

Case No. 17-16560

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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SIERRA CLUB, INC.,  
*Plaintiff – Appellee,*

vs.

UNITED STATES FISH AND WILDLIFE SERVICE and  
NATIONAL MARINE FISHERIES SERVICE,  
*Defendants – Appellants*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

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**BRIEF OF *AMICUS CURIAE*  
UNION OF CONCERNED SCIENTISTS  
IN SUPPORT OF APPELLEES**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), *amicus* Union of Concerned Scientists (“UCS”) states that it does not have any parent companies and no publicly-held company has a 10% or greater ownership interest in it.

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## INTEREST OF THE AMICUS CURIAE<sup>1</sup>

Founded in 1969 by scientists and students at the Massachusetts Institute of Technology, the Union of Concerned Scientists (“UCS”) is a nonprofit science advocacy organization. UCS’s more than 500,000 members and supporters range from scientists to students to businesspeople who share the common goal of promoting the use of scientific analysis to create a healthy, safe, and sustainable future.

Through its Center for Science & Democracy, UCS promotes the role of science in government decisionmaking and seeks to preserve science-based public health, safety, and environmental safeguards. As part of its advocacy, UCS has released many reports on scientific integrity in policymaking and documented examples of political interference with scientific decisions, including under the Endangered Species Act (“ESA”) and other environmental statutes.<sup>2</sup> These

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure Rule 29(a)(2), *amicus* states that all parties have consented to or stated that they do not object to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(A)(4)(e), *amicus* certifies that no person or entity, other than *amicus* or its counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part.

<sup>2</sup> See, e.g., UCS, *Scientific Integrity in Policymaking: An Investigation into the Bush Administration’s Misuse of Science* (2004), available at [http://www.ucsusa.org/sites/default/files/legacy/assets/documents/scientific\\_integrity/rsi\\_final\\_fullreport\\_1.pdf](http://www.ucsusa.org/sites/default/files/legacy/assets/documents/scientific_integrity/rsi_final_fullreport_1.pdf); *Abuses of Science: Case Studies*, <http://www.ucsusa.org/our-work/center-science-and-democracy/promoting-scientific-integrity/abuses-science-case-studies> (last visited Nov. 18, 2017).

investigations have revealed, among other things, the editing of scientific information in ESA documents by political appointees.<sup>3</sup> Earlier this year, UCS released a toolkit to help scientists leverage their expertise by participating in ESA decisionmaking processes.<sup>4</sup> UCS is also a member of the Endangered Species Coalition, a national network of conservation, scientific, education, religious, sporting, outdoor recreation, business, and community organizations that works to safeguard and strengthen the ESA.<sup>5</sup>

UCS advocates for government transparency because the ability of courts and the public to scrutinize the governmental decisionmaking process is essential to upholding scientific integrity among government officials. Public access to the scientific documents involved in governmental decisions allows courts and the public to act as watchdogs for public policies while protecting scientists' right to present information without undue suppression from political appointees or the political manipulation of scientific data, and to ensure that the work of government

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<sup>3</sup> See *Political Appointee Edits Science on Greater Sage Grouse*, [http://www.ucsusa.org/center-for-science-and-democracy/scientific\\_integrity/abuses\\_of\\_science/a-to-z/sage-grouse.html](http://www.ucsusa.org/center-for-science-and-democracy/scientific_integrity/abuses_of_science/a-to-z/sage-grouse.html) (last visited Nov. 18, 2017).

<sup>4</sup> See UCS, *Advancing Science in the Endangered Species Act: A Toolkit for Scientists* (2017), available at <http://www.ucsusa.org/sites/default/files/attach/2017/07/esa-toolkit-ucs-july-2017.pdf>.

<sup>5</sup> See *About Us*, Endangered Species Coalition, <http://www.endangered.org/about-us/> (last visited Nov. 18, 2017).

scientists is given due consideration in public decisionmaking. This, in turn, encourages the public to become more deeply involved in the processes that lead to agency decisions.

Disclosure of agency documents under the Freedom of Information Act (“FOIA”) allows organizations like UCS to recognize failures of government agencies to meet standards of scientific integrity. UCS is thus concerned that FOIA be applied in a way that is faithful to its broad policy goal of promoting government transparency through liberal disclosure of documents. Disclosure of ESA consultation documents is especially relevant to UCS’s concerns because Congress mandates that these documents rely upon the “best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2).

### **SUMMARY OF ARGUMENT**

FOIA aims to open government action to public scrutiny. It thus serves the essential purposes of creating an informed citizenry and ensuring government transparency and accountability. Accordingly, it creates a strong presumption that all government documents are subject to disclosure upon request. The Supreme Court has repeatedly emphasized that FOIA’s exemptions to disclosure must be construed narrowly to be consistent with FOIA’s underlying purposes.

It is particularly important to require compliance with FOIA’s disclosure mandate when science-driven agency processes, such as consultation under section

7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), are implicated. The ESA requires that the U.S. Fish & Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS”) (collectively, “the Services”) rely on the best available science when drafting Biological Opinions. Biological Opinions are fundamentally scientific documents in which the Services apply their expertise to determine the impacts that a proposed action will have on threatened and endangered species.

As a result, there should be a strong presumption that ESA consultation documents are not subject to the deliberative process privilege. On the one hand, disclosure of draft ESA consultation documents is critical to enable courts and the public to ensure that agencies have complied with their congressionally-mandated duty to rely on the best available scientific data. Without such disclosure, neither the public nor courts would have any way of knowing that the Services or the agency taking final action had actually followed the scientific advice of their staff.

On the other hand, the release of such documents would not expose the Services’ decisionmaking process in such a way as to discourage candid discussion among agency staff. ESA consultation documents are primarily scientific and factual in nature and do not reflect subjective judgments or policy views of individual staff members, but instead reflect the best scientific data available on the effects the proposed action would have on listed species. In addition, the Services regularly make draft ESA consultation documents available to the public, and both

the Department of the Interior (“DOI”) and the National Oceanic and Atmospheric Administration (“NOAA”), the agencies within which the Services are based, have guidance documents indicating that significant drafts should be included in the administrative record. Finally, the draft Biological Opinions at issue in this case were nearly finished products and therefore reflected the official position of the agencies, not individual positions of staff members. Requiring the disclosure of such documents would therefore not discourage candid discussion among agency staff.

In sum, to preserve the scientific integrity of the ESA consultation process, it is essential that this Court rule that consultation documents—and especially draft Biological Opinions prepared for disclosure to the action agency—are presumptively subject to release pursuant to FOIA. Because the Services have made no showing that there is any reason to overcome such a presumption here, this Court should uphold the district court’s decision to order the release of the requested documents.

## **ARGUMENT**

### **I. FOIA’S PURPOSE IS TO PROMOTE TRANSPARENT AND ACCOUNTABLE DECISIONMAKING**

The goal of FOIA is “to open agency action to the light of public scrutiny.” *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976). It does so by “permit[ting] access to official information long shielded unnecessarily from

public view and . . . creat[ing] a judicially enforceable public right to secure such information from possibly unwilling official hands.” *EPA v. Mink*, 410 U.S. 73, 80 (1973). “The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

Accordingly, “virtually every document generated by an agency is available in one form or another, unless it falls within one of the Act’s nine exemptions.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975); *see* 5 U.S.C. § 552(b)(1)–(9). Given that the overall purpose of FOIA is to encourage disclosure, the Supreme Court has repeatedly emphasized that courts must construe these exemptions narrowly. *See, e.g., DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 7–8 (2001); *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989); *Dep’t of Justice v. Julian*, 486 U.S. 1, 8 (1988); *cf. United States v. Nixon*, 418 U.S. 683, 710 (1974) (Evidentiary privileges “are not lightly created nor expansively construed, for they are in derogation of the search for truth.”). The government therefore has the burden to prove that a requested document falls within one of FOIA’s exemptions. 5 U.S.C. § 552(a)(3).

Exemption 5 allows agencies to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than

an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). This provision shields “those documents, and only those documents, normally privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 149.

“Exemption 5 is to be construed ‘as narrowly as consistent with efficient Government operation.’” *Petro. Info. Corp. v. DOI*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (quoting *EPA v. Mink*, 410 U.S. at 87).

Exemption 5 encompasses the “deliberative process privilege,” which applies to “documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *Kowack v. U.S. Forest Serv.*, 766 F.3d 1130, 1135 (9th Cir. 2014). This privilege has its origins “in a now discredited 1841 decision of the British House of Lords” involving the “Crown privilege.”<sup>6</sup> First recognized in the United States in the 1950s, the deliberative process privilege is based on the idea that, for government agencies, “secrecy is necessary to candor, . . . candor is necessary to effective decisionmaking by the executive, and . . . enhancing the effectiveness of executive decisionmaking serves the public interest.”<sup>7</sup>

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<sup>6</sup> Michael Ray Harris, *Standing in the Way of Judicial Review: Assertion of the Deliberative Process Privilege in APA Cases*, 53 St. Louis U. L.J. 349, 359 (2009).

<sup>7</sup> Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 Ind. L.J. 845, 849 (1990).

In deciding whether documents are covered by the privilege, this Circuit “focus[es] on the *effect* of the materials’ release.” *Carter v. U.S. Dep’t of Commerce*, 307 F.3d 1084, 1090 (9th Cir. 2002) (emphasis added). Therefore, the privilege “applies only if ‘disclosure of [the] materials would expose an agency’s decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions.’” *Kowack*, 766 F.3d at 1135.

## **II. ESA CONSULTATION IS A SCIENCE-DRIVEN PROCESS**

Under section 7 of the ESA, federal agencies must “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence” or “result in the destruction or adverse modification” of critical habitat of listed endangered or threatened species. 16 U.S.C. § 1536(a)(2). To this end, any agency proposing an action (the “action agency”) must consult, formally and/or informally with the Services. Formal consultations require the Services to prepare a written Biological Opinion that includes a “detailed discussion of the effects of the action on listed species or critical habitat” and the Services’ “opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat.” 50 C.F.R. § 402.14(h)(2), (3).



The Services' role in this process is to provide expert, scientific analysis for the action agency. For example, Biological Opinions must include "a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." 16 U.S.C. § 1536(b)(3)(A). In carrying out this task, the Services must "[e]valuate the current status of the listed species or critical habitat," "[e]valuate the effects of the action and cumulative effects on the listed species or critical habitat," and "use the best scientific and commercial data available." 50 C.F.R. § 402.14(g)(2)–(3), (8). As this court has emphasized, a Biological Opinion may "be invalid if it fails to use the best available scientific information." *Pac. Coast Fed'n of Fishermen's Ass'ns v. NMFS*, 265 F.3d 1028, 1034 (9th Cir. 2001); *cf. Midwater Trawlers Coop. v. Dep't of Commerce*, 282 F.3d 710, 720–21 (9th Cir. 2002) (holding that a NMFS regulation under the Magnuson-Stevens Act was arbitrary and capricious because it "was a product of pure political compromise, not reasoned scientific endeavor" and "the best available politics does not equate to the best available science as required by the Act").

### **III. THIS COURT SHOULD ADOPT A STRONG PRESUMPTION THAT ESA CONSULTATION DOCUMENTS ARE NOT SUBJECT TO THE DELIBERATIVE PROCESS PRIVILEGE**

Because of the nature of the ESA consultation process, draft consultation documents should rarely qualify for the deliberative process privilege. On the one

hand, allowing the Services to keep such documents secret undermines the judicial review and public accountability necessary to ensure that the Services and the action agency comply with their duties to base their decisions on the best available science. On the other hand, the release of such documents will rarely implicate the chilling effect concerns underlying the deliberative process privilege.

A. The Disclosure of Draft ESA Consultation Documents Ensures Accurate Judicial Review and Public Accountability

The disclosure of ESA consultation documents allows courts and the public to ensure that the Services and the action agency fulfill their duties to rely upon the best scientific data available. ESA consultation documents are primarily scientific in nature. As such, their disclosure is essential to allowing courts and the public to determine whether the agencies' actions were arbitrary and capricious. The public availability of these documents is also critical to ensuring the accountability of agency actions and shining a spotlight on political interference with scientific decisions.

ESA consultations are scientific processes. As Judge Haggerty put it in *Northwest Environmental Advocates v. United States EPA*, No. 05-1876-HA, 2009 WL 349732 (D. Or. Feb. 11, 2009), ESA consultation documents are “not open to discretionary decisionmaking,” *id.* at \*7. Instead, “these documents lay out the law applicable to the decisions at hand, discuss the relevant science, and apply the law to that science.” *Id.*; accord *Greenpeace Found. v. Mineta*, No. 00-00068, slip op.

at 12 (D. Haw. Oct. 27, 2000) (“A determination of jeopardy . . . is an objective, fact-based conclusion.”); *Greenpeace v. NMFS*, 198 F.R.D. 540, 543 (W.D. Wash. 2000) (holding that the drafting of Biological Opinions did not “bear on the formulation or exercise of agency policy-oriented judgment”).

The disclosure of ESA consultation documents is necessary to ensure that the Services have complied with their statutory duties. Courts must have before them internal documents providing “evidence contrary to the Services’ ultimate findings” to determine whether their actions were arbitrary and capricious. *Wash. Toxics Coal. v. DOI*, No. C04-1998C, 2005 U.S. Dist. LEXIS 45566, at \*7 (W.D. Wash. June 14, 2005); *see also Desert Survivors v. DOI*, 231 F. Supp. 3d 368, 382 (N.D. Cal. 2017) (“There can be no doubt that under some circumstances, pre-decisional deliberative communications may go to the heart of the question of whether an agency action was arbitrary and capricious, an abuse of discretion or otherwise inconsistent with the law under Section 706(2) of the APA.”).

Accordingly, “indiscriminate use of the ‘deliberative process’ privilege to justify expurgation of administrative records may frustrate the process of judicial review of agency action under the APA.” *Seabulk Transmarine I, Inc. v. Dole*, 645 F. Supp. 196, 202 (D.D.C. 1986). As one commentator has explained,

applying the deliberative process privilege to redact information from the record associated with those portions of the rulemaking decision to which the arbitrary or capricious standard applies” makes it “virtually impossible to check upon whether an agency has—intentionally or

not—overstepped the legal authority given to it by Congress, or whether the agency has decided to act in a biased or wholly unreasonable manner.<sup>8</sup>

Disclosure is especially important when there is a risk of political interference with scientific decisionmaking. *Amicus* does not suggest that such interference took place in this case, but if the deliberative process privilege is allowed to mask the nature of an agency’s decisionmaking, it may be impossible for courts and the public to determine whether it has occurred.<sup>9</sup> Public disclosure and judicial review help to ensure that the considerable effort and resources expended by Services staff and scientists to create Biological Opinions based on the best scientific data available will not be improperly overturned by appointees more sensitive to changing political winds. A risk created by over-broad application of the deliberative process privilege is that it

will operate to diminish the sense of accountability under which executive officials do their business. That diminished sense of accountability may increase the likelihood that the official will act in a way that is sloppy or incompetent, that he will confuse his own self-interest (or that of a particular constituency) with the interests of the

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<sup>8</sup> Harris, *supra* note 6, at 408.

<sup>9</sup> “[T]here is mounting evidence that the Executive Branch is using the deliberative process privilege to frustrate judicial review by redacting information from administrative records that provide the agency’s underlying rationale for rulemaking decisions, and arguably as a subterfuge to cover up decisions that are being made largely on political grounds without regard to whether such decisions are legally or scientifically sound.” Harris, *supra* note 6, at 386.

public, or that he will engage in various kinds of bad acts with which he would not want to be publicly associated.<sup>10</sup>

. Thus, instead of suppressing scientists' ability to perform effectively their role as expert consultants in the section 7(a)(2) consultation process, public scrutiny and judicial review enabled by FOIA disclosure protects these scientists' work from political decisions that might fail to meet the congressional mandate to rely on the best scientific data available.

B. The Disclosure of Draft ESA Consultation Documents Will Not Chill Candid Discussion among Agency Scientists

For at least three reasons, disclosure of the draft consultation documents will not "discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Kowack*, 766 F.3d at 1135. First, there is no empirical support for the assumption that disclosure of documents allegedly subject to the deliberative process privilege *ever* chills candid discussions by agency staff. Such a chilling effect is particularly unlikely in the case of scientifically-driven processes like ESA consultation. Second, the Services regularly put consultation documents such as draft Biological Opinions into administrative records, and indeed have guidance indicating that significant drafts should be included in the record. As a result, agency staff should have no expectation that these drafts will be kept confidential. Third, the key documents at

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<sup>10</sup> Wetlaufer, *supra* note 7 at 893.

issue here—two draft Biological Opinions prepared by the Services to be shared with the Environmental Protection Agency (“EPA”) in December 2013—were virtually complete and thus represented the official positions of the Services rather than the individual views of staff. As such, they did not represent the kind of internal back and forth the privilege is intended to protect.

*1. There is Little Evidence for a Chilling Effect from Disclosure in General and such an Effect is Especially Unlikely in the Case of ESA Consultation Documents*

Disclosing ESA consultation documents generally will not in general discourage candid discussion within the Services. Except in rare cases involving particularly-sensitive policymaking, there is little support for the assumption that disclosure will chill staff candor. This chilling effect is particularly unlikely for ESA consultation documents because they are primarily scientific and factual documents.

The deliberative process privilege is premised on the idea that disclosing deliberative documents will hinder the frank exchange of view among agency staff. Yet, “[t]he evidence that has been proffered by the executive is nothing but the repeated recitation of the bare conclusory assertion that disclosure will cause chilling.”<sup>11</sup> As expressed by a leading treatise, the idea “that government

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<sup>11</sup> Wetlaufer, *supra* note 7, at 886–87; accord Kirk D. Jensen, Note, *The Reasonable Government Official Test: A Proposal for the Treatment of Factual Information Under the Federal Deliberative Process Privilege*, 49 Duke L.J. 561,

bureaucrats will not feel free to express their opinions fully and candidly when they fear that their views will be made public” is a “dubious empirical assumption.” 26A Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5680 (1992). Accordingly, the authors of the treatise conclude, “[t]he deliberative process privilege should seldom be upheld in a case where there is any need for the evidence because it rests on such a puny instrumental rationale.” *Id.*

Such a chilling effect is particularly unlikely in the case of scientific processes like ESA consultation. As indicated above, consultation is a science-driven process in which Congress has mandated that the Services “shall use the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2). The Services’ “Interagency Cooperative Policy on Information Standards under the Endangered Species Act,” 59 Fed. Reg. 34,271 (July 1, 1994),<sup>12</sup> is instructive in this regard. This policy requires that agency scientists “evaluate all scientific and other information that will be used to . . . prepare biological opinions.” *Id.* at 34,271. In doing so, the scientists must “gather and *impartially evaluate*

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587 (1999) (“Little, if any, empirical evidence exists to support the claim that such chilling actually occurs.”).

<sup>12</sup> This policy is still in effect. See *Endangered Species Act Policies, Guidance, and Regulations*, NOAA Fisheries, <http://www.nmfs.noaa.gov/pr/laws/esa/policies.htm> (last visited Nov. 18, 2017).

biological, ecological, and other information that disputes official positions, decisions, and actions proposed or taken by the Services during their implementation of the Act.” *Id.* (emphasis added). They must also “document their evaluation of information *that supports or does not support* a position being proposed as an official agency position on . . . interagency consultation.” *Id.* (emphasis added). When more senior staff review these documents, they are charged with “verify[ing] and assur[ing] *the quality of the science* used to establish official positions, decisions, and actions taken by the Services during their implementation of the Act.” *Id.* (emphasis added).

This policy establishes two key points. First, it emphasizes the objective, scientific nature of the task that the Services undertake when preparing a Biological Opinion. Second, because the policy requires that agency scientists include information on both sides of a scientific question in a Biological Opinion, it undermines any suggestion that the disclosure of a draft Biological Opinion will have a chilling effect on the candor of agency staff.

Judge Haggerty recognized the latter point in *Northwest Environmental Advocates*, explaining that:

[t]he release of a preliminary draft that may treat scientific information differently than it is treated in the final draft, or which reaches conclusions later modified, should not discourage candid discussions within the agencies. Many of the scientific questions dealt with in these drafts are difficult, and agency decisions are not overturned simply because of a change of position on a difficult issue.



The agencies will have the opportunity to defend the scientific rigor of their decisions and the reasons for choosing to utilize the scientific information they ultimately relied upon.

2009 WL 349732 at \*8; *see also id.* at \*7 (“Congressionally mandated scientific decisions, such as those made under § 7(a)(2), are less likely to result in the creation of documents which might expose an agency’s decisionmaking process in such a way as to discourage candid discussion within the agency.”).

Dialogue among scientists about the best way to interpret and present scientific evidence is a far cry from discussions about how to implement science into policy decisions. The latter is the task of the action agency receiving the Biological Opinions so that it can make policy decisions based on the Services’ analyses. These decisions involve weighing values such as the economic and political importance of a proposed action. As an exercise in weighing disparate values, these policy discussions imply that decisionmakers’ subjective judgments will be brought to bear on the diverse information presented to the action agency, including expert Biological Opinions. Staff and scientists creating the Biological Opinions, however, do not have to balance disparate policy values when coming to their conclusions: their discretion is limited to using the best available science to determine whether an action is “likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification” of the species’ habitat. 16 U.S.C. § 1536(a)(2). Scientists may disagree about the weight of

evidence, but this is a technical disagreement among experts whose discretion is greatly curtailed by statute in a way that the action agency's policy discretion is not.

A description of the 85-page final Biological Opinion issued by the Services at the end of the consultation at issue in this case illustrates the scientific nature of the document.<sup>13</sup> The first fourth of the opinion consists of a detailed description of the proposed action, including a summary of permitting requirements for owners and operators of plants as well as requirements for the agency in charge of making permitting decisions. Final BiOp at 2–17. After describing the methods used for its analysis, which “used the best available scientific and commercial data,” *id.* at 17–18, the document goes on describe the status of the affected species, *id.* at 21–28; to establish an environmental baseline, *id.* at 28–34, the purpose of which is to “describe[s] the condition of the listed species/critical habitat that exist in the action area in the absence of the action subject to consultation,” *id.* at 28; and to provide an extensive description of the effects of the action against this baseline,

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<sup>13</sup> The full final Biological Opinion is available on NMFS's website. FWS & NMFS, Endangered Species Act Section 7 Consultation: Programmatic Biological Opinion on the U.S. Environmental Protection Agency's Issuance and Implementation of the Final Regulations, Section 316(b) of the Clean Water Act (May 19, 2014) [hereinafter “Final BiOp”], *available at* [http://www.nmfs.noaa.gov/pr/consultation/opinions/biop\\_epa\\_cwa316b\\_2014.pdf](http://www.nmfs.noaa.gov/pr/consultation/opinions/biop_epa_cwa316b_2014.pdf). The Appellee has cited portions of the document in the Supplemental Excerpts of Record. SER 86–125.

*id.* at 35–66. This latter section goes into significant detail, identifying stressors on species resulting from impacts such as chemical discharges, flow alteration, and other aggregate impacts, and then discussing the most scientifically-sound ways to monitor and reduce these impacts. Following a bibliography summarizing the scientific papers used in creating the report, *id.* at 80–85, is a 253-page appendix that includes the extensive scientific data supporting the reasoning in the Biological Opinion. The document does not contain policy discussions; it is a technical document meant to convey the Service’s expert knowledge to the EPA for the EPA to make informed policy decisions of its own.

2. *Pursuant to Agency Guidance, the Services Routinely Place Draft Consultation Documents in the Administrative Record*

The disclosure of draft consultation documents also would not chill candor among agency staff because such documents are regularly included in the public administrative record. Accordingly, staff have no reason to expect that these documents will be withheld in the first place.

There are numerous cases within the Ninth Circuit where the Services have released draft Biological Opinions over the course of the litigation. *See, e.g., Selkirk Conservation All. v. Forsgren*, 336 F.3d 944, 949 (9th Cir. 2014); *Idaho Rivers United v. FERC*, 189 Fed. App’x 629, 637 (9th Cir. 2006); *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Gutierrez*, 606 F. Supp. 2d 1122, 1157 (E.D. Cal. 2014); *San Francisco Baykeeper v. U.S. Army Corps of Eng’rs*, 219 F. Supp. 2d

1001, 1010 (N.D. Cal. 2002) (expressly citing the administrative record containing a FWS draft Biological Opinion); *Hells Canyon Pres. Council v. Jacoby*, 9 F. Supp. 2d 1216, 1226 (D. Or. 1998); *Southwest Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 6 F. Supp. 2d 1119, 1123 (D. Ariz. 1997). *Idaho Rivers United v. FERC* even includes an agency (the FWS) publicly releasing a jeopardy draft Biological Opinion and then a non-jeopardy final Biological Opinion. 189 Fed. App'x at 637. The record in this case also includes several examples of administrative records released by the Services that contain draft Biological Opinions. See Certification of the U.S. Fish and Wildlife Service Administrative Record, *Klamath-Siskiyou Wildlands Ctr. v. NOAA*, Case No. 3:13-cv-03717-NC, SER 164–74; Defendant National Marine Fisheries Service's Notice of Lodging Administrative Record, *Native Fish Soc'y v. Bryson*, Case 3:15-cv-05872-EDL, SER 176–84; NOAA Fisheries Administrative Record, *Western Watersheds Project v. U.S. Fish and Wildlife Serv.*, Case No. 4:12-cv-00197-BLW, SER 186–91; Defendant National Marine Fisheries Service's Notice of Lodging Administrative Record, *Bark et al. v. Northrop et al.*, Case No. 3:13-cv-00828-AA, SER 193–99.

The Services have even issued guidance regarding the preparation of administrative records indicating that the record should include significant drafts. The DOI (of which the FWS is a part) requires drafts to be put into the

administrative record when they “help substantiate and evidence the decision-making process.” SER 155. Drafts to be included in the administrative record include those that “contain unique information such as an explanation of a substantive change in the text of an earlier draft, or substantive notes that represent suggestions or analysis tracing the decision making process.” *Id.* Similarly, NOAA (which includes NMFS) has guidelines that distinguish between working drafts that include personal notes and drafts and internal briefing materials that “will be identified for inclusion in the Administrative Record.” SER 133. The latter sort includes both “significant drafts” and “drafts with independent legal significance.” NOAA’s guidelines on significant drafts are:

**“Significant” Drafts** – Significant drafts must be included in the Administrative Record *if* ideas in the draft reflect significant input into the decision-making process. Significant input may exist, for example, if the document reflects alternative approaches, grounded in fact, science, or law, to resolving a particular issue or alternative interpretations of factual, scientific, or legal inputs. Significant drafts must be identified for inclusion in the Administrative Record, but flagged for potential listing, in whole or in part, on the agency’s Privilege Log.

SER 135. NOAA’s guidelines on drafts with independent legal significance are:

**Drafts with Independent Legal Significance** – Final draft documents with independent legal significance, *such as final draft environmental impact statements*, are to be included in the Administrative Record and will not be flagged for potential listing on the agency’s Privilege Log.

SER 135 (emphasis added). As final drafts of congressionally-mandated ESA documents, the December 2013 Biological Opinions are drafts with independent legal significance that employees would expect to be included in the administrative record. In sum, given agency guidelines recommending the release of draft Biological Opinions and the fact that draft Biological Opinions are regularly released in the administrative record and/or produced over the course of litigation, staff should have no expectation that draft Biological Opinions will be kept confidential.

3. *The December 2013 Biological Opinions Represented the Official Positions of the Services*

The December 2013 Biological Opinions were virtually complete and thus represented the official position of the services rather than the individual views of staff. As described by Appellees, the draft Biological Opinions were on track for the Services to release them to EPA by early December, the FWS Biological Opinion was finalized to the point that it had incorporated edits from the official in charge of signing off on its release, and staff had already moved into planning for their “rollout” to Congress and other agencies. Appellee Br. at 11. The December 2013 Biological Opinions were therefore not working drafts, but nearly final documents that the Services intended to release to the EPA imminently “for the purpose of analyzing the reasonable and prudent alternatives.” 50 C.F.R. § 402.14(g)(5). These drafts were the documents “in which the Services *concluded*

that EPA's regulation in its then-current form was likely to jeopardize listed species and destroy or adversely modify designated critical habitat." ER 41 (emphasis added). As documents reflecting the Services' conclusions, the December draft Biological Opinions reflected the official position of the agencies. As a result, their disclosure cannot chill candid internal discussions.

Other correspondence shows that staff expected these draft documents to be put into the administrative record. A December 3, 2013 email acknowledged that the Services "plan to put all meeting notes, emails and draft opinions in the record." SER 76; *see also* SER 77 ("Services confirmed their draft Biop expected this Friday will be in the record"). If agency staff are operating under the assumption that documents will be included in the administrative record and therefore eventually will be released to the public, the disclosure of those documents cannot chill their ability to engage in candid scientific discussion.

### **CONCLUSION**

In sum, there is little reason to believe that the disclosure of ESA consultation documents, either in this case or in general, will chill the candid exchange of information among the Services' scientists. Given the importance of public disclosure of such documents to both public accountability and judicial review of scientific decisionmaking, this Court should adopt a strong presumption that such documents are not subject to the deliberative process privilege.

For the foregoing reasons, *amicus* UCS respectfully requests that the judgment of the district court be affirmed.

DATED: November 20, 2017

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<sup>14</sup> The Emmett Environmental Law & Policy Clinic would like to acknowledge the contributions to this brief of Thomas Wolfe, a student in the Clinic.



## **CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(G), I hereby certify that the foregoing brief complies with the type-volume limitations in Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(b). It was prepared using Microsoft Word 2013 in Times New Roman 14-point font, a proportionally spaced typeface, and contains 5,383 words.

*/s/ Shaun A. Goho*  
Shaun A. Goho

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/EF system on November 20, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Shaun A. Goho  
Shaun A. Goho

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