

Major Win for Wiley Rein Clients in Fourth Circuit Environmental Case

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In an Endangered Species Act (ESA) case of major importance to American agriculture and suppliers of crop protection products, a unanimous three-judge panel of the U.S. Court of Appeals for the Fourth Circuit on February 21 vacated a “biological opinion” issued by the U.S. National Marine Fisheries Service (NMFS) in 2008. NMFS had found that the use of three pesticide products “jeopardized” the future of salmon and related fish in California and the Pacific Northwest.

Wiley Rein represented two of the three companies that successfully challenged the NMFS opinion in *Dow AgroSciences, LLC., Makhteshim Agan of North America, Inc. and Cheminova, Inc. USA v. National Marine Fisheries, et al.* David B. Weinberg, chair of Wiley Rein’s Environment & Safety Practice, argued the case on behalf of Dow AgroSciences, LLC and Makhteshim Agan of North America, Inc.

The case considered the lawfulness of the first of a raft of pesticide-related opinions being issued in response to requests from the U.S. Environmental Protection Agency (EPA) over the last decade. Since 2002, EPA has been ordered by courts to consult with NMFS and its sister agency, the U.S. Fish & Wildlife Service, about potential impacts on endangered species of several dozen pesticides. EPA also has incorporated ongoing ESA reviews in its routine reevaluation of pesticide registrations. As a result, hundreds of additional consultations are expected to occur in the coming years.

DAS v. NMFS is the first decision to consider the soundness of NMFS’s conclusions in response to one of these requests, which are stated in a “biological opinion.” The Fourth Circuit panel found the challenged biological opinion arbitrary and capricious because, among other

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things, it “relied on a selection of data, tests, and standards that did not always appear to be logical, obvious, or even rational.” The panel also directed NMFS, on remand, to evaluate the economic feasibility of any responsive actions it recommended.