

Charles M. Tebbutt (OSB# 96579)
Western Environmental Law Center
1216 Lincoln St.
Eugene, OR 97401
(541) 485-2471
Attorneys for Plaintiffs

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,)
)
v.)
)
TALENT IRRIGATION DISTRICT, an Oregon)
municipal corporation,)
)
Defendant.)
_____)

Civil No. 98-6004-HA

COMPLAINT (Clean Water Act
Citizen Suit)

INTRODUCTION

1. This action is brought under the citizen suit provision of 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. Defendant, Talent Irrigation District, has discharged and continues to discharge pollutants to the waters of the United States without a permit, in violation of § 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.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over the claims specified in this Complaint pursuant to 33 U.S.C. § 1365(a) and 28 U.S.C. § 1331. The relief requested is authorized pursuant to 33 U.S.C. §§ 1319 and 1365(a) and 28 U.S.C. §§ 2201 and 2202.

3. On June 11, 1997, Plaintiffs gave notice of the violations specified in this complaint and of their intent to file suit to the Administrator of the U.S. Environmental Protection Agency (EPA), to the Regional Administrator of the EPA, to the Oregon Department of Environmental Quality (DEQ), to the Defendant, and to the Defendant's agent, as required by Section 505(b)(1)(A) of the Act, 33 U.S.C. § 1365(b)(1)(A). A copy of the notice letter is attached hereto as Exhibit A.

4. More than sixty days have passed since notice was served, and the violations complained of in the notice are continuing at this time or are likely to continue. Neither the EPA nor the DEQ has commenced or is diligently prosecuting a civil or criminal action to redress the continuous and ongoing violations.

5. Defendant remains in violation of the Act.

6. Venue is appropriate in the District of Oregon pursuant to Section 505(c)(1) of the Act, 33 U.S.C. § 1365(c)(1), because the source of the violations is located within the District.

PLAINTIFFS

7. Plaintiff Headwaters, Inc. is a nonprofit corporation organized under the laws of the State of Oregon. Headwaters' offices are located in Ashland, Oregon. Headwaters' members reside throughout Oregon. Members of Headwaters use, enjoy, and recreate in the waters of Bear Creek and its tributaries as well as in and around the irrigation canals within the Talent irrigation District, in the immediate vicinity of, and downstream from, Defendant's discharges. Members of Headwaters also use, or are entitled to use, TID irrigation waters. Member uses of the Bear Creek watershed include, but are not limited to, the following:

(a) Headwaters' members recreate, observe, and enjoy wildlife in and around the irrigation canals and waters of Bear Creek and the Bear Creek watershed.

(b) Headwaters' members have an aesthetic interest in the natural beauty and biodiversity of the Bear Creek watershed in the area of and downstream from Defendant's discharges. Headwaters' members engage in hiking, walking, horseback riding, fishing, boating, swimming, and farming in the Bear Creek watershed.

The recreational, health, aesthetic, economic, and environmental interests of Headwaters' members have been, are being, and will be adversely affected by Defendant's unpermitted discharges.

8. Headwaters' mission is to rehabilitate watershed ecosystems and promote biological diversity through promoting a just, sustainable economy, grassroots organizations, and education. Plaintiff Headwaters has standing in this suit to protect its own interests and those of its individual members in a representative capacity. Headwaters' organizational purposes are adversely affected by Defendant's discharges, which degrade the receiving waters as fish and wildlife habitat, recreational sources, and sources of aesthetic benefits.

9. Plaintiff ONRC Action is a nonprofit corporation organized under the laws of the State of Oregon. ONRC Action is commonly known as Oregon Natural Resources Council (ONRC) and does business as ONRC. The Plaintiff will hereinafter be referred to as ONRC. ONRC's offices are located in Portland, Oregon, Eugene, Oregon, and Klamath Falls, Oregon. ONRC's members reside throughout Oregon. Members of ONRC use, enjoy, and recreate in the waters of the Bear Creek and Rogue River watersheds, in the immediate vicinity of, and downstream from, Defendant's discharges, including, but not limited to, the following:

(a) ONRC's members recreate, observe, and enjoy wildlife in and around the waters of Bear Creek;

(b) ONRC's members have an aesthetic interest in the natural beauty and biodiversity of Bear Creek in the area of and downstream from Defendant's discharges. ONRC's members engage in, among other activities, fishing and swimming in the waters of Bear Creek and downstream waterways.

The recreational, health, aesthetic and environmental interests of ONRC's members have been, are being, and will be adversely affected by Defendant's unpermitted discharges.

10. ONRC's mission is to protect Oregon's environment and natural heritage through education, advocacy, and grassroots empowerment. Plaintiff ONRC has standing in this suit to protect its own interests and those of its individual members in a representative capacity. ONRC's organizational purposes are adversely affected by Defendant's discharges, which degrade the receiving waters as fish and wildlife habitat, recreational sources, and sources of aesthetic benefits.

DEFENDANT

11. Defendant, Talent Irrigation District (TID), is a municipal corporation doing business in the State of Oregon. TID operates a system of irrigation canals in the Bear Creek watershed area.

FACTS

12. Chemicals used by TID in its irrigation canals, upon information and belief, include, among others, acrolein and copper sulfate, which are used to kill vegetation in the irrigation canals.

13. TID has applied acrolein, and possibly other chemicals, to each of its irrigation canals approximately every two weeks from late spring through the early fall of each year. Upon information and belief, TID has continued to, and will continue to, apply acrolein and possibly other chemicals on a regular basis.

14. Acrolein is an acutely toxic chemical that is lethal to fish and other aquatic organisms at the recommended application rates.
15. Upon information and belief, Acrolein can and does pass through and from the canals into other waters of the United States at numerous points in the canal system. Waters that are interconnected with the TID canals are numerous. Such waters include, but are not limited to, Neil Creek, Butler Creek, Clayton Creek, Emigrant Creek, Emigrant Lake, and many more.
16. TID has engaged in the practice of applying chemicals, including but not limited to acrolein, at regular intervals into irrigation canals since at least June 1992.
17. TID applies acrolein into irrigation canals including but not limited to Talent Canal, East Canal, West Canal, and Ashland Canal.
18. 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 the area as partly identified in paragraph 15.
19. For example, on May 8, 1996, TID applied the pesticide acrolein to the Talent Canal.
20. 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.
21. The waste gate, when closed, was found to leak at about one cubic foot per second.
22. Bear Creek, its tributaries, and the irrigation canals constitute "waters of the United States."
23. Acrolein is a pollutant within the meaning of Section 301 of the Clean Water Act, 33 U.S.C. § 1301, and under ORS § 468B.050.

24. TID's application of pesticides, which upon information and belief include, but are not limited to, acrolein and copper sulfate, constitute discharges from point sources into navigable waters of the United States within the meaning of Section 301 of the Act, 33 U.S.C. § 1311, and ORS 468B.050.

25. TID does not have, and has not applied for, a National Pollution Discharge Elimination System (NPDES) permit issued pursuant to the Federal Water Pollution Control Act allowing it to discharge to the waters of the United States.

26. 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).

COUNT 1
Discharge of Pollutants into Bear Creek Not Authorized by a NPDES Permit

27. Section 301(a) of the Federal Water Pollution Control Act, 33 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. Section 301(a) prohibits, inter alia, such discharges unless pursuant to the terms of a NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342.

28. Defendant applies chemical pesticides which, upon information and belief, include, but are not limited to, acrolein and copper sulfate, to kill vegetation in the irrigation canals. Defendant uses irrigation waters to deliver the pesticide application throughout the canal system. The discharge of chemical pesticides from irrigation canals constitutes discharge of a pollutant in violation of the provisions of Section 301 of the Act.

29. A point source is any discernible, defined, and discrete conveyance, including a ditch or channel, from which pollutants are discharged. The waters from the irrigation canals, which contain the chemical pollutants, feed the waters of Bear Creek and mix with other surface waters in the watershed. Bear Creek and other surface waters in the watershed constitute waters of the United States which are protected by Section 301 of the Act. Defendant's canals therefore constitute point sources of Defendant's discharge into waters of the United States.

30. Defendant's discharges of canal water mixed with chemical pollutants, including but not limited to the toxic chemicals, acrolein and copper sulfate, into the waters of Bear Creek, constitute violations of Section 301 of the Act, 33 U.S.C. § 1311, unless Defendant has received a permit to do so pursuant to Section 402 of the Act, 33 U.S.C. § 1342. Defendant does not have a NPDES permit and therefore is in violation of Section 301(a), 33 U.S.C. § 1311.

31. Discharge of a pollutant on a seasonal basis constitutes an ongoing violation of the Act. Defendant has applied and is likely to continue to apply chemicals on a seasonal basis.

32. Defendant's discharges have resulted in damage to the waters of Bear Creek and other surface waters in the watershed including, but not limited to, the killing of numerous fish and other aquatic life. Defendant's discharges of chemical pollutants have violated and continue to violate Section 301(a) of the Act, 33 U.S.C. § 1311(a).

33. Oregon Revised Statutes § 468B.050 prohibits the discharge of any pollutant unless such discharge is specifically permitted in a NPDES permit.

COUNT 2
Discharge of Pollutants into Canals Not Authorized by a NPDES Permit

34. Section 301(a) of the Federal Water Pollution Control Act, 33 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. Section 301(a)

prohibits, inter alia, such discharges unless pursuant to the terms of a NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342.

35. The Act authorizes states to enact laws stricter than the federal enabling legislation. 33 U.S.C. § 1370. Enactment and approval of the Oregon scheme takes the place of the federal scheme. 33 U.S.C. § 1342(b). Acrolein, and other chemicals used by TID, constitute pollutants pursuant to ORS §468B.005.

36. The TID irrigation canals constitute waters of the United States and the State of Oregon. Therefore, discharge of pollutants into irrigation canals without a NPDES permit is a violation of section 301(a) of the Act, 33 U.S.C. § 1311(a), and ORS § 468B.050.

37. Discharge of a pollutant on a seasonal basis constitutes an ongoing violation of the Act.

38. Oregon Revised Statutes § 468B.050 prohibits the discharge of any pollutant into waters of the State unless such discharge is specifically permitted in a NPDES permit.

39. Defendant's discharges of toxic pollutants have violated and continue to violate Section 301(a) of the Act, 33 U.S.C. § 1311(a) and ORS § 468B.050.

RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

A. Issue a declaratory judgment that Defendant, Talent Irrigation District, has violated and continues to be in violation of Section 301 of the Federal Water Pollution Control Act, 33 U.S.C. § 1311, and Oregon Revised Statutes § 468B.050.

B. Enjoin Defendant from applying pollutants in its canals in such a manner as will result in further violation of the Act. In particular, Plaintiffs seek an order enjoining Defendant from discharging pollutants without a NPDES permit.

C. Authorize Plaintiffs, for the period beginning on the date of the Court's order and running for two irrigation seasons (May-September) after Defendant achieves compliance with

the Act, to sample or to arrange sampling of any discharge of pollutants into the irrigation canals with the costs of the sampling to be borne by Defendant.

D. Order Defendant to provide Plaintiffs, for a period beginning on the date of the Court's Order and running for two years after Defendant achieves compliance with the Act, with a copy of all reports and other documents which Defendant submits to EPA or to DEQ regarding Defendant's discharges or NPDES permit at the time each report or document is submitted to these authorities;

E. Order Defendant to participate in and fund research into alternative methods to control vegetative growth in irrigation canals.

F. Issue a remedial injunction ordering Defendant to pay the cost of any environmental restoration or remediation deemed necessary and proper by the Court to ameliorate the water degradation caused by Defendant's violations;

G. Order Defendant to pay civil penalties of \$27,500 per day of violation for violations post-January 1, 1997, and \$25,000 per day per violation for violations pre-January 1, 1997, or each violation pursuant to Sections 309(d) and 505(a) of the Act, 33 U.S.C. §§ 1319(d) and 1365(a), including those listed in Exhibit A and this Complaint, and violations committed subsequent to those identified in this Complaint.

H. Award Plaintiffs their costs, including reasonable attorney and expert witness fees, as authorized by Section 505(d) of the Act, 33 U.S.C. § 1365(d); and

- I. Award such other relief as this Court deems appropriate.

Dated this th day of January, 1998.

Respectfully submitted,

Charles M. Tebbutt, (OSB# 96579)
Western Environmental Law Center
1216 Lincoln Street
Eugene, Oregon 97401
(541) 485-2471

Counsel for Plaintiffs