Message

From: Bouma, Stacey [Bouma.Stacey@epa.gov]
Sent: 9/30/2020 1:11:07 PM
To: Able, Tony [Able.Tony@epa.gov]
Subject: RE: Tony re GA Narrative - discussion and proposed changes

I agree that should be added.

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From: Able, Tony <Able.Tony@epa.gov>
Sent: Tuesday, September 29, 2020 5:03 PM
To: Bouma, Stacey <Bouma.Stacey@epa.gov>
Subject: RE: Tony re GA Narrative - discussion and proposed changes

Stacey: Based on this language from Lisa, I would add a bullet to what you provided. *In that same vein of trying to help to clear up confusion on this topic, during the 9/10 briefing, the RA said multiple times that the change was not a change to standards and that the state of Georgia does not consider this a change to standards. I, again, reviewed the GA EPD submission. When referring to the change itself GA EPD referred to it consistently in all documents as, "adopted amendments to Georgia's water quality standards, " and/or "rule amendments..." It was stated in the AG Cert that it was a change duly adopted by law. The state submitted it as a change to standards and asked for EPA to review it as a change to standards under 40 CFR 131.21. That is, the RA is taking a position that is not supported by the state. I was unable to get in to clarify this for the RA during the briefing.*

What do you think

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From: Bouma, Stacey <Bouma.Stacey@epa.gov>
Sent: Tuesday, September 29, 2020 2:52 PM
To: Able, Tony <Able.Tony@epa.gov>
Subject: Tony re GA Narrative - discussion and proposed changes

Tony, before reaching out to Lisa, Jamal, Michele, here is what I think we may want to change for the briefing paper on the second option (to try and minimize changes). Basically took out any wording related to "editorial".

Option 2 - Full approval of the revisions: approval of "designated use of the water body" revision and approval of "unreasonably" revision.

- Rationale:

i. The "designated use of the water body" revision satisfies 40 C.F.R. § 131.11 and is consistent with the CWA.

    1. The term "Designated uses" is defined in 40 C.F.R. § 131.3 while the term "legitimate water uses" is broader and not defined in the rules or the statute. Pursuant to 40 C.F.R. §§ 131.5 and 131.11, states must adopt those water quality criteria that protect the designated use therefore this revision is consistent with the requirements of 40 C.F.R. Part 131.

ii. Georgia indicated that adding the word 'unreasonably" is a clarification only and not a substantive change in their historical application of the narrative standards.

    1. EPA would rely on GAEPD's submission and supplemental memorandum.

- Considerations:

    i. The Region's record, including our October 5, 2018 letter, indicates that we view this as a new or revised standard for which the minimum submission requirements under 40 C.F.R 131.6 must be met.
    ii. The state submitted it as a change to standards and asked for EPA to review it as a change to standards under 40 CFR 131.21
    iii. The narrative criteria apply to all waters in Georgia. Approval would require ESA consultation or documentation in the Administrative Record on the change having no effect therefore consultation not being needed. The Services have expressed concern that the change will have an effect on threatened and endangered species.
    iv. Citizen public comments overwhelmingly did not support the revisions (over 550 commenters stated the revisions would weaken the WQS).

- Litigation Risk: This is a case of first impression and therefore difficult to accurately estimate litigation risk but ORC believes the litigation risk is Significant to High if the Agency were challenged under the APA as arbitrary and capricious and not in accordance with the law. The Agency would be vulnerable based on an administrative record lacking the required scientific rationale that the revised criteria protect the designated uses.

1. Option 2 - Full approval of the revisions: approval of "designated use of the water body" revision and approval of "unreasonably" revision.
    - Rationale:
        i. The "designated use of the water body" revision satisfies 40 C.F.R. § 131.11 and is consistent with the CWA.
            1. The term "Designated uses" is defined in 40 C.F.R. § 131.3 while the term "legitimate water uses" is broader and not defined in the rules or the statute. Pursuant to 40 C.F.R. §§ 131.5 and 131.11, states must adopt those water quality criteria that protect the designated use therefore this revision is consistent with the requirements of 40 C.F.R. Part 131.
        ii. ~~The revision adding~~ Georgia indicated that adding the word "unreasonably" is a clarification only and not a substantive change in their historical application of the narrative standards. ~~the phrase "unreasonably" is editorial and therefore the minimum requirements under 40 C.F.R. 131.6 are not necessary.~~
            1. EPA would rely on GAEPD's submission and supplemental memorandum.
    - Considerations:
        i. The Region's record, including our October 5, 2018 letter, indicates that we view this as a new or revised standard for which the minimum submission requirements under 40 C.F.R 131.6 must be met.
        ii. ~~This change is inconsistent with what the Region or other Region's consider editorial.~~
        ~~iii. If we consider this editorial it would be the Region's first instance of approving a change to WQS without the minimum submission requirements under 40 C.F.R. § 131.6.~~
        iv.iii. The narrative criteria apply to all waters in Georgia. Approval would require ESA consultation or documentation in the Administrative Record on the change having no effect therefore consultation not being needed. The Services have expressed concern that the change will have an effect on threatened and endangered species.
        v.iv. Citizen public comments overwhelmingly did not support the revisions (over 550 commenters stated the revisions would weaken the WQS).
    - Litigation Risk: This is a case of first impression and therefore difficult to accurately estimate litigation risk but ORC believes the litigation risk is Significant to High if the Agency were challenged under the APA as arbitrary and capricious and not in accordance with the law. ~~Typically, editorial revisions do not have support in the record because they obviously do not change the condition of the waterbody and require no justification or explanation.~~ The Agency would be vulnerable based on an administrative record lacking the required scientific rationale that the revised criteria protect the designated uses ~~and with a decision that expands the characterization of editorial changes.~~