Message

From: Gettle, Jeaneanne [Gettle.Jeaneanne@epa.gov]
Sent: 9/13/2018 12:56:47 PM
To: Wetherington, Michele [Wetherington.Michele@epa.gov]; Gordon, Lisa Perras [Gordon.Lisa-Perras@epa.gov]; Cooper, Jamal [cooper.jamal@epa.gov]
CC: Ghosh, Mita [Ghosh.Mita@epa.gov]; Rubini, Suzanne [Rubini.Suzanne@epa.gov]; Palmer, Leif [Palmer.Leif@epa.gov]
Subject: RE: Jac's question on partial approval

Michele,

I am going to suggest to Jac that you talk with his attorneys on this issue if they still have concerns since it is really a legal analysis. Otherwise we can discuss in our next meeting.

Jeaneanne

From: Wetherington, Michele
Sent: Wednesday, September 12, 2018 6:20 PM
To: Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>; Gordon, Lisa Perras <Gordon.Lisa-Perras@epa.gov>; Cooper, Jamal <cooper.jamal@epa.gov>
Cc: Ghosh, Mita <Ghosh.Mita@epa.gov>; Rubini, Suzanne <Rubini.Suzanne@epa.gov>; Palmer, Leif <Palmer.Leif@epa.gov>
Subject: Jac's question on partial approval

Jeaneanne,

I'm responding in a new thread to Jac's last email about the legal basis for a partial approval to avoid confusion. To recap, here is what I sent you:
Case Law: The relevant case, "Bethlehem Steel Corp. v. Gorsuch" (7th Cir. 1984), held that the EPA must follow statutory procedures to promulgate a more stringent regulation rather than use a partial approval to revise a regulation to be more stringent than the state intended. This decision has been followed in other circuits, including the 3rd, 5th, 6th, 7th, 9th, and D.C. The court held that the EPA has the authority to approve some revisions and disapprove others, rather than having to approve or disapprove the whole package. When dealing with a single regulation, the EPA can approve part and disapprove part provided the effect is just to prevent the state from weakening its previous regulation. Even if the effect is to strengthen it, the EPA has not exceeded its authority if it can show that the increase in the stringency of regulation is apparent rather than real, or if real is minor.

Jac wrote:
Is this correct?
"It is important that the two parts of the submittal be separable. By separable, EPA means that the action it anticipates taking will not result in the approved rule(s) being more stringent than the State anticipated. See Bethlehem Steel Corp. v. Gorsuch, 742 F. 2d 1028 (7th Cir. 1984); Indiana and Michigan Elec. Co. v. U.S. E.P.A., 733 F. 2d 489 (7th Cir. 1984). For example, EPA cannot approve part of a submittal that specifies control measures and disapprove the part that specifies the test methods associated with those control measures. The EPA has frequently taken a partial approval approach in the past to process groups of rules that are submitted together. The EPA can approve some of the rules and disapprove the rest as long as the rules that are disapproved do not affect those that are approved."

When I google this quote, it is from an EPA webpage on SIP approval: https://cfpub.epa.gov/oarwebadmin/sipman/sipman/mContent.cfm?chap=6&filePos=6

My opinion is yes, this is correct, to answer Jac's question. It cites the same Bethlehem Steel Corp. case that I did. There is not a CWA case directly on point, this is a CAA case. In the SIP world, the case talks about control measures and test methods associated with those control measures. Approving one without the other would change the stringency of the provision. Our reading of the GA narrative is that the two changes (unreasonably and designated uses) are not connected in that manner, so approving the designated use change and disapproving "unreasonably" would not make the provision more stringent than GA intended regarding the free from narrative applying to designated uses. We are disapproving "unreasonably" to prevent the state from weakening its previous regulation because we don't have the scientific rationale to show us that the change maintains the same protection of the designated use as before.

Michele

Michele Wetherington
Associate Regional Counsel
U.S. EPA, Region 4
61 Forsyth Street S.W. Atlanta, GA 30303
(404) 562-9613

Confidentiality Notice: This communication is being sent to you by an attorney and is intended only for the individual(s) or entity(s) to whom or to which it is addressed. This communication may contain information that is proprietary, privileged, enforcement confidential, or otherwise legally exempt from disclosure. If you have received this message in error, please notify the sender immediately by email and delete all copies of this message.