PLANTIFFS' OPENING BRIEF IN THE "NO SURPRISES" CASE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

INTRODUCTION

This case raises a critically important issue regarding our nation's commitment to the conservation of endangered species: whether permits issued by the federal government allowing the killing or harming of an endangered species may subsequently be modified to take into account new circumstances that are contributing to the species' extinction in ways not anticipated or simply not provided for when the permit was issued. The federal defendants' remarkable answer to that question, embodied in the "No Surprises" regulation at issue here, is that, when such new circumstances -- i.e.,"surprises" -- occur the federal government will never require a permittee to conserve more habitat or spend more money on species conservation than provided for in the original permit. As explained below, this regulation violates the plain language of the Endangered Species Act, 16 U.S.C. § 1532 et seq. ("ESA"), undermines the purposes of that landmark conservation law, and disregards the overwhelming consensus of scientists that, if widespread species extinction is to be averted, "incidental take" permits ("ITPs") -- which may last as long as a century -- must be modified when necessary to keep pace with changing natural

conditions, human activities, and new information on the needs of imperilled species.

Plaintiffs are also challenging a related regulation -- the "Revocation rule" -- that defendants issued in the midst of summary judgment briefing on the No Surprises Rule. Although this new regulation constituted defendants' post hoc attempt to shore up their position in this case, defendants actually compounded the grave legal problems underlying the No Surprises rule. Indeed, in their haste to issue the new regulation while the No Surprises rule was under review, defendants dispensed entirely with advance public notice and comment -- although defendants' own attorneys recognized that the rule involved a "major substantive change" in policy. Second Supplement to the Administrative Record, Privilege Index ("PI") at 12. In addition, the post hoc Revocation rule actually further impedes the recovery of endangered and threatened species -- and hence thwarts the overriding purpose of the ESA -- by providing that the U.S. Fish and Wildlife Service ("FWS") may not even revoke an ITP on the grounds that it is detrimental to the recovery of an endangered or threatened species.[1]

[1] On February 15, 2001, the Court granted plaintiffs' motion to compel disclosure of various documents that defendants had sought to withhold concerning the reasons for adoption of the Revocation rule. The government filed these documents as a Second Supplement to the Administrative Record. As explained in defendants' February 27, 2001 Notice of Filing, these documents are identified by a number stamp in the upper right hand corner, which corresponds to the Privilege Index filed by the government. For the convenience of the Court, plaintiffs are also attaching the most pertinent of these documents, which largely consist of single page e-mails, as Exhibit A.

BACKGROUND

A. The Statutory Scheme

The ESA is the "most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 698 (1995) ("Sweet Home"), quoting Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978). In passing the Act, Congress stressed the embryonic state of our knowledge regarding myriad life forms on Earth, including the "unknown uses that endangered species may have and the [] unforeseeable place such creatures may have in the chain of life on this planet." TVA v. Hill, 437 U.S. at 178-79 (emphasis in original). Accordingly, believing that "[s]heer self-interest impels us to be cautious," Congress enacted the ESA as the "institutionalization of that caution." H.R. Rep. No. 412, 93d Cong., 1st Sess. 5 (1973).

In considering the threats to endangered species, "Congress was informed that the greatest was destruction of natural habitats." TVA v. Hill, 437 U.S. at 179. Accordingly, the purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species . . .." 16 U.S.C. § 1531(b). In turn, Congress defined "conservation" as the "use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." Id. at § 1532(3) (emphasis added). The principal responsibilities under the Act are imposed on the Secretaries of Interior and Commerce, id. at § 1532(15), who, in turn, have delegated day-to-day implementation of the Act to the FWS, an agency within the Department of the Interior, and the National Marine Fisheries Service ("NMFS"), an agency

within the Department of Commerce (collectively referred to as "the Services"). See 50 C.F.R. § 402.01(b).[2]

Before a species may receive protection under the ESA, it must be listed by one of the Services as "endangered" or "threatened." An "endangered" species is one that "is in danger of extinction throughout all or a significant portion of its range . . . ." 16 U.S.C. § 1532(6) (emphasis added). A "threatened" species is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." Id. at § 1532(20). Once a species is listed, it receives critical protections under various provisions of the ESA.

For example, under section 7, every federal agency must "consult" with one or both Services to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is . . . critical" to the survival of the species. 16 U.S.C. § 1536(a)(2). Under section 9, it is illegal for anyone, including a private party, to "take" an endangered species, 16 U.S.C. § 1538(a)(1), and the Services, by regulation, have extended that prohibition to "threatened" species as well. See 50 C.F.R. §§ 17.21, 17.31. The term "take" is broadly defined to encompass a wide range of activities that may adversely affect imperilled species, including "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The Services have further defined "harm" to include "significant habitat

[2] The FWS has principal responsibility with regard to terrestrial species, and NMFS has principal responsibility with regard to marine species.

modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3. Anyone who "takes" a species in violation of the statute is subject to substantial civil and criminal penalties, see 16 U.S.C. § 1540(a)(1) (civil penalties); id. at § 1540(b)(1) (criminal sanctions), as well as citizen suits for injunctive relief. See id. at § 1540(g).

As originally enacted, the Act contained no provision that allowed the "take" of an endangered species that might occur "incidentally" during otherwise lawful activities undertaken by a private landowner -- such as a developer who wishes to build a housing complex in the habitat of an endangered species. See Sierra Club v. Babbitt, 15 F. Supp. 2d 1274 (S.D. Ala. 1998). In 1982, however, Congress amended section 10 of the Act by adding a narrow exception to the strict prohibition against "taking" a listed species under which, in exchange for being permitted to "kill," "harm," or otherwise "take" one or more members of an endangered species in the course of an otherwise lawful activity, a permit applicant must commit to a plan that "conserve[s]" the species as a whole. Id. at §§ 1539(a)(1)(B), (a)(2)(A).

Thus, to obtain an Incidental Take Permit ("ITP"), a permit applicant must submit a habitat "conservation plan" -- commonly known as an "HCP" -- that, in addition to promoting the conservation of the species, must also delineate "the impact which will likely result from such taking," the "steps the applicant will take to minimize and mitigate such impacts, the funding that will be available to implement such steps," and "such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan." 16 U.S.C. § 1539(a)(2)(A). In addition, before issuing an ITP, the Secretary must provide an "opportunity for public comment[] with respect to a permit application and the related conservation plan," and it

must make certain specified findings, i.e., that (1) the "taking will be incidental," (2) "the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking," (3) "the applicant will ensure that adequate funding for the plan will be provided," (4) "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild," and (5) any other conservation "measures" de emed appropriate by the Services "will be met." Id. at § 1539(a)(2)(B).

B. The Services' Approach Prior To Adoption Of No Surprises

In 1985, the FWS adopted regulations implementing section 10 that provided that each ITP applicant must submit a "conserv ation plan that specifies," among other items, "[t]he impact that will likely result from such taking," as well as "[w]hat steps the applicant will take to monitor, minimize, and mitigate such impacts, the funding that will be available to implement such steps, and the procedures to be used to deal with unforseen circumstances." 50 C.F.R. § 17.22(b)(1)(iii)(B) (emphasis added) (1992).

The regulations further provided that one of the Service's mandatory "criteria" for issuance of any ITP was that the "ap plicant will ensure that adequate funding for the conservation plan and procedures to deal with unforseen circumstances will be provided." Id. at § 17.22(b)(2)(iii) (emphasis added). The preamble to the regulations explained that this provision was "nee ded" because "circumstances requiring modification of a conservation plan could arise even during the life of a permit with a relatively short term." 50 Fed. Reg. 39684 (Sept. 30, 1985). Likewise, when NMFS promulgated its section 10 regulations, it explained that "[s]ince circumstances and information may change over time," plans submitted by ITP applicants "must contain a procedure by which NOAA Fisheries and the permit holder will deal with unforseen

circumstances." 55 Fed. Reg. 20603, 20605 (May 18, 1990), 1990 WL 335069.[3]

Following issuance of those regulations and until adoption of the "No Surprises" policy at issue in this case, the Services made clear to ITP applicants that, in exchange for receiving permission to "take" an endangered species, they would have to address how they would deal with "unforseen circumstances" that might harm species covered by the permits. Indeed, the FWS's standard permit application form required applicants to submit an HCP specifying the "steps you will take to monitor, minimize, and mitigate such impacts [on endangered species], the funding that will be available to implement such steps, and the procedures to be used to deal with unforseen circumstances." Form 3-20 and Instructions (Federal Fish and Wildlife Permit Application), at 2, A.R. Vol. 1, Doc. 3 at Appendix 9 (emphasis added); see also A.R. Vol. 4, Doc. 599 at Exh. C (listing ITPs/HCPs approved without "No Surprises" assurances). In other words, a permit applicant who did not commit to "deal[ing] with unforseen circumstances" was foreclosed from receiving a federal permit entitling that applicant to kill, injure, harass, or otherwise "take" an endangered or threatened species.

C. The Service's Adoption of the "No Surprises" Rule

[3] The FWS's notice is also in Volume 1 of the Administrative Record for the No Surprises rule as an attachment to Document 3. Henceforth, such documents shall be cited as A.R. Vol. 1, Doc. 3. Public comments on the No Surprises rule shall be cited as A.R. Vol. __, Comm. ___. Documents in the separate Administrative Record for the Revocation rule will be cited as "Rev. Rec. Doc. __".

Although the Services originally tried to implement a "No Surprises" policy without any public notice and comment, in May 1997, the Services formally proposed to adopt a regulation that would mandate that all ITP holders receive No Surprises guarantees. In explaining the No Surprises approach, the Services stressed that it:

> provides regulatory assurances to the holder of an incidental take permit issued under section 10(a) of the ESA that no additional land use restrictions or financial compensation will be required of the permit holder with respect to species adequately covered by the permit, even if unforseen circumstances arise after the permit is issued indicating that additional mitigation is needed for a given species covered by a permit.

62 Fed. Reg. 29091 (May 29, 1997), A.R. Vol. 1, Doc. 5 (emphasis added). The Services further explained that, instead of the ITP holders paying for the "unforseen" harms caused by their permitted activities, the "obligation for implementing additional conservation measures would be borne by the Federal government" -- i.e., federal taxpayers. Id. at 29093 (emphasis added).[4]

The vast majority of commenters strongly opposed the proposal on the grounds that it would undermine the conservation of endangered and threatened species and violate various requirements of the ESA. See A.R. Vol. 1, Doc. 9 at 23 ("tally" of comments indicating that 755 commenters opposed the rule, while only 38 commenters supported it as drafted). The proposal was opposed by every national conservation and animal protection organization that commented on it, as well as a host of regional and grassroots environmental groups from every part of the country, Native-American tribes, religious organizations, and ordinary citizens who expressed

[4] The proposal was issued in settlement of a lawsuit brought by environmental groups, including several of the plaintiffs in this case, which challenged, as violative of section 553 of the APA, the Service's adoption of a "No Surprises" "policy" without going through any public notice and comment procedures. See A.R. Vol. 1, Doc. 1; A.R. Vol. 1, Doc. 2; see also Spirit of the Sage Council et al. v. Babbitt et al., Civ. No. 1:94CV02503 (D.D.C. Settlement and Stipulated Dismissal Approved, March 20, 1997).

grave concern that the new policy would reverse the nation's longstanding commitment to endangered species conservation. See Exh. B at 1-3 (listing types of commenters who criticized the rule).

The proposal was also severely criticized by hundreds of conservation biologists and other scientists, including those in academic institutions, as well as those performing field research on endangered species. See Pfs. Exh. A at 1. These commenters stressed that the No Surprises approach would make it impossible to prevent the extinction of species under innumerable circumstances that occur in the natural world all the time, and hence that there must be some mechanism by which HCPs/ITPs that are approved for many decades can be modified in response to "surprise s such as new diseases, droughts, storms, floods, and fire." Statement on Proposed Private Lands Initiatives from the Meeting of Scientists at Stanford University (April 1997) ("Stanford Paper"), quoted in A.R. Vol. 5, Comm. 683, at 10. Thus, a letter signed by 168 scientists with experience in endangered species conservation -- including 122 with Ph.D's in wildlife conservation, ecology, and related fields -- warned that the proposed rule would "greatly increase the risk of extinction of rare, threatened and endangered species in the wild," and hence that the proposal is "antithetical to the Endangered Species Act." A.R. Vol. 4, Comm. 577, Attach. at 3 (Exh.C) (emphasis added). These scientists further explained that adoption of the "No Surprises" pol icy as a final rule would:

> disregard a large body of scientific evidence, along with the professional opinions of many scientists, that surprises are inherent in the distribution and abundance of both common and rare species, as well as in our interpretation of nature generally.

Id. at 1 (emphasis added).

Hundreds of other scientists have described the No Surprises approach in similarly

ominous terms. For example, leading conservation biologists denounced No Surprises on the grounds that it:

> runs counter to the natural world, which is full of surprises . . . Surprises will occur in the future; it is only the nature and timing of surprises that are unpredictable. Furthermore, scientific research produces surprises in the form of new information regarding species, habitats, and natural processes . . . Unless conservation plans can be amended, habitats and species certainly will be lost.

Stanford Paper, quoted in A.R. Vol. 5, Comm. 683, at 10 (emphasis added).

In addition to such dire warnings by scientists, many commenters explained that the No Surprises approach represents a radical departure from preexisting environmental regulation -- which requires that individuals who cause damage to the environment for their own economic gain, rather than federal taxpayers, pay for the harms they cause, as well as accept any necessary changes in the conditions under which they are permitted to impair natural resources. See, e.g., A.R. Vol. 5, Comm. 695 at 11 (Sierra Club) ('the policy sets an incredibly dangerous precedent that is likely to undermine the basis for all environmental regulation in this country"). Commenters also pointed out that the Services historically have lacked the necessary funds even to implement their basic mandatory duties under the ESA, let alone to relieve ITP holders of their financial responsibilities to respond to new developments. As a local chapter of the Audubon Society put it, '[g]iven the past level of funding and enforcement of the ESA, it will be 'no surprise' when the cost[s] of additional conservation measures are not borne by the federal government, or anyone else, and it will be 'no surprise' when species begin to go extinct at an even more alarming rate than they are today." A.R. Rec. Vol. 2, Comm. 74 at 1.[5]

[5] See. also A.R. Vol. 5, Doc. 684 at 5 (National Wildlife Federation) ; A.R. Vol. 3, Comm. 404 at 3 (Humane Society of the U.S.); A.R. Vol. 4, Comm. 539 at 4 (Environmental Defense Fund, World Wildlife Fund, The Nature Conservancy); Thornton, The Search for a

Conservation Planning Paradigm: Section 10 of the ESA, Natural Resources & Environment, at 23 (Summer 1993) (addendum to A.R. Vol. 4, Comm. 600) ("The ESA, more than any other major environmental law, is administered with completely inadequate funding.").

Despite the public and scientific opposition, in February 1998, the Services promulgated a final rule requiring that the No Surprises approach be followed with regard to every ITP issued by the Services, regardless of the amount of habitat affected, the nature of the endangered species at risk, or the length of the permit. See 63 Fed. Reg. 8859-8873 (A.R. Vol. 2, Doc. 23) (codified at 50 C.F.R. § 17.22(b)(5) . In doing so, the Services stressed that, under the rule, once an ITP is issued, "no additional land use restrictions or financial compensation will be required of the permit holder with respect to species covered by the permit, even if unforseen circumstances arise after the permit is issued indicating that additional mitigation is needed for a given species covered by a permit." 63 Fed. Reg. 8859 (emphasis added). Rather, under the rule, such assurances are automatically extended to the permit holder for as long as the permit is valid, which is often for many decades. Id. at 8867 ("The No Surprises assurances apply during the life of the permit").

In adopting the rule, the Services distinguished between "changed circumstances" and "unforseen circumstances," although the rule provides ITP holders extensive assurances with regard to both kinds of post-ITP developments. Thus, the Services defined "unforseen circumstances" as "changes in circumstances affecting a species or geographic area covered by a conservation plan that could not reasonably have been anticipated by plan developers and the Service at the time of the conservation plan's negotiation and development, and that result in a substantial and adverse change in the status of the covered species." Id. at 8871 (emphasis added). With regard to all such developments, the rule guarantees ITP holders that the Services will never "require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources" beyond the level

provided for in the initial ITP/HCP, no matter how desperate the situation facing the species. Id. at 8870-71 (emphasis added).[6]

In contrast, the rule defines "changed circumstances" as "changes in circumstances affecting a species or geographic area covered by a conservation plan that can reasonably be anticipated by plan developers and the Service and that can be planned for (e.g., the listing of new species, or a fire or other natural catastrophic event in areas prone to such events)." 63 Fed. Reg. 8870 (emphasis added). Yet, although the preamble states that "reasonably foreseeable circumstances . . . should be addressed in the HCP," 63 Fed. Reg. 8863 (emphasis added), the rule itself contains no requirement that such "reasonably[]anticipated" circumstances be addressed as a precondition to ITP/HCP approval. To the contrary, the rule provides that even "if additional conservation and mitigation measures are deemed necessary to respond to changed [i.e., reasonably foreseeable] circumstances" -- such as a hurricane along the coast of Florida -- unless that contingency is specifically "provided for" in the HCP, then the Services will still "not require any conservation and mitigation measures in addition to those provided for in the plan,"

[6] The final rule provides that the Services may, on occasion, make minor adjustments to HCPs, but only if such modifications do not require the ITP holder to conserve any additional habitat or spend any additional money. 63 Fed. Reg. 8871. Even then, the Services still "have the burden of demonstrating that unforseen circumstances exist" due to such factors as the "[p]ercentage of range adversely affected by the conservation plan" and "whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery" of the affected species. Id.

even when essential to avoid species extinction. Id. at 8871.

Instead, the preamble to the rule suggested that the federal government would use its own "resources" to address unforseen problems with ITPs that drive species closer to extinction, although the Services conceded that such steps would be "dependent on the availability of appropriated funds," id. at 8864, and defendants have repeatedly declared, including in sworn affidavits filed in this and other courts, that they have historically lacked, and continue to lack, the necessary appropriated funds even to carry out most of their mandatory duties under the ESA. See, e.g., Forest Guardians v. Babbitt, 164 F.3d 1261, 1273 (10th Cir. 1998) (the Secretary of the Interior "urges us to excuse his failure [to perform a nondiscretionary du ty under the ESA] on the basis of resource limitations and the impossibility of compliance due to . . . insufficient monetary allocations").[7]

D. Plaintiffs' Challenge To The No Surprises Rule and Defendants' Response By Announcing New Rule Changes Regarding The Revocation Of ITPs

Plaintiffs filed this lawsuit challenging the No Surprise rule in July 1998, and in, February 1999, they moved for summary judgment. Among other arguments, plaintiffs contended that the rule contravenes section 7(a)(2) of the Act, which compels every federal agency to "insure that any action authorized" by the federal government is "not likely to

[7] According to the FWS's web site, as of April 17, 2002, 379 ITPs/HCPs with No Surprises assurances have been issued, covering approximately 30 million acres and affecting more than 200 endangered or threatened species. See http://endangered.fws.gov/hcp/index.html. For example, one such ITP issued to Orange County, California, lasts for 75 years, authorizes the "taking" of seven species which have been listed as endangered or threatened, and covers more than 208,000 acres of species habitat, of which approximately 78% -- more than 160,000 acres -- may be developed under the permit. See Attachment to A.R. Vol. 3, Comm. 460, at 4. Another ITP, issued to the Plum Creek Timber Company, authorizes takings of endangered - species for up to 100 years, applies to more than 169,000 acres of habitat in Washington state, and authorizes the killing and/or harming of a variety of imperilled species, including the grizzly bear, gray wolf, northern spotted owl, and marbled murrelet. See Hall, Using Habitat Conservation Plans to Implement the Endangered Species Act in Pacific Coast Forests, at 5 (July 1997) (attachment to A.R. Vol. 4, Comm. 555).

jeopardize the continued existence of any endangered species or threatened species . . .." 16 U.S.C. § 1536(a)(2).

Defendants responded by relying, in part, on an entirely new regulation that the Interior Department stated it was in the process of issuing. See Fed. Def. April 23, 1999 Mem. In Supp. of Cross-Mot. for Summ. Jud., at 37. In particular, defendants announced that the FWS would "soon" be "amend[ing] [its] incidental take permitting regulations" to "clarify" that the FWS may "revoke a[] permit for which there has been an unforseen circumstance resulting in likely jeopardy to a covered species . . .." Id. (emphasis added). Defendants further asserted that the "revocation of an HCP permit under the very narrow circumstances described above will provide a necessary 'safety net' against extinction for covered species." Id. at 37-39 (emphasis added).[8]

Without providing any opportunity for public comment, defendants published their new ITP revocation rules on June 17, 1999 -- shortly after briefing was completed on the No Surprises rule. See 64 Fed. Reg. 32706-16, reproduced at Rev. Rec. Doc. 55. However, contrary to defendants' characterization of the rules as establishing a "safety net" for species affected by ITPs, the rule changes actually further undermine the conservation of endangered and threatened species.

Thus, in its new rules, the FWS actually made changes to two parts of its regulations -- Part 17, which contains requirements specifically applicable to ITPs, including the No Surprises rule, see 50 C.F.R. §§ 17.22(b), 17.32(b), as well as Part 13, which sets forth the agency's "general permit procedures" tha t are intended to "provide uniform rules, conditions, and

[8] Although the No Surprises rule was jointly issued by the FWS and NMFS -- which is why both agencies are named as defendants in this lawsuit -- the 1999 Revocation rule changes were issued only by the FWS and, accordingly, do not affect NMFS's implementation of the ESA.

procedures for . . . issuance, denial, suspension, revocation, and general administration of all permits issued" by the Service. 50 C.F.R. § 13.2 (emphasis added); see also id. at § 13.3 ("[t]he provisions in this part are in addition to, and are not in lieu of, other permit regulations of this subchapter"). In its amendment to Part 13, the Service expressly excluded ITPs from a broad permit revocation provision, section 13.28(a)(5), that states that Service permits can be revoked whenever:

> 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.

64 Fed. Reg. 32711, codified at 50 C.F.R. § 13.28(a)(5) (emphasis added).[9]

In its change to Part 17, the Service adopted an entirely new -- and far narrower -- revocation standard applicable specifically to ITPs, by providing that ITPs could not be revoked "unless continuation of the permitted activity would be inconsistent" with the requirement that "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild," 16 U.S.C. § 1539(a)(2)(B)(iv) -- and "the inconsistency has not been remedied [by the Service] in a timely fashion." 64 Fed. Reg. 32712, 37714 (emphasis added), codified at 50 C.F.R. §§ 17.22(b), 17.32(b). Hence, the net effect of the Service's post hoc Revocation rule changes is to make endangered species affected by ITPs subject to far less protection than endangered species (or even non-endangered wildlife) affected by other permits issued by the Service. Under the new rules, ITPs can now only be revoked when they are impairing both the

[9] In adopting the No Surprises rule -- which, once again, was designed to afford "economic and regulatory certainty" to ITP applicants, 63 Fed. Reg. 8860 -- the FWS did not even mention this preexisting authority to revoke permits whenever they are "detrimental to maintenance or recovery of" any "affected population" of a species, let alone attempt to explain the interrelationship between the No Surprises approach and this revocation provision.

"survival and recovery" of an entire "species in the wild," whereas other kinds of permits can be revoked when they are simply "detrimental to maintenance or recovery" of any "affected population" of a species. And, even when this far more stringent standard is met, ITPs still cannot be revoked unless the Service itself has been unable to "remedy" the problem for some unspecified period of time.[10]

E. Judicial Proceedings Following Issuance Of the New Rules

Since both defendants and intervenors relied on these post hoc rule changes to defend the No Surprises regulation, see Fed. Def. June 15, 1999 Reply Mem. in Supp. of Their Motion for Summ. Jud., at 11 ("the 1999 regulation[] is now part of the implementing regulations for the ESA and, therefore, must be considered by this Court in its review of plaintiffs' claims challenging the No Surprises rule"), plaintiffs requested that the government be compelled to file the full Administrative Record underlying the rule revisions. At a subsequent hearing, the government's counsel insisted that it "was coincidental" that the new Revocation rules were promulgated at the very same time that plaintiffs were challenging the No Surprises regulation.

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[10] The rule itself does not further define what is meant by a "timely fashion" to "remedy" a "taking" which is jeopardizing the "survival and recovery" of a species, nor does it specify who must endeavor to remedy this problem. The preamble to the rule, however, states that it is the Service itself -- rather than the ITP holder -- that is "required" to devote its own "resources to address[ing] any such unforseen circumstances" before revoking a permit. 64 Fed. Reg. 32709 (emphasis added); id. (revocation is a "last resort" if the " Service has not been successful in remedying the situation through other means").

See Transcript of July 15, 1999 Hearing, at 30 (Exh. D). The Court, however, found that review of the records underlying the newly promulgated rules was necessary, explaining that:

> I would like to know why [the new rules were promulgated]. Was it just coincidental? Was it an effort to address the issues raised by plaintiff[s]. If so, they'd be highly relevant.

Id. at 28 (emphasis added); see also Order of August 3, 1999.

Defendants then filed a Supplemental Record relating to the Revocation rule changes, but, asserting the "deliberative process" and other p rivileges, withheld from plaintiffs and the Court virtually every relevant document. See Def. Index of Priv. Docs. Withheld from A.R. of Final Permit Revocation Regulations. The Court subsequently ordered defendants to disclose many of the records, explaining that "[h]ere the issue is whether the changes" in the Revocation rules "were made to bolster the defense of the No Surprises Rule," and that the "sweeping coverage of the deliberative process privilege suggested by the Federal defendants seriously undermines the requirement that this Court review the whole record, as mandated by the APA." February 14, 2001 Mem. Op. and Order, at 3-4. In addition, the Court allowed plaintiffs to amend their Complaint to add a claim pertaining specifically to defendants' failure to follow APA requirements in adopting the Revocation rules.

The documents produced by the government made clear that, despite defendants' "vehement[]" denials to the Court, the post hoc rule changes were, in fact, made to "bolster the defense of the 'No Surprises' rule at issue in this case." Feb. 14, 2001 Mem. Op. and Order, at 1.[11] Moreover, contrary to defendants' characterizations of the new rules as merely "technical,"

[11] See, e.g., PI 18; PI 23 at 2 ("By opening the j eopardy standard to negotiation, we undercut our ability to defend the Department in the 'no surprises' lawsuit .") (emphasis added); PI 69 ("Justice is concerned about what we're going to say in the brief about the government's

"fine-tuning" adjustments, that "merely confirm[]" defendants' "pre-existing" policy positions, Fed. Def. Nov. 2, 1999 Response to Pfs. Mot. To File Second Amend. Complaint, at 3 n. 1 ("Nov. 2, 1999 Resp."), the documents demonstrate that the rule changes were debated at the highest level of the government, see PI 16 (referring to the "intensity of the debate" within the Interior Department), and that they actually entailed two critical policy decisions relating to the meaning and effect of the No Surprises rule that had been completely sidestepped in that rulemaking. The first was whether, despite the extraordinary "assurances" extended to ITP holders in the No Surprises rule, the federal government was nonetheless retaining the ultimate authority to revoke a permit that was having far more deleterious effects on an endangered or threatened species than anticipated when the permit was granted. Contrary to defendants' representation to the Court that there has always been an "unquestioned premise that [such] revocation authority exists," Nov. 2, 1999 Resp. at 12, the documents demonstrate that, prior to this litigation, Interior Department officials had purposefully avoided taking a position on whether, once it gave a permittee a No Surprises guarantee, the government nevertheless retained the authority to revoke the permit based on unforseen developments that placed the species at risk of extinction. See, e.g., PI 19 ("we have not, so far as I can tell, taken any public position as to whether we can later revoke a sec. 10 permit for jeopardy"); PI 18 (Assistant Interior Secretary has been "trying for so long to avoid . . . stat[ing] publicly what our position is on the ultimate jeopardy issue"). [12]

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ability under the No Surprises rule to revoke an incidental take permit if a species is unexpectedly jeopardized and the government is not able to remedy the situation.").

[12] The Interior Department sought to "avoid" taking a "public position" on this critical issue, since the whole purpose of the No Surprises rule is to provide permittees with "economic

and regulatory certainty" for the life of their permits, 63 Fed. Reg. 8860 (emphasis added) -- an assurance that, as DOI officials recognized, is difficult to square with the "uncertainty" inherent in allowing revocation due to unforseen circumstances. See PI 13. Indeed, the documents reveal that, in particular ITPs, the FWS had even gone so far as to make express commitments that it would not revoke the permits even where they are jeopardizing species with extinction. See PI 12 (referring to "HCPs where we are vulnerable -- Central Coastal Orange County and MSCP [] because we have gone too far in my view in committing not to revoke permits"); PI 15 (referring to "inconsistencies between the language of certain provisions in Part 13 and some of the HCPs [] we have out there"); PI 70 ("HCPs such as Orange County [] provide expressly that we don't have the ability to revoke for jeopardy").

The second, related policy question considered by Interior Department officials was precisely what substantive standard should apply to revocation decisions for ITPs, i.e., whether the FWS would maintain the same broad revocation authority that is applicable to all permits issued by the agency, or whether some different, narrower standard would be employed. Ultimately, after considering various "fixes" at the highest levels of the Department, see PI 28, 36, 51, defendants decided to adopt the changes to Parts 13 and 17 of the Service's rules under which, despite the No Surprises guarantee, ITPs may be revoked because of unforseen circumstances, but only under much more narrow circumstances than are embodied in the FWS's longstanding, general revocation authority. See PI 27 ("On the big one: 13.28(a)(5) [the general permit revocation provision] would be replaced for [ITPs]").

ARGUMENT

Under the APA, the Court must "hold unlawful and set aside agency action" that has been adopted "without observance of procedure required by law," and that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §§ 706(2)(A), (D). When these standards are applied here, it is clear that the Court should vacate and remand both of the interrelated rules at issue. See American Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1084 (D.C. Cir. 2001) (if a plaintiff "prevails on its APA claim, it is entitled to relief under that statute, which normally will be vacatur of the agency's order"). Since defendants have relied on the post hoc Revocation rule changes to "clarify" and defend the No Surprises rule, plaintiffs will start with the legal defects in that rulemaking, and then turn to the No Surprises rule.[13]

[13] Plaintiffs have standing in this case because they, and their members, have submitted numerous affidavits identifying specific recreational, aesthetic, professional, and organizational interests in habitats and species that are being destroyed and harmed as a direct consequence of

section 10 permits regulated by the No Surprises and Revocation rules. See Pfs. Exhs G-P, U-W, filed in Support of Pfs. 1999 Mot. for Summ. Judg.; Supplemental Affidavit of Leeona Klippstein (attached as Exh. 6 to Plaintiffs' June 15, 2001 Supp. Reply Mem.) (identifying additional ITPs/HCPs approved since 1999 that are "further injur[ing] my recreational, aesthetic, and professional interests"); Affidavit of Professor Ben W. Twight (attached as Exh. 7 to Plaintiffs' June 15, 2001 Supplemental Reply Memo). These injuries are more than adequate to support plaintiffs' standing to complain about APA violations in connection with regulatory decisions that severely restrict the conditions under which environmental harms from ITPs/HCPs may be remedied. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 (1986) (members of the public have standing to "enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs"); Federal Election Commission v. Akins, 524 U.S. 11, 21 (1998) (members of the public have standing to seek relief from agency violations that violate procedural rights); Friends of the Earth v. Laidlaw, 528 U.S. 167, 183-84 (2000) (affidavits asserting that the defendants' actions "directly affected those affiants' recreational, aesthetic, and economic interests" was sufficient for Article III standing).

I. DEFENDANTS' POST HOC REVOCATION RULE CHANGES MUST BE SET ASIDE AS CONTRARY TO THE APA AND ESA.

A. Defendants Violated The Public Notice And Comment Requirements Of The APA When They Issued The Revocation Rule Changes.

Section 553 of the APA requires agencies to publish "[g]eneral notice of proposed rule making," and to "give interested persons an opportunity to participate in the rule making . . ..." 5 U.S.C. §§ 553(b) - (c). Such "rule-making proceedings must provide both notice and meaningful opportunity to comment." Asiana Airlines v. FAA, 134 F.3d 393, 396 (D.C. Cir. 1998). These procedures reflect Congress's "judgment that . . . informed administrative decisionmaking require[s] that agency decisions be made only after affording interested persons" an opportunity to communicate their views to the agency. Chrysler Corp. v. Brown, 441 U.S. 281, 316 (1979)).

Consequently, this Circuit has "looked askance at agencies' attempts to avoid the standard notice and comment procedures, holding that exceptions to § 553 must be 'narrowly construed and only reluctantly countenanced' in order to assure that 'an agency's decisions will be informed and responsive.'" Asiana Airlines, 134 F.3d at 396, quoting New Jersey v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980); see also Utility Solid Waste Activities Group v. EPA, 236 F.3d 749, 752 (D.C. Cir. Jan. 30, 2001) (section 553 "sets down certain procedural requirements with which agencies must comply in promulgating legislative rules: there must be publication of a notice of proposed rulemaking [and] opportunity for public comment on the proposal"). Here, despite the sweeping importance of the policy questions resolved by Interior Department officials for the first time, in their haste to issue the rules during this litigation, defendants did not solicit or consider any public comment before adopting the Revocation rules changes.

Therefore, under Circuit precedent, defendants have the burden to demonstrate that one of the "limited exceptions to the [notice and comment] requirements" of the APA may be invoked. Batterton v. Marshal, 648 F.2d 694, 701 (D.C. Cir. 1980). Defendants have previously suggested several different (and contradictory) rationales for why they could avoid advance public notice and comment procedures here -- none of which has merit. See Defendants' May 7, 2001 Supplemental Memorandum ("Def. Supp. Mem.").

1. The Revocation Rule Changes Are "Substantive."

Defendants have previously argued that public comment was unnecessary because the Revocation rule changes are "interpretive" rather than "substantive" or "legislative" rules. Def. Supp. Mem. at 13, citing 5 U.S.C. § 553(B)(A). This argument is baseless, since the plain language of the rule changes -- which make ITPs subject to a far narrower revocation standard than any other permits issued by the FWS, including those affecting non-endangered wildlife -- "substantially curtail [FWS's] discretion in [ITP revocation] decisions and accordingly ha[ve] present binding effect." Nat'l Family Planning v. Sullivan , 979 F.2d 227, 239 (D.C. Cir. 1992). Thus, the creation of an entirely new, narrow standard for revoking ITPs is the quintessential "substantive rule" change "having the force of law" and hence is subject to the requirement for advance public notice and comment. Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579, 587 (D.C. Cir. 1997).

Indeed, defendants plainly intended the revocation rule changes to "have the force and effect of law." American Mining Congress v. Mine Safety & Health Administration, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (citing Attorney General's Manual on the Administrative Procedure Act). Thus, not only were the rule changes published in the C.F.R., see id.; 44 U.S.C. § 1510

(publication in the C.F.R. is limited to rules "having general applicability and legal effect"), but, in adopting the rules, the FWS has now expressly precluded itself from revoking ITPs under the broader revocation standard that applies to every other permit issued by the agency except ITPs, i.e., when such permits are "detrimental to the maintenance or recovery" of "any affected population" of any species. 50 C.F.R. § 13.28(a)(5) (emphasis added).

Rather, ITPs may now only be revoked when they are impairing both the "survival and recovery" of an entire species, 64 Fed. Reg. 32712, 32715, and not when they are simply "detrimental" to the "recovery" of an endangered or threatened species, or to the "maintenance" of a "population" of such a species. See Sierra Club v. U.S. Fish and Wildlife Service, 245 F.3d 434, 441 (5th Cir. 2001) ("The ESA's definition of 'conservation' speaks to the recovery of a threatened or endangered species" which is a "much broader concept than mere survival") (emphasis added). Hence, by vesting in ITP holders the legal right not to have their permits revoked based on the much broader permit revocation standard that is applicable to all other FWS permit holders, the FWS has unquestionably adopted rule changes "having the force of law." Paralyzed Veterans of America, 117 F.3d at 587; see also 64 Fed. Reg. 32709 (describing the "narrow and unlikely situation" in which the Service could now revoke an ITP under the new standard).[14]

[14] Indeed, DOI officials recognized the importance of this drastic change in the

revocation standards and that it would greatly constrain the Service's ability to revoke ITPs, even where such permits are clearly impeding the recovery of endangered species. In fact, in discussing why a rule change was necessary to accomplish this shift, then Solicitor of the Interior Department explained that, "[o]n the 13.28(a)(5) issue, the plain meaning . . . is that it allows us to revoke an ITP/HCP that impairs recovery, regardless of whether it threatens jeopardy . . . [T]here seems to be agreement among knowledgeable people that, in some circumstances at least, there can be a considerable difference between the two." PI 20 at 2 (emphasis added).

In addition to amending its regulations to adopt a new substantive standard for revocation of ITPs, the FWS also established new preconditions to revocation of ITPs that do not apply to any other permits issued by the agency, which also triggered the notice and comment requirement. See United States v. Picciotto, 875 F.2d 345, 348 (D.C. Cir. 1989) (adding new conditions to a legislative rule requires notice and comment proceedings). As noted previously, the rule and preamble make clear that revocation may not occur unless the Service itself has attempted, but "not been successful in remedying the situation through other means." 64 Fed. Reg. 32709 (emphasis added); see also id. (committing the Service "to utilizing its resources to address any such unforseen circumstances"). Therefore, the rule imposes an extraordinary precondition even on the revocation of ITPs that are jeopardizing species with extinction -- i.e., the Service itself must first exhaust all "other" potential "means" to "remed[y] the situation." This unique restriction on the Service's own ability to revoke ITPs has no analogue in section 13.28(a)(5), and, as Interior Department officials themselves recognized, it will create an "implementation/litigation nightmare" whenever the Service seeks to revoke an ITP. PI 38.[15]

In light of these and other critical issues raised by the new rules, DOI's own attorneys recognized that modifying section 13.28(a)(5) to expressly exclude ITPs was a "major

[15] See also PI 38 ("Would we have to reprogram funds if necessary? Are all DOI (i.e., not just FWS) authorities implicated?"); PI 36 ("How would FWS prove a negative? What existing authorities and appropriations would be eligible? Would it mean that the Service would have an obligation to reprogram money from all other programs if necessary for this purpose?"); PI 47 ("We would be giving a permit holder a very potent defense in a revocation proceeding.").

substantive change" that, at least, warranted advance public notice and comment. PI 12; PI 15 (urging an approach that would "solve the APA/inadequate public notice problems with the current Part 13 rulemaking") (emphasis added); PI 24 ("Changes to provisions such as thi s could have significant impacts on species conservation and cannot be reconciled with the common understanding of what a clarifying change would be.") (emphasis added); PI 35 ("how can you do it under the guise of technical revisions to Pt. 13 without any opportunity for public comment?"). However, even if defendants could somehow characterize the Revocation rule changes as simply new "interpretations" of their statutory obligations with regard to the revocation of ITPs, this would still necessitate prior public comment, since, according to defendants' own description of the rule changes, the new Revocation rules amended the revocation standard that applied to ITPs.

Thus, in responding to plaintiffs' challenge to the No Surprises rule, defendants have insisted that, prior to the promulgation of the ITP-specific Revocation rules issued in June 1999, and irrespective of the No Surprises rule, the Service's Part 13 "regulations governing general permit revocation" -- which were themselves promulgated following public comment, see 54 Fed. Reg. 38142 (Sept. 14, 1989) -- "were applicable to all Service permits, including ITPs for ESA-listed species under Part 17." Def. Supp. Mem. at 4-5 (emphasis added); see also id. at 8 ("final [No Surprises] rule did not exempt ITPs from the . . . permit revocation provisions in 50 C.F.R. § 13.28(a)(5) (emphasis added). Therefore, the unavoidable result of the government's position is that the June 1999 rulemaking amended the Service's preexisting substantive rules for revocation of ITPs.

However, as the Court of Appeals has held:

> [i]t is a maxim of administrative law that: '[i]f a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and of course, an amendment to a legislative rule must itself be legislative.'

Nat'l Family Planning , 979 F.2d at 235 (emphasis added), quoting Michael Asimow, Nonlegislative Rulemaking and Regulatory Reform, 1985 Duke L. J. 381, 396; see also Hudson v. FAA, 192 F.3d 1031, 1036 (D.C. Cir. 1999) (an agency may only "'formally modify'" a regulation "'through the process of notice and comment rulemaking'") (internal citation omitted).

Indeed, in a series of recent cases, the D.C. Circuit has applied and extended this "maxim" to situations where the government has not even promulgated a new regulation that amends a preexisting substantive rule -- as occurred here -- but has instead simply issued a revised interpretation of an existing regulation. Even in those circumstances, the D.C. Circuit has held that advance public notice and comment is mandatory, explaining that:

> the [agency's] change in interpretation is contrary to the Administrative Procedure Act because it circumvents section 553, which requires that notice and comment accompany the amendment of regulations []. Even if not a change, it constitutes a substantive addition which itself requires notice and comment.

Paralyzed Veterans of America, 117 F.3d at 583 (emphasis added). Accordingly, even if

> defendants could manage to convince the Court that their new binding, substantive standards for ITP revocation are merely "interpretive," they were nonetheless promulgated in patent violation of APA requirements.[16]

[16] See also Paralyzed Veterans of America, 117 F.3d at 586 ("To allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements."); Monmouth Medical Center v.

Thompson, 257 F.3d 807, 814 (D.C. Cir. 2001) ("characterization as an interpretive rule does not relieve the Secretary of notice and comment requirements when a valid interpretation exists"); Alaska Prof'l Hunters Ass'n, Inc. v. FAA , 177 F.3d 1030, 1034 (D.C. Cir. 1999) ("'Rule making,' as defined in the APA, includes not only the agency's process of formulating a rule, but also the agency's process of modifying a rule.").

2. Defendants Have Never Complied With the APA In Issuing The New Revocation Rules.

In their prior briefing, defendants have argued, alternatively, that they have complied with APA requirements in promulgating the Revocation rules. Those arguments are not only also baseless, but they make a mockery of the APA's "essential purpose" to "reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies." Batterton, 648 F.2d at 703.

First, defendants have relied on a June 1997 Federal Register Notice in which the FWS solicited public comment on entirely different changes to the agency's rules that were described to the public as mere "technical amendments to [the Service's] general regulations," and did not even remotely suggest that the Service was contemplating significantly limiting the circumstances under which ITPs could be revoked. 62 Fed. Reg. 32189 (emphasis added). Nonetheless, defendants have contended that the Revocation rules issued in response to plaintiffs' arguments in this case were somehow a "logical outgrowth" of the June 1997 proposal, Bldg. Indus. Ass'n of Superior Cal. v. Norton, 247 F.3d 1241, 1246 (D.C. Cir. 2001) -- although defendants concede that not a single member of the public submitted comments in response to that rulemaking discussing the standards and process that should be apply to revocation of ITPs.

As the D.C. Circuit has explained, the theory underlying the "logical outgrowth" doctrine is that, to "avoid 'perpetual cycles of new notice and comment periods,' a final rule that is a logical outgrowth of the proposal does not require an additional round of notice and comment even if the final rule relies on data submitted during the comment period." Id. (emphasis added), quoting Ass'n of Battery Recyclers v. EPA, 208 F.3d 1047, 1058 (D.C. Cir. 2000). Where, as here, there was never even a single "cycle" of public comment on defendants' hastily made,

litigation driven, decision to exclude ITPs entirely from the general permit revocation standard embodied in section 13.28(a)(5), and to instead develop new, far narrower requirements for ITP revocation, the "logical outgrowth" principle has no conceivable applicability here. Indeed, the notion that interested members of the public "should have anticipated that such a requirement" would be developed by the FWS two years later in response to this lawsuit -- which is the test for whether fair notice has been afforded by an agency, Small Refiner Lead Phase Down Task Force v. EPA, 705 F.2d 506, 548 (D.C. Cir. 1991) -- is simply nonsensical on its face, especially since defendants' own officials called the June 1997 proposal a "stealth rule" and conceded that the "public did not understand the proposed rule might allow significant, non-clarifying changes in the Part 13 regulations." Exh. 1 at PI 24, p. 2 (emphasis added); see also Sugar Cane Growers Cooperative of Florida v. Veneman, No. 01-5335, Slip op. at 7 (D.C. Cir. May 10, 2002) (rejecting a similar argument that the government had "essentially complied with section 553 of the APA" as "border[ing] on the frivolous"); National Mining Ass'n v. Mine Safety & Health Admin., 116 F.3d 520, 531 (D.C. Cir. 1997) (setting aside a final rule which was not a "logical outgrowth" of the proposed rule; "none of this would have alerted a reasonable interested party" of the final rule adopted by the agency); Am. Water Works Ass'n v. EPA, 40 F.3d 1266, 1274 (D.C. Cir. 1994) (in applying the "logical outgrowth" concept, the Court asks "whether 'the purposes of notice and comment have been adequately served'") (internal citation omitted). [17]

[17] Not only did the June 1997 proposal say nothing at all about changing the revocation standards for ITPs, but it downplayed the significance of the other changes to Part 13 that the Service was contemplating (and that were never adopted). Hence, the Service specifically advised the public that its proposed "technical amendments" would merely "clarify the application of existing general permit conditions to the permitting procedures associated with [HCPs]" by providing that such "general permit conditions" would apply to ITPs/HCPs except "in case of a conflict between general permit provisions in Part 13 and more specific terms or

conditions in a HCP permit . . .." 62 Fed. Reg. 32189-90. In addition, far from suggesting that any provision of Part 13 would no longer apply to ITPs, the Service's proposal would have specifically provided that the 'provisions in this part [Part 13] are, in addition to, and not in lieu of, other permit regulations of this subchapter and apply to all permits issued thereunder, including . . . 'Endangered Wildlife and Plants' (Part 17)." Id. at 32191 (emphasis added). Even further, the June 1997 proposal advised the public of another pending FWS rulemaking -- that proposed to expand, rather than narrow, the Part 13 criteria for revoking all Service permits, including ITPs, see 60 Fed. Reg. 46087 (Sept. 5, 1995) (reproduced at 1995 WL 518916) -- and stated that the 'present proposal in no way amends the language included" in that proposal. 62 Fed. Reg. 32190 (emphasis added).

Second, trying yet another tack, defendants have also sought to rebut plaintiffs' APA claim by pointing to a Federal Register notice issued in February 2000 -- eight months after the Revocation rule changes were made and three months after plaintiffs amended their Complaint -- "seeking additional comment on a number of the regulatory changes finalized in the June 17, 1999 rule." 65 Fed. Reg. 6916 (Feb. 11, 2000) (Exh. E). That notice specifically stated that the "regulations published in the final rule of June 17, 1999 will remain in full force and effect," and that, "[b]ased on public comments received, we will decide whether portions of the June 17, 1999 final rule should be reproposed." Id. (emphasis added). Predictably, defendants subsequently announced -- a full eighteen months after adoption of the Revocation rules in final form -- that, despite overwhelming public opposition to the rule changes, it had made "no changes" in the rules, nor did it even discern a basis that would "warrant a reproposal of the permit regulation changes." 66 Fed. Reg. 6487 (Jan. 22, 2001) (Exh. F).

> The controlling rule in this Circuit is that such a post hoc comment opportunity cannot generally "cure" a violation of section 553 because it defeats the entire purpose of public input before the agency has made and announced its decision. The seminal case on the issue is State of New Jersey v. U.S. EPA, 626 F.2d 1038 (D.C. Cir. 1980). In an extended discussion emphatically rejecting an agency's attempt to accomplish exactly what the FWS is arguing here, the D.C. Circuit explained why a post hoc comment opportunity does not moot a violation of section 553:
>
> [A]fter promulgating a 'final rule' which was to be effective 'immediately,' the Administrator [of EPA] stated the Agency would accept public comments received within sixty days of the promulgation of the rule[]. The Administrator now argues that his provision for post hoc comment 'cures' his failure to follow section 553' s procedures. We cannot agree.

Id. at 1049 (emphasis added). Rather, the Court

> accept[ed] the reasoning of the Fifth Circuit [in United States Steel Corp. v. EPA, 595 F.2d 207 (5th Cir. 1979)]:

. . .

> 'Section 553 is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas. Other courts have recognized this difference and rejected arguments similar to that asserted here: Permitting the submission of views after the effective date is no substitute for the right of interested persons to make their views known to the agency in time to influence the rule making process in a meaningful way . . . Were we to allow the EPA to prevail on this point we would make the provisions of § 553 virtually unenforceable.' . . .
>
> We are convinced the Fifth Circuit accurately assessed the psychological and bureaucratic realities of post hoc comments in rule-making. It was in recognition of those realities that Congress specified that notice and an opportunity to comment are to *precede* rule-making.

626 F.2d at 1049-50 (internal citations omitted) (emphasis added). Because, in light of this analysis, the post hoc comment period could not "cure" the APA violation, the Court of Appeals did what the APA commands -- it "set aside" the challenged actions and remanded them for "reconsideration" which, "must, certainly, be preceded . . . by opportunity for public comment, as section 553 prescribes." Id. at 1050 (emphasis added).[18]

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[18] See also Air Transport Ass'n of America v. Dep't of Transportation , 900 F.2d 369, 379 (D.C. Cir. 1990), vacated as moot, 933 F.2d 1043 (D.C. Cir. 1991) (relying on State of New

Jersey for the proposition that '[s]ection 553 provides 'that notice and an opportunity to comment are to precede rulemaking.' We strictly enforce this requirement because we recognize that an agency is not likely to be receptive to suggested changes once the agency 'put[s] its credibility on the line in the form of 'final' rules. People naturally tend to be more close-minded and defensive once they have made a 'final' determination") (emphasis added) (internal citations omitted). The government has previously argued that, because Air Transport was vacated as moot in response to a remand from the Supreme Court, it "no longer constitutes a valid" precedent with which this Court need concern itself. Def. Supp. Mem. at 22. However, the D.C. Circuit has specifically instructed that its rulings that are vacated as moot "continue to have precedential weight, and in the absence of contrary authority, we do not disturb them." Action Alliance of Senior Citizens v. Sullivan, 930 F.2d 77, 83 (D.C. Cir. 1991) (emphasis added). Indeed, the D.C. Circuit itself has quoted with approval the very same section of Air Transport that plaintiffs rely on here. See Advocates for Highway Safety v. FHA, 28 F.3d 1288, 1292 (D.C. Cir. 1994).

This case is controlled by both the reasoning and result in State of New Jersey and its progeny. Indeed, the subversion of the APA is even more stark here, since, in State of New Jersey, the agency at least solicited public comment contemporaneously with the announcement of its "final rule." 626 F.2d at 1049. Here, in sharp contrast, defendants waited until more than half a year after the final rule was promulgated -- and only after plaintiffs had amended their Complaint to challenge the patent APA violation -- before even asking for post--hoc comment on rules that "remain[ed] in full force and effect," 65 Fed. Reg. 6916 (emphasis added), and then, inevitably, the agency saw no need to "change" the final rules in any fashion, despite extensive criticism of them by conservation organizations, scientists, and even industry groups. 66 Fed. Reg. 6487. Such after-the-fact window dressing obviously does not "cure" the serious APA violation that occurred here. See State of New Jersey, 626 F.2d at 1050 ("we have no evidence to rebut the presumption that post hoc comment was not contemplated by the APA and is generally not consonant with it"); see also Sugar Cane Growers, Slip op. at 8 ("an utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure") (emphasis added).[19]

B. Defendants Acted Arbitrarily, Capriciously, and in Violation of the ESA By Adopting the New Revocation Rules.

While the Court should set aside and remand the Revocation rule changes in view of defendants' patent procedural violation of the APA, even if defendants can somehow overcome

[19] In stark contrast to the situation here and in State of New Jersey, in NRDC v. NRC, 680 F.2d 810 (D.C. Cir. 1982) -- a case on which defendants have previously relied -- the agency pursued an entirely new rulemaking proceeding and promulgated a new rule, thus mooting the plaintiff's APA challenge to a prior rule that no longer had any legal effect. Nothing in that case suggests that an agency can moot an APA challenge by engaging in the kind of purely post hoc comment solicitation denounced in State of New Jersey and other Circuit precedents.

that hurdle, their mid-litigation rule changes -- and especially their decision to exclude ITPs from the broad revocation authority set forth in section 13.28(a)(5) -- cannot pass muster under section 706(a)(2)(A) of the APA. In determining whether an action is "in accordance with law" within the meaning of that provision, reviewing courts have traditionally applied the framework established by Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

Under "step one" of Chevron analysis, the Court must first ascertain whether Congress had a specific intent on the issue before the Court. Natural Resources Defense Council v. EPA, 194 F.3d 130, 135 (D.C. Cir. 1999). In doing so, the Court must "consider[] 'the particular statutory language at issue, as well as the language and design of the statute as a whole.'" Halverson v. Slater, 129 F.3d 180, 184 (D.C. Cir. 1997) (quoting K Mart v. Cartier, Inc., 486 U.S. 281, 291 (1988)). Only if the Court determines that Congress "has not spoken to the question at issue, does Chevron step two" ordinarily "come into play, requiring the court to defer to the agency's reasonable interpretation of the statute." Southern California Edison Company v. FERC, 195 F.3d 17, 23 (D.C. Cir. 1999) (emphasis added).

However, the Supreme Court has recently ruled that where, as here, agency rules have not been adopted following notice-and-comment or equivalent public proceedings -- as is the case with regard to the Revocation rule changes -- they "do not warrant Chevron-style deference," even where the underlying statute is vague or ambiguous. Christensen v. Harris County, 529 U.S. 576, 587 (2000) (emphasis added); accord United States v. Mead Corp., 533 U.S. 218 (2001). Hence, in light of Mead and Christensen, the D.C. Circuit has declined to defer to agency statutory constructions that have not been adopted as a result of "a notice-and-comment

rulemaking, a formal agency adjudication, or some other procedure meeting the prerequisites for Chevron deference." Landmark Legal Foundation v. IRS, 267 F.3d 1132, 1135-36 (D.C. Cir. 2001). Rather, in such situations, a reviewing court "must decide for [itself] the best reading of the" statute. Id. at 1136 (emphasis added).[20]

[20] See also Fogg v. Ashcroft, 254 F.3d 103, 109 (D.C. Cir. 2001) (refusing to grant deference to agency "brief submitted to the court" because the "brief is obviously not the product of either formal adjudication or notice-and-comment rulemaking").

Applying these principles here, it is plain that a rule change that forecloses the FWS from revoking ITPs/HCPs solely because they are detrimental to the recovery of an endangered or threatened species -- i.e., by impairing the species' ability to rebound to the point where it is no longer on the verge of extinction -- is hardly the "best reading" of the ESA, which embodies Congress's intent to "halt and reverse the trend towards species extinction, whatever the cost." TVA v. Hill, 437 U.S. at 187. As noted previously, section 10 does not allow the FWS even to issue an ITP unless the permit has in place a "conservation plan" that will further the recovery of the species. 16 U.S.C. § 1539(a)(1)(B) (emphasis added); see also Sierra Club v. Babbitt, 15 F. Supp. 2d at 1278 n. 3 (the ITP applicant "must submit a 'conservation plan' that will -- as its name plainly connotes -- help 'conserve' the entire species by facilitating its survival and recovery") (emphasis added). As the Fifth Circuit recently reaffirmed in the course of invalidating another FWS regulation, "'[c]onservation' is a much broader concept than mere survival," since the "ESA's definition of 'conservation' speaks to the recovery of a threatened or endangered species." Sierra Club, 245 F.3d 434, 441-42 (5th Cir. 2001) (citing 16 U.S.C. § 1532(3)). Plainly, therefore, it is contrary to the plain terms of the ESA, and section 10 in particular, for the Service to modify its regulations to preclude itself from revoking an ITP/HCP that is deemed to be "detrimental" to the "recovery" of an endangered or threatened species.[21]

[21] The legislative history of the ESA reinforces Congress's intent that permits to "take" endangered or threatened species should be issued only where the permit holders are taking actions that are "likely to enhance the habitat of the listed species or increase the long-term survivability of the species or its ecosystem." H. Conf. Rep. 835, 97th Cong., 2d Sess. 31 ("1982 Conf. Rep.") (emphasis added). Indeed, Congress stated that section 10's requirement for a "conservation plan" was "modeled" after a plan that had been developed for the "San Bruno Mountain area of San Mateo County" which "preserves sufficient habitat to allow for enhancement of the survival of the species," including by "protect[ing] in perpetuity at least 87 percent of the habitat of the listed butterflies." Id. at 32.

Defendants' exclusion of ITPs from section 13.28(a)(5) is also impossible to reconcile with the "design of the [ESA] as a whole." Southern California Edison Company, 195 F.3d at 408. Thus, the stated purposes of the ESA are "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved and] to provide a program for the conservation of such endangered and threatened species. . . .." 16 U.S.C. § 1531(b) (emphasis added). Once again, since the ESA defines "conservation" as meaning "recovery," the Service's self-imposed refusal to revoke ITPs/HCPs even where they are "only" "detrimental" to a species' recovery clearly thwarts the fundamental objectives of the Act.

Moreover, defendants' decision to establish a far narrower standard for the revocation of permits applicable to the "taking" of endangered and threatened species than that which applies to other FWS permits affecting wildlife, including non-endangered wildlife, cannot be harmonized with the "'explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species . . .." Defenders of Wildlife v. Babbitt, 130 F. Supp. 2d 121, 124-25, (D.D.C. 2001), quoting TVA v. Hill, 437 U.S. at 185. It is hardly compatible with this Congressional design to "afford first priority" to endangered and threatened species, for defendants to establish a regulatory regime under which such species at risk of extinction are treated worse than non-endangered wildlife affected by FWS permits -- i.e., where permits authorizing the "take" of imperilled species can only be revoked where they are impeding the "survival and recovery" of the entire species, but not their recovery alone -- whereas other FWS permits, including those affecting non-endangered migratory birds and other unlisted species, can be revoked whenever "continuation of the permitted activity would be detrimental" to either the maintenance or recovery" of any "affected population." 50 C.F.R. §

13.28(a)(5) (emphasis added). This result, which plainly thwarts Congress' intent, is not even a "permissible construction of the statute" -- let alone the "best" one -- since it is not "'reasonable and consistent with the statute's purpose.'" Chemical Manufacturers Ass'n v. EPA, 217 F.3d 861, 866 (D.C. Cir. 2000) (internal citation omitted).

Finally, even if the exclusion of ITPs from section 13.28(a)(5) could been deemed "in accordance with law," it still must be set aside as "arbitrary, capricious, [and] an abuse of discretion," 5 U.S.C. § 706(2)(A), since defendants failed to "articulate a satisfactory explanation for [their] action . . .." Defenders of Wildlife, 130 F. Supp. 2d at 124, quoting Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Ins., Co., 463 U.S. 29, 43 (1983)); see also AT & T Corporation v. FCC, 236 F.3d 729, 735 (D.C. Cir. 2001), quoting State Farm, 463 U.S. at 42 ("when an agency determines to change an existing reg ulatory regime it must do so on the basis of 'reasoned analysis.'")

When hurriedly changing their ITP revocation rules, the FWS furnished virtually no explanation for the critical policy decisions being made, let alone the "reasoned analysis" demanded by the APA. Thus, in its Federal Register notice announcing the Revocation rule changes, the FWS asserted merely that it would be "more appropriate" to condition revocation of an ITP on the statutory issuance criterion that prohibits the issuance of such a permit unless the Service finds the permit is "not likely to jeopardize the continued existence of the species." 64 Fed. Reg. 32709 (emphasis added). Conspicuously, however, the FWS did not explain why it is more "appropriate" to make it significantly mor e difficult to revoke ITPs -- which allow permit holders to actually kill or otherise "take" endangered species -- than other FWS permits affecting endangered species or wildlife generally or, more specifically, why it is "appropriate" to allow an

ITP to remain in effect whenever it is "detrimental" to the "recovery" of an endangered species. [22]

[22] Nor did the FWS explain why it is "appropriate" to pick only one of the "statutory issuance" criteria for ITPs as the standard for ITP revocation, assuming that there is any need at all to devise a new revocation standard specific to ITPs. For example, the Service has utterly failed to explain why the "issuance criterion" regarding implementation of a "conservation plan" -- which must, by definition, affirmatively further the recovery of the affected species -- should not also be incorporated into the revocation standard, so that an ITP can be revoked when the HCP on which it is based fails to provide any "conservation" for the species as a whole.

The FWS also failed to provide any explanation to support the Service's "firm[] commitment" to "using its own" resources to address any unforseen circumstances befo re revoking an ITP, 64 Fed. Reg. 32709, especially in view of the agency's own repeated protestations that it lacks the resources even to perform its existing duties under the ESA See Forest Guardians, 164 F.3d at 1263; see also Affidavit of FWS Director, at ¶ 36 (filed in Center for Biological Diversity v. Babbitt, Civ. No. C99-3202 SC (N.D. Cal.) (Exh. G) ("The Service's Endangered Species budget, the portion of the Service's budget used to carry out all aspects of the Act, has in recent years been inadequate to carry out all of the duties the Service is mandated to address, not just the listing activities, but consultation and recovery activities as well.") (emphasis added). In short, the Service's abbreviated notice did not meaningfully address any of the important issues, let alone "fully articulate the basis for its decision," as required by the APA. Missouri Public Service Commission v. FERC, 234 F.3d 36, 40 (D.C. Cir. 2000).[23]

I. THE NO SURPRISES RULE MUST BE SET ASIDE AS CONTRARY TO THE ESA AND APA.

Since defendants have expressly relied on the Revocation rule changes to defend the No Surprises rule -- and, indeed, to resolve, without prior public notice and comment, critical policy questions left open in the No Surprises rulemaking -- the No Surprises rule must, at minimum, also be set aside and remanded, so that defendants can consider both of these interrelated regulatory actions at the same time, and provide the public with the input mandated by law. See

[23] See also American Lung Ass'n v. EPA, 134 F.3d 388, 392 (D.C. Cir. 1998) ("[J]udicial review can occur only when agencies explain their dec isions with precision for it will not do for a court to be compelled to guess at the theory underlying the agency's action.").

Chemical Manufacturers Ass'n v. EPA, 217 F.3d 861, 867-68 (D.C. Cir. 2000) ("Because it is impossible for us to determine from this record that EPA would have promulgated the NIC and Progress Report requirements absent the early cessation rule, we must vacate these provisions as well."). In any event, the No Surprises rule is also fundamentally contrary to the ESA and the APA, irrespective of defendants' post hoc "clarification" of their position.

A. The No Surprises Rule Is Contrary to Sections 10 and 7 of the ESA.

The Court of Appeals has recently reaffirmed the importance of reading a statutory provision to "mean what it says." Verizon Telephone Companies v. FCC, 269 F.3d 1098, 1105 (D.C. Cir. 2001); see also State of Michigan v. EPA, 268 F.3d 1075, 1087 (D.C. Cir. 2001) ("when Congress has spoken, we are bound by that pronouncement"); Southwest Center for Biological Diversity v. Babbitt, 215 F.3d 58, 61 (D.C. Cir. 2000) (ruling, in an ESA case, that even an argument with "superficial appeal cannot circumvent the statute's clear wording"). The No Surprises rule contravenes the plain terms of several provisions of the ESA.

First, under section 10 of the ESA, to issue an ITP, the Services must find that the "applicant [for the permit] will, to the maximum extent practicable, minimize and mitigate the impacts of such taking." 16 U.S.C. § 1539(a)(B)(ii) (emphasis added). Thus, the plain terms of the statute require that permit applicants themselves "minimize and mitigate" the adverse effects of the "taking" that is being authorized, and, moreover, that they do so to the "maximum extent practicable." Plainly, therefore, a rule that provides that, in the event of all "unforseen" (or foreseen but ignored) circumstances, ITP holders will never be obligated to "minimiz[e] and mitigat[e]" the effects of the taking -- but that this obligation will instead fall on the Services themselves and, ultimately, federal taxpayers -- cannot be reconciled with the unequivocal

language of section 10.

The rule is also impossible to square with how section 10 has been construed by the courts. In Sierra Club v. Babbitt, the court reviewed ITPs issued to developers, which allowed the direct "take," and destruction of habitat, of the endangered Alabama beach mouse. 15 F. Supp. 2d at 1280. In issuing the ITPs, the FWS had allowed much of the existing habitat of the species to be destroyed on the grounds that there would be "off site mitigation" -- i.e., other habitat of the species would be acquired and protected -- although the developers themselves did not commit funds sufficient to acquire that habitat; instead, the FWS had asserted that "unnamed sources" would pick up the slack and make the habitat purchase possible. Id. at 1282.

The court held, however, that this "speculative reliance on other un named sources to contribute funds to make up for the inadequacy of the amounts of offsite mitigation funding required is simply contrary to the law . . .." Id. (emphasis added). Instead, the court reasoned, the "law establishes that the FWS cannot comp ly with the strict ESA mandate that the HCP 'minimize and mitigate' the effects of the projects 'to the maximum extent practicable' simply by relying on speculative future actions of others." Id. (emphasis added).

But the No Surprises rule mandates reliance on the "speculative future actions of others" -- rather than the ITP holders themselves -- whenever a "take" permit proves to be far more devastating to a species than previously anticipated. See 63 Fed. Reg. 8862 ("The Services will not require the landowner to provide additional mitigation in the form of additional land, water, or money. However, additional mitigation can be required by another entity") (emphasis added). Such a scheme plainly does not comport with the Services' duty to requi re that permit holders themselves mitigate the effects of their actions "to the maximum extent practicable." See also

National Wildlife Federation v. Lujan, 128 F. Supp. 2d 1274, 1293-95 (E.D. Ca. 2000) (setting aside an ITP/HCP that sought to shift funding for mitigation measures to "third parties" as violative of section 10, because the FWS did not demonstrate that the permittees would mitigate the effects of their taking to the "maximum extent practicable," and because the permit applicant had failed to "'ensure that adequate funding for the plan will be provided,'" 16 U.S.C. § 1539(a)(2)(B)(iii)") (emphasis in original); Fund for Animals v. Babbitt, 903 F. Supp. 96, 111 (D.D.C. 1995) ("[u]se of the phrase 'to the maximum extent practicable' [in section 4(f) of the ESA] indicates a strong Congressional preference that the agency fulfill its obligation to the extent that it is possible or feasible") (emphasis added).[24]

[24] The No Surprises rule is also contrary to other requirements of section 10. First, as discussed previously, section 10 forbids the issuance of ITPs in the absence of a "conservation plan," 16 U.S.C. § 1539(a)(2)(A) (emphasis added) -- which, under the statutory definition of "conservation" means a plan that will "help 'conserve' the entire species by facilitating its survival and recovery." Sierra Club v. Babbitt, 15 F. Supp. 2d at 1278 n. 3 (emphasis added). However, the No Surprises rule extends extraordinary assurances to ITP holders without even requiring that their initial plans provide for the long-term recovery needs of affected species. In addition, section 10 requires the Services to provide an "opportunity for public comment" on every request for an ITP, by affording "interested parties" the opportunity to submit "written data, views, or arguments with respect to the application" for a permit. 16 U.S.C. §§ 1539(a)(2)(B), (c). Yet the No Surprises rule eviscerates the public's right to comment on a

critical aspect of each ITP/HCP -- i.e., whether, under what circumstances, and for how long the ITP holder should be immune from additional mitigation measures in the event of new developments that are adverse to affected species.

The No Surprises rule also violates section 7(a)(2) of the ESA, which compels every federal agency -- including the Services themselves -- to "insure that any action authorized" by the federal government is "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of the species' critical habitat. 16 U.S.C. § 1536(a)(2) (emphasis added). Moreover, in "fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available." Id. Hence, as the Supreme Court has held, "one would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the [ESA]." TVA v. Hill, 437 U.S. at 173.

While flatly conceding, as they must, that their issuance of ITPs is subject to the requirements of section 7, see 63 Fed. Reg. 8862, the Services have adopted a rule that not only undermines the process and requirements established by section 7, but turns them completely upside down. Thus, under the "No Surprises" rule, whenever an action sub ject to an ITP is found to be "jeopardizing" a species with extinction or destroying its critical habitat due to any circumstances not addressed in the ITP itself, the Services are flatly prohibited from requiring the permit holder to adopt additional measures to avert those calamities -- thus requiring "precisely the opposite effect" than that of "insuring" the avoidance of jeopardy or destruction of critical habitat. TVA v. Hill, 437 U.S. at 174.

The extraordinary extent to which the Services have departed from the clear dictates of section 7 can best be illustrated by comparing the "No Surprises" scheme for ITPs to what is required with regard to any other federally permitted activity under section 7. For example, if a developer received a permit from the Army Corps of Engineers to destroy wetlands in which

endangered species are present, and it was later determined that the project would harm the species in ways not previously considered, under section 7, the Corps would be required to reinitiate consultation and consider alternative ways to avoid jeopardizing those species, including by imposing a duty on the developer to conserve more habitat or change the design of the project. See Sierra Club v. Marsh, 816 F.2d 1376, 1389 (9th Cir. 1987) ("The institutionalized caution mandated by section 7 of the ESA require the [Corps of Engineers] to halt all construction that may adversely affect the habitat unless it insures the acquisition of the mitigation lands or modifies the project accordingly") (emphasis added).

Likewise, if a timber company received permission from the Forest Service to engage in logging on national forest lands, and new information disclosed that this logging was harming endangered species in ways not previously anticipated, there is no question that the Forest Service would be required to revisit and revise timber cutting plans. See Pacific Rivers Council v. Thomas, 30 F.3d 1050, 10546 (9th Cir. 1994) (previously approved forest management plans which were "inadequate because they do not address [] newly listed species" required reinitiation of consultation under section 7(a)(2)). In sharp contrast, however, under the No Surprises rule, when the very agencies that are primarily responsible for furthering the conservation goals of the ESA themselves issue ITPs, they will never be able to subject the permit holders to additional "land use restrictions" not provided for in the initial permits even when that "additional mitigation is needed" to avoid jeopardizing a species with extinction. 63 Fed. Reg. 8859 (emphasis added). This massive new loophole to the mandate and purpose of section 7 is nowhere to be found in the statute itself and may not be added by regulatory fiat. See TVA v. Hill, 437 U.S. at 186 (refusing to recognize exception to ESA which Congress had not expressly

enacted).

The Services cannot justify this rending of the statutory fabric by invoking vague "authorities and resources" through which the Services "could meet their section 7 responsibilities" in the event of unforseen circumstances. 63 Fed. Reg. 8862 (emphasis added). Rather, this response simply underscores the patent conflict between the No Surprises rule and Congress's intent in enacting section 7, since, under the rule, the fate of the affected species themselves are "dependent on the availability of appropriated funds" to pay for mitigation measures that the Services could otherwise have imposed on ITP holders. 63 Fed. Reg. 8864 (emphasis added). Critically, however, as the Services further concede, there is, at present, a "lack of guaranteed funding to handle a breakdown of an HCP due to unforseen circumstances," 63 Fed. Reg. 8864 (emphasis added), and, indeed, the Services are prohibited by federal law from making any commitments for the expenditure of taxpayer funds before they are appropriated. See 30 U.S.C. § 1341 (barring federal officials from "involv[ing] [the] government in a contract or obligation before an appropriation is authorized by law") (emphasis added). In addition, as numerous commenters pointed out, the Services have received scant appropriations to implement the ESA, with a total budget which is "equivalent to the amount spent on a couple of miles of the federal Interstate Highway System . . .." Thornton, Natural Resources & Environment, at 23 (1993) (attachment to A.R. Vol. 4, Comm. 600).[25]

[25] As noted earlier, the Services themselves have frequently informed federal courts that they lack the necessary appropriated funds even to carry out their mandatory duties under the Act, let alone to shoulder a new financial burden of dealing with "breakdown[s]" in HCPs caused

by unforseen circumstances. 63 Fed. Reg. 8863.

In short, by placing the interests of ITP holders in securing "regulatory certainty," 63 Fed. Reg. 8864, above the interests of endangered and threatened species -- whose fate may now be determined by the "availability of appropriated funds," id. -- the No Surprises rule reflects the reverse of the priority scheme that Congress intended when it enacted section 7. As the Supreme Court has held, in enacting that provision, "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'" TVA v. Hill, 437 U.S. at 194 (emphasis added); see also id. at 185 ("§ 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species") (emphasis added).

Nor is this violation of the statute cured by defendants' post hoc "clarification" that ITPs may be revoked under the narrow circumstances set forth in the new Revocation rules. Not only has the Service made clear that the draconian step of permit revocation will be exercised exceedingly rarely, if ever, see 64 Fed. Reg. 32709 (revocation is a "last resort" if the "Service has not been successful in remedying the situation through other means"), but it will accomplish nothing whatsoever where what is needed, in light of unforseen events, are modifications to an ITP/HCP -- e.g., by requiring that additional or different habitat areas be conserved for a species that has already been severely harmed by activities authorized by an ITP -- rather than permit revocation. For example, if an already-built housing development proves to be far more damaging to a species than previously anticipated, revocation of a permit might prevent future harms, but it obviously could not remedy the damage already done. Under such circumstances, not only is it patently irrational for the regulatory agency to foreclose itself from simply

amending the permit -- rather than taking a more extreme action that may be far less beneficial to the species -- but, once again, it flouts the "plain intent of Congress in enacting this statute [] to halt and reverse the trend towards species extinction, whatever the cost," and to adopt a policy of "institutionalized caution" in dealing with endangered species. TVA v. Hill, 437 U.S. at 184 (emphasis added); see also National Wildlife Federation, 128 F. Supp. 2d at 1295 ("The Service's discretion to revoke a permit . . . does not seem to satisfy the statute's requirement that the applicant ensure the adequacy of funding.") (emphasis added).

The No Surprises rule also violates section 7(a)(2)'s requirement that all agencies "use the best scientific and commercial data available" in fulfilling the requirements of that provision. 16 U.S.C. § 1536(a)(2). Not only does the entire premise of the rule flout scientists' current understanding of nature as inherently unpredictable -- as hundreds of scientists have explained, see supra at 8-9 -- but the rule expressly forecloses the Services' reliance on the "best scientific data available" whenever new information suggests that a previously approved ITP should be modified because of "unforseen" and "changed" circumstances not provided for in the initial ITP/HCP. Indeed, the record is replete with examples of precisely those kinds of unanticipated advances in scientific knowledge regarding the needs of

species -- information as to which, under the rule, the Services must turn a blind eye whenever the data counsel in favor of modifying the ITP/HCP in ways prohibited by the rule. See, e.g., A.R. Vol. 3, Comm. 350 at 2 (Harris Center for Conservation Education) ("A good example of new knowledge from my region is that obtained regarding the Bicknell's Thrush. The scientific community has only within the past five years come to realize that this is a distinct species with a very restricted breeding range. . . Any habitat conservation plans developed for downhill ski

areas prior to five years ago would not have addressed this species adequately"); A.R. Vol. 3, Comm. 442 (Vancouver Audubon) ("Not so long ago, fisheries biologists thought that streams should be cleaned out of all leftovers from logging and left nice and clean. Now we know that large logs and fallen trees and root wads left in the streams provide structure that is absolutely essential for fish habitat. This example points out that we must not lock in any management plan for a species for a long period of time."). [26]

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[26] While resort to the legislative history is unnecessary where, as here, the statutory language and design are sufficiently clear to resolve the issue, see, e.g., Lin-Qi-Zhuo v. Meissner, 70 F.3d 136, 140 (D.C. Cir. 1995), the No Surprises rule is also contrary to that history as well as defendants' own past construction of Congress's intent. Thus, in the Conference Report accompanying the 1982 amendments to section 10, Congress specifically

> recognized that circumstances and information may change over time and that the original plan might need to be revised. To address this situation the Committee expects that any plan approved for a long-term permit will contain a procedure by which the parties will deal with unforseen circumstances.

1982 Cong. Rep. at 31 (emphasis added). Moreover, prior to the No Surprises rule, the FWS itself left no doubt that it construed Congress's intent, and this language in particular, as requiring ITP holders to address unforseen, harmful developments. See, e.g., 50 Fed. Reg. 39684 (Sept. 30, 1985) (an "express provision[] pertaining to modifications in conservation plans required by changed or unforseen circumstances" is "needed" because "[a]s stated in the Conference Report: 'circumstances may change over time and . . . the original plan might need to be revised.' The Services believes that, while such provisions may be of most value for long-term permits, circumstances requiring modification of a conservation plan could arise even during the life of a permit with a relatively short term.") (emphasis added).

B. The No Surprises Rule Is Arbitrary and Capricious, And Lacking In Any Explanation Consistent With The Purposes Of The ESA, Particularly In View Of The Post Hoc "Clarification" Of The Government's Position.

Not only is the No Surprises rule contrary to the ESA, but defendants have utterly failed even to "articulate a satisfactory explanation" for the rule. State Farm, 463 U.S. at 43. Indeed, especially in light of the post hoc "clarification" of defendants' position, as embodied in the Revocation rule changes, any explanation defendants have mustered makes no sense at all.

The preamble accompanying the rule is devoid of any rational explanation as to why, even as a matter of policy, persons who are applying for federal permits to "take" endangered and threatened species should be provided extraordinary guarantees that "no additional land use restrictions or financial compensation will be required" even if that "additional mitigation is needed for a given species covered by a permit" in order to avoid the species' extinction. 63 Fed. Reg. 8859 (emphasis added). The closest that the Services come to such an explanation is a statement that there has been an "absence of adequate incentives for non-Federal landowners to factor endangered species conservation into their day-to-day management activities." Id. at 8860 (emphasis added).

But that rationale cannot support the rule for two compelling reasons. First, the rule does not, in fact, require "endangered species conservation" as a condition for provision of No Surprises assurances -- as "conservation" is expressly defined in the ESA, 16 U.S.C. § 1532(3); see also Sierra Club, 245 F.3d at 442 ("conservation" in the ESA means "recovery") -- and, indeed, in the course of changing their Revocation rules, defendants have now made abundantly clear that their position is that ITPs may even be "detrimental" to the "recovery" of endangered and threatened species, as well as to the "maintenance" of the population of such a species.

Second, even aside from that incongruity, the Services' reference to "incentives" for private party conduct makes no sense in the context of activities which simply may not occur in the absence of a federal permit without exposing the party to criminal and civil sanctions for illegally "taking" an endangered species. Simply put, since it is " unlawful to 'take' an endangered species without first obtaining, from the FWS [or NMFS], an ITP pursuant to ESA § 10(a)(1)(B)," Sierra Club, 15 F. Supp. 2d at 1279 (emphasis added, footnote omitted), the Services never explain why ITP applicants must be given some additional "incentives" to comply with their basic obligations under federal law. As many commenters pointed out, the Services' approach here reflects an extreme departure from the manner in which other environmental laws are implemented and, indeed, from virtually every sphere in which the federal government regulates third party activities that may harm societal interests.

For example, when the EPA issues permits for the discharge of emissions into the water and air, or for the storage of hazardous wastes -- which would otherwise be unlawful under the Clean Water Act, Clean Air Act, and Resource Conservation and Recovery Act ("RCRA") --- it does not give polluters an additional "incentive" to comply with the law by promising them that their permit conditions will never change, even if the permitted activities turn out to be far more detrimental to the public health and environment than previously believed. To the contrary, as the Services have conceded, although those permits are issued for far shorter periods of time than ITPs (only five years for Clean Water and Clean Air Act permits, and ten years in the case of RCRA permits), the EPA nonetheless "retains explicit authority to modify" such "permits in response to information arising after a permit is issued that would have justified different permit

terms had it existed when the permit was issued." 63 Fed. Reg. 8865.[27]

In the case of endangered species, however, the Services have adopted a truly radical regulatory approach, which affords permittees extraordinary guarantees they receive nowhere else in federal environmental law, despite the fact that, in enacting the ESA, "Congress intended endangered species to be afforded the highest of priorities." TVA v. Hill, 437 U.S. at 174 (emphasis added). Yet the Services have never coherently explained why those who seek permits to kill or otherwise "take" species already on the brink of extinction -- an activity which is punishable by civil and criminal penalties unless specifically permitted by the federal government -- should receive far greater "assurances" than thos e who wish to discharge pollutants, operate nuclear power plants, market prescription drugs, or take any other action that is unlawful without federal approval.

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[27] See also 33 U.S.C. § 1342(b)(1)(C)(iii) (providing that Clean Water Act permits must be "modified for cause including . . . [a] change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge"); 42 U.S.C. § 7661a(b)(5)(D) (each "permitting authority" under the Clean Air Act must have authority to "terminate modify, or revoke" a permit); 42 U.S.C. § 6925(c)(3) ("any permit" under RCRA "shall be for a fixed term, not to exceed 10 years," and "[n]othing . . . shall p reclude the Administrator from reviewing and modifying a permit at any time during its term"); 21 U.S.C. § 355(e) (provision of Food, Drug, and Cosmetic Act requiring the FDA to "withdraw approval" to market a drug if "new evidence of clinical experience, not contained" in the original application shows that the drug is "not safe for use").

Moreover, the rationale for the No Surprises rule is even more difficult to grasp in light of the post hoc Revocation rule changes. Thus, even if defendants had coherently explained why there is a need for "incentives" to secure compliance with the ESA, the unavoidable reality is that ITP holders are not receiving the "economic and regulatory certainty" described in the No Surprises rule, see PI 13, since defendants have now "clarified" that ITPs may be revoked even when there is complete compliance with the ITPs, albeit under very limited circumstances. Indeed, the bizarre regulatory regime that was hastily cobbled together to defend the No Surprises rule in this case places ITP holders at risk of completely losing their permits because of unforseen circumstances, while at the same time assuring them that they are entirely immune from mere modifications of their permits, even where that far less draconian remedy (such as requiring that some additional habitat be protected, or that some additional money be put into a conservation fund) would be a better way of both avoiding extinction of species and ensuring that the "conservation plan" that must accompany the ITP is actually furthering the species' recovery. If there is indeed some "satisfactory explanation" for this patchwork, "Some Surprises" policy -- under which ITP holders are not receiving regulatory "certainty," while endangered species are still placed at extreme risk from both "unforeseen" and "changed" circumstances -- it is certainly nowhere to be found in the preambles of either the No Surprises rule or the Revocation rules. A. L. Pharma, Inc. V. Shalala, 62 F.3d 1484, 1491 (D.C. Cir. 1995) ("'an agency must cogently explain why it has exercised its discretion in a given manner'"), quoting State Farm, 463 U.S. at 48.

In addition to failing to provide a sensible rationale for the entire regulatory approach, the Services also failed to explain especially pernicious features of the rule that will work to the

detriment of endangered and threatened species. Most important, as stressed above, the rule relieves ITP holders of the responsibility to address not only "unforeseen circumstances," but also "changed circumstances" -- i.e., harmful developments that are foreseeable at the time of an application for an ITP -- but that, for whatever reason, are simply "not provided for in the plan." 63 Fed. Reg. 8871 (emphasis added). That feature of the rule not only flatly contradicts the preamble -- which states that "[a]ll reasonably foreseeable circumstances, including natural catastrophes that normally occur in the area, should be addressed in the HCP," 63 Fed. Reg. 8863 (emphasis added) -- but it was correctly criticized by commenters as creating a perverse "incentive" for ITP applicants to avoid addressing even readily foreseeable circumstances in their HCPs.[28]

In addition to failing to furnish a coherent rationale, defendants sought to defend the rule on the basis of two critical assumptions that not only "run[] counter to the evidence before the agency," but are inherently "implausible." State Farm, 463 U.S. at 43. Hence, the Services downplayed the significance of the rule by asserting that "unforeseen circumstances will be rare, if at all . . .." 63 Fed. Reg. 8867 (emphasis added). That critical assumption, however, is unaccompanied by a single scientific reference, either within the administrative record or

[28] See, e.g., A.R. Vol. 2, Comm. 195 at 1-2 (Fresno Audubon Society) (the proposal "gives permittees every incentive to omit items from their HCPs"); A.R. Vol. 3, Comm. 441 at 2 (environmental scientist) ("there is no incentive for these stakeholders to be concerned about a lack of science in the process because failure of the HCP to adequately provide for species protection will be borne by the environment not them").

anywhere else. More important, that precise assumption was undermined by hundreds of scientists who explained at length why -- as common-sense dictates -- "surprises" affecting endangered species over the course of many decades are "inherent" in the natural world, and that, accordingly, the Services' contrary assertion "does not reflect ecological reality and rejects the best scientific knowledge and judgment of our era." A.R. Vol. 4, Comm. 577; A.R. Vol. 2, Comm. 133. Yet the Services failed even to acknowledge the overwhelming scientific critique of an assumption that lies at the core of the Services' defense of the rule, let alone demonstrate that their contrary assumption has any scientific basis at all.

Second, the Services made the equally vital -- and unsupported -- assumption that the Services themselves will have available adequate funds to "handle any unforeseen circumstances so that species are not jeopardized." 63 Fed. Reg. 8867(emphasis added). Yet, as numerous commenters pointed out, this counterintuitive assumption also has no basis in reality, especially since the Services themselves have repeatedly represented, including to federal courts, that they lack the necessary resources even to meet non-discretionary statutory deadlines because of inadequate appropriations. See, e.g., Forest Guardians, 164 F.3d at 1263. Indeed, it is difficult to conceive of a more arbitrary course of conduct than an agency shouldering a new, extremely costly obligation based on the unproven premise that it will have "resources available to respond to any unforeseen circumstances," 63 Fed. Reg. 8864, while the same agency is simultaneously telling federal courts that it is so woefully underfunded that it cannot afford to comply with its preexisting statutory duties. See Exh. G at ¶ 36.

CONCLUSION

For the foregoing reasons, the Court should hold unlawful and set aside the rules under

review. See National Mining Ass'n v. U.S. Army Corps of Engineers, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("'[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated'") (internal citation omitted). At a bare minimum, as the Court itself has previously suggested, the Court should vacate the rules and remand the matter for a more coherent explanation, especially in light of the post hoc rule changes that defendants adopted, in patent violation of the APA, to defend the No Surprises rule. See Exh. D at 21 ("The government just t old me it's relying upon a rule that was not present when the rule that's being challenged was promulgated. Why shouldn't the court remand and give the administrative agency an opportunity to make a determination with appropriate public comment as to the impact of the new rule on the No-Surprises rule?"); Sugar Cane Growers, Slip op. at 9 ("Normally when an agency so clearly violates the APA we would vacate its action . . . and simply remand for the agency to start again").

Respectfully submitted,

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