

# NORTHWEST ENVIRONMENTAL ADVOCATES



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Via E-Mail: [cnie461@ecy.wa.gov](mailto:cnie461@ecy.wa.gov)

**Re: Use Attainability Analysis Guidance for Washington State, version 1.2**

Dear Ms. Niemi:

The comments below are filed on behalf of Northwest Environmental Advocates, People for Puget Sound, Puget Soundkeeper Alliance, and Washington PEER. In general, we are unhappy that much of the extensive comments we filed previously have been ignored by the Department of Ecology. Therefore, we incorporate these comments by reference as they remain as pertinent to Version 1.2 of this guidance as they were to Version 1.1. It is very difficult to comment on a document that remains incomplete. For example, a “final working definition” of the term “feasible,” the guidance regarding dams, or any guidance regarding fish harvest, wildlife use, or water supply are not currently available. In the absence of these critical pieces, it is impossible for us to comment on Ecology’s proposed UAA process as a whole. In fact, given that the guidance states it will not even bother to draft the latter three items, this document is defective on its face, will remain so, and therefore cannot be used to downgrade designated uses.

Also discussed below is the fact that Ecology uses ambiguity and uncertainty in which ever way most disadvantages the goal of improving water quality. In the context of TMDLs to clean up polluted water, Ecology argues that an iterative approach must be taken because there is too much uncertainty to know what exact pollution controls are necessary. In the context of UAAs to permanently downgrade the goals for water quality and protection of species and habitat in this state, Ecology argues that uncertainty must weigh in favor of eliminating protection. This is an unacceptable approach and in light of the many threatened and endangered species, as well as locally harmed species, it is very poor public policy for this state.

## Glossary

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The definition of “attainable use” is partially circular. It proposes to determine attainability by defining what is unattainable but it does not state the starting point from which these items will be subtracted. An attainable use should be established by determining what the designated uses and the existing uses are before determining whether something is not attainable.

We will not comment on the “compliance schedules for dams” until such time as Ecology puts out its proposed guidance for dam UAAs.

The definition of “existing uses” is an inadequate method of assuring that waterbodies are protected to November 28, 1975. In many, if not most, cases there will not be surveys, historic records, or anecdotal accounts upon which Ecology can rely to ensure that existing uses and/or the water quality to support such uses is degraded and permanently removed from protection. Ecology has established an impermissible requirement for establishing a use as “existing.” Instead, Ecology must determine other methods of assessing the likelihood of uses and water quality to support uses that were existing in 1975 including professional judgment, modeling, the health of species and the status of their populations. Many of these items were discussed in previous comments and are mentioned in the comments below. In addition, a problem that crops up throughout this guidance is its failure to put the federal regulatory definition into its regulatory context of the antidegradation policy, as discussed below.

As stated above, it is unreasonable to request that the public comment on a guidance document that lacks a final definition of the word “feasible.”

The definition of “highest attainable use” is circular because all it does is quote from a sentence which uses the term.

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The definition of “highest attainable uses for dams” implies that Washington can remove existing uses if they are not capable of being “feasibly achieved.” This is a misstatement of the law.

We are pleased to see, after years of Ecology’s arguing that narrative criteria and beneficial uses are the same thing, that the department now acknowledges that they are distinct.

The definition of “numeric standards” should not be “numeric water quality criteria.” It is inappropriate to confuse standards and criteria particularly in a document in which the distinction is essential to the process and the outcome. Ecology should be able to prepare a guidance document that refers to numeric criteria and not use the phrase “numeric standards” thereby implying that there is such a thing. This only enhances the misconception that the legal definition of water quality standards is restricted to the numeric criteria contained therein.

The definition of TMDLs is inadequate.

The definition of variances states that they can be applied to waterbodies as well as dischargers. This definition is incorrect and insufficient. A variance is discharger-specific, pollutant-specific, and time-limited. There are numerous procedural and substantive aspects to granting variances that this definition should cite in order to be more accurate.

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The definition of “water body-specific criterion” is inaccurate and unclear. First, it states that “in general” it will be the same as the highest attainable water quality for the waterbody. It is not helpful to have definitions that state that in general things will be true because that implies that in some cases it is not true, yet the definition does not tell the reader when those instances will arise. Second, it cites back to a definition that itself is circular (and therefore nonexistent) which, in turn, cites back to the definition of “attainable use.” Comments on the latter definition are set out above.

## **Part 1. How to use this document**

*Page 1*

Further comments on the guidance’s relevance to establishing existing uses is below, however the reference to all data types not being necessary for a specific UAA is misleading. In establishing existing uses, applicants will have to use all data and information that is available, obtainable, or able to be inferred. The further statement in the guidance that not all data types or sources are contained in the guidance, while true, demonstrates the serious weakness of the document. Given that proponents of UAAs are likely to be seeking to downgrade protection of public waters, and that Ecology is likely to rely heavily on the information and data presented by vested interests, it is essential that the guidance set out as much as possible rather than shortcutting. As explained below, where the burden of proof lies is also an essential piece of knowing what kinds of data and information will be required.

## **Part 2. The UAA Process**

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There are references here, as well as throughout the guidance, that the information will be needed by the U.S. EPA as well as Ecology. While it is true that EPA will review the submission prepared by Ecology that will rely in whole in or part on the application for a UAA, the guidance leaves unclear 1) the degree to which Ecology will prepare its own data, information, and analysis rather than merely take the application and forward it to EPA for approval, and 2) the degree to which the EPA may or may not be involved in the process at the

time the application is made to Ecology, as opposed to later review upon its submission. It would be useful if the guidance made these issues more clear rather than leaving it to the readers' imaginations.

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Step 8 sets out Ecology's determination concerning whether a rule change is supported by the UAA and the subsequent actions it will take. What this guidance does not discuss here, or anywhere else in the document, are the policy questions associated with taking these steps including, for example, 1) whether it is a good use of limited state dollars to downgrade water quality standards in light of the other work the Department is not doing, including updating water quality standards to provide the level of protection required by the Clean Water Act, 2) whether it is a good policy choice to downgrade standards even if a UAA is technically allowable given that designated uses are those to which the State aspires, even if they are not achievable in the near term, and 3) whether downgrading standards will have much relevance to providing regulatory relief when Ecology is not able or not willing to enforce water quality standards against many sources of pollution.

**Part 3. Is a UAA right for your waterbody? Basic information to read before going any further.**

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As mentioned directly above, the statement in the first paragraph of this section referring to one way to meet water quality standards is to change the standards does not address any of the policy reasons why Ecology might want to avoid this approach to "meeting standards." Such a big picture framework should be a necessary first step before putting out a guidance document that is intended to induce prospective applicants into submitting UAA proposals. Instead, Ecology acts in this guidance as if there are no policy considerations that come before applying the UAA regulations.

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The first box under UAAs on this chart refers to uses "that don't exist." We strongly recommend that Ecology avoid using such shorthand references to existing uses because it could be misleading to a reader.

The reference to UAAs being undertaken "where the designated uses for the waterbody are suspected to be inaccurate" fails to take into consideration the fact that designated uses set out what the State aspires to achieve in terms of use protection. Nowhere in the CWA does it suggest that states should only protect what was actually existing in 1975. Instead, the exhortation to protect existing uses was a method of ensuring that the states would not choose

goals that allowed water quality to worsen such that it eliminated pre-existing uses. The point of designated uses is not to ensure that they are the same as existing uses but that they set out the higher aspirations of the State for its public waters. To avoid this is to avoid confronting the major public policy question that UAAs entail, including such questions as: What does the public want? What consequences does an alternate approach have for the likelihood that species in the state will be listed in the future as threatened or endangered? What are the policy ramifications of downgrading water quality standards in light of the widespread failure of Washington's waterbodies to meet existing standards including the widespread problems to beneficial uses caused by water pollution? If Washington's waters were clean enough that they were safe for swimming, fish and wildlife were not suffering reproductive failure and other health problems, and subsistence fishers could consume fish without fear of health problems, then Ecology might have a basis for considering downgrading its level of protection. To do so in the absence of meeting these goals is to demonstrate misguided priorities.

The guidance states here, and elsewhere, that where a use is present but the water quality criteria are not met then the use is to be considered not fully supported and needing to be downgraded. We disagree. At the most this is an argument for a site specific or waterbody specific criterion change. There is no basis for changing a use designation where the use is fully supported. Even if the use is present but not as healthy as it could possibly be, to downgrade the use and the criterion is to ensure that the water quality is never improved to recover the full support of the use. This is a nonsensical reading of the UAA provisions.

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Again, the guidance document should state in this section why there is a policy rationale for designated uses being protected in locations where the uses do not presently exist, such as where it is desirable to expand the range of a species that has been placed at risk from water pollution and other types of habitat degradation.

Here and elsewhere in this guidance document it refers to the definition of existing uses from federal regulations. It fails, however, to place the definition in the context of those regulations, namely the Tier I protections of the federal antidegradation policy. 40 C.F.R. § 131.12(a)(1). This policy requires not only that the existing uses be maintained and protected but also the "level of water quality necessary to protect [them]."

In describing the dual focus of a UAA, Ecology once again omits the policy considerations described above. The first bullet should hearken to the comments made below on this page of the guidance stating that if existing uses are not included and protected in use designations, the UAA must result in the upgrading of standards. Likewise, the first sentence of the last paragraph on "upgrading uses" refers to the need for credible information "showing the existence" of a use which is directly contradictory to the definition of existing uses used throughout the guidance document. It becomes clear that it is not an error in writing but in understanding because further

down the guidance refers to uses “occurring at a recent time” as the basis for upgrading a use. This is simply contrary to the federal regulation and demonstrates that Ecology may have inserted a portion of the federal definition of existing uses into its guidance but that it still is intent on ignoring it. Moreover, the discussion of the dangerousness of making upgrades where recreational uses should not be encouraged is irrelevant. First, people who are recreating in dangerous areas are not the least bit aware of whether Ecology has designated those areas for primary or secondary water contact. If they are using the water, however, they are entitled to it being clean. Second, if people are using irrigation supply water, for example, even if it is not desirable to do so, they are using it which makes it a beneficial use. It is all very well for Ecology staff to conclude that people shouldn’t do things but if they have no choice they may do them anyway. Ecology’s only job is to make sure they aren’t poisoned in the process. In addition, this is a slippery slope. The next step will be Ecology’s determining that people shouldn’t eat as much fish as they may do for cultural or economic reasons, concluding therefore that the fish should be allowed to be poisonous because Ecology staff don’t believe they should be consumed at higher levels. Once again, this is not Ecology’s role.

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The first full sentence states says that downgrading can occur if the use is not existing “or” not attainable; this should be changed to an “and.”

The guidance asks and answers “Are UAAs used only to lower protection under the water quality standards?” with the answer “no.” However, the text does not demonstrate that Ecology has any intention of proceeding on spending its resources on anything but downgrading. In asking the question whether existing uses can be downgraded, Ecology states that “enhanced water pollution control options are included “ in the toolbox. Perhaps the department could make it more clear that the Clean Water Act is primarily about treatment of pollution, not changing the rules to make them easier to meet.

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In discussing the role of cost in changing uses, Ecology ignores the question of the enforceability of the water quality standards. How does this enter into an evaluation? Does Ecology just assume that costs are associated even in light of the fact that it does not have or chooses not to use its enforcement authorities over such pollution sources as logging, farming, mining, grazing, and urbanization? Will Ecology make these conclusions based on theory or reality? Will Ecology factor in the costs related to today’s listings of threatened and endangered species and the likelihood of creating more such listings? Will Ecology consider the costs associated with localized extirpations of species?

It is a real problem to put out this guidance for public comment without certain critical pieces, including a definition of the word “feasible.” Ecology should have waited until it was capable of

putting out the entire document.

This section addresses ESA-listed species but is silent on candidate and sensitive species, as well as species that are unlikely to ever be listed pursuant to the Endangered Species Act but which are suffering from local extirpations, such as mink along the Lower Columbia River, or poor health, such as many birds and mammals in Washington waters.

This section on ESA-listed species is one of several where Ecology notes that the water quality standards are not intended to enforce compliance with the ESA. It is not clear why this remark is included. First, it could be misleading to readers who do not entirely understand the consultation process that is required for Washington's standards changes. Second, Section 7 of the ESA enumerates the substantive and procedural obligations of federal agencies with respect to listed species including the affirmative duty of all federal agencies to use their authorities in consultation with the Secretary of Interior or Commerce to conserve listed species. 16 U.S.C. § 1536.

#### **Part 4. General Information about UAAs**

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In discussing the components of a UAA, Ecology lists a few items that could be used to identify existing uses. As explained in our earlier comments and further in these, this is an inadequate approach. Moreover, there is nothing in this explanation of existing use determinations that concerns whether the habitat in question is needed to prevent extirpation or extinction. It is a narrow and scientifically-unsubstantiated approach to limit the consideration of a waterbody to those uses that are currently using it.

*Page 8 (Figure 1 Summary flowchart)*

In the middle of this flowchart there is a box that asks "Are any existing uses more stringent than the designated uses assigned to the waterbody?" It is nonsensical to refer to uses as being "more stringent." There is a box in the upper right corner that asks "Are the existing and attainable uses better represented by using a new use subcategory, a seasonal use, a special condition, or another designated use?" This question is applicable but begs other questions, discussed above, such as what is the state cost for making such changes and would they be worth the expense? In choosing to make these changes, what will Ecology not be doing with its resources? The use of the phrase "better represented" may be justified in a flowchart but it is our opinion that the guidance does not shed much more light elsewhere on what Ecology means by this ambiguous phrase. Finally, this chart does not acknowledge the policy and scientific reasons why the states's designated uses should be aspirational in nature.

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We strongly object to the notion that multiple waterbodies can be grouped in one UAA. It is simply not possible to evaluate existing uses without looking at each waterbody individually. Nor is there a sound policy rationale for downgrading multiple waterbodies in one action. Again, it appears Ecology does not understand the aspirational nature of designated uses that exceed those that are “existing” and perhaps exceed those which are currently achievable. Once downgraded, the State will not likely ever upgrade uses, particularly if they support any of the required CWA section 101(a)(2) uses. In addition, Ecology opens the door to massive downgrading of waterbody protection through the UAA process by stating that groupings not even be limited by hydrological boundaries. Under such a scenario, Ecology should explain in its guidance how existing use protection will be determined, as well as how cost evaluations will be conducted.

We appreciate Ecology’s inclusion of the mandatory review of non-section 101(a)(2) use designations but do not understand why Ecology fails to discuss the additional costs that will be entailed by choosing to engage in such a downgrading. While it is true that Ecology is not required to collect new data for such reviews, this is one more example of how this guidance sticks to the bare minimums of meeting the Clean Water Act and its implementing regulations rather than considering what is good public policy. Does Ecology really want to take the position that if a waterbody is not useable for §101(a)(2) uses and has not been since 1975 that it should be state policy to not obtain new information on attainability? Likewise, while it is correct that many downgrading efforts by Ecology would not trigger this review, is this the policy that Ecology wants to take with regard to protecting water quality in the State? These are very poor policy choices and appear to be ways in which Ecology thinks it can ‘game the system’ rather than meet the intent of the law.

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Ecology’s view of the public involvement process is seriously flawed. While recognizing that the department will conduct its own legally-required process after the applicant gathers information, this process does not recognize that the agency’s process will be after a great deal of money has been spent. The timing of the agency process is such that it will certainly preclude meaningful public involvement in the gathering of information and data at the time when it is being gathered; Ecology is simply not likely to instruct an applicant to go back and gather more after the agency itself has signed off on sampling plans and money has been spent on gathering data. This, however, is a key point in the process and one in which public input should be required. The guidance does not say what happens if an applicant fails to contact the types of groups listed, nor does it address the appropriateness of an applicant “coordinat[ing]” with tribes. Finally, the guidance says nothing about documenting this applicant-led public involvement process or what happens if the public suspicion precludes meaningful public involvement in such a process. Ecology should not delegate early public involvement to a monied interest vested in the outcome of the process.



In this section on what designated uses are, the guidance should explain, as stated above, why we have designated uses and the role that they play. In the section on existing uses the guidance is misleading because it fails to include the Tier I policy at 40 C.F.R. § 131.12(a)(1) and contains a wholly inadequate approach to determining uses that have occurred some time during the last 30 years.

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The discussion of establishing subcategories of uses includes the option of adopting more generalized subcategories along with waterbody-specific criteria. This is clearly an example of going backwards in making the standards more clear and logical. Moreover, this example is premised on a waterbody in which the uses are present but the criteria are not attainable. It is not clear why the uses would have to be changed in order to adopt a new criteria nor does the guidance discuss the policy ramifications of spending resources on such changes or the implications in the long-term of downgrading criteria. This notion that Ecology can determine attainability with precision is completely antithetical to its position that in seeking to restore water quality it must take an iterative approach. In other words, the agency uses ambiguity and uncertainty always to the disadvantage of improved water quality.

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The section on the relationship of uses and water quality criteria is flawed. First, the premise that a use is not fully attained if the criteria are not met is simply not accurate. Ecology's compulsion to blend and blur the distinctions between uses and criteria is not useful. Perhaps, for example, a temperature criterion is not being met but there are thermal refugia allowing full support of the use, why does the department feel the need to downgrade the use or conclude that it is not fully supported? The criteria do not "define the level of use" but rather they are intended to protect the level of use. To apply this to toxic parameters one would conclude that people are not eating fish because tissue residues of toxic contaminants are too high. This is not logical.

This section uses an example where a river has "naturally fine sediment substrate" that precludes its use for spawning. How does the department know this is natural? How does it know that spawning has been precluded in this river since 1975? How does it know that expanding spawning into this river will not be highly desirable considering the status of species that could spawn in it? Why should the criteria that protect this use be downgraded because this use is not currently taking place? Is this a good use of scarce resources considering the widespread loss of spawning habitat?

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The discussion at the top of this page is very disturbing. Here, Ecology states that spawning and rearing by a use "might be present" and actually "appear healthy" but – because it has illogically

already decided that a use cannot be deemed fully supported and therefore granted full support protection through criteria because a single criterion is not met – it will now be subject to downgrading because a single criterion is not met. The intent of the water quality standards is to identify where criteria are not met and remedy the water pollution problem. The intent is not to use any opportunity where unsafe levels of water pollution occur to downgrade the levels of protection to be established now and forever after. Moreover, Ecology appears to be looking forward to this opportunity to downgrade the criteria that it has established when it states this “situation is one we expect to be encountered in some of our waters.”

The next paragraph goes on to merge attainment of use and full support as if they were the same thing. Again, it appears clear that Ecology will allow downgrading if the use is not fully supported in that it is not at its greatest population and health or if the water quality is not what it should be. Instead, its policy should be to expect improvements in water quality such that the populations can rebound and expand, not continue to shrink as a result of worsening the already poor policies that have led the state to the poor quality of its water and the poor condition of its species. Moreover, this paragraph appears to avoid the entire issue of existing uses and suggest that standards should be rolled back because of existing pollution levels. It also introduces the idea that an existing use can come in levels. This is faulty because the presumption should be – with the burden of proof on the proponent of the UAA – that the use if existing today was fully supported 30 years ago. This is true of any existing use: the assumption should be that it was there and fully supported. Putting the burden of proof on those who would seek greater environmental protection rather than rollbacks is to require them to prove something for which there may be no evidence and punish the habitat because of the lack of information. Good public policy entails the opposite.

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In its discussion of the regulatory approach, Ecology states that a decision to add a new use or subcategory will be based on the “need to provide full protection for designated or new uses.” It is not clear that this means. We agree that full support is required but how will this be determined? Will there be an evaluation of the costs to the state to establish new criteria for new uses in lieu of leaving existing uses and criteria in place?

The first example has a number of problems, the first of which is that the third bullet, which states that spawning is not an existing use, contradicts the initial set-up of the example which is that spawning is an existing use. Second, the example states that the level of rearing use since 1975 is unknown. If unknown, then it must be assumed to have been existing in that 30 year period. The policy should support the highest protected use, not the lowest. Finally, there is no mention of whether this is a worthwhile process for use of limited state funds or whether, for example, it would be worthwhile to see what the highest level of water quality that could be attained is before lowering the goal post. There is no mention of whether the opportunity to expand the range of an ESA-listed species outweighs the desire of vested interests to reduce their

possible exposure to enforcement actions if indeed there is any such exposure. Instead, this example just demonstrates that Ecology would forge ahead with rolling back any and all protections if there is the least shred of justification to do so.

The discussion in Example Two suggests that Ecology has an interest in the continued nickel and diming away of water quality and species' protection. Given the widespread failure to meet water quality standards this should not be Ecology's top priority or even a priority at all.

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Example No. 3 asks if criteria cannot be met whether the next level of protection can be chosen instead. Again, this is a waste of resources and suggests a level of precision that simply does not exist. Ecology can model whether criteria are likely to be met but it cannot know what the outcome of real on-the-ground efforts will be. It is one thing to use such a model to set out the tasks that need to be accomplished within a TMDL; it is quite another to use such projections to permanently lower the goalpost in order to establish criteria known to not be fully protective of species. This is poor policy. Please see our comments above with regard to fully supported uses where criteria are not met and expected not to be met. Again, this implies degrees of precision in Ecology's crystal ball that are simply without a basis.

The fourth example discusses infrequent use of a waterbody by a salmonid. While Ecology states with emphasis that "great care must be exercised," it is our opinion that the wholesale loss of habitat for salmonids which are, after all, on the brink of extinction, should result in the policy of erring on the side of the species. All efforts should be made to restore a waterbody that is being used, however infrequently, until such time as it is demonstrated that all steps have been taken to provide the resulting level of support. This could mean that the level of protection is greater than the level that would be provided dating to 1975 but the concept of designated uses is not to match all designated uses to existing uses but to provide sufficient protection to species. After all, if the salmonids are not sufficiently supported, not to 1975 levels of habitat or pollution but to their biological needs, they will cease to exist altogether.

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Page 18 demonstrates a punctuation problem that exists throughout this document where commas and periods are placed outside, rather than inside, ending quotation marks.

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It would be useful if the guidance were more specific about the "various life stages of the associated non-fish species indigenous to that type of waterbody" so that it was clear to the reader if this is in reference to amphibians, for example, or to the prey of the fish species, or both. Without more specific information it leaves it to the reader – member of the public or

proponent of a UAA – to interpret what existing uses might not be covered by the use designations. It also might make it clear where Ecology draws the line between wildlife and aquatic life.

In discussing the size of waterbodies subject to UAAs Ecology also raises the issue of where a use takes place at certain locations within a waterbody. While the example is spawning it could be swimming, wildlife use, fishing, or use by amphibians. It is absurd to think that it is a worthwhile use of resources to determine whether such an activity is stationary over the years or it moves in order to seek a downgrading of the surrounding waters. It is absurd to think that Ecology has the ability to manage water quality so precisely such that the uses would not be affected if the larger waterbody was downgraded. This type of approach to reducing pollution controls was attempted by Oregon, when in the throes of preparing its on-time 304(1) lists it suggested it could list as polluted just those river miles where pulp mills discharged into the Columbia River. This was soundly rejected by EPA as it deserved to be. There are numerous reasons why this entire section should be taken out of the guidance including the fact that uses move, that Ecology does not have the ability to micro-manage at this level, that the department should assume that the uses were existing at a broader range than they are at present, that it is a bad use of funds to engage in this approach, and that it is bad policy to try to restrict habitat in a state that doesn't have enough usable habitat to support aquatic species.

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The discussion at the top of this page concerning economic and social impact appears to have a significant tie-in to the issue of feasibility which is itself not defined in this guidance. This makes it impossible to fully comment on the document. We object to being asked to comment on such a lengthy document with such substantial missing pieces.

In the discussion on how economics are taken into account with UAAs the guidance states that economic and social factors “must be examined” in determining what is attainable. While we agree that Ecology is mirroring the federal regulations we do not agree with the other implication, namely that Ecology need embark on this process at all. A UAA is optional.

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It is impossible to comment on matters related to dams at this time.

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The suggestion that TMDLs can be used to support UAAs is highly questionable because TMDLs usually are done on too broad of a scale to support the type of evaluation of existing uses and attainability that must be done for a UAA. The discussion of attainment for TMDLs fails to mention the issue of the time frame for attainment. Since Ecology plans, apparently, to

attain water quality standards in a couple of centuries, if at all, any attainment analysis for the purpose of UAAs should look at attainment in the same time frame.

In the discussion of initiating TMDLs with preliminary determinations of whether designated uses appear to be “inaccurate” for the waterbodies in question should be added that Ecology intends to take its responsibilities under Tier I of the antidegradation policy seriously as well as will include an analysis of existing uses as part of the development of a TMDL. It should also add in this guidance a third element to what a combined UAA/TMDL might result in, namely adding uses that are existing but have not been designated.

In its discussion of screening factors, the guidance fails to explain what it means when it says that “designated uses must be applied to protect all existing uses.” To this list should also be added a fourth element: reasons why the State might want to preserve a higher use than is either existing or perceived to be attainable at this time. To the list of items in the last full paragraph on this page, discussing when Ecology will determine a UAA is a viable alternative, should be added: 5) it does not interfere with state policies to preserve uses, such as threatened and endangered species, and 6) it is worth spending limited state resources on.

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The first Category 2 screening factor concerns the agreement of federal, state “or” tribal biologists. Given that the intent of a UAA is a permanent downgrading of the use designations, we recommend that the word “or” be replaced with an “and.” In considering the removal of certain aquatic life designated uses, Ecology must ensure that there remain in place criteria that protect at least partially other designated uses that it routinely ignores, such as wildlife. Removal of aquatic uses may lead to no protection whatsoever to fish-consuming birds and mammals, for example.

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We urge the addition of a third element for when a TMDL should be put on hold for a UAA: that it is a good policy choice. The two elements set forth are based on a regulatory perspective not the need for a plan to clean up unsafe levels of water pollution that are affecting human health or contributing to the demise of aquatic species. Additionally, the TMDL components set out that complement a UAA should include an analysis of existing uses which Ecology should know is a part of attainment of water quality standards and should be part of each TMDL completed.

The example on what might happen when the screening step demonstrates a more sensitive use is present fails to include information that demonstrates the waterbody was used in the past for bull trout spawning or that it should be used because the bull trout require a broader geographic range to sustain their populations. While this is merely an example, its inherent limitations as written fail to demonstrate to the reader what it really means to protect existing uses.

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The reference at the top of the page to TMDLs being designed to meet criteria omits that TMDLs are supposed to also meet narrative criteria, use support, and antidegradation policies.

The reference to long-lived toxics as a rationale to modify a use fails to account for existing uses. It also would be extremely poor policy to downgrade uses that exist simply because of high pollution levels. This stems from Ecology's blurring the lines between criteria attainment and uses. It appears that Ecology is looking for ways to reduce its 303(d) list of impaired waters without making any improvements in water quality whatsoever. Additionally, there is no reason to establish variances when pollution controls can be used as needed to meet existing standards.

With regard to the role of standards in supporting the ESA, we reference comments made above.

In the discussion of effluent dominated streams Ecology treats "natural weather patterns" and "water withdrawals" in the same sentence as if they should be treated the same way. We strongly disagree. We also disagree that the notion that polluted water is always good where water is scarce, particularly where streams are naturally ephemeral or intermittent. Aquatic habitat can be polluted causing its own long-term problems with toxic pollution of wildlife attracted to it, or it can be so invaded by non-native species as to not be useful. Its mere characteristic of being wet does not recommend suspending water quality standards to accommodate it. The natural progression of such a view is to suspend the Clean Water Act throughout areas where people have removed too much flow from streams, a widespread problem. We agree that in some situations the discharge must simply be removed. This section should specifically discuss the build up of various pollutants where an effluent dominated stream exists.

The seven conditions are not conclusive of a net environmental benefit. Waters in arid areas is not necessarily ecologically valuable and should not be deemed so in order that Ecology can suspend the Clean Water Act's application to naturally or anthropogenically dried up streams. The meaning of "quantities" when attached to "persistent or bioaccumulative pollutants" does not help the reader in understanding what Ecology means by this sentence. The fourth element includes the word "feasible," rendering us unable to comment on it. In any case, this guidance should specifically discuss flow augmentation, dilution, treatment, etc. The fifth element should explicitly include sediment quality. It is unclear what Ecology thinks could be used to attain the legal commitment referred to in the last element. The guidance should explain this.

#### **Part 5. Economic analyses for UAAs**

As stated above, asking for public comment without a definition of feasible makes it impossible to comment on this document, particularly this section. In addition, the guidance does not make clear the time frames in which attainment will be evaluated nor does it consider whether the

standards are enforceable, for legal or political reasons, and how that does or does not enter into the economic evaluations.

## **Part 6. Use-specific guidance for UAAs**

### *Page 32*

As stated above, we disagree that not all data types are necessary for addressing questions of existing uses.

### *Page 33*

As stated above, the existing use definition without the Tier I protection is misleading and incorrect.

### *Page 34*

In the discussion of whether a designated use is attained Ecology determines that a use should be protected unless it's ESA-listed or otherwise impaired – i.e. not at “healthy levels” – which is not a good policy. With regard to criteria not met when uses are supported, please see above.

### *Page 35*

Please see our previously submitted comments regarding why the discussion on how to assess the existing uses is totally inadequate. With regard to the levels of existing use, Ecology should explain why this approach is justified on the basis of public policy. Why does the agency seek to decrease rather than increase the amount of aquatic habitat available to species many of which are threatened with extinction or local extirpation?

### *Page 36*

We agree that use of degraded sites for reference “may introduce error” and strongly object to this as the basis for establishing biological potential. Given that the setting of water quality standards is not and can never be a precise exercise, Ecology should simply err on the side of designating uses in a more geographically broad manner rather than attempting to finely hone the minimal required uses to every mile of stream present in the State of Washington. In taking this approach, it will not need to focus on things such as reference sites.

### *Page 38*

The study design should be put out for public comment because otherwise the public input will come after most of the money has been spent. There are innumerable ways in which study

design can be used to ignore what the true subjects of the study should be including, for example, people choosing the wrong species, homogenizing samples inappropriately, taking samples from the wrong places, failing to look for a full range of species, making inappropriate assumptions about what aquatic life is consumed by which species and people, failing to look at sublethal health effects, analyzing cuts of fish that do not correspond appropriately to the uses. Here, if the public including, scientists and long-time users of waterbodies, is to have input at a meaningful time it must be at the outset of the process.

*Page 41*

This aquatic habitat checklist omits any reference to wildlife as a designated and existing use.

*Page 48*

Please refer to our comments on Version 1.1 regarding existing use evaluations as the guidance remains highly inadequate in this regard. In addition, while the guidance discusses “the entity” searching for information – none of which it actually wants to find – this guidance does not state what Ecology is going to do to ensure that the searching was adequate, the assumptions were correct, etc. This is a serious flaw in Ecology’s plan to downgrade uses in Washington. Also, as stated above, this guidance fails to establish where the burden of proof lies.

The same comments as made in the paragraph immediately above apply to the section on the entity identifying the causes of impairment.

*Page 49*

As stated above, making the water clean in areas where it may not be physically safe to use water does not encourage users. People generally are not able to discern if water is polluted, particularly with human pathogens which are invisible, and most people do not read the 303(d) list before they decide to use some water for recreation or other, even more essential, purposes.

*Page 51-52*

Ecology should clarify some of its discussion about the hazardous physical aspects of certain waterbodies and how these statements are consistent with the excerpts from EPA’s Gold Book included in the document. With regard to data sources, Ecology should understand that there are likely limitations to what the UAA proponent will be able to find out particularly if people are concerned about being ‘caught’ doing something they fear is wrong or because of their immigration status, for example. Similar limitations may be associated with Ecology’s doing the same investigations. It may be more appropriate for a neutral party to be hired to accomplish these tasks. Again, as stated above, this guidance needs to establish where the burden of proof lies. It is possible that Ecology could establish a different burden for different uses as well as



different starting assumptions for differing situations. For example, if a constructed watercourse is surrounded by barbed wire, it would be an acceptable assumption to believe that – unless evidence to the contrary demonstrated a human use – there was no human use of the water. On the other hand, in most cases we believe the burden should be on the proponent to demonstrate that the designated uses have not existed nor should they be protected for other reasons, e.g., the need for more habitat. The fundamental problem is that Ecology has not grappled with the problem that it is asking proponents of downgrading to obtain information that they do not want to find or report.

*Page 55*

It remains totally unacceptable that Ecology is planning on entertaining UAAs without having completed the sections on water supply, fish harvest, and most of all wildlife uses. At the very least, perhaps Ecology could tell the readers how UAAs will be completed without addressing these existing and designated uses? As discussed above, removing aquatic use designations and their associated criteria may have effects on other uses that require protection but which on this page Ecology suggests they will ignore.

**Part 7. Submittal of the UAA to Ecology**

*Page 56*

We suggest that this section be far more detailed in order that the public interest be served and the private interests not be misled. Most, if not all, of these elements to be included in a report by the proponent of a UAA are simply too vague and open to interpretation. The use of words such as “description” and “summary” are too subjective. This should be a very detailed scientific report and there does not need to be left much ambiguity in what it should include and how it should be presented.

**Part 8. Ecology Review and Actions**

*Page 56*

It is impossible to comment on the tribal consultation when the section is not yet drafted.

There appears to be an inconsistency in the paragraph concerning Ecology’s review of a submitted UAA proposal. It states that a review of the UAA is dependent upon staff resources. It then states that a decision to not proceed towards rule-making means the submittal is clearly deficient. These two statements are not consistent because a negative 60-day decision could be either a finding of deficiency or a lack of staffing.

*Page 57*

Cheryl Niemi (Comments on UAA Guidance, Version 1.2)  
September 16, 2005  
Page 18

We strongly object to the statement that if done properly, a UAA can be accomplished within three months. It is inconceivable that in three months Ecology can make independent determinations not based entirely on the submittal of a vested interest and fully involve the public as well as the agencies, tribes, and “other groups” that are mentioned Ecology will “confer” with.

Ecology hints that – for unknown reasons – a use change may not be appropriate even if the “UAA supports a thorough review” yet this guidance document fails to explain why this might happen. We strongly urge Ecology to consider what state policies are at stake in this process so that the public will know in advance and proponents will as well. This is not a confirmation hearing for a U.S. Supreme Court nominee; you do not need to hide the ball!

Sincerely,

Nina Bell, Executive Director  
Northwest Environmental Advocates

and on behalf of

Heather Trim  
People for Puget Sound

Sue Joerger, Puget Sound Keeper  
Puget Soundkeeper Alliance

TJ Johnson, Director  
Director, Washington PEER