

SUMMARY AND IMPLICATIONS OF THE NWEA v. EPA
U. S. DISTRICT COURT FOR THE DISTRICT OF OREGON

March 31, 2003

Background

EPA approved in part and disapproved in part the Oregon temperature, pH, bacteria and dissolved oxygen criteria in July 1999. Since October 1999, EPA has focused its energy on completing the Regional Temperature Criteria Guidance. NWEA filed this suit against EPA and NMFS in April 2001. In general the suit alleged that EPA's approval of Oregon's temperature and dissolved oxygen standards was invalid because the standards are not protective of the designated uses of salmonid spawning and rearing. Other facets of the lawsuit are explained below. We are in the process of working with DOJ and EPA to assess the ramifications of this decision.

Summary of the Decision

1. 68°F Criterion for the Lower Willamette River

EPA had disapproved Oregon's standard of 68 degrees for the Lower Willamette River. EPA is under a mandatory duty to promptly promulgate a revised standard upon a state's failure to submit its own revision within 90 days of EPA's notice of disapproval to the State. EPA did not promulgate a standard for the Lower Willamette instead deferring to completion of the regional temperature standard guidance. EPA is ordered to prepare and publish a revised water quality temperature criterion for the Lower Willamette River.

2. 68° Criterion for the Columbia River

The plaintiffs challenged the current temperature standard of 68 degrees for the Columbia River based on the argument that since EPA disapproved 68 degrees for the Lower Willamette, it should disapprove the same criteria for the Columbia. Since Oregon did not submit a revised temperature criterion for the Columbia River, EPA was under no duty to review the existing Columbia River criterion of 68°F. EPA has the discretion to determine that a new or revised is necessary. Since EPA has not concluded that the Columbia criteria should be reviewed, the Court lacks jurisdiction on this issue.

3. Antidegradation

Oregon's antidegradation rule (OAR 340-41-0026(1)(a)) was submitted in 1991 and approved by EPA in 1992. In March 2001, DEQ developed detailed internal guidance to explain the rule. Although EPA took no action to reopen this rule in 1999, the Court linked the existing antidegradation rule with the State's ability to implement the temperature criteria. Having brought the issue into the case, the Court then found that the antidegradation rule is too vague

to be meaningful, and held that EPA was arbitrary in approving temperature criteria with an inadequate antidegradation rule.

Specifically, the Court found that EPA should have required Oregon to have a more detailed antidegradation implementation plan to use in concert with the temperature criteria, and that EPA should not have approved the temperature criteria without such a plan. Therefore, the Court ordered EPA to promulgate an antidegradation implementation plan for Oregon.

4. The 64°F Criterion for Salmonid Rearing & 50°F Criterion for Bull Trout Rearing and Spawning

Although the Court found technical support for the numeric criteria in the record, it ruled that EPA's approval was arbitrary because the locations where these criteria applied were unspecified. The Court determined that Oregon's system of designating beneficial uses for waterways was deficient since both EPA and NMFS identified problems with Oregon's system for designating uses. Without accurate time and place designations, EPA cannot approve Oregon's revised criteria and comply with the CWA. EPA is ordered to rescind its approval and promulgate revised criteria.

5. Intergravel dissolved oxygen criterion (IGDO)

The Court ruled that the 6.0 mg/l criterion is not protective. The Court noted that EPA itself had found that salmonids were likely to be adversely affected by this IGDO criterion. Oregon's nonregulatory (unenforceable) commitment to use 8.0 mg/l for 303(d) listings does not cure the defective rule. In addition, Oregon has not updated its designated uses by specifying the geographic area and time period during which spawning criteria for DO apply. EPA is ordered to rescind its approval of the 6.0 mg/l IGDO criterion and shall prepare a revised IGDO criterion.

6. Surface Water Temperature Management Plan

The Court held that these plans are akin to a variance or site specific criteria and noted that EPA would have to approve each one individually. Based on this understanding, the Court upheld this provision of the temperature criteria. This ruling implies that EPA must explicitly approve all actions that DEQ takes using temperature management plans which could include all NPDES permits, and 401 certifications for hydropower.

7. 1°F Cumulative Increase

The Court also held that these allowances for human activity are also akin to a variance or site specific criteria and noted that EPA would have to approve each one. Based on this understanding, the Court upheld this provision of the temperature criteria.

8. 0.25° increase

The Court upheld this provision of the Oregon temperature criteria (although there is language in the opinion that suggests that mixing zones of any sort may be inappropriate).

9. Alternate Mixing Zone Rules

The Court finds that Oregon never made a proper submission to EPA for approval of the alternative mixing zone rules (OAR 340-041-subbasin(4)(g)). Therefore, the rules are ineffective as a matter of Federal law. The Court noted that the Oregon's basic mixing zone rule applies until the State properly submits and EPA approves the alternate rules.

10. NMFS Biological Opinion

Given staff statements that the Oregon temperature criteria might have an adverse impact, NMFS failed to demonstrate a rational basis when it issued a no-jeopardy finding. NMFS's reliance on future State commitments to perform the conservation measures and participate in the regional was arbitrary and capricious. NMFS is ordered to withdraw its biological opinion and reinitiate consultation and issue a new opinion.

11. EPA's Section 7(a)(1) Duties

The Court considered the various ESA activities that EPA has performed and concluded that EPA is not required to create a separate conservation plan for the recovery of listed salmonid and bull trout populations after consultation with NMFS.

12. EPA's Section 7(a)(2) Duties

EPA is ordered to promulgate temperature, IGDO, use designation and narrative criteria that satisfy the Agency's 7(a)(2) obligations, or issue a new determination on the existing criteria based on a no-jeopardy finding that is reasonably supported by the available evidence.

13. NWEA's Request to Add Toxic Counts to the Temp Suit

Request denied due to the lateness of the request.

Implications of the Decision

The existing Oregon criteria remains in effect and should be used for permits, 303(d) listings, TMDLs, SB 1010 and Forest Practices Act purposes.

The exception to this general implication is the alternative mixing zone rule in OAR 340-041-Subbasin 4(g). Since the Court found that these provisions were not submitted prior to 2000, EPA must approve them before they may be used in permits. Current [e.g., Oremet, Klamath, and General Permit for Irrigators] permits using the alternative mixing zone rule may need to either be withdrawn or revised unless EPA approves the rule (or partially approves, or approves conditioned on subsequent ESA consultation) before the permit appeal runs its course.

Next Steps

EPA indicates that it may take final action on the alternative mixing zone rule in the next 30-45 days.

Although it is re-examining the situation in light of the Court's decision, EPA still hopes to issue the final Regional Temperature Guidance in the next several weeks.

Unless DEQ wishes to defer to EPA on revisions to the Oregon's temperature criteria, DEQ should continue with its plans to reopen the criteria this fall. Public meetings to discussion options have been scheduled at various locations in the State from May 1 thru May 12.

The Court ordered the parties to, within 30 days, develop a mutually acceptable schedule for federal promulgation of temperature criteria, dissolved oxygen criteria (IGDO) and an antidegradation implementation plan. If agreement cannot be reached, the parties are ordered to submit separate recommendations for a schedule.

It is possible that one or more of the industry intervenors may appeal one or more aspects of the Court's decision.