



Three Companies File Suit Against the U.S. NMFS over Proposed Restrictions on Agricultural Products

On April 1, 2009, Dow AgroSciences LLC; Cheminova, Inc.; and Makhteshim-Agan of North America filed suit against the U.S. National Marine Fisheries Service (NMFS), calling for ill-considered restrictions advocated by NMFS for the protection of endangered salmon to be set aside as arbitrary and capricious, lacking either legal or scientific foundation and offering no actual benefit to the environment.

Details of the Suit

Initially filed in the U.S. District Court for the District of Maryland, the suit relates to a NMFS “biological opinion” (BiOp) issued in November 2008 advancing restrictions on authorized uses of the insecticides chlorpyrifos, diazinon and malathion near habitats of endangered west coast salmon and steelhead populations. That court declined to hear the case, claiming that the issue was outside its jurisdiction.

When the registrants appealed the district court’s decision to the U.S. Fourth Circuit Court of Appeals, however, that court agreed to hear the case and denied motions by NMFS for their suit to be dismissed.

Consequently, the registrants’ suit against the NMFS BiOp will go forward, with a decision likely later in 2010.

Products manufactured by the three companies are as follows:

Chlorpyrifos:	Cheminova, Dow AgroSciences, and Makhteshim Agan
Diazinon:	Makhteshim Agan
Malathion:	Cheminova

Why the NMFS Biological Opinion is Objectionable

The NMFS Biological Opinion ignores detailed scientific assessment of these three compounds undertaken over several decades by the Environmental Protection Agency.

Rather than making use of the extensive risk assessments and data compiled by state and federal regulators on these compounds, NMFS would require new restrictions based on its own flawed modeling without validation or peer review.

A highly precautionary approach to the protection of salmon is already in place under existing science-based regulations. These protections will not be reliably increased by arbitrary and unfounded measures based on flawed modeling without regard to actual product use and existing monitoring data. NMFS failed even to consider significant additional restrictions imposed (or soon to be imposed) by U.S. regulators in the normal process of regulatory review.

Part of the reason for the many flaws in the NMFS assessment is that it was prepared to meet deadlines imposed by activist-driven litigation, which limited the time available for a science-based evaluation.

If Allowed to Stand, NMFS’ Assessment Would Set Dangerous Precedents

NMFS is under court order to complete assessments of 34 more agricultural products for the protection of salmonids in the next few years. This initial assessment is expected to set a precedent for the evaluations that follow. Unless problems with this assessment are rectified now, evaluations of other products are likely to be similarly flawed.

The NMFS Assessment Has Been Strongly Criticized by Other Regulators

The NMFS assessment has been strongly criticized in initial review by the U.S. Environmental Protection Agency and the California Department of Pesticide Regulation as lacking a solid scientific basis for concluding that authorized uses of these three products actually pose a risk to the continued existence of the salmon species in question. (NMFS largely ignored these comments in issuing its final BiOp.)

The NMFS assessment was similarly criticized by the Washington State Department of Agriculture for over-reliance on the use of hypothetical worst case product use scenarios without sufficient regard to the extensive, readily-available water monitoring data that has already been conducted for these three products.

Why a Legitimate Science-Based Assessment of Pesticides Is Essential

Pesticides are a necessity of modern food and fiber production. Arbitrarily restricting access to these important tools without valid data-driven scientific assessments offers no clear benefit to the environment and no assurance of protection for salmon and steelhead. Such restrictions can, however, lead to reduced food supply and quality and increased food cost. They can also significantly impair the ability of American farmers to compete with growers overseas and cause tremendous financial risk and damage to their livelihood and the sustainability of their operations.

In addition, some pesticides serve a critical role in protecting public health, by controlling important disease vectors such as mosquitoes, which can carry West Nile virus and other disease. By arbitrarily and unnecessarily restricting the use of these vital tools, ill-founded restrictions such as those proposed by NMFS threaten to undermine the ability of municipalities and others to control these common disease vectors and protect public health.