

WATER QUALITY ALERT
April 2001

**Clean Water Act Permitting Requirements Held to Apply to
Irrigation District's Use of Herbicides in Canals**

On March 12, 2001, the federal Ninth Circuit Court of Appeals decided that an Oregon irrigation district should have obtained a National Pollution Discharge Elimination System (NPDES) discharge permit pursuant to the Clean Water Act (CWA) before applying an herbicide to its irrigation canals. The Headwaters, Inc. v. Talent Irrigation District case has significant regulatory implications for irrigation districts and farmers in California and elsewhere in the west. The case not only established that the application of an herbicide for its registered use and as directed by the EPA-approved label does not eliminate the requirement to obtain a NPDES permit, but also found that irrigation canals, which draw water from or are tributary to "waters of the United States," are also subject to CWA regulation.

The full opinion of the Headwaters case can be accessed through this hyperlink to the Ninth Circuit Court of Appeals' web site:

<http://www.ca9.uscourts.gov/ca9/newopinions.nsf/04485f8dcbd4e1ea882569520074e698/382a2e21df25a83788256a0d00615fde?OpenDocument>. The court determined that the herbicide applied (Magnacide H or acrolein) was a "pollutant," which escaped from the irrigation canals and killed at least 92,000 juvenile steelhead. Instead of finding that the point of entry to the natural surface water was the discharge point of the pollutant, the court determined that the irrigation canals themselves were "waters of the United States" and that the direct application of the herbicide into these waters was a "discharge" regulated by the CWA. Finally, the court determined that the EPA-approved label under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) did not eliminate the irrigation district's obligation to obtain a NPDES permit prior to applying pesticides to its canals.

An expansive reading of this case could mean that irrigation canals are also subject to other CWA provisions, including permitting for other pollutants besides just pesticides and wetlands permitting under CWA Section 404. However, at this point, it is unclear how EPA, the Corps of Engineers, and the State and Regional Water Boards will react to this case and implement permits for actions taken by irrigation districts, particularly herbicide application and canal dredging activities. A statewide general NPDES permit allowing for herbicide applications in accordance with labeling provisions seems to be the only vehicle that will provide fast, comprehensive coverage to deal with the Headwaters decision, and protect against federal, state, or citizen enforcement for pesticide applications to waters. EPA regulations allow statewide permits for a category of sources, such as this newly defined pesticide applicator source (40 C.F.R. § 122.28(a)(1)(iii) and (a)(2)(ii)). A general permit could be adopted with just a 30-day notice and comment period (40 C.F.R. §124.10(b)), although per our state's Memorandum of Agreement, EPA has to have an opportunity to review and comment on the draft permit. The initial general permit could be relatively simple with an effluent limitation that merely states that pesticides must be applied at the quantities and rates set by the pesticide's label. The permit could apply to all who file a Notice of Intent (NOI) to be covered pursuant to the requirements of 40 C.F.R. §122.28(b)(2)(i), or could apply to all applicable

discharges under 40 C.F.R. §122.28(b)(2)(v) if a finding is made and included in the public notice that the Notice of Intent requirement would be appropriate. This last option would expedite the process further and avoid the need to add additional staff to process NOIs. Although this could be done relatively quickly, it probably must be accompanied by an emergency regulation such as a Cleanup and Abatement Order to cover the immediate need to apply the herbicides in the interim before a general permit could be adopted.

All indications are that the State Water Resources Control Board is moving ahead on these regulatory vehicles to provide coverage to applicators.

Similar general permits could be issued for canal dredging and maintenance activities if the Corps of Engineers determines that irrigation canals are now jurisdictional waters of the United States for which CWA 404 permits are required.

Before these permit protections are in place, irrigation districts, water purveyors, and farmers should be cautioned about applying herbicides to waterways or dredging or clearing irrigation canals. Large civil penalties up to \$27,500 per day and criminal penalties including jail time may be imposed for violations of CWA provisions. For additional information, please call us at (916) 441-0131.