

CWA Section 303(c)

303(c)(2)(A)

“Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator.”

303(c)(3)

“If the Administrator within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State.”

Relevant Federal WQS Regulation

40 CFR 131.11(b)

“Form of criteria: In establishing criteria, States should:

(1) Establish numerical values based on:

(i) 304(a) Guidance; or

(ii) 304(a) Guidance modified to reflect site-specific conditions; or

(iii) Other scientifically defensible methods;

(2) Establish narrative criteria or criteria based upon biomonitoring methods where numerical criteria cannot be established or to supplement numerical criteria.

Note: In preamble for adoption of WQS regulation EPA recommended establishing numerical values wherever practical. 47 Fed. Reg. 49,234 (Oct. 29, 1982).

NWEA v. EPA – Oregon litigation

Focus on two cases:

NWEA 2 – 2005 kitchen sink litigation raising various challenges to EPA actions on WQS submissions including temperature and dissolved oxygen criteria, use designations, anti-degradation policy, natural conditions narrative criteria, and ESA consultation.

NWEA 3 – 2012 litigation raising various challenges to EPA TMDL approvals including the application of natural condition narrative criteria in TMDLs.

NWEA 2 – Challenge to NCC Standard

OAR 340-041-0028(8)

“Natural Conditions Criteria. Where the department determines that the natural thermal potential of all or a portion of a water body exceeds the biologically-based criteria in section (4) of this rule, the natural thermal potential temperatures supersede the biologically-based criteria, and are deemed to be the applicable temperature criteria for that water body.”

EPA approved on the basis that natural temperatures may exceed biologically based temperature criteria and natural temperatures were historically fully protective of uses.

NWEA 2 – Challenge to NCC Standard

NWEA challenged EPA's approval of provision claiming it was arbitrary and capricious because:

- It effectively swallowed the numeric criteria
- Was only used to increase in temperature but not to protect naturally cooler water
- Methodology for estimating natural conditions was seriously flawed
- Narrative natural criteria supplanted applicable numeric criteria without EPA review and approval

NWEA 2 – Challenge to NCC Standard

Court agreed with NWEA that EPA's approval was unlawful because

- NCC narrative supplants rather than supplements applicable numeric criteria in violation of 40 CFR 131.11(b)(2)
- NCC narrative violates CWA 303(c) review by establishing a new WQS without EPA review and approval

Court also addressed some of NWEA's other arguments:

- NCC based on flawed assumption that historical temperatures would protect uses today (did not address other present day conditions that might impact uses)
- NCC flawed based on difficulty in estimating historical water temperatures

NWEA 3 – Challenge to NCC-based TMDLs

Court addressed two of NWEA's claims

- Claim 1: EPA approval of TMDL written to NCC was arbitrary because did not implement the applicable WQS
 - Court agreed: NCC approval was never valid so criteria was never effective and TMDL assignment of allocations to meet NCC was arbitrary.
- Claim 2: EPA violated its duty to review natural condition in TMDLs as a revised WQS
 - Court agreed: TMDL effectively revised the biologically-based numeric criteria without EPA review and approval of the new/revised WQS

NWEA v. EPA – Washington NCC

NWEA goes to Washington - 2014 litigation raising kitchen sink challenge to EPA's 2008 approval of Washington WQS including natural conditions narrative.

- Included same NCC arguments as made in Oregon Litigation, but Oregon decision not mandatory authority in Washington.

WAC 173-201A-206 (General NCC provision)

“(1) Natural and irreversible human conditions.

- (a) It is recognized that portions of many water bodies cannot meet the assigned criteria due to the natural conditions of the water body. When a water body does not meet its assigned criteria due to natural climatic or landscape attributes, the natural conditions constitute the water quality criteria.”

NWEA v. EPA – Idaho NCC

In 2013, NWEA and ICL challenged EPA's 2004 and 2005 approvals of Idaho's NCC provision.

- Challenge involved only ESA claim that EPA failed to complete consultation prior to approving NCC.
- In February 2019, EPA prevailed on motion to dismiss the ESA claim on the basis of 6 year statute of limitations.