

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

HEADWATERS, INC., an Oregon )  
not-for-profit corporation, )  
and OREGON NATURAL RESOURCES )  
COUNCIL ACTION, an Oregon )  
not-for-profit corporation, )

Plaintiffs, )

vs. )

TALENT IRRIGATION DISTRICT, )  
an Oregon municipal )  
corporation, )

Defendant. )

Civil No. 98-6004-AA

OPINION AND ORDER

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AIKEN, Judge:

Headwaters, Inc. and the Oregon Natural Resources Council Action ("Plaintiffs") bring this action against the Talent Irrigation District ("TID") alleging that TID has illegally discharged pollutants into waters of the United States by applying aquatic herbicides to its water delivery system without first obtaining a permit under the Federal Water Pollution Control Act (commonly known as the Clean Water Act and hereinafter referred to as "the Act"), 33 U.S.C. § 1365. Plaintiffs allege that TID's actions violate § 301(a) of the Act, 33 U.S.C. § 1311 (a)

Plaintiffs seek a declaratory judgment, injunctive relief, the imposition of civil penalties and the award of costs, including attorney and expert witness fees.

Plaintiffs filed a motion for partial summary judgment as to TID's liability under the Act. TID filed a cross-motion for summary judgment. The Oregon Water Resources Congress ("OWRC"), filed an amicus curiae brief in support of the defendant. Plaintiffs' motion is denied, TID's motion is granted and this case is dismissed.

#### FACTUAL BACKGROUND

TID operates a system of irrigation canals in the Jackson County/Bear Creek watershed area, including, Talent Canal, Ashland Canal, East Canal, and West Canal. TID uses chemicals in its canals, specifically Magnacide H, to kill vegetation, including weeds and algae. The active ingredient in Magnacide H is acrolein. Acrolein is an acutely toxic chemical that is lethal to fish and other aquatic organisms at the recommended

application rates. The irrigation canals into which TID discharges chemicals derive water from, are tributaries to, and/or exchange water with Bear Creek and other surface waters in Oregon. Since at least June 1992, TID has applied acrolein to each of its irrigation canals approximately every two weeks from late spring through early fall of each year.

On May 8, 1996, TID applied acrolein to Talent Canal. On May 9, 1996, the Oregon Department of Fish and Wildlife (ODFW) discovered numerous dead fish in Bear Creek around and downstream from waters leading to a waste gate from Talent Canal. ODFW later estimated that over 92,000 juvenile steelhead were killed. Defendant admits that on May 8, 1996, a diversion or "wasteway" from Talent Canal to Bear Creek leaked at a rate of approximately one cubic foot per minute.

TID does not have, and has not applied for, a National Pollution Discharge Elimination System ("NPDES") permit issued pursuant to the Act allowing it to discharge into the waters of the United States. The State of Oregon has been delegated authority to administer the Act by the United States Environmental Protection Agency. The State of Oregon passed legislation in 1976 which enabled it to administer the Act. States are given such authority pursuant to § 402(b) of the Act, 33 U.S.C. § 1342(b).

Section 301(a) of the Act, 22 U.S.C. § 1311(a), prohibits the discharge of pollutants from a point source into navigable waters of the United States, unless in compliance with various enumerated sections of the Act. Committee to Save Mokelumne River v. East Bay Util., 13 F.3d 305, 307 (9th Cir. 1993) (1994).

See also, Or. Rev. Stat. § 468B.050. "Discharge of any pollutant" is defined as "any addition of any pollutant to navigable waters from a point source." 33 U.S.C. § 1362(12) (A). Section 301(a) prohibits such discharges unless pursuant to the terms of a NPDES permit issued pursuant to § 402 of the Act, 33 U.S.C. § 1342; and Or. Rev. Stat. § 468B.050.

Plaintiffs have brought a "citizen's suit" pursuant to § 505 of the Act. That section provides that "any citizen may commence a civil action on his own behalf against any person . . . who is alleged to be in violation of an effluent standard or limitation under this chapter [.] " 33 U.S.C. § 1365 (a) (1) (A)

#### STANDARDS

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The materiality of a fact is determined by the substantive law on the issue. T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assoc., 809 F.2d 626, 630(9th Cir. 1987). The authenticity of a dispute is determined by whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go

beyond the pleadings and identify facts which show a genuine issue for trial. Id. at 324.

Special rules of construction apply to evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. T.W. Electrical, 809 F.2d at 630.

#### DISCUSSION

To establish that the defendant has violated the Act by failing to acquire a NPDES permit, plaintiffs must prove that (1) defendant is a "person," (2) who "discharged" or "added," (3) a "pollutant," (4) from a "point source," (5) into "waters of the United States," (6) and the discharge was not authorized by an NPDES permit. 33 U.S.C. § 1311 (a); see 33 U.S.C. § 1342; Committee to Save Mokelumne River, 13 F.3d at 308; and Beartooth Alliance v. Crown Butte Mines, 904 F. Supp. 1168, 1172 (D. Mont. 1995).

The parties do not dispute elements one (TID, a municipal corporation is a "person" as defined by the Act, 33 U.S.C. § 1362 (5), two (the application of aquatic pesticides constitutes a "discharge" or "addition"), or four (TID has discharged or added from a "point source") . The parties dispute elements three (whether acrolein is a "pollutant" under 33 U.S.C. § 1362(14)), five (whether the canals constitute "waters of the United States"), and six (whether the discharge is otherwise authorized by law).

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TID asserts that (1) TID's canals do not constitute "navigable waters" under the Act; (2) Magnacide H as used by TID is not a "pollutant" under the Act; and (3) the discharge is otherwise authorized by law.

1. Standing

TID argues that plaintiffs lack standing to enforce asserted violations of state law. TID asserts that to the extent plaintiffs contend that Oregon has created more stringent definitions and requirements than the federal Act, plaintiffs lack standing to seek enforcement of such legislation under the Act's citizen enforcement provisions. See Atlantic States Legal Foundation, Inc. v. Eastman Kodak Company, 12 F.3d 353, 358-59 (2nd Cir. 1993) (citizens' suit brought to stop discharge of pollutants not listed in a valid permit issued pursuant to the Act; summary judgment for defendant affirmed, court holding that broader, onerous, or more restrictive standards imposed by states may not be enforced by citizens under the Act).

Plaintiffs respond that first, it is not clear that Oregon's definition is more stringent than the federal definition, and second, even if it is, Oregon's definition of "pollutant" is an essential part of its federally approved permitting program which takes the place of the federal program once it is approved.

Plaintiffs also argue that whether the court chooses to apply the Act's federal definitions instead of Oregon's definitions, TID's pesticide application is still a "discharge" of a "pollutant."

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I conclude that plaintiffs have standing to bring a citizen's suit pursuant to § 505 of the Act. 33 U.S.C. § 1365. The court will not reach the issue of whether Oregon's definitions are "stricter" or provide a "greater scope of coverage" than the federal definitions found in the Act. See Atlantic States Legal Foundation, Inc., 12 F.3d at 358-59. TID's actions will be measured against the definitions imposed by the Act.

## 2. "Navigable Waters" Under the Act

33 U.S.C. § 1362(7) defines navigable waters as all waters of the United States including the territorial seas. 40 C.F.R. § 122.2 defines waters of the United States as:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate "wetlands;"

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wet lands," sloughs, prairies, potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreation or other purposes;

(2) From which fish or shellfish are or could be taken or sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

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(f) The territorial sea; and

(9) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

The parties agree that the Court of Appeals has not specifically determined whether canals are waters of the United States. The court has, however, indicated that the term "navigable waters" within the meaning of the Act is to be given the broadest possible interpretation under the Commerce Clause of the United States Constitution. Leslie Salt Co. v. Froehlke, 578 F.2d 742, 754-55 (9th Cir. 1978). See Leslie Salt Co. v. United States, 896 F.2d 354, 360 (9th Cir. 1990) (interpreting "other waters" in the Army Corps of Engineers' regulations defining "waters of the U.S." to include intermittent artificial waters).

Plaintiffs argue that the irrigation canals themselves as well as the natural surface waters that intersect and exchange water with TID's canals, including Bear Creek, Neil Creek, Butler Creek, Clayton Creek, Emigrant Creek, Griffen Creek and Emigrant Lake, meet the Act's broad definition of "navigable waters" of the United States. 33 U.S.C. § 1362(7). I agree.

The canals at issue are tributaries to waters of the United States and are therefore "waters of the United States" under the Act. Congress intended the Act to control discharges into any waters which might reasonably end up in waters related to interstate public commerce. That is the case here. See United States v. St. Bernard Parish, 589 F. Supp. 617, 620-21 (E.D. La. 1984) (if tributaries and waters leading to navigable waters were unregulated, the whole purpose of the Act would be

defeated); Weiszmann v. District Engineer, 545 F. Supp. 721, 727 (S.D. Fla. 1982) (canal which connects with waters of the United States is itself waters of the United States) ; United States v. Eidson, 108 F.3d 1336, 1342-43 (11th Cir. 1997) (non-navigable, man-made, intermittently flowing drainage ditch fell within definition of "waters of the United States" for purposes of the Act).

TID distinguishes these cases not because its irrigation canals are different from the canals or drainage ditches discussed above, but because those cases "involve[d] the application of a waste product directly to canal waters which eventually, but directly, flowed into waters of the United States." Defendant's Memorandum in Opposition, p. 12. TID argues that it has applied an agricultural product approved by the United States Environmental Protection Agency ("EPA") to an irrigation canal which never flows into waters of the United States while the product is "active." TID contends that during the application of Magnacide H its canal system is a "closed system," in that the treated water is maintained in a closed canal system with no interaction with other waters.

Even assuming TID's contention is true, the canals, as defined, fall under the Act as "waters of the United States." The canals meet several subcategory definitions of navigable waters as set forth in 40 C.F.R. § 122.2, including subsections (a) waters susceptible to use in interstate commerce; (b) all intrastate waters; (d) all impoundments of waters; and (e) tributaries of waters. The canals are (a) used by commercial agricultural operations which are undoubtedly

involved in interstate commerce; (b) part of intrastate waters; (d) take water from natural surface waters and discharge at least some of it back to natural surface waters which qualifies them as impoundments; and (e) contribute waters to other surface waters, thus acting in part as tributaries.

Further, TID has admitted that its canal water eventually finds its way into various creeks, including Bear Creek. See Plaintiffs' Ex. 5, TID's Answer to Notice of Violation, Department Order and Assessment of Civil Penalty, p. 1 ("Admits that [TID's] system diverts water from Bear Creek for delivery to its customers and returns unneeded water via a system of waste gates to Bear Creek") (emphasis added).

TID's Long Range Plan, adopted in April 1998, also provides evidence that TID's canal system is not separate from natural surface waters. That document states: "[t]here are four components of the system that must be upgraded to reach the goals of separating the canal system from the natural creek system or 'waters of the United States.'" Plaintiffs' Supplement to Summary Judgment Motion, Ex. 1, p. 4. The document further describes actions which involve "waters of the United States." Id. TID then acknowledges three areas where natural creeks cross through the canal system. Those creeks are: (1) East Canal at Gearky Creek; (2) East Canal at Butler Creek; and (3) Talent Canal at Butler Creek. Id.

Plaintiffs assert that the plans for changes to the system have not yet been implemented. TID's long range plan lists specific improvements to each of the canals which would be required to insure separation of the system and prevent

treated waters from being discharged. Plaintiffs, Supplement to Summary Judgment Motion, Ex. 1, p. 3-8. The Long Range Plan states:

The recent events, involving the Fish Kill and the WELC lawsuit, has [sic] brought to the attention of the District its vulnerability to the Endangered Species Act (ESA) and the Clean Water Act (CWA). The ESA and the CWA did not exist at the time the system was being designed. The system was not built to the standards that are required to relieve the District of liability imposed by these acts.

Id. at p. 3 (emphasis added).

The canals at issue are "waters of the United States" as covered under the Act.

### 3. Magnacide H as a Pollutant

The Department of Environmental Quality ("DEQ") is charged with enforcing the Act in Oregon. Despite consistent use by irrigation districts of aquatic herbicides, the DEQ has never required an NPDES permit for this activity. Magnacide H is approved by the EPA for registration under the Federal Insecticide Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136Y ("FIFRA"). FIFRA in effect "regulates" the use of Magnacide H through its labeling and instruction requirements. TID argues that the imposition of another level of regulation such as an NPDES permit would be duplicative.

The Act defines "pollutant" as  
dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agriculture waste discharged into water.  
33 U.S.C. § 1362.

TID argues that, as applied by irrigators, aquatic herbicides are not wastes; rather, they are useful products necessary to maintain irrigation canals. I disagree. Courts have held that a particular substance is a pollutant even if it is discharged into water for a beneficial purpose. See Hudson River Fishermen's Ass'n v. City of New York, 751 F. Supp. 1088 (S.D.N.Y. 1990), aff'd without opinion, 90 F.2d 649 (2nd Cir. 1991) (despite beneficial purpose of adding water treatment chemicals, chlorine and aluminum sulfate, water containing those chemicals held to be a pollutant). That is the case here. Acrolein is a "pollutant." The herbicide, while beneficial in killing weeds and other vegetation in the canals, is shown to be toxic to fish species and other aquatic life at the recommended application levels.

4. Whether the Discharge is Otherwise Authorized by Law

TID contends that, even if acrolein is a "pollutant," the application of acrolein is adequately regulated and controlled by FIFRA and the EPA thus making further regulation by the Act unnecessary. I agree.

TID argues that the proper use of aquatic herbicides does not have adverse environmental effects and has never required an NPDES permit. In order for the court to give effect to both FIFRA and the Act, the court must construe the EPA-approved label on Magnacide H as an indication that an applicator of Magnacide H does not need a NPDES permit. If an applicator of Magnacide H is required to obtain a NPDES permit before using the herbicide, the label would so indicate. In other instances, the EPA has issued labels requiring applicators of

aquatic pesticides to obtain NPDES permits. Specifically, the fact sheet for copper sulfate attached to plaintiffs, motion for partial summary judgment as Exhibit 9 states in part:

The following revised environmental hazard statement must appear on all NP labels: "This pesticide is toxic to fish and aquatic organisms. Do not discharge effluent containing this product into lakes, streams, ponds, estuaries, oceans, or public water unless this product is specifically identified and addressed in an NPDES permit."

Id. The Magnacide H label does not contain any similar requirement that an applicator have an NPDES permit.

The issue then becomes what constitutes "proper use" of the herbicide.

TID contends that Acrolein breaks down rapidly into water and carbon dioxide, and when applied properly and in accord with the EPA-mandated application directions, no acrolein is released into nearby waterways. TID argues that acrolein dissipates or is otherwise flushed from the canal into fields before it becomes waste. Therefore, when used for its intended purpose, Magnacide H cannot constitute "waste" and is therefore not a "pollutant" under the Act.

To the contrary, plaintiffs' expert, Glenn Miller, a Professor in the Department of Environmental and Resource Sciences at the University of Nevada in Reno, states that the half life of acrolein in water is from 2-10 days. Plaintiffs' Motion for Partial Summary Judgment, Declaration of Glenn Miller, p. 2.

TID relies on an affidavit from the Director of Health, Safety, Environmental and Regulatory Affairs for Baker Petrolite Corporation ("BPC"), the manufacturer of Magnacide H,

who states that the half-life of acrolein is typically ten hours, and may be as little as six to eight hours. See Defendant's Summary Judgment Motion, Ex. 2, Affidavit of Halina Caravello, p. 3.

Caravello also disputes Miller's contention that quantities of acrolein can be released from the soil as water rinses the soil. Caravello maintains that acrolein is bound and transformed when it touches the soil, and that acrolein will not desorb from the soil when rinsed with water. Id. at p. 4.

Plaintiffs have proffered a second declaration by Glenn Miller with information from another acrolein distributor, Spectrum Laboratories, which states that acrolein added to irrigation canals had a half-life of 2.0-2.5 days. Plaintiffs, Reply, Second Declaration of Glenn Miller, p. 2, ¶ 4, Ex. 1, p. 2.

The label approved by the EPA for Magnacide H instructs applicators to not discharge treated water "for 6 days after application into any fish bearing waters or where it will drain into them." Id.; Defendant's Summary Judgment Motion, Ex. 3.

Based on the information in the record, I find that holding any treated water for the EPA-required six day period is sufficient to "cleanse" the water of acrolein, thus making it safe to release into "waters of the United States."

TID asserts that it complies with this application restriction by maintaining a "closed system" for the treated water for the mandated time period. This system includes

containing treated water in a "sump," a cement pool that is water tight. See Supplemental Affidavit of Hollie Cannon, p. 2. Cannon states that, "during application of Magnicide H, the level of treated water in these sumps has never been such that treated water has escaped the sump." Id.

TID relies on Roseann Kachadoorian's affidavit. Kachadoorian is a pesticide and fertilizer registration specialist for the Oregon Department of Agriculture ("ODA"). On July 1, 1998, Kachadoorian accompanied Hollie Cannon, TID's manager, during the application of Magnicide H to TID's Talent Canal. Kachadoorian states that during this application she observed no evidence of leakage of any treated water from Talent Canal to Bear Creek or any other body of water. She observed the catch basins that TID had installed at gates to serve as-a secondary source of containment and to prevent the introduction of treated water to Bear Creek or any other off-target area. She observed that all the water in these catch basins was siphoned back into the irrigation canal. She concluded that "TID's application of Magnicide H on July 1, 1998 was in accordance with the instructions contained on the label of Magnicide H approved by the United States Environmental Protection Agency." Defendant's Ex. 5, Kachadoorian Affidavit, p. 2-3.

TID also relies on an affidavit from Alicia Lanier, a biological and agricultural engineer employed by CH2M Hill in Portland, Oregon. On August 12, 1998, she accompanied Hollie Cannon during TID's application of Magnicide H to one of its irrigation canals. Lanier states that during the eight hour

application period she did not observe "any treated water leaking from TID's canals into Bear Creek or any other bodies of water." Defendant's Ex. 6, Lanier Affidavit, p. 2. Lanier concludes that if TID applies Magnacide H according to its established protocol, according to the EPA-approved label, and in the manner observed on August 12, 1998, "acrolein will not leak from the canals into Bear Creek or any other bodies of water." Id. at 2-3.

Plaintiffs allege that after TID's application of aquatic herbicides to irrigation canal waters, "water containing such pesticides passes and leaks from the canals into intersecting natural surface waters at numerous points." Plaintiffs, Memorandum, p. 11-12. Plaintiffs rely on two occasions where acrolein escaped the canal system, both occurring prior to the filing of this lawsuit. Plaintiffs, Declaration of Charles Tebbutt, Ex. 4.

TID admits that before commencement of this action, it was cited by DEQ for releasing waters containing acrolein into intersecting natural waters through an open headgate; however, TID has since developed and implemented a protocol for the application of aquatic herbicides that has eliminated the risk of such releases. TID states that it has developed a series of catchment basins to collect waters that seep through existing headgates. TID then pumps all of the water from the catchment basins back into the main canal channel. TID states that since implementation of the protocol, no treated water has passed from the canals to natural surface waters. In fact, TID claims that it has applied Magnacide H to its canals approximately 27

times since development of the protocol and there have been no releases of the herbicide during those applications. The record does not indicate that any further releases of acrolein have occurred since TID's implementation of its "holding" protocol.

Moreover, TID states that if proper protocol is followed, no herbicide residues remain in any water that leaves the canal because it has been "contained" in a closed system for the required six days. Thus, even if there were "discharges" from the canal system, there is no evidence in the record that such "discharges" contain a "pollutant."

Plaintiffs dispute that TID maintains a "closed" system. Relying on the declaration of Richard Hart, the Staff Ecologist for plaintiff Headwaters, Inc., plaintiffs assert that there continues to be "seepage" from TID's Talent Canal into Bear Creek. On October 29, 1998, Hart photographed several wet areas where the canal above is in close proximity to the hill slopes that were cut back for the Greenway. Hart found no indications of wet areas above the canal at these sites. Plaintiffs' Consolidated Reply, Declaration of Richard Hart, p. 2-3, Ex. 3.

The record contains no evidence that Magnacide H has recently (in the 27 applications post-filing of plaintiffs, lawsuit) traveled from the canals into natural waterways, or that Magnacide H is likely to seep through ground water from the canal into natural waterways. Further, there is no evidence that any of the alleged leakages observed by Hart contained acrolein.

Moreover, isolated groundwater does not constitute "navigable waters." See Exxon Corp. V. Train, 554 F.2d 1310, 1312 n.3 (5th Cir. 1977) (EPA does not have authority to regulate groundwater). The courts are split, however, with regard to whether groundwater which is hydrologically connected to surface water is subject to the Act. See Village of Oconomowoc Lake v. Dayton Hudson Co., 24 F.3d 962 (7th Cir. 1994) (possibility of hydrological connection between groundwater and surface waters insufficient to justify regulation by the Act); Washington Wilderness Coalition v. Hecla Mining Co., 870 F. Supp. 983 (E.D. Wash. 1994) (pollutants that enter surface waters through hydrologically connected groundwater are covered by the Act).

Regardless, "it is not sufficient to allege groundwater pollution, and then assert a general hydrological connection between all waters. Rather, pollutants must be traced from their source to surface waters, in order to come within the purview of the CWA." Id., 870 F. Supp. at 990.

The Act prohibits discharges from a point source into navigable waters. I find no evidence in the record for the proposition that groundwater which contains Magnacide H is traceable to TID's irrigation canals.

Although the court can afford plaintiffs no relief here, plaintiffs are encouraged to seek relief under FIFRA to petition the EPA to amend the Magnacide H label to include a requirement that an applicator hold an NPDES permit. With this permit would come the relief that plaintiffs lobby for here: monitoring acrolein's impacts on the environment and

consequences of any spillage or leakage, and the development of safe methods of use.

CONCLUSION

Plaintiffs, motion for partial summary judgment (doc. 28) is denied. Defendant's motion for summary judgment (doc. 55) is granted. Defendant's motion to strike declarations (doc. 77) is denied.

This case is dismissed; all pending motions are denied as moot.

Dated this 1 day of February 1999.

/s/ \_\_\_\_\_

Ann Aiken

United States District Judge