High Court Seems To Seek Balance In Agency Draft Disclosure

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The U.S. Supreme Court, in its first oral argument with newly appointed Justice Amy Coney Barrett on the bench, recently delved into the limits on the federal government's ability to protect its internal deliberations from public disclosure, in U.S. Fish and Wildlife Service v. Sierra Club.

In an argument that probed the intricacies of a multiagency administrative process, the court explored when an agency's internal deliberations begin to have real-world effects, and whether that should influence what agency documents must be disclosed to the public. While the issue seems fairly esoteric at first glance, draft documents play a significant role in the administration of the Endangered Species Act, or ESA. The ruling here will have impacts on agency rulemaking and project permitting alike.

The issue was argued on Nov. 2, in the context of a request under the Freedom of Information Act for disclosure of draft biological opinions prepared by the Fish and Wildlife Service and the National Marine Fisheries Service. The Sierra Club submitted a FOIA request seeking drafts of biological opinions that the services prepared in conjunction with a U.S. Environmental Protection Agency rulemaking. The services declined to release the draft biological opinions, asserting that they are protected from disclosure under FOIA's deliberative process exemption.[1]

Oral argument emphasized the unique role the biological opinion plays in an agency process. The discussion highlighted the services' common practice of sharing all, or portions, of a draft biological opinion with the action agency.

The government argued this was simply part of the deliberative process, while the Sierra Club argued that the services take this step to influence the action agency's decision, and that the public should be allowed to see the documents shared between the agencies. This fairly unique aspect of how the services use draft biological opinions may differentiate the facts of this case from drafts generated in other administrative processes that are not shared outside the agency.

The justices, in a concession to the limitations of telephonic oral argument, took turns, in order of seniority, probing the arguments advanced by both parties. The federal government's counsel advocated a bright-line test: Draft documents that precede the agency's final decision should be protected under FOIA's deliberative process exemption, so

long as they are predecisional and deliberative.

Counsel for Sierra Club argued for a factual inquiry: whether a document constitutes an agency decision that has appreciable consequences. The justices appeared troubled by the potential for federal agencies to withhold any document labeled a draft, yet also concerned about how to articulate a legal test for determining when records are being improperly withheld.

History

ESA Section 7(a)(2) requires that an agency — prior to authorizing, funding or otherwise carrying out an action — must consult with the services to:
insure that any action authorized, funded, or carried out by such is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat.[2]

This consultation obligation arises when agencies promulgate rules, grant right-of-ways, issue permits or provide funding to nonfederal proponents. The product of the consultation process is a biological opinion authorized by the services.

While the biological opinion itself is not the primary agency action — in the sense that it arises as a corollary process to another agency action — the Supreme Court has nonetheless held that a biological opinion is a final agency action subject to judicial review under the Administrative Procedure Act.[3]

In this case, the consultation concerned the EPA's rulemaking to establish cooling water intake requirements for existing electric generating plants and factories pursuant to Clean Water Act Section 316(b). When the EPA proposed the new Section 316(b) regulations, it initially engaged in informal consultation with the services regarding the potential for the proposed regulations to impact listed species and/or their critical habitat.

Following informal consultation, the EPA initiated formal consultation with the services, during which multiple drafts of the services' biological opinions were discussed among the services and the EPA. The services each prepared draft biological opinions, including versions that found the proposed regulations would jeopardize listed species and adversely modify critical habitat.

Before finalizing the biological opinions, however, the services provided portions of them to the EPA, including "reasonable and prudent alternatives" that would avoid a jeopardy and adverse modification conclusion in accordance with ESA Section 7(b)(3)(A).

The services later — and prior to finalizing and signing the biological opinions — determined that additional consultation with the EPA was necessary to better understand and consider effects associated with key elements of the EPA's proposed rules. After extensive discussions based on the draft biological opinions, the EPA revised its draft rules, and provided the revised rules to the services.

The agencies engaged in additional conversations concerning the revised draft rules, and the services ultimately issued a joint biological opinion concluding that no jeopardy or adverse modification of critical habitat would result from the rulemaking. Similar conversations occur between agencies whenever there is a consultation, even in smaller scale actions where jeopardy is not an issue. The result of these conversations often results in additional conservation measures and minimization measures before the underlying

federal action is finalized.

Following the EPA's publication of the final Section 316(b) rules,[4] the Sierra Club filed petitions for review in the U.S. Court of Appeals for the Second Circuit. In connection with that litigation, the Sierra Club sought to compel the agencies to supplement the administrative record with draft documents — including draft biological opinions — relating to the ESA Section 7 consultation. The Second Circuit declined the Sierra Club's request.[5]

Separately, the Sierra Club filed FOIA requests with the services for the documents, and the services declined to provide them, citing the deliberative process exemption. FOIA requests for interim draft documents are often used by opponents to pick apart agency decision making, and build a case that it was arbitrary and capricious.

Given that biological opinions are a federal action subject to judicial review, and a precondition to other agency actions, consultations are a frequent avenue for those opposing an agency action. The deliberative process exemption is often used to shield interim drafts, so that the parties involved in the consultation can work through issues and concerns without an outside party "Monday-morning quarterbacking" the consultation process.

When the Sierra Club's FOIA requests were denied, the Sierra Club filed a FOIA-related lawsuit in the U.S. District Court for the Northern District of California.[6] The district court ordered the services to disclose two draft biological opinions, the draft of reasonable and prudent alternatives, and certain species-specific documents prepared as possible parts of a biological opinion.

The Fish and Wildlife Service appealed the case to the U.S. Court of Appeals for the Ninth Circuit, which largely upheld the lower court's decision.[7] The services then petitioned the Supreme Court for certiorari, which was granted on March 2.

Supreme Court

The government's brief to the Supreme Court reiterated the predecisional and deliberative role the draft biological opinions played in the services' consultation with the EPA. The Sierra Club's briefs to the Supreme Court focused heavily on the appreciable legal consequences of the draft biological opinions irrespective of their "draft" label. During oral argument, the justices spent significant time discerning when a draft biological opinion should no longer be considered predecisional or deliberative.

The government advocated for a bright-line application of the deliberative process exemption: Until the services deem a biological opinion final, the document is protected from disclosure. In this case, the government argued that the draft biological opinions fell squarely within the "molten core" of the deliberative process, and did not approach the outer reaches of the justices' hypotheticals. Whether or not the government's characterization of the documents warranted deference was not discussed.

The Sierra Club focused on the de facto legal import of the draft biological opinions to determine whether the documents should be protected by the deliberative process exemption. The Sierra Club's counsel highlighted the impact the draft biological opinions had on the EPA's rulemaking.

While not a final agency action in its own right, the draft biological opinions resulted in a change to the Section 316(b) rulemaking. For these reasons, the Sierra Club argued that

the draft biological opinions were neither predecisional nor deliberative.

Many of the justices' questions sought the parties' views on how the government and Sierra Club positions could be administered outside of the context at issue here. The justices focused on how the advisory role of the Section 7 process — even in draft form — impacted the EPA's ultimate rulemaking, highlighting the function of the consultation process and its ability to influence the ultimate rulemaking, acknowledging that the draft biological opinions here, even when shared only in part, had an impact on the EPA's rulemaking regardless of the "draft" label.

At the same time, justices also noted that the draft biological opinions had not been approved by those with the authority to deem them complete — and in fact had been sent back within the services for further work.

Conclusion

The Supreme Court could respond to this case with a broadly applicable legal standard for applying the deliberative process exemption to draft documents. However, it also could take a narrower slice, differentiating this case based on the interagency communications inherent in the ESA consultation process.

Either way, the court's ruling is likely to affect agencies and project proponents alike when they engage in the ESA consultation process. If the court sides with the government's bright line position, then prospective permittees and agencies will enjoy continued privacy while they sort through the consultation process.

If the court moves toward a fact-intensive inquiry focusing on the legal import of draft consultation documents, the services may be reticent to share drafts and ideas until they are ready to make a final decision. Even a middle-ground approach will likely impact how consultation parties coordinate during the consultation process.

Ultimately, the oral arguments focused on hypotheticals falling in much grayer areas than the draft biological opinions in question. The justices, in grappling with how to apply the deliberative process exemption to draft documents that have similar influence over agency actions, seemed to be searching for a middle ground — one less fact-intensive than the approach the Sierra Club championed, but more thoughtful than simply protecting everything stamped with "draft."

While not directly remarked on during the argument, these exchanges exposed the potential difficulty of crafting a general rule for applying FOIA's deliberative process exemption based on the fairly unique facts of the ESA consultation process.

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[1] 5 U.S.C. § 552(b)(5).

[2] 16 U.S.C. § 1536(a)(2).

[3] Bennett v. Spear, 520 U.S. 154 (1997).

[4] 79 Fed. Reg. 48,300 (Aug. 15, 2014).

[5] Cooling Water Intake Structure Coal. v. United States Envtl. Prot. Agency, 905 F.3d 49 (2d Cir. 2018).

[6] Sierra Club Inc. v. U.S. Fish & Wildlife Service, No. 15-cv-5872 (N.D. Cal. July 24, 2017)

[7] Sierra Club Inc. v. U.S. Fish & Wildlife Service, 911 F.3d 967 (9th Cir. 2018).