Message

From: Gordon, Lisa Perras [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=F9AC77737B6D43759B069E24466BA077-GORDON, LISA]
Sent: 9/3/2020 11:12:22 AM
To: Wetherington, Michele [Wetherington.Michele@epa.gov]; Cooper, Jamal [cooper.jamal@epa.gov]
Subject: FW: Follow-up

Very confusing answer from Erica below. I'll follow up with her.

From: Fleisig, Erica <Fleisig.Erica@epa.gov>
Sent: Wednesday, September 2, 2020 6:07 PM
To: Gordon, Lisa Perras <Gordon.Lisa-Perras@epa.gov>
Subject: RE: Follow-up

Thanks for sending this and the update on the regional poll. I remember that language from Manjali well 😉 I think the situation here is just so unique given the court cases, and it would be very different if those didn't exist and we were just looking at the words on the page in isolation.

We sent Sara some thoughts (particularly reminding her of the argument from the Sept 2019 briefing paper that we thought was most viable to support a disapproval) and I'm hopeful she's reaching out to Jeanneanne soon, ideally before 9/9. Let me know if you hear anything from their conversation, and if it changes Jeanneanne's thinking at all. I'll be rooting for you on the 9th!

-Erica

From: Gordon, Lisa Perras <Gordon.Lisa-Perras@epa.gov>
Sent: Wednesday, September 2, 2020 5:07 PM
To: Fleisig, Erica <Fleisig.Erica@epa.gov>
Subject: Follow-up

Hey Erica, At the request of management, I've been doing a Regional poll on what other Regions consider as 'editorial, non-substantive.' It's been a great exercise. Not only to catch up with the other Coordinators, but to realize that there is stunning consistency in how Regions view, 'editorial, non-substantive' as only things such as renumbering, spelling out acronyms, or typos. Each coordinator volunteered a quick review of the GA narrative (which I hadn't even asked them to do but had included it.) Each said it was substantive. I'm summarizing the results and rationales and will send them to you. Regional consistency is important, especially as you've said HQ would defer to Regions, which I appreciate. BUT, Terry Fleming also sent me the following email exchange, which included the following clarification from Manjali (highlighted in context in yellow below):

"Since you might be new to the non-substantive approach, I wanted to give you a heads up that ideally we'd like to try to avoid getting into a subjective discussion/debate of whether actual changes to words results in a changing "…the meaning or intent of the existing WQS…" So, <u>where actual words change, we often just go ahead and act normally</u> (unless they are correcting typos or other types of simple edits). <u>Things can get difficult if we think word changes don't change the meaning but someone could interpret them to change the meaning.</u> Since both get approved under 303(c) <u>we try to limit this non-substantive action to truly non-substantive stuff.</u> Again, if you have questions, just bring it to us through your liaison and we'll see where we land."

I thought that was spot on for how we viewed this. The fact that we've had discussions for over two years underscores her point on the difficulty of saying that wording changes are editorial vs. typos or simple edits. I wanted to see if you thought Manjali's December 2019 position for Region 9 that Sara would find of interest. Michele said you were continuing your talks with her.

Thanks, Lisa

From: Fleming, Terrence <Fleming.Terrence@epa.gov>
Sent: Wednesday, September 2, 2020 2:19 PM
To: Gordon, Lisa Perras <Gordon.Lisa-Perras@epa.gov>
Subject: FW: nonsubstantive WQS approvals

Hi Lisa, the information on non-substantive WQS is in the FAQs for what is a new or revised WQS.

From: Fleming, Terrence
Sent: Wednesday, May 6, 2020 11:18 AM
To: Sussman, Daniel@Waterboards <daniel.sussman@waterboards.ca.gov>
Cc: Fitzgerald, Rebecca@Waterboards <Rebecca.Fitzgerald@waterboards.ca.gov>; Bernard, Lisa@Waterboards <Lisa.Bernard@waterboards.ca.gov>
Subject: FW: nonsubstantive WQS approvals

Hello representative of the Basin Planning Roundtable.

At the last BPRT, the issue of EPA's approval of non-substantive WQS came up. See item 6 of EPA's what is a new and revised water quality standard FAQs (attached and item 6 is reproduced below).

6. Does EPA have the authority and duty to approve or disapprove non-substantive revisions to WQS?

EPA considers non-substantive edits to existing WQS to constitute new or revised WQS that EPA has the authority and duty to approve or disapprove under CWA section 303(c)(3). While such revisions do not substantively change the meaning or intent of the existing WQS, EPA believes that it is reasonable to treat such non-substantive changes in this manner to ensure public transparency as to which provisions are effective for purposes of the CWA. EPA notes that the scope of its action in reviewing and approving or disapproving such non-substantive changes would extend only as far as the actual non-substantive changes themselves. In other words, EPA's action on non-substantive changes to previously approved WQS would not constitute an action on the underlying previously approved WQS. Any challenge to EPA's prior approval of the underlying WQS would be subject to any applicable statute of limitations and prior judicial decisions.

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From: Fleck, Diane (LA user) <Fleck.Diane@epa.gov>
Sent: Tuesday, February 11, 2020 2:32 PM
To: R9-WTR-2-1 <R9-WTR-2-1@epa.gov>
Subject: nonsubstantive WQS approvals

See link to FAQ (Question no. 6) – and discussion below.

From: Vlcan, Manjali <Vlcan.Manjali@epa.gov>
Sent: Thursday, December 19, 2019 4:32 AM
To: Fleck, Diane (LA user) <Fleck.Diane@epa.gov>; Fleisig, Erica <Fleisig.Erica@epa.gov>
Cc: Fleming, Terrence <Fleming.Terrence@epa.gov>; Dreyfus, Melissa G. <Dreyfus.Melissa@epa.gov>; Pettit, Elizabeth

(Libby) <pettit.elizabetha@epa.gov>
Subject: RE: Thoughts on WQS approval issue

Hi Diane – there is actually a discussion in #6 of the What is a new or revised WQS FAQ we issued in 2012. The language that Erica provided you to include in the approval letter is actually language from that FAQ. We didn't specifically say in there that you should include it in the letters but as time has gone on since then we have realized that we have wanted to be forthright about what it means when we approve something as a non-substantive change right there in the letter. Here is the FAQ in case you haven't seen it or don't have it handy.

https://www.epa.gov/sites/production/files/2014-11/documents/cwa303faq.pdf

Hope that helps! Since you might be new to the non-substantive approach, I wanted to give you a heads up that ideally we'd like to try to avoid getting into a subjective discussion/debate of whether actual changes to words results in a changing "…the meaning or intent of the existing WQS…" So, where actual words change, we often just go ahead and act normally (unless they are correcting typos or other types of simple edits). Things can get difficult if we think word changes don't change the meaning but someone could interpret them to change the meaning. Since both get approved under 303(c) we try to limit this non-substantive action to truly non-substantive stuff. Again, if you have questions, just bring it to us through your liaison and we'll see where we land.

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From: Fleck, Diane (LA user) <Fleck.Diane@epa.gov>
Sent: Wednesday, December 18, 2019 5:23 PM
To: Fleisig, Erica <Fleisig.Erica@epa.gov>
Cc: Fleming, Terrence <Fleming.Terrence@epa.gov>; Vlcan, Manjali <Vlcan.Manjali@epa.gov>; Dreyfus, Melissa G. <Dreyfus.Melissa@epa.gov>; Pettit, Elizabeth (Libby) <pettit.elizabetha@epa.gov>
Subject: RE: Thoughts on WQS approval issue

Hi Erica,
Thanks! This info is extremely useful. I was not aware (and others in R9 were not aware since it has not come up in conversations about this issue as an option) that this was an acceptable option – it is actually what I suggested in my original e-mail below at the end (yellow), so I'm very glad to see that it's already an existing option for Regions and is being implemented. We will include the disclaimer language you noted below (green), in any of our "approvals", to make clear exactly what we are doing.

Is there any written guidance to Regions on this issue? Did I/R9 miss this discussion in the past? If so, apologies. If anything written exists on this issue, I'd love to see/read it. If not, I think this would be a great discussion issue for other Regions to hear about on one of our WQS Coordinator calls (EPA only).

Many Thanks --
Diane

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From: Fleisig, Erica <Fleisig.Erica@epa.gov>
Sent: Wednesday, December 18, 2019 12:34 PM
To: Fleck, Diane (LA user) <Fleck.Diane@epa.gov>
Cc: Fleming, Terrence <Fleming.Terrence@epa.gov>; Vlcan, Manjali <Vlcan.Manjali@epa.gov>; Dreyfus, Melissa G. <Dreyfus.Melissa@epa.gov>; Pettit, Elizabeth (Libby) <pettit.elizabetha@epa.gov>
Subject: RE: Thoughts on WQS approval issue

Hi Diane,

Nice to hear from you!

I confirmed this with Manjali and Melissa who are our leads on our "4 part test" for WQS. Our recommendation is to take a simple 303c action that just treats the regional board actions as non-substantive WQS revisions when they come up. That way you are acknowledging them as changes to WQS and approving them for transparency, but you can point to the prior approval of the state water board criteria and specify that you aren't acting again on the underlying substance, so you don't have to re-justify the acceptability of the criteria.

Other regions have used this type of language when acting on non-substantive revisions:
The EPA approves the non-substantive changes as providing useful clarification regarding the provisions at 18 AAC 70.240(k). The EPA's approval of the non-substantive changes to previously approved water quality standards is to ensure public transparency as to which provisions are applicable for purposes of the CWA in accordance with 40 CFR 131.21(c). The scope of the EPA's action in approving such provisions extends only as far as the actual non-substantive changes themselves. The EPA's action on the non-substantive changes does not constitute an action on the underlying previously approved water quality standards because they are not new or revised. What is a New or Revised WQS FAQ, p. 4.

Let us know if you have any other questions. Happy holidays!
-Erica

From: Fleck, Diane (LA user) <Fleck.Diane@epa.gov>
Sent: Tuesday, December 17, 2019 3:48 PM
To: Fleisig, Erica <Fleisig.Erica@epa.gov>
Cc: Fleming, Terrence <Fleming.Terrence@epa.gov>
Subject: Thoughts on WQS approval issue

Hi Erica,
Hope you're having a good holiday season!

We have a CA WQS approval question for you, that we are hoping you can help us with. The issue is whether EPA must approve a WQS update in a Regional Board Basin Plan, that was previously adopted statewide by the State Water Board, and approved by EPA. You may remember that CA has a State Water Board (SB) that oversees 9 Regional Water Boards; the SB also has statewide Water Quality Plans that apply statewide (the statewide plans apply in addition to each of the Regional Water Board Basin Plans which only apply within each Regional Water Board's jurisdiction).

Here are the specifics: The CA State Water Board adopted, and EPA approved, new statewide bacteria water quality criteria (objectives in CA) for their REC-1 beneficial use (body contact designated use), earlier in 2019. The new statewide objectives apply in all Regional Water Boards, and explicitly supersede any old REC-1 bacteria objectives that existed in any Regional Board Basin Plan. The Los Angeles Regional Water Board (LA RB) just noticed the adoption of the

new statewide bacteria objectives into their Basin Plan: they will be replacing the old bacteria objectives with the new statewide WQOs, so there is no confusion. These changes in the LA RB Basin Plan are purely editorial since the SB already adopted the objectives statewide and in doing so, explicitly stated that the objectives superseded all Basin Plan objectives.

The question is whether EPA must now also approve the change to the LA RB Basin Plan. It is likely that other Regional Boards will be doing the same, i.e., amending their Basin Plans to reflect the SB's action, through an adoption process. (They actually don't have to go through another adoption process at the Regional Board level, but they are choosing to do so.)

Our question is whether HQ would recommend that we also approve the Regional Board action, or whether our previous SB approval is sufficient. If HQ recommends we also approve the RB action, would a simple approval letter be sufficient instead of a complete justification and approval write-up? We would reference our earlier SB approval documents for the technical rational.

Thanks! Any thoughts would be appreciated!
Diane

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