

Oregon's Temperature Standard & Why It is Being Revised...Again

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Summary

- Discuss 20 years of legal temperature standard litigation in Oregon
- Frame current, ongoing legal cases
- Offer thoughts about the future...

**Timeline:
Oregon Temperature Standard**

1990s

1999-2003: EPA develops Regional Temperature Guidance w/ stakeholders

March 2004: Oregon's revised temperature standard approved by EPA

2000s

February 28, 2012: Judge Acosta issues opinion finding EPA's approval of NCC arbitrary and capricious; Services must conduct additional consultation

August 8, 2013: EPA formally disapproves the Natural Conditions Criteria for temperature

2010s

1996: Oregon DEQ triennial review and revisions to temperature standard

July 1999: EPA disapproves portions of the Oregon's temperature standard

2001: Northwest Environmental Advocates files lawsuit against EPA challenging temperature standard

March 2003: Judge Haggerty issues decision in *NEA I* case: time & place designations needed, among other things

2005-2013

Northwest Environmental Advocates v. EPA et al. case litigated

November 2012: Stipulated Order to Services re: consultation on numeric stds

April 2013: Stipulated order requiring EPA to act in accordance with Judge Acosta's opinion re: NCC & statewide narrative stds

June 2015: NMFS issues draft "jeopardy" opinion on 20°C migration standard

Issues Categories

- Challenge to Standard
 - Natural Conditions
 - Final Decision
 - Consultation with the Services
 - US Fish & Wildlife
 - Nat'l Marine Fisheries Services Draft *'jeopardy'* decision from NMFS
 - *"Reasonable & Prudent Alternatives"* discussion pending
- Challenge to TMDLs
 - On going lawsuit to invalidate EPA approval of TMDLs
 - Continued discussion

If that, then this...

- Standards

- No natural conditions standards
- Numeric criteria apply
- Migration Standard (20° C)

- If 'jeopardy', EPA likely to reject 20° C unless '*reasonable & prudent*' measures put in place

-or-

- If DEQ/EPA/Services agree to '*reasonable & prudent*' measures – likely protection of cold water refugia – then no '*jeopardy*'

If that, then this...

- TMDLs
 - Temperature TMDLs are upheld until they are revised
 - NPDES permits issued with the waste load allocation in the adopted TMDL
 - Temperature TMDLs are not valid....
 1. Judge will invalidate immediately
 - Meet numeric at end of pipe unless assimilative capacity is available
 2. Judge will set TMDL revision schedule
 - Questions about impact on permit issuance

Conclusions

- Understand your technical fact set
- Anticipate changing regulatory conditions
- Craft flexible compliance strategies
- Engage Senior Management
 - Council & Commission
- Consider when you need good legal assistance