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## ENDANGERED SPECIES

Future of HCPs uncertain as judge strikes blow to popular program  
Natalie M. Henry, Greenwire reporter

PORTLAND, Ore. -- A federal judge late yesterday struck a blow to one of the government's most popular programs to preserve endangered species on private land by ruling that federal regulators must rework a provision of habitat conservation plans known as the "No Surprises" rule.

Judge Emmet Sullivan of the U.S. District Court for the District of Columbia ruled that the Fish and Wildlife Service and the National Marine Fisheries Service failed to follow the proper public comment procedures in formulating the rule, thereby violating the Administrative Procedures Act. Sullivan struck down "No Surprises" and another related rule, remanding them to the agencies for revision.

Sullivan did not clarify whether the "No Surprises" rule violates the Endangered Species Act, the central charge in a lawsuit filed by the California-based Spirit of the Sage Council, Humane Society of the United States, several American Indian tribes and other organizations.

As such, if the federal agencies choose to rewrite the rule, they will have little guidance from the courts on how or whether the provisions need to be modified to comply with ESA. At minimum, the ruling may require the agencies to send the rules back for additional public comment.

Officials with FWS and NMFS confirmed this morning that they are reviewing the court decision. However, it remains unclear whether the agencies will reissue, modify or abandon the rule altogether. "We don't have any comment on it yet," said FWS spokesman Mitch Snow.

In his order, Sullivan wrote that far from creating a rule with "no surprises," the agencies have "surprised" the public twice by issuing new directives without adequate public notice.

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

The "No Surprises" rule, finalized by the Clinton administration in 1994, essentially protects landowners who enter habitat conservation plans with FWS or NMFS from being forced to provide additional land, water, money or other resources for species beyond what is spelled out in the original plan. Developers and industry officials say without assurances like the "No Surprises" rule, HCPs are largely useless (Greenwire, Oct. 31).

The Spirit of the Sage lawsuit is part of a long line of litigation dating back to 1994, when the agencies first issued the rule without putting it up for public comment. The government settled and, in 1996, gathered more than 800 public comments, 755 opposed, 38 in favor and the rest suggesting some changes, according to court documents. But even after soliciting public comments, FWS and NMFS finalized the "No Surprises" rule with few changes.

Spirit of the Sage sued again in 1998, charging that the rule violates ESA because it nearly eliminates the option of further protection for a species that is moving further toward extinction. During the case, the government issued the Permit Revocation Rule, which said that while the government could not change an HCP, it could revoke one if necessary. The government submitted the revocation rule to the court as part of its defense, saying it helped explain the "No Surprises" rule, according to court documents.

Once again, the agencies issued a rule without soliciting public comment. Sullivan said the agencies violated APA when issuing the revocation rule. Sullivan struck down the rule and sent it back to the agencies.

Sullivan further said the government had so closely linked the revocation rule to the "No Surprises" rule in its defense that the judge was forced to remand both rules. And since the judge remanded both rules on the basis of APA alone, he found it unnecessary to rule on the merits of the case determining whether the rules violate ESA, the order states.

Should the agencies open the "No Surprises" rule for additional public comment, environmental groups are likely to weigh in.

"This creates a new opportunity for us to bring good science into the HCP process," said John Kostyack, senior counsel with the National Wildlife Federation. "A lot of these HCPs are harmful to species -- they lock in bad science by destroying habitat without adequate mitigation."

Greenwire reporter Michael Burnham contributed to this report.

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