

MEDIA MENTION

Environment & Safety Practice Chair David Weinberg Discusses Fourth Circuit Win in Pesticides Case with *BNA*

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Environment & Safety Practice chair David Weinberg discussed the ruling by a federal appeals court that pesticide manufacturers can challenge a biological opinion to protect salmon from three kinds of pesticides. Mr. Weinberg, counsel for two of the plaintiffs, said that the decision would "put the 'quality of the science' of the biological opinion at issue in the district court." The U.S. Court of Appeals for the Fourth Circuit decided that the U.S. District Court of Maryland had wrongly dismissed a challenge to the biological opinion brought by the makers of three pesticides. The biological opinion was issued by the National Oceanic and Atmospheric Administration's National Marine Fisheries Service. Mr. Weinberg said "that if the government does not attempt to take the opinion to the U.S. Supreme Court, the remanded lawsuit could go to a factual hearing in the district court on the merits of the biological opinion before the end of the year." He added that "the question of actual harm to Northwest salmon listed under the Endangered Species Act has not yet come up in the litigation. To date, the litigation has been over procedural matters." Mr. Weinberg explained that the pesticides at issue "are widely used in agriculture in California and the Pacific Northwest, especially on apple trees and other fruit trees," and that "the government argued in the district court that the proper time for review was after EPA decided what action to take on the biological opinion, but the Fourth Circuit found a flaw in the government's argument." That flaw, Mr. Weinberg said, "was that the biological opinion 'has a separate legal impact independent of what the Environmental Protection Agency does.' For this reason, the biological opinion is final and subject to

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Pesticides and FIFRA

judicial review in the district court under the Endangered Species Act, as applied through the Administrative Procedure Act." Although the pesticides are registered under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), Mr. Weinberg explained that "the review in the district court of the biological opinion will not be a registration review under FIFRA, but a review for consistency with the Endangered Species Act." "The Fourth Circuit recognized that the biological opinion had a legal impact regardless of whether EPA elected to follow it, because it could affect other pending litigation," he concluded.