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**Volume 2 INTERVENOR-APPELLANTS' JOINT OPENING BRIEF -- SPIRIT OF THE SAGE COUNCIL V. NORTON**

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 03-5345

(Consolidated with Case Nos. 03-5357, 04-5262, 04-5263 and 04-5264)

SPIRIT OF THE SAGE COUNCIL, *et al.,* Plaintiff-Appellees, v. GALE A. NORTON, Secretary, U.S. Department of the Interior, *et al.,* Defendant-Appellants, and COALITION FOR HABITAT CONSERVATION, *et al.,* Intervenor-Appellants.

Appeals from the United States District Court for the District of Columbia Hon. Emmet G. Sullivan, District Judge District Court Case No. 98cv01873

**INTERVENOR-APPELLANTS' JOINT OPENING BRIEF**

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**CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES**

**A. Parties and Amici.**

The plaintiff-appellees are Spirit of the Sage Council, Biodiversity Legal Foundation, National Endangered Species Network, Shoshone Gabrielino Nation, Humane Society of the United States, Klamath Forest Alliance, The Mountaneers, Leeona Klippstein, Vera Rocha and Dolores Welty.

The defendant-appellees are Gale A. Norton (formerly Bruce Babbitt), Secretary, United States Department of the Interior; Steven A. Williams (formerly Jamie Clark), Director, United States Fish and Wildlife Service; Donald L. Evans (formerly William Daley), Secretary, United States Department of Commerce; and William T. Hogarth (formerly Roland A. Schmitten), Assistant Administrator, National Marine Fisheries Service.

The intervenor-appellants are Coalition for Habitat Conservation, National Association of Home Builders, County of ***Kern***, ***Kern*** Water Bank Authority, Foothill/Eastern Transportation Corridor Agency, San Joaquin Hills Transportation Corridor Agency, Building Industry Legal Defense Foundation, County of San Diego, County of Orange, Irvine Ranch Water District, City of San Diego, American Forest and Paper Association and Western Urban Water Coalition. Intervenor-appellants County of San Diego, County of Orange, Irvine Ranch Water District and City of San Diego are not pursuing their appeal (case number 03-5357).

The amici before the District Court were National Wildlife Federation, United States Public Interest Research Group, Defenders of Wildlife, Sierra Club, Natural Resources Defense Council, Institute for Fisheries Resources, Northwest Ecosystem Alliance, American Lands Alliance and Fund for Animals. There are no amici before this Court.

**B. Rulings Under Review.**

The rulings under review are:

(1) an order (per Sullivan, J.), filed September 30, 2003, granting Spirit's motion for summary judgment and denying the Services' and Intervenor-Appellants' motions for summary judgment (*see Spirit of the Sage Council v. Norton,* No. 98-1873 (D.D.C. Sept. 30, 2003) (App. 0473));

(2) a memorandum opinion and order (per Sullivan, J.), filed December 11, 2003, expanding upon the September 30, 2003 order by (a) finding that Spirit has standing to bring the lawsuit, (b) finding that Spirit's claims are ripe for judicial review, (c) finding that the Permit Revocation Rule violates the APA, (d) remanding and vacating the Permit Revocation Rule, and (e) remanding the No Surprises Rule (*see* Spirit of the Sage Coucil v. Norton, 294 F. Supp. 2d 67 (D.D.C. 2003) (App. 0474-0494)); and

(3) An order (per Sullivan, J.), filed June 10, 2004, (a) granting Spirit's motion to clarify and/or amend the District Court's December 11, 2003 decision, (b) directing the Services to complete all ordered remand proceedings by December 10, 2004, and (c) enjoining the Services from issuing ITPs and related documents containing No Surprises assurances (*see Spirit of the Sage Council v. Norton,* No. 98-1873 (D.D.C. June 10, 2004) (App. 0511-0512)).

**C. Related Cases.**

This case was before the District Court as case number 98cv01873. It has not previously been before this Court or any other court, except as noted above. Counsel are not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

DATED: November 15, 2004

Respectfully submitted,

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**INTERVENOR-APPELLANTS' RULE 26.1 DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Intervenor-Appellants make the following disclosure statement:

Intervenor-Appellant Coalition for Habitat Conservation ("CHC") is an organization of landowners that own over one hundred thousand acres of land in San Diego County and Orange County, California. Since 1990, CHC and its members have been working with local and state agencies and the Services to develop and implement plans for the protection of the coastal sage scrub community in Southern California and its resident plant and animal species, including the coastal California gnatcatcher, a species that is listed as threatened pursuant to the ESA. Certain of CHC's members have prepared HCPs under Section 10(a)(2) of the ESA, 16 U.S.C. 1539(a)(2), have received ITPs, and have entered into implementing agreements with the Services in reliance on the assurances provided by the Services in accordance with the Services' regulations, including the No Surprises Rule and the Permit Revocation Rule. CHC does not have a parent corporation, nor does any publicly held company have a ten percent or greater ownership interest in CHC. Because CHC is a "trade association" as defined in D.C. Circuit Rule 26.1(b), no further disclosures are necessary.

Intervenor-Appellant National Association of Home Builders ("NAHB") is a national organization whose members consist of approximately 190,000 individuals and firms that develop land, construct homes and apartments, and build commercial and industrial projects. NAHB's members (a) have made substantial and valuable commitments of land and money in order to obtain ITPs from the Services pursuant to the ESA, or (b) are working with the Services to develop regional HCPs and obtain the authority to conduct their businesses in compliance with the ESA. NAHB does not have a parent corporation, nor does any publicly held company have a ten percent or greater ownership interest in NAHB. Because NAHB is a "trade association" as defined in D.C. Circuit Rule 26.1(b), no further disclosures are necessary.

Intervenor-Appellant County of ***Kern*** is a governmental entity. Therefore, no disclosures are necessary.

Intervenor-Appellant ***Kern*** Water Bank Authority is a governmental entity. Therefore, no disclosures are necessary.

Intervenor-Appellant Foothill/Eastern Transportation Corridor Agency is a governmental entity. Therefore, no disclosures are necessary.

Intervenor-Appellant San Joaquin Hills Transportation Corridor Agency is a governmental entity. Therefore, no disclosures are necessary.

Intervenor-Appellant Building Industry Legal Defense Foundation ("BILD") is a California non-profit mutual benefit corporation that is a wholly-owned subsidiary of the Building Industry Association of Southern California ("BIASC"). BIASC has over sixteen hundred members, which include a significant number of residential developers and associated businesses that take part in building seventy percent of all new homes annually in the Southern California region, and a significant number of homes throughout California. BIASC members (a) have made substantial and valuable commitments of land and money in order to obtain ITPs from the Services pursuant to the ESA, or (b) are working with the Services to develop regional HCPs and obtain the authority to conduct their businesses in compliance with the ESA. BILD's mission, in turn, is to defend the legal rights of home and property owners. To accomplish this mission, BILD participates in and supports litigation necessary to the protection of such rights. Because BILD is a "trade association" as defined in D.C. Circuit Rule 26.1(b), no further disclosures are necessary.

Intervenor-Appellant American Forest and Paper Association ("AF&PA") is a national trade association representing the forest products and paper industry. AF&PA's members own private timberlands and are interested in obtaining ITPs from the Services pursuant to the ESA. AF&PA does not have a parent corporation, nor does any publicly held company have a ten percent or greater ownership interest in AF&PA. Because AF&PA is a "trade association" as defined in D.C. Circuit Rule 26.1(b), no further disclosures are necessary.

Intervenor-Appellant Western Urban Water Coalition ("WUWC") is an unincorporated professional association of municipal water utilities that own and operate water management, water supply and hydroelectric projects, and serve the largest cities in the western United States. WUWC's members are interested in obtaining ITPs from the Services pursuant to the ESA. WUWC does not have a parent corporation, nor does any publicly held company have a ten percent or greater ownership interest in WUWC. Because WUWC is a "trade association" as defined in D.C. Circuit Rule 26.1(b), no further disclosures are necessary.

DATED: November 15, 2004

Respectfully submitted,

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**GLOSSARY**

|  |  |
| --- | --- |
| APA | Administrative Procedure Act, 5 U.S.C. 551-559, |
|  | 701-706 |
|  |  |
| App | Appendix |
|  |  |
| District Court | United States District Court for the District of |
|  | Columbia |
|  |  |
| ESA | Endangered Species Act, 16 U.S.C. 1531-1544 |
|  |  |
| FWS | United States Fish and Wildlife Service |
|  |  |
| HCP | Habitat Conservation Plan |
|  |  |
| ITP | Incidental Take Permit |
|  |  |
| Intervenor-Appellants | Intervenor-Appellants Coalition for Habitat |
|  | Conservation, National Association of Home |
|  | Builders, County of ***Kern***, ***Kern*** Water Bank |
|  | Authority, Foothill/Eastern Transportation |
|  | Corridor Agency, San Joaquin Hills |
|  | Transportation Corridor Agency, Building |
|  | Industry Legal Defense Foundation, American |
|  | Forest and Paper Association and Western |
|  | Urban Water Coalition |
|  |  |
| June 10, 2004 Order | Spirit of the Sage Council v. Norton, No. 98-1873 |
|  | (D.D.C. June 10, 2004) (App. 0511-0512) |
|  |  |
| No Surprises Rule | 63 Fed. Reg. 8859 (Feb. 23, 1998) (codified at |
|  | 50 C.F.R. 17.22, 17.32, 222.22) |
|  |  |
| Permit Revocation Rule | 64 Fed. Reg. 32,706 (June 17, 1999) (codified at |
|  | 50 C.F.R. 13.28(a), 17.22(b), 17.32(b)) |
|  |  |
| Services | Defendant-Appellees Gale A. Norton, Secretary, |
|  | United States Department of the Interior; Steven |
|  | A. Williams, Director, United States Fish and |
|  | Wildlife Service; Donald L. Evans, Secretary, |
|  | United States Department of Commerce; and |
|  | William T. Hogarth, Assistant Administrator, |
|  | National Marine Fisheries Service |
|  |  |
| Spirit | Plaintiff-Appellees Spirit of the Sage Council, |
|  | Biodiversity Legal Foundation, National |
|  | Endangered Species Network, Shoshone |
|  | Gabrielino Nation, Humane Society of the |
|  | United States, Klamath Forest Alliance, The |
|  | Mountaneers, Leeona Klippstein, Vera Rocha |
|  | and Dolores Welty |

**STATEMENT OF JURISDICTION**

The No Surprises Rule and the Permit Revocation Rule are agency rules that Spirit challenges under the ESA and the APA. Thus, the District Court had subject matter jurisdiction over this action pursuant to the ESA, 16 U.S.C. 1540(g)(1), and the APA, 5 U.S.C. 701-06.

On December 11, 2003, the District Court issued a memorandum opinion and order granting Spirit's motion for summary judgment and denying the Services' and Intervenor-Appellants' motions for summary judgment. *See* Spirit of the Sage Council v. Norton, 294 F. Supp. 2d 67 (D.D.C. 2003) (App. 0474-0494). Among other things, the District Court remanded the Permit Revocation Rule and the No Surprises Rule. *See* id. at 92 (App. 0494).

On June 10, 2004, the District Court issued an order granting Spirit's motion to clarify and/or amend the District Court's December 11, 2003 decision, and, among other things, enjoining the Services from issuing ITPs and related documents containing No Surprises assurances. *See* App. 0511-0512.

On July 8, 2004, the Services filed a timely notice of appeal (case number 04-5262). Intervenor-Appellants also filed timely notices of appeal on November 26, 2003 (case number 03-5345) and July 13, 2004 (case numbers 04-5263 and 04-5264). *See* District Court Docket entries 161, 185, 188, 189 (App. 0020, 0021, 0024).

This Court has jurisdiction over Intervenor-Appellants' appeals pursuant to 28 U.S.C. 1292(a)(1), which provides, in pertinent part, that "the courts of appeals shall have jurisdiction of appeals from...interlocutory orders of the district courts of the United States...granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." The District Court's June 10, 2004 Order enjoins the Services from issuing ITPs and related documents containing No Surprises assurances. *See* App. 0512. This Court therefore has jurisdiction pursuant to 28 U.S.C. 1292(a)(1) to hear Intervenor-Appellants' appeals. *See, e.g.,* I.A.M. Nat'l Pension Fund Benefit Plan A v. Cooper Indus., Inc., 789 F.2d 21, 24 n.3 (D.C. Cir. 1989) (district court orders clearly granting or denying specific request for injunctive relief are always, and automatically, subject to judicial review pursuant to 28 U.S.C. 1292(a)(1)). *See also* Carson v. American Brands, 450 U.S. 79, 83 (1981)(28 U.S.C. 1292 (a)(1) may provide jurisdiction not only over injunction so-denominated, but also over orders having "practical effect" of injunction); Forest Guardians v. Babbitt, 174 F.3d 1178, 1185 n.11 (10th Cir. 1998) (quoting 11A Charles Alan Wright *et al.,* Federal Practice and Procedure § 2962, at 413 (1995) ("[A] district court may not avoid immediate review of its determination simply by failing to characterize or label its decision as one denying or granting injunctive relief.")).

**REPRODUCTION OF STATUTES, RULES AND REGULATIONS**

The pertinent statutes, rules, regulations, and other miscellaneous authorities are reproduced in a separately-bound addendum filed concurrently herewith.

**STATEMENT OF ISSUES PRESENTED FOR REVIEW**

The issues presented for review are:

(1) Whether Spirit's challenge to the No Surprises Rule is ripe for judicial review;

(2) Whether Spirit has standing to challenge the No Surprises Rule; and

(3) Whether the District Court erred in granting relief that goes beyond vacating and remanding the Permit Revocation Rule, the only rule found (procedurally) defective.

**STATEMENT OF THE CASE**

Spirit challenged the No Surprises Rule and the Permit Revocation Rule on both ESA and APA grounds. *See generally* Second Amended Complaint (App. 0145-0178). The District Court (a) found that Spirit had standing to bring the lawsuit (294 F. Supp. 2d at 81-83 (App. 0485-0487)), (b) found that Spirit's claims were ripe for judicial review (id. at 83-85 (App. 0487-0489)), (c) found that the Permit Revocation Rule violated the APA (id. at 92 (App. 0494)), (d) remanded and vacated the Permit Revocation Rule (*id.*), (e) remanded the No Surprises Rule (*id.*); (f) directed the Services to complete all remand proceedings by December 10, 2004 (June 10, 2004 Order at 1 (App. -511)), and (g) enjoined the Services from issuing ITPs and related documents containing No Surprises assurances (*id.* at 2 (App. 0512)).

Intervenor-Appellants appeal the District Court's findings of standing and ripeness, as well as the ordered remedies (*i.e.,* remand and injunction), insofar as they extend beyond remanding the Permit Revocation Rule.

**STATEMENT OF FACTS**

**I. REGULATORY CONTEXT.**

**A. Applicability of the ESA to Non-Federal Lands -- The "Take" Prohibition.**

The primary duty under the ESA for non-federal persons is to avoid unauthorized "take" of a member of a listed wildlife species. 16 U.S.C. 1538(a)(1). "Take" and its component word "harm" refer to actions that cause actual death or injury to members of a listed wildlife species. *Id.* at 1532(19); 50 C.F.R. 17.3, 222.102 ("harm" includes "habitat modification" or land use activity "which actually kills or injures wildlife"); Babbitt v. Sweet Home Chapter of Cmties. for a Great Or., 515 U.S. 687, 691 n.2, 696 n.9, 700 n.13 (1995).

**B. 1982 Amendments Authorizing Incidental Take and "No Surprises" Assurances.**

Prior to 1982, the ESA did not include any mechanism to authorize "incidental take" of endangered species. In 1982, Congress amended the ESA to authorize the Secretary [[1]](#footnote-2)n1 to grant an incidental take permit ("ITP") in exchange for the commitment of land and dollar resources to a habitat conservation plan ("HCP"). 16 U.S.C. 1539(a). To issue an ITP, the Service must determine, among other things, that the permittee will minimize and mitigate "take" impacts, the permittee will provide adequate funding to carry out its HCP, and the "take" will not appreciably reduce the likelihood of the survival and recovery of the species. *Id.* at 1539(a)(2)(B)(i)-(iv). An ITP/HCP can be approved only after a review process that includes public comment, and the opportunity for judicial review. *Id.* at 1539(a)(2)(B).

"Pursuing an ITP is not mandatory." Defenders of Wildlife v. Bernal, 204 F.3d 920, 927 (9th Cir. 2000). That is, a non-federal "party can choose whether to proceed with that permitting process," whether to conduct the land use activity and bear the risk of prosecution if the "activity, in fact, takes a listed species," or whether to forgo productive land uses to avoid risks of "take." *Id. See* Steven P. Quarles & Thomas R. Lundquist, *When Do Land Use Activities "Take" Listed Wildlife Under ESA Section 9 and the "Harm" Regulation? Endangered Species Act: Law, Policy, and Perspectives* 207, 242-44 (Donald C. Baur & William Robert Irwin eds., 2002).

Since committing lands to a HCP is ***voluntary,*** Congress recognized that the HCP program would be successful only if the incidental take permit program is implemented in a manner that provides:

***long-term assurances*** to the proponent of the conservation plan that the terms of the plan will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan.

\* \* \*

In order to provide ***sufficient incentives*** for the private sector to participate in the development of such long-term conservation plans, plans which may involve the expenditure of hundreds of thousands if not millions of dollars, ***adequate assurances*** must be made ***to the financial and development communities*** that a section 10(a) ***permit can be made available for the life of the project.***

\* \* \*

Permits of 30 or more years duration may be appropriate to ***provide adequate assurances*** that the private sector to commit to long-term funding for conservation activities or long-term commitments to restrictions on the use of land.

H.R. Conf. Rep. No. 97-835, at 30-31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, at 2871-72 (emphasis added).

Congress authorized incidental take permits and regulatory assurances to permittees because it recognized that the goals of the ESA could not be achieved on non-federal land without the cooperation of private landowners and local government. Many respected voices in the academic and environmental community agree with this Congressional determination. Dr. David Wilcove, Professor of Public Affairs and Ecology and Evolutionary Biology at Princeton University, observed,

The ESA relies on fines and jail sentences to deter or punish undesirable behavior, but it provides no rewards or incentives to encourage good behavior on the part of landowners....It does little to encourage landowners to restore or enhance the habitats of endangered species on their property....In short, until landowners become more willing participants in the national effort to save endangered species, there is little reason to hope that most species will recover and every reason to believe that many species will vanish. This, I submit, is the greatest challenge facing the Endangered Species Act. [[2]](#footnote-3)n2

The nation's leading scientific organization, the National Academy of Sciences, concurs:

The ESA and other existing programs will not ***by themselves*** prevent all future extinctions of species in the United States....If species extinctions are to be prevented, a broader management approach will be needed to complement the ESA's protections. [[3]](#footnote-4)n3

The "broader management approach" referred to by the Academy is best represented by regional HCPs stimulated by assurances provided by the Service that it will not require more land, water or money from plan participants in the event of unforeseen circumstances.

**C. The No Surprises Rule.**

The Services have limited options for promoting the ESA's objectives on non-federal lands. One option (preferred by Spirit) is to rely exclusively on enforcement remedies for "take" of listed wildlife under §§ 9 and 11, 16 U.S.C. 1538, 1540. In the view of counsel for the Environmental Defense Fund, Spirit's option "does not effectively address many of the most serious threats to rare species," does not adequately protect habitat, and creates perverse incentives for landowners to keep listed species off their lands. Michael J. Bean, *The Endangered Species Act and Private Land:* Four Lessons Learned From the Past Quarter Century, 28 Envtl. L. Rep. 10701, 10707 (1998) (*"Four Lessons Learned"*).

There is a respected view in the conservation literature that the Services can achieve greater protection of listed and unlisted plant and animal species, their habitats and rare ecosystems on non-federal lands by creating positive incentives that "encourage and reward beneficial conduct" by making it more advantageous for non-federal landowners and local governments to enter into habitat conservation plans. [[4]](#footnote-5)n4 Congress endorsed this view in the legislative history of ESA § 10. For example, Congress found that "encouraging creative partnerships between the public and private sectors" was in the "interest of species and habitat conservation," and that habitat conservation plans could provide protection of "unlisted species" and rare "ecosystems." H.R. Conf. Rep. No. 97-835, at 30, *reprinted in* 1982 U.S.C.C.A.N. at 2871.

The Services fulfilled this legislative intent through the No Surprises Rule. The No Surprises Rule provides regulatory incentives to landowners and local governments that voluntarily agree to develop and implement habitat conservation plans for the protection of endangered species and their habitat on non-federal land. In return, the Services provide a measure of regulatory protection against the imposition of additional mitigation measures in the event that unforeseen events occur.

Contrary to Spirit's argument that the No Surprises Rule ignores surprises in nature, the Rule anticipates such changes and merely allocates risks and financial duties for responding to future changes. A habitat conservation plan must address how the incidental take permit ("ITP") holder will respond to "changed circumstances." [[5]](#footnote-6)n5 In many situations, the ITP holder will bear the costs of dealing with changed circumstances under an HCP, either through adaptive management provisions or through the landowner's obligation to address foreseeable changed circumstances in the HCP. *See* No Surprises Rule, 63 Fed. Reg. at 8870-73.[[6]](#footnote-7)n6

The No Surprises Rule provides assurances to the holder of each ITP that, if "unforeseen circumstances" [[7]](#footnote-8)n7 occur that were not anticipated by the HCP/ITP, (1) the Services "will not require" the ITP holder to commit "additional land...or financial compensation...beyond the level" agreed to in the HCP "without consent of the permittee," but (2) the Services may use the committed dollar and land resources more effectively by modifying the measures "within conserved habitat areas." 50 C.F.R. 17.22(b)(5)(iii), 17.32(b)(5)(iii), 222.307(g)(3). *See* No Surprises Rule, 63 Fed. Reg. at 8867-69. No Surprises assurances allow the Services to respond to changes in the environment, and to changed understanding of listed species' needs, by (1) securing more cost-effective mitigation from the permit holder, and (2) using the Services' authorities to address more general issues that are not within the control of the permit holder. [[8]](#footnote-9)n8 The assurances simply mean that, in the rare instance where an unforeseen event occurs, the Services cannot compel increased commitments of money or land without the landowner's consent. Id. at 8862-64, 8866-69.

If unforeseen events do occur, responsibility to provide additional mitigation rests with the federal government. Fundamentally, the No Surprises Rule is a mechanism for the federal, state and local governments and the private sector to share risks and responsibilities for the protection of endangered species and their habitat on non-federal land. The No Surprises Rule makes it possible for the Services to obtain extraordinary commitments from private landowners and local governments that are not otherwise required by the ESA. In return, the Services promise not to require additional land or money from the landowner to address unforeseen circumstances.

The No Surprises Rule is a central component of any successful strategy for the protection of biodiversity on private lands. This essential point could not be made any more persuasively than it was by its author, former Interior Secretary Bruce Babbitt:

If we're going to make this Act work on the ground in the real world, and ask timber companies and developers to make those kinds of concessions..., we've got to establish one simple commonsense principle, and that is one bite at the apple -- take a good one -- thrash it out, but then say to the developer, "Okay, a deal's a deal. . . ." [[9]](#footnote-10)n9

The cooperation of private landowners is not feasible without regulatory protection against multiple "bites at the apple." The No Surprises Rule provides the necessary regulatory protection. [[10]](#footnote-11)n10

**D. The Permit Revocation Rule.**

FWS [[11]](#footnote-12)n11 adopted the Permit Revocation Rule in 1999, in a rulemaking separate from the No Surprises Rule. *See*64 Fed. Reg. 32,706. The Permit Revocation Rule is part of a rule that addresses several topics and alters several rules. *Id.* Among other things, the Permit Revocation Rule clarifies the relationship between the more general standards applicable to other Fish and Wildlife Service permits in 50 C.F.R. Part 13 and the specific standards applicable to ESA permits in 50 C.F.R. Part 17. What the District Court stylized as the "Permit Revocation Rule" is 50 C.F.R. 17.22(b) and 17.32(b).

The portions of the Permit Revocation Rule most relevant here provide that, in the narrowly defined and highly unlikely circumstances where the incidental take allowed by an ITP/HCP is jeopardizing the continued existence of a listed species, and where FWS's use of its other ample authorities does not cure the threat of jeopardy, FWS will revoke the ITP notwithstanding the No Surprises Rule. *See* 50 C.F.R. 13.28(a)(5), 17.22(b)(8), 17.32(b)(8); Permit Revocation Rule, 64 Fed. Reg. at 32,709;66 Fed. Reg. at 6487.

**II. PROCEDURAL BACKGROUND.**

On December 11, 2003, the District Court issued a memorandum opinion and order concluding that Spirit had standing to assert its claims (294 F. Supp. 2d at 81-83 (App. 0485-0487)) and that its challenge was ripe for judicial review (id. at 83-85 (App. 0487-0489)). The District Court did not, however, reach the merits of Spirit's substantive ESA challenge to the No Surprises Rule. Rather, it concluded that the Fish and Wildlife Service had violated the APA's notice and comment requirements by not providing for a second round of notice and comment on modifications to the Permit Revocation Rule adopted in response to comments on the proposed rule. Id. at 92 (App. 0494). It therefore remanded the Permit Revocation Rule for further notice and comment "proceedings consistent with section 553 of the APA." *Id.* In addition, the District Court vacated the amendments to 50 C.F.R. 17.22(b) and 17.32(b) effected by the Permit Revocation Rule. *See*294 F. Supp. 2d at 73 (App. 0479). Although the District Court ***did not*** find that the Services had violated any law in adopting the No Surprises Rule, it concluded that the relationship between the Permit Revocation Rule and the No Surprises Rule was such that remand of the former required remand of the latter. *See id.*

On June 10, 2004, the District Court granted Spirit's motion to clarify and/or amend its December 11, 2003 decision. App. 0511. Among other things, the District Court directed the Services to "complete all proceedings remanded by the Court's Order of December 11, 2003, by no later than December 10, 2004." *Id.* Moreover, the District Court directed that, "pending completion of the proceedings on remand, [the Services] shall refrain from approving new ITPs or related documents containing 'No Surprises' assurances...." *Id.* at 0512. The District Court thus enjoined the Services' implementation of the No Surprises Rule pending remand.

On October 13, 2004, this Court issued an order (1) denying the Services' motion for summary reversal, (2) denying the Services' motion for a stay pending appeal because that same motion remained pending in the District Court, and (3) granting expedited consideration of the consolidated appeals. [[12]](#footnote-13)n12

**SUMMARY OF ARGUMENT**

The District Court committed reversible error in concluding that Spirit's facial challenge to the No Surprises Rule was ripe for judicial review and that Spirit had standing to bring that challenge. Because the District Court lacked jurisdiction, it also erred when it fashioned a remedy concerning the No Surprises Rule. Moreover, even if Spirit's lawsuit presented a justiciable case and controversy regarding the No Surprises Rule (which it does ***not***), the District Court erred in granting relief that goes beyond remanding the Permit Revocation Rule, the only rule found (procedurally) defective.

Accordingly, this Court should direct the District Court to dismiss Spirit's challenge to the No Surprises Rule and should vacate those portions of the District Court orders that go beyond remanding the Permit Revocation Rule.

**STANDARD OF REVIEW**

The APA, 5 U.S.C. 706(2)(A), (D), provides that a final agency action is unlawful if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or if the agency acted "without observance of procedures required by law."

This Court reviews *de novo* the District Court's grant of summary judgment. *See* Castlewood Prods. v. Norton, 365 F.3d 1076, 1082 (D.C. Cir. 2004). This Court accords no particular deference to the District Court's review of the Services' actions, but ***does*** grant discretion to the Services on most legal, factual, and policy issues. *See id.*

**ARGUMENT**

**I. SPIRIT'S CHALLENGE TO THE NO SURPRISES RULE IS NOT RIPE FOR JUDICIAL REVIEW.**

We start with ripeness, as courts prefer to dismiss on prudential ripeness grounds in lieu of reaching constitutional standing issues. Association of Am. RRs. v. Surface Transp. Bd., 146 F.3d 942, 946 (D.C. Cir. 1998).

Intervenor-Appellants do not contest that there is a ripe controversy regarding whether the Services violated APA notice-and-comment requirements in adopting of the Permit Revocation Rule (Spirit's Claim Three). Intervenor-Appellants ***do*** contest, however, the District Court's jurisdiction to issue an order remanding and enjoining the No Surprises Rule when there is no ripe controversy regarding that separately adopted No Surprises Rule (Spirit's Claims One and Two). Jurisdiction is assessed on a rule-by-rule and claim-by-claim basis. *E.g.,* Friends of the Earth v. Laidlaw Envt'l Servs., Inc., 528 U.S. 167, 185 (2000);Wyoming Outdoor Council v. United States Forest Serv., 165 F.3d 43, 49-51 (D.C. Cir. 1999). The facial challenge to the ***No Surprises*** Rule (Claims One and Two in the Complaint) is not ripe under several different aspects of ripeness doctrine.

**A. Spirit Faces a Heavy Burden Regarding Ripeness -- a Burden Spirit Ultimately Fails to Satisfy -- Because Spirit Is Not the Entity Regulated by the No Surprises Rule and Because That Rule Is Triggered Only When Future Unforeseen Circumstances Occur.**

Spirit's burden with respect to ripeness is particularly heavy because Spirit is not the entity that the No Surprises Rule regulates. Unlike a regulated entity's challenge, whose ripeness might be "self-evident" (*see* Sierra Club v. EPA, 292 F.3d 895, 900 (D.C. Cir. 2002)), Spirit asserts a hardship that "arises from the government's allegedly unlawful regulation (or lack of regulation) of ***someone else***" (Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992)).[[13]](#footnote-14)n13 Especially when the challenger is ***not*** the regulated entity, a "regulation is not ordinarily considered the type of agency action 'ripe' for judicial review." Lujan v. National Wildlife Fed'n, 497 U.S. 871, 891 (1990).*See* National Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 808 (2003). Spirit fails to satisfy its heavy ripeness burden for the reasons elaborated below.

Moreover, Spirit's challenge to the No Surprises Rule is not ripe because that Rule is triggered ***only*** when future unforeseen circumstances develop. By the language of the Rule itself, No Surprises assurances are invoked only where a hypothetical future scenario of "unforeseen circumstances" arise. Under the No Surprises Rule, landowners and local governments agree to undertake conservation programs for the protection of endangered species and their habitat. In return, the Services provide a measure of regulatory protection against the imposition of additional mitigation measures ***in the event of unforeseen circumstances.*** The core of Spirit's lawsuit is that the No Surprises Rule violates the ESA because (it argues) the Rule limits the ability of the Services to extract additional concessions from landowners and local governments in the event that unforeseen circumstances occur.

***In the six years since the initiation of this litigation, Spirit failed to document a single instance where "unforeseen circumstances" had occurred to trigger the No Surprises assurances of any HCP, or where those No Surprises assurances have been otherwise invoked.***[[14]](#footnote-15)n14 Accordingly, Spirit's Claim One (that No Surprises assurances may contribute to some future ESA violation) is too speculative and remote to create a present ripe controversy. Texas v. United States, 523 U.S. 296, 302 (1998) (facial challenge to statute not ripe because it is "too speculative whether the problem Texas presents will ever need solving").

Even procedural claims, such as Spirit's claim that the Services failed to explain certain elements of the No Surprises Rule in sufficient detail (Spirit's Claim Two), are not justiciable if it is unlikely that a ripe controversy concerning that Rule will arise. Sprint Corp. v. FCC, 331 F.3d 952, 957-58 (D.C. Cir. 2003);Association of Am. R.Rs., 146 F.3d at 947.

**B. The Factors Courts Consider in Assessing Ripeness Weigh Against Spirit.**

In assessing ripeness, a court "must consider: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998). "If the institutional interests of the agency or reviewing court favor postponing review, then" the plaintiff must show a countervailing "hardship" to obtain review. Arizona Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1297 (D.C. Cir. 2000).*See* Association of Am. RRs., 146 F.3d at 946. Under these factors, the challenges to the No Surprises Rule are not ripe. [[15]](#footnote-16)n15

**1. The Courts Would Benefit From Further Factual Development of the Issues Presented by Spirit's Challenge to the No Surprises Rule**

In assessing ripeness, courts consider the dangers of premature review from the judicial perspective. Compelling ***judicial*** interests augur against attempting to divine, in a facial setting and without record facts, whether the No Surprises Rule violates the ESA. This case fits the "classic institutional reason to postpone review: we need to wait for 'a rule to be applied [to see] what its effect will be.'" Louisiana Envtl. Action Network v. Browner, 87 F.3d 1379, 1385 (D.C. Cir. 1996).

Count One in Spirit's Complaint asserts that the No Surprises Rule, on its face, substantively violates ESA §§ 7(a)(2) and 10(a)(2). Spirit argues that, because the No Surprises Rule requires No Surprises assurances to be included in each ITP package, there is a ripe issue of law concerning the legality of that Rule. The No Surprises Rule does ***not*** present a pure issue of law because the legality of No Surprises assurances can only be determined in the context of judicial review of an entire incidental take permit package.

Sections 7(a)(2) and 10(a)(2) do not apply to No Surprises assurances in isolation or in the abstract, but only to the totality of terms in a final ITP/HCP/Implementing Agreement package. *See*16 U.S.C. 1536(a)(2) (compliance assessed with respect to ***full*** proposed "agency action," which, in this case, is approval of ITP/HCP package); *id* at 1539(a)(2)(B) (providing standards that apply only to ***full*** "permit application and...related conservation plan"). Thus, Spirit's challenge that the No Surprises Rule, on its face, violates sections 7 and 10 of the ESA fails because these provisions simply do not apply to the No Surprises Rule in isolation. [[16]](#footnote-17)n16

An ITP package's No Surprises assurances are merely a few of many contractual terms included in the agreement between the Services and the applicants implementing an HCP. Spirit's only legally viable claim is that an ITP package violates the ESA. But, the legality of a particular ITP package depends on the totality of the ITP/HCP including how No Surprises assurances interact with adaptive management provisions, the term of the HCP and its implementing agreement, the status of the affected species, and a number of other factors that can only be evaluated in an "as applied" challenge. The No Surprises Rule by itself cannot violate ESA provisions that apply only to an incidental take permit package as a whole.

Spirit and the District Court emphasize that the No Surprises Rule applies to all ITPs. But while the rule applies to all ITPs, the manner and the extent of the application of the Rule vary from permit to permit. No Surprises assurances are just one of many components of a permit including adaptive management permit measures addressing changed circumstances, the length of the permit, the number and status of species addressed by the permit, and other factors. A court needs the facts of a full ITP/HCP package with No Surprises assurances to assess compliance with the ESA. *See* Sprint Corp., 331 F.3d at 957-958. The Services have explained they may treat different classes of ITP applications differently. "Each HCP is analyzed on a case-by-case basis" considering the "habitat conditions" for that species, and the Services may require "conservation" measures or "adaptive management" to avoid jeopardy. No Surprises Rule, 63 Fed. Reg. at 8864.*See also*65 Fed. Reg. 35,242 (June 1, 2000) (strengthening the commitment to adaptive management and other responses to new information and environmental changes). [[17]](#footnote-18)n17

Therefore, Spirit's challenge is not ripe, because "there are too many imponderables, [making it] impossible...to decide now what impact the [No Surprises] rule will have." Clean Air Act Implementation Project v. EPA ("Clean Air Project"), 150 F.3d 1200, 1205 (D.C. Cir. 1998). "From the court's perspective," reviewing rules "that may affect many different parcels of land in a variety of ways" and "without [the] benefit of the focus that a particular" ITP would bring, places judicial review on too slippery a footing. Ohio Forestry, 523 U.S. at 736.*See Natural Res. Def. Council v. Abraham,* F.3d , No. 03-35711, 2004 WL 2480949, at \*3-5 (9th Cir. Nov. 5, 2004).

The judicial role in reviewing federal agency actions is to apply law to facts, not to set policy. The judicial role works best where "factual components" have been "fleshed out...by some concrete action" supported by "record citation." Ohio Forestry, 523 U.S. at 737. Judicial review in the factual vacuum presented by Spirit's challenge presents risks that the review will be based on "bias," speculation, or a desire to dictate policy. *See id.*

Spirit's Claim One also asks courts to assume the following speculative and hypothetical future events that may never occur (and, to this date, have not occurred):

1. An ITP is issued that includes No Surprises assurances;

2. An event occurs that was not reasonably foreseeable (an "unforeseen circumstance");

3. The unforeseen circumstance results in injury to an endangered species covered by the ITP;

4. The adaptive management provisions of the HCP and ITP do not address the impact from the unforeseen circumstance;

5. The permittee does not agree to other modifications of the HCP and ITP that address the impacts of the unforeseen circumstance; and

6. The federal permitting agency is unable or unwilling to use its other authorities (including the revocation of the permit under the Permit Revocation Rule) and resources to address the impact of the unforeseen circumstance.

Where Spirit's claims depend on such rank speculation about future contingencies, the claims are not ripe. Atlantic States Legal Found. v. EPA ("Atlantic States"), 325 F.3d 281, 284 (D.C. Cir. 2003) (claims not ripe where they depend on contingent future facts). On such claims, Spirit is improperly seeking an advisory opinion on "what the law would be upon a hypothetical state of facts." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1934).*See also* Sullivan, 494 U.S. at 94 (courts must assume that the agency will comply with the law in the future).

This logic applies equally to Claim Two of the Complaint. There, Spirit asserts that portions of the No Surprises Rule were arbitrary and inadequately explained. The administrative record on an ITP package may provide additional answers pertinent to resolution of those claims. Thus, the procedural claims are also not ripe at this time. *See* Nuclear Energy Inst. v. EPA, 373 F.3d 1251, 1312-14 (D.C. Cir. 2004) (procedural National Environmental Policy Act claims not ripe until concrete action based on some version of NEPA document is about to be adopted).

The District Court's decision fails to address the foregoing considerations. The decision simplistically reasons that a pure issue of law should be reviewable. *See*294 F. Supp. 2d at 83-85 (App. 0487-0489). Even purely legal issues are not ripe if they are unlikely to occur, do not cause hardship, or would benefit from factual development. National Park Hospitality Ass'n, 538 U.S. at 812;Atlantic States, 325 F.3d at 284 ("even purely legal issues may be unfit for review").

For all the above reasons, "future factual development" and the facts of a specific ITP package would "significantly advance [a court's] ability to deal with the legal issues" in a responsible manner. Ohio Forestry, 523 U.S. at 736-37.*See* Association of American RRs., 146 F.3d at 946-47 (facial challenge to guidelines not ripe when court would benefit from a "concrete case"). [[18]](#footnote-19)n18

**2. A Judicial Decision Regarding Spirit's Challenge to the No Surprises Rule Inappropriately Interferes With Administrative Action.**

The ripeness factor concerning premature interference with ***agency*** prerogatives also counsels against a finding that there is a justiciable controversy with respect to the No Surprises Rule. Broad judicial review of a Rule that merely sets one of many ITP terms inappropriately "hinder[s] agency efforts to refine its policies" and thereby "threatens the kind of 'abstract disagreements over administrative policies'...that the ripeness doctrine seeks to avoid." Ohio Forestry, 523 U.S. at 735-36 (citing Abbott Labs., 387 U.S. at 148).

In applying ESA § 10(a)(2), the No Surprises Rule, and other pertinent rules to a specific ITP, the Services may require a shorter duration for some ITPs, describe and provide for more "changed circumstances," or require additional opportunities for the Services to seek HCP modification through adaptive management procedures. *See* page 7, *supra.* These adjustments may protect listed species and their habitat in ways that wholly avoid Spirit's speculative claim that permits including the No Surprises Rule always violate the ESA.

In Wyoming Outdoor Council v. Dombeck, 148 F.3d 1, 9-11 (D.C. Cir. 2001), this Court found that federal mineral leases were not ripe for review until the agency specified all terms of the leases. Similarly, Spirit's substantive challenges to the No Surprises Rule (and the Permit Revocation Rule) are not ripe except in a challenge to the known terms of a specific ITP package triggered when unforeseen circumstances have developed. *See also* Atlantic States, 325 F.3d at 284-85 (challenge to federal rules not ripe until state adopts the operative final rules and all rules are implemented).

**3. Delaying Review of Spirit's Challenge to the No Surprises Rule Will Not Cause Spirit Significant Hardship.**

The judicial and agency interests in postponing review can be overcome only by Spirit's showing that conducting review under the facts of specific ITPs would cause them significant hardship. Arizona Pub. Serv., 211 F.3d at 1297. Spirit cannot sustain that burden.

Spirit has relied on the following attenuated theory of hardship and injury. The greater regulatory certainty provided to a permit holder by the No Surprises Rule creates incentives for more entities to prepare HCPs and seek ITPs. The issuance of more ITPs (than would occur in the absence of No Surprises assurances) potentially injures Spirit members' interest in viewing listed wildlife, as the ITPs authorize "take" of listed wildlife that would otherwise be unlawful. *See, e.g.,*294 F. Supp. 2d at 81 (App. 0486). This theory suffers from gaps in logic and causation. [[19]](#footnote-20)n19

More importantly, this theory does not require review in the present context to avoid hardship to Spirit members, who are ***not*** the regulated parties. If judicial review occurs on a specific ITP at the time it is issued, and if Spirit is successful in showing that the ITP package (including its No Surprises assurances) violates the ESA, then the ITP could be set aside and Spirit would not suffer any hardships/injuries associated with that ITP. Such a later, as-applied challenge to the legality of a final package (including its No Surprises assurances) would still allow judicial review and relief before substantial environmental hardship/injury occurs to Spirit's members because the No Surprises rules does not directly regulate them. Therefore, the hardship factor does not support early, facial review of the No Surprises Rule. [[20]](#footnote-21)n20*E.g.,* Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57-66 (1993) (facial challenge to rules are not ripe for persons who could later challenge an application of the rules); Atlantic States, 325 F.3d at 285 ("Petitioners may protect all of their...claims by returning to court when the controversy ripens" and "cannot show that they will suffer any injury in the interim").

The District Court's discussion of this ripeness factor is incomplete. The District Court did not "tarry long" on hardship to Spirit as there were allegations of "ongoing harm to species and habitats." 294 F. Supp. 2d at 85 (App. 0489). The District Court did not explain why a series of as-applied suits against ITPs in the localities where Spirit's members recreate would not avoid any unlawful hardship to their members, and alleged "ongoing harm to species." Postponing review to as applied challenges is particularly appropriate here because of the extent to which Spirit relied on allegations of "injury" from habitat conservation plans that do not even exist. *See* pages 26-27 *infra.*

To be sure, it would be more expensive for Spirit to conduct a series of challenges against specific permits where there members' interests are directly affected rather than attempting to set aside the No Surprises Rule in a facial challenge. But such litigation cost savings are not a cognizable hardship. Ohio Forestry, 523 U.S. at 734-35;Nuclear Energy Inst., 373 F.3d at 1313;Clean Air Project, 150 F.3d at 1205-06. Instead, the presumption in favor of case-by-case review and in favor of case-specific relief should be followed. Lujan v. National Wildlife Fed'n, 497 U.S. at 894.

Because a plaintiff bears the burden of demonstrating that jurisdiction exists and Spirit has not done so, the District Court committed reversible error when it concluded that Spirit's challenge to the No Surprises Rule was ripe for judicial review. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). Moreover, because the District Court lacked jurisdiction over Spirit's facial challenge to the No Surprises Rule, it lacked authority to issue an Article III remedy concerning that Rule (here, directing the Services to ignore a legally binding and still valid rule). *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95, 101-02 (1998). Accordingly, the Court should (1) vacate the portions of the District Court orders granting relief against the No Surprises Rule, and (2) direct the District Court to dismiss Spirit's challenge to the No Surprises Rule.

**II. SPIRIT LACKS STANDING TO CHALLENGE THE NO SURPRISES RULE.**

As was the case with ripeness, Spirit faces a heavy burden when it comes to standing because Spirit is not regulated by the No Surprises Rule. Unlike a regulated entity, whose standing to challenge a regulatory action would be "self-evident" (Sierra Club v. EPA, 292 F.3d at 900), Spirit asserts an injury that "arises from the government's allegedly unlawful regulation (or lack of regulation) of ***someone else"*** (Lujan v. Defenders of Wildlife, 504 U.S. at 562). Thus, much more is needed than bare allegations of injury. *Id.* Spirit must "adduce facts showing" that those regulated by the No Surprises Rule have acted or will act "in such manner as to produce causation and permit redressability of injury." *Id.* Spirit has failed to satisfy this heavy burden.

**A. Spirit's Allegations of Imminent Injury Caused by the No Surprises Rule Are Entirely Speculative.**

This Court recognizes that "ripeness, while often spoken of as a justiciability doctrine distinct from standing, in fact shares the constitutional requirement of standing that an injury in fact be certainly impending." National Treasury Employees Union v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996). Spirit lacks standing for review because claims of injury from the No Surprises Rule are speculative. The "injuries" will only occur if unforeseen circumstances occur in the future and if the Services are unable to address impacts of unforeseen circumstances on endangered species. To have standing, Spirit must adduce facts on the basis of which it could reasonably be found that concrete injury to their members was ***"certainly impending."***Lujan v. Defenders of Wildlife, 504 U.S. at 567 n.3 (emphasis added). A plaintiff must "show that the particularized injury is ***at least imminent*** in order to reduce the possibility that a court might unconstitutionally render an advisory opinion by 'deciding a case in which no injury would have occurred at all.'" Florida Audubon Soc'y v. Bentsen, 94 F.3d 658, 663 (1996) (emphasis added) (quoting Lujan v. Defenders of Wildlife, 504 U.S. at 564 n.2) (additional citations omitted).

The dictionary definition of "imminent" is "appearing as if ***about to happen;*** likely to happen ***without delay;*** impending." Webster's New Universal Unabridged Dictionary, 909 (2d ed. 1983) (emphasis added). Spirit has adduced absolutely no facts that would indicate that the No Surprises Rule is "about to" cause harm, or that any of the harms alleged will happen "without delay." ***All*** of Spirit's affidavits suffer from the same deficiency: They all fail to aver specific facts establishing that Spirit's members are suffering imminent hardship from the implementation of the No Surprises Rule. Whether one looks at some or all of the affidavits that Spirit submitted in the District Court, the conclusion is the same: Spirit fails to establish the concrete, specific and imminent injury required to establish Article III standing.

"Specific facts, not 'mere allegations,'" are required "to substantiate each leap necessary for standing." Florida Audubon, 94 F.3d at 666 (quoting Lujan v. Defenders of Wildlife, 504 U.S. at 561). The District Court concluded that Spirit had standing based on the Court's speculation that the No Surprises Rule

"substantially increases the likelihood that the Services will issue additional permits allowing the taking and habitat destruction of species in which plaintiffs and their members, supporters, officers and board members have an interest -- by encouraging developers to obtain such permits -- and will thereby hasten the extinction of species affected by such permits when ITPs/HCPs containing No Surprises guarantees fail to protect and conserve endangered and threatened species."

294 F. Supp. 2d at 81 (App. 0486) (citation omitted). The District Court, however, does not cite to a single ***fact*** establishing future injury to a member of Spirit. Rather, the District Court's reasoning relies on the speculation (1) that it is "likely" that permits will be issued, (2) that the permits will harm species, (3) that Spirit members will have an interest in the species that are harmed, (4) that the permits will "hasten" the extinction of species affected by the permits, and (5) that the HCPs will fail to protect the endangered and threatened species.

*Florida Audubon* makes it clear that the such attenuated "causation" does not satisfy Article III requirements that plaintiffs demonstrate "concrete and particularized" injury that is: 1) "actual or imminent," and 2) "caused by, or fairly traceable to, an act that the litigant challenges in the instant litigation." Florida Audubon, 94 F.3d at 663.*Florida Audubon* concluded that a chain of causation remarkably similar to the chain in this case was far too attenuated to satisfy standing requirements:

Appellants contend that the tax credit will cause more [ethanol] production, which in turn will cause more ethanol production, which consequently will cause more production of the corn and sugar necessary for ethanol, which will then cause more agricultural pollution, which, as this pollution is likely to occur on farmland bordering wildlife areas appellants visit, is also likely to harm the areas visited by appellants.

Id. at 666. This case presents a remarkably similar super-attenuated chain of "causation."

The following speculative events, already enumerated above in the ripeness context (*see* pages 17-18, *supra*), would need to occur before any of Spirit's members could suffer the concrete and imminent injury required under *Florida Audubon:*

1. An ITP is issued that includes No Surprises assurances;

2. An event occurs that was not reasonably foreseeable (an "unforeseen circumstance");

3. The unforeseen circumstance results in injury to an endangered species covered by the ITP;

4. The adaptive management provisions of the HCP and ITP do not address the impact from the unforeseen circumstance;

5. The permittee does not agree to other modifications of the HCP and ITP that address the impacts of the unforeseen circumstance; and

6. The federal permitting agency is unable or unwilling to use its other authorities (including revoking the permit) and resources to address the impact of the unforeseen circumstance.

Steps 2-6 remain entirely speculative at this point. Thus, whether Spirit's members will ever suffer "imminent hardship" as a result of the No Surprises Rule is just as speculative as whether the members in *Florida Audubon* would suffer hardship from the ethanol tax credit.

The core of Spirit's lawsuit is that the No Surprises Rule violates the ESA because (it argues) it limits the ability of the Services to extract additional concessions from landowners and local governments in the event that unforeseen circumstances occur that jeopardize the existence of an endangered or threatened species. However, there is no evidence in the record to support the claim that the No Surprises Rule prevents the federal government from meeting its obligations under the ESA. The injury Spirit alleges is therefore far too speculative to meet the Article III standing requirement especially where Spirit is not regulated by the rule that it is challenging.

**B. Spirit's Affidavits Do Not Reveal a Single Allegation of Concrete Present Injury Caused by the No Surprises Rule.**

**1. Spirit Alleges Present Injuries in Areas Not Subject to the No Surprises Rule.**

Spirit's allegations of present injury caused by the No Surprises Rule do not confer standing because they all involve (1) areas in which ***no*** HCP has ***ever*** been adopted, (2) HCPs adopted ***before*** the No Surprises Rule was adopted, or (3) HCPs adopted ***after*** the date of the filing of the complaint. None of these allegations meets the requirements of standing.

The first two categories are self-explanatory: It is not possible for injury to be caused by the No Surprises Rule in areas in which it does not apply. [[21]](#footnote-22)n21 Allegations of injuries in the third category, involving HCPs adopted after the date of the filing of the complaint, fail to establish that Spirit was injured as of the date that the lawsuit was filed. The standing doctrine evaluates litigants' personal stake as of the date of the filing of the litigation, and Spirit was not damaged by HCPs that did not exist at that time. Cook v. Colgate Univ., 992 F.2d 17, 19 (2d Cir. 1993);Atlantic States Legal Found. v. Babbitt, 140 F. Supp. 2d 185, 192 (N.D.N.Y. 2001) (environmental group lacked standing because members' affidavits showed that they had not visited sites that allegedly caused their injuries until after complaint was filed).

A liberal reading of Spirit's affidavits identifies ten allegations of present harm. Of these allegations, two allege present harm from HCPs that ***do not, in fact, exist:*** the "Yolo County HCP" and the "Orange County Southern Region HCP." [[22]](#footnote-23)n22 Six allegations allege harm from ***pre-No Surprises Rule*** HCPs. [[23]](#footnote-24)n23 The remaining two allegations of present injury refer to injury allegedly caused by HCPs adopted ***after*** the date that the litigation was commenced. [[24]](#footnote-25)n24 The No Surprises Rule could not have authorized the conduct of which Spirit complains either before it was adopted or in areas in which it has not been applied. Because it was impossible for any of the HCPs that Spirit has referenced to have caused harm as of the date of the commencement of litigation, Spirit does not have standing based on present injury.

**2. Spirit's Allegations of Present Injury Do Not Establish That The No Surprises Rule Caused These Alleged Injuries.**

A second basis for rejecting Spirit's standing claim based on present injury is the fact that Spirit failed to establish that the injuries allegedly suffered were caused by the No Surprises Rule. Spirit's affiants insist that the No Surprises Rule has ruined habitat, spoiled views, and reduced wildlife diversity -- even in areas where no HCP has even been adopted and the No Surprises Rule does not (and may never) apply.

Spirit relies heavily on the Affidavit of Dr. Fraser Shilling. According to Dr. Shilling, "the No Surprises rule ***is harming*** and will continue to harm my enjoyment" of Swainson's hawks in Yolo County, California. Shilling Aff. at P9 (App. 0368-0369) (emphasis added). "***As a result*** of the regulatory assurances extended to the Incidental Take Permit applicants," the affidavit states, "these applicants have sought, ***and obtained,*** [Fish and Wildlife Service] authorization to destroy and degrade the natural areas which I enjoy, and to 'take' Swainson's hawks, salmon, and other species which I enjoy viewing.'" *Id.* (emphases added).

***This may sound compelling until one key fact raises its ugly head: There is no Yolo County HCP.*** There was no HCP at the time that Spirit's complaint was filed or at the time that Dr. Shilling signed his affidavit; nor is there a Yolo County HCP at the current time. *See* Lawrence Decl. at P7 (App. 0461). Therefore, although it may be accepted for purposes of summary judgment that development in Yolo County is "injuring" Dr. Shilling's recreational and aesthetic interests, any such injury ***has to be*** caused by something other than the No Surprises Rule. In these circumstances, where the allegations of present injury are weak or non-existent, the Court should apply *Florida Audubon* and require Spirit to bring its challenge to the No Surprises Rule only when No Surprises assurances in a particular permit are triggered and result in injury to Spirit's members.

**III. THE DISTRICT COURT ERRED IN GRANTING RELIEF THAT GOES BEYOND VACATING AND REMANDING THE PERMIT REVOCATION RULE, THE ONLY RULE FOUND (PROCEDURALLY) DEFECTIVE.**

Based only on a finding of a notice-and-comment rulemaking violation concerning the Permit Revocation Rule, the District Court granted relief against the ***separate*** No Surprises Rule. If there is a justiciable controversy, that relief is improper: The Permit Revocation Rule's curable notice-and-comment defects do ***not*** justify the injunction against applying the still-valid No Surprises Rule, the relief against the National Marine Fisheries Service, and ordering a December 10, 2004 deadline for completion of rulemaking.

The District Court's December 2003 opinion defines the Permit Revocation Rule as what is "codified at 50 C.F.R. 17.22(b), 17.32(b)," finds the notice-and-comment on the 1999-adopted Permit Revocation Rule did not comply with 5 U.S.C. 553, and vacates and remands the Permit Revocation Rule to FWS. 294 F. Supp. 2d at 72, 91, 92 (App. 0478, 0493, 0494). To simplify this appeal, Private Appellants contest the vacatur of the Permit Revocation Rule in the footnote below. [[25]](#footnote-26)n25 Even if it was appropriate to remand and set aside the Permit Revocation Rule, the ***additional*** relief granted by the December 2003 order and the June 2004 amendment clearly is improper and should be vacated. The contested relief is as follows. First, though the No Surprises Rule was not found unlawful, the June 10, 2004 Order (App. 0512) enjoins the Services from offering No Surprises assurances in ITPs [[26]](#footnote-27)n26 until completion of some rulemaking proceeding. Second, though 50 C.F.R. 13.28(a)(5) was not found unlawful, the June 10, 2004 Order (App. 0511-0512) enjoins FWS from following that rule and substitutes the "revocation standard applicable to other [FWS] permits." [[27]](#footnote-28)n27 Third, the December 2003 decision remands "all...regulations challenged in this action" -- including the No Surprises Rule and 50 C.F.R. 13.28(a)(5), 17.22(b)(8) and 17.32(b)(8) -- "for global reconsideration." 294 F. Supp. 2d at 92 (App. 0494). Fourth, the June 10, 2004 Order (App. 0511) enjoins defendants to complete rulemaking on "all...remanded" rules "no later than December 10, 2004." [[28]](#footnote-29)n28

These four injunctive relief provisions should be vacated. The District Court erred on multiple grounds in granting such overreaching relief.

**A. The District Court Overreached Its Function.**

The "function of the reviewing court ends when an error of law is laid bare. At that point[,] the matter once more goes to the [agency] for reconsideration." Florida Power Comm'n v. Idaho Power Co., 344 U.S. 17, 20 (1952);County of Los Angeles v. Shalala, 192 F.3d 1005, 1011 (D.C. Cir. 1999). Thus, if there was inadequate notice-and-comment on the Permit Revocation Rule, the judicial function should have ended with an opinion describing that procedural error and remanding the Permit Revocation Rule only.

**B. The Relief the District Court Ordered Improperly Intrudes on the Services' Discretion in Implementing the Law.**

The other relief ordered goes beyond the judicial function and improperly intrudes on an agency's discretion in implementing the law. County of Los Angeles, 192 F.3d at 1011 ("error" for court "to devise a specific remedy for...Secretary to follow"). This is improper under separation-of-powers constraints built into the APA and not superseded in ESA citizen suits. [[29]](#footnote-30)n29

The principal purpose of the [APA] limitation is to protect agencies from undue judicial interference with their lawful discretion and to avoid judicial entanglement in abstract policy disagreements which courts lack the expertise and information to resolve.

Norton v. Southern Utah Wilderness Alliance ("SUWA"), 542 U.S.    , 124 S. Ct. 2373, 2381 (2004).*See* Lujan v. National Wildlife Fed'n, 497 U.S. at 890-94.

The APA governs permissible and impermissible judicial relief against federal agencies. *See* Bowen v. Massachusetts, 487 U.S. 879, 911 (1988);Hi-Tech Furnace Sys. v. FCC, 224 F.3d 781, 790 (D.C. Cir. 2000). The "APA provides relief for a failure to act in § 706(1)." SUWA, 124 S. Ct. at 2378. Similarly, under 5 U.S.C. 706(2), a court may only "hold unlawful and set aside agency action...found to be...not in accordance with law" or adopted "without observance of procedure required by law." "Agency action" refers to the "discrete action" adopted by the agency, or a discrete failure to act. SUWA, 124 S. Ct. at 2379.

Thus, the APA only authorizes the District Court to set aside the ***discrete*** 1999 Permit Revocation Rule agency action found to have been adopted without observance of APA rulemaking procedures. *See* SUWA, 124 S. Ct. at 2379 ("agency action" that can be held unlawful/set aside under APA § 706(2) refers to "***discrete*** action" adopted by agency or discrete failure to act) (emphasis in original). The relief ordered against ***other discrete agency actions*** (*e.g.,* enjoining use of the 1998-adopted No Surprises Rule and of 13.28(a)(5)) is unauthorized by the APA and is impermissible.

Where a discrete rule has not been found unlawful, the rule cannot be remanded or set aside. Instead, the APA presumes that a rule is lawful. Until plaintiffs sustain their burden of showing that rule is unlawful, it remains a binding, valid rule. *E.g.,* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-44 (1984);Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979);Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 413-17 (1971);FCC v. Schreiber, 381 U.S. 279, 286 (1965). Since the District Court did not find any illegality concerning the No Surprises Rule and § 13.28(a)(5), it erred in enjoining the Services from following those still-lawful rules.

Accordingly, pertinent legal principles support the common sense result that a legal defect in Regulation A (the Permit Revocation Rule) does not authorize an injunction against Regulation B (the No Surprises Rule). *See* Sugar Cane Growers, 289 F.3d at 98;County of Los Angeles, 192 F.3d at 1023.

**C. The District Court Impermissibly Added to APA Procedures.**

Related principles bar courts from adding to APA procedures by "'dictating to the agency the methods, procedures, and time dimension of the needed inquiry.'" Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 541-48 (1978) (quoting Federal Power Comm'n v. Transcont'l Gas Pipe Line Corp., 423 U.S. 326, 333 (1976), which reversed a detailed remand order). The four challenged elements of relief should be vacated because that relief ***does*** dictate the "time dimension" (*i.e.,* complete remand proceedings by December 10, 2004) and procedures (*e.g.,* "global reconsideration" of the No Surprises Rule) to the Services.

Federal agencies have the authority to set their own priorities and the scope of rulemakings. Mobil ***Oil*** Exploration & Producing Southeast, Inc. v. United Distribution Cos., 498 U.S. 211, 230-31 (1991);Personal Watercraft Indus. Ass'n v. Department of Commerce, 48 F.3d 540, 544-45 (D.C. Cir. 1995). The District Court improperly "exercised essentially an administrative function" by dictating or coercing the scope and timing of rulemaking, and by dictating that some lawful rules could not be applied in the interim. Federal Power Comm'n v. Transcont'l, 423 U.S. at 333-34.

**D. The Relief the District Court Ordered Is Also Improper Because the Legality of the No Surprises Rule Does Not Depend on the Permit Revocation Rule.**

The District Court rationalized remanding the No Surprises Rule for global reconsideration because (it concluded) it is "sufficiently intertwined with the [Permit Revocation Rule]." 294 F. Supp. 2d at 91-92 (App. 0493-0494). Even if some aspects of the 1998-adopted No Surprises Rule are conceptually related to the ITP revocation matter clarified in the 1999-adopted Permit Revocation Rule, this does not authorize remanding the still-lawful No Surprises Rule for global reconsideration along with the Permit Revocation Rule:

The court clearly overshot the mark....An agency enjoys broad discretion in determining how best to handle ***related,*** yet discrete, issues in terms of procedures...and priorities...[,] even where the initial solution to one problem has adverse consequences for another area that the agency was addressing.

Mobil ***Oil***, 498 U.S. at 230-31 (emphasis added).

Moreover, the District Court's rationale for remanding, and suggesting reconsideration of, the No Surprises Rule is unpersuasive on other grounds as well. First, the Services' and Intervenor-Appellants' position is that the legality of the No Surprises Rule ***does not depend*** on the Permit Revocation Rule. *See, e.g.,* Fed. Defs.' Aug. 2004 Mot. at 13. Notwithstanding out of context citations by the District Court to the contrary (*see*294 F. Supp. 2d at 91 (App. 0493-0494); *Spirit of the Sage Council v. Norton,* No. 98-1873 (D.D.C. Mar. 31, 2002) ("Mar. 31, 2002 Dist. Ct. Order") (App. 0209-0210) (order regarding cross-motions for summary judgment); *Spirit of the Sage Council v. Norton,* No. 98-1873 (D.D.C. Sept. 15, 1999) ("Sept. 15, 1999 Dist. Ct. Order") (App. 0143) (order denying cross-motions for summary judgment)), the Services and Intervenor-Appellants defended the legality of the No Surprises Rule ***both*** with and without the Permit Revocation Rule. Thus, there is no persuasive basis for remanding the No Surprises Rule for reconsideration in light of the Permit Revocation Rule. [[30]](#footnote-31)n30

Second, the District Court was highly selective in citing non-final briefs and arguments to support its desired conclusion that the No Surprises Rule should be remanded and reconsidered. The December opinion cites exclusively to statements in Federal Defendants' "1999" briefs and at a 1999 hearing (on administrative record issues) to establish "relatedness" and the permissibility of remanding both rules. *See*294 F. Supp. 2d at 91 (App. 0493). However, those 1999 briefs were struck by the Court. *See* Sept. 15, 1999 Dist. Ct. Order (App. 0143). The District Court also declined to address the merits based on the briefs filed in 2001 and ordered a third round of summary judgment briefing. *See* Mar. 31, 2002 Dist. Ct. Order (App. 0209-0210). The Services did not make similar statements in the relevant, final 2002 briefs or at the 2003 oral argument.

Instead, Federal Defendants stated:

To remove any doubt as to the federal defendants' position, the No Surprises Rule stands on its own record, accord, and merit. Even a judicial determination setting aside the Revocation Rule, which federal defendants oppose, would not undermine the No Surprises Rule.

Federal Defs.' Mem. Supp. Mot. Summ. J. & Opp'n Pls.' Mot. Summ. J. at 45 (filed June 14, 2002) (App. 0354). *See* Tr. June 13, 2003 Hr'g Mot. Summ. J. at 70-76 (App. 0465-0471); Federal Defs.' Mem. Opp'n Pls.' F.R.C.P. 59(e) Mot. (filed Jan. 9, 2004) (App. 0495-0510). Further, Intervenors supported why "the Court cannot set aside and/or remand the No Surprises rule if the Court only finds an error in the separate Permit Revocation rule" on grounds similar to those developed above. Intervenor-Defs.' Br. Supp. Fed. Defs.' Mot. Summ. J. & Opp'n Pls.' Mot. at 45 (filed June 13, 2002) ("Intervenor-Defs.' June 2002 Br.") (App. 0349). Thus, the record does not support any acquiescence in a remand of the No Surprises Rule, and the District Court neglected to address Intervenors' arguments.

Third, the Permit Revocation Rule merely provides a back-up defense to one of Spirit's claims against the No Surprises Rule. Spirit had criticized the No Surprises Rule for failing to address what happens to an ITP if a jeopardy-to-species problem develops years after an ITP has satisfied the issuance standards in ESA § 10(a)(2)(B), and the Services cannot cure the jeopardy threat. Intervenor-Appellants' position is that a rulemaking preamble need not provide that level of detail to survive judicial review, and that the Services could address that matter on a case-by-case basis. The Permit Revocation Rule later provided the answer that, "as a last resort" if "an unforeseen circumstance results in likely jeopardy," the Services will revoke an ITP and protect the listed species. 66 Fed. Reg. at 6487.*See*Intervenor-Defs.' June 2002 Br. at 41 (App. 0347).[[31]](#footnote-32)n31 Since the Permit Revocation Rule is only secondarily relevant to a few challenges to the No Surprises Rule, the remand of the Permit Revocation Rule does not justify remanding the No Surprises Rule and prohibiting the Services from providing No Surprises assurances.

**E. The District Court Erred in Compelling the Services to Act Through Rulemaking.**

Absent a clear statutory duty, a court cannot compel an agency to act through rulemaking versus employing case-by-case adjudication. NLRB v. Bell Aerospace Co., 416 U.S. 267, 293 (1974). Neither ESA § 10(a) nor any other statute compels rulemaking regarding ITPs. Instead, the Services have the discretion to provide guidance on ITPs through rules or case-by-case examination.

Consequently, even if it was permissible for the District Court to set aside and remand the Permit Revocation Rule, it was impermissible for the District Court to: (1) order further rulemaking on the Permit Revocation Rule; (2) order or strongly suggest rulemaking on No Surprises assurances; and (3) dictate a rulemaking deadline.

**F. The District Court Erred in Ordering Any Relief Against the National Marine Fisheries Service.**

The National Marine Fisheries Service did not publish the Permit Revocation Rule. The Permit Revocation Rule, the only rule the District Court found procedurally defective, is a Fish and Wildlife Service rule. Since no National Marine Fisheries Service rule was found invalid, the District Court lacked authority to enjoin the National Marine Fisheries Service to do ***anything.*** Hence, the challenged remedy is improper as applied to the National Marine Fisheries Service. *See* Fed. Defs.' Aug. 2004 Mot. at 15-16.

**G. The District Court's Injunction Against the Issuance of No Surprises Assurances Will Have Disruptive Consequences.**

Even if the District Court had the bare authority to temporarily enjoin use of the No Surprises Rule, it abused its discretion in doing so. Courts should consider the "disruptive consequences of an interim change" in deciding whether to set aside or enjoin a rule. Sugar Cane Growers, 289 F.3d at 98. The interim injunction against offering No Surprises assurances and establishing a new ITP revocation standard has disruptive consequences for the beneficial ESA § 10(a) program. *See* Fed. Defs.' Aug. 2004 Mot. at 4-5, 19; Intervenor-Appellants' Mot. Expedite Appeals & Stay Dist. Ct. Orders Pending Appeal at 1-2, 16-19 (filed in this Court Aug. 19, 2004); pages 5-8, *supra;* Seiber v. United States, 364 F.3d 1356, 1368 (Fed. Cir. 2004) ("it is indisputable...that the ESA and the ITP process serve a legitimate public purpose").

For example, many members of the non-federal sector will elect to devote land and resources to a voluntary HCP only if there are credible promises of regulatory certainty. This certainty is compromised by the injunction against offering No Surprises assurances and the injunction stating a new ITP revocation standard. Once these disruptive consequences are considered, the Services should not be enjoined from applying the still-valid No Surprises Rule and the still-valid 50 C.F.R. 13.28(a)(5).

The District Court's injunction is even more insupportable in light of the fact that the Permit Revocation Rule is a discrete, separate rule and that the court below only found curable notice-and-comment defects in the Permit Revocation Rule. The use of substantive Rule A should not have been enjoined based only on curable procedural defects in Rule B. *See* Sugar Cane Growers, 289 F.3d at 98;County of Los Angeles, 192 F.3d at 1023.

**IV. CONCLUSION.**

Because no justiciable controversy exists regarding the No Surprises Rule, this Court should direct the District Court to dismiss Spirit's challenge to that Rule. The Court should also vacate the portions of the District Court orders that go beyond vacating and remanding the Permit Revocation Rule.

DATED: November 15, 2004

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a) OF THE FEDERAL RULES OF APPELLATE PROCEDURE**

I hereby certify that:

(1) The foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,460 words, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2).

(2) The foregoing brief complies with the typeface requirement of Federal Rule of Appellate Procedure 32(a)(5)(A) and D.C. Circuit Rule 32(a)(1), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it was prepared in a proportionally spaced typeface (Times New Roman 12 points) using Microsoft Word 2000.

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **INTERVENOR-APPELLANTS' JOINT OPENING BRIEF** has been served, by first-class mail, postage prepaid (unless otherwise indicated), on this 15th day of November, 2004, on the following:

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ALI-ABA COURSE OF STUDY MATERIALS

**End of Document**

1. n1 "Secretary" refers to the Secretary of the Interior with regard to terrestrial species and the Secretary of Commerce with regard to marine species. The Secretaries have delegated administration of the ESA to the Fish and Wildlife Service ("FWS") in the Department of the Interior and the National Marine Fisheries Service (or "NOAA Fisheries") in the National Oceanic and Atmospheric Administration of the Department of Commerce. [↑](#footnote-ref-2)
2. n2 David. S. Wilcove, *The Promise and the Disappointment of the Endangered Species Act,* 6 N.Y.U. Envtl. L.J. 275, 277-28 (1998) (*"The Promise and the Disappointment"*) (citations omitted). [↑](#footnote-ref-3)
3. n3 Committee on Scientific Issues in the Endangered Species Act, Nat'l Acad. of Scis., Science and the Endangered Species Act 159-160 (1995), *at* http://books.nap.edu/books/0309052912/html/index.html (accessed Nov. 9, 2004) (emphasis in original). [↑](#footnote-ref-4)
4. n4 Four Lessons Learned, supra, at 10707-09. *See* No Surprises Rule, 63 Fed. Reg. at 8861-62 (Feb. 23, 1998); Reed F. Noss *et al., The Science of Conservation Planning: Habitat Conservation Under the Endangered Species Act* 26-28, 64-66 (1997); David S. Wilcove *et al., Rebuilding the Ark: Toward a More Effective Endangered Species Act for Private Land* (1996) (App. 0559-0571); Amara Brook *et al., Landowners' Responses to an Endangered Species Act Listing and Implications for Encouraging Conservation,* 17 Conservation Biology 1638 (2003); Michael J. Bean, *Overcoming Unintended Consequences of Endangered Species Regulation,* 38 Idaho L. Rev. 409 (2002); Edward D. Koch, *The Practice of Endangered Species Conservation on Private Lands: One Federal Biologist's Experiences,* 38 Idaho L. Rev. 505 (2002); J.B. Ruhl, *Who Needs Congress? An Agenda for Administrative Reform of the Endangered Species Act,* 6 N.Y.U. Envtl. L.J. 368, 397-98 (1998); Fred P. Bosselman, *The Statutory and Constitutional Mandate for a No Surprises Policy,* 24 Ecology L.Q. 707 (1997); John F. Turner & Jason C. Rylander, *Conserving Endangered Species on Private Lands,* 32 Land & Water L. Rev. 571, 572-73, 615 (1997). The social sciences generally concur that rewards and other positive incentives are the most effective way to lead subjects towards desired behaviors. *See The Promise and the Disappointment, supra* note 2, at 277-28. [↑](#footnote-ref-5)
5. n5 "Changed circumstances" are "changes in circumstances affecting a listed species" that "can reasonably be anticipated" and "planned for" in the HCP. 50 C.F.R. 17.3. The HCP must specify the measures "to respond to changed circumstances" that the "permittee will implement." 50 C.F.R. 17.22(b)(5). [↑](#footnote-ref-6)
6. n6 "Where significant data gaps exist [*e.g.,* where we only partially understand a species' habitat needs], adaptive management provisions are included in the HCP." No Surprises Rule, 63 Fed. Reg. at 8863. This "allow[s] for upfront, mutually agreed upon changes in the operating conservation program that may be necessary in light of subsequently developed biological information." *Id. See also* Final Addendum to the HCP Handbook, 65 Fed. Reg. 35,242, 35,252-53 (June 1, 2000) (increased use of monitoring and adaptive management in HCPs). [↑](#footnote-ref-7)
7. n7 "Unforeseen circumstances" means a change affecting a species "that could not reasonably have been anticipated" and that results in a "substantial and adverse change in the status of the covered species." 50 C.F.R. 17.3, 222.102. Thus, "unforeseen circumstances" may occur in only a small number of HCPs. 66 Fed. Reg. 6483, 6487 (Jan. 22, 2001); No Surprises Rule, 63 Fed. Reg. at 8867-69. [↑](#footnote-ref-8)
8. n8 The Services' authorities include (1) use of the ESA § 5 land acquisition authority and off-budget land exchanges; (2) use of § 7 consultation to prevent any federally-assisted actions which contribute to jeopardy; (4) increased stringency on future § 10 permits concerning the jeopardized species; (6) increased emphasis on prohibiting § 9 take; and (4) use of translocation of members of a listed species and other measures. No Surprises Rule, 63 Fed. Reg. at 8862, 8869. [↑](#footnote-ref-9)
9. n9 Secretary Bruce Babbitt, United States Department of the Interior, Address at the National Press Club Luncheon 5 (July 17, 1996) (transcript available at Administrative Record Document 600, Exhibit C) (App. 0576). [↑](#footnote-ref-10)
10. n10 *See* United States Fish & Wildlife Serv., Department of the Interior & National Marine Fisheries Serv., United States Dep't of Commerce, Habitat Conservation Planning and Incidental Take Permit Processing Handbook i (1996) (available at http://endangered.fws.gov/hcp/hcpbook.html (accessed July 8, 2004)) (App. 0518). [↑](#footnote-ref-11)
11. n11 The National Marine Fisheries Service did not adopt a rule that is equivalent to the Permit Revocation Rule. [↑](#footnote-ref-12)
12. n12 The Services and Intervenor-Appellants brought their motions to expedite pursuant to 28 U.S.C. 1657 ("The court shall expedite the consideration of...any action for temporary or preliminary injunctive relief...."), since the District Court's June 10, 2004 Order enjoins the Services from issuing No Surprises assurances pending remand (*see* App. 0512). [↑](#footnote-ref-13)
13. n13 The District Court principally relied on ripeness cases brought by regulated industry groups. *See* 294 F. Supp. 2d at 83-85 (App. 0487-0489). However, the logic of those opinions is limited to situations where the regulation directly restricts primary activities of regulated entities. *E.g.,* CropLife Am. v. EPA, 329 F.3d 876, 881, 883-84 (D.C. Cir. 2003). *Compare* Abbott Labs. v. Gardner, 387 U.S. 136, 150-53 (1967) (duty to comply immediately with rules under threat of criminal sanction creates ripe controversy) with Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967) (rules that do not immediately constrain behavior are not ripe). [↑](#footnote-ref-14)
14. n14 The No Surprises Rule against imposition of additional ESA costs is ***not*** triggered by "changed circumstances" or by adaptive management provisions incorporated into a specific package. Those assurances are triggered ***only*** by "unforeseen circumstances." *See* pages 7-8, *supra.* [↑](#footnote-ref-15)
15. n15 Two district courts have dismissed as unripe comparable ESA facial challenges to rules. *See* Washington Envtl. Council v. National Marine Fisheries Serv., No. C00-1547R, 2002 WL 511479 (W.D. Wash. Feb. 26, 2002) (facial challenges to ESA § 4(d) rules for threatened salmon not ripe); Environmental Prot. Info. Ctr. v. Tuttle, No. C-00-0713-SC, 2001 WL 114422 (N.D. Cal. Jan. 22, 2001) (ESA § 9 "take" challenge to California's forestry rules not ripe). [↑](#footnote-ref-16)
16. n16 The No Surprises Rule does not inherently violate the ESA. Instead, that Rule, directing that No Surprises assurances be provided in exchange for commitment to a voluntary HCP, ***fulfills the ESA legislative intent*** that the Services provide

    long-term assurances to the proponent of the conservation plan that the terms of the plan will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan....Adequate assurances must be made to the financial and development communities that a section 10(a) permit can be made available for the life of the project.

    H.R. Conf. Rep. No. 97-835, at 30-31, *reprinted in* 1982 U.S.C.C.A.N. at 2871-72. Further, ITP packages containing No Surprises assurances normally can be expected to comply with ESA § 7(a)(2) and its analogue in § 10(a)(2)(B)(iv). Those provisions are satisfied if the proposed ITP approval action is "not likely to jeopardize the continued existence" of the entire listed species or to adversely modify designated critical habitat. 16 U.S.C. 1536(a)(2). All well-designed ITP packages will meet this standard, as the HCP must "minimize and mitigate the impacts of" allowed incidental take of a few individuals. 16 U.S.C. 1539(a)(2)(B)(ii).

    Additionally, the required presumption is that the Services will comply with the ESA in the future. Sullivan v. Everhart, 494 U.S. 83, 94 (1990). This provides another reason why it must be presumed, in the absence of record facts to the contrary, that ITP packages with No Surprises assurances will comply with the ESA. [↑](#footnote-ref-17)
17. n17 Under adaptive management terms, the fixed level of resource commitments can be used to maximize benefits to the listed species. This makes "jeopardy" to the species even more "not likely" under 16 U.S.C. 1536(a)(2). Further, there may be trade-offs among the length of the permit term, the number of "changed circumstances" described, the degree of "take" minimization and other factors that influence the likelihood that "unforeseen circumstances" would occur, that No Surprises assurances would be invoked, and a species' existence would be jeopardized. As a final example, since ESA §§ 9 and 10 apply only to the take of "endangered" wildlife, § 10 compliance can depend on whether the ITP concerns endangered ***or*** threatened wildlife. [↑](#footnote-ref-18)
18. n18 Even if Spirit could identify a justiciable controversy on the No Surprises assurances ***in a specific ITP,*** alleged "flaws in the entire 'program'" (the entire Rule) "cannot be laid before the courts for wholesale correction...simply because one" site-specific action "is ripe for review." Lujan v. National Wildlife Fed'n, 497 U.S. at 893. *See* Sierra Club v. Peterson, 228 F.3d 559, 567 (5th Cir. 2000) (en banc) ("Environmental groups [cannot] challenge an entire program by simply identifying specific allegedly-improper final agency actions within that program...."). [↑](#footnote-ref-19)
19. n19 The view of the Services and many respected academicians is that the increased use of HCPs/ITPs has net ***benefits*** for listed wildlife when compared to reliance on the ESA prohibition against "taking" listed wildlife. *See* pages 5-6, *supra.* Even if No Surprises assurances and issuing ITPs are subjectively viewed as net detriments by Spirit's members, the proximate cause of their hardship and injury is the ITP provisions Congress enacted (and the No Surprises assurances that Congress directed) in the 1982 ESA Amendments, not the No Surprises Rule. [↑](#footnote-ref-20)
20. n20 Restricting Spirit to an as-applied challenge has several benefits. If No Surprises assurances do violate the ESA, as Spirit insists, Spirit ought to be able to prove that in the context of a specific ITP package. That would give the court a record, permitting it to apply the law to more concrete facts, and would allow the Services to exercise their discretion on the terms of the ITP package. Since § 1539(a)(2) compliance is determined with reference to the full ITP package, this also suggests judicial review at the time of, and in the context of, final agency action approving a specific ITP. [↑](#footnote-ref-21)
21. n21 The Spirit has characterized as "formalistic" the contention that standing to challenge the No Surprises Rule cannot be based on pre-Rule HCPs. Pls.' Mem. Supp. Mot. Summ. J. at 15 n.10 (filed May 15, 2002) (App. 0215). The requirements of standing are not, however, merely "formalistic" or "legalistic." In order to satisfy the "irreducible constitutional minimum of standing," a plaintiff must establish causation and redressability. Florida Audubon, 94 F.3d at 663; Allen v. Wright, 468 U.S. 737, 752-753 (1984). Neither is possible in the case of HCPs adopted before the challenged rule was adopted. Therefore, the "case or controversy" raised by these allegations has a different root and is not properly before the Court. [↑](#footnote-ref-22)
22. n22 *See* Affidavit of Fraser Shilling, Ph.D. ("Shilling Aff.") at P7 (filed July 16, 2002 as Ex. H to Pls.' Mem. Opp'n Fed. Defs.' & Def.-Intervenors' Mots. Summ. J. & Reply Supp. Pls.' Mot. Summ. J. ("Pls.' Opp'n & Reply") (App. 0366-0367); Affidavit of K. Shawn Smallwood, Ph.D. ("Smallwood Aff.") at P2 (filed July 16, 2002 as Ex. I to Pls.' Opp'n & Reply) (App. 0372-0374). *See also* Declaration of Monica Lawrence ("Lawrence Decl.") (filed Aug. 8, 2002 in support of Intervenor-Defs.' Reply Supp. Fed. Defs.' Mot. Summ. J.) (App. 0460-0462). One affiant also mentions the "San Bernardino and Riverside HCPs," which have not been adopted. *See* Affidavit of Leeona Klippstein at P2 (filed July 16, 2002 as Ex. N to Pls.' Opp'n & Reply) (App. 0395-0396); Lawrence Decl. (App. 0460-0462). [↑](#footnote-ref-23)
23. n23 *See* Smallwood Aff. at PP4-7 (App. 0376-0379); Affidavit of Jean K. Jenks at P5 (filed July 16, 2002 as Ex. J to Pls.' Opp'n & Reply) (App. 0382-0383); Affidavit of Dean P. Keddy Hector at P8 (filed July 16, 2002 as Ex. K to Pls.' Opp'n & Reply) (App. 0389); Affidavit of Professor Ben W. Twight at PP1, 4 (filed July 16, 2002 as Ex. V to Pls.' Opp'n & Reply) (App. 0453, 0454). These affidavits allege harm from Orange County Central/Coastal HCP (3 allegations), Balcones Canyonlands Conservation Plan, San Diego County Multiple Species Conservation Plan, and Plum Creek HCP. [↑](#footnote-ref-24)
24. n24 *See* Supplemental Affidavit of Leeona Klippstein at P3 (filed July 16, 2002 as Ex. U to Pls.' Opp'n & Reply) (App. 0448) (North Peak, Assessment Dist. 161, Cornerstone Homes RR Canyon/Lake Elsinore, Granite Homes/Lake Elsinore, Rancho Bella Vista, Van Daele, Evergreen Nursery, City of La Mesa MSCP Subarea Plan and Ocean Trails); Affidavit of Julia Butterfly Hill at P3 (filed July 16, 2002 as Ex. T to Pls.' Opp'n & Reply) (App. 0443-0444) (Pacific Lumber HCP). [↑](#footnote-ref-25)
25. n25 The set aside of the Permit Revocation Rule could be reversed on several grounds. First, 5 U.S.C. 553(b) only requires notice of the "subjects" for rulemaking. The Services provided such notice twice. Once was when the proposed No Surprises Rule requested comment on the extent to which the Services should provide "regulatory assurances" against the Services' unilateral amendment or revocation of an ITP "even if unforeseen circumstances arise." 62 Fed. Reg. 29,091 (May 29, 1997). The 1997 proposed Permit Revocation Rule requested comment on what the rule of law should be "in case of a conflict between the general permit provisions in part 13 [including permit revocation in 13.28] and more specific terms or conditions in a HCP permit." 62 Fed. Reg. 32,189, 32,191 (June 12, 1997). Then the final 1999 Permit Revocation Rule merely added details consistent with the direction in the proposed rule (13.3) that, "in case of a conflict between general permit provisions in Part 13 and the more specific terms" in an HCP permit or Part 17 (such as No Surprises assurances), the "more specific provisions in the HCP permit and accompanying documents would control." 62 Fed. Reg. 32,189. *See* id. at 32,190-91. Hence, while the proposed rule addressed the relationship between Parts 13 and 17 "in a more general way" and contained "no provision exactly comparable" to 50 C.F.R. 17.22(b)(8), adequate notice of that rulemaking subject was provided. Trans-Pacific Freight v. Federal Maritime Comm'n, 650 F.2d 1235, 1249 (D.C. Cir. 1980). This record does not support the District Court's characterizations that the "June 1997 proposal does not even suggest that any provision of the existing revocation regulations would no longer apply to ITPs" and that "flagrant violations of the APA's notice and comment" provisions had occurred. 294 F. Supp. 2d at 88-89, 92 (App. 0491, 0494).

    Moreover, the Services offered a post-adoption opportunity to comment on the Permit Revocation Rule in 2000, Spirit exercised that opportunity to comment, and the Services responded to Spirit's comments in the Federal Register. *See* 65 Fed. Reg. 6916 (Feb. 11, 2000); 66 Fed. Reg. 6483. Consequently, any earlier APA error becomes "harmless error" at this point, and no set aside of the Permit Revocation Rule (to provide another opportunity to comment) was warranted. Advocates for Highway & Auto Safety v. Federal Highway Admin., 28 F.3d 1288, 1291-93 (D.C. Cir. 1994); U.S. Steel Corp. v. EPA, 605 F.2d 283, 291 (D.C. Cir. 1979).

    The 1999 Permit Revocation Rule favors the listed species in a jeopardy situation over the absolute ITP tenure security provided once the No Surprises Rule was adopted in 1998. Accordingly, it was error for the District Court to set aside the ESA-friendly Permit Revocation Rule for curable procedural defects. Sugar Cane Growers Coop. v. Veneman, 289 F.3d 89, 97-98 (D.C. Cir. 2002) (remanding without vacating for "notice-and-comment" defects); City of Las Vegas v. Lujan, 891 F.2d 927, 935 (D.C. Cir. 1989). [↑](#footnote-ref-26)
26. n26 The No Surprises Rule requires the Services to include a-deal-is-a-deal assurances in each ITP, and to not negotiate for further concessions on responsibility for "unforeseen circumstances." *E.g.,* 50 C.F.R. 17.22(b)(5). Thus, the relief barring No Surprises assurances enjoins the Services to violate their own binding rules. [↑](#footnote-ref-27)
27. n27 Since 1999, 13.28(a)(5) has stated that its standards do not apply to ITPs/HCPs ("Except for permits issued under § 17.22(b) through (d)"). Prior to 1999, 13.28(a)(5) had stated that Fish and Wildlife Service-issued permits could be revoked if permit continuation would be detrimental to the "recovery" of a listed species. The injunction essentially imposes the pre-1999 rule on ITPs. Yet, the rule had been changed because: (1) an easily-met ITP revocation standard is inconsistent with the ITP tenure security provided by the 1998 No Surprises Rule; and (2) a standard allowing an ITP to be revoked if it is not advancing conservation or recovery of a listed species is inconsistent with the permit issuance standards in 16 U.S.C. 1539(a)(2)(B)(iv) and (C).

    The revocation and provisions for FWS-issued ITPs are found in 16 U.S.C. 1539(a)(2)(C), 50 C.F.R. 13.28(a)(1)-(4), 17.22(b)(8) and 17.32(b)(8). The court below found notice-and-comment violations only with respect to the Permit Revocation Rule (defined as what is "codified at 50 C.F.R. 17.22(b), 17.32(b)"). 294 F. Supp. 2d at 72, 91 (App. 0478, 0493). Notably, the court refrained from setting aside the 1999-adopted 13.28(a)(5). *See* id. at 78-79 & n.3 (App. 0483-0484) ("The Court does not reach the...propriety of the promulgation of the second rule [i.e., 13.28(a)(5)] exempting ITPs from general permit revocation provisions."); id. at 92 (App. 0494) (carefully vacating just the Permit Revocation Rule adopted at "64 Fed. Reg. 32,712, 32,714," when 13.28(a)(5) was adopted at page 32,711). Yet, the challenged injunction directs FWS to ignore the binding, valid 13.28(a)(5). [↑](#footnote-ref-28)
28. n28 FWS has proposed to re-adopt the 1999-adopted Permit Revocation Rule. 69 Fed. Reg. 29,681 (May 25, 2004). The Services have not proposed new No Surprises Rules for "global reconsideration." Unless this Court provides supervisory guidance, the District Court may well find in December 2004 that the Services have violated earlier court orders by not globally reconsidering and proposing a new No Surprises Rule. On that basis, the District Court could extend the "temporary" injunctions or use other enforcement powers to force a new rulemaking on the still-valid No Surprises Rule. *See* Federal Defs.' Mot. Summ. Reversal, Expedited Briefing, & Stay Pending Appeal at 18-20 (filed in this Court Aug. 19, 2004) ("Fed. Defs.' Aug. 2004 Mot."). [↑](#footnote-ref-29)
29. n29 APA principles apply to ESA citizen suits against federal agencies because nothing in 16 U.S.C. 1540(g) "expressly...supersede[s]" those principles, as 5 U.S.C. 559 would require to displace the APA. *See* Dickinson v. Zurko, 527 U.S. 150, 154-55 (1999); Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson, 685 F.2d 678, 685-87 (D.C. Cir. 1992). [↑](#footnote-ref-30)
30. n30 Nor does the notice-and-comment issue on the Permit Revocation Rule provide a persuasive basis for withholding review of the legality of the No Surprises Rule. We fail to see how, after concluding that "plaintiffs present 'purely legal' challenges to" the No Surprises Rule which are fit for review under the ripeness doctrine, the District Court could legitimately withhold merits review of that Rule. Compare 294 F. Supp. 2d at 83 (App. 0487) *with* id. at 85, 91-92 (App. 0489, 0493-0494). The sad truth is that, ***six years*** after the suit against the No Surprises was filed and after ***three*** rounds of summary judgment briefing ordered by Judge Sullivan, the parties are no closer to a District Court resolution of No Surprises issues than they were when the Complaint was filed in 1998. [↑](#footnote-ref-31)
31. n31 While this "species win" answer advances Spirit's interests, they counterintuitively challenged the Permit Revocation Rule. [↑](#footnote-ref-32)