UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPIRIT OF THE SAGE COUNCIL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:98CV01873(EGS)
	)	
GALE NORTON, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' MOTION TO CLARIFY AND/OR AMEND THE COURT'S ORDER OF DECEMBER 11, 2003, AND MEMORANDUM IN SUPPORT THEREOF

Pursuant to Fed. R. Civ. P. 59(e), and the Court's inherent power to effectuate its own orders, plaintiffs move to clarify and/or amend the Court's December 11, 2003 Order in certain limited respects. In particular, plaintiffs respectfully request that the Court establish a specific timetable for federal defendants to complete the proceedings remanded by the Court. In addition, assuming that the Court establishes such a timetable, plaintiffs request that the Court clarify how federal defendants should deal with Incidental Take Permits ("ITPs") during the period of remand.

Plaintiffs have advised counsel for defendants and intervenors that they are filing this motion. None of those parties has authorized plaintiffs to represent a position regarding the relief requested in the motion. Federal defendants have indicated that they intend to confer regarding the matter, and to file a response to this motion by January 9, 2004.

DISCUSSION

In its December 11 Memorandum Opinion and Order, the Court held that defendants had violated the public notice and comment procedures required by the Administrative Procedure

Act ("APA") in promulgating new regulations concerning the "circumstances under which ITPs may be revoked in light of the No Surprises rule." Spirit of the Sage Council v. Norton, 2003 WL 22927492 * (D.D.C. Dec. 11, 2003). As relief, the Court ordered that the "Permit Revocation Rule, be and is hereby Vacated." Id. at * 21. In addition, finding that the "No Surprises Rule is sufficiently intertwined with the [Permit Revocation Rule] that it must also be remanded to the agency for consideration as a whole with the PRR," the Court also ordered that "all administrative regulations challenged in this action are hereby REMANDED for global consideration by the Services in a manner consistent with this opinion." Id. at * 21.

The Court, however, did not establish a timetable for this "global consideration" to occur on remand. Particularly in view of the time that has passed since plaintiffs brought their initial challenge to the No Surprises policy, plaintiffs believe that it would be in the interests of all parties, as well as the Court, for such a timetable to be established at the outset of the remand, so that all parties know what is expected of the federal defendants, and so that the Court does not have to address questions at a later date concerning the length of the process. Indeed, especially in light of the already "somewhat tortured" history of this case, 2003 WL 22927492 * 1, as well as the fact that the Court did not vacate the No Surprises rule, the establishment of a schedule at this stage will help ensure that the additional administrative proceedings required by the Court are brought to completion within a reasonable period of time.

At the same time, plaintiffs recognize that the rules remanded by the Court raise complex, vitally important issues "likely to have significant effects on public resources," 2003 WL 22927492 * 20, which should receive close scrutiny from defendants, as well as meaningful input from the public and independent scientists. In plaintiffs' view, a 180-day timetable should

be sufficient for the government to solicit and consider public comment, and then announce new decisions on the related No Surprises and Permit Revocation Rules remanded by the Court.

If the Court does establish a schedule, the only remaining question is how defendants should deal with ITPs during the remand period. With regard to that issue, plaintiffs request, first, that the Court simply clarify that, in light of the Court's vacatur of the Permit Revocation Rule issued by the Fish and Wildlife Service ("FWS"), the standards governing the FWS's revocation of ITPs during the period of remand are those that apply to the Service's permits generally, see 50 C.F.R. § 13.28(a)(5).

Thus, in its ruling, the Court explained that, "[p]rior to promulgation of the PRR" vacated by the Court, the FWS could revoke an ITP based on the same standard that applies to other FWS permits, i.e., it "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 the maintenance *or* recovery of the affected *population.*'" 2003 WL 22927492 * 15 (emphasis in original) (quoting 50 C.F.R. § 13.28(a)(5); see also id. at * 16 ("Defendants themselves concede that the final No Surprises rule 'did not exempt ITPs from the . . . permit revocation provisions in 50 C.F.R. § 13.28(a)(5),' thus confirming that the PRR amended the pre-existing substantive rules for revocation of ITPs with No Surprises assurances.") (quoting Defs.' 4/23/99 Mem. in Supp. of Cross-Mot. For Summ. J. at 8).

Hence, it appears evident that, by vacating the Permit Revocation Rule – which, for the first time, established a new, very narrow standard for revocation of ITPs – the Court intended that, at least pending compliance with the APA, ITPs would continue to be subject to the broader, generally applicable revocation standard embodied in 50 C.F.R. § 13.28(a)(5). In

particular, the Court apparently – and reasonably – assumed that, by "vacat[ing] and remand[ing] the [ITP-specific] Permit Revocation Rule, 64 Fed. Reg. 32,712, 32714 (Jun. 17, 1999), for further proceedings consistent with Section 553 of the APA," 2003 WL 22927492 * 21, the Court was, during the remand period, necessarily reinstating the broader revocation standard applicable to all FWS permits, i.e., that FWS's exempting of ITPs from the general revocation standard was legally contingent on the agency's issuance of a new ITP-specific standard.

However, the Court's Order did not expressly provide that this would be the case, leaving some room for uncertainty as to the Court's specific intentions on this matter. Particularly given that the "history of the two regulatory provisions challenged in this action has indeed been full of surprises," id. at * 20, plaintiffs believe that it is in interests of all concerned for the regulatory landscape during the remand period to be as free of ambiguity as possible.[1]

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[1] Footnote 3 of the Court's ruling may also create some confusion in this regard. In that footnote, the Court explains that plaintiffs, in addition to challenging the PRR vacated by the Court -- which as noted, established a new, narrow standard for revocation of ITPs -- also challenged the FWS's simultaneous rulemaking to "exempt[] ITPs from the general permit revocation regulations, which authorize revocation of any FWS permit when 'populations of the wildlife or plant that is 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.'" 2003 WL 22927492 at n. 3 (quoting 64 Fed. Reg. 32,711).

However, the Court stated that it was "not reach[ing] the procedural or substantive propriety of the promulgation of th[is] second rule" because "this entire action can be disposed of based on plaintiffs' claims relative to the PRR . . .." Id. (emphasis added). Plaintiffs agree that the Court need not independently address plaintiffs' challenges to this inextricably interrelated rule change – which was adopted at exactly the same time and in precisely the same manner as the PRR, and hence suffers from the identical legal flaws – so long as the Court makes clear that the effect of its ruling, during the remand period, is that ITPs will continue to be subject to the general permit revocation standard applicable to other FWS permits, rather than the new ITP-specific standard vacated by the Court. Alternatively, the Court could resolve any ambiguity simply by deleting footnote 3, and instead making clear that all of the rule changes made in June 1999 relating to the revocation of ITPs are vacated for the reasons set forth in the Court's December 11 ruling.

As the Court well knows, the Court of Appeals has held that, "[w]hen an agency replaces an existing regulation with a new regulation, and [the Court] vacates all or part of the new regulation, [the Court] must decide whether the agency's prior regulation continues in effect or whether [its] action leaves no regulation in effect." Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 553 (D.C. Cir. 1983); see also The Fund for Animals v. Norton, 2003 WL 22963926 * 17 (D.D.C. Dec. 16, 2003) (providing that, "because the 2003 Final Rule is vacated and remanded, and pursuant to the Court's authority in Small Refiner []," the prior final rule "shall remain in effect until further Order of the Court").

Here, if the effect of the Court's vacatur of the PRR was to leave "no regulation in effect" authorizing the FWS to revoke ITPs in the event that they are impairing the survival and/or recovery of species due to unanticipated developments, that result would "be irrational," Small Refiner, 705 F.2d at 533, as well as impossible to reconcile with the overriding purpose of the ESA to "conserv[e]" endangered and threatened species. 16 U.S.C. § 1531(b). It would also be in patent conflict with federal defendants' own position in this litigation – i.e., that there must be some basis on which ITPs can be revoked due to unforseen circumstances, and the only question is whether the FWS should adopt an ITP-specific standard, or continue to apply the broader one applicable to all FWS permits. See 2003 WL * 16.

Consequently, the only sensible result, consistent with Small Refiner and the Court's ruling invalidating the PRR on APA grounds, is for the Court to clarify that, at least until defendants have fully complied with 5 U.S.C. § 553, the permit revocation standard generally applicable to all FWS permits – 50 C.F.R. § 13.28(a)(5) – will continue to apply to ITPs issued by FWS, i.e., that the same regulatory regime for revoking ITPs that federal defendants maintain

existed immediately prior to June 17, 1999, will continue in effect until the public is afforded its right to comment on new proposed rules. Once again, this is necessary to avoid any counterintuitive suggestion that the unintentional upshot of the Court's ruling is that listed species are presently receiving less, rather than greater protection, as a consequence of the ruling.

Second, plaintiffs request that the Court make clear that defendants should not approve new No Surprises assurances during the remand period. While plaintiffs recognize that the Court did not vacate the No Surprises rule – presumably because of the many ITPs that have previously been issued that incorporate No Surprises assurances, see 2003 WL 22927492 * 8 – the Court did not specifically address how defendants should approach pending or new ITP applications during the time that defendants are engaging in the requisite "global" review of "all administrative regulations challenged in this action" that has been mandated by the Court. Id. at * 21.

Plaintiffs believe that it would be fundamentally incompatible with the result and rationale of the Court's ruling for defendants to continue to approve new ITPs with No Surprises assurances at the very same time that defendants are engaging in the Court-ordered reconsideration of the "No Surprises rule . . . in tandem with the now-vacated PRR . . .." Id. at * 20. Indeed, especially if defendants were to proceed with business as usual during the period of remand, plaintiffs are gravely concerned that defendants will, once again, "merely go through the motions," rather than take a fresh look at all of the pertinent regulations, as contemplated by the Court. Id. at * 21. On the other side of the coin, it is difficult to see how either defendants or intervenors would be prejudiced if defendants were merely to refrain from approving new No

Surprises assurances during the remand period, especially if the Court were to establish a specific timetable, as plaintiffs request.

In sum, plaintiffs respectfully request that the Court amend and/or clarify its December 11 order by (1) establishing a specific schedule for the proceedings on remand; (2) clarifying that, until and unless the FWS adopts new ITP-specific revocation rules following compliance with the APA, ITPs issued by the Service shall be subject to the general revocation standard applicable to other FWS permits; and (3) making clear that defendants should not approve new ITPs with No Surprises assurances during the remand period. A proposed Order to this effect is attached.

Respectfully submitted,

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