



Fourth Circuit Strikes NMFS Biological Opinion regarding Pesticide Registrations

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In a unanimous panel decision, the United States Court of Appeals for the Fourth Circuit held (pdf) that a biological opinion issued by the National Marine Fisheries Service (NMFS) regarding the effects of three pesticides on certain salmonids "was not the product of reasoned decision-making." The Fourth Circuit refused to "silently rubber stamp" an agency decision where NMFS failed to provide a satisfactory explanation for key aspects of that decision. Further, the court refused to allow NMFS to offer post hoc rationalizations for its decision in the form of an expert affidavit and arguments advanced by counsel in the course of the litigation. In contrast to the lower court decision, which deferred to NMFS and found that it is not the duty of the court to sit in judgment of scientific standards, the Fourth Circuit took a hard look at the agency determination even as it applied a deferential standard of review.

NMFS issued the biological opinion after consulting with the Environmental Protection Agency (EPA) regarding the effects of chlorpyrifos, diazinon, and malathion on 27 species of Pacific salmonids. NMFS concluded that the pesticides would jeopardize numerous species and adversely affect their critical habitat. Having drawn these conclusions, the agency developed a reasonable and prudent alternative to the action proposed by EPA, which included a number of limitations on the use of those pesticides.

Pesticide manufacturers claimed NMFS failed to justify numerous aspects of its analysis, and the court focused on three of these. First, the pesticide manufacturers argued that, in its analysis regarding the effects of the action on the listed species, NMFS failed to justify the assumption in its population model that salmonids would be exposed to lethal levels of the pesticides continuously for a 96-hour period. The court noted that the assumption was severely criticized after NMFS released a draft biological opinion, but NMFS failed to respond to such criticism. NMFS argued that it recognized the model's limits in light of the assumption and that disclosing those limits justified its action. The court rejected this argument, holding that the agency failed to articulate a satisfactory explanation for its action; the court reasoned that acknowledging the assumption was flawed necessitated more explanation, not less.

Second, the pesticide manufacturers claimed NMFS relied on outdated monitoring data. The court stated that, after the draft biological opinion was released, a number of stakeholders directed NMFS to more recent available data. The court held that NMFS "never adequately explained why it relied on older data despite the existence of new data and the potential drawbacks of using the older data." The court went on to explain that when an agency acknowledges that data it relies upon are outdated or inaccurate, it should analyze the new data or explain its choice to limit its analysis to the older data.

Third, the pesticide manufacturers claimed that the imposition of uniform no-spray buffers is unreasonable given that the buffers applied to water courses of varying depth and width. NMFS argued it was not required to explain why it chose the reasonable and prudent alternative that it settled upon. The court noted that the absence of an explanation was especially relevant in view of the potential economic consequences of the requirement. While the court held that NMFS is not required to specify a reasonable and prudent alternative that is the best option for industry, it must address the economic feasibility of the option it selects.

The Fourth Circuit's decision re-affirms that, although agency decisions are due deference, such deference is not boundless. Those decisions must be reasoned and the agency cannot ignore deficiencies in its analysis. The Fourth Circuit's decision is consistent with the ESA's requirement that the agency must use the best available data during the consultation process.