



## **Court Rejects Biological Opinion That Backed Restrictions on Pesticides to Protect Salmon**

Monday, February 25, 2013  
Chemical Regulation Reporter  
The U.S. Court of Appeals for the Fourth Circuit vacated a 2008 biological opinion issued by the NOAA Fisheries Service that supported restrictions on application of three pesticides near streams containing species of Pacific salmon listed under the Endangered Species Act (Dow AgroSciences LLC v. National Marine Fisheries Service, 4th Cir., No. 11-2337, 2/21/13).

The court ruled Feb. 21 that the biological opinion, which concluded that the pesticides chlorpyrifos, diazinon, and malathion would jeopardize the viability of federally listed endangered and threatened salmonids, was “arbitrary and capricious” under the Administrative Procedure Act.

The opinion included recommendations that the Environmental Protection Agency restrict ground application of the pesticides within 500 feet of protected salmon habitats and ban aerial pesticide applications within 1,000 feet of a salmon habitat.

### **Judge Faults Decisionmaking**

Judge Paul Niemeyer, author of the opinion, concluded that the biological opinion was “not the product of reasoned decisionmaking” because the NOAA Fisheries failed to support several critical assumptions that factored into the final opinion.

“The Fisheries Service’s November 2008 BiOp relied on a selection of data, tests, and standards that did not always appear to be logical, obvious, or even rational,” Niemeyer wrote. “While the Service may have had good and satisfactory explanations for its choices, the BiOp did not explain them with sufficient clarity to enable us to review their reasonableness.”

Dow AgroSciences LLC, along with Makhteshim Agan of North America Inc. and Cheminova Inc., filed a lawsuit challenging the biological opinion, arguing that the agency did not comply with the Endangered Species Act’s mandate to use the best available scientific and commercial data.

A spokeswoman for NOAA Fisheries told BNA Feb. 22 that the service is still reviewing the decision and did not yet have any comment.

### **District Court Dismissal Overturned**

The circuit court’s decision overturns an October 2012 decision by the U.S. District Court for the District of Maryland to dismiss the lawsuit (35 CRR 1073, 11/7/11).

The district court found that although the service may have used “debatable assumptions” for estimating pesticide exposure, the service’s biological opinion was “sufficiently justified by the weight of evidence.” The service failed in the biological opinion to adequately explain its assumption that salmonids would be exposed to lethal levels of pesticides for 96 continuous hours and failed to explain why the recommended buffers do not vary according to channel depth and width, according to the district court.

Niemeyer wrote that the district court “erred by failing to confine itself to a review of the agency record” because the court’s decision relied on an argument made by the service’s counsel during the summary judgment process.

Niemeyer remanded the case to the Maryland district court, with instructions to remand the biological opinion to NOAA Fisheries to address the flaws identified in the opinion.

#### Other BiOps in Question, CropLife Official Says

CropLife America, a trade association representing the crop protection industry, said in a Feb. 21 statement that the circuit court’s ruling “inherently calls into question” the use restrictions recommended by NOAA Fisheries in other biological opinions.

The opinion on chlorpyrifos, diazinon, and malathion was the first in a series of biological opinions issued to comply with a legal settlement with the Northwest Coalition for Alternatives to Pesticides that required EPA consultation with the service on 37 pesticides (Northwest Coalition for Alternatives to Pesticides v. National Marine Fisheries Service, W.D. Wash., No. 07-1791, 8/1/08; 32 CRR 1122, 11/24/08).

The service has completed biological opinions for 28 of the pesticides, with biological opinions for another eight scheduled to be completed by June 30, 2013, according to NOAA Fisheries’ website. A planned biological opinion for the pesticide molinate was cancelled because use of the substance has been prohibited since 2009.

“This important ruling is critical to the success of future ESA consultations,” Rachel G. Lattimore, senior vice president and general counsel for CropLife America, said in a statement. “CLA is pleased that the court made a reasonable judgment that will hopefully set a standard for future BiOp decisions that affect the crop protection industry.”

CropLife said the inadequacies of the biological opinion highlight ongoing scientific differences between NOAA Fisheries, the U.S. Fish and Wildlife Service, and EPA. The industry group said there is a “lack of a sound and workable process for consultation” under the Endangered Species Act.

#### ‘Minor’ Victory for Industry

Jonathan Evans, toxics and Endangered Species Act director at the Center for Biological Diversity, told

BNA Feb. 22 that he does not anticipate the court decision affecting ongoing efforts to protect protected species from harmful pesticide exposure.

“The writing is on the wall that they [the industry] need to be taking major steps to mitigate impact on endangered species,” he said.

Evans classified the decision as a “minor procedural victory” because the court only concluded that NOAA Fisheries needed to provide better rationale for its decisionmaking. The court did not determine whether it is appropriate or not for the service to recommend the mitigation measures, he said.

Evans said he expects the service to provide “a more robust analysis” in its future biological opinions to satisfy its legal requirements.

Nichelle Harriott, staff scientist at Beyond Pesticides, told BNA in a Feb. 22 email that NOAA Fisheries did not effectively show that available data clearly shows how toxic the three pesticides are to endangered salmon and steelhead, which led to the court decision.

“This oversight can be easily and quickly rectified,” Harriott said.