

**NESARC Legal Memorandum Re: *Spirit of the Sage Council v. Norton*
January 8, 2004**

On December 11, 2003, Judge Edward Sullivan with the United States District Court for the District of Columbia issued a memorandum opinion and order in *Spirit of the Sage Council v. Norton*, Civil Action No. 98-1873 (D.D.C. Dec. 11, 2003). This litigation challenged the No Surprises Rule promulgated by the Fish and Wildlife Services (FWS) and the National Marine Fisheries Service (NMFS) and the, later, promulgation of a Permit Revocation Rule (PRR) solely by the FWS. The decision vacates and remands the PRR for failure to comply with the notice and comment procedures under the Administrative Procedures Act (APA), and it separately remands (but does not vacate) the joint FWS/NMFS No Surprises Rule for further notice and comment in conjunction with any re-promulgation of the PRR. In light of its holding regarding the insufficiency of the APA notice and comment procedures on the PRR, the court did not reach the merits of the plaintiff's challenges to the legal underpinnings of either the No Surprises Rule or the PRR.

Under the court's opinion, the No Surprises Rule remains in full force and effect. The PRR, however, has been vacated and remanded. Due to this action, Incidental Take Permits (ITPs) should be subject to the general permit revocation rules found in 50 C.F.R. §13.28(a). In the event that FWS chooses to repromulgate the PRR, that repromulgation will have to "globally" consider the interaction of the No Surprises Rule with the PRR.

On December 24th, the plaintiff environmental groups filed a motion to clarify the court's ruling. The plaintiff's have requested clarification that: (i) in light of the vacation of the PRR, the existing general permit revocation rules under 50 C.F.R. §13.28(a)(5) apply to all incidental take permits; (ii) requesting that a specific timetable be established for remand proceedings by the court; and (iii) requesting that "defendants should not approve new ITPs with No Surprises during the remand period."

The plaintiff's arguments that no new ITPs should include a No Surprises assurance is an attempt to expand the scope of Judge Sullivan's ruling. The court's opinion clearly allows the No Surprises rule to remain in effect. In fact, on Friday, January 9th, FWS filed a response to the motion for clarification arguing that the court's opinion did not vacate or modify the No Surprises Rule. Accordingly, FWS defended its authority to continue issuing ITPs with No Surprises assurances.

I. SUMMARY OF DECISION

The No Surprises Rule was issued by the Clinton Administration in 1998 and provides that no additional land use restrictions or financial compensation will be required of an incidental take permit (ITP) holder with respect to species covered by the ITP, even if unforeseen circumstances subsequently arise which indicate that additional mitigation is needed for a listed species covered by the ITP. This rule was immediately challenged by environmental groups and spawned the *Spirit of the Sage Council* litigation. During the litigation, in 1999, the FWS issued the PRR which provides that an ITP that includes a No Surprises commitment can be revoked where continuation of the activity would violate the “jeopardy” standard (i.e. where the probable direct and indirect effects of the permitted activity will appreciably reduce the likelihood of survival and recovery in the wild of any listed species) and the inconsistency with such “jeopardy” standard has not been remedied by FWS in a timely manner. The PRR modified a prior FWS regulation that allowed revocation of an ITP permit when the population of the endangered wildlife or plant declined to the point where continuation of the activity would be detrimental to the maintenance or recovery of the population.

In the *Spirit of the Sage* decision, the court held that PRR constituted a substantive rule that imposes new obligations, vests new rights, and restricts agency discretion which requires a full notice and comment proceeding under the APA. In particular, the court held that the PRR “narrows the Services’ discretion to revoke ITPs, adds a threshold precondition to permit revocation where ITPs are concerned, and significantly raises the bar as to the degree of harm to listed species which must be likely to occur in the absence of corrective action before an ITP permit can be revoked.” Based on its finding of an APA violation, the court vacated the PRR and remanded it to the federal agencies for further consideration.

The court did not reach the merits of the plaintiff’s challenge to the No Surprises Rule. The court nevertheless concluded that, “because the government explicitly relies on the PRR to bolster its contention that the No Surprises Rule is consistent with the requirements of the ESA,” the notice and comment proceedings directed as part of the remand of the PRR must address both the PRR and the No Surprises Rule. The court justified this direction on the basis that the federal defendants had relied on the PRR as support for the No Surprises Rule throughout the litigation and refused to follow the defendants’ alternative argument that the rule could independently withstand plaintiffs’ challenges.

II. EFFECT OF THE RULING ON NO SURPRISES PROVISIONS IN HCPS

The remand by the court should have little effect on the legal status of the No Surprises Rule. In contrast to the PRR, the court did not vacate the No Surprises Rule and, as such, it remains legally in effect.

III. EFFECT OF THE RULING ON THE FWS AND NMFS ISSUANCES OF ITPS

On November 4, 2003, the FWS issued guidance to its field offices, which directed that FWS personnel continue to issue ITPs pending the court’s ruling. The FWS guidance required ITPs to contain conditional language stating that, in the event that the No Surprises Rule was vacated, enjoined to any extent, or otherwise rendered unenforceable, the permit would be automatically amended to comply with the court’s ruling. The guidance also confirmed that the other provisions of the ITP would be unaffected by such a ruling. The court’s December 11 opinion did not vacate, enjoin, or otherwise make the No

Surprises Rule unenforceable and therefore should not trigger the conditional language required by the FWS.

NMFS has not issued any guidance documents regarding the effect of the *Spirit of the Sage Council* decision on its issuance of ITPs.

IV. FUTURE CONSIDERATIONS ARISING FROM DECISION

The court's decision leaves a number of unanswered questions for the No Surprises Rule and the future of any PRR. To begin with, the court did not address the merits of the plaintiffs' challenges that the No Surprises Rule and/or the PRR were inconsistent with the statutory directives of the Endangered Species Act. Accordingly, challenges to the No Surprises Rule and any re-promulgated PRR are likely to continue.

FWS also must consider whether to re-promulgate the PRR. FWS, for instance, might decide to forego re-promulgation of the PRR and independently continue the application of the No Surprises Rule. This would be consistent with the approach taken by NMFS which, notwithstanding commitments to issue an equivalent regulation to the PRR, never issued counterpart regulations and has implemented ITPs and the No Surprises Rule in conjunction with similar (but not identical) general permit terms.

In weighing whether to proceed with a re-promulgation of the PRR, FWS is likely to take into account is whether the more "general" permit revocation terms under 50 C.F.R. 13.28(a) are sufficient for ITPs or whether a separate permit revocation standard is required. The general permit revocation standard requires revocation where the "population(s) of the wildlife or plant that is the subject of the permit declines to the extent that continuation of the permitted activity would be detrimental to maintenance or recovery of the affected population." In contrast, the PRR, provides that revocation of an ITP shall occur where the continuation of the permitted activity would be inconsistent with a "jeopardy" standard (i.e. "that the probable direct and indirect effects of any authorized take will not appreciably reduce the likelihood of survival and recovery in the wild of any listed species"). On its face, the revocation standard set forth under the PRR is a higher bar since it requires the reduction in the likelihood of survival and recovery in the wild versus a general decline in species population in which the continuation of the permitted activity will be detrimental to the maintenance or recovery of the affected population. However, critics have pointed out that the nature of the general permit revocation term's requirement for a decline in species population and, then, a determination that the continuation of the permitted activity in the face of such decline will be detrimental to the maintenance or recovery of the affected population could be, as a practical matter, a more difficult determination to reach.

Finally, to the extent that the FWS re-promulgates the PRR, the court's opinion requires that the No Surprises Rule be considered "as a whole with the PRR without further inquiry into its substantive validity." Under this remand requirement, any re-promulgation of the PRR will be required to also examine the inter-relationship between the PRR and the No Surprises Rule. While there is no requirement for substantive reconsideration or changes to the No Surprises Rule, FWS has the authority to undertake such a substantive review in that forum.

V. FUTURE ACTIONS/APPEALS

The court's ruling is subject to appeal in the D.C. Circuit Court of Appeals. An appeal must be filed within 60 days of the date that the judgment was entered in the district court.