Legal Backgrounder

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FEDERAL COURT RAISES UNCERTAINTY FOR ESA "NO SURPRISES" POLICY

by

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In recent years, the federal government's sponsorship of Habitat Conservation Plans ("HCPs") has provided one of the most important tools for consensual administration of the Endangered Species Act ("ESA") with private landowners and developers. HCPs have offered private landowners an opportunity to obtain ESA permit protection for land development activities in the context of a landscape plan that includes set-asides for the benefit of threatened or endangered species. Several hundred HCPs have been negotiated with private parties in recent years, covering millions of acres of private lands. *See generally* David J. Hayes, *Recent Developments Reveal 'Mid-Life' Crisis for Species Act* (Washington Legal Foundation; Dec. 14, 2001). Most of these consensual agreements have been forged under the "No Surprises" policy, through which the federal government agrees to take some risk of increased future need of species protection in return for specific commitments made by landowners to protect species and their habitat.

In a recent decision handed down by Judge Emmet Sullivan of the District of Columbia District Court, the legal vitality of the "No Surprises" regulations issued by the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS" or "NOAA Fisheries") have been called into question. The remand threatens to potentially unsettle a program that has flourished in recent years and that provides both landowners with certainty as well as significant protections for threatened and endangered species.

Section 9 of the ESA prohibits all persons from "taking" threatened and endangered species. *See, e.g.,* 16 U.S.C. § 1538(a); 50 C.F.R. § 17.31(a). A "take" is broadly defined to include harm, harassment, killing and even habitat modification that actually kills or injures wildlife. Those who knowingly violate Section 9's "take" prohibition can face potential civil and/or criminal penalties.

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In response to concerns that private landowners would be prohibited from undertaking lawful activities on their property by Section 9, Congress amended the ESA in 1982 to provide new flexibility in the Act, and allow for the "incidental take" of listed species in the course of an otherwise lawful activity through the issuance of an "Incidental Take Permit" under Section 10(a)(1)(B). As a result, where there is no federal nexus to a project, incidental take may be authorized by FWS and/or NOAA Fisheries provided the proposed activities are conducted pursuant to a HCP that is designed to conserve the species and avoid appreciably reducing the likelihood of the survival and recovery of the species in the wild (e.g., jeopardizing the species' continued existence), typically through implementation of mitigation measures, and after opportunity for public comment. 16 U.S.C. §§ 1539(a); 50 C.F.R. § 402.02. HCPs are required to include, among other things, the steps that the applicant will take to minimize and mitigate the impacts of the taking, provide adequate funding over the term of the HCP, and include other measures that the agency may require as necessary or appropriate. 16 U.S.C. §§ 1539(a)(2); *see also* 50 C.F.R. §§ 17.22, 17.32; *see also* 50 C.F.R. §§ 222.307.

Between 1983 and 1992, only fourteen Section 10 permits were issued. This little-used tool was given new life in the Clinton Administration with the adoption of the "No Surprises" policy by Secretary Babbitt in 1994. The "No Surprises" policy gives landowners and developers assurances that they will not be asked by the FWS or NOAA Fisheries to commit additional land, water and/or financial resources than previously agreed to for the species covered in the HCP, even if unforeseen circumstances (e.g., those circumstances that could not reasonably have been anticipated) arise after the permit is issued indicating the need for additional mitigation measures. Additional conservation and mitigation measures can be required in the case of changed circumstances, e.g., those that can reasonably be anticipated and planned for, but only if the HCP implementing agreement authorizes such additional measures.

HCPs and the "No Surprises" policy have been viewed favorably by many in the development community and in local government because they have provided a new tool which addresses landowners' need for assurances that their development activities are not violating the ESA, while also providing important set-asides for the benefit of endangered species. A number of prominent environmental and conservation organizations also have supported the concept because it facilitates significant set-asides on private lands for the benefit of endangered species, although others in the environmental community have expressed reservations about the approach.

Several of the more skeptical environmental groups, led by the Spirit of the Sage Council, challenged the "No Surprises" regulations in 1998 in federal district court, claiming that they violated the ESA. In particular, plaintiffs alleged that the regulations unlawfully failed to require permit applicants to fully minimize and mitigate impacts to listed species that occur during changed and unforeseen circumstances, and impermissibly allowed the agencies to issue permits that failed to conserve the species generally and where the taking "appreciably reduces the likelihood of the survival and recovery of the species in the wild" under changed or unforeseen circumstances. The plaintiffs sought a judicial declaration that the "No Surprises" regulations violated the ESA, sought to have the court vacate the "No Surprises" rule, and to enjoin its implementation.

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During the course of the litigation, and in an ill-fated attempt to shore up its position, the FWS quickly issued an additional set of regulations — known as the "permit revocation" rule — which clarified that permits issued under the HCP program could be revoked in certain narrow circumstances when it was evident that continued implementation of the HCP would jeopardize the continued existence of a listed species and the FWS has not remedied the situation in a timely manner. 64 Fed. Reg. 32,706, 32,712 (June 17, 1999). A concurrently issued new rule also eliminated one of the pre-existing general authorities to revoke permits as it applies to the HCP program, (i.e. that a permit could be revoked when the 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). These revocation rules were likewise immediately challenged by the environmental plaintiffs on substantive and procedural grounds. *Id*. at 32,711.

On September 30, 2003, Judge Sullivan, in a two sentence order, issued a decision granting the environmental group's motion for summary judgment. The court, however, did not articulate the basis for its ruling, leaving that for a future day. *Spirit of the Sage Council v. Norton*, Civ. No. 98-1873 (D.D.C. 2003). Because the pending opinion could have had far reaching effects on both existing HCPs and those being negotiated, the FWS immediately issued guidance to its regional and field offices on how to proceed in light of the uncertainty pending an order from the court explaining his decision. That guidance allowed the issuance of new incidental take permits under the HCP program with assurances, but only if the incidental take permits contain specific "severability" language stating that any "No Surprises" provisions would be enforceable only to the extent allowable by any judicial decision or determination, and be subject to automatic amendment should the "No Surprises" regulation subsequently be revised. NOAA Fisheries, which issues significantly fewer HCPs than the FWS, and which did not adopt the permit revocation rule, is addressing the issue on a case-by-case basis, and is expected to follow a similar approach.

On December 11, 2003, Judge Sullivan issued his long-awaited decision. The Judge vacated and remanded the FWS's "permit revocation" rule because he found that it had not been developed in accordance with appropriate procedural requirements under the Administrative Procedure Act. Judge Sullivan also remanded the "No Surprises" rule. In an exercise of judicial restraint, however, he did not expressly vacate that rule, nor did he reach the substantive challenges raised by the plaintiffs against the "No Surprises" rule. Rather, Judge Sullivan suggested that the government review the underpinnings of the "No Surprises" rule in connection with its remanded reconsideration of the vacated permit revocation rule. By taking this approach, the court avoided the harsh result of invalidating all of the incidental permits that have been issued in reliance on the No Surprises regulations; those permits remain in force.

Not satisfied, the plaintiffs brought a motion to clarify the decision on December 24, 2003. The motion asks the court to set a 180-day deadline for the federal government to address the remand, including any required additional administrative proceedings such as providing the public with notice of any new proposals and an opportunity for comment. Additionally, the motion asks that the court declare that the standards governing the Services' ability to revoke incidental take permits during the period of remand are those that apply generally to FWS permits, without application of the "permit revocation" rule (e.g., which would allow the FWS to revoke an Incidental Take Permit when continuation of the permitted activity would be

detrimental to the maintenance or recovery of the affected population as allowed by 50 C.F.R. § 13.28(a)(5), as opposed to only when it jeopardizes the continued existence of the species as had been provided by the now vacated "permit revocation" rules). Finally, the plaintiffs requested that the court make it clear that the federal government may not approve *any* new "No Surprises" assurances during the remand period.

The federal government has opposed this motion, and it is currently pending before the court. In particular, the government has argued strenuously against plaintiffs' request to enjoin the granting of future "No Surprises" assurances, asserting that "the No Surprises Rule remains in effect, and as a matter of law, the FWS and NMFS may continue to uphold and implement it." *See* Federal Defendant's Opposition to Plaintiff's F.R.C.P. 59(e) Motion at 10 (Jan. 9, 2004) ("Federal Opposition").

While interested parties await the court's response to plaintiffs' motion to clarify, the FWS is following guidance that it issued on January 28, 2004, which states that regional and field offices may continue to issue, renew, amend or transfer Incidental Take Permits with "No Surprises" assurances, so long as the "severability" language required by the FWS guidance issued shortly after the Sullivan decision was initially rendered is included in the permits. The FWS also reaffirmed that Incidental Take Permits remain exempt from the general permit revocation standard in 50 C.F.R. § 13.28(a)(5) based on the agency's statutory authority.

Regardless of the court's next step, however, the federal agencies would be well-advised to revisit the No Surprises rule and, as the government itself has explained, "decide how to exercise their range of rulemaking options: whether to issue entirely new rules, to reissue similar rules, to revoke the existing rules, or not to issue formal rules at all — provided that they comply with the Order of the Court and the [Administrative Procedure Act]" on their own timetable. Federal Opposition at 11. Science-based, voluntary agreements between the government and private landowners are one of the best ways to implement both the letter and the spirit of the Endangered Species Act on private lands. It is vitally important that habitat conservation plans — which have helped protect millions of acres of sensitive habitat on private land — remain in the government's ESA toolbox. The feds should invest the effort, now, to address the outstanding legal issues and lay them to rest.

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