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## ENDANGERED SPECIES

### Judge's opinion may dictate future of HCPs

**Natalie M. Henry, *Greenwire* reporter**

PORTLAND, Ore. -- One of the government's most popular programs to preserve endangered species on private land could be in jeopardy as environmentalists and government regulators await a judge's opinion on a provision of habitat conservation plans known as the "No Surprises" policy.

Effective this month, Fish and Wildlife Service field offices have suspended approval of new habitat conservation plans (HCPs) until a judge from the U.S. District Court for the District of Columbia issues an opinion in a lawsuit brought by a California environmental group challenging the policy.

On Sept. 30, Judge Emmet Sullivan awarded a summary judgment in favor of the plaintiffs, the Pasadena, Calif.-based Spirit of the Sage Council. But Sullivan has yet to issue a detailed ruling on the matter. That opinion could spell out procedural issues with HCPs that FWS could easily fix, or it could find the plans in violation of the ESA. Court officials would not comment on when Sullivan was expected to issue his opinion.

The "No Surprises" rule, finalized by the Clinton administration in 1998, essentially protects landowners who enter HCPs with FWS from being forced to provide additional land, water, other resources for species beyond what is spelled out in the original plan.

FWS officials familiar with HCPs and the new policy were unavailable for comment yesterday. But in a memo sent to FWS regional offices earlier this month, FWS Director Steve Williams explained that government attorneys had advised field offices to avoid issuing new incidental take permits, a key provision of HCPs, until Sullivan releases his opinion. Incidental take permits allow landowners to develop some land -- even if it results in harm to a protected species -- as long as they take steps to preserve habitat in other areas.

The new policy does not affect more than 400 HCPs already in place, covering more than 500 species and 38 million acres. But it does apply to more than 300 plans still in the development phase. Michael Bean of Environmental Defense said he hopes the permits will not be suspended indefinitely, noting that in the absence of HCPs, members of Congress might take legislative action to try to push certain development projects through.

HCPs have been lauded by both developers and some environmentalists as a way to encourage species protection on private land.

The National Association of Home Builders maintains that without landowner assurances, HCPs have no value to developers, counties, cities, farmers and others for whom HCPs have become rather popular ([Land Letter](#), June 5, 2003). "There has to be some reason that the landowner enters into these things to justify the expense," said Christopher Galik of NAHB.

Spirit of the Sage and other groups suing FWS over the policy argue that if species continue to decline and the government is unable to ask the landowners for more help, the result could be species extinction. Other plaintiffs include the Humane Society of the United States, while the National Wildlife Federation filed amicus briefs on the plaintiffs' behalf ([Greenwire](#), June 17, 2003).

But not all environmentalists are opposed to the "No Surprises" policy. Bean of Environmental Defense said it is a critical part of successful species protection because the assurances bring landowners to the negotiating table.

"I think the ' No Surprises' policy succeeded in getting people to the table and also succeeded in getting important concessions out of developers and others," Bean said. "And without some sort of assurance of that type, it' s going to be much more difficult to accomplish conservation, particularly in rapidly urbanizing landscapes."

John Kostyack of NWF said his group is not opposed to providing assurances for landowners. "The problem with the ' No Surprises' policy is it' s completely one-sided, and it didn' t address ' what are you going to do when the day comes when the plan proves to be inadequate, and the species is heading toward extinction?' "

Kostyack suggested reforming the policy to include an insurance policy or bond as a financial backstop if the species needs more protection, or establishing a federal fund to pay for additional costs should they arise.

Kostyack said NWF wants landowners to have incentives to protect endangered species, but his experience with HCPs is that landowners and developers do little to protect species. The "No Surprises" policy is particularly harmful to species because it prohibits any changes to the landowner' s agreement in the future, he said.

Eric Glitzenstein, the attorney who argued the case for the Spirit of the Sage Council, agreed that HCPs often lack serious species protections. If HCPs did contain such protections, perhaps no one would argue against "No Surprises," he said. "We would be in a much different place legally if [FWS officials] were saying that they were giving out these ' No Surprises' guarantees in order to approve plans that were furthering recovery of species," Glitzenstein said.

Rob Thornton, an attorney for NAHB and timber interests who has followed the lawsuit, said he doubts the case will result in an end to the "No Surprises" policy because the judge' s concerns seemed more attuned to procedural issues than the merits of the case. As such, he said the service' s temporary moratorium on incidental take permits "was an overreaction."