UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1941

DOW AGROSCIENCES LLC; MAKHTESHIM AGAN OF NORTH AMERICA, INC.; CHEMINOVA, INC. USA,

Petitioners,

v.

NATIONAL MARINE FISHERIES SERVICE; JAMES W. BALSIGER, Acting Assistant Administrator of the National Marine Fisheries Service,

Respondents.

NORTHWEST COALITION FOR ALTERNATIVES TO PESTICIDES; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; INSTITUTE FOR FISHERIES RESOURCES; DEFENDERS OF WILDLIFE; AMERICAN BIRD CONSERVANCY,

Amici Supporting Respondents.

On Petition for Writ of Mandamus.
(8:09-cv-00824-AW)

Argued: October 27, 2010 Decided: March 2, 2011

Before NIEMEYER, SHEDD, and AGEE, Circuit Judges.

Petition denied by unpublished per curiam opinion.

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ARGUED: David Burton Weinberg, WILEY REIN, LLP, Washington, D.C., for Petitioners. Robert Parke Stockman, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondents. **ON BRIEF**: Eric Andreas, WILEY REIN, LLP, Washington, D.C.; David Menotti, Warren U. Lehrenbaum, PILLSBURY WINTHROP SHAW PITTMAN LLP, Washington, D.C.; Christopher Landau, Michael D. Shumsky, Aaron Nielson, KIRKLAND & ELLIS, LLP, Washington, D.C., for Petitioners. Ignacia S. Moreno, Assistant Attorney General, Michael T. Gray, Pamela B. Lawrence, Environmental & Natural Resources Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondents. Stephen D. Mashuda, Amanda W. Goodin, EARTHJUSTICE, Seattle, Washington, for Amici Supporting Respondents.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

The petitioners, three pesticide manufacturers holding registrations from the Environmental Protection Agency for the sale and use of the insecticides chlorpyrifos, diazinon, and malathion, filed a petition in this court for the issuance of a writ of mandamus directed to the National Marine Fisheries Service, which issued a biological opinion concluding that those insecticides will kill or damage Pacific salmonids and their habitat. The petition asks us to require the Fisheries Service to set aside its biological opinion and, in issuing a new one, to consider all the data and utilize "the best scientific and commercial data available," as required by the Endangered Species Act, 16 U.S.C. § 1536(a)(2). The petitioners have filed this petition as an alternative to their appeal from the district court's order dismissing their action to review the biological opinion in the district court under the Administrative Procedure Act, 5 U.S.C. § 704.

In Dow Agrosciences LLC v. National Marine Fisheries Service, No. 09-1968, ___ F.3d ___ (4th Cir. Mar. 2, 2011), which we also decide today, we reverse the district court's order dismissing the petitioners' suit under the Administrative Procedure Act and remand the case for further proceedings in the district court.

It is well established that "mandamus is a drastic remedy that should only be used in extraordinary circumstances and may not be used as a substitute for appeal." In re Lockheed Martin Corp., 503 F.3d 351, 353 (4th Cir. 2007). By reversing and remanding Dow Agrosciences LLC v. National Marine Fisheries Service to the district court, we have provided the plaintiffs with an "adequate means of attain[ing] the relief [they] desire[]." United States ex rel. Rahman v. Oncology Assocs. P.C., 198 F.3d 502, 511 (4th Cir. 1999). Moreover, because mandamus is an extraordinary remedy, avoiding potential delay in reviewing the biological opinion is not sufficient to warrant issuance of the writ in this case.

For the foregoing reasons, we deny the petition.

PETITION DENIED