

Court Issues Decision on the Use of No Surprises Guarantees in Habitat Conservation Plans; Fish and Wildlife Service Publishes New Proposal on Permit Revocation

On June 10, 2004, U.S. District Judge Emmet G. Sullivan of the U.S. District Court for the District of Columbia issued an order clarifying his decision in the *Spirit of the Sage Council* case, in which the court vacated and remanded the permit revocation rule of the U.S. Fish and Wildlife Service (USFWS) and also remanded the related “No Surprises” rule for further consideration. The USFWS’ 1998 No Surprises rule grants certain assurances to holders of incidental take permits (ITPs) issued as part of a habitat conservation plan (HCP) developed pursuant to the Endangered Species Act (ESA).

In this new order, the court explicitly required the USFWS to adopt new permit revocation rules and to complete its reconsideration of the No Surprises rule by December 10, 2004. The judge also ordered that “until and unless the United States Fish and Wildlife Service adopts new revocation rules specifically applicable to Incidental Take Permits following full compliance with the advance public notice and comment requirements. . . all ITPs issued by the [USFWS] shall be subject to the general revocation standard applicable to other [USFWS] permits.” The judge further ordered the USFWS to “refrain from approving new ITPs or related documents containing ‘No Surprise’ assurances,” pending adoption of a new permit revocation rule and reconsideration of the No Surprises rule.

For the present time, the USFWS will consequently stop issuing any ITPs that have No Surprises assurances. The decision has no immediate effect on existing ITPs and HCPs. The No Surprises rule permits the USFWS to offer permittees assurances that they will not be required to commit additional land, water or financial compensation beyond the commitments to which they have agreed in the HCP. These assurances have been part of ITPs since the mid-1990s and are considered by many permittees to be essential to participation in the HCP program.

The previous permit revocation rule was announced in 1999 and addresses HCPs and ITPs providing No Surprises assurances. This rule explained that an ITP may be not be revoked unless continuation of the permitted activity would jeopardize species. According to the June 10 order, any ITPs issued by the USFWS must now follow the more general permit revocation rules applicable to all other USFWS permits. These more general rules state that a permit may be revoked if the wildlife population subject to the permit “declines to the extent that continuation of the permitted activity would be detrimental to maintenance or recovery of the affected population.” 50 C.F.R. §13.28(a)(5). ITPs also may not contain No Surprises assurances until USFWS completes consideration of the new ITP rules, but the USFWS can issue ITPs that do not include assurances.

In a separate action related to the judge’s earlier ruling, the USFWS has also recently proposed to reissue the Permit Revocation Rule for ITPs. The USFWS has issued a notice, effective immediately, that withdraws the previous permit revocation rules in 50 C.F.R. § 17.22(b)(8) and 17.32(b)(8) (69 Fed. Reg. 29669 (May 25, 2004)). Simultaneously, the USFWS has also published a proposed rule to amend § 17.22(b)(8) and 17.32(b)(8) to reinsert the previous permit revocation language (69 Fed. Reg. 29681 (May 25, 2004)). This proposal will continue the special rule for revoking an ITP issued pursuant to an HCP. The language is identical to the previous Permit Revocation Rule language and states:

Criteria for revocation. A permit issued under paragraph (b) of this section may not be revoked for any reason except those set forth in § 13.28(a)(1) through (4) of this subchapter or unless continuation of the permitted activity would be inconsistent with the criterion set forth in 16 U.S.C. 1539(a)(2)(B)(iv) and the inconsistency has not been remedied in a timely fashion.

The USFWS is taking comment on the proposal through July 26, 2004, and has specifically invited the public to comment on the following issues:

1. The proposal to reestablish the permit revocation rule;
2. The interrelationship of the permit revocation rule and the No Surprises rule, including whether the revocation standard in the permit revocation rule is appropriate in light of the regulatory assurances contained in the No Surprises rule; and
3. Whether the revocation standard in 50 C.F.R. § 13.28(a)(5) or some other revocation standard would be more appropriate for incidental take permits with No Surprises assurances.

At this point, it can be expected that the USFWS will receive numerous comments both in favor and opposed to the use of the standard in the Permit Revocation Rule. The USFWS has indicated its support for issuing the rules in their present form and maintaining No Surprises assurances. If the permit revocation rules are promulgated in final as proposed, the USFWS likely will begin issuing new ITPs with No Surprises assurances and subject to the permit revocation jeopardy standard. It can also be expected that the challenges to the No Surprises assurances will continue.

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For additional information on the proposed rule, the HCP program, or the Endangered Species Act and other environmental issues in general, please contact Thomas M. Berliner (tberliner@duanemorris.com), Colin L. Pearce (clpearce@duanemorris.com) or Karen L. Donovan (kldonovan@duanemorris.com) in the San Francisco office at 415.371.2200, or the attorney in the firm with whom you are regularly in contact.