



# “No Surprises” Rule *Objectives*

- Describe the background and purpose of the “No Surprises” rule
- Describe specific provisions of the “No Surprises” rule and how they affect the HCP program





# “No Surprises” *History* Highlights

- **Pre-policy – 1982 Congressional intent**
  - ❖ “...the Secretary may utilize this provision to approve conservation plans which provide long-term commitments regarding the conservation of listed as well as unlisted species and 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.”





# “No Surprises”

## *History Highlights cont.*

- Policy issued in 1994
  - ❖ found in the 1996 HCP handbook
- Final rule 1998
  - ❖ 63 FR 8859
  - ❖ 50 CFR 17.22(b)(5), 17.32(b)(5) – **FWS**



# No Surprises Assurances

Assurances apply only:

- To permits where the conservation plan is being properly implemented, and
- To species adequately covered by the conservation plan.



# “No Surprises” Rule *Definitions*

## Properly Implemented

### Conservation Plan:

- Any HCP, Implementing Agreement, and permit whose commitments and provisions have been or are being fully implemented by the permittee.



# “No Surprises” Rule Definitions

## Adequately covered species

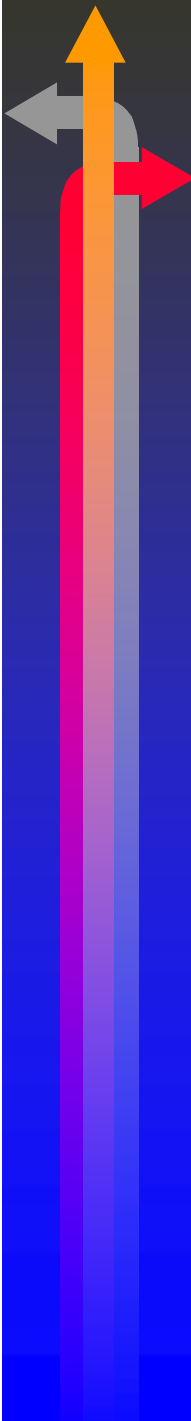
- Species addressed in an HCP for which permit Issuance criteria have been satisfied; species is listed on permit.
- Unlisted Species – addressed in HCP as if it were listed.





# “No Surprises” Rule *Definitions*

- Changed Circumstances:
  - ❖ future changes that are planned for in the HCP
- Unforeseen circumstances:
  - ❖ changes that were not anticipated, resulting in a substantial and adverse change in a species’ status



# “No Surprises” Rule Changed Circumstances

- HCP must describe the circumstances;
- HCP should provide for contingency, if changed circumstances occurs, including funding by Permittee;
- May require additional mitigation measures, if provided for in the operating conservation program.







# “No Surprises” Rule Unforeseen Circumstances

- FWS has the burden of demonstrating unforeseen circumstances exist;
- Federal government pays for remedy;
- FWS, NMFS, other governmental agency or a private entity can take additional actions.





# Determining “Unforeseen Circumstances”

The Director/Administrator will consider, but not be limited to:

- Size of current range of species
- Percentage of range adversely affected by HCP
- Percentage of range conserved by HCP
- Ecological significance of portion of range affected by HCP
- Level of knowledge about species and degree of specificity of species conservation program in HCP
- Whether failure to adopt additional conservation measures would jeopardize species



## No Surprises Assurances

In negotiating unforeseen circumstances, the Services will not require additional land, water, or financial compensation, or additional restrictions on the use of his/her land, water, or other natural resources, other than those agreed to in the HCP.



# “No Surprises” Rule Unforeseen Circumstances

- Negotiating with Permittee :
  - ❖ Can increase effectiveness of HCP by adjusting the program in a way that does not increase cost to permittee;
  - ❖ Need consent of Permittee for additional HCP restrictions or compensation.





# How to Increase Comfort-Level with “No Surprises”

- Be specific in the HCP
- Provide detailed changed circumstances
- Develop detailed responses to changed circumstances
- Limit Covered Species list
- Use active adaptive management
- Include specific benchmarks
- Permits of shorter duration





# Caveat to No Surprises Rule

## Permit Revocation rule

2004 – 50 CFR 17.22(b)(8), 17.32(b)(8)

An incidental take permit may not be revoked unless:

- ❖ Continuation of the permitted activity would be inconsistent with the statutory criterion that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild (i.e., jeopardy standard);
- ❖ And the inconsistency has not been remedied in a timely fashion.