

NAS Report to Trigger New Round of Pesticide Stewardship Policymaking

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The anticipated release later this month of a National Academy of Sciences (NAS) report on ecological risk assessment is expected to trigger a new round of policymaking and attention to how the Environmental Protection Agency (EPA) evaluates the potential effects of pesticide registrations on endangered species.

The report will be issued in response to a joint request from EPA, the National Marine Fisheries Service, the U.S. Fish & Wildlife Service and the U.S. Department of Agriculture for the NAS to referee continuing disputes among the agencies about how to address a number of scientific issues central to such evaluations. Among the issues of concern are how to better identify geographic areas of concern, how to evaluate the impacts of mixtures of pesticides and—perhaps most important—how to account for uncertainties.

Disagreements about these and several other issues have frustrated for years efforts by EPA and the Services to develop an efficient way to address obligations created by the Endangered Species Act. Those disagreements have led to more than a decade of litigation. The most recent related decision was issued in February by the United States Court of Appeals for the Fourth Circuit. In that case, the court vacated a “biological opinion” in which the National Marine Fisheries Service found that the registration of three organophosphate pesticides would “jeopardize” salmonids in the Pacific Northwest and California¹.

These controversies already have disrupted EPA's extensive pesticide registration program and threaten to do far more damage as the Agency proceeds with a statutorily mandated routine, 15-year review of every registered product.²

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That effort requires that EPA address the registration of about 90 products a year, and use of many of those products are likely to trigger ESA analyses.

In the last 90 days, leaders of EPA's Office of Pesticide Programs have indicated their intention to follow the release of the NAS report with a series of formal and informal discussions with a wide range of stakeholders about how to incorporate the NAS's ecological risk evaluation recommendations in the pesticide registration program. The model for this effort appears to be the successful "science policy" question resolution process that followed the 1996 enactment of the Food Quality Protection Act, which focused primarily on potential human health effects³. That process involved solicitation of comment on a number of papers addressing specific issues, advisory committee meetings and other outreach efforts. A similar multiyear, interactive program to address ecological risk issues presented by threatened and endangered species can be expected to begin by this June.

1 *Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv.*, 707 F.3d 462 (4th Cir. 2013). Wiley Rein was counsel to two of the three successful appellants in this case.

2 See 7 U.S.C. § 136a(g).

3 Food Quality Protection Act of 1996, Pub. L. No. 104-170, 110 Stat. 1489 (1996), see generally Food Quality Protection Act (FQPA) of 1996, www.epa.gov/pesticides/regulating/laws/fqpa/.