Message

From: Wetherington, Michele [Wetherington.Michele@epa.gov]
Sent: 6/18/2019 5:58:12 PM
To: Gordon, Lisa Perras [Gordon.Lisa-Perras@epa.gov]
CC: Cooper, Jamal [cooper.jamal@epa.gov]; Bouma, Stacey [Bouma.Stacey@epa.gov]
Subject: RE: GA Narrative Discussion

Jamal,
Do you want to reply all to Erica's last email (below from Saturday) with the below framework for our call? This might let us jump right in at 11am. Feel free to edit and tweak the language however you'd like, of course.

Erica,

Thanks for sharing your questions and thoughts to help with framing our call tomorrow. We believe we are bound by the state's acceptable interpretation of its standard. We agree with the state that it could interpret its narrative before the revisions in a "reasonable" manner, which is what the state court decision confirmed in the Court of Appeals. To frame the call, we'd like to walk through the following points:

- EPA defers to a state's reasonable interpretation of a narrative, and agrees with the state court finding that GA's interpretation of its previous narrative included a level of reasonableness, instead of any interference. EPA is not bound by wording in a state court decision. In October, EPA asked the state to clarify problematic language in the decision that is in the language you pasted below, regarding balancing competing uses of the river. EPD clarified that for waters with multiple use designations, the WQS must support the most sensitive use.
- This revision takes implicit reasonableness in finding interference, and makes it explicit. The scientific context of adding explicit unreasonable interference may change the ambient condition in the waterbody, making the revision substantive. Before, EPD could find interference in a reasonable manner. With the revision, EPD still finds interference in a reasonable manner, then can determine whether that inference is unreasonable/acceptable.
- Making reasonableness explicit instead of implicit changes the standard technically and in practice:
    - Two other regional states have used "unreasonably" explicitly in narratives, and these examples clearly show the word to mean a less stringent/more permissive standard through selective placement within the narratives.
        - FL Class V Waters for Navigation, Utility and Industrial Use: only for odor producing substances, not included for oil interference; approved in 1973; state no longer puts waters in this class
        - AL outstanding water, fish and wildlife, shellfish harvesting uses: only for affects to aesthetic value, not included for toxicity, marketability or palatability, unsafe or unsuitable for contact; reviewed in 1966
    - The attachment of non-substantive revision examples.

Talk to you tomorrow.
Thanks,

Thanks,

Michele

From: Wetherington, Michele
Sent: Monday, June 17, 2019 6:15 PM

To: Gordon, Lisa Perras <Gordon.Lisa-Perras@epa.gov>
Cc: Cooper, Jamal <cooper.jamal@epa.gov>; Bouma, Stacey <Bouma.Stacey@epa.gov>
Subject: RE: GA Narrative Discussion

I talked with Tom Glazer in OGC today, we had a great conversation. He is trying to tell us what he thinks will not get past David Ross. In summary, a plain reading of the text, with the addition of the word unreasonably, is not going to be compelling to David. On its face, the revision does not appear problematic or to change the narrative from what the state court said is a fine interpretation. I think this is true. Legally, just reading the words on the page, I can make the argument that the word does nothing but clarify what EPD meant it to mean. So, he suggested targeting our approach in this manner:

- The state court decision is not controversial. EPA defers to a state's reasonable interpretation of a narrative.
- This revision takes something that was implicit, and adds it to be explicit. (again here, on its face, there is nothing obviously wrong with that in the text so we have to add technical context.)
- Articulate why making reasonableness explicit instead of implicit changes the standard. In practice and technically, what happens on the ground?
    - **Discuss and provide the language where the two other regional states have used reasonable explicitly, and say why those two examples show a clearly weaker/less stringent/more permissive standard. So our states understand that using the word weakens the standard.**
    - **Describe how reasonableness is a term of art in a narrative standard that has a recognized effect on the standard.**
    - Ask Erica for any other national examples, maybe if you want. She could come back with something that hurts our argument here and if she does, we can stick to only using R4 state examples.
    - The attachment of non-substantive examples is helpful as an addition, but probably not enough to carry our argument through David Ross.

At the end of the day, the lawyers can describe a path that supports what the client wants to do, i.e., call this a substantive change, so that is the end of our job and then David will make whatever decision he finds best supported. Tom and I agree that EPA is not headed down a path of promulgation via a 303(c)(4)(b) determination on this. Its also unlikely that we'd overlist based on a finding that the state wasn't interpreting the narrative properly, but that is theoretically in the realm of possibility. No need to discuss this whole line, in my opinion.
Tom and I agree that the GA Supreme Court affirming the Court of Appeals decision does not change any of the above, we'd be in the same place. If they reverse, we'd have more support for a disapproval, so this is one argument to continue waiting.
OGC is fine being blamed for any backlog issue related to this matter.

Regarding Erica's framing below, I disagree with her initial premise and do not want to follow that. See my first point above, the state court decision is not controversial. To address her dichotomy, I would say we are bound by a state's reasonable interpretation of its standard, which is not her numbers 1 or 2, and in this case is a reasonableness to the finding of interference. EPA does not think one kayaker on one day smelling odor means the use is not being met; rather, it can be weight of the evidence. We don't have a good argument against the Court of Appeals' finding that the EPD can reasonably interpret its narrative. But we aren't bound by a state court decision. Also, the court case language she pasted at the end has the problematic phrase that we got EPD to counteract in their supplemental memo: "and the need to balance the competing uses of the river", again supporting how we aren't bound by state court language.

So let's stick to the above framework in my bullets. I'll need help talking about the bold/underline bullets from you. I have the chart you made with the AL and FL uses of the word. Any other way you'd like to describe or explain a technical context for the word in narratives?

Thanks,

Michele

From: Gordon, Lisa Perras
Sent: Monday, June 17, 2019 8:07 AM
To: Wetherington, Michele <Wetherington.Michele@epa.gov>
Cc: Cooper, Jamal <cooper.jamal@epa.gov>; Bouma, Stacey <Bouma.Stacey@epa.gov>
Subject: FW: GA Narrative Discussion

Michele, Erica's thoughts. Lisa

From: Fleisig, Erica
Sent: Saturday, June 15, 2019 5:10 PM
To: Gordon, Lisa Perras <Gordon.Lisa-Perras@epa.gov>; Ludwig-Monty, Sarah <ludwig-monty.sarah@epa.gov>; Cooper, Jamal <cooper.jamal@epa.gov>
Subject: RE: GA Narrative Discussion

Hi Lisa,

Thanks to you guys too, that was a really helpful discussion for us. I think that's a good plan to start with that threshold question. Here are some questions and thoughts to hopefully help with framing:

1. Helpful for you guys to explain R4's treatment of "non-substantive" revisions in the past – e.g., re-numbering, fixing spacing; not just things that don't change the meaning of a provision.
2. Then there's the question of whether the state is changing the meaning of this provision. To get at this, it would be helpful to hear from the lawyers whether the previous meaning that we are bound by is the words on the page, or the words on the page as interpreted by the state Superior Court (I pulled out the section below that I think is most pertinent).
    a. If they say it's simply the words on the page as we had previously approved them, then I think this clearly is changing the meaning and then we'd have the question as you point out of whether they satisfied the bar of supporting that change (definitely not).
    b. If they say it's the words on the page as interpreted by the Superior Court, then I think the new language isn't changing the meaning, it's codifying what the state said was the existing meaning all along. And then it would be helpful to discuss what our recourse is if we don't agree with that meaning and don't think that meaning is consistent with CWA requirements (e.g., disapproval or determination).
        i. And for this, I think your analogy of "what if the state previously had a narrative that a state court interpreted to mean "=100mg/L" of a particular pollutant, and we don't agree that 100mg/L is the right number – shouldn't we be able to disapprove the 100mg/L as a change to WQS?" Maybe we can treat this submission as codifying the court's ruling, and disapprove it and then it would revert to the previous version of the narrative but not with this Superior Court interpretation? I think when we talked previously we thought that disapproval would be an easier sell if we had a state supreme court ruling in our favor (reversing this earlier ruling), but maybe we don't need that now post-Dave Ross memo.

I look forward to the discussion next week, thanks so much for your time on this!
-Erica

"Protecting the use of water from "unreasonable interference" rather than "any interference" is reasonable and consistent with the WQCA and its purpose. Where the color levels set in the Permit are reasonable and consistent with EPD's interpretation of the standard and the need to balance the competing uses of the river, the Court finds that, despite evidence of minor interference with the use of this portion of the river at low flow conditions, such interference would not be unreasonable in light of the need to accommodate multiple uses of the river and maximize the State's water resources for all people. Despite the ALJ's erroneous interpretation of the standard. her detailed findings of fact allow the Court to apply the proper interpretation of the standard to this case. Her findings regarding extensive use of this portion of the river for fishing and recreation33 establish that Rayonier's discharge does not unreasonably interfere with legitimate uses of the river so as to violate the narrative water quality standard."

From: Gordon, Lisa Perras
Sent: Friday, June 14, 2019 11:12 AM
To: Fleisig, Erica <Fleisig.Erica@epa.gov>; Ludwig-Monty, Sarah <ludwig-monty.sarah@epa.gov>; Cooper, Jamal <cooper.jamal@epa.gov>
Subject: GA Narrative Discussion

Erica, Sarah,

Thanks for making the time to talk yesterday – much appreciated that everyone stayed late so we could fit that in.

To make sure that we meet all of the deadlines coming up, I thought it might be helpful to focus next week's call on the substantive vs. non-substantive discussion. Yesterday, Jamal walked through the decision flow chart that we use for reviews. The state and EPA are in agreement that this is a change to standards – there's no dispute there. So, the next step on the flow chart is whether it is sub v. non-sub.

We could walk through our review of why we find it substantive and talk through any questions you may have. If we can work through any issues regarding that, then we can move through to the next part of the decision tree, such as what types of 131.6 materials we would have expected to see so that we could do our review. Does that work for you guys? Looking forward to continuing the discussion.

Lisa

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