, and not a rule or agency policy, it is intended only to inform and guide interested parties through the complexities of the UAA process. The final decision on what to include in a UAA rests with the party conducting the UAA, and it is up to that party to weigh the cost of the UAA with the likelihood of success as the UAA is planned and conducted. The guidance will not be modified to contain specific requirements for UAA studies.
Change in Guidance:	A preface to the guidance has been added that states the intent of the guidance, and indicates that the guidance is not a rule or formal policy of Ecology.

Issue # 5	**Public involvement**
Draft guidance:	The first draft, while encouraging public involvement, does not require a public involvement effort or define specifically all groups who should be involved at specific points in the process.
Scope of Most Comments Received:	• Public involvement is important and should be a required component of a UAA.
Discussion:	Ecology agrees that public involvement is a very important component of any UAA. Ecology also agrees that a broad public involvement effort (particularly where public monies are involved), early in the process and continuing through to the completion of the UAA, is important. Ecology will look to a completed UAA to have gauged the level of support of different groups in the local area, as well as to have coordinated with agencies working in the area to determine their support for any use change. As with other components of a successful UAA, Ecology will not insert specific requirements for public involvement in the draft guidance because it is intended as guidance and not as rule or policy.
Change in Guidance:	A section on the public involvement process has been added to the guidance that stresses the importance of the process and what types of information Ecology would like to see in a UAA submittal.

Issue # 6	**Ecology's resources and its impact on UAA review and action**
Draft guidance:	In several places the draft guidance says that Ecology resources will influence the ability to review UAA submittals and to conduct rule-making based on submittals.
Scope of Most Comments Received:	• Ecology resources should not influence review ability or rule-making schedules • Ecology resources should be directed so that UAAs are a very high priority • Ecology resources should be directed entirely away from UAAs and toward implementation of the water quality standards

Discussion:	Available resources will always be an issue in determining where Ecology will put its efforts. However, Ecology agrees that resources alone will not be the sole factor determining Ecology's review and action on UAAs. The main driver in this will be whether the UAA submittal meets the federal requirements for UAAs. Initial review by Ecology will likely detect any clear insufficiencies in the submittal. A final review of the UAA, and comparison to federal and state laws and regulations, will determine whether a use change would be likely to obtain federal Clean Water Act and ESA approval. Ecology does not expect that the decision to review or base rule-making on a UAA will jeopardize timely actions implementing the water quality standards.
Change in Guidance:	Areas of the guidance that refer directly to Ecology resources have been modified to instead reflect the need to meet federal requirements for UAAs.

Issue # 7	**Develop a different UAA process**
Draft guidance:	The draft guidance presents a step-by-step process for conducting UAAs that Ecology thinks will produce UAAs that meet the requirements of the federal UAA requirements and the information needs of Ecology.
Scope of Most Comments Received:	• Need a simplified process inserted in the guidance • Need a more flexible process • Need more flexibility in requirements
Discussion:	The draft guidance contains Ecology's best thinking about the issues surrounding the federal UAA requirements, and the specific questions that need to be addressed in a UAA. The guidance is meant to be adaptable to the individual needs of a water body, and as such if followed could result in simple UAAs for certain areas. The guidance does not suggest that certain steps, such as evaluating existing or attainable uses, can be ignored or taken out of the process because one goal of the guidance is to help an applicant produce a successful UAA that both state rule-making and federal CWA and ESA approval can be based on. Additionally, the guidance also gives the applicant Ecology's best assessment of the type and quality of information needed to support a state rule-making effort that can successfully make it through Clean Water Act approval.
Change in Guidance:	The guidance was not modified to produce a simpler process.

Issue # 8	**Coordination of UAAs and TMDLs**
Draft guidance:	The draft guidance had little information on coordination between UAAs and TMDLs.
Scope of Most	• More information needed on how to coordinate

Comments Received:	• UAAs should be done prior to TMDLs • TMDLs should be completed prior to any UAAs
Discussion:	Ecology agrees that more information should be presented on how to coordinate UAAs and TMDLs. Ecology also agrees that TMDLs required by agreement with EPA must not be delayed due to UAAs. In order to address this issue Ecology developed a screening approach for Ecology staff to use at the inception of a TMDL to determine whether a UAA might be a worthwhile effort to be conducted simultaneously with the TMDL.
Change in Guidance:	New language on coordinating TMDLs and UAAs is included in the new draft of the guidance.

Issue # 9	**Net Environmental Benefit section**
Draft guidance:	The draft guidance contains an appendix that describes a specific process to be used when evaluating and making decisions on net environmental benefit.
Scope of Most Comments Received:	The NEB approach is flawed on many fronts, including how toxics are addressed, does not focus on uses but instead focuses on meeting criteria, and its focus on producing riparian habitat but not on protecting aquatic life. Comments on this topic were very extensive, and can be found in the scanned comment letters.
Discussion:	Ecology agrees that many questions remain to be answered regarding how and whether NEB will be a viable or valuable tool in Washington. The intent of the tool is not to reduce protection, but to maximize benefits. As the comments point out, that premise begs the question of which uses are more highly valued. Any use changes based on NEB must go through a public process, where these questions will be addressed. The following information has been added to the revised NEB text, and might be useful to reviewers in providing context to the NEB approach: "The concept of a Net Ecological Benefit (NEB) Use Attainability Analysis (UAA) was developed by EPA Region 9 to help that Region's states deal with the issues surrounding effluent dominated and effluent dependent streams. The program as established in guidance by EPA Region 9 has not undergone national review and has not been adopted by EPA at the national level as guidance for meeting the federal Clean Water Act (CWA) or the EPA regulations governing application of Use Attainability Analyses (UAA) to change designated uses in state water quality standards. The Washington State Department of Ecology cannot find a legal basis for some of the specific provisions and allowances contained in the Region 9 guidance, but find that the fundamental concept is sound and is of value to our state. Currently, EPA is participating in a forum sponsored by the Western States Water Council (WSWC) to explore the use of NEB UAAs, in addition to addressing numerous other issues surrounding the application of water

	quality standards to waterbodies in the arid west. Washington is one of the western states participating in the forum, and hopes to use it to help answer some of the more critical questions surrounding the application of water quality standards to effluent dependent ecosystems (EDE). The draft guidance introduces the concept of NEB UAAs, and initiates a NEB UAA program for Washington that appears well supported by state and federal laws and regulations. Washington's draft NEB UAA guidance will be updated in response to changes in Ecology's understanding of the state's options and responsibilities, particularly as clarified through ongoing discussions in the WSWC forum."
Change in Guidance:	The draft guidance has been modified substantially to both clarify information and intent (the general approach remains unchanged), and to place it in the context of the current WSWC process to develop guidance with the USEPA.

Issue # 10	**Economic analysis**
Draft guidance:	The draft guidance presents summary materials prepared by the USEPA in their Interim Economic Guidance. Specific information on defining feasibility for hydrologic modifications is not in the draft guidance.
Scope of Most Comments Received:	• More specific economic guidance is needed to for the economic tests in 40CFR131.10(g)(4) (feasibility) and 40CFR131.10(g)(6) (substantial and widespread). • The time frame that is used to assess whether a use can be attained is critically important. We cannot predict that new technologies or monies might become available in the future that would make a use attainable that in the short-term would appear unattainable.
Discussion:	Ecology agrees that specific guidance for determining 40CFR131.10(g)(4) (feasibility) and 40CFR131.10(g)(6) (substantial and widespread) is needed. At present the following approaches are being taken by Ecology to develop this guidance: • Substantial and widespread: Ecology will rely largely on the EPA guidance to address this. It is likely that more detailed guidance might be developed to address "widespread", which under the EPA guidance is a rather indeterminate analysis. Ecology is working with EPA Region 10 to add specific instructions to the EPA guidance that will tailor the analysis to this area. • Feasibility: Ecology is working closely with EPA Region 10 to develop feasibility definitions for federal and non-federal dams. Ecology will provide opportunities for the public to provide input into this process. Ecology recognizes that the time frame used to evaluate economic effects is important in the analysis of attainability. Language acknowledging this has been added to the section on variances. At this point we do not have a decision on how Ecology will evaluate the certainties and uncertainties surrounding longer or shorter time frames of analysis.

Change in Guidance:	At present the economic guidance section is very similar to the first draft. As new information is developed it will be announced through the Water Quality list serve.

Issue # 11	**UAAs and dams**
Draft guidance:	The draft guidance does not address UAAs and dams.
Scope of Most Comments Received:	• The UAA guidance needs specific information so the dam community can perform UAAs.
Discussion:	Ecology agrees that specific information on UAAs and dams is needed. As part of the process of developing the guidance Ecology has drafted an approach to dams and UAAs. This approach will be posted on the Water Quality Program web page and announced on the Water Quality Standards list serve when it is ready for review. The approach gives information on assessing attainability and compliance, and is compatible with the dam language contained in the 2003 water quality standards revisions (WAC 173-201A-510(5)). <u>However, some important parts of this approach need to be developed and discussed with the public.</u> The definition of "feasibility" is currently being developed with EPA Region 10, and as currently scheduled Ecology expects to have draft guidance of determining feasibility in Fall/Winter 2005. In addition, there are concepts within the new draft language on dams that Ecology expects will prompt discussion and analysis. <u>Ecology anticipates working with the dam community and other interested groups as this language and approach is reviewed and further developed during this guidance development process.</u>
Change in Guidance:	No change in the posted version of the draft UAA guidance was made. The draft UAA guidance for dams will be posted and announced at a later date.

Issue # 12	**Guidance on determining existing uses**
Draft guidance:	The draft guidance addressed existing uses, but often confused the term "existing" with the concept of uses that are currently present in a water body.
Scope of Most Comments Received:	• Need more information on determining existing uses • Use the regulatory definition of existing uses • Existing uses do not mean only current uses
Discussion:	Ecology agrees that the concept of existing uses can be confusing, and has rewritten text in the draft to include the specific regulatory definition, as well as to clarify when current uses are being referred to versus existing uses.

Change in Guidance:	The guidance has been modified to include the specific regulatory definition of existing uses, as well as to clarify when current uses are being referred to versus existing uses. The section on determining existing uses has been modified to provide more clarification.

Issue # 13	**Guidance on determining attainable uses**
Draft guidance:	The draft guidance addresses attainable uses.
Scope of Most Comments Received:	• Need lots more information on determining attainable uses
Discussion:	Ecology realizes that there are numerous specific questions on attainability that will come up when thinking about or conducting a UAA, and that in many cases the questions will be specific to the water body in question. The draft guidance attempts to address the big-picture questions, but cannot give guidance on all specific cases. In many cases the approaches used to address attainability might be developed as UAAs are conducted in different water bodies. In all cases, however, the basic tests on attainability are based on the federal UAA regulations.
Change in Guidance:	The guidance has been modified to be clearer in sections on attainability, but the level of detail of the discussion has not been changed.

Issue # 14	**Antidegradation and UAAs**
Draft guidance:	The draft guidance is silent on the subject of antidegradation.
Scope of Most Comments Received:	• Antidegradation analysis should be applied to water quality standards revisions based on UAAs. • The guidance needs more information on antidegradation and how to coordinate it with UAAs.
Discussion:	Ecology interprets the federal regulations as requiring antidegradation analysis in the implementation of the standards, but not for changes to the water quality standards themselves. By adopting water quality criteria that meet the use protection requirements of the federal regulations, and by implementing our antidegradation policy to protect water quality and uses from any proposed or ongoing sources of water quality degradation, we remain in compliance with federal antidegradation requirements. A formal response to this comment was copied to the USEPA Region 10 and USEPA headquarters so they are aware of Ecology's interpretation so they can notify us if it is not correct.

Change in Guidance:	No change has been made to the draft guidance based on this comment. If EPA notifies Ecology that the interpretation above is incorrect then language will be added as needed to stay in conformance with federal regulations.

Issue # 15	**UAAs, site-specific criteria, and variances**
Draft guidance:	The draft guidance explains that site-specific criteria and variances are other tools that can be used to modify the standards. Specific guidance on SSC or variances is not contained in the UAA guidance.
Scope of Most Comments Received:	• Need more information on site specific criteria • Need more information on variances
Discussion:	The UAA guidance draft is aimed specifically at UAAs, and will not contain specific guidance for site-specific criteria or variances. However, additional language on variances has been added to the draft guidance because in some cases proposed UAAs might result in temporary variances from meeting a standard instead of a use change. Information on these other tools will be found at documents linked to the UAA guidance. The links to the other sites and documents, as well as other links indicated in the draft, will be activated in the final version of the UAA guidance that is released for use.
Change in Guidance:	Unchanged.

Issue # 16	**Thresholds of use to demonstrate that a use is being attained**
Draft guidance:	The draft guidance poses the question of what threshold of use determines the use category, but does not answer the question.
Scope of Most Comments Received:	• A very low level of use (for instance one salmonid wandering into a water body) should indicate that the use is a salmonid use and full protection for that use should be provided • A single occurrence is not necessarily evidence the water body is capable of supporting a sustainable population, and one fish does not match the CWA intent of protecting populations
Discussion:	This is a complicated issue. A conclusion on existing or attainable uses must be supported by a critical examination of questions regarding the potential of the system to support higher quality uses than what exists at the time the fish was found, and must seriously examine the ability of the sampling program to characterize the aquatic life community. But assuming that a defensible basis exists to support the contention that an

	uncharacteristic species entered into the water body, we would agree that that species does not become the benchmark for assigning water quality criteria. However, we do not concur that the CWA is just about maintaining populations of fish and that the criteria can or should be set at levels that just provides for self replication for instance.
Change in Guidance:	The following language has been added to the guidance on existing uses*: "The water quality criteria are based on providing full protection for aquatic communities. The designated uses accompanying the criteria describe healthy communities. In general, one fish wandering into a water body will not be considered to represent the healthy aquatic community best characterizing the site. Instead, the highest quality aquatic community that has been attained in the water body on or after November 28, 1975 will be considered the existing use for the site."*

Issue # 17	**What uses need to be evaluated in a UAA?**
Draft guidance:	The draft guidance indicates that all uses should be evaluated in a water body when a UAA is conducted.
Scope of Most Comments Received:	• In a UAA all the existing uses in a water body should be evaluated
Discussion:	Ecology thinks that all existing uses in a water body should be evaluated during a UAA, but in some cases the evaluation, apart from the use being focused on, need not be an in-depth assessment. For instance, if aquatic life uses are being evaluated the evaluation of recreational use might need only a cursory examination. The determination on how much effort should go into the evaluation should be based on the relatedness of the uses (for instance, is the primary recreation use in the waterbody based on the same factors, such as temperature and nutrients, that are driving the UAA for aquatic life?), as well as on an assessment of whether the criteria changes associated with a use change could affect any other existing use in the water body. As stressed in the guidance, applicants should talk with Ecology prior to planning or conducting a UAA.
Change in Guidance:	The guidance has not been changes in regard to this issue.

Issue # 18	**ESA**
Draft guidance:	The draft guidance contains very precautionary statements about conducting UAAs in waters used by ESA listed species.

Scope of Most Comments Received:	• There are legal paths to use changes in waters with ESA-listed species
Discussion:	Ecology thinks that UAAs can possibly be done successfully in water bodies with ESA-listed species, but from a pragmatic viewpoint our current experience with the ESA consultation over the 2003 water quality standards revisions leads Ecology to think that use changes in these waters may be very difficult indeed. However, there is no statute or regulation prohibiting use changes in these waters, thus the possibility of a UAA being successfully conducted and leading to successful rule-making and EPA approval exists.
Change in Guidance:	The guidance has been modified to address the possibility of successful use changes in waters with ESA-listed species.

Issue # 19	**Grouping Water bodies**
Draft guidance:	The draft guidance does not recommend grouping water bodies for UAAs, but does not state that the approach is unworkable. The guidance lists advantages and disadvantages of the approach.
Scope of Most Comments Received:	• Grouping water bodies should be allowed (should not be prohibited) • Grouping water bodies should not be allowed
Discussion:	Ecology thinks that grouping water bodies for UAAs might in some cases be a viable approach, but recognizes that there are risks inherent in this approach. If a party is interested in pursuing a UAA for multiple water bodies using a grouped (sometimes called categorical) approach, Ecology urges the party to discuss the applicability of the approach to their water body with Ecology prior to expending resources on a UAA study.
Change in Guidance:	The guidance was not changed to either encourage or disallow UAAs for grouped water bodies.

Issue # 20	**Recreational Uses**
Draft guidance:	The draft guidance presented a series of indicators that could be used to distinguish primary from secondary recreation. Indicators included possible use types, and physical and water quality parameters.
Scope of Most Comments Received:	• Provide information on distinguishing the two classes of primary recreation • Secondary recreation fulfills the CWA goal of swimmable • Can only apply primary use if water is deep enough to have complete submergence • Cannot protect “illegal” uses

Discussion:	(1)Determining recreational uses is a complex issue, particularly because the classifications of "extraordinary primary" and "primary" have the potential to have significant overlap in characteristics. It is likely that the first few UAAs that attempt to address this issue will be critical in working out the specific factors that will help determine between the two, and in defining the specific questions that need to be asked to determine the final use classification. Because of the complexity of this issue we recommend that anyone interested in conducting a UAA follow the step-wise process in the draft guidance and work with Ecology to determine the best approach to the project and their specific site. (2) Draft guidance from EPA reiterates their position that secondary recreation does not fulfill the swimmable goals of the CWA: *Nov. 2003 Draft Implementation Guidance for Ambient Water Quality Criteria for Bacteria: "Where states and authorized tribes have adopted uses less than primary contact recreation, federal regulations require a re-examination every three years to determine if any new information has become available to support the designation of a primary contact recreation use. See 40 CFR 131.20."* In order to increase the chances of a UAA applicant producing a successful UAA that can support state rule-making and federal CWA approval Ecology recommends that secondary recreation not be assumed to meet the federal requirements for "swimmable." (3) The definition of secondary recreation is qualified by the requirement that the use NOT normally cause exposure that would result in bacterial infections of eyes, ears, respiratory or digestive systems, or urogenital areas. Children wading in shallow waters are likely to expose eyes, ears, respiratory or digestive systems, or urogenital areas to the waters they are playing in, thus this situation does not fit the definition of secondary recreation. This exposure situation does fit the intent of the swimmable goal of the CWA, which is characterized by primary contact recreation. In situations where children wade in shallow waters Ecology thinks the use of primary recreation fulfills the intent of both the federal definitions and the state definitions of recreational uses. (4) In some cases institutional restrictions, such as local ordinances or no trespassing signs, might be set up to discourage use of the water body. These types of institutional restrictions, as well as some physical features (as discussed later in this section), will not be sufficient in and of themselves, to affect the demonstration of whether a recreational use is existing or attainable. However, in areas where safety is a concern it does not make sense to encourage primary recreational uses. In some cases a designated use of primary recreation could be interpreted as encouraging these types of activities. In determining the level of use that exists or is attainable in the water

	body Ecology will look to language in the preamble to the federal 1982 water quality standards modifications and to EPA guidance as contained in the EPA's *Water Quality Standards Handbook*: *"FRVol.48No.217, 51401: States need to give consideration to the incidental uses which may be made of the water body. Even though it does not make sense to encourage use of a stream for swimming because of the flow, depth or the velocity of the water, the States and EPA must recognize that swimming and/or wading may occur anyway. In order to protect public health, States must set criteria to reflect recreational uses if it appears that recreation will in fact occur in the stream"* "*EPA Water Quality Standards Handbook, 1994, p.2-2: EPA believes that a secondary contact recreational use (with criteria sufficient to support primary contact recreation) is consistent with the CWA section 101(a)(2) goal. The rationale for this option is discussed in the preamble to the Water Quality Standards Regulation, which states:"…even though it does not make sense to encourage use of a stream for swimming because of the flow, depth or the velocity of the water, the States and EPA must recognize that swimming and/or wading may occur anyway. In order to protect public health, States must set criteria to reflect recreational uses if it appears that recreation will in fact occur in the stream"* The language above indicates that a use change could occur in areas that are unsafe for primary contact activities, but that the criterion set for the water body should be protective of incidental uses as well. Therefore, in these situations the possibility exists that a use could be downgraded from primary to secondary, but that the criterion for the water body would need to remain at a level that would be protective of primary recreation. The specifics of this approach have not been fully developed for Washington.
Change in Guidance:	Language addressing extraordinary primary contact has been clarified, and new language has been added. Language has also been added indicating that institutional use restrictions are not in themselves sufficient to demonstrate unattainability of a recreational use, but that use changes might make sense as long as criteria protective of incidental uses are maintained.

Issue # 21	**Subcategories and water body-specific criteria**
Draft guidance:	The draft guidance discusses subcategories of uses and "less than optimal uses", as well as ways to determine attainable uses and how "special conditions" can be set to address subcategories of uses.
Scope of Most Comments	• Information on subcategories is confusing • Need more information on "less than optimal uses"

Received:	• How do "less than optimal uses" and site-specific criteria go together
Discussion:	Subcategories and the level of use support that is existing or attainable are difficult to distinguish and explain. The new 2003 water quality standard's use categories for aquatic life are analogous to EPA's subcategories, and the draft guidance discusses subcategories that are even more finely divided then the 2003 categories. The concept of fully supporting uses is important in determining the attainable use, and is explained in new text in the draft guidance document. New discussion on more generalized (instead of more specific) use categories is also included, which in some cases could make the determination of a new use a more streamlined task. The term "less than optimal" has largely been removed from the report because it leads to the impression that a use is somehow "inferior" and that is not the intent of the discussion in the draft document. Uses in the natural world exist on a continuum, and trying to place them into a classification scheme can be confusing. Discussion about uses is now couched in terms of whether named uses are fully attained based on being fully protected by the criteria. If criteria are not met, then the uses paired with those criteria are not fully attained. That does not mean that a relatively healthy use-type might not exist, but instead indicates that not all uses are fully protected or attained. Site specific criteria development is a separate process from UAAs, and that is explained in the draft guidance. Site specific criteria are based on an assessment that the water chemistry or the biota at the site make the state-wide criterion inappropriate, and when taking into account the chemical characteristics or the biology an equally protective criterion can be developed for the site. A new type of criterion termed a "water body-specific criterion" is introduced in the next draft of the guidance. This new type of criterion is based on the attainable water quality condition corresponding to a subcategory and is fully protective of the attainable use.
Change in Guidance:	New language has been added to the draft that more fully discusses subcategories and water body-specific criteria. Text has been changed to minimize use of the term "less than optimal".