No.

In the Supreme Court of the United States

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL., PETITIONERS

v.

SIERRA CLUB, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5) (2012), by incorporating the deliberative process privilege, protects against compelled disclosure a federal agency's draft documents that were prepared as part of a formal interagency consultation process under Section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1536, and that concerned a proposed agency action that was later modified in the consultation process.

PARTIES TO THE PROCEEDING

Petitioners were the appellants in the court of appeals. They are the United States Fish and Wildlife Service and the National Marine Fisheries Service.

Respondent is Sierra Club, Inc.

RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

Sierra Club, Inc. v. *United States Fish & Wildlife Serv.*, No. 15-cv-5872 (July 24, 2017)

United States Court of Appeals (9th Cir.):

Sierra Club, Inc. v. *United States Fish & Wildlife Serv.*, No. 17-16560 (Dec. 21, 2018), petition for reh'g denied, May 30, 2019

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The Solicitor General, on behalf of the United States Fish and Wildlife Service and the National Marine Fisheries Service, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals (App., *infra*, 1a-37a) is reported at 925 F.3d 1000. The order of the district court (App., *infra*, 38a-53a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2018. A petition for rehearing was denied on May 30, 2019 (App., *infra*, 2a). On August 19, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including Septem-

ber 27, 2019. On September 17, 2019, Justice Kagan further extended the time to and including October 25, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix to this brief. App., *infra*, 54a-65a.

STATEMENT

In the decision below, the court of appeals held that the deliberative process privilege—which protects documents reflecting a government agency's deliberations over a prospective action, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)—does not protect certain *draft* documents that an agency created as part of a formal interagency consultation process under Section 7 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1536. The court therefore compelled disclosure of the draft documents under the Freedom of Information Act (FOIA), 5 U.S.C. 552 (2012), even though the draft documents were never signed by the relevant agency decisionmakers or otherwise finalized, but were instead abandoned or superseded when the proposed agency action was modified in response to feedback in the ongoing consultation process. Moreover, the Ninth Circuit ordered disclosure under FOIA even though the Second Circuit, in respondent's separate suit challenging the final agency action at issue, had sustained the invocation of the deliberative process privilege as to some of the very same documents. The Ninth Circuit's decision implicates the core purpose of the deliberative process privilege, which is "to enhance 'the quality of

agency decisions' by protecting open and frank discussion among those who make them within the Government." *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 9 (2001) (quoting *Sears*, 421 U.S. at 151). The interagency consultation process in this case was plainly deliberative, and the agencies' preliminary drafts preceding their final decisions are entitled to protection. The court of appeals' decision to the contrary warrants this Court's review.

1. a. FOIA generally mandates disclosure upon request of records held by a federal agency. *Klamath Water Users*, 532 U.S. at 7. FOIA Section 552(b), however, identifies several categories of records that are exempt from compelled disclosure. See *id.* at 7-8. Exemption 5 authorizes an agency 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) (2012). Exemption 5 incorporates the civil-discovery deliberative process privilege, which protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Sears*, 421 U.S. at 150 (citation and internal quotation marks omitted).[1]

b. This case concerns the application of the deliberative process privilege to draft documents created during a formal interagency consultation process under Section 7 of the ESA. The ESA directs the Secretary of the Interior and the Secretary of Commerce to maintain

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[1] Congress amended FOIA in 2016 by adding another condition on withholding material from disclosure, but that amendment applies only prospectively and does not apply to respondent's FOIA request at issue here. See App., *infra*, 12a n.7 (citing FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538).

a list of all species determined to be "endangered" or "threatened" according to specified criteria, and to designate their "critical habitat." 16 U.S.C. 1533(c). Section 7 of the ESA then requires each federal agency to "insure that any action authorized, funded, or carried out" by the agency "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [its critical] habitat." 16 U.S.C. 1536(a)(2). Agencies carry out that responsibility "in consultation with and with the assistance of" the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, the Services), acting as delegates of the Secretaries of the Interior and Commerce, respectively. *Ibid.*[2] The consultation may be informal in some circumstances, 50 C.F.R. 402.13 (2013), but if an agency determines that a proposed action is likely to adversely affect a listed species or its critical habitat, then the agency must engage in a formal consultation with the appropriate Service (or both), depending on the particular species involved. 50 C.F.R. 402.14(a) (2013).[3]

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[2] Generally, marine species are under the jurisdiction of NMFS, whereas all other species are under the jurisdiction of FWS. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 586 n.3 (1992) (Stevens, J., concurring in the judgment).

[3] The regulations governing ESA Section 7 consultation were amended in 2015 and 2019 in certain respects not directly relevant here. See 80 Fed. Reg. 26,832, 26,844-26,845 (May 11, 2015); 84 Fed. Reg. 44,976, 44,516-44,517 (Aug. 27, 2019). Subsection (g)(5) of 50 C.F.R. 402.14, the provision principally relevant here, was not amended. Other subsections cited in this brief, subsections (h)(3) and (*l*), were redesignated as subsections (h)(2) and (m), respectively, without changes to the points for which they are cited.

The culmination of a formal consultation is the issuance by one or both Services of a "written statement," called a "biological opinion," "setting forth the [Service's] opinion" as to "how the agency action affects the species or its critical habitat," 16 U.S.C. 1536(b)(3)(A)—specifically whether the action, taken together with cumulative effects, "is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat," 50 C.F.R. 402.14(g)(4) (2013); see 50 C.F.R. 402.14(h) (2013) (describing a Service's "biological opinion"). If the Service concludes that jeopardy or adverse modification of critical habitat is likely—that is, if it issues what is known as a "jeopardy opinion"—then it must suggest any "reasonable and prudent alternatives" (RPAs) to the proposed agency action that the Service believes will avoid jeopardizing the species or causing adverse modification of critical habitat. 16 U.S.C. 1536(b)(3)(A); see 50 C.F.R. 402.14(h)(3) (2013).

Regulations implementing ESA Section 7 provide for the interagency consultation process to be collaborative. See 50 C.F.R. 402.14(g) (2013). The Service and the relevant action agency work together to determine the risks to listed species and critical habitat created by the agency's proposed action and, if necessary, how best to mitigate those risks. *Ibid.* For example, the Service must "[r]eview all relevant information provided by" the action agency, 50 C.F.R. 402.14(g)(1) (2013); it must "[d]iscuss" the basis for the findings in its opinion with the agency, 50 C.F.R. 402.14(g)(5) (2013); and it must "utilize the expertise" of the agency to identify appropriate RPAs that the agency can implement to avoid unlawful takings, *ibid.* Importantly, the Service must provide a "draft biological opinion" to the action agency

upon request, and "while the draft is under review," the Service is forbidden from issuing a final biological opinion. *Ibid.* The Service is then provided extra time, if necessary, to adjust the draft in response to agency comments. *Ibid.*

2. In April 2011, the U.S. Environmental Protection Agency (EPA) proposed new regulations for certain "cooling water intake structures," which power plants and manufacturing facilities use to dissipate heat from industrial processes. 76 Fed. Reg. 22,174 (Apr. 20, 2011) (Intake-Structures Rule, or rule); see 33 U.S.C. 1326(b); App., *infra*, 2a-3a. After informal consultation, EPA requested a formal consultation under Section 7 with both Services about the potential impact of the new regulations on listed species and critical habitat. App., *infra*, 3a-5a.

The consultation process was lengthy and complicated. App., *infra*, 4a-6a; see C.A. E.R. 40-41 (declaration of Samuel D. Rauch, III, Acting Assistant Administrator for NMFS); C.A. E.R. 58-60 (declaration of Gary Frazer, Assistant Director of FWS Ecological Services). EPA and both Services worked collaboratively to achieve a regulatory solution that would allow EPA to fulfill its legal obligations under the ESA and other applicable statutes. See App., *infra*, 4a-6a; C.A. E.R. 41, 58-60. Multiple options for the EPA rule and its implementation were considered, and multiple drafts of biological opinions and related documents prepared by each Service were discussed and circulated within the Services and with EPA. See C.A. E.R. 41, 59-60.

EPA prepared a draft final version of the Intake-Structures Rule in November 2013. App., *infra*, 4a-5a. The Services tentatively agreed to provide their draft

biological opinions on that rule to EPA by December 6, 2013, with final opinions to be issued on December 20, 2013. *Id.* at 5a. In preparation for that deadline, each Service initially prepared its own draft opinion making a preliminary finding that EPA's November 2013 draft of the Intake-Structures Rule was likely to cause jeopardy for certain ESA-listed species and negatively impact critical habitat. *Ibid.*; see C.A. E.R. 43, 59. The Services also prepared draft RPAs to accompany the draft jeopardy opinions. App., *infra*, 5a.

The Services sent to EPA portions of their draft biological opinions, but never transmitted the draft opinions in their entirety, as contemplated by 50 C.F.R. 402.14(g)(5) (2013) upon the action agency's request. App., *infra*, 5a. Rather, before the draft opinions and documents were signed or otherwise finalized for transmittal by the relevant decisionmaker at each Service, both Services decided that "additional consultation [with EPA] was needed to better understand and consider the operation of key elements of EPA's rule," *id.* at 32a (Wallace, J., dissenting in part) (brackets in original); see C.A. E.R. 43, 59. The Services and EPA thereafter all "agreed that more work needed to be done and [they] agreed to extend the time frame for the consultation." App., *infra*, 32a (brackets omitted); see C.A. E.R. 43, 59-60.

Neither Service ever finalized its December 2013 draft opinion. See C.A. E.R. 43, 59-60. Instead, over the next few months, the Services engaged in further "extensive discussions with the EPA." App., *infra*, 41a. In March 2014, EPA prepared a new version of its draft final Intake-Structures Rule and sent it to the Services. *Id.* at 6a. The Services continued their consultation with EPA about its new draft rule, including asking

questions to ensure that the Services understood how the rule would operate. *Ibid.* After EPA confirmed the Services' understanding, the Services issued a joint final "no jeopardy" biological opinion in May 2014, finding that EPA's rule as constituted in March 2014 would not jeopardize any listed species or adversely affect critical habitat. *Ibid.*; see 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), https://www.epa.gov/sites/production/files/2015-04/documents/final_316b_bo_and_appendices_5_19_2014.pdf (Final Biological Opinion). EPA issued its final Intake-Structures Rule the same day, and published the rule in the Federal Register on August 15, 2014. App., *infra*, 6a; see 79 Fed. Reg. 48,300.

3. Shortly after EPA published its final Intake-Structures Rule, respondent here (Sierra Club, Inc.) and others filed petitions for review challenging both the EPA rule and the Services' no-jeopardy biological opinion. *Cooling Water Intake Structure Coal.* v. *United States Envtl. Prot. Agency*, 905 F.3d 49, 58 (2d Cir. 2018). The Second Circuit denied the petitions for review, finding that "the Services' biological opinion is consistent with the ESA and its implementing regulations, and their no-jeopardy finding is supported by the administrative record." *Id.* at 83-84. In the course of that litigation, the parties challenging the rule sought to compel supplementation of the administrative record with a public filing of draft documents relating to the consultation process, including the Services' December 2013 draft biological opinions. See *id.* at 65 n.9. The Second Circuit held, however, that the agencies had

"adequately describe[d] the nature of the * * * requested documents and their rationale for classifying those documents as deliberative and therefore privileged." *Ibid.*

4. Respondent also submitted FOIA requests to each Service for records related to the consultation process concerning the Intake-Structures Rule shortly after the final rule was issued. App., *infra*, 6a. The Services released thousands of documents, but withheld others under FOIA Exemption 5 based on the deliberative process privilege. *Id.* at 6a-7a.

Respondent then filed this suit against the Services under FOIA in the Northern District of California. App., *infra*, 8a. Respondent argued that the Services had improperly withheld documents under Exemption 5, including several of the same documents that respondent and others attempted (unsuccessfully) to obtain in the Second Circuit litigation. On cross motions for summary judgment, the district court held that four of the disputed documents were protected against disclosure by the deliberative process privilege, but the court ordered the Services to produce one document in part and 11 other documents in full. *Id.* at 8a-9a; see *id.* at 38a-53a. The documents ordered disclosed included the Services' two December 2013 draft biological opinions as well as RPAs and species-specific documents prepared as possible parts of a biological opinion. *Id.* at 46a-52a; see pp. 6-7, *supra*.

5. The government appealed. A divided panel of the court of appeals affirmed in part and reversed in part. App., *infra*, 1a-29a.

a. The panel majority concluded that the deliberative process privilege protected three of the disputed

documents under FOIA Exemption 5, but that the Services must disclose the other nine, including the two December 2013 draft biological opinions and draft documents prepared as possible parts of those opinions. App., *infra*, 28a-29a. The majority stated that it would apply the privilege only if the challenged documents are "both 'pre-decisional and deliberative,'" factors that the majority "analyzed separately although the issues they address overlap." *Id.* at 14a-15a (citation omitted).

The panel majority acknowledged that the Services' December 2013 draft biological opinions and associated documents were never signed by the decisionmaker at either Service for transmittal to EPA or issued as final opinions. But the majority nevertheless concluded that those draft documents do not qualify as "pre-decisional" and so are subject to disclosure, reasoning that they "represent the final view of the Services regarding the then-current" EPA draft of the Intake-Structures Rule. App., *infra*, 18a; see *id.* at 18a-21a. The majority stated that the Services' December 2013 draft opinions "had been approved by final decision-makers at each agency"; that the FWS decisionmaker had "made final edits" to that Service's draft opinion and "the document was awaiting his autopen signature"; and that NMFS "was preparing 'talking points' for its legislative affairs staff" and had been "preparing to release the drafts to the public." *Id.* at 19a. The majority further acknowledged that the Services' December 2013 draft biological opinions were abandoned or substantially modified before the Services issued their joint final biological opinion in May 2014, but the majority nevertheless held that the December 2013 draft opinions were not pre-decisional because the May 2014 final opinion addressed a "different version of the EPA's rule." *Id.* at 20a.

The panel majority additionally concluded that none of the nine documents that it ordered disclosed was "deliberative." App., *infra*, 21a-28a. It reasoned that the Services' December 2013 draft biological opinions and related documents were "final products" that "d[id] not contain line edits, marginal comments, or other written material" that would reveal internal agency discussion; that the documents did not reflect only the views of "lower level employees" but had been sent to decisionmakers; and that they did not include any comments sent to the Services by EPA. *Id.* at 25a-26a. On that basis, the majority found that the drafts "represent the final view of the Services on the likely impact of [EPA's] then-proposed regulation." *Id.* at 26a. The majority was also of the view that releasing those documents would not enable "a reader to reconstruct the 'mental processes' that le[d] to the production of the May 2014 no jeopardy opinion" or the deliberative process that resulted in revisions to EPA's regulation. *Id.* at 27a.

b. Judge Wallace concurred in part and dissented in part, concluding that all of the documents at issue are protected by the deliberative process privilege. App., *infra*, 30a-37a. He criticized the majority for "overlook[ing] the 'context of the administrative process which generated' the December [2013] draft opinions," specifically, the fact that ESA Section 7 and its implementing regulations set up an interagency consultation process designed to enable the Services and the action agency to modify their drafts and their views in light of feedback from one another. *Id.* at 30a (quoting *Sears*, 421 U.S. at 138, and citing 50 C.F.R. 402.14 (2013)). Judge Wallace noted, in particular, the sworn declarations of officials from each Service explaining that the

December 2013 draft biological opinions were never issued as final opinions, and were never even transmitted in full to EPA, because EPA and the Services agreed that more work needed to be done in the consultation process and because EPA eventually modified its draft of the Intake-Structures Rule in ways that caused the Services to modify their own findings regarding potential jeopardy to listed species and harm to critical habitat. *Id.* at 31a-32a. Thus, in Judge Wallace's view, the regulations and the record both showed definitively that "the Services had not made a final decision as of December [2013] and the deliberative process was ongoing." *Id.* at 32a.

Judge Wallace further observed that the Services' decision in an ESA consultation becomes final only when a final biological opinion is issued, and he explained, adopting the D.C. Circuit's reasoning in *National Security Archive* v. *CIA*, 752 F.3d 460 (2014) (Kavanaugh, J.), that a draft that "dies on the vine"—as the Services' December 2013 draft opinions did when EPA modified its rule—"is still a draft and thus still pre-decisional and deliberative." App., *infra*, 33a (quoting 752 F.3d at 463) (brackets omitted). Judge Wallace thought it clear that, although each Service was *preparing* its draft opinion to be finalized in December 2013, they "sought advice from the EPA about the decision" before finalizing it, which this Court's decision in *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (1975), "teaches" is "precisely the type of inter-agency process that Congress designed the [deliberative process] privilege to protect." App., *infra*, 34a (citing 421 U.S. at 188). Judge Wallace also rejected the majority's focus on whether the draft documents reflected the views of individuals or groups of

employees as opposed to the views of an entire agency, explaining that no other circuit's precedent supports that distinction under the deliberative process privilege and it "contravenes *Grumman Aircraft*." *Ibid.*

c. The court of appeals subsequently issued an amended opinion, in which it noted that a majority of the panel had voted to deny the Services' petition for rehearing and that the court had denied the Services' petition for rehearing en banc. App., *infra*, 2a.

REASONS FOR GRANTING THE PETITION

This Court's review is warranted because the decision below is plainly wrong and in serious tension with multiple decisions of this Court and other courts of appeals.

FOIA Exemption 5, and the deliberative process privilege in particular, exist in order to protect government decisionmaking by promoting a candid exchange within and between agencies before a final decision is made. The consultation process under Section 7 of the ESA is likewise designed to facilitate the ability of action agencies and the Services to work together to assess and mitigate adverse impacts on listed species and designated critical habitat. The applicable regulations thus provide, for example, an opportunity for review by the relevant action agency (here, EPA) of a Service's draft biological opinion before the Service issues a final opinion.

In the course of the Section 7 consultation in this case, the Services prepared draft biological opinions and related documents during their deliberations, but those drafts were never finalized or even transmitted in full draft form to EPA for its review and comment. Instead, those drafts were abandoned and superseded when the Services issued their joint final opinion, because the

drafts addressed an earlier version of EPA's Intake-Structures Rule that EPA modified after additional consultation. The regulations and the record both demonstrate that the draft documents at issue here were part of one continuous deliberative process preceding the Services' final joint opinion in May 2014, and that those drafts and related discussions helped shape the final version of EPA's rule. That is exactly how the ESA consultation process is supposed to work. The draft documents that the Services prepared prior to issuing their joint final biological opinion are therefore protected by the deliberative process privilege through FOIA Exemption 5.

The court of appeals' contrary holding rests on multiple fundamental errors. First, the court believed (App., *infra*, 18a) that the draft documents could constitute the "final views" of the Services even though the drafts were not issued in final form, signed off on by the relevant decisionmakers with authority to finalize them, or otherwise adopted as official policy. Second, the court failed to give effect to the Section 7 regulatory requirement that draft biological opinions be sent to the action agency upon request *as drafts*, which makes it especially clear that the draft documents at issue here—which were never even provided in full to EPA under the regulations—were deliberative and non-final. Third, the court incorrectly found that EPA's decision to modify the November 2013 version of the draft Intake-Structures Rule before the Services issued final biological opinions on that version caused the Services' drafts to take on "final" status.

The decision below is also in serious tension with decisions of this Court and other courts of appeals. The Ninth Circuit's refusal to take appropriate account of

the steps in the ESA Section 7 interagency consultation process—especially the requirement that the action agency be allowed to review a Service's draft biological opinion before the Service issues a final opinion—strayed from this Court's instruction in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975), that the "context of the administrative process" is crucial to applying the deliberative process privilege. *Id.* at 138. In addition, the court of appeals' distinction between documents created by lower-level officials within an agency and those prepared for transmission to another agency in the ESA consultation process is the sort of distinction between "*inter*-agency" and "*intra*-agency" memoranda that this Court rejected in *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 188 (1975). And finally, the court of appeals' holding that the Services' draft opinions here fell outside the deliberative process privilege because they were directed toward an EPA regulatory proposal that was later changed cannot be reconciled with the D.C. Circuit's holding that a draft that "died on the vine * * * is still a draft" and remains privileged. *National Sec. Archive* v. *CIA*, 752 F.3d 460, 463 (2014) (Kavanaugh, J.).

If the decision below is left standing, it has the potential to inhibit the frank deliberations between agencies that are essential to ESA Section 7 consultations, which are in turn essential to the wide range of federal agency actions that may affect ESA-listed species. This Court should grant the petition for a writ of certiorari and reverse the judgment of the court of appeals.

A. The Decision Below Is Wrong

1. The deliberative process privilege serves important governmental interests

"Congress realized" in enacting FOIA "that legitimate governmental and private interests could be harmed by release of certain types of information," so it provided "specific exemptions" to FOIA's general disclosure mandate "under which disclosure could be refused." *FBI* v. *Abramson*, 456 U.S. 615, 621 (1982). FOIA thereby establishes a "workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989) (citation omitted).

Congress recognized in particular that "frank discussion of legal or policy matters in writing" is "impossible" when such writings are "subjected to public scrutiny," and it feared that the quality of agencies' decisionmaking would suffer if they were "forced to 'operate in a fishbowl.'" *EPA* v. *Mink*, 410 U.S. 73, 87 (1973) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (Senate Report)). FOIA Exemption 5 therefore "incorporates civil discovery privileges" into the statute, *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984), including the deliberative process privilege—a uniquely governmental privilege that covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated," *Sears*, 421 U.S. at 150 (citation and internal quotation marks omitted).

The deliberative process privilege aims "to enhance 'the quality of agency decisions' by protecting open and frank discussion among those who make them within

the Government," based on "the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news." *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001) (quoting *Sears*, 421 U.S. at 151). The privilege "allow[s] agencies freely to explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny." *Assembly of the State of Cal.* v. *United States Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992); see *National Security Archive*, 752 F.3d at 462.

2. The Services' draft documents fall well within the deliberative process privilege

Each of the draft documents at issue in this case meets the requirements for the deliberative process privilege (and FOIA Exemption 5) that this Court described in *Sears*. See 421 U.S. at 149-150. Each document was created as part of the deliberative process of internal assessment and interagency consultation that led up to the Services' subsequent issuance of a joint final biological opinion on the anticipated impact on listed species of EPA's final Intake-Structures Rule.

"[T]he consultation process" under Section 7 of the ESA is complete only "once the biological opinion is issued." *Center for Biological Diversity* v. *United States Fish & Wildlife Serv.*, 450 F.3d 930, 940 (9th Cir. 2006); see *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997) (holding that issuance of a biological opinion marks the "consummation of the [Service's] decisionmaking process" and thus constitutes final agency action) (citation and internal quotation marks omitted); 50 C.F.R. 402.14(*l*)(1) (2013). Before a Service makes its final decision and commits to final agency action, it often creates draft

biological opinions and related documents for purposes of consideration and discussion. See, *e.g.*, C.A. E.R. 41, 58-60. Those draft documents are "prepared in order to assist an agency decisionmaker in arriving at his decision," *Grumman Aircraft*, 421 U.S. at 184, and they are a "valuable deliberative tool" in the decisionmaking process, *id.* at 190. While drafts frequently become increasingly polished as they approach completion—that is typical of any drafting process—a draft document retains its draft status throughout the Section 7 consultation process, and for that reason does not cease to be deliberative unless and until the decisionmaker adopts that draft as the agency's final decision. At all times until then, the decisionmaker retains authority to revise the document or to postpone its issuance while the agency studies the problem further. Cf. *Reliable Automatic Sprinkler Co.* v. *Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732 (D.C. Cir. 2003) (finding no final agency action because the agency's position was "tentative" and the agency still had an opportunity "to change its mind") (citation omitted).

The documents at issue in this case are draft biological opinions and draft constituent documents under consideration for inclusion with the opinions if they had been issued in final form. See App., *infra*, 5a, 9a-12a. Even if some of the draft documents may have been *close* to being transmitted to EPA or being issued in final form if further consultation with EPA did not make revisions necessary, the agency's "deliberations" over the issues remained ongoing until the decisionmaker gave final approval, and the drafts remained simply "recommendations" subject to alteration or (as happened here) pullback for further examination. *Sears*,

421 U.S. at 150 (citation omitted); see *Grumman Aircraft*, 421 U.S. at 190 (recognizing that the author of a draft "may change his mind as a result of * * * discussion").

The deliberative (and privileged) nature of these documents is even more apparent in light of "the function of the documents * * * in the context of the administrative process which generated them." *Sears*, 421 U.S. at 138. The regulations that govern the Section 7 formal consultation process require that EPA be given the opportunity to review a "draft biological opinion" prepared by the Services before it became final, 50 C.F.R. 402.14(g)(5) (2013), which "allow[ed] the Services to consider changes to the draft opinion based on the agency's comments," App., *infra*, 30a (Wallace, J. dissenting in part); see also 51 Fed. Reg. 19,926, 19,952 (June 3, 1986) (explaining that the "release of draft opinions to Federal agencies * * * facilitates a more meaningful exchange of information"; "may result in the development and submission of additional data, and the preparation of more thorough biological opinions"; and "helps ensure the technical accuracy of the opinion"). The regulations thereby call for the very sort of exchange of views and information that occurred in this case, where the Services, during their preparation and discussion of draft biological opinions, raised questions and concerns to EPA, after which EPA modified its draft of the Intake-Structures Rule. That modification in turn prompted the Services to conclude that the final version of the rule would not jeopardize listed species or adversely modify critical habitat.

The regulatory requirements that EPA be allowed to review a draft opinion and that the Services be allowed time to alter their draft in response to EPA comments

confirm that the preparation and sharing of *draft* opinions is an important part of the intra-agency and inter-agency deliberative process before the Services make a final decision in an ESA consultation. "Seeking comments on a document presupposes the ability to make changes to it," which underscores "the deliberative nature of" the Services' ongoing process in this case. App., *infra*, 31a (Wallace, J., dissenting in part); cf. *Wolfe* v. *Department of Health & Human Servs.*, 839 F.2d 768, 774-776 (D.C. Cir. 1988) (en banc) (finding that, until final agency action was taken, the process of sharing information between agencies was deliberative). And it is particularly clear that the Services were still deliberating here given their determination that "more work needed to be done" in the consultation, as a result of which the draft documents at issue were never transmitted "to EPA as the [Services'] official preliminary position." C.A. E.R. 59-60. Indeed, the final biological opinion reported how the Services and EPA "engaged in numerous exchanges about possible revisions to the processes embodied in EPA's draft final Rule," thereby improving EPA's overall administrative process as well. Final Biological Opinion 2.

In short, the ongoing ESA consultation process in this case was still deliberative in December 2013, and the Services' drafts in that consultation process remained privileged drafts.

3. The court of appeals' reasons for refusing to apply the deliberative process privilege do not withstand scrutiny

The court of appeals' holding that the Services' draft documents were not covered by the deliberative process privilege rested on multiple errors, and those errors

implicate the core interests that the privilege exists to protect.

a. First and most simply, the court of appeals badly erred by concluding that the draft December 2013 biological opinions and related documents constituted the Services' "final views and recommendations regarding the EPA's then-proposed regulation," App., *infra*, 18a, even though the documents had not been signed by the relevant decisionmakers, had not been transmitted to EPA, and had not been otherwise finally issued, see C.A. E.R. 59. Rather than allow those dispositive facts to control the outcome, the court chose to focus on aspects of the record showing that the December 2013 draft opinions were in the hands of decisionmakers at the Services (as opposed to lower-level officials), and were in the court's estimation *nearly* final because: the draft opinions would not be sent to "another decision-maker higher up the chain," but instead "contain[ed] the final conclusions by the final decision-makers" at each agency; the FWS decisionmaker had made "final edits" to that draft opinion and it "was awaiting his autopen signature" for transmittal to EPA; and NMFS "was preparing 'talking points' for its legislative affairs staff and preparing to release the drafts to the public." App., *infra*, 18a-19a; see also *id.* at 25a (the drafts were not "prepared by low-level officials"; they contained the Services' seals; and they did not "contain line edits[or] marginal comments").

None of those facts means that the agencies' deliberative process had terminated as a legal matter, because only the actual exercise of authority by a properly vested decisionmaker can commit an agency to the policy or decision reflected in a draft document. See, *e.g.*, *Board of Miss. Levee Comm'rs* v. *United States Envtl.*

Prot. Agency, 674 F.3d 409, 420 (5th Cir. 2012) (affirming agency's conclusion that an environmental impact statement "was not 'final'" until the "Record of Decision had been signed"); *Sierra Club* v. *United States Dep't of Energy*, 825 F. Supp. 2d 142, 156-157 (D.D.C. 2011) ("Regardless of whatever steps have been taken thus far, [the agency] can change its mind (or, more precisely, has not yet made up its mind) until it issues a Record of Decision."). It is not sufficient to overcome the deliberative process privilege that the Services' draft opinions were *available* to be signed off on by the decisionmakers—either for transmittal to EPA or to be issued in final form if no changes were made following a review by EPA—because a biological opinion is adopted only by being signed and sent in final form "to the action agency" as part of a "formal consultation package." FWS & NMFS, *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act* 4-69 (Mar. 1998), https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf. Until the decisionmakers at the Services took the last crucial steps, they retained authority to make changes to the draft biological opinions, or to step back and consider the matter further.

The Ninth Circuit did not offer guidance that would enable government agencies to understand at what point in the deliberative process their drafts would become *close enough* to being final (in the view of the Ninth Circuit) so as to lose their privilege. A final biological opinion by one of the Services is final agency action under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, that "alter[s] 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." *Bennett*, 520 U.S. at 178. But a *draft* opinion—even a nearly final draft—carries no legal consequences for the Service or the relevant action agency. See, *e.g.*, *Pacific Coast Fed'n of Fishermen's Ass'ns* v. *Gutierrez*, 606 F. Supp. 2d 1122, 1157 n.6 (E.D. Cal. 2008) (a "draft biological opinion is not binding or determinative whether the final [biological opinion] is arbitrary and capricious").

The record also illustrates another seriously problematic aspect of the court of appeals' approach to the deliberative process privilege in this case: the court's decision minimized the significance of a principal decisionmaker's authority to conduct one last review before putting his or her signature on a decision, and as part of that review, to change his or her mind. An opportunity for thorough examination up to the point of finality is critical to sound agency decisionmaking. That is just what happened here. After the Services' draft opinions were prepared and the FWS decisionmaker had made some edits, but before the Services had issued final opinions and even before the drafts were transmitted in draft form to EPA, officials at the Services concluded that further consultation was required "to better understand and consider the operation of key elements of EPA's rule." App., *infra*, 32a (Wallace, J., dissenting in part). The further consultation with EPA that followed prompted changes in EPA's draft final rule, which in turn caused the Services to revise their conclusions regarding potential jeopardy to species or harm to critical habitat. The decision to pause and ask additional questions is a sign of a successful interagency consultation process; taking those steps should not expose the Services' drafts to compelled disclosure.

b. In addition to resting on a mistaken *legal* view of what makes a document "final," the court of appeals' conclusion (App., *infra*, 18a) that the draft documents at issue here, if they had been signed, would have "represent[ed] the Services' final views," is flatly contradicted by the record and by the regulations that govern the ESA Section 7 consultation process. While the court's opinion is not entirely clear, it appears that the court rested its conclusion on the erroneous belief that the Services' drafts were effectively final biological opinions under Section 7. The majority stated that the draft opinions communicated "the final conclusions by the final decision-makers * * * regarding whether a proposed regulation will harm protected species and habitat." *Ibid.*; see *ibid.* (observing that "the issuance of a biological opinion is a final agency action") (citing *Bennett*, 520 U.S. at 178); see also *id.* at 19a (reasoning that a document is not protected by the deliberative process privilege when it is "created by a final decision-maker and represents the final view of an entire agency as to a matter which, once concluded, is a final agency action independent of another agency's use of that document").

That reasoning disregards this Court's instruction that applying the deliberative process privilege requires "an understanding of the function of the documents in issue in the context of the administrative process which generated them." *Sears*, 421 U.S. at 138. In the context of Section 7 consultations, the applicable regulations make clear that a draft opinion—even (unlike here) when a Service transmits a full draft opinion to an action agency for review—is distinct from "the issuance of the biological opinion," which concludes the consultation process. 50 C.F.R. 402.14(*l*)(1) (2013). In fact, "the regulations forbid the Services from issuing the final

opinion before the agency has had time to comment on the draft." App., *infra*, 30a (Wallace, J., dissenting in part); see 50 C.F.R. 402.14(g)(5) (2013).

The record of this case is equally clear about the court of appeals' error on this point: the NMFS official who oversaw this Section 7 consultation explained in a declaration that "[b]y providing a draft for transmission to another agency, [a Service] is not rendering a final decision. The document remains a draft and is subject to change until final signature." C.A. E.R. 44. The FWS decisionmaker similarly declared that, because the Services determined that additional consultation was needed here, FWS's draft biological opinion was "never signed by [him] and distributed to EPA as [FWS's] official preliminary position." *Id.* at 59.

c. The court of appeals also went astray by drawing the wrong conclusions from EPA's decision to revise its draft Intake-Structures Rule before the Services issued final biological opinions on the prior version. The court appeared to view EPA's "November 2013 proposed rule" as an agency action distinct from the "March 2014 revised, proposed rule," and to proceed on the assumption that the Services had effectively engaged in two distinct consultations, each of which must have culminated in distinct final decisions by the Services. App., *infra*, 18a ("[T]he December 2013 draft jeopardy opinions * * * represent the final view of the Services regarding the then-current November 2013 proposed rule; the May 2014 no jeopardy opinion represents the final view of [the] Services regarding the later March 2014 revised, proposed rule."); see *id.* at 26a. That understanding of the Section 7 consultation process is mistaken for two reasons.

First, the Section 7 consultation process cannot be artificially bifurcated as the court of appeals suggested. As described above, the Section 7 process is designed to be cooperative and to facilitate input and changes from either the Services or the action agency that arise from their discussions. The record of this case demonstrates that all of the draft documents at issue were part of a single consultation process on development of an Intake-Structures Rule. See C.A. E.R. 44-45, 59-60. That process ultimately culminated in the Services' formal issuance of a joint final biological opinion and EPA's promulgation of a final rule. See 50 C.F.R. 402.14(*l*)(1) (2013) (the consultation process ends with "issuance of the biological opinion"). The Services' prior draft opinions considering a prior version of the EPA rule retained their status as drafts throughout that single decisionmaking process.

Second, even if the court of appeals had been correct to view the December 2013 draft opinions as part of a distinct deliberative process, the most that could be said is that the Services abandoned those drafts when EPA modified the version of the Intake-Structures Rule that was the subject of those drafts. And contrary to the court of appeals' decision below, abandonment does not elevate a draft document into a final decision. See *Florida House of Representatives* v. *United States Dep't of Commerce*, 961 F.2d 941, 950 (11th Cir.) ("draft policy options which are ultimately rejected are protected from disclosure under the deliberative process privilege") (citing *Pies* v. *United States Internal Revenue Serv.*, 668 F.2d 1350, 1353 (D.C. Cir. 1981)), cert. dismissed, 506 U.S. 969 (1992). A comparable situation would arise if, for example, the Services transmitted a draft opinion to an action agency for review per 50 C.F.R.

402.14(g)(5) (2013), and in response, the agency decided to forgo the proposed action altogether. At that point, the Services could sensibly stop work on their opinion as well, there being no need for a final biological opinion. See 50 C.F.R. 402.14(*l*)(2) (2013). The *draft* opinion in that scenario would plainly remain only a draft that "d[id] not ripen into [an] agency decision[]." *Sears*, 421 U.S. at 151 n.18. And the deliberative process privilege would continue to apply to such a draft. As then-Judge Kavanaugh explained, a draft that "died on the vine * * * is still a draft," and therefore remains privileged. *National Security Archive*, 752 F.3d at 463. Such "documents are no less drafts than the drafts that actually evolve into final Executive Branch actions." *Ibid.*

B. The Question Presented Warrants Review

This Court should grant a writ of certiorari to review the court of appeals' erroneous holdings regarding the deliberative process privilege. The decision below is not only clearly wrong, it is also in serious tension with decisions of this Court and other courts of appeals, including the decision of the Second Circuit holding that the Services had properly invoked the deliberative process privilege for, *inter alia*, the same draft biological opinions at issue here. And if the Ninth Circuit's decision is left standing, it would threaten to chill the candid interagency exchange that is the very purpose of the privilege and the Section 7 consultation process.

1. a. The court of appeals' conclusion that draft documents can be treated as "final" agency decisions flows from its cramped reading of this Court's decision in *Sears*. That case involved a FOIA request for memoranda and related documents "generated by the Office of the General Counsel [of the National Labor Relations

Board] in the course of deciding whether or not to permit the filing with the Board of unfair labor practice complaints." *Sears*, 421 U.S. at 136. This Court explained that "an understanding of the function of the documents in issue in the context of the administrative process which generated them" was "[c]rucial" to applying the deliberative process privilege, *id.* at 138, and the Court then examined the relevant agency procedures in detail, *id.* at 155-160.

Here, rather than apply *Sears*'s teaching to assess the application of the privilege by considering the administrative process of interagency consultation under ESA Section 7—especially the requirement that the Services share a draft opinion with EPA upon request so that EPA can share comments before the Service issues a final biological opinion—the court of appeals stated that "a document's origins as part of the interagency consultation process between the EPA and the Services only relate to a threshold requirement for applying Exemption 5—that the document is an 'interagency or intra-agency memorandum." App., *infra*, 13a-14a (citation omitted). Thus, once the court determined that the drafts at issue here were interagency memoranda, the court gave no further meaningful consideration to the applicable administrative process dictating that draft opinions remain drafts throughout the back-and-forth consultation, which concluded only upon issuance of a final biological opinion.

b. It is also difficult to reconcile the court of appeals' decision with this Court's holding in *Grumman Aircraft* that FOIA Exemption 5 "does not distinguish between *inter*-agency and *intra*-agency memoranda." 421 U.S. at 188. *Grumman Aircraft* shows that the court of appeals erred by distinguishing the December 2013 draft

biological opinions—which the Services were preparing for transmission to EPA in the ongoing consultation process—from a draft opinion "circulated internally" within an agency for comment or reflecting only the views of "lower level employees," which the court acknowledged would be protected. App., *infra*, 25a, 28a.

This Court in *Grumman Aircraft* explained that, through Exemption 5, "Congress plainly intended to permit one agency possessing decisional authority to obtain written recommendations and advice from a separate agency not possessing such decisional authority without requiring that the advice be any more disclosable than similar advice received from within the agency." 421 U.S. at 188. That reasoning supports the privileged status of the draft documents in this case, as Judge Wallace explained in his dissent below: "[T]he Services had decisional authority in preparing the opinions, but sought advice from the EPA about the decision," which *Grumman Aircraft* teaches "is precisely the type of inter-agency process that Congress designed the privilege to protect." App., *infra*, 34a. The court of appeals' response was to acknowledge that comments on draft biological opinions sent back *to* the Services by EPA would likely receive interagency protection under the deliberative process privilege, *id.* at 23a-24a, yet to refuse to find that the drafts that the Services had prepared to send (but did not send) to EPA in the first place to elicit such comments are protected by the privilege. *Grumman Aircraft* does not support any such distinction. For a privilege to be effective in an interagency consultation process, it must protect communication running both ways.

Grumman Aircraft also undermines the court of appeals' suggestion that the draft biological opinions at

issue here were not privileged because the FWS draft had received edits from the FWS decisionmaker. See App., *infra*, 19a. This Court in *Grumman Aircraft* held that reports prepared for discussion were protected by the deliberative process privilege even though the authors of the reports would be among those participating in the final decision. 421 U.S. at 189-190. The court of appeals' assumption that the draft documents here must have been final because decisionmakers worked on them ignores this Court's recognition that decisionmakers often create drafts for purposes of discussion, and those drafts remain privileged drafts. See *id.* at 190 (it is error to assume that drafts "always disclose the final views" of the author).

c. In addition, the Ninth Circuit's decision departs from the approach to the deliberative process taken by other courts of appeals. As explained above, the Ninth Circuit's reasoning cannot be squared with the D.C. Circuit's decision in *National Security Archive*, which rejected the contention that FOIA required disclosure of a draft, never-released volume of the Central Intelligence Agency's official history of the Bay of Pigs invasion. 752 F.3d at 461-462. Whereas the court of appeals here thought it crucial that the December 2013 draft opinions marked (in the court's estimation) the Services' last word on the then-existing version of EPA's draft Intake-Structures Rule, App., *infra*, 18a, 26a, the D.C. Circuit found it inconsequential that no final version of the draft history was ever produced. *National Security Archive*, 752 F.3d at 463. Then-Judge Kavanaugh explained the commonsense proposition that "[t]here may be no final agency document because a draft died on the vine. But the draft is still a draft and thus predecisional and deliberative." *Ibid.* The Second Circuit

similarly held that "a draft of a proposed op-ed article" that "was never published" remained exempt from disclosure. *ACLU* v. *United States Dep't of Justice*, 844 F.3d 126, 133 (2016). And the Eleventh Circuit in *Florida House of Representatives* "ha[d] no problem" concluding that the deliberative process privilege applied to a proposed methodology for the census "that eventually was rejected by the person in charge." 961 F.2d at 949-950.

Notably, the Second Circuit has concluded that the very same draft documents at issue here are protected by the deliberative process privilege. On petitions for review of the Services' final joint opinion, the Second Circuit sustained the Services' invocation of the privilege over several draft documents created during the consultation process—including the two December 2013 draft biological opinions at issue in this case. See *Cooling Water Intake Structure Coal.* v. *United States Envtl. Prot. Agency*, 905 F.3d 49, 65 n.9 (2018). The Ninth Circuit attempted to distinguish that decision on the ground that the Second Circuit had invoked the presumption of regularity afforded to an agency's certification of the administrative record. App., *infra*, 14a n.8. But the court did not engage with the Second Circuit's *legal* determination that the agencies had properly invoked the deliberative process privilege.

2. Without further review by this Court, the Ninth Circuit's refusal to uphold invocation of the deliberative process privilege in the ESA Section 7 consultation here threatens to undermine confidence in the ability of principal decisionmakers to reserve their prerogative to withhold final approval of a decision until the decisionmaker decides that it should take effect.

In addition, by diminishing the clarity that attaches to requisite formalities in agency administration, such as a signature or public issuance, the decision below threatens to create uncertainty within government agencies about when their drafts may cease to be protected as deliberative documents. The possibility that drafts exchanged between the Services and an action agency will be subject to compelled disclosure—and that even drafts being *prepared* for transmission to the action agency will be discoverable—would threaten to undermine the "open and frank discussion" that Congress sought to protect in adopting FOIA Exemption 5, with an attendant threat to diminish "'the quality of agency decisions'" overall. *Klamath Water Users*, 532 U.S. at 8-9 (quoting *Sears*, 421 U.S. at 151); see *Sears*, 421 U.S. at 150 ("The point, plainly made in the Senate Report [for FOIA], is that the 'frank discussion of legal or policy matters' in writing might be inhibited if the discussion were made public; and that the 'decisions' and 'policies formulated' would be the poorer as a result.") (quoting Senate Report 9). As then-Judge Kavanaugh explained, this Court "has said[that] an uncertain privilege is 'little better than no privilege at all.'" *National Security Archive*, 752 F.3d at 463 (quoting *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981)).[4]

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[4] In the court of appeals, respondent "ma[de] much of the fact that 'the Services typically include draft biological opinions in their administrative records.'" App., *infra*, 35a (Wallace, J., dissenting in part). But regardless of the frequency with which that has occurred, as Judge Wallace correctly recognized, "the government's waiver of privilege in some contexts does not waive the privilege here, a point that [respondent] concede[d]" below. *Ibid.* (citation omitted).

The court of appeals erroneously viewed as sufficient indicators of finality the fact that the FWS draft had been edited by a decisionmaker; that the draft did not contain margin notes; that an employee stated that the draft was ready for the autopen; that NMFS was preparing talking points; and that a draft document contained the "agency's seal/header." App., *infra*, 18a-19a, 25a. But the court did not explain the relative significance of those various facts. The inherent unpredictability of the Ninth Circuit's "close enough" ruling on finality threatens to chill the deliberative process for the many federal agency actions affected by ESA Section 7.

At the same time, the decision below fails to meaningfully advance FOIA's "core purpose" of "'contribut[ing] significantly to public understanding of the operations or activities of the government.'" *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989) (emphasis omitted; brackets in original). The deliberative process privilege not only protects the capacity for open and frank discussions within and among agencies; it also "protects the integrity of the decision-making process itself by confirming that 'officials should be judged by what they decided, not for matters they considered before making up their minds.'" *Jordan* v. *United States Dep't of Justice*, 591 F.2d 753, 773 (D.C. Cir. 1978) (en banc) (brackets and citation omitted), overruled in part on other grounds by *Crooker* v. *Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc). The disclosure of the Services' draft biological opinions here suggesting potential reasons for a decision that the Services did *not* adopt creates a risk of confusing and misleading the public. See *Grumman Aircraft*, 421 U.S. at

186. And in any event, "[t]he public is only marginally concerned with reasons supporting a [decision] which an agency has rejected." *Ibid.* (citation omitted; second set of brackets in original).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2019

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-16560
D.C. No. 3:15-cv-05872-EDL

SIERRA CLUB, INC., PLAINTIFF-APPELLEE

v.

UNITED STATES FISH AND WILDLIFE SERVICE;
NATIONAL MARINE FISHERIES SERVICE,
DEFENDANTS-APPELLANTS

Argued and Submitted: Mar. 15, 2018
San Francisco, California
Filed: Dec. 21, 2018
Amended: May 30, 2019

Appeal from the United States District Court
for the Northern District of California
ELIZABETH D. LAPORTE, Magistrate Judge, Presiding

ORDER AND AMENDED OPINION

Before: J. CLIFFORD WALLACE and MARSHA S. BERZON, Circuit Judges, and TERRENCE BERG,[*] District Judge.

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[*] The Honorable Terrence Berg, United States District Judge for the Eastern District of Michigan, sitting by designation.

ORDER

The Opinion filed December 21, 2018 and reported at 911 F.3d 967 is hereby amended. The amended opinion will be filed concurrently with this order.

A majority of the panel has voted to deny the petition for panel rehearing. The full court was advised of the petition for rehearing en banc. No judge requested a vote on whether to rehear the matter en banc pursuant to Fed. R. App. P. 35(f). The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

Future petitions for rehearing or rehearing en banc will not be entertained in this case.

OPINION

BERG, District Judge:

Across the United States, thousands of large industrial facilities, power plants, and other manufacturing and processing complexes draw billions of gallons of water each day from lakes, rivers, estuaries and oceans in order to cool their facilities through cooling water intake structures.[1] These structures can harm fish, shellfish, and their eggs by pulling them into the factory's cooling system; they can injure or kill other aquatic life by generating heat or releasing chemicals during cleaning processes; and they can injure larger fish, reptiles and mammals by trapping them against the intake screens.[2] Section 316(b) of the Clean Water Act, 33 U.S.C. § 1326(b), directs the Environmental Protection Agency (EPA) to

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[1] *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 181 (2d Cir. 2004).

[2] See *Cooling Water Intakes*, Envtl. Protection Agency, https://www.epa.gov/cooling-water-intakes.

regulate the design and operation of cooling water intake structures to minimize these adverse effects.

In April 2011, the EPA proposed new regulations under Section 316(b) for cooling water intake structures. 76 Fed. Reg. 22,174 (April 20, 2011). The final rule was published in the Federal Register in August 2014. Final Regulations to Establish Requirements for Cooling Water Intake Structures, 79 Fed. Reg. 48,300 (Aug. 15, 2014) (to be codified at 40 C.F.R. pts. 122 & 125). As part of the rule-making process, EPA consulted with Appellants, the United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, the Services), about the impact the regulation might have under the Endangered Species Act (ESA). Section 7 of the ESA and implementing regulations require federal agencies to consult with the Services whenever an agency engages in an action that "may affect" a "listed species" (i.e., one that is protected under the ESA). 50 C.F.R. § 402.14(a). The purpose of the consultation is to ensure that the agency action is "not likely to jeopardize the continued existence" or "result in the destruction or adverse modification of habitat" of any endangered or threatened species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). As part of this Section 7 consultation process, the Services must prepare a written biological opinion on whether the proposed agency action is one that poses "jeopardy" or "no jeopardy" to the continued existence of a listed species or critical habitat. 50 C.F.R. § 402.14(h)(3). If the opinion concludes that the agency action causes "jeopardy," the Services must propose "reasonable and prudent alternatives" (RPAs) to the action

that would avoid jeopardizing the threatened species. 16 U.S.C § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(8), (h)(3).[3]

Appellee, the Sierra Club, made a Freedom of Information Act ("FOIA") request to the Services for records generated during the EPA's rule-making process concerning cooling water intake structures, including documents generated by the Services as part of an ESA Section 7 consultation about the rule. The Services withheld a number of the sought-after records under "Exemption 5" of FOIA, which shields documents subject to the "deliberative process privilege" from disclosure. *See* 5 U.S.C. § 552(b)(5); *see also Kowack v. U.S. Forest Serv.*, 766 F.3d 1130, 1135 (9th Cir. 2014). The district court determined that 12 of the 16 requested records were not protected by the privilege, in whole or in part, and ordered the Services to turn them over to the Sierra Club. The Services now appeal. We affirm in part and reverse in part.

I. BACKGROUND

a. Factual History

In 2012, the EPA began an informal consultation process with the Services about a proposed rule for regulating the requirements governing the operation of cooling water intake structures. The EPA requested a formal consultation on the proposed rule in 2013. On November 4, 2013, the Services received a revised version of the proposed rule from the Office of Management and

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[3] The Second Circuit in a consolidated case recently denied a petition to review several challenges to this final rule under the Clean Water Act, the Administrative Procedures Act, and the Endangered Species Act. *Cooling Water Intake Structure Coal. v. EPA*, 898 F.3d 173 (2d Cir. 2018), *amended*, 2018 WL 4678440 (2d Cir. Sept. 27, 2018).

Budget (OMB). On November 15, 2013, the Services sent a "Description of the Action" (i.e. a summary of what the Services thought the proposed rule set out to do) to the EPA. Finally, on November 26, 2013, the EPA responded with corrections to the Services' description of the rule and the Services incorporated the EPA's corrections. The EPA and the Services tentatively agreed that the FWS and NMFS would each provide a draft biological opinion to the EPA by December 6, 2013, and a final opinion by December 20, 2013.

After reviewing the November 2013 proposed rule, both Services prepared draft opinions finding that the rule in its then-current form was likely to cause jeopardy for ESA-protected species and negatively impact their designated critical habitats. The Services also proposed RPAs to accompany those jeopardy opinions. At the same time, NMFS discussed whether the jeopardy opinions should be sent to "the Hill" or OMB, or posted to its docket, which was publicly available at regulations.gov.

NMFS completed its draft jeopardy opinion on December 6, 2013 and FWS completed its draft jeopardy opinion on December 9, 2013, both for transmission to the EPA. The ESA regulations require that the Services make draft opinions available to the Federal agency that initiated the formal consultation upon request. 50 C.F.R. § 402.14(g)(5). Here, the Services sent the EPA portions of its December 2013 draft jeopardy opinions, but never formally transmitted them in their entirety.

On December 12, 2013, the FWS Deputy Solicitor called and emailed the EPA General Counsel to "touch base . . . about transmitting a document to EPA." He also emailed "the current draft RPAs" to the EPA

that same day. On December 17, 2013, the NMFS sent a "Revised Combined NMFS and USFWS RPA" to the EPA. The Services have further indicated in their briefing that they also provided other unspecified portions of the draft jeopardy opinions to the EPA.

After the transmission of these partial December 2013 jeopardy biological opinions and accompanying documents, the EPA issued a new version of the rule, the "final Rule and Preamble," which it sent to the Services on March 14, 2014. On April 7, 2014, NMFS employees completed and internally circulated a draft of another jeopardy biological opinion. During this same time frame, the Services and the EPA discussed whether the EPA agreed with the Services' interpretation and understanding of the March 2014 final rule: On March 31, 2014 the Services sent the EPA a document "seeking clarification on the Services' understandings of key elements in EPA's proposed action." On April 8, 2014, EPA "provided confirmation on the Services' description and understanding of the key elements of EPA proposed action." Finally, on May 19, 2014, the Services issued a joint final "no jeopardy" biological opinion regarding the March 2014 final rule. The EPA issued the regulation that same day, and it was published in the Federal Register on August 15, 2014. Final Regulations to Establish Requirements for Cooling Water Intake Structures, 79 Fed. Reg. 48,300.

On August 11, 2014, the Sierra Club submitted FOIA requests to the Services for records related to this ESA Section 7 consultation. In response, the Services produced a large quantity of documents (some of which were partially redacted). The Services withheld other documents under FOIA Exemption 5, which protects

"inter-agency or intra-agency memorandums or letters that 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).

In summary, the key chronological dates in this FOIA dispute are:

- **June 18, 2013:** EPA initiates formal consultation under ESA Section 7 with the Services regarding the proposed rule.
- **November 4, 2013:** The Services receive the most recent version of the EPA's proposed rule from OMB.
- **November 15, 2013:** The Services send the Description of the Action (i.e. a summary of their understanding of the proposed rule) to the EPA for review.
- **November 26, 2013:** EPA sends the Services its corrections and comments on the Description of the Action, which the EPA incorporated into the final description of the November 2013 proposed rule.
- **December 3, 2013:** The Services inform the EPA that their draft opinions are "jeopardy opinions" and will be completed on or around December 6, 2013.
- **December 6, 2013:** NMFS completes its draft jeopardy opinion.
- **December 9, 2013:** FWS completes its draft jeopardy opinion.

- **December 12, 2013:** FWS Deputy Solicitor calls the EPA General Counsel to "touch base . . . about transmitting a document to EPA."
- **December 12 & 17, 2013:** The Services email two RPAs—written to accompany the draft jeopardy opinions—to the EPA.
- **March 14, 2014:** EPA sends the Services a new, final rule for review and Biological Opinion analysis.
- **March 31, 2014:** The Services send the EPA a document requesting clarification regarding their understanding of elements of the final rule.
- **April 7, 2014:** NMFS employees internally circulate a draft jeopardy biological opinion relating to the March 14, 2014 proposed rule; this draft is not sent to EPA.
- **April 8, 2014:** EPA confirms the Services' interpretations and understanding of the final rule contained in the Services' clarification document.
- **May 19, 2014:** The Services issue a joint final no jeopardy biological opinion regarding the March 14, 2014 proposed rule.

b. Procedural History

On December 21, 2015, the Sierra Club filed suit against the Services, arguing that they had improperly withheld documents under FOIA Exemption 5. The parties filed cross-motions for summary judgment regarding their release. During and after that hearing the district court and the parties narrowed the list of contested documents to 16. The district court found that 4 of the disputed documents were fully protected

under Exemption 5 but ordered that the Services produce one document in part and the other eleven in full.[4] The Services timely appealed the district court's order to produce the documents, and the parties stipulated to stay of production pending appeal.[5]

The documents at issue on appeal—those that the district court found were not exempt from disclosure—were submitted to the panel under seal for *in camera* review. They are:

1. **Biological Opinions**

   i. **"NMFS 44516.1":** A 289-page NMFS draft jeopardy biological opinion dated December 6, 2013;

   ii. **"FWS 252":** A 72-page FWS draft jeopardy biological opinion dated December 9, 2013;

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[4] Although the district court initially cited the correct test for FOIA Exemption 5—that exempt documents must be both "pre-decisional" and "deliberative" to avoid disclosure—the test it applied to each document was whether it was a "relatively polished draft" that contained "subjective comments, recommendations, or opinions." These factors, though they might bear on whether a document was "pre-decisional" or "deliberative," are not dispositive—and to the extent the district court's analysis depended solely on these factors, it was in error. Because the standard of review on appeal from an Exemption 5 challenge is *de novo*, however, we have examined each of the contested documents to determine whether they satisfy the "pre-decisional" and "deliberative" test.

[5] Sierra Club did not cross-appeal to challenge the district court's holding that four of the requested documents were completely protected under Exemption 5.

iii. **"NMFS 5427.1":** A 334-page NMFS draft jeopardy biological opinion dated April 7, 2014;[6]

2. **Reasonable and Prudent Alternatives (RPAs)**

   i. **"FWS 279":** A 4-page FWS RPA, dated December 17, 2013;

   ii. **"FWS 308":** A 3-page FWS RPA, dated December 18, 2013;

   iii. **"FWS 555":** A 2-page FWS RPA, dated March 6, 2014.

3. **Other Documents**

   i. **"NMFS 61721":** A 1-page statistical table showing estimated aggregate effects of cooling water intake structure facilities on protected species;

   ii. **"NMFS 5597.1":** A 2-page document that describes steps that facility owners/operators must take if abalone, an endangered species, is affected by their cooling water intake structures;

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[6] The draft opinion itself is undated. The district court opinion states that it was dated April 4, 2014, but the affidavit submitted on behalf of the agency that created it states it was sent via email on April 7, 2014. We therefore refer to it as the April 7, 2014 draft opinion.

iii. **"NMFS 7544.2":** A 15-page document on Anadromous Salmonid Requirements that provides criteria and guidelines to be utilized by owner/operators in the development of downstream migrant fish screen facilities for hydroelectric, irrigation, and other water withdrawal projects;

iv. **"NMFS 37695":** A 2-page document that lists the steps that owner/operators must follow if a seal, sea lion, or fur seal, or their designated critical habitat, may be affected by a cooling water intake structure;

v. **"NMFS 37667":** A 3-page document that lists the steps that owner/operators must follow if sea turtles are affected by their cooling water intake structures;

vi. **"NMFS 14973":** A 5-page document that lists the terms and conditions with which the EPA and an owner/operator must comply in order to be exempt from Section 9 of the ESA. These terms and conditions involve the protocols for dealing with sea turtles near cooling water intake structures. The district court held NMFS could redact one

sentence but had to disclose the rest of the document.

II. STANDARD OF REVIEW

In FOIA cases, this court reviews summary judgment determinations *de novo*. *Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987, 990 (9th Cir. 2016) (en banc).

III. DISCUSSION

Section 522 of Title 5, FOIA, "mandates a policy of broad disclosure of government documents." *Maricopa Audubon Soc. v. U.S. Forest Serv.*, 108 F.3d 1082, 1085 (9th Cir. 1997) (*Maricopa I*) (quoting *Church of Scientology v. Dep't of the Army*, 611 F.2d 738, 741 (9th Cir. 1979) (internal quotations omitted)). Agencies may withhold documents only pursuant to the exemptions listed in § 552(b). *See id.*[7]

Here, the Services argue that the 12 documents the district court ordered them to produce to the Sierra Club are protected under § 552(b)(5) (Exemption 5). Under Exemption 5, FOIA's general requirement to make information available to the public does not apply

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[7] In 2016, Congress amended FOIA by adding another requirement that agencies must meet before exempting material from disclosure. *See* FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016). Under the amended law, an agency "shall withhold information" under the FOIA "only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption" or "disclosure is prohibited by law." 5 U.S.C. § 552(a)(8)(A)(i). This new "foreseeable harm" requirement does not apply to Sierra Club's FOIA request because the amendment only applies to a "request for records . . . made after the date of enactment," which was June 30, 2016. Pub. L. No. 114-185, § 6, 130 Stat. 538, 545.

to "inter-agency or intra-agency memorandums or letters that 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 exemption has been interpreted as coextensive with all civil discovery privileges. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The particular privilege the Services have claimed here is the "deliberative process privilege," which permits agencies to withhold documents "to prevent injury to the quality of agency decisions by ensuring that the frank discussion of legal or policy matters in writing, within the agency, is not inhibited by public disclosure." *Maricopa Audubon Soc. v. U.S. Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997) (*Maricopa II*) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975) (internal quotations omitted)).

Because FOIA is meant to promote disclosure, its exemptions are interpreted narrowly. *Assembly of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 920 (9th Cir. 1992) (citing *Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988)). The dissent argues that because the FOIA Exemption 5 privileges "inter-agency or intra-agency memorandums or letters" and because the documents at issue here were transmitted between agencies, they should be exempt from disclosure. We agree that the documents must be considered in the context in which they were produced, *Sears, Roebuck & Co.*, 421 U.S. at 138. But a document's origins as part of the inter-agency consultation process between the EPA and the Services, *see* 50 C.F.R. § 402.14(a), only relate to a threshold requirement for applying Exemption 5—that the document is

an "inter-agency or intra-agency memorandum." Beyond that threshold, "to qualify [under the deliberative process privilege] a document must thus satisfy two conditions: its source must be a Government agency and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001).

This circuit has defined the ambit of the deliberative process privilege under Exemption 5 narrowly. It "applies only if disclosure of the materials would expose an agency's decision-making 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 (quoting *Maricopa II*, 108 F.3d at 1093) (internal quotations omitted) (finding the Forest Service had not sufficiently demonstrated that disclosure of redacted portions of an intra-agency investigative report regarding alleged employee misconduct contained more than factual, i.e., deliberative, content).

The Services therefore bear the burden of proving that the documents they maintain should be exempt from disclosure are both "pre-decisional and deliberative." *Carter v. Dep't of Commerce*, 307 F.3d 1084, 1089 (9th Cir. 2002) (internal quotations omitted).[8]

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[8] In *Cooling Water Intake Structure Coal. v. EPA*, 898 F.3d 173 (2d Cir. 2018), *amended*, 2018 WL 4678440 (2d. Cir. Sep. 27, 2018), the plaintiffs asked to supplement the certified record with what appear to be the same documents at issue in this case. 2018 WL 3520398 at *7 n.9. Finding "nothing in the privilege log that would

These pre-decisional and deliberative prongs are analyzed separately although the issues they address overlap. *Assembly of Cal.*, 986 F.2d at 920. For the reasons explained below, we conclude that the December 2013 draft jeopardy biological opinions (NMFS 44516.1 and FWS 252), the accompanying statistical table (NMFS 61721), the accompanying instructional documents (NMFS 5597.1, NMFS 7544.2, NMFS 37695, NMFS 37667, NMFS 14973.1), and the March 2014 RPA (FWS 555) were not both pre-decisional and deliberative. We therefore AFFIRM in part the district court's summary judgment order requiring the production of these records. There is, however, sufficient support for concluding the December 2013 RPAs (FWS 279, 308) and the April 2014 draft jeopardy opinion (NMFS

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disturb the 'presumption of regularity' afforded to the agencies' certified record," *id.* (citing *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971)), the Second Circuit denied this motion in a footnote, noting that the EPA had "produced a privilege log that adequately describes the nature of [the requested documents] and their rationale for classifying [them] as deliberative and therefore privileged," and thus the Agency had satisfied their obligation under Fed. R. Civ. P. 26(b)(5)(A)(ii) (requiring that a party claiming privilege describe the privileged documents in a manner that allowed other parties to assess the claim). *Cooling Water Intake Structure Coal.*, 2018 WL 4678440 at *7 n.9. *Cooling Water Intake* did not, however, analyze whether the reasons given in the privilege log for the claims of privilege were justified. Instead, the Second Circuit applied a "presumption of regularity" regarding the administrative record, not applicable here. It did not address whether the EPA had carried a burden of showing that the documents at issue were both deliberative and predecisional, as we must do to determine whether they should be disclosed under FOIA, *Carter*, 307 F.3d at 1089. Given the different burdens, we do not believe that the footnote in that decision suggests a different result than the one we reach.

5427.1) were pre-decisional and deliberative. Because these records satisfy the standard for non-disclosure under FOIA Exemption 5, we REVERSE the district court's order for their production.

a. Pre-decisional

A document is pre-decisional if it is "prepared in order to assist an agency decision-maker in arriving at his decision, and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Assembly of Cal.*, 968 F.2d at 920 (citation and internal quotations omitted). The agency requesting the exemption "must identify a specific decision to which the document is pre-decisional." *Maricopa II*, 108 F.3d at 1094.

Here, the Services argue that the December 2013 and April 2014 jeopardy opinions, the three RPAs, and all of the other statistical and instructional documents predate the May 2014 "no jeopardy" opinion and are thus pre-decisional as to that final opinion.

1. April 2014 NMFS Draft Biological Opinion

We agree that the April 2014 draft jeopardy opinion (NMFS 542.71) was prepared as an internal agency document. It was only circulated between groups of NMFS employees, and there is nothing in the record that indicates that the jeopardy finding was communicated even informally to the EPA. Where one document reflects an earlier position of the agency—as the April 2014 draft jeopardy opinion does here when compared with the May 2014 final no jeopardy opinion—it is pre-decisional as to the issues addressed in both. *See Nat. Wildlife*

Fed., 861 F.2d at 1120 (documents that were "working drafts" subject to revision are pre-decisional). In other words, it does not appear to represent the conclusion of the agency on the likely impact of the final March 2014 rule, but rather is an interim step, communicated only internally within NMFS. The document expressed the agency staff's initial opinion as to the rule. NMFS never adopted that opinion as the agency's; instead, the NMFS ultimately joined the FWS in a final joint no jeopardy opinion in May 2014 regarding the final March 2014 rule.[9]

2. RPAs

We also agree that the December 2013 RPAs (FWS 279, 308) are pre-decisional because they appear to be earlier drafts of the third, March 2014 RPA (FWS 555). In other words, the December 2013 RPAs do not reflect the FWS' final position regarding the kinds of changes the November 2013 version of the rule needed in order to comply with the ESA. The December 2013 RPAs, but not the March 2014 RPA, are therefore pre-decisional.

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[9] We recognize the difference between the NMFS April 2014 "jeopardy opinion" and the NMFS and FWS joint May 2014 "no-jeopardy" opinion, both of which address the March 2014 proposed EPA rule. The cover letter transmitting the final "no jeopardy" opinion of May 19, 2014 explains that its opinion is based in part on "the Services' interpretations of that rule as agreed upon by EPA on April 8, 2014." These interpretations—obviously considered of key importance to the Services—were agreed to by EPA during the same time frame that NMFS was preparing its earlier jeopardy opinion, which it ultimately decided not to send. Beyond this, we do not know why NMFS decided to join the final "no jeopardy" opinion after its staff earlier proposed reaching the opposite conclusion. But "back-and-forth" debate is precisely the type of deliberative process that Exemption 5 protects.

3. 2013 Draft Biological Opinions

We disagree with the Services, however, that the December 2013 draft jeopardy opinions (NMFS 44516.1; FWS 252) are pre-decisional. These two jeopardy opinions represent the final view of the Services regarding the then-current November 2013 proposed rule; the May 2014 no jeopardy opinion represents the final view of Services regarding the later March 2014 revised, proposed rule.

Both the Supreme Court and this court have held that the issuance of a biological opinion is a final agency action. *Bennet v. Spear*, 520 U.S. 154, 178 (1997); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 940 (9th Cir. 2006). So our focus is on whether each document at issue is pre-decisional as to a biological opinion, not whether it is pre-decisional as to the EPA's rulemaking. Although the December 2013 biological opinions in this case were not *publicly* issued, they nonetheless represent the Services' final views and recommendations regarding the EPA's then-proposed regulation. The purpose of the December 2013 jeopardy biological opinions and their accompanying documents was not to advise another decision-maker higher up the chain about what the Service's position should be on the proposed rule. Instead, these opinions, created pursuant to an ESA Section 7 formal consultation, contain the final conclusions by the final decision-makers—the consulting Services—regarding whether a proposed regulation will harm protected species and habitat. *See* 50 C.F.R. 402.14(h)(3) (a biological opinion is "[t]he *Service's* opinion on whether the action is likely to jeopardize the continued existence of listed species. . . . ") (emphasis added).

Where, as here, a document is created by a final decision-maker and represents the final view of an entire agency as to a matter which, once concluded, is a final agency action independent of another agency's use of that document, it is not pre-decisional. *Cf. Maricopa II*, 108 F.3d at 1094 (Forest Service's internal investigative report was prepared to advise the Chief of the Forest Service on how the agency should respond to misconduct allegations and was thus pre-decisional); *Kowack v. U.S. Forest Serv.*, 766 F.3d 1130, 1135 (9th Cir. 2014) (investigative reports prepared by the Forest Service's Misconduct Investigations program manager were meant to assist the agency in making a final decision regarding how to deal with an employee and were thus pre-decisional).

The record reflects the finality of the conclusions in the December 2013 draft jeopardy opinions. The documents had been approved by final decision-makers at each agency: the email correspondence in the record indicates Gary Frazer, the Assistant Director for Ecological Services at FWS who was responsible for overseeing and administering ESA consultations, made final edits to the FWS Service December 9, 2013 jeopardy opinion and that the document was awaiting his autopen signature. NMFS meanwhile was preparing "talking points" for its legislative affairs staff and preparing to release the drafts to the public.

Moreover, the Services' own account indicates that the EPA made changes to its proposed regulations *after* December 2013—that is, after both Services' jeopardy opinions were completed and partially transmitted to

the EPA—and that the "final" May 2014 Biological Opinion reflected the Services' opinion concerning the EPA's later *revised* proposed regulation.

The fact that the December 2013 jeopardy opinions predated the later no jeopardy opinion does not render them predecisional. "[M]aterial which predate[s] a decision chronologically, but did not contribute to that decision is not pre-decisional in any meaningful sense." *Assembly of Cal.*, 968 F.2d at 921 (census data prepared by the Department of Commerce "solely for the purpose of post-decision dissemination" if the Secretary decided to adjust the census was not pre-decisional merely because it predated the Secretary's decision). The December 2013 jeopardy opinions pre-date the May 2014 no jeopardy opinion, but address and thus make final conclusions about a different version of the EPA's rule. These earlier opinions therefore were not pre-decisional with respect to the later opinion, which addressed a different proposed rule.

4. Other Documents

We disagree with the Services' arguments that the remaining documents, which accompanied the December 2013 draft jeopardy opinions, were pre-decisional because they were either "modified" or excluded from the May 2014 final no jeopardy opinion. These documents—1) a statistical table showing estimated aggregate effects of cooling water intake structures on ESA-protected species (NMFS 61721); 2) several instructional documents for cooling water intake structure operators detailing how to abate the harmful impacts of those structures on specific species (NMFS 5597.1, "Abalone Measures"), (NMFS 7544.2, "Andromous Salmonid Measures"), (NMFS 37695, "Pinniped Measures"), and (NMFS

37667, "Sea Turtle Requirements"); and 3) "Terms and Conditions" that operators of cooling water intake structures must follow in implementing the RPAs (NMFS 14973.1)—were largely instructional, and intended to explain best practices for mitigating the projected, harmful effects of the November 2013 proposed rule. They were not early-stage recommendations for mitigating the impacts of the revised, March 2014 rule, and are thus not pre-decisional as to the May 2014 no jeopardy opinion the Services issued in response to that later rule.

b. Deliberative

To shield documents from disclosure under Exemption 5, the Services must not only show that they are predecisional, but also that they are deliberative. *Maricopa II*, 108 F. 3d at 1093. Examples of "deliberative" materials include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency" or that "inaccurately reflect or prematurely disclose the views of the agency." *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1118-19 (9th Cir. 1988) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). With three exceptions noted below, the contested documents here are not "deliberative."

The Supreme Court has cautioned against relying on a "wooden" facts-versus-opinions dichotomy for determining whether a document is deliberative. *Assembly of Cal.*, 968 F.2d at 921 (citing *EPA v. Mink*, 410 U.S. 73, 91 (1973)). Accordingly, this circuit applies a "functional approach," which considers whether the contents of the documents "reveal the mental processes of the decision-makers" and would "expose [the Services']

decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine [their] ability to perform [their] functions." *Id.* at 920-21.

After conducting a *de novo* review of the documents, we conclude that only three—the December 2013 RPAs (FWS 279, 308) and April 2014 draft jeopardy opinion (NMFS 5427.1)—could reveal inter- or intra- agency deliberations and are thus exempt from disclosure.

The Services argue that all the documents at issue are deliberative because they were created as part of a "lengthy and complicated" consultation process between the Services and the EPA about the EPA's water cooling intake structures rule—a process during which many drafts of biological opinions and other documents were circulated intra-agency and inter-agency and "commented upon by others, revised, and recirculated for further discussion." According to the Services, the Sierra Club's request is intended to "uncover any discrepancies between the findings, projection and recommendations" between jeopardy opinions created by "lower-level" Services personnel and the final joint no jeopardy opinion. (quoting *Nat'l Wildlife Fed'n*, 861 F.2d at 1122).

The underlying concern in *National Wildlife Federation* was that releasing "working drafts" and comments on Forest Plans and Environmental Impact Statements (EISs) prepared by "lower-level" Forest Service employees would "reveal the mental processes" that went into choosing and publishing a final Forest Plan and EIS. *Id.* at 1119-22. In other words, a reader with access to both these working drafts and the final plan could "probe the editorial and policy judgment of the decision-makers" who selected and issued the final plan. *Id.*

The draft Forest Plans in *National Wildlife Federation* were a collection of "tentative opinions and recommendations of Forest Service employees"; the draft EISs compared these alternative Forest Plan proposals, thereby revealing the agency's deliberations in choosing a final plan. *Id.* at 1121-22. This understanding of "deliberative"—meaning reflecting the opinions of individuals or groups of employees rather than the position of an entire agency—is shared among the circuits. *See, e.g.*, *Moye, O'Brien, Hogan & Pickert v. Nat'l R.R. Passenger Corp.*, 376 F.3d 1270, 1279 (11th Cir. 2004) (Amtrak OIG "audit work papers and internal memoranda" that "lower level staff" played a "significant role" in authoring were deliberative); *Grand Cent. Partnership, Inc. v. Cuomo*, 166 F.3d 473, 483 (2d Cir. 1999) (emails between HUD employees that discussed their personal opinions on an investigation into misconduct by a HUD funding recipient were deliberative); *Providence Journal Co. v. U.S. Dep't of Army*, 981 F.2d 552, 560 (1st Cir. 1992) (Inspector General Reports that were "essential to the consultative process *within* the agency" were deliberative) (emphasis added)).

The dissent makes a similar point about the ongoing nature of the consultative process to argue that documents exchanged between the Services and the EPA during that process are protected inter-agency memoranda. It cites to the ESA Section 7 regulations to point out that the Services "shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives." 50 C.F.R. § 402.14(a). The agency may in turn submit comments to the Service regarding the draft biological opinion within a given window of time, at which

point the Service may receive an extension on the time for issuing the opinion. *Id.*

Nothing in the documents at issue here indicates whether the EPA sent these types of comments to the Services, how those comments impacted the Services' jeopardy/no jeopardy conclusion, or anything else about what the substance of those comments might have been. Such documents would likely satisfy the two aforementioned conditions of 1) being an inter-agency memorandum that 2) fell within the ambit of deliberative process.

In the case before the court, we know that the draft opinion was transmitted piecemeal to the EPA, the Services and the EPA agreed to extend the time frame for the consultation, and that "[u]ltimately *based on changes to the regulation*, the Services' final conclusion was that the regulation"—the final version—"was not likely to jeopardize the continued existence of listed species nor likely to destroy or adversely modify critical habitat." (emphasis added). The fact that the decision to revise the rule after the jeopardy finding was the result of additional back-and-forth between the Services and the EPA—deliberative discussions that are not memorialized in the documents before us—does not render the December 2013 opinions or accompanying documents pre-decisional or deliberative as to the Services' opinion about the November 2013 version of the EPA regulation or as to the Services' later conclusion about a different version of the rule.

1. 2013 Draft Biological Opinions and Other Documents

After reviewing the documents in this case in camera to make a *de novo* determination, we conclude that neither the December 2013 draft jeopardy opinions (NMFS 44516.1; FWS 252), nor the accompanying statistical and instructional documents (NMFS 5597.1, NMFS 7544.2, NMFS 37695, NMFS 37667, NMFS 14973.1) were prepared by low-level officials, or contain merely tentative findings. These are final products that reflect the agencies' findings on the jeopardy posed by the November 2013 proposed rule, and their recommendations for mitigating the harmful impacts of that rule.

We note that the documents do not contain line edits, marginal comments, or other written material that expose any internal agency discussion about the jeopardy finding. Nor do these documents contain any insertions or writings reflecting input from lower level employees.[10] The two December 2013 opinions both state they were prepared on behalf of the entire agency and represent that agency's opinion. And the record shows that preparations were being made for the NMFS opinion (NMFS 44516.1), as is, to be publicly "roll[ed] out" and published in the administrative record; the FWS opinion (FWS 252), which includes its agency's seal/header, had received final edits from a senior official and was just awaiting his autopen signature.

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[10] The NMFS December 2013 jeopardy opinion (NMFS 44516.1) does contain two insertions that could possibly be editorial notes not intended to be included in the final report. For that reason, we instruct the district court to redact these lines from that report.

The only thing the December 2013 draft jeopardy opinions have in common with the draft Forest Plans and EISs in *National Wildlife Federation* is that they were referred to as "draft" documents. But to treat them similarly would ignore clear substantive distinctions. Unlike the documents in *National Wildlife Federation*, these opinions and accompanying documents represent the final view of the Services on the likely impact of the then-proposed regulation. These final jeopardy opinions from December 2013 pertain to a different rule and are not "earlier draft" versions of the no jeopardy opinion from May 2014; that later opinion addressed a new and different proposed rule.[11]

Moreover, taking seriously our obligation to consider the underlying purpose of the deliberative process privilege, these documents do not reveal more about the internal deliberative process that the Services went through before issuing their joint May 2014 no jeopardy opinion than what the Services themselves have already disclosed during this litigation: that the initial proposed regulation resulted in final drafts of jeopardy opinions in December 2013, that the EPA received portions of those opinions and proposed a revised regulation at some point after that, and that the Services ultimately issued a no jeopardy opinion for that revised, proposed regulation. Nor do the December 2013 jeopardy opinions reveal either the Services' internal deliberative processes that lead to reaching those opinions or the EPA's internal deliberative process that resulted in revising the draft regulation. *Cf. Assembly of Cal. v. U.S. Dep't*

[11] As discussed earlier, the NMFS did prepare a jeopardy opinion concerning the March 2014 rule, which was pre-decisional as to the final no jeopardy joint opinion on that rule.

of Comm. 968 F.2d 916, 922-23 (9th Cir. 1992) (disclosing final census figures would not reveal the deliberative process in reaching those figures, particularly when the method used to generate the data was already a matter of public record).

Nor would releasing these opinions and accompanying documents allow a reader to reconstruct the "mental processes" that lead to the production of the May 2014 no jeopardy opinion by allowing one to compare an early draft of that opinion to the final opinion. There is no later draft of the Services' opinion regarding the November 2013 version of the rule that a discerning reader could compare to the two December 2013 opinions requested here.

Again, the statistical table (NMFS 61721) and the instructional documents and terms and conditions (NMFS 5597.1, NMFS 7544.2, NMFS 37695, NMFS 37667, NMFS 14973.1) summarize the Services' best practices and recommendations for mitigating environmental harm to certain species, and effectively monitoring the welfare of certain protected species should they appear in the vicinity of a water cooling intake structure. They do not reveal any internal discussions about how those recommendations were vetted and are thus not deliberative.

2. RPAs

Our analysis regarding the December 2013 RPAs (FWS 279, 308) is different from our analysis concerning the December 2013 Draft Biological Opinions and Other Documents because, as discussed above, they *do* appear to be successive drafts of the Services' recommendations for the November 2013 proposed rule. And comparing these drafts would shed light on FWS' internal

vetting process. Thus, considering *de novo* whether the Services have carried their burden in showing that these documents are deliberative, we find that they have done so.

By comparison, disclosure of only the March 2014 RPA (FWS 555) will offer no insights into the agency's internal deliberations. It appears to be the final version in a progression of agency recommendations about how to amend the November 2013 proposed rule. The Services have offered no evidence that there were any subsequent versions of this RPA addressing the November 2013 proposed rule. The March 2014 RPA is therefore not deliberative.

3. April 2014 NMFS Draft Biological Opinion

Finally, we agree with the Services that the NMFS April 2014 draft jeopardy biological opinion is deliberative. As discussed above, it addresses the revised rule that the EPA proposed in March 2014. A reader could thus conceivably reconstruct some of the deliberations that occurred between the April 2014 and May 2014 opinions by comparing the two. Additionally, the Acting Assistant Administrator for NMFS testified in an affidavit provided to the district court that this draft of the jeopardy opinion was only circulated internally between one employee and a group of other lower-level employees. The April 2014 draft jeopardy opinion is therefore deliberative and subject to Exemption 5.

IV. CONCLUSION

For the foregoing reasons the district court's order to produce the December 2013 draft jeopardy biological opinions (NMFS 44516.1 and FWS 252), the March 2014

RPA (FWS 555), and the remaining statistical and instructional documents (NMFS 5597.1, NMFS 61721, NMFS 7544.2, NMFS 37695, NMFS 37667, NMFS 14973.1) is **AFFIRMED** because the record shows that these materials are not both pre-decisional and deliberative and therefore not exempt under § 522(b)(5) of FOIA, Exemption 5.

The district court's order to produce the December 2013 RPAs (FWS 279, 308) and the April 2014 draft jeopardy opinion (NMFS 5427.1) is **REVERSED** because these materials are both pre-decisional and deliberative and thus exempt from disclosure under FOIA Exemption 5. The parties agree that reversal would require the district court to perform a segregability analysis on remand. We instruct the district court to perform that analysis.

The case is **REMANDED** for further proceedings consistent with this opinion.

WALLACE, Circuit Judge, concurring in the result in part and dissenting in part:

I concur in the result reached by the majority as to the April 2014 draft opinion (NMFS 5427.1) and the December 2013 RPAs (FWS 279, 308). I dissent from the result reached by the majority as to the rest of the documents. I respectfully disagree with my colleagues that the deliberative process privilege does not protect the December draft opinions (NMFS 44516.1, FWS 252) and other documents.

The majority overlooks the "context of the administrative process which generated" the December draft opinions. *NLRB. v. Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975). They were part of an inter-agency consultation process. 50 C.F.R. § 402.14(a). The regulations governing that process make clear that the purpose of agency review is to allow the Services to consider changes to the draft opinion based on the agency's comments. Specifically, the regulations forbid the Services from issuing the final opinion before the agency has had time to comment on the draft and build in time for the Services to revise a draft opinion to incorporate or respond to any agency comments. *See* 50 C.F.R. § 402.14(g)(5) (Services cannot issue the final opinion "prior to the 45-day or extended deadline while the draft is under [the agency's] review" and if the agency submits comments within 10 days of the final opinion deadline, the Services are entitled to a 10-day deadline extension). The preamble to the regulations explains that the "release of draft opinions to Federal agencies . . . facilitates a more meaningful exchange of information," "may result in the development and submission of additional data, and the preparation of more thorough biological opinions," and

"helps ensure the technical accuracy of the opinion." *Interagency Cooperation—Endangered Species Act of 1973*, 51 Fed. Reg. 19,926, 19,952 (June 3, 1986). Therefore, the regulations governing formal consultations set up a process by which the Services may receive feedback from the agency on draft opinions.

Moreover, a formal consultation may involve not only the Services making a jeopardy decision, but also a decision about what alternative actions are reasonable and prudent, so-called RPAs. The Services and the agency "work[] closely" on the "development of [RPAs]" contained in a jeopardy opinion. *Id.* The "provision to review draft biological opinions" provides the necessary "exchange of information for the development of [RPAs]." *Id.* The Services "will, in most cases, defer to the Federal agency's expertise and judgment" as to whether a draft RPA is feasible, but if the Services disagree, the Services make the ultimate call. *Id.* Thus, even though the Services have discretion as to whether to accept the EPA's comments, the purpose of agency review is to seek the agency's advice on the draft opinion. Seeking comments on a document presupposes the ability to make changes to it, showing it is pre-decisional. It also shows the deliberative nature of the process. Accordingly, the administrative context shows that draft opinions are generally both pre-decisional and deliberative.

A quick look at the record in this case dispels any doubt that the December draft opinions are pre-decisional and deliberative. The FWS draft opinion requests that the EPA "provide any comments" and states that the FWS would need about ten days after receiving comments, assuming they are not substantial, to issue the final opinion. Likewise, the government submitted declarations

of two management-level Service employees stating that the drafts were subject to revision. Gary Frazer, assistant director of the FWS, stated that both draft opinions "were subject to internal review within FWS and the Department of the Interior and consultation with the EPA." Samuel D. Rauch, an administrator at the NMFS, stated that by transmitting a draft opinion to the EPA, the "NMFS is not rendering a final decision" and the document "remains a draft and is subject to change until final signature."

The majority asserts that there is nothing in the record that "indicates whether the EPA sent . . . comments to the Services" on the December draft opinions. Of course, there is not. As the majority observes, the Services "never formally transmitted" the drafts to the EPA. The EPA could not mark up a document it never received. The record, however, is clear that the EPA and the Services engaged in extensive discussions about the draft opinions before and after the December 6 deadline. As the deadline approached, the Services decided based on "internal review and *interagency* review in December" that "additional consultation [with the EPA] was needed to better understand and consider the operation of key elements of EPA's rule." The EPA and the Services "agreed[] that more work needed to be done and agreed to extend the time frame for the consultation." That the EPA and the Services jointly concluded the draft opinions needed more work shows their predecisional and deliberative nature: the Services had not made a final decision as of December and the deliberative process was ongoing.

The majority and Sierra Club argue that because the December draft opinions were the Services' "final" word

on the November 2013 regulations, the opinions are not pre-decisional. I disagree. The Services' decision would become final only "once the biological opinion is issued." *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 940 (9th Cir. 2006); *see also Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The majority's observation that the December draft opinions did not contribute to the Services' later decision about the March 2014 regulations is beside the point. The draft opinions are pre-decisional as to the November 2013 regulations, which the EPA changed before finalizing. That the Services never gave their final word as to those regulations does not strip the drafts of their privileged status. A draft that "die[s] on the vine . . . . is still a draft and thus still pre-decisional and deliberative." *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014); *see also Sears*, 421 U.S. at 151 n.18 (privilege may apply even if documents "do not ripen into agency decisions").

The majority and Sierra Club contend that the December draft opinions are not deliberative because the Services' management had vetted them and they represented the view of the "entire" Services. But even if true, those facts do not show that the drafts are not deliberative. It is well established that circulation of a draft opinion to *another* agency does not change its privileged status, any more than circulation *within* the agency. The Supreme Court has spoken decisively on this point: "By including inter-agency memoranda in Exemption 5, Congress plainly intended to permit one agency possessing decisional authority to obtain written recommendations and advice from a separate agency not possessing such decisional authority without requiring that the advice be any more disclosable than similar

advice received from within the agency." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 188 (1975). Here, the Services had decisional authority in preparing the opinions, but sought advice from the EPA about the decision. *Grumman Aircraft* teaches that is precisely the type of inter-agency process that Congress designed the privilege to protect.

The majority's decision sets out a categorical rule that the deliberative process privilege protects only documents "reflecting the opinions of individuals or groups of employees rather than the position of an entire agency." This rule contravenes *Grumman Aircraft*, which acknowledged Exemption 5's parity between inter- and intra-agency drafts. 421 U.S. at 188. There the Supreme Court explained, "Exemption 5 does not distinguish between inter-agency and intra-agency memoranda." *Id.* Unsurprisingly, the out-of-circuit cases the majority cites provide no support for its ill-founded rule, much less do they reflect that this view "is shared among the circuits" as the majority claims. In each cited case, the court concluded that the deliberative process privilege protected the documents at issue. *Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger Corp.*, 376 F.3d 1270, 1278 (11th Cir. 2004); *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 483 (2d Cir. 1999); *Providence Journal Co. v. U.S. Dep't of Army*, 981 F.2d 552, 562-63 (1st Cir. 1992). Therefore, even if the majority is right that these cases show that "opinions of individuals or groups of employees" are generally deliberative, they do not support the contrary proposition that "the position of an entire agency" can never be deliberative.

Sierra Club makes much of the fact that "the Services typically include draft biological opinions in their administrative records." Again, even if true, the government's waiver of privilege in some contexts does not waive the privilege here, *see Assembly of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 916, 922 n.5 (9th Cir. 1992), a point that Sierra Club concedes.

Finally, Sierra Club argues that the Services' draft opinions are "significant, legally-mandated drafts, apart from any number of internal or 'working drafts.'" It argues that they are "formal documents reflecting and conveying the Services' conclusions at a prescribed point in the consultation process." This argument reflects a misunderstanding of the governing regulation. It does not require draft opinions shared with the EPA to be "significant" or to constitute a formal statement of the Services' conclusions. The regulation states that the Services must, upon the agency's request, "make available to the Federal agency the draft biological opinion for the purpose of analyzing the [RPAs]." 50 C.F.R. § 402.14(g)(5). The regulation, however, does not provide that a draft opinion shared with an agency be at any particular level of completion or approval. For example, nothing appears to preclude the EPA from requesting to see a draft at the beginning of the process. It also does not require that the Services *ever* provide a draft opinion to the EPA if the EPA does not request it. Given that "Exemption 5 does not distinguish between inter-agency and intra-agency" drafts, *Grumman Aircraft*, 421 U.S. at 188, a draft opinion sent to the EPA is no more disclosable than a draft sent from one working group within the Service to another.

In conclusion, the administrative process that generated the draft opinions shows that they are pre-decisional and deliberative. They are pre-decisional because they do not reflect the Services' final jeopardy and RPA decisions as to the November 2013 regulations. They are deliberative because they are "part of the deliberative process" by which the Services and the EPA consult on those decisions. *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1118 (9th Cir. 1988). I conclude that the Services may withhold them.

The deliberative process privilege also protects the other documents at issue in this case. Because the NMFS never finalized or adopted the April draft jeopardy opinion (NMFS 5427.1), my analysis above applies to it with equal force. The same is true for the three draft RPAs (FWS 279, FWS 308, FWS 555), which were part of never-finalized jeopardy opinions. In addition, the Services should be able to withhold the four species-specific protective measures (NMFS 5597.1, NMFS 7544.2, NMFS 37695, NMFS 37667), the affected species table (NMFS 61721), and the terms and conditions (NMFS 14973.1). The protective measures are earlier versions of those included in the final opinion. Likewise, NMFS decided not to include the table in the final opinion after deliberations among scientists. Finally, NMFS staff circulated the terms and conditions internally as a possible precedent for a section of the final opinion. In each case, the documents are privileged because disclosure would allow Sierra Club to "probe the editorial and policy judgment of the decisionmakers" by comparing the draft versions to what the Services finally published. *Nat'l Wildlife*, 861 F.2d at 1122.

In conclusion, I would reverse the district court's judgment ordering production of all twelve documents and instruct it to perform a segregability analysis on remand.[1]

[1] The Second Circuit recently sustained the Services' assertion of the deliberative process privilege over the critical documents at issue in this case: the three draft biological opinions and the three draft RPAs. *Cooling Water Intake Structure Coal. v. EPA*, 905 F.3d 49, 65 n.9 (2d Cir. 2018). The court held that the Services' privilege log "adequately describes the nature of the . . . requested documents and their rationale for classifying those documents as deliberative and therefore privileged." *Id.* While we do not have the privilege log's descriptions of the documents, the Second Circuit described them as "draft documents produced by the Services during consultation with the EPA." *Id.* These key facts—that the documents were subject to change and that they reflect a joint deliberative process—are the basis for my dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 15-cv-05872-EDL

SIERRA CLUB, INC., PLAINTIFF

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL., DEFENDANTS

Filed: July 24, 2017

ORDER FOLLOWING IN CAMERA REVIEW

Before the Court is Plaintiff Sierra Club, Inc.'s ("Plaintiff") motion for summary judgment and Defendants National Marine Fisheries Service ("NMFS") and U.S. Fish and Wildlife Service's ("FWS") (collectively, "Defendants") cross-motion for summary judgment. Plaintiff seeks disclosure of documents pursuant to the Freedom of Information Act ("FOIA"). Following a hearing on June 6, 2017, the Court ordered Defendants to lodge sixteen documents with the Court for *in camera* review.[1] For the reasons discussed below, the Court finds that four are protected by the deliberative process

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[1] These documents were: NMFS 0.7.266.44516.1, FWS 252, FWS 279, FWS 308, FWS 555, NMFS 0.7.266.5427.1, NMFS 0.7.266.5597.1, NMFS 0.7.266.7544.2, NMFS 0.7.266.37667, NMFS 0.7.266.37695, NMFS 0.7.266.61721, NMFS 0.7.266.14973.1, NMFS 0.7.266.7544.3, NMFS 0.7.266.44616.1, NMFS 0.7.266.45263.1, NMFS 0.7.266.45277.2

privilege in their entirety; one is partially protected and must be redacted and produced; and eleven are not protected and must be produced in their entirety.

I. FACTUAL BACKGROUND

Industrial cooling water intake structures have the potential to kill or harm fish and other organisms by impinging them on intake screens and entraining eggs and larvae through the plants' heat exchangers. 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, 48,303 (Aug. 15, 2014) (to be codified at 40 C.F.R. pt. 122). Accordingly, Section 316(b) of the Clean Water Act requires the Environmental Protection Agency ("EPA") to regulate the withdrawal of water from U.S. waters through these structures in order to minimize the structures' adverse environmental impact. 33 U.S.C. § 1326(b).

On April 20, 2011, the EPA proposed new Section 316(b) regulations intended to apply to more than one thousand existing power plants and manufacturing facilities. Cooling Water Intake Structures at Existing Facilities and Phase I Facilities, 76 Fed. Reg. 22,174 (Apr. 20, 2011) (to be codified at 40 C.F.R. pt. 122). In order to fulfill its obligations under Section 7 of the Endangered Species Act ("ESA"),[2] the EPA commenced informal consultation with Defendants in 2012 and formal

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[2] This Section requires federal agencies to consult with Defendants in order to ensure that their actions are "not likely to jeopardize the continued existence" or "result in the destruction or adverse modification of habitat" of threatened or endangered species. 16 U.S.C. § 1536(a)(2). Following formal consultation, Defendants must prepare a written biological opinion containing Defendants' conclusion of either "jeopardy" (i.e., the finding that the agency action is likely

consultation in 2013. Following several extensions (related in part to the October 2013 government shutdown), Defendants and the EPA agreed that Defendants would provide a draft biological opinion to the EPA by December 6, 2013 and the final biological opinion by December 20, 2013. Super Decl., Ex. 6 at 3.

On December 3, 2013, Defendants informed the EPA that: (i) they still expected to complete the draft biological opinions by December 6, 2013; (ii) the opinions would be "jeopardy opinions"; and (iii) Defendants planned to include the draft biological opinions and related information in their administrative records, which document the agency's decisionmaking process and basis for the agency's decision. Super Decl., Ex. 7. NMFS completed its draft biological opinion on December 6, 2013, and FWS completed its draft biological opinion on December 9, 2013 (together, the "December 2013 Biological Opinions"). See Dkt. 47 at n.4. However, Defendants did not transmit either biological opinion to the EPA in December 2013. Instead, on December 17, 2013, Defendants emailed the RPAs to the EPA, Super Decl. ¶ 13, Ex. 9, and provided other "portion[s] of the [draft] biological opinion[s]" to the EPA thereafter. Super Decl. ¶¶ 14, 31, Ex. 21.

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to jeopardize the continued existence of a protected species or habitat) or "no jeopardy" (i.e., the finding that the agency action is not likely to jeopardize the continued existence of a protected species or habitat). If Defendants issue a jeopardy opinion, they must propose reasonable and prudent alternatives ("RPAs") that the agency can implement to avoid jeopardizing the species' continued existence. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(8), (h)(3).

On May 19, 2014, following extensive discussions with the EPA, Defendants issued a joint final biological opinion. Super Decl., Ex. 10. Unlike the December 2013 Biological Opinions, this opinion was a "no jeopardy" opinion that concluded that the EPA's Section 316(b) regulations were not likely to jeopardize the continued existence of listed species or destroy or adversely modify their designated critical habitat. The EPA issued its final regulations on May 19, 2014 and published them in the Federal Register on August 15, 2014. 79 Fed. Reg. at 48,300.

Shortly after the EPA published its final regulations, various environmental groups, including Plaintiff, filed petitions for review in six different circuits pursuant to 33 U.S.C. § 1369(b)(1), challenging the EPA's "no jeopardy" biological opinion. Super Decl. ¶ 17. These petitions for review were eventually consolidated in the Second Circuit as Cooling Water Intake Structure Coalition, et al. v. U.S. EPA, et al., No. 14-4645(L). Super Decl. ¶ 16. On August 11, 2014, Plaintiff requested documents relating to the ESA Section 7 consultation from Defendants. Super Decl., Exs. 1, 2. NMFS produced responsive documents over the course of several months, but withheld 2,916 documents in full and 1,536 documents in part on the basis of deliberative process, attorney-client, and work product privilege. Super Decl., Ex. 17. Similarly, FWS produced responsive documents over the course of several months, but withheld 1,075 documents in full and 347 documents in part on the basis of deliberative process, attorney-client, and work product privilege. Super Decl., Ex. 19.

II. PROCEDURAL HISTORY

Plaintiff initiated this action against NMFS on December 21, 2015, alleging that NMFS improperly withheld responsive documents on the basis of the deliberative process privilege. Plaintiff amended its complaint to add FWS as a defendant on March 22, 2016. Plaintiff filed a motion for summary judgment on December 1, 2016, asking the Court to order Defendants to produce twenty-seven documents related to the ESA Section 7 consultation. Defendants filed their opposition and cross-motion on February 13, 2017, arguing that each of the requested documents was protected by the deliberative process privilege. Plaintiff filed its opposition and reply on March 31, 2017, by which point twenty-five documents were in dispute. Defendants filed their reply on May 5, 2017.

The hearing took place on June 6, 2017. During the hearing, the Court ordered Defendants to lodge six documents—the December 2013 Biological Opinions and four independent—for *in camera* review. It also ordered the Parties to meet and confer and submit a joint statement regarding the documents that remained in dispute. On June 13, 2017, the Parties provided a joint statement listing the ten documents still in dispute and requesting permission to lodge these ten documents for *in camera* review. On June 23, 2017, the Court granted the Parties' request, and Defendants thereafter lodged these documents with the Court.

III. LEGAL STANDARD

FOIA provides the public with the right to access records from federal agencies. Upon receipt of a FOIA request, a federal agency must disclose the requested

records unless they fall within one of nine exemptions. 5 U.S.C. § 552(b)(1)-(9). The agency bears the burden of proving that a requested record is exempt from disclosure. Id. § 552(a)(4)(B). Federal courts have jurisdiction to order a federal agency to disclose improperly withheld documents or to review documents in camera to determine if a claimed FOIA exemption applies. 5 U.S.C. § 552(a)(4)(B); Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1089, 1093 n.2 (9th Cir. 1997).

The fifth FOIA exemption, which permits nondisclosure of "inter-agency or intra-agency memorandums or letters that 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), encompasses the deliberative process privilege. This privilege protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Carter v. U.S. Dep't of Commerce, 307 F.3d 1084, 1089 (9th Cir. 2002) (quoting Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001).

The deliberative process privilege applies to documents that are both (i) pre-decisional and (ii) deliberative. A document is pre-decisional if it is "prepared in order to assist an agency decisionmaker in arriving at his decision, and . . . reflect[s] the personal opinions of the writer rather than the policy of the agency." Carter, 307 F.3d at 1089. A record is deliberative if it contains "recommendations, draft documents, proposals, suggestions and other subjective documents that reflect the personal opinions of the writer rather than the policy of the agency." Nat'l Wildlife Fed'n v. United States Forest Serv., 861 F.2d 1114, 1118-19 (9th Cir.1988).

The key question is "whether the disclosure of 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." Assembly of State of Cal. v. U.S. Dep't of Commerce, 968 F.2d 916, 920 (9th Cir. 1992).

"[C]ommunications containing purely factual material are not typically within the purview of Exemption 5." Julian v. U.S. Dep't of Justice, 806 F.2d 1411, 1419 (9th Cir. 1986), aff'd 486 U.S. 1 (1988). Generally, factual information is not covered by the privilege because the release of such information does not expose the deliberations or opinions of agency personnel. See Mink, 410 U.S. at 91 (refusing to extend Exemption 5 to "factual material otherwise available on discovery merely [because] it was placed in a memorandum with matters of law, policy, or opinion"). "The factual/deliberative distinction . . . [is] a useful rule-of-thumb favoring disclosure of factual documents, or the factual portions of deliberative documents where such separation is feasible." Assembly, 968 F.2d at 921. However, "even if the content of a document is factual, if disclosure of the document would expose the decision-making process itself to public scrutiny by revealing the agency's evaluation and analysis of the multitudinous facts, the document would nonetheless be exempt from disclosure." Nat'l Wildlife Fed'n, 861 F.2d at 1119.

Several cases have considered whether documents related to ESA Section 7 consultations fall within the deliberative process exemption. See Desert Survivors v. US Dep't of the Interior, No. 16-CV-01165-JCS, 2017 WL 475281 (N.D. Cal. Feb. 6, 2017); Our Children's Earth Foundation v. National Marine Fisheries Service, No.

14-4365 SC, 14-1130 SC, 2015 WL 4452136 (N.D. Cal. July 20, 2015); Nw. Envtl. Advocates v. U.S. E.P.A., No. CIV 05-1876-HA, 2009 WL 349732, at *7 (D. Or. Feb. 11, 2009); Greenpeace v. Nat'l Marine Fisheries Serv., 198 F.R.D. 540 (W.D. Wash. 2000). These cases consistently require production of ESA Section 7 documents that are "relatively polished drafts." Nw. Envtl. Advocates, 2009 WL 349732, at *7; see also id. (drafts that "lay out the law applicable to the decisions at hand, discuss the relevant science, and apply the law to that science" not protected); Desert Survivors, 2017 WL 475281 at *14 ("preliminary drafts" not protected because disclosure would not have chilling effect on agencies); Greenpeace, 198 F.R.D. at 543. ("[I]nformation that does not disclose the deliberative process, communications unrelated to the formulation of law or policy, and routine reports are not shielded by the privilege.").

However, "documents express[ing] preliminary staff views or tentative opinions" are protected from disclosure. Nw. Envtl. Advocates, 2009 WL 349732, at *8; see id. at *7 (documents reflecting "internal discussions" and "back-and-forth/give-and-take" are protected); Desert Survivors, 2017 WL 475281 at *14 (because disclosure of preliminary staff views or tentative opinions "might chill speech," documents expressing them are protected); Our Children's Earth Foundation, 2015 WL 4452136 at *5 (drafts that "reflect the *interpretations* of that scientific information by staff and scientists, thus reflecting their personal opinions on the science" are protected).

III. DISCUSSION

A. Documents Lodged on June 13, 2017

As discussed in more detail below, of the six documents that Defendants lodged for *in camera* review on June 13, 2017, the Court finds that one is protected and five are not protected and must be disclosed.

1. December 6, 2013 Draft Biological Opinion (NMFS 0.7.266.44516.1): Not Protected

This document is a 289-page draft jeopardy biological opinion that describes the EPA's proposed changes to Section 316(b) of the Clean Water Act, the new requirements for owner/operators of industrial cooling water intake structures, and the location of affected structures. It also evaluates the direct and indirect effects that the EPA's proposed action would have on ESA-listed species and their habitats. The document is a "relatively polished draft." Nw. Envtl. Advocates, 2009 WL 349732, at *7. It contains only two comments in the margins, neither of which reveals the decisionmaking process of NMFS personnel. See Assembly of State of Cal., 968 F.2d at 920 ("A predecisional document is a part of the 'deliberative process,' if the disclosure of [the] materials would expose an agency's decisionmaking process."). Accordingly, it is not exempt from disclosure under the deliberative process privilege. See Greenpeace, 198 F.R.D. at 543 ("[I]nformation that does not disclose the deliberative process . . . [is] not shielded by the privilege.").

2. December 9, 2013 Draft Biological Opinion (FWS 252): Not Protected

This document is a 72-page draft jeopardy biological opinion that is similar to the NMFS December 6, 2013 draft Biological Opinion, but it omits several sections.

The document is a "relatively polished draft." Nw. Envtl Advocates, 2009 WL 349732, at *7. It contains no subjective comments, recommendations, or opinions,. Accordingly, it is not exempt from disclosure under the deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

3. December 17, 2013 RPAs (NMFS 0.7.266. 44616.1): Protected

This document is a 4-page RPA that describes a course of action by which the EPA could avoid adversely affecting protected species and habitats. It includes multiple comments, modifications, and additions of language by NMFS personnel that reflect their "internal discussions" and "back-and-forth/give-and-take [that is] protected by the deliberative process privilege." Nw. Envtl. Advocates, 2009 WL 349732, at *7. Because the comments appear throughout the entirety of this brief document, they are not reasonably segregable. See Nat'l Wildlife Fed'n, 861 F.2d at 1119. Defendants may withhold this document from production.

4. December 17, 2013 RPAs (FWS 279): Not protected

This document is also 4-page RPA that describes an alternative course of action by which the EPA could avoid adversely affecting protected species and habitats. It contains no subjective comments, recommendations, or opinions, and is a "relatively polished draft." Nw. Envtl. Advocates, 2009 WL 349732, at *7. Accordingly, it is not exempt from disclosure under the deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

5. December 18, 2013 FWS RPAs (FWS 308): Not Protected

This document is a 3-page RPA that describes an alternative course of action by which the EPA could avoid adversely affecting protected species and habitats. It contains no subjective comments, recommendations, or opinions, and is a "relatively polished draft." Nw. Envtl. Advocates, 2009 WL 349732, at *7. Accordingly, it is not exempt from disclosure under the deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

6. March 6, 2014 FWS RPAs (FWS 555): Not Protected

This document is a 2-page RPA that that describes an alternative course of action by which the EPA could avoid adversely affecting protected species and habitats. It contains no subjective comments, recommendations, or opinions, and is a "relatively polished draft." Nw. Envtl. Advocates, 2009 WL 349732, at *7. Accordingly, it is not exempt from disclosure under the deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

B. Documents Lodged on June 27, 2017

As discussed in more detail below, of the ten documents that Defendants lodged for *in camera* review on June 27, 2017, three are protected, one is partially protected, and six are not protected and must be disclosed.

1. April 4, 2014 Draft Biological Opinion (NMFS 0.7.266.5427.1): Not Protected

This document is a 334-page draft jeopardy biological opinion. Like the December 6, 2013 Biological Opinion, it describes the EPA's proposed changes to Section

316(b) of the Clean Water Act, the new requirements for owner/operators of industrial cooling water intake structures, the location of affected structures, and the direct and indirect effects that the EPA's proposed action would have on protected species and their habitats. The document is a "relatively polished draft." Nw. Envtl Advocates, 2009 WL 349732, at *7. It contains no subjective comments, recommendations, or opinions,. Accordingly, it is not exempt from disclosure under the deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

2. October 21, 2013 Abalone Measures (NMFS 0.7.266.5597.1): Not Protected

This 2-page document describes steps that owner/operators must take if abalone, an endangered species, is affected by their cooling water intake structures. It contains no subjective comments, recommendations, or opinions, and is a "relatively polished draft." Nw. Envtl. Advocates, 2009 WL 349732, at *7. Accordingly, it is not exempt from disclosure under the deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

3. Anadromous Salmonid Measures (NMFS 0.7.266.7544.2): Not Protected

This 15-page document is entitled "Anadromous Salmonid Requirements." It provides criteria and guidelines to be utilized by owner/operators in the development of downstream migrant fish screen facilities for hydroelectric, irrigation, and other water withdrawal projects. The document includes sections on screen design and hydraulics, site conditions, structure placement, screen material, and debris management. It contains no subjective comments, recommendations, or opinions,

and is a "relatively polished draft." Nw. Envtl. Advocates, 2009 WL 349732, at *7. Accordingly, it is not exempt from disclosure under the deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

4. Salmonids, Larval Fish, Sea Turtles, Abalone, and Corals Measures (NMFS 0.7.266.7544.3): Protected

This 3-page document lists the steps that owner/operators must follow if salmonids, larval fish, sea turtles, abalone, or corals may be affected by a cooling water intake structure. It is a preliminary draft with notes, comments, and highlighting that reflect "internal discussions" and "back-and-forth/give-and-take [that is] protected by the deliberative process privilege." Nw. Envtl. Advocates, 2009 WL 349732, at *7. Because the comments appear throughout the entirety of this brief document, it is not reasonably segregable. See Nat'l Wildlife Fed'n, 861 F.2d at 1119. Defendants may withhold this document from production.

5. Pinniped Measures (NMFS 0.7.266.37695): Not Protected

This 2-page document lists the steps that owner/operators must follow if a seal, sea lion, or fur seal, or their designated critical habitat, may be affected by a cooling water intake structure. It contains no subjective comments, recommendations, or opinions, and is a "relatively polished draft." Nw. Envtl. Advocates, 2009 WL 349732, at *7. Accordingly, it is not exempt from disclosure under the deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

6. Sea Turtle Requirements (NMFS 0.7.266. 45263.1): Protected

This 2-page document lists the steps that owner/ operators must follow if sea turtles are affected by their cooling water intake structures. This document contains comments and additions that reflect "internal discussions" and "back-and-forth/give-and-take [that is] protected by the deliberative process privilege." Nw. Envtl. Advocates, 2009 WL 349732, at *7. Because the comments appear throughout the entirety of this brief document, it is not reasonably segregable. See Nat'l Wildlife Fed'n, 861 F.2d at 1119. Defendants may withhold this document from production.

7. Sea Turtle Requirements (NMFS 0.7.266. 45277.2): Protected

This 2-page document is an exact duplicate of NMFS 0.7.266.45263.1, including all comments, modifications, and additions. For the reasons discussed above, this document is protected and need not be disclosed.

8. Sea Turtle Requirements (NMFS 0.7.266. 37667): Not Protected

This 3-page document lists the steps that owner/ operators must follow if sea turtles are affected by their cooling water intake structures. It contains no subjective comments, recommendations, or opinions, and is a "relatively polished draft." Nw. Envtl. Advocates, 2009 WL 349732, at *7. Accordingly, it is not exempt from disclosure under the deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

9. Table re Affected Species (NMFS 0.7.266. 61721): Not Protected

This 1-page document contains a statistical chart showing estimated aggregate effects of cooling water intake structure facilities on protected species as a result of impingement and entrainment. It contains no subjective comments, recommendations, or opinions, and is a "relatively polished draft." Nw. Envtl. Advocates, 2009 WL 349732, at *7. Accordingly, it is not exempt from disclosure under the deliberative process privilege. See Greenpeace, 198 F.R.D. at 543.

10 Terms and Conditions (NMFS 0.7.266. 14973.1): Partially Protected

This 5-page document lists the terms and conditions with which the EPA and an owner/operator must comply in order to be exempt from Section 9 of the ESA. These terms and conditions involve the protocols for dealing with sea turtles near cooling water intake structures. Although Defendant's cross-motion for summary judgment describes the document as "NMFS staff correspondence made in the course of deliberating about and preparing biological opinions," the document does not contain correspondence. The only notation throughout the document is one sentence highlighted in yellow, which may reveal NMFS's personnel's decisionmaking process, and thus may be redacted. See Nat'l Wildlife Fed'n, 861 F.2d at 1119. The remainder of the document is not protected and should be disclosed.

IV. CONCLUSION

For the reasons set forth above, the cross-motions for summary judgment are GRANTED IN PART and DENIED IN PART. Defendants shall produce the

following documents in their entirety: NMFS 0.7.266.44516.1; FWS 252; FWS 279; FWS 308; FWS 555; NMFS 0.7.266.5427.1; NMFS 0.7.266.5597.1; NMFS 0.7.266.7544.2; NMFS 0.7.266.37667; NMFS 0.7.266.37695; NMFS 0.7.266.61721. Defendants shall redact the protected portions of the following document and produce the remainder: NMFS 0.7.266.14973.1. Defendants may withhold the following documents in their entirety: NMFS 0.7.266.7544.3; NMFS 0.7.266.44616.1; NMFS 0.7.266.45263.1; NMFS 0.7.266.45277.2. Defendants shall produce the required documents to Plaintiff within two weeks from the date of this order.

IT IS SO ORDERED.

Dated: July 24, 2017

/s/ ELIZABETH D. LAPORTE
ELIZABETH D. LAPORTE
United States Magistrate Judge

APPENDIX C

1. 5 U.S.C. 552(b) (2012) provides in pertinent part:

Public information; agency rules, opinions, orders, records, and proceedings

* * * * *

(b) This section does not apply to matters that are—

* * * * *

(5) 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;

* * * * *

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

* * * * *

2. 16 U.S.C. 1536 provides in pertinent part:

Interagency cooperation

(a) Federal agency actions and consultations

* * * * *

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

* * * * *

(b) Opinion of Secretary

* * * * *

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat.

If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

* * * * *

3. 50 C.F.R. 402.13 (2013) provides:

Informal consultation.

(a) Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required. If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

(b) During informal consultation, the Service may suggest modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat.

4. 50 C.F.R. 402.14 (2013) provides:

Formal consultation.

(a) Requirement for formal consultation. Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) *Exceptions.* (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(c) *Initiation of formal consultation.* A written request to initiate formal consultation shall be submitted to the Director and shall include:

(1) A description of the action to be considered;

(2) A description of the specific area that may be affected by the action;

(3) A description of any listed species or critical habitat that may be affected by the action;

(4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;

(5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and

(6) Any other relevant available information on the action, the affected listed species, or critical habitat.

Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12. Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.

(d) *Responsibility to provide best scientific and commercial data available.* The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal repre-

sentative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.

(e) *Duration and extension of formal consultation.* Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

(1) The reasons why a longer period is required,

(2) The information that is required to complete the consultation, and

(3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) *Additional data.* When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to § 402.14(e), the Federal agency shall obtain, to the

extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

(g) *Service responsibilities*. Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1) through (3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The

Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10-day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take may occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken

by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

(h) *Biological opinions*. The biological opinion shall include:

(1) A summary of the information on which the opinion is based:

(2) A detailed discussion of the effects of the action on listed species or critical habitat; and

(3) The Service's 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 (a "jeopardy biological opinion"); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion). A "jeopardy" biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(i) *Incidental take.* (1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, i.e., the amount or extent, of such incidental taking on the species;

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be established in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 220.45 and 228.5 for NMFS.

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the Federal agency must reinitiate consultation immediately.

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(j) *Conservation recommendations.* The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

(k) *Incremental steps.* When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if:

(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);

(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;

(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;

(4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and

(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

(*l*) *Termination of consultation.* (1) Formal consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.