Message

From: Wetherington, Michele [Wetherington.Michele@epa.gov]
Sent: 8/31/2020 7:50:25 PM
To: Cooper, Jamal [cooper.jamal@epa.gov]; Gordon, Lisa Perras [Gordon.Lisa-Perras@epa.gov]
Subject: FW: GA Narrative Revisions, Non-substantive Examples
Attachments: Legal Analysis GA Narrative 08 25 2020.docx

I emailed Tom Glazer as directed by Leif. He brought in Erica, see our string below. Jamal I said I'd talk more with Erica but at this point I think these emails suffice.
I created the attached legal briefing sheet last week and sent it to Mita Thursday morning for edits. I haven't gotten any back yet. I just added a sentence on the ALJ using the bad EPD interpretation to the sheet this afternoon per Erica's message below.
I think this may sound different than what we've been saying about how the 4 part test applies. We can chat any time once you have thoughts.

Thanks,

Michele

From: Fleisig, Erica <Fleisig.Erica@epa.gov>
Sent: Monday, August 31, 2020 3:15 PM
To: Wetherington, Michele <Wetherington.Michele@epa.gov>; Glazer, Thomas <glazer.thomas@epa.gov>
Subject: RE: GA Narrative Revisions, Non-substantive Examples

FWIW, in talking to Corey some more this morning we feel like the ALJ final decision you shared (particularly this sentence: "However, applying the standard as articulated by the Court of Appeals, which allows EPD to weigh the various legitimate uses of Georgia's waterways and balance a host of competing values, including conservation, industry, and recreation, the Court is unable to conclude that ARK met its burden to prove that the NPDES Permit issued to Rayonier will allow unreasonable interference with the rights of the public to use and enjoy the Altamaha, even during low flow conditions.") makes the argument from our Sept 2019 briefing paper (pasted below) even more compelling. Essentially we can't defer to a court interpretation that interprets a WQS provision in a way that is contrary to the CWA. I think Sara might reach out to Jeanneanne to discuss this a bit more in advance of your briefing with the RA, so I'll give Lisa P-G and Jamal a heads up on that.

From: Wetherington, Michele <Wetherington.Michele@epa.gov>
Sent: Wednesday, August 26, 2020 10:22 PM
To: Fleisig, Erica <Fleisig.Erica@epa.gov>; Glazer, Thomas <glazer.thomas@epa.gov>
Subject: RE: GA Narrative Revisions, Non-substantive Examples

Hi,
Your point in 1 is well taken. And it is what Tom said, does not change the level of protectiveness, I can see now. I've edited my materials accordingly, now that my brain has fully let that meld together. I appreciate you guys helping me clear up that reasoning.

Thanks,

Michele

From: Fleisig, Erica <Fleisig.Erica@epa.gov>
Sent: Monday, August 24, 2020 7:13 PM

To: Wetherington, Michele <Wetherington.Michele@epa.gov>; Glazer, Thomas <glazer.thomas@epa.gov>
Subject: RE: GA Narrative Revisions, Non-substantive Examples

Hi guys,

I'll think more on this, but I'm glad Lisa reached out to the other regions since my memory only goes so far. Two things I wanted to react to:

1. I don't think we'd argue that the revisions don't meet a part of our 4-part test and that the addition of unreasonably "does not have the effect of expressing or establishing the desired ambient condition for waters." I think we'd say that it doesn't have the effect of *changing* that already established desired condition, given the baseline of the court's interpretation of that narrative (and no other interpretation to go on from when GA originally submitted and EPA originally approved).
2. I think we share your discomfort with the court's decision and GA's statements. I sent this to Lisa and Jamal last week, but I wanted to make sure you had handy the attached paper that we used to jointly brief Sara and Jeanneanne back in Sept 2019. In the attached (also pasted below) is the best argument we at HQ could see for disapproval (essentially saying that the state's interpretation of that narrative, as per the court decision, runs counter to the CWA).

OST positions:

- It is very challenging to argue that "reasonableness" is not an inherent part of any narrative interpretation and that GA's language change is therefore substantive, particularly given the vagueness of the terms often used in those narratives and the deference typically afforded to states in interpreting their own narrative regs and uses. The record becomes even more challenging where we did not object to the permit written under the prior version of the narrative. Moreover, EPA has asked the state to clarify what is reasonable (e.g. how large the area), which supports the argument that there can be some reasonable interference with a designated use. Also, this need for clarification could, arguably, extend to any ambiguous term, including existing terms in GA's narrative such as "sufficient" and "unsightly", which we have no examples of nationally.

- However, we could point to the WQS regs to support the position that the change was substantive (and the permit was issued in error), that a disapproval is warranted, and that this is an instance in which deferring to the state would exceed EPA's statutory authority. The Court of Appeals decision misconstrued some important aspects of the CWA. In particular, the regs and the CWA do not establish a "need to balance the competing uses of the river", as the court stated, where those uses are not on equal footing. 40 CFR 131.11(a) provides that the criteria must protect the most sensitive use, which would arguably be recreation and fishing in the underlying case; moreover, those uses are singled out for protection by section 101(a)(2) of the CWA, as opposed to uses such as an industrial use for the paper mill. We would therefore be saying that it is not "reasonable" for the latter use to interfere with the former, except in the mixing zone context where we have carefully prescribed the circumstances under which such an interference with a 101(a)(2) use can be warranted. Because the Court seems to have misconstrued this aspect of the CWA, we might say in a disapproval that the kind of reasonableness articulated by the Court (and requested by the State) is inconsistent with the CWA. In other words, unless the State can provide further clarification about what it means by "unreasonable" interference and assurance that that interpretation is consistent with the CWA, EPA cannot approve such a revision as consistent with CWA requirements.

From: Wetherington, Michele <Wetherington.Michele@epa.gov>
Sent: Monday, August 24, 2020 2:37 PM
To: Glazer, Thomas <glazer.thomas@epa.gov>; Fleisig, Erica <Fleisig.Erica@epa.gov>
Subject: RE: GA Narrative Revisions, Non-substantive Examples

I believe Lisa Gordon and Erica have talked recently about this. Lisa also reached out to her counterparts in some other regions for their thoughts on non-substantive edits. I know she got answers from 6, 7, and 8 so far that said they view non-substantive as editorial type changes meaning renumbering or clarifications such as adding lat/longs to locations of DUs. But I don't know that we have any examples in hand, especially of any words being added to a narrative.

Tom, yes the Supreme Court did not grant cert. The Court of Appeals sent the case back to the ALJ for fact finding consistent with their opinion. In March, the ALJ found that the Riverkeeper did not present enough evidence to meet the standard of inference with reasonableness taken into account, therefore the Rayonier permit stands. I have trouble relying on the court opinion by itself because of EPD's testimony about balancing water uses. "Rather, for multi-use bodies of water, like the Altamaha, there must be a reasonable accommodation of all legitimate uses, including industrial discharges. This section of the Altamaha's designated use is fishing, the lowest designation in terms of water quality, and the narrative standards should not be interpreted to convert the designated use to some higher use." This clip is from the March ALJ opinion:

> In its opinion, the Court of Appeals held that the narrative standard established by Ga. Comp. R. & Regs. r. 391-3-6-.03 (5)(e) prohibits industrial discharges into Georgia's waterways only if such discharges produce objectionable conditions, such as color or odor, that "unreasonably" interfere with legitimate water uses. Id. at 256-57. Moreover, in assessing whether an industrial discharge unreasonably interferes with legitimate uses, the Court of Appeals held that the focus should be on "the public's use of the water" and not "any one or a small group of persons whose own aesthetic sensibilities might hinder their personal use of the river." Id. at 276. Finally, the Court of Appeals adopted EPD's position that the narrative standard was "not intended to convert the designated use of a water body to a more protected use." Id. at 274.

I don't understand what EPD is saying about converting the DU to a more protected use. The DU for the Altamaha River at issue in the case is fishing and secondary rec. If people cannot kayak and fish because the odor is so strong, the DU is not being met. How is that converting the DU to a more protected use? EPD sent us that line of reasoning about not converting the DU to a more protected use in their supplemental memo when we asked for more info on these revisions to clarify this language from the court case in our Oct 5, 2018 letter. But then at the end of the section in their memo, EPD did state that for waters with multiple use designations, the standards must support the most sensitive use (pg 2 – 3 of attached memo). So that sentence is good to rely on for me, but I'm not sure it wipes out their reasoning on page 2 that I'm struggling with. Wouldn't the WQS supporting the more sensitive use be supporting the secondary rec in this case? Which is what led to the suit about Rayonier's odor/color discharge. I'm troubled by all of this in the record. Would you address this in the decision document or address it in a memo to file for the AR, or not address it at all?

Do you think we have vulnerability of losing a suit that would allege the revisions are substantive revised WQS per the 4 part test? So I would be stating that the addition of the word unreasonably does not have the effect of expressing or establishing the desired ambient condition for waters, therefore it is not changing the meaning of the standard. It seems to me to be a 50/50 on a judge agreeing that adding the word has no legal meaning. Especially since legally, the word reasonable has such meaning in the basic elements of a tort that it requires a fact finder (duty of care in negligence).

Thanks for mentioning this point, "(and I'm not aware of any lawsuits involving non-substantive revisions)," I was wondering that as well. My RC and I are also thinking through how much to put in the decision document, versus a memo to file to explain this. For R4 we don't really explain non-substantive revisions in the document, so adding an explanation shows how much we've had to consider this and hurts our argument of it being non-substantive.

Thanks,

Michele

From: Glazer, Thomas <glazer.thomas@epa.gov>
Sent: Monday, August 24, 2020 11:28 AM

To: Fleisig, Erica <Fleisig.Erica@epa.gov>; Wetherington, Michele <Wetherington.Michele@epa.gov>
Subject: FW: GA Narrative Revisions, Non-substantive Examples

Erica: Not sure when the last time you were engaged on the GA narrative issue. Can you help out with Michele's request for examples of non-substantive revisions below?

Michele: I think the defense of a non-substantive approval would simply be that according to the Agency and the State Court of Appeals, the standard already implicitly included a reasonableness standard. Therefore, this revision is simply an express codification of what the standard implicitly says already and does not change the level of protectiveness. Per EPA's guidance (which I think is legally dubious, but that's what we're working with), EPA doesn't re-review the underlying standard when there's a non-substantive revision. Also, I just checked the GA Supreme Court website and it looks like the Court denied cert. on the Court of Appeals decision in Aug. 2019. So that decision stands. I'm not sure if there have been any subsequent developments in the case. You might check with the State if you haven't already.

As to the AR question, I don't have any examples for you. Regional practice varies about how they compile Dockets and ARs. From my perspective, a Docket isn't assembled unless public comment is sought (which it wouldn't be on a 303(c) action) and an AR isn't assembled unless a lawsuit is filed (and I'm not aware of any lawsuits involving non-substantive revisions). I know some Regions preemptively assemble ARs when they take an action, but OGC wouldn't ordinarily be involved in that. I would suggest using the monthly ORC WQS call invite list to send an inquiry out to the other Regions. Beyond that, the basis for approval here would be primarily legal (i.e. what does the revision do?), rather than factual (i.e. is the revision protective?), so I'm not sure how much of an AR you'd really need. It seems like the more important thing would be to explain our reasoning in the approval document.

Thanks,
Tom

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From: Wetherington, Michele <Wetherington.Michele@epa.gov>
Sent: Monday, August 24, 2020 11:01 AM
To: Glazer, Thomas <glazer.thomas@epa.gov>
Subject: GA Narrative Revisions, Non-substantive Examples

Hi Tom,

I hope you had a wonderful vacation!
Changing gears from 303(d) litigation, I'm working on the GA free from narrative revisions again, we talked about a year ago on it. The Water Division is looking to brief the RA September 10th on the GA narrative revisions, adding the word "unreasonably" before interfere and substituting designated uses for legitimate uses in the criteria. The Division Director wants to present to the RA both sides of these revisions for approval, as substantive and non-substantive changes. In evaluating the legal risk of the options, she's asked me to state what we could have in our AR, if the RA makes the call to approve the revisions as editorial, non-substantive changes.
Since R4's editorial changes have all been renumbering, formatting, etc., I was asked to look EPA wide for examples from other Regions on making editorial, non-substantive approvals, to bolster the AR through possible national consistency. I remember last year you saying other Regions had word addition revisions that were treated as non-substantive. Can you send me some examples most similar to these GA revisions adding in the word "unreasonably" to the free from?

We are discussing how much to put in the AR, because our R4 editorial changes historically don't have much in the record because they are obvious and non-controversial, yet we think SELC will challenge us on this approval so we want a defensible record for why this revision is editorial.

We already have in our record one letter, attached, asking for more info to meet our regs for their submission. This piece in the AR trends toward it being substantive, so I need to close that loop on how to defend the position of non-substantive. Is there anything you can add about what Regions put in their AR for editorial changes?

Thanks,

Michele

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