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FOIA's Deliberative-Process Privilege and the ESA

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The Supreme Court delivered its opinion in *U.S. Fish & Wildlife Service v. Sierra Club* on March 4, 2020 and held that agency documents that lack a legally operative effect are likely to qualify for the deliberative process exemption under the Freedom of Information Act. The deliberative process exemption allows agencies to withhold inter- and intra-agency memorandums, letters, and other communications created during an agency's decisionmaking process.[1] Draft documents exchanged within or between agencies that never become final or legally operative may not be obtained through FOIA, even if those documents indicate the near-culmination of an agency's deliberative processes. Traditionally, the courts have established two fundamental requirements, both of which must be met, for the deliberative process privilege to be invoked. First, the communication must be pre-decisional.[2] Second, the communication must be deliberative, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters."[3]

At issue in *Sierra Club* were draft biological opinions pertaining to the Environmental Protection Agency's proposed rulemaking regarding cooling water intake structures in 2013. Cooling water intake structures draw water from a variety of sources to cool industrial equipment; in the process of drawing that water, such structures can affect fish and other aquatic wildlife. Because some of those aquatic species are endangered, EPA consulted with the U.S. Fish & Wildlife Service and the National Marine Fisheries Service (together, the "Services") under Section 7 of the Endangered Species Act. The Services drafted a biological opinion that concluded that EPA's 2013 rule, as drafted, would jeopardize endangered aquatic species and shared that draft with EPA. EPA ultimately withdrew its proposed rule on cooling water intake structures, significantly revised the rule, and consulted with the Services regarding its revision. The Services concluded that the revision would not result in jeopardy to endangered species and prepared and submitted another biological opinion to EPA, which finalized its cooling water intake structures rule later that same day.

Sierra Club submitted FOIA requests pertaining to the cooling water intake structures rule, seeking information on the Services' consultation with EPA regarding impacts to species. When the Service declined to produce the draft biological opinion for EPA's earlier version of the rule, Sierra Club sued the Services claiming that the draft biological opinion for the earlier rule was not protected by the deliberative privilege exemption. Sierra Club succeeded in the district court and in the appellate court, and the Supreme Court granted certiorari.

The Court held, 7-2, that the draft biological opinion was protected by the deliberative process privilege. Writing for the Court for the first time in a majority opinion, Justice Amy Coney

Barrett explained that the draft biological opinion, although it exhibited a degree of refinement was not final because it was not legally operative. Although Sierra Club had argued that the draft biological opinion expressed the Service's final views on EPA's initial 2013 rule, Justice Barrett answered that "[a] document is not final solely because nothing else follows it. Sometimes a proposal dies on the vine." What matters is "whether [a document] communicates a policy on which the agency has settled." The agency's deliberative process has been "consummat[ed]" with a document that will have "real operative effect." If the document is "merely tentative," no matter how far down the road the agency's deliberative processes might be, it remains protected from disclosure through the deliberative privilege exemption. The effects-based test for finality offered by the Sierra Club—that the draft biological opinion was final because it induced EPA to change its rule—would make *too many* agency communications final, as even emails from lower-level agency employees could be considered "final" if other agencies changed their positions.

Justice Breyer, dissenting and joined by Justice Sotomayor, would have preferred to examine the finality of a document in more detail than the "legally operative" test for finality offered by the majority. For Justice Breyer, the draft biological opinion did represent the Services' final view of EPA's 2013 rule, and its jeopardy conclusion was unlikely to change after it received feedback on the draft from EPA. Further, the draft biological opinion put the ball back in EPA's court—the Services had very little else to do while it waited for EPA to make the decision whether to move forward with the cooling water intake structures rule. And if the concern with publicizing deliberative documents is that public scrutiny would "chill" employees' expression of their candid views on the subject, it was unlikely that the disclosure of the draft biological opinion would have the same effect—especially because so many draft biological opinions are shared publicly anyways. Judge Breyer would have remanded the case to allow the Ninth Circuit to identify just how much work remained to be done on the Service's draft biological opinion to see whether it was truly final.

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1 The deliberative-process privilege is not absolute. Typically, a litigant may obtain deliberative process materials if his or her need for the materials and the need for accurate fact-finding override the government's significant interest in non-disclosure.

2 Jordan v. United States Dep't of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc)

3 Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975)