

July 26, 2004

Mr. Patrick Leonard  
Chief, Division of Consultation, Habitat Conservation Planning,  
Recovery and State Grants  
U.S. Fish and Wildlife Service  
4401 North Fairfax Drive, Room 420  
Arlington, Virginia 22203

RE: Proposed Endangered Species Act Incidental Take Permit Revocation Regulations RIN # 1018-AT64

Dear Mr. Leonard,

The NATIONAL ASSOCIATION OF REALTORS® (NAR) appreciates the opportunity to submit these comments in response to the proposed Endangered Species Act Incidental Take Permit Revocation Regulations, as published in the Federal Register on May 25, 2004 (hereafter "Proposed Regulations").

NAR, with over one million members, is the largest professional trade association in the country. NAR members are involved in all aspects of the real estate brokerage industry, including selling existing properties, property development and management, and affiliated services such as insurance, title and mortgage brokerage.

Nationwide, private landowners play a vital role in helping the nation meet its species conservation and preservation goals. Through the Habitat Conservation Plan/Incidental Take Permit program, landowners are allowed to conduct activities that may result in the incidental take of endangered species in exchange for implementing conservation measures. The No Surprises Rule offers an additional incentive to develop and participate in these voluntary plans, as it provides assurances that if the species' status declines, the landowner will not be required to initiate additional conservation measures. Although there may be limited conditions under which an Incidental Take Permit (ITP) issued concurrently with the approval of a Habitat Conservation Plan (HCP) containing No Surprises assurances may be revoked, this proposal establishes reasonable and workable limits to revocation authority that serve to protect both landowner and species.

The certainty provided by the No Surprises Rule is an integral component to private landowner conservation efforts, and NAR urges the U.S. Fish and Wildlife Service (hereafter "the Service") to resist any action to undercut or weaken it. NAR fully supports the Proposed Regulations, as they will help to ensure that the nation continues to realize conservation gains, will limit revocation to only specific incidences, conditions and circumstances and will fully implement the Endangered Species Act (ESA) as Congress intended. NAR urges the Service to adopt the language as proposed.

- **The Proposal Will Continue to Provide Incentives to Landowners to Contribute to Conservation Gains.** Over 70% of land in the lower 48 states is privately owned. Compounding this fact with the simple observation that 95% of all ESA-listed species have some portion of their habitat located on non-federal lands, and 19% of these have habitat occurring *only* on non-federal lands, the role of the private landowner in species conservation becomes all the more apparent. HCPs, ITPs and No Surprises assurances demonstrate the Service's recognition of the opportunities provided by privately owned lands, and encourage and facilitate landowner conservation efforts – efforts that are clearly needed to reach species conservation goals.

Of the 33.3 million acres covered by the 325 individual HCPs approved as of March 2004, private landowners, counties, and corporations have worked to create, enhance, or restore over 4.4 million acres of habitat. Without the No Surprises Rule, it is extremely doubtful that an area the size of Connecticut and Rhode Island combined would have undergone such extensive conservation efforts. Moreover, many of these conservation efforts occur in precisely the high-growth areas where species conservation is needed most. HCPs have helped to bridge the gap between two often competing public policy objectives – economic development and habitat conservation. Retaining their availability and facilitating their use will certainly lead to even more conservation benefits.

- **The Proposal Appropriately Limits When Permits May Be Revoked.** The Proposed Regulations offer two options, whether to reestablish the Permit Revocation Rule (PRR) under 50 CFR Part 17, or to apply the existing general permit revocation procedures currently found under Part 13 to HCPs and associated ITPs. The proposal to reestablish the PRR under 50 CFR Part 17 adequately protects both species and landowners, and NAR urges the Service to adopt the PRR as proposed. If the permit revocation standard is set too low by including either references to individual populations, as is the case under the general permit revocation standards at 50 CFR 13.28(a)(5), or mandatory contributions to recovery, the notion of No Surprises is lost and provides a strong disincentive for a landowner to enter into an HCP. Setting the standard too high by failing to provide species assurances against jeopardy runs contrary to agency policy and the very intent of the ESA, and will expose the No Surprises Rule and associated permits to an onslaught of legal challenges.

The ESA and long-standing agency interpretation indicates that HCPs and associated ITPs do not and should not carry an affirmative responsibility to assist in the recovery of affected species. Since the ESA allows permits to be issued where they minimize take and do not appreciably reduce the likelihood of a species' survival, the ESA does not allow permits to be revoked where they fail to provide *net* conservation or recovery benefits. Thus, applying the general permit revocation standard established under Part 13 is inappropriate in the context of No Surprises and undercuts the very notion of regulatory certainty by broadly expanding the conditions under which permits may be revoked. The Service has noted the unsuitability of Part 13 regulations in the context of HCPs and ITPs, calling the standard "inappropriately constraining and narrow." (69 Fed. Reg.

29682) As such, NAR urges the Service to reestablish the PRR under 50 CFR Part 17, as proposed.

- **The Proposal is Necessary to Fully Implement the ESA.** When considering the 1982 amendments to the ESA, Congress recognized that certainty would be necessary to trigger long-term private sector funding and land use commitments for species conservation. The No Surprises Rule as promulgated on February 23, 1998 (63 Fed. Reg. 8859) provides this certainty and conforms to the letter and spirit of the ESA while ensuring that federal agencies can continue to carry out their responsibilities to conserve endangered and threatened species. As the Proposed Regulations allow for meaningful implementation of No Surprises in the context of HCPs and associated ITPs, NAR urges the Service to finalize the rule as proposed. The failure to continue to make HCPs and associated ITPs and No Surprises assurances available to private landowners flies in the face of the letter and intent of the ESA by removing critical Congressionally-mandated species conservation tools.

In summary, NAR fully supports the Proposed Regulations, and more broadly, the continued institution of No Surprises and the Habitat Conservation Planning program under the ESA, and urge the Service to finalize the rule as proposed. NAR appreciates the opportunity to comment on this important policy.

Sincerely,

A handwritten signature in blue ink, appearing to read "Joseph M. Ventrone". The signature is fluid and cursive, with a long horizontal stroke at the end.

Joseph M. Ventrone  
Managing Director  
Regulatory and Industry Relations