STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
4601 N. Monroe, Suite 202 • Spokane, Washington 99205-1295 • (509) 456-2926

June 26, 2000

Ms. Nan Nalder
Acres International
150 Nickerson Street, Suite 310
Seattle, WA 98109

Dear Ms. Nalder:

Re: Request for Water Quality Certification
Application for Subsequent License
Cedar Creek Project, FERC Project no. 2103-A
Cominco American Incorporated

Cominco American requested a water quality certification persuant to Section 401 of the federal Clean Water Act on February 10, 2000. A water quality certification is required for federally licensed or permitted activities that will cause a discharge to the nation's water. After reviewing the material presented in Cominco American's pre-filing draft of the Application for Subsequent License, and conferring with two of the consultants who conducted field studies for this report, the Department of Ecology is waiving Section 401 Water Quality Certification for the Cedar Creek project. There are no known discharges of pollutants into Washington State waters caused by project lands in the United States (the 2.4 acres of land along Cedar Creek in Stevens County, Washington).

If you have any questions regarding this matter, please feel free to call Jean Parodi at (509) 456-6160.

Sincerely,

Carl J. Nuechterlein
Section Manager
Water Quality Program

CJN:JP:slt

cc: Bruce DiLuzio, Cominco American Inc., Spokane
Kelly Cairns, Cominco LTD, Trail
Deborah Mull, Attorney General's Office, Olympia
Jeff Marti, Department of Ecology, Lacey
Hector Perez, FERC, Washington DC

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

APR 7 1986

MEMORANDUM

SUBJECT: Determination of "Existing Uses" for Purposes of Water Quality Standards Implementation

FROM: Patrick Tobin, Director Patrick Tobin
Criteria and Standards Division (WH-585)

TO: Water Management Division Directors, Regions I-X
WQS Coordinators, Regions I-X

The antidegradation policy calls for the protection of existing uses and the level of water quality to protect those uses. Questions continue to be asked on defining existing uses, particularly in the recreational area, and who defines them. This memorandum provides guidance on these questions.[1]

Recreational uses have traditionally been divided into primary contact and secondary contact recreation (i.e., swimming vs. boating; that is recreation "in" and "on" the water.) However, these two broad uses can logically be subdivided into an almost infinite number of subcategories (e.g., wading, sailing, power-boating, rafting, etc.). The water quality standards regulation does not establish a level of specificity which each State must apply in determining what "uses" exist. However, the regulation directly or indirectly establishes the following principles applicable to that process.

The State selects the level of specificity it desires for identifying existing uses (that is, whether to treat secondary contact recreation as a single use or to define subcategories of secondary recreation). There are two limitations to the State decision: (1) the State must be at least as specific as the uses listed in sections 101(a) and 303(c) of the Clean Water Act, and (2) the State must be at least as specific as the written description of the use classifications adopted by the State.

If the State use classification system is very specific in describing subcategories of a use, then such specifically defined uses, if they exist, must be protected fully under our regulation

[1] With regard to aquatic protection uses, questions 7, 10, 11, and 16 of Questions and Answers on Antidegradation provide guidance for determining whether such uses exist, as does the Waterbody Survey and Assessment Guidance in Chapter 3 of the Water Quality Standards Handbook.)

and policies. A State with a broadly written use classification system may, as a matter of policy, interpret its classifications more specifically for determining existing uses - as long as it does so consistently. A State may also redefine its use classification system, subject to the downgrading constraints in 40 CFR 131.10.

If the use classification system in a State is defined in broader terms such as primary contact recreation, secondary contact recreation, or boating, then it is a State determination whether to allow changes in the type of primary or secondary contact recreation or boating activity which would occur on a specific water body as long as the basic use classification is met. For example, if a State defines a use simply as "boating", it is the State's decision whether to allow something to occur which would change the type of boating from canoeing to power-boating as long as the resulting water quality allows the "boating" use to be met. (The public record used originally to establish the use may provide a clearer indication of the use intended to be attained and protected by the State.)

Our rationale is that the required water quality will allow a boating use to continue and that use meets the goal of the Act. For EPA to determine for a State what kind of boating, fishing, or recreation that should occur, where the question has not been addressed through the State's use classification system, appears to us to be extending a Federal presence beyond the scope intended by the Clean Water Act. Water quality is the key. This interpretation may allow a State to change activities within a specific use category but it does not create a mechanism to downwardly change use classifications - this latter action is governed solely by the downgrading provisions of the standards regulation (§131.10(g)).

One situation where EPA might conceivably be called upon to decide what constitutes an existing use is where EPA is writing an NPDES permit. EPA has the responsibility under §301(b) (1)(C) to determine what is needed to protect existing uses under the State's antidegradation policy, and accordingly may define "existing uses" for the purpose of writing that permit if the State has not done so.

Ordinarily, it is the State which selects the level of specificity for identifying existing uses within its waters; EPA has the right of review and approval/disapproval just as we have on any aspect of water quality standards. (The general process, including emphasis on the State role, is described in the Water Quality Standards Handbook (pages 1-4 to 1-6)).

cc: James M. Conlon
Ed Johnson
Ned Notzon
Rebecca Hanmer
Martha Prothro
Bill Whittington
Cathy Winer