U.S. Fish & Wildlife Service

"No Surprises" Myths

Given the importance of non-Federal land in the conservation of threatened and endangered species, the Fish and Wildlife Service and National Marine Fisheries Service recognized the need to provide adequate incentives for non-Federal landowners to factor endangered species conservation into their day-to-day land management activities. Economic and regulatory certainty regarding the overall cost of species conservation and mitigation was of great concern to non-Federal property owners. The Services believed that assurances of regulatory certainty should be provided, provided that the affected species were adequately covered by a properly functioning HCP, and the permittee was properly implementing the HCP and complying with the terms and conditions of the HCP permit in good faith. Therefore, the Services codified the No Surprises policy into the Habitat Conservation Plan ("No Surprises") assurances (63 FR 8859).

Subsequently, there has been some misunderstanding about the intent and substance of the No Surprises rule. These "myths" are dispelled below.

The Services cannot guarantee No Surprises since "nature is full of surprises."

This is a misleading statement. The term "No Surprises" refers to regulatory assurances, *not* biological assurances, and applies only to the extent of mitigation required by the incidental take permit. It does not assure that nature will remain static. Precisely because of nature's dynamic personality we would ensure an HCP would institute provisions for changed circumstances or adaptive management strategies for situations with significant uncertainty.

No Surprises assurances are applied beyond incidental take permits.

Some have applied the term No Surprises assurances to other programs beyond HCPs and non-federal landowners, and beyond the Endangered Species Act (e.g. 404 wetland permitting). No Surprises assurances applies *only* to issued incidental take permits. It does not apply to approved HCPs that are improperly implemented, HCPs that have yet to be approved, section 7 consultations and Federal agencies, 4(d) rules, 10(j) populations, MOUs, MOAs, listings, and 10(a)(1)(A) permits.

Candidate conservation agreements and safe harbor agreements have proposed assurances but are not No Surprises. The difference is that the standard for a candidate conservation agreements is the proportional contribution to the removal of the need to list. Participants in safe harbor agreements are proposed to receive "assurances" in that they will be permitted to return to baseline conditions at the end of the permit time period.

The HCP/operating conservation program cannot change once permit is issued.

The operating conservation program can change as long as it does not require the commitment of additional land, water, or financial compensation or other natural resources. An HCP can have mitigation/management alternatives and adaptive management built in so that changes will be agreed to up front.

Adaptive management and No Surprises conflict

Adaptive management strategies, if used, are part of the HCPs provisions, and their implementation becomes part of a properly implemented conservation plan, or part of the "deal."

Northern spotted owl. USFWS photo

The Services can never go back and ask for additional mitigation/minimization

If conservation measures are deemed necessary to respond to unforeseen circumstances, the Services may require measures of the permittee where the conservation plan is being properly implemented, but only if such measures are limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for

the affected species, and maintain the original terms of the conservation plan to the maximum extent possible.

Additional conservation and mitigation measures will not involve the commitment of additional land, water or financial compensation or restrictions on the use of land, water (including quantity and timing of delivery), or other natural resources otherwise available for development or use under the original terms of the conservation plan, without the consent of the permittee.

Additionally, the assurances apply only to HCPs that are properly implemented. Determining whether an HCP is properly implemented is where most of the HCP disputes lie. Therefore, HCPs must be specific enough so that the permittee knows exactly what they are responsible for and how to fulfill their part of the deal.

The Services have to take whatever the applicant offers.
The issuance criteria still applies to incidental take permits; the HCP must mitigate and minimize to the maximum extent practicable and not appreciably reduce the likelihood of survival and recovery of the species in the wild. The HCP is still a negotiated document. No Surprises makes it that much more important that good HCPs are developed, with enough detail that everyone is clear as to their responsibilities.

Assurances are discretionary, we can choose to offer it or not
The final rule codifies assurances to be a part of every permit issued. The final rule applies to permits issued after March 25, 1998. Assurances provided individually in permits issued prior to that date remain in effect and will not be revised as a result of the final rule.

Permits for HCPs with a net benefit provide the permittee additional assurances
The proposed rule had two levels of assurances. This was determined to be confusing and ultimately meaningless. The Services revised the rule so that there is only one level of assurances provided to permittees, instead of one level of assurances for standard HCPs and another level for HCPs that were developed to provide a "net benefit" for the covered species.

"Unforeseen circumstances" was meant to be different than "Extraordinary circumstances."
There was some confusion in terminology since the policy, HCP Handbook, and proposed rule contained the words "extraordinary circumstances" as well as the term "unforeseen circumstances". The Services have made the regulations consistent between the two agencies, where possible. Moreover, there was never an intention in the August 1994 No Surprises announcement to create a substantive difference between "unforeseen" and "extraordinary" circumstances. The term "unforeseen" is used in place of "extraordinary."

All changed circumstances must be addressed in order to issue a permit
The final rule gives a definition for changed circumstances and, if provisions for changed circumstances are provided in the plan, requires the permittee to implement them. Measures to respond to changed circumstances, like any other part of an HCP, are negotiable. The importance of including changed circumstances provisions is determined on the basis of the issuance criteria (e.g. does the taking appreciably reduce the likelihood of survival and recovery of the species in the wild and does the plan minimize and mitigate to the maximum extent practicable). If a possible circumstance is likely to occur that could alter the extent of the proposed activities effects, it should be addressed in the HCP. However, this does not mean every single possible circumstance must be provided for in the HCP.

The final rule has significantly changed the HCP program.
The HCP program has always strived to provide permittees regulatory assurances. The first HCP, which served as a model for the 1982 ESA amendments instituting the incidental take permit process, contains assurances language. The Conference Report on the 1982 ESA amendments recognized the potential for HCPs to provide conservation for unlisted species and allowed the Federal government to provide regulatory assurances to permittees. In 1994, the No Surprises policy was issued. Since then the Services have been providing permittees regulatory assurances. As a result, we have seen a dramatic increase in the number of potential applicants interested in working with us to develop HCPs.

The Federal government will not be able to afford additional measures if they are needed
The Services believe that HCPs are, and will continue to be, carefully crafted so that unforeseen circumstances will be rare, if they occur at all, and that the Services will be able to successfully handle any unforeseen circumstance so that species are not jeopardized. In addition, the Services must ensure that HCPs are designed to adequately mitigate the incidental take authorized by the permit, include procedures to deal with unforeseen circumstances that may arise, and comply with such other measures that are determined to be necessary or appropriate for purposes of the plan.

Once the Services have concluded that a permittee has initially satisfied the incidental take permit issuance criteria, there is nothing in the ESA that precludes the Services from assuming additional responsibility for species covered in an HCP, especially when such responsibilities are limited to highly unlikely unforeseen circumstances. In fact, the Services have responsibility for listed species conservation regardless of whether an HCP is involved or not. Carrying out that responsibility (for example, through the initiation of litigation to enforce section 9 of the ESA) is also dependent upon the availability of appropriated funds. Therefore, at a conceptual level, the lack of guaranteed funding to handle a breakdown of an HCP due to unforeseen circumstances is no different from a lack of guaranteed funding to enforce the ESA generally.

The Services and the Department are committed to making No Surprises work and will utilize their resources and authorities, if necessary. In the face of an unexpected species decline, where additional conservation efforts are warranted, the Services have significant resources at their disposal to address the comparative needs of the species. The Services can also work with Congress, other Federal, State, and local agencies, tribes, environmental groups, and private entities to help ensure the continued conservation of the species in the wild. There are a variety of tools available to ensure that the needs of the species affected by unforeseen circumstances are adequately addressed, including land acquisition or exchange, habitat restoration or enhancement, translocation, and other management techniques.

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