

U.S. Fish & Wildlife Service Issues Final Permit Revocation Rule for Incidental Take Permits

On December 10, 2004, the U.S. Fish and Wildlife Service (USFWS) issued a final rule setting forth new regulations authorizing the Service to revoke incidental take permits (ITPs) issued for habitat conservation plans (HCPs) under the Endangered Species Act (ESA) under certain circumstances. 69 Fed. Reg. 71723. This action reinstates an element of the Service's HCP procedures allowing landowners to enter into HCPs with "No Surprises" assurances. It is unlikely that the rulemaking will end the controversy over the HCP program, but the action removes a hurdle to the Service's ability to enter into HCPs that ensure against the imposition of additional conservation and mitigation measures beyond those committed to in a plan.

"No Surprises" Assurances and the Permit Revocation Rule

The USFWS originally promulgated the permit revocation rule in 1999 to address permitting standards for HCPs and ITPs providing No Surprises assurances. 64 Fed. Reg. 32,712 (June 17, 1999). No Surprises assurances ensure that once an HCP is approved, the government will not impose additional conservation and mitigation measures except in limited circumstances generally addressed up front by the parties. The permit revocation rule stated that an ITP may not be revoked unless continuation of the permitted activity would be inconsistent with the requirement that an ITP not appreciably reduce the likelihood of the survival and recovery of the species. In effect, this provides the Service with the discretion to revoke a permit if the permitted activity will jeopardize the species. Without the rule, any ITPs issued by the USFWS would be subject to 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).

In a decision issued in December 2003, a U.S. district court held that the Service adopted the permit revocation rule in violation of the notice and comment requirements of the Administrative Procedure Act (APA). *Spirit of the Sage Council v. Norton*, 294 F. Supp.2d 67 (D. D.C. 2003). The court ordered the Service to adopt new revocation rules following full compliance with the APA notice and comment requirements and ordered the Service to refrain from approving any ITPs or HCPs containing No Surprises assurances until the new rulemaking was completed. In accordance with this decision, the Service released draft rules for comment earlier this year and adopted these new final rules in compliance with the deadlines set by the court.

"In a Timely Fashion" Omitted

In the final permit revocation rule, USFWS has made one change to the text of the original rule. The agency deleted the phrase at the end of the original rule, which stated that a permit would be revoked if an inconsistency was not been remedied "in a timely fashion." The agency notes that each HCP is unique, and the situation

associated with a finding of unforeseen circumstances and a determination that continued activity under a permit would appreciably reduce the likelihood of survival and recovery of a species covered by the permit is case-specific. As a result, USFWS has determined that it is not possible to determine when a situation has been remedied in “a timely fashion.”

At this point, it is likely that the controversy over the USFWS HCP program and the No Surprises Rule will continue. Even though the revocation rule has been welcomed by environmental groups as a step toward addressing their concerns with HCPs and No Surprises, several groups continue to have concerns with respect to the assurances provided by No Surprises. Permit holders, on the other hand, have applauded the USFWS efforts to develop policies to promote HCPs and other conservation efforts through the use of No Surprises assurances and related regulations. As the new Congress prepares to work on amendments to the ESA, it appears likely that there will also be an effort to codify No Surprises assurances, in part to avoid any further adverse decisions regarding the legality of the efforts to offer these assurances as part of an HCP.

For Further Information

If you have questions about the USFWS’ new rule, including how it may affect your projects or activities, please contact **Tom Berliner** or **Karen Donovan** in San Francisco (415-371-2200) or any of the other members of Duane Morris’ Energy, Water and Natural Resources Group (www.duanemorris.com) or the attorney in the firm with whom you are regularly in contact.