



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Washington, D.C. 20240

JUN 28 2004

In Reply Refer To:
FWS/AES/DCHRS/017828

Memorandum

To: Regional Director, Regions 1,2,3,4,5,6, and 7
Manager, California/Nevada Operations Office

From: Director *Steve Wilcove*

Subject: Revised Directive Concerning "No Surprises" Litigation

This memorandum supersedes my June 10, 2004, memorandum providing direction on how to respond to the June 10, 2004, order of the court in *Spirit of the Sage Council v. Norton* Civil Action No. 98-1873 (D. D.C.). On December 11, 2003, the court vacated the Permit Revocation Rule for incidental take permits, 50 C.F.R. 17.22(b)(8) and 17.32(b)(8), and remanded it to the Service for further proceedings consistent with the rulemaking provisions of the Administrative Procedure Act. On May 25, 2004, the Service issued a proposed rule to reestablish the provisions of the vacated Permit Revocation Rule. The court's June 10, 2004, order requires the Service to complete this rulemaking by December 10, 2004. The order also requires that, until the Service completes this rulemaking, all incidental take permits issued by the Service are subject to the general permit revocation standard in 50 C.F.R. 13.28(a)(5). Finally, the order prohibits the Service from approving, under authority of section 10(a)(1)(B) of the Act, new incidental take permits or related documents containing No Surprises assurances until the rulemaking is completed. However, the June 10 order states that it does not prevent the Service from approving incidental take permits that do not contain No Surprises assurances.

Effective immediately, you may resume issuance of new incidental take permits or major amendments of existing incidental take permits provided either (1) that the permit and related documents do not contain No Surprises assurances, or (2) the following language is included in the terms and conditions of any permit, implementing agreement, and any other contractual document associated with the permit:

On June 10, 2004, the court in *Spirit of the Sage Council v. Norton*, Civil Action No. 98-1873 (D. D.C.) ordered that, until the Service completes a rulemaking on revocation standards for incidental take permits, the Service may not approve new incidental take permits or related documents

containing No Surprises assurances. The order specifically allows for the Service to issue incidental take permits that do not contain No Surprises assurances. Therefore, the “No Surprises” assurances contained in **[insert references to all No Surprises assurances provisions in the IA, HCP, etc.]** are currently unenforceable and ineffective with respect to this Permit. The remainder of the Permit, the IA, and the HCP shall remain in full force and effect to the maximum extent permitted by law. In addition, in the event that any future judicial decision or determination holds that the “No Surprises” assurances rule (or similar successive rule) is vacated, held unenforceable or enjoined for any reason or to any extent, **[insert references to all No Surprises assurances provisions in the IA, HCP, etc.]** shall be enforceable only to the degree allowed by any such decision or determination; provided that the remainder of the Permit, the IA, and the HCP shall remain in full force and effect to the maximum extent permitted by law. In the event that the “No Surprises” assurances rule is vacated, held unenforceable or enjoined by a judicial decision or determination, including the June 10, 2004, order described above, but is later reinstated or otherwise authorized, the assurances provided under the revised rule shall automatically apply to the HCP, IA, and Permit in place of **[insert references to all No Surprises assurances provisions in the IA, HCP, etc.]**. If, in response to any judicial decision or determination, the “No Surprises” assurances rule is revised, **[insert reference to all No Surprises assurances provisions in the IA, HCP, etc.]** shall be automatically amended in a manner consistent with the revised rule so as to afford the maximum protection to the Permittees consistent with the revised rule. Pursuant to the June 10, 2004, order in *Spirit of the Sage Council v. Norton*, Civil Action No. 98-1873 (D. D.C.), until the Service adopts new revocation rules specifically applicable to incidental take permits, all incidental take permits issued by the Service shall be subject to the general revocation standard in 50 C.F.R. § 13.28(a)(5). Additionally, notwithstanding anything to the contrary in the IA and the HCP, the Service retains statutory authority, under both sections 7 and 10 of the ESA, to revoke incidental take permits that are found likely to jeopardize the continued existence of a listed species.

You may also resume approving requests for transfer or minor amendments of an approved incidental take permit that includes “No Surprises” assurances provided that the full extent of environmental impacts that will result from the activity authorized by the transfer or minor amendment was analyzed when the permit subject to transfer or amendment was first approved. No additional disclaimer language is needed for such transfers or amendments.

Notices of Availability for publication in the Federal Register for new incidental take permit applications that include No Surprises assurances within the HCP or related documents must include the following language as part of the notice:

Pursuant to the June 10, 2004, order in *Spirit of the Sage Council v. Norton*, Civil Action No. 98-1873 (D. D.C.), the Service is enjoined from approving new section 10(a)(1)(B) permits or related documents containing “No Surprises” assurances until such time as the Service adopts new permit revocation rules specifically applicable to section 10(a)(1)(B) permits in compliance with the public notice and comment requirements of the Administrative Procedure Act. This notice concerns a step in the review and processing of a section 10(a)(1)(B) permit and any subsequent permit issuance will be in accordance with the Court’s order. Until such time as the Service’s authority to issue permits with “No Surprises” assurances has been reinstated, the Service will not approve any incidental take permits or related documents that contain “No Surprises” assurances.

As a final point of clarification, incidental take permittees may also issue certificates of inclusion for new activities to be covered by their permit provided that the full extent of environmental impacts that will result from the activity authorized by the certificate of inclusion was analyzed at the time of permit approval. As the Service does not issue a permit in these circumstances, no additional disclaimer language is needed for such certificates.

This direction will remain in effect until further notice. Requests to deviate from the procedures described in this memorandum will require coordination with my office. Please contact Patrick Leonard, Chief, Division of Consultation, Habitat Conservation Planning, Recovery, and State Grants if you have any questions regarding this issue.