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Ninth Circuit Court of Appeals Maintains Broad Clean Water Act Jurisdiction

*Headwaters, Inc. v. Talent Irrigation District,* an early case to interpret the reach of the Clean Water Act (CWA) in light of *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs (SWANCC),* declined to read the SWANCC decision narrowly and maintained the expansive jurisdiction of the Clean Water Act (CWA).

In the case, Headwaters, Inc. and Oregon Natural Resources Council Action (ONRC), two Oregon-based environmental citizens groups, brought suit against the Talent Irrigation District (TID) under the CWA's citizen suit provision for applying the herbicide Mangacide H to Talent's irrigation canals without obtaining a National Pollutant Discharge Elimination System (NPDES) permit required by the CWA for pollutant discharge. The district court granted summary judgement to TID on the grounds that a permit was not required because the herbicide label, which was approved by the EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), did not mention any permit requirement.

The Ninth Circuit, reviewing *de novo,* held that the FIFRA approved label did not preclude the need for permit under the CWA and that the CWA jurisdiction extended to the waters at issue. In assessing the interaction of the two statutes, the court noted that "CWA and FIFRA have different, although complementary, purposes." Specifically, while FIFRA establishes uniform nationwide labeling system to regulate pesticide use, the permitting system under CWA assesses and regulates the impact of pollution on local environmental conditions to further the CWA's purpose – to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

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1. 243 F.3d 526 (9th Cir. 2001) [Headwaters].
3. *Headwaters,* 243 F.3d at 528.
4. *Id.* at 529.
5. *Id.* at 531.
After ruling on the permitting requirement, the court also concluded that CWA jurisdiction extended to TID's irrigation canals because the canals qualified as "waters of the United States" under EPA's interpretation of the statutory definition. Although the Supreme Court recently overturned a similar interpretation by the Army Corps of Engineers in SWANCC, the *Headwaters* court specifically distinguished SWANCC. The court stated that 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." Instead, the canals exchange water with natural lakes and streams and therefore are connected as tributaries to other "waters of the United States."

The Ninth Circuit decided *Headwaters* correctly by maintaining the historically broad jurisdiction of the CWA and limiting the reach of SWANCC to truly isolated intrastate waters. The case is significant because it is the first appellate decision after SWANCC to maintain broad jurisdiction under the CWA and limit SWANCC's holding to the migratory bird rule. While the Fifth Circuit has reached the opposite conclusion, a number of district courts have followed the lead of the Ninth Circuit in *Headwaters*. This case hopefully signals that the holding of SWANCC, which was both unexpected and largely inconsistent with three decades of expansive CWA jurisdiction, will be confined to its narrow legal and factual circumstances.

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8. Id. ("Our conclusion is not affected by the Supreme Court's recent limitation on the meaning of 'navigable waters'").
9. Id.
10. Id.
11. See e.g. U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); United States v. Eidson, 108 F.3d 1336, 1341 (11th Cir. 1997); United States v. Pozsgai, 999 F.2d 719, 731 (3d Cir. 1993); Rueth v. U.S. EPA, 13 F.3d 227 (7th Cir. 1993); Leslie Salt Co. v. United States, 896 F.2d 354, 357 (9th Cir. 1990); Quivira Mining Co. v. EPA, 765 F.2d 126, 129-30 (10th Cir. 1985); Aoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 914-15 (5th Cir. 1983); United States v. Byrd, 609 F.2d 1204, 1209 (7th Cir. 1979); United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1325 (6th Cir. 1974).