No. 19-547

IN THE

Supreme Court of the United States

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Petitioners,

v.

SIERRA CLUB, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* ANDREW ROSENBERG, JACOB CARTER, AND JOEL CLEMENT IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are former officials of the National Marine Fisheries Service ("NMFS"), the Department of the Interior ("DOI"), and the United States Environmental Protection Agency ("EPA"). Collectively, they have decades of experience in the implementation of the Endangered Species Act ("ESA") and therefore have an interest in its proper implementation. As scientists, they are also concerned with the integrity of decisionmaking under the ESA and are particularly concerned that a reversal of the decision of the Court of Appeals will disrupt the implementation of the ESA by seriously undermining the transparency of the consultation process.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief either in whole or in part and that no person or entity, aside from *amici* and their counsel, made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), *amici* state that counsel of record for Petitioners and Respondent have consented to the filing of this brief.

("NOAA") scientist, then NOAA Fisheries Regional Administrator in the Northeastern United States, and then Deputy Director of NMFS.

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SUMMARY OF ARGUMENT

The purpose of the Freedom of Information Act ("FOIA") is to promote government accountability and an informed citizenry. It does so by ensuring the public has access to information regarding both *what* the

government does and *why* it takes those actions. Accordingly, although FOIA incorporates nine exemptions to its general disclosure mandate, this Court interprets those exemptions narrowly. In applying the deliberative process privilege under exemption 5, in particular, courts adopt a functional approach under which documents may be withheld only if their disclosure will harm the decisionmaking process by discouraging candor among agency staff.

In this case, the documents that Petitioners assert are protected by the deliberative process privilege are draft Biological Opinions prepared under section 7 of the ESA. Section 7 requires that federal agencies proposing actions that might harm threatened or endangered species (collectively, "listed species") consult with the U.S. Fish & Wildlife Service ("FWS") and NMFS (collectively, the "Services"). If, when reviewing an agency proposal, the Services conclude that it could jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat, they document this finding in a Biological Opinion.

Biological Opinions are not merely recommendations, but documents that carry real legal and practical weight. If a federal agency persists with an action that the Services have found will cause jeopardy, the action may be struck down as unlawful and may result in liability for "take" of listed species. This weight is not lessened by the fact that a Biological Opinion is labeled "draft." In fact, it is through the sharing of a draft "jeopardy" Biological Opinion that the Services typically exercise their authority in an ESA consultation. In response to the receipt of a draft jeopardy

finding, the action agency usually modifies its proposal to address the Services' concerns, resulting in the issuance of a final Biological Opinion with a no-jeopardy finding. Multiple published judicial decisions reflect this process, and even the sequence of events in this case demonstrate it in action. Draft "jeopardy" Biological Opinions that reflect decisions adopted by the Services, like those at issue in this case, are therefore not merely interim steps, but instead legal and policy decisions with real force and effect.

Moreover, the public disclosure of draft Biological Opinions will not chill the candor of staff at the Services. The assumption of a chilling effect is a theory with no empirical support that is particularly unlikely in the case of science-driven processes like ESA consultation. In addition, the Services have issued guidance indicating that significant drafts such as those at stake here should be included in the administrative record and, pursuant to this guidance, have frequently released draft Biological Opinions to the public. As a result, staff at the Services do not have any expectation that these drafts and the scientific evidence they contain will be kept confidential.

While there is thus little evidence that the withholding of draft Biological Opinions would serve the purposes that the deliberative process privilege seeks to advance, the disclosure of such documents promotes important public interests. In particular, it fulfils FOIA's purpose of ensuring public disclosure of the reasons underlying the policies that agencies adopt, and thus promotes public accountability and scientific transparency.

ARGUMENT

I. FOIA's Purpose is to Promote Transparent and Accountable Decisionmaking and this Court Therefore Interprets its Exemptions Narrowly

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, this Court has repeatedly emphasized that courts must construe these exemptions narrowly. *See, e.g., U.S. Dep't of the Interior 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." *Sears*, 421 U.S. at 149. "Exemption 5 is to be construed 'as narrowly as consistent with efficient Government operation.'" *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (quoting *Mink*, 410 U.S. at 87).

One of the privileges incorporated by Exemption 5 is 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." *Klamath Water Users Protective Ass'n*, 532 U.S. at 8 (citations and internal quotation marks omitted). First recognized in the United States in the 1950s, this 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."[2]

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[2] 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, courts "focus on the *effect* of the materials' release." *Dudman Commc'ns Corp. v. Dep't of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987) (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 v. U.S. Forest Serv.*, 766 F.3d 1130, 1135 (9th Cir. 2014) (citations and internal quotation marks omitted) (alteration in original); *accord Nat. Res. Def. Council v. EPA*, 954 F.3d 150, 158 (2d Cir. 2020) ("The 'key question' we keep in mind when assessing the application of the deliberative process privilege to an agency record is 'whether disclosure would tend to diminish candor within an agency.'") (quoting *Petroleum Info. Corp.*, 976 F.2d at 1435).

II. ESA Consultation is a Science-Driven Process in Which the Services Wield Considerable Power

A. The Services' Role in the Consultation Process is to Provide a Science-Based Check on Action Agency Proposals

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 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 one or both of the Services.[3]

If the action "may affect listed species or critical habitat," 50 C.F.R. § 402.14(a), then the action agency must engage in formal consultation, during which the Services prepare a "written statement" describing "how the agency action affects the species or its critical habitat." 16 U.S.C. § 1536(b)(3)(A). This statement, which the Services refer to as a "Biological Opinion," must include 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."[4] 50 C.F.R. § 402.14(h)(2), (3).

If the Services conclude that an action will cause jeopardy, then they must "suggest those reasonable and prudent alternatives" available to the action

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[3] The FWS fulfills this consultation role under the ESA for terrestrial and freshwater species, while NMFS does so for marine and anadromous species. FWS & NMFS, Memorandum of Understanding between the U.S. Fish and Wildlife Service and the National Marine Fisheries Service Regarding Jurisdictional Responsibilities and Listing Procedures under the Endangered Species Act of 1973 (1974), *available at* https://www.fisheries.noaa.gov/national/endangered-species-conservation/endangered-species-act-guidance-policies-and-regulations.

[4] For the sake of brevity, this brief refers to either a finding that an action is likely to jeopardize the continued existence of a listed species or that it is likely to result in the destruction or adverse modification of critical habitat as a "jeopardy" finding.

agency that would avoid jeopardy. 16 U.S.C. § 1536(b)(3)(A). If instead the Services conclude that the action will not cause jeopardy, they do not need to identify such alternatives and instead will issue an "Incidental Take Statement," which serves as a safe harbor from liability for any "takes" of listed species that arise from the action. 16 U.S.C. § 1536(b)(4).

The Services' role in this process is based on their scientific expertise. 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 multiple courts of appeals have held, 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); *accord Defs. of Wildlife v. U.S. Dep't of the Interior*, 931 F.3d 339, 345 (4th Cir. 2019); *Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1265 (11th Cir. 2009).

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.[5] The first quarter of the opinion

[5] The full final Biological Opinion is available on EPA's website. FWS & NMFS, Endangered Species Act Section 7 Consultation: Programmatic Biological Opinion on the U.S. Environmental

consists of a detailed description of the proposed action (an EPA rule regarding Clean Water Act standards for cooling-water intake structures), including a summary of permitting requirements for owners and operators of plants subject to the rule as well as requirements for the agency responsible for making permitting decisions. Final BiOp at 2–17. After summarizing the Services' analytical methods, which including "us[ing] the best available scientific and commercial data," *id.* at 17–18, the document goes on to describe the status of the affected species, *id.* at 21–28; 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 provide an extensive description of the effects of the action against this baseline, *id.* at 35–66. This last 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 Bi-

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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* https://www.epa.gov/sites/production/files/2015-04/documents/final_316b_bo_and_appendices_5_19_2014.pdf .

ological Opinion. The document does not contain policy discussions; it is a technical document meant to convey the Services' expert knowledge.

Essentially, a Biological Opinion is the outcome of the process of compiling and synthesizing scientific information. While the Services must make choices as to the weight of evidence, these choices are fundamentally different from policy decisions on actions government agencies should take in the public interest. Weighing the evidence is inherent in the determination of what is the "best available science," and how that determination is made should be as open as possible.

B. When the Services Reach a Jeopardy Conclusion, that Decision Carries Significant Practical Weight

The Biological Opinion, while "theoretically serv[ing] an 'advisory function,'" in fact "has a powerful coercive effect on the action agency." *Bennett v. Spear*, 520 U.S. 154, 169 (1997). In particular, "the Biological Opinion and accompanying Incidental Take Statement alter the legal regime to which the action agency is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions." *Id.* at 178. An action agency that "proceed[s] with its proposed action" despite the Services' determination that the action will cause jeopardy or adverse modification faces "a substantial risk that its (inexpert) reasons turn out to be wrong." *Id.* at 170. In particular, the action may be struck down as unlawful, *TVA v. Hill*, 437 U.S. 153, 193-94 (1978), and—without the safe harbor provided by the Incidental Take Statement—may result in liability for

"take" of listed species, *Bennett*, 520 U.S. at 170. As a result, "the action agency rarely, if ever, chooses to disregard the terms and conditions of an Incidental Take Statement." *Arizona Cattle Growers' Ass'n v. FWS*, 273 F.3d 1229, 1240 (9th Cir. 2001).

C. The Fact that a Biological Opinion is Labeled "Draft" Does not Lessen its Impact

This "coercive effect" is not diminished by the fact that a Biological Opinion is labeled "draft." When the consultation process works as intended, an action agency will modify its proposal in response to the Services' preparation of a draft jeopardy opinion. As a result, the Services rarely issue a final "jeopardy" Biological Opinion.[6] Instead, it is through the sharing of their jeopardy conclusions in "draft" documents that the Services exercise their authority in the ESA consultation process.

The Services' consultation regulations embody the assumption that the Services will convey their "jeopardy" determinations to action agencies through "draft" documents. Under these regulations, once the Services have determined that an action will cause "jeopardy," they must, "[i]f requested, make available to the Federal agency the draft biological opinion for

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[6] A review of 6,829 FWS formal consultations between 2008 and 2015 found that only *two* resulted in the issuance of a final, jeopardy Biological Opinion. Jacob W. Malcom & Ya-Wei Li, *Data Contradict Common Perceptions About a Controversial Provision of the US Endangered Species Act*, 112 Proc. Nat'l Acad. Sci. 15,844, 15,848 (2015). The authors identified the modification of agency proposals in response to the Services' preparation of draft jeopardy Biological Opinions as one reason for the extremely low number of final jeopardy opinions. *Id.* at 15,847.

the purpose of analyzing the reasonable and prudent alternatives" that the Services have identified pursuant to their jeopardy conclusion. 50 C.F.R. § 402.14(g)(5). Because federal agencies know that their proposed action will not survive in court in the face of a "jeopardy" determination, *cf. Bennett*, 520 U.S. at 170, they typically respond to the receipt of such a draft by modifying their proposal to reduce the harm to listed species. If the Services are satisfied that these modifications will prevent the action from causing jeopardy, the Services then release a final Biological Opinion with a no-jeopardy conclusion.

Several cases demonstrate the power of a draft jeopardy Biological Opinion in action. For example, in *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944 (9th Cir. 2003), a timber company sought an easement across part of the Colville National Forest to reach inholdings on which it intended to harvest trees. The FWS initially completed a draft Biological Opinion, in which it concluded that granting the easement would cause jeopardy for some listed species. *Id.* at 949. In response, the U.S. Forest Service, FWS, and the timber company negotiated a Conservation Agreement that would mitigate some of the effects of the easement. The FWS subsequently produced a final Biological Opinion. "Relying heavily on the mitigating effects of the Conservation Agreement . . ., the opinion concluded that the [easement] would not jeopardize any of the threatened or endangered species in the area." *Id.* at 950.

Similarly, in *Nat'l Audubon Soc'y v. FWS*, 55 F. Supp. 2d 316 (E.D.N.Y. 2014), the FWS prepared a

draft Biological Opinion for a U.S. Army Corps of Engineers ("Army Corps") beach construction project, which concluded that the project "was likely to jeopardize the continued existence of the piping plover," *id.* at 324, a beach-nesting shorebird. In response, the Army Corps, FWS, and other cooperating agencies development "conservation measures to minimize impacts to the piping plover." *Id.* FWS issued a final Biological Opinion, in which it found that the project would not cause jeopardy, relying on the conservation measures, a decision that was subsequently upheld in court. *Id.* at 354.

Several other cases similarly involve the modification of proposals following the Services' issuance of a draft jeopardy Biological Opinion. *See, e.g.*, *Idaho Rivers United v. Foss*, 373 F. Supp. 2d 1158, 1159 (D. Idaho 2005) (FWS and applicant for Federal Energy Regulatory Commission license entered into settlement agreement following issuance of draft jeopardy Biological Opinion); *Hayward Area Planning Ass'n v. Norton*, No. C 00-4211 SI, 2004 WL 724950, at *1 (N.D. Cal. Mar. 29, 2004) (applicant for permit from Army Corps modified its proposed development after FWS issued draft jeopardy Biological Opinion). In each of these cases, it was the Services' conclusion, in a draft Biological Opinion, that the proposed action would jeopardize listed species that resulted in modifications to the proposal that would reduce or mitigate the harm to the species.

This kind of process was exemplified by the events underlying this case. In the fall of 2013, EPA developed what was intended to be a "final rule." J.A. 89-

90. In response, the Services drafted Biological Opinions embodying the conclusion that EPA's rule would jeopardize listed species and adversely affect listed species' critical habitat. As the Ninth Circuit properly concluded, the draft Biological Opinions "represent[ed] the final view of the Services regarding the then-current November 2013 proposed rule." Pet. App. 18a. In December 2013, the Services communicated to EPA their conclusions that the rule would violate the jeopardy prohibition. J.A. 102. While the Services did not send the Biological Opinions themselves to EPA, they did send a set of possible reasonable and prudent alternatives—alternatives that are required under the ESA only in response to a jeopardy determination. J.A. 106-07; *see* 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(5), (h)(2). In response, after additional communications among the Services and EPA, EPA modified the rule to address the Services' concerns. National Pollutant Discharge Elimination System—Final Regulations To Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities, 79 Fed. Reg. 48,300, 48,327 (Aug. 15, 2004) (explaining that during the consultation process "EPA made a number of adjustments to the rule to protect threatened and endangered species and designated critical habitat"). With these modifications in place, the Services finalized a no-jeopardy Biological Opinion.

Thus it is through the preparation of draft "jeopardy" Biological Opinions that the Services exercise their power in the consultation process. Regardless of whether such a draft opinion carries the "force of law," it is "a decision . . . which has real operative effect,"

Sears, 421 U.S. at 160, and is a far cry from the mere "recommendations" of lower-level staff to a supervisor. Pet. Br. 19.

For these reasons, the government's reliance on the D.C. Circuit's decision in *National Security Archive* is misplaced. *See* Pet. Br. at 39 (citing *National Security Archive v. CIA*, 752 F.3d 460 (D.C. Cir. 2014)). In that case, the court held that even in situations where there was "no final agency document because a draft died on the vine," a "draft is still a draft and thus still pre-decisional and deliberative." *Nat'l Security Archive*, 752 F.3d at 463. The "dying on the vine" analogy is inapt because here the draft jeopardy Biological Opinions were the Services' final word on the then-current version of EPA's rule and had their intended effect of producing changes in the action agency proposal.

III. The Disclosure of Draft Biological Opinions Will Not Chill Candid Discussion at the Services

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 science-driven processes like ESA consultation. Second, the Services have issued guidance indicating that significant drafts such as those at stake here should be included in administrative records. Third, pursuant

to this guidance, the Services regularly release draft Biological Opinions to the public. As a result, staff at the Services do not, in our experience, have any expectation that these drafts and the scientific evidence they contain will be kept confidential.

A. There is Little Evidence for a Chilling Effect from Disclosure in General and Such an Effect is Especially Unlikely in the Case of Draft Biological Opinions

Disclosing draft Biological Opinions generally will not 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 draft Biological Opinions 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 views 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."[7] As expressed by a leading treatise, the idea "that government 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 Kenneth W. Graham, Jr. & Ann Murphy, *Federal Practice and*

[7] Wetlaufer, *supra* note 2, at 886–87.

Procedure: Evidence § 5680 (April 2020 update). 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 scientific analysis and summary data as well as methods and results are not private for ESA listings, even if some data sets may contain confidential information that prevents releasing raw data (e.g. locations of last remaining individuals of a listed species). The work of many scientists is usually and properly considered in preparing a draft Biological Opinion. The information in that sense is not closely held and should not be.

The Services' Interagency Cooperative Policy on Information Standards under the Endangered Species Act, 59 Fed. Reg. 34,271 (July 1, 1994),[8] 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* biological, ecological, and

[8] This policy is still in effect. *See Endangered Species Act Policies, Guidance, and Regulations*, NOAA Fisheries, https://www.fisheries.noaa.gov/national/endangered-species-conservation/endangered-species-act-guidance-policies-and-regulations (last visited July 30, 2020).

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 scientific 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.

In fact, surveys of staff from the Services and other federal agencies demonstrate that it is not public disclosure of their scientific analyses that they fear, but rather political interference within the agency. In a 2018 survey on scientific integrity, hundreds of federal scientists from FWS, NMFS, and other agencies disagreed that they could "openly express any concerns about the mission-driven work of my agency

without fear of retaliation."[9] This result echoed those from 2005 surveys, which found that almost a third of FWS and NMFS scientists felt that they could not express "concerns about the biological needs of species and habitats without fear of retaliation."[10] From this perspective, the public disclosure of their scientific conclusions might even help protect agency scientists from interference or retribution.

B. The Services Have Issued Guidance Calling for the Inclusion of "Significant Drafts" or "Drafts with Independent Legal Significance" in Administrative Records

The Services have issued guidance regarding the preparation of administrative records indicating that the record should include "significant drafts." 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." DOI, Standardized Guidance on Compiling a Decision File and an Administrative Record 10 (June 27, 2006), https://www.nps.gov/features/foia/Standardized-

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[9] Gretchen T. Goldman et al., *Perceived Losses of Scientific Integrity under the Trump Administration: A Survey of Federal Scientists*, 15(4) PLOS One e0231929, https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0231929.

[10] *National Oceanic & Atmospheric Administration Fisheries Service Scientist Survey*, Union of Concerned Scientists (Aug. 2, 2008), https://www.ucsusa.org/resources/survey-noaa-fisheries-scientists; *Survey: US Fish & Wildlife Service Scientists*, Union of Concerned Scientists (July 11, 2008), https://www.ucsusa.org/resources/survey-us-fish-wildlife-service-scientists.

Guidance-on-Compiling-and-Administrative-Record.pdf. 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 directing that agencies include both "significant drafts" and "drafts with independent legal significance" in administrative records. NOAA, Guidelines for Compiling an Agency Administrative Record 9 (Dec. 21, 2012), https://www.gc.noaa.gov/documents/2012/AR_Guidelines_122112-Final.pdf. NOAA's guidelines provide that:

> 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.

Id. Similarly, NOAA's guidelines on drafts with independent legal significance state that: "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." *Id.* 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 under these agency guidelines. In addition, these guidance documents are inconsistent with Petitioners' argument that documents are subject to the deliberative process privilege merely because they are labeled "draft."

These guidance documents build on the Services' regulations, which specify that draft Biological Opinions must be shared upon request not just with the action agency, but also with any private "applicant" (as when the underlying agency action is the grant of a permit or other approval). 50 C.F.R. § 402.14(g)(5). This regulation demonstrates that draft Biological Opinions are not documents that agency scientists would expect to be kept confidential.

C. Pursuant to this Guidance, the Services Routinely Place Draft Biological Opinions in the Administrative Record or Otherwise Release Them to the Public

The disclosure of draft Biological Opinions also would not chill candor among staff at the Services 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 judicial decisions that mention the Services' inclusion in the administrative record—and consequent public release—of draft Biological Opinions. *See, e.g.*, *Selkirk Conservation Alliance*,

336 F.3d at 949; *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. 2008); *San Francisco Baykeeper v. U.S. Army Corps of Eng'rs*, 219 F. Supp. 2d 1001, 1010 (N.D. Cal. 2002); *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); *see also* Section I.C, *supra* (discussing cases in which the action agency modified its proposal after receiving a jeopardy draft Biological Opinion). In *Idaho Rivers United v. FERC*, for example, FWS publicly released a jeopardy draft Biological Opinion and then a non-jeopardy final Biological Opinion. 189 Fed. App'x at 637. The record submitted to the court below also includes several examples of administrative records released by the Services that contain draft Biological Opinions. *See* SER 163-199.

This routine practice of publicly disclosing draft Biological Opinions undermines the government's asserted need for a bright-line rule to promote candor by agency staff. *See* Pet. Br. 25. If the Services' scientists are accustomed to the public disclosure of their analyses in draft Biological Opinions, then a court ordering the release of such opinions pursuant to FOIA could have no effect on their incentives to be candid in their recommendations. Moreover, despite this history of disclosure, the Petitioners point to no examples of ESA consultations in which scientists or other staff at the Services have carried out flawed analyses because they feared the disclosure of their conclusions in a draft Biological Opinion.

IV. The Disclosure of Draft Biological Opinions Ensures Scientific Transparency and Public Accountability

The disclosure of draft Biological Opinions allows the public to ensure that the Services fulfill their duty to rely upon the best scientific data available. Such disclosure thus fulfils FOIA's purpose of ensuring public disclosure of "the reasons which did supply the basis for an agency policy actually adopted." *Sears*, 421 U.S. at 152.

As explained above, a draft "jeopardy" Biological Opinion typically functions to drive the action agency to modify its proposed action in a way that avoids jeopardy. *See* Section II.C, *supra*. Courts, regulated industries, the scientific community, and the public at large can only determine whether the modifications in fact achieve this goal by comparing the initial finding of jeopardy with the final, modified agency action. In particular, these drafts allow the public to follow the logic of the decision process and understand where the Services draw the line between jeopardy and no-jeopardy. Removing parts of this logic chain makes it significantly harder to understand why the government has taken any given action.

Such disclosure is particularly important to the scientific community. Biological Opinions provide important information about the status of listed species, threats to them, and potential mitigation and recovery measures. "Successive biological opinions can be used to monitor trends in the species' baseline, making predictions of the impacts of future actions more reliable." FWS & NMFS, *Endangered Species Consul-*

tation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act, at 4-2 (1998). For example, if scientists want to review at a later date whether the reasonable and prudent alternatives developed in the consultation process actually achieved their intended result, then access to the draft Biological Opinion will help them carry out this analysis.

Such disclosure is especially important when there is a risk of political interference with scientific decisionmaking. *Amici* do 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.[11] Public disclosure and judicial review help to ensure that the considerable effort and resources expended by scientists and other staff at the Services to create Biological Opinions based on the best scientific data available will not be improperly overturned by appointees more sensitive to changing political winds.

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[11] Whistleblowers from the Services have in other cases credibly alleged political interference with the development of Biological Opinions. *See, e.g.*, *Distorting Scientific Knowledge on Florida Panthers*, Union of Concerned Scientists, https://www.ucsusa.org/resources/distorting-scientific-knowledge-florida-panthers; *Salmon Experts Pressured to Change Findings*, Union of Concerned Scientists (Dec. 2, 2008), https://www.ucsusa.org/resources/salmon-experts-pressured-change-findings; *Science Regarding Endangered Species Act Manipulated*, Union of Concerned Scientists (Aug. 14, 2008), https://www.ucsusa.org/resources/science-regarding-endangered-species-act-manipulated.

Thus, instead of suppressing scientists' ability to perform effectively their role as experts in the section 7 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.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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August 3, 2020