No Surprises rule remanded to FWS, NMFS

Sullivan also vacates rule allowing ITPs to be revoked

By Steve Davies, editor, *ESWR*

Dec. 12 -- The Fish and Wildlife Service and National Marine Fisheries Service will have to reconsider their "No Surprises" rule, an integral part of hundreds of habitat conservation plans nationwide (*Spirit of the Sage Council v. Norton*, 98-1873 EGS, D.D.C.).

On Thursday, Dec. 11, U.S. District Judge Emmet Sullivan remanded No Surprises to FWS and NMFS after finding FWS had committed "flagrant violations" of APA notice and comment requirements in promulgating the so-called permit revocation rule (PRR). Although he vacated that rule and not No Surprises, he ordered FWS and NMFS to reconsider them "in tandem."

The PRR was adopted by FWS in June 1999 after the plaintiffs filed their lawsuit challenging No Surprises. It allows FWS to revoke an incidental take permit if its implementation is jeopardizing listed species.

"[T]he appropriate remedy is to vacate the [permit revocation] rule and remand it to the services with instructions to truly begin anew the APA-mandated notice and comment procedures, with the open mind required by the governing authorities," Sullivan said. (NMFS did not adopt the PRR.)

Sullivan agreed with the plaintiffs that the pre-existing general permit regulations had given FWS more discretion to revoke permits.

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," Sullivan said. "Prior to promulgation of the PRR, the services could revoke an ITP once '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' " (emphasis added). "It appears beyond dispute that, following promulgation of the PRR, the services can no longer revoke an ITP under these circumstances."

Sullivan said FWS gave the public inadequate notice in a 1997 proposal that two years later, it planned to issue the revocation rule. Sullivan said the government itself "has conceded that the June 1997 proposal did not include a proposal for the revocation provision which eventually became the PRR."

Nor did a February 2000 request for comments on the PRR cure the violation,

the judge said.

"Defendants concede ... that they did not repromulgate the PRR in this case, but rather left the rule in place and merely accepted comments on a rule already adopted," Sullivan said. The plaintiffs said FWS did not address the concerns raised about the permit revocation rule when it reopened the comment period without reproposing the PRR.

Because the No Surprises rule is "sufficiently intertwined with the PRR," Sullivan said it also must be remanded to the agency "for consideration as a whole with the PRR." However, Sullivan did not address the substance of plaintiffs' allegations that the rule violates numerous provisions of the ESA, including Sections 7(a)(1) and 7(a)(2).

The judge said that earlier in the case, he had "already preliminarily found, at least for purposes of ordering production of the administrative record, that the defendants are relying on the PRR to defend the No Surprises rule."

In conclusion, Sullivan said:

"The history of the two regulatory provisions challenged in this action has indeed been full of surprises. The public has consistently been denied the opportunity, absent a court order, to be notified of substantive changes to regulations enforcing the ESA, and to weigh in on decisions likely to have significant effects on public resources.

"First, the No Surprises Rule was announced as a ' policy' without any prior notic or opportunity to comment on its wisdom. It was only pursuant to a settlement agreement spurred by litigation and approved by Judge [Stanley] Sporkin of this Court that members of the public were finally afforded an opportunity to have their say with respect to the proposed policy.

"Similarly, the services promulgated the PRR during the pendency of this litigation without prior public notice or opportunity to provide meaningful comment, only to turn around and rely on the recently issued rule in their motion for summary judgment on plaintiffs' claims relating to the No Surprises Rule.

" ' Section 553 of the APA is designed to ensure that affected parties have an opportunity to participate in and influence agency decision-making at an early stage," so as to have meaningful input into decisions which have an impact on their interests. See *State of New Jersey v. EPA*, 626 F.2d at 1049 (citation omitted).

Sullivan said that "with respect to the No Surprises Rule, defendants cannot have it both ways. They cannot, in one breath, cite to the PRR in its pleadings in support of summary judgment as evidence that the No Surprises Rule does not

violate the ESA, and in the next contend that the No Surprises Rule can stand on its own without reference to the PRR such that judicial review of one without the other is appropriate."

- FWS HCP information, including background on No Surprises