

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HEADWATERS, INC., an Oregon not
for profit corporation; OREGON
NATURAL RESOURCES COUNCIL
(ONRC) ACTION, an Oregon not

for profit corporation,

Plaintiffs-Appellants.

v.

TALENT IRRIGATION DISTRICT, an
Oregon municipal corporation,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted
August 8, 2000--Pasadena, California

Filed March 12, 2001

Before: Robert Boochever, Stephen S. Trott, and
Marsha S. Berzon, Circuit Judges.

Opinion by Judge Boochever

No. 99-35373

D.C. No.
CV-98-06004-ALA

OPINION

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derive water from a variety of surface streams and other bodies of water, including Bear Creek, Emigrant Lake, Wagner Creek, and Anderson Creek. The canals also divert water to such streams as Bear Creek, Wagner Creek, Anderson Creek, Coleman Creek, Dark Hollow Creek, and Butler Creek. [ER pp. 53-56]

TID provides irrigation waters to its members from May to September or October. To control the growth of aquatic weeds and vegetation in its irrigation canals, TID uses an aquatic herbicide, Magnacide H, which it applies to the canals with a hose from a tank on top of a truck every two weeks from late spring to early fall. The active ingredient in Magna-

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cide H is acrolein, an acutely-toxic chemical that kills fish and other wildlife. TID does not have, and has never applied for, a National Pollution Discharge Elimination System permit ("NPDES permit" or "permit") issued under the Clean Water Act, 33 U.S.C. § 1342.

In May 1996, TID applied Magnacide H to the Talent Canal, and the next day the Oregon Department of Fish and Wildlife found many dead fish in nearby Bear Creek, around and downstream from a leaking waste gate from the canal. Over 92,000 juvenile steelhead were killed. An earlier fish kill in Bear Creek followed an application of Magnacide in 1983. [ER pp. 34-35]

On January 5, 1998, Headwaters, Inc. and Oregon Natural Resources Council Action (hereafter referred to as "Headwaters" or "plaintiffs"), nonprofit environmental corporations whose members use the streams near TID's canals, brought a citizen suit under the Clean Water Act ("CWA"), 33 U.S.C. § 1365. The complaint alleged that TID is in violation of the CWA, 33 U.S.C. § 1311, when it discharges the toxic chemical into the irrigation canals, and through the canals into Bear Creek without a permit under 33 U.S.C. § 1342. [ER pp. 8-10] The complaint asked for a declaratory judgment, an injunction prohibiting TID from discharging pollutants without a permit, and an injunction requiring TID to allow the plaintiffs to monitor further discharges. The complaint also asked for an injunction requiring TID to pay for environmental restoration, as well as civil penalties and the plaintiffs' costs and attorneys fees.

The complaint alleges that TID's application of Magnacide H to its irrigation canals, without a permit, violates the

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CWA. There is no factual dispute that TID continues to apply Magnacide H to its canals without a permit. The plaintiffs' claim is thus based on a continuing violation.

The complaint also alleges that Magnacide H reaches Bear Creek. TID claims that it has implemented a new protocol, and that since the complaint was filed there have been no leaks into Bear Creek and "no releases are likely to occur." But the claimed violation of the Clean Water Act is the continuing discharge of the herbicide into the canals without a permit, regardless of whether the herbicide continues to cause environmental damage to any of the numerous streams with which the canals exchange water.

We conclude that we have subject matter jurisdiction.

II. EPA-approved label under FIFRA

The Clean Water Act, as originated in the Federal Water Pollution Control Act Amendments of 1972, generally prohibits the discharge of pollutants into "navigable waters" or "waters of the United States." 33 U.S.C. §§ 1311(a), 1362(7). There are statutory exceptions, however, the broadest of which is the National Pollution Discharge Elimination System ("NPDES") permit program, which allows a polluter who obtains a permit to discharge a specified amount of the pollutant. See *id.* at § 1342; Russian River, 142 F.3d at 1138. Under the NPDES program, 33 U.S.C. § 1342, the EPA may establish a uniform national limitation on the discharge of an identified pollutant from categories of sources, but the EPA may also issue permits on a case-by-case basis, taking into account local environmental conditions. See American Mining Cong. v. United States Envtl. Prot. Agency, 965 F.2d 759, 762 n.3 (9th Cir. 1992); United States v. Pozsgaj, 999 F.2d 719, 725 (3d Cir. 1993) ("The permit system translates[national effluent] standards into site-specific limitations to accommodate individual circumstances and ease enforcement."). TID does not have, and has never applied for, such a permit.

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TID claims that it does not need a permit, because Magnacide H's label does not mention any permit requirement, and

ing their sense and purpose. When two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective." Resource Invs. Inc. v. U.S. Army Corps of Eng'rs, 151 F.3d 1162, 1165 (9th Cir. 1998) (quotations and internal alteration omitted).

The CWA and FIFRA have different, although complementary, purposes. The CWA's objective "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and to that end the statute requires a NPDES permit before any pollutant can be discharged into navigable waters from a point source. See 33 U.S.C. § 1342(1). FIFRA's objective is to protect human health and the environment from harm from pesticides, and to that end the statute establishes a nationally uniform pesticide labeling system requiring the registration of all pesticides and herbicides sold in the United States and requiring users to comply with the national label. See 7 U.S.C. § 136a, 136j(a)(2)(G).

Even this cursory review of the statutes reveals that a FIFRA label and a NPDES permit serve different purposes. FIFRA establishes a nationally uniform labeling system to regulate pesticide use, but does not establish a system for granting permits for individual applications of herbicides. The CWA establishes national effluent standards to regulate the discharge of all pollutants into the waters of the United States, but also establishes a permit program that allows, under certain circumstances, individual discharges. FIFRA's labels are the same nationwide, and so the statute does not and cannot

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consider local environmental conditions. By contrast, the NPDES program under the CWA does just that.

The facts in this case illustrate the way in which the statutes differ. When TID applies Magnacide H to its irrigation canals, it is required to follow the directions on a label that is the same across the United States no matter where Magnacide H is applied. The application of Magnacide H in the Talent Canal, however, even if done in compliance with the label, may have effects that depend on local environmental conditions and that will not be duplicated in other areas. The label's general rules for applying the herbicide must be observed under FIFRA, but where the herbicide will enter waters of the United States, FIFRA provides no method for analyzing the

This court has already held that registration under FIFRA is inadequate to address environmental concerns under the National Environmental Policy Act, 42 U.S.C. §§ 431-435. See Northwest Coalition for Alternatives to Pesticides v. Lyng, 844 F.2d 588, 595 (9th Cir. 1988) (herbicide); Save Our Ecosystems v. Clark, 747 F.2d 1240, 1248 (9th Cir. 1984) (herbicide); Oregon Env'tl. Council v. Kunzman, 714 F.2d 901, 905 (9th Cir. 1983) (pesticide): "FIFRA registration is a cost-benefit analysis that no unreasonable risk exists to man or the environment taking into account the economic, social and environmental costs and benefits of the use of any pesticide." Save Our Ecosystems, 747 F.2d at 1248 (quotation omitted). In contrast, the granting of a NPDES permit under the CWA is not based on a cost-benefit analysis, but rather on a determination that the discharge of a pollutant satisfies the EPA's effluent limitations, imposed to protect water quality. See 33 U.S.C. § 1342(a) (permit conditioned on discharge meeting CWA's effluent limitations).

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We conclude that the registration and labeling of Magnacide H under FIFRA does not preclude the need for a permit under the CWA. The label's failure to specify that a permit is required does not mean that the CWA does not apply to the discharge of Magnacide-H.

III. "Discharge" of a "pollutant" into "waters of the United States"

To establish a violation of the CWA's NPDES permit requirement, a plaintiff must show that defendants (1) discharged (2) a pollutant (3) to navigable waters (4) from a point source. See Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist., 13 F.3d 305, 308 (9th Cir. 1993). The CWA defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7). The district court held that Magnacide H is a pollutant (and by implication that it is discharged into the canals), and that the irrigation canals are "waters of the United States" under the CWA. The only element not disputed by TID is that the Magnacide H flowed from a "point source," the hose that delivered the herbicide to the canals.

A. Discharge

TID's direct application of acrolein into the irrigation

sion the irrigation canals exchange water with a number of natural streams and at least one lake, which no one disputes are "waters of the United States." A "stream which contributes its flow to a larger stream or other body of water" is a tributary. Random House College Dictionary 1402 (rev. ed. 1980). As tributaries, the canals are "waters of the United States," and are subject to the CWA and its permit requirement. See United States v. Eidson, 108 F.3d 1336, 1341-42

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(11th Cir. 1997) (tributaries are "waters of the United States," and manmade ditches and canals that flow intermittently into creek may be tributaries); United States v. TGR Corn., 171 F.3d 762, 764 (2d Cir. 1999) (non-navigable tributaries flowing into navigable streams are "waters of the United States"); United States v. Texas Pipe Line Co., 611 F.2d 345, 347 (10th Cir. 1979) (unnamed tributary of creek that is tributary to river is "water of the United States").

Our conclusion is not affected by the Supreme Court's recent limitation on the meaning of "navigable waters" in Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 121 S. Ct. 675 (2001). The Court invalidated a 1986 Army Corps of Engineers promulgation known as the "Migratory Bird Rule," which included in "waters of the United States" intrastate waters with no connection to any navigable waters, but which were or would be used as habitat by migratory birds. See 51 Fed. Reg. 41206, 41217 (1986) (setting out Corps' interpretation). The Court rejected the Corps' argument that "isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under [the] definition of 'navigable waters' because they serve as habitat for migratory birds," holding that such an interpretation exceeded the Corps' authority under the CWA and "imping[ed] the States' traditional and primary power over land and water use." 121 S. Ct. at 682, 684.

The irrigation canals in this case are not "isolated waters" such as those that the Court concluded were outside the jurisdiction of the Clean Water Act. Because the canals receive water from natural streams and lakes, and divert water to streams and creeks, they are connected as tributaries to other "waters of the United States." TID claims that the canals are not tributaries because, during the application of Magnacide H, the canals are a "closed system," isolated from natural streams by a system of closed waste gates. It is a disputed

navigable river"). The Clean Water Act is concerned with the pollution of tributaries as well as with the pollution of navigable streams, and "it is incontestable that substantial pollution of one not only may but very probably will affect the other." Id.

CONCLUSION

The EPA-approved label under FIFRA did not eliminate TID's obligation to obtain a NPDES permit. We reverse the district court's grant of summary judgment in favor of TID and its dismissal of the case, and remand for entry of partial summary judgment in favor of Headwaters and for further proceedings on damages and injunctive relief.