

Court Opinion in NWEA's Challenge to Oregon's Temperature TMDLs

Three documents must be read together to understand the court's opinion in NWEA's case challenging 14 Oregon temperature TMDLs and the Willamette River Mercury TMDL: U.S. Magistrate Judge Acosta's recommended Findings and Recommendations (Oct. 12, 2016); Judge Acosta's recommendations on EPA's motion for voluntary remand; and Judge Hernandez opinion (April 13, 2017). The following summarizes the three, omitting claims dismissed as moot.

Claim No. 1 – EPA's approval of Oregon Temperature TMDLs was arbitrary and capricious because each TMDL was written to water quality standards EPA had not approved, the so-called "natural conditions."

COURT: Held in favor of NWEA for all TMDLs that EPA approved after September 2006: Willamette Basin; Willow Creek Subbasin (Umatilla); Umqua Basin; Middle Rogue Subbasin and Bear Creek Watershed (Rogue); Molalla Pudding Subbasin (Willamette); Rogue Basin; Miles Creek Subbasin (Middle Columbia/Hood); Lower Grande Ronde Subbasin (Grande Ronde); Malheur Basin; John Day Basin.

Claim No. 2 – EPA failed to perform its mandatory duty to review and act on new so-called "natural" temperature standards that Oregon established through its temperature TMDLs.

COURT: Held in favor of NWEA for all TMDLs, including those before 2006: Hells Canyon (Snake); Applegate Subbasin (Rogue); Sandy Basin; and Walla Walla Subbasin (Umatilla).

Claim No. 6 – EPA failed to consult under the Endangered Species Act (ESA) when approving the TMDLs.

Claim No. 7 – EPA failed to determine whether the new so-called "natural" standards developed in the Willamette Temperature TMDL would have an effect on species listed under the ESA.

COURT: Held for NWEA that ESA consultation is required for these Oregon temperature TMDLs. The court found that EPA approvals of TMDLs are affirmative agency actions that trigger ESA consultation because: (1) the approvals changed the water quality standards, and (2) approved TMDLs have binding legal effects. Judge Hernandez also found that EPA retains substantial discretion in approving or disapproving TMDLs such that it can take actions to benefit ESA-listed species and therefore consultation is required. (Because these TMDLs did not meet the water quality standards, EPA had the authority to disapprove them, the same authority it has to change its action to benefit the species, without which ESA consultation would have no value.) The court also held that EPA's "no effect" ESA finding on the Willamette TMDL did not relieve its ESA obligations for all the other TMDLs. And, finally, the court found that the 2004 ESA consultation on Oregon's temperature standards, which the court had earlier vacated, did not address these TMDLs.

Claim No. 8 – EPA failed to act on the Klamath Temperature TMDL within 30 days.

Claim No. 9 – EPA’s approval of the Willamette Mercury TMDL was arbitrary and capricious.

COURT: EPA moved for a voluntary remand for both the Klamath Temperature (EPA failure to act) and Willamette Mercury (EPA approval) TMDLs, seeking four years in which to complete replacement TMDLs. The court granted EPA and Oregon two years.