

Litigation Turns Up the Heat on Agencies to Protect Salmon in the Pacific Northwest



A pair of court developments in the Western District of Washington places pressure on EPA and the Washington Department of Ecology to issue new water standards for temperature, sediment, and ammonia to protect salmon in Northwest waters.

Court Holds EPA to Its Word to Develop Temperature Standards for Columbia and Snake Rivers

On October 17, 2018, in *Columbia Riverkeeper v. Pruitt*, the U.S. District Court for the Western District of Washington held EPA responsible for the absence of enforceable temperature limits in the Columbia and lower Snake Rivers. This is an unusual holding because usually states are responsible for developing such standards, known as Total Maximum Daily Loads (TMDLs). Under Clean Water Act (CWA) section 303(d), states identify “impaired” waters and develop TMDLs to help repair them. Heat is an important pollutant for fish species like salmon, and both Washington and Oregon have listed the Columbia and Snake Rivers as impaired waters in part due to thermal pollution. In the normal course of events, states develop TMDLs, and EPA’s only role is to approve or disapprove them based on specific criteria.

In *Columbia Riverkeeper*, the Western District of Washington ruled that EPA, not the states, must develop temperature TMDLs for the Columbia and lower Snake Rivers. The court reached this unique but unsurprising decision based on the history of negotiations and

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agreements between Oregon, Washington, and EPA. In these negotiations, EPA agreed that it, not the states, would develop temperature TMDLs for these specific rivers. The court held that these agreements, including a Memorandum of Agreement issued in 2000, meant that the states had constructively submitted a “no TMDL” for temperature, and thus it was EPA’s burden to act on those constructive submissions. The court gave EPA thirty days to approve or disapprove this constructively submitted “no TMDL,” although the court indicated that it did “not see how EPA can approve the constructively submitted TMDL consistent with its obligations under the CWA.” If disapproved, EPA has thirty days after disapproval to issue a new TMDL for temperature on these waterways. See U.S.C. § 1313(d)(2).

EPA and Washington Agree to Take Action on Standards for Washington Waters

The following day, in *Northwest Environmental Advocates v. U.S. EPA*, the Western District of Washington approved a settlement between EPA, the Washington Department of Ecology, and Northwest Environmental Advocates. Northwest Environmental Advocates had sued EPA for approving several of Washington’s revisions to its water quality standards. Among other claims, the Northwest Environmental Advocates argued that these revisions did not meet the CWA’s standards for EPA approval and that EPA unlawfully approved them without consulting with the Fish and Wildlife Service or the National Marine Fisheries Service, as required by the Endangered Species Act.

In this wide-ranging proposed settlement, EPA has agreed, within three years, to determine the effects of Washington’s 2006 ammonia standards, or any new state standards, on listed species or critical habitat under the Endangered Species Act. Ecology has agreed to repeal and replace standards allowing for incremental temperature increases from nonpoint sources of up to 5.04° Fahrenheit, as well as to propose a criterion for fine sediments to protect salmon redds, also within three years.

Although this settlement does not resolve all of Northwest Environmental Advocates’ claims, the case is on ice until 2021. The court is holding the case in abeyance until because EPA has agreed to voluntary reconsideration of all decisions related to the remaining claims. If by October 16, 2021, EPA has either failed to complete its reconsideration or its reconsideration has not rendered the claims by Northwest Environmental Advocates moot, the case will come out of deep freeze at that point.

Together, these two developments may lead to new standards in the near term designed to protect salmon in Pacific Northwest waterways. But given EPA’s long delays that sparked the *Columbia Riverkeeper* litigation in the first place, rapid action is not guaranteed.

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