

U.S. Fish and Wildlife Service v. Sierra Club, Inc.: The Supreme Court Favors Protecting Government Documents from the Public Eye, Overlooking the Practicalities of Formulating a Biological Opinion Under the Endangered Species Act

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I. OVERVIEW OF CASE

Cooling water intake structures used to moderate the temperature of industrial equipment have become relevant to environmental law because of the uncertain impacts they have on protected species living within marine ecosystems.¹ In an interesting turn of events, these structures recently became relevant for their impact on an entirely different subject matter: the public’s access to government information.² In 2011, the Environmental Protection Agency (EPA) proposed a rule aiming to ensure that the cooling structures ran using technology that ensured environmental protection.³ Because the specifics of this rule may have adversely affected protected species living in proximity to the cooling structures, the National Marine Fisheries Service and the U.S. Fish and Wildlife Service (together, the Services) were obligated to form a biological opinion to evaluate if any of these species would be jeopardized as a result of the rule.⁴ After consulting with EPA, the Services sent a draft biological opinion indicating that the affected species were in fact in jeopardy.⁵ In response, EPA made modifications to their rule and the Services made a finding of no jeopardy in their final biological opinion on the matter.⁶ Eager to understand the substance of the draft finding jeopardy, the environmental organization Sierra Club brought suit against

1. U.S. Fish and Wildlife Serv. v. Sierra Club, Inc., 141 S. Ct. 777, 783 (2021).
2. *Id.*
3. *Id.*
4. *Id.* at 783-84.
5. *Id.* at 784.
6. *Id.*

the U.S. Fish and Wildlife Service after the agency attempted to claim that the information was protected under the Freedom of Information Act (FOIA).⁷ From here, the dispute surrounding the cooling water intake structures transitioned from an Endangered Species Act (ESA) concern to an issue rooted in the public's ability to view government documents.

The United States District Court for the Northern District of California sided with Sierra Club, determining that the draft biological opinion should not be privileged under FOIA.⁸ The United States Court of Appeals for the Ninth Circuit affirmed in part, stating that the documents are not privileged. In addition, the Ninth Circuit interpreted these documents to represent a final opinion despite their "draft" label.⁹ Writing her first majority opinion for the Supreme Court of the United States, Justice Barrett contemplated the consequences of revealing a draft biological opinion to the public, as well as the category that draft biological opinions may fall into from a FOIA perspective. The Supreme Court *held* that draft biological opinions satisfy the requirements of the deliberative process privilege under Exemption 5 of FOIA and should not be released to the public. *U.S. Fish and Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 788 (2021).

II. BACKGROUND

FOIA grants the public access to government documents, maintaining transparency for the public about government decision-making.¹⁰ Nine exemptions limit this transparency and provide the means for parties to withhold their information by asserting privileges that distinguish their interests as holding priority over disclosure.¹¹ The fifth of these exemptions (Exemption 5) contains within it three privileges: the attorney-client privilege, the attorney-work product privilege, and the deliberative process privilege.¹² Documents to which these privileges may apply are unified under a common rationale: they typically receive protection under discovery.¹³ Regarding the deliberative process privilege, courts are motivated to protect the quality of agency decisions, or as the United States Court of Appeals for the D.C. Circuit put it, to prevent

7. *Id.* at 784-85.

8. *Id.* at 785.

9. *Id.*

10. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980).

11. *Id.*; 5 U.S.C. § 552(b)(5).

12. *Coastal States Gas Corp.*, 617 F.2d at 862.

13. *Id.*

agencies from “operat[ing] in a fishbowl” and exposing agency discussion to the public.¹⁴ To assert such a privilege, courts require the document at issue be both “predecisional” and “deliberative.”¹⁵ The predecisional element calls for the document to be made before an agency’s commitment to a policy. The deliberative element calls for the document to weigh the possible outcomes of a decision rather than firmly assert a position.¹⁶

An analysis of finality may also suffice to determine whether Exemption 5 applies. *N.L.R.B. v. Sears, Roebuck & Co.* held that a document falling within the exemption must not “invariabl[y] explain agency action already taken or agency decision already made.”¹⁷ Rather than a formal evaluation of the overlapping deliberative and predecisional elements, *Sears* enables courts to assess whether an agency regards a document as an embodiment of its final view.¹⁸ Such an analysis requires diligent awareness of the context of the specific agency process being examined.¹⁹ A document’s “operative effect” on an agency within this context allows for a determination of finality, where decisions indicating a policy settled upon by an agency have such an effect.²⁰

One example of an agency document which can arise as an issue under FOIA is a biological opinion, which serves as a critical component for protecting endangered species under the requirements of Section 7 of the ESA.²¹ Section 7 provides that agencies must carry out actions to avoid jeopardizing protected species or the critical habitat of these species.²² This provision mandates agencies to perform a scientific evaluation of a species’ likely response to potentially damaging new rules or decisions.²³ To achieve such an evaluation, agencies defer to the expertise of the Services, who prepare biological opinions in response to an agency’s determination that a proposed action could “adversely affect” a listed

14. *Dudman Commc’n Corp. v. Dep’t of Air Force*, 815 F.2d 1565, 1567 (D.C. Cir. 1987) (citing S. REP. NO. 89-813, at 9 (1965)).

15. *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-52 (1975); *Coastal States Gas Corp.*, 617 F.2d at 866.

16. *Coastal States Gas Corp.*, 617 F.2d at 866; *see also Sears*, 421 U.S. at 153 (citing Kenneth C. Davis, *The Information Act: A Preliminary Analysis*, 34 U CHI. L REV. 761, 797 (1967)).

17. *Sears*, 421 U.S. at 153.

18. *Id.* at 161.

19. *Id.* at 138; *Coastal States Gas Corp.*, 617 F.2d at 858.

20. *See Sears*, 421 U.S. at 160; *see also Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 186-87 (1975).

21. 16 U.S.C. § 1536(c).

22. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 154 (1978).

23. *Bennett v. Spear*, 520 U.S. 154, 158 (1997).

species.²⁴ A biological opinion may take two forms: a “no jeopardy” opinion, which allows for agency action to continue and the drafting of an incidental take statement, or a “jeopardy” opinion, which does not allow for agency action and instead presents a set of alternatives.²⁵ Prior to the final form of this decision under formal consultation, agencies may engage in the exchange of information, including draft biological opinions.²⁶ Ultimately, the final biological opinion issued by the Services formally consummates the consultation process between the Services and the acting agency.²⁷

III. COURT’S DECISION

In the noted case, the Supreme Court rejected the notion that a draft biological opinion could be considered sufficiently final to fall outside of Exemption 5, shielding it from becoming publicly available. The Court began its reasoning by highlighting a policy rationale for FOIA that supports including draft biological opinions under Exemption 5.²⁸ This rationale posited that officials who work under the assumption that their conversations leading up to a final decision have the potential to become exposed to the public will forego candidness, and thus effective decision-making, to protect potentially sensitive information.²⁹

After establishing this overarching purpose, the Court required that for this rationale to apply to a given document (here, the draft biological opinion), it cannot be final and must instead be categorized as a predecisional, deliberative document.³⁰ To clarify these overlapping terms, the Court emphasized that the critical factor in identifying a final decision was to ask whether the process by which a final decision was normally reached had terminated and resulted in a formal communication of agency policy.³¹ This means that nothing following the draft biological opinion creates a final decision with “operative effect.”³² Rather than maturing to

24. 16 U.S.C. § 1536(a)(2).

25. 16 U.S.C. §§ 1536(a)(2), 1536(b)(3)(A), 1536(b)(4).

26. Formal Consultation, 50 C.F.R. § 402.14(g)(5) (2019).

27. *Bennett*, 520 U.S. at 178.

28. *U.S. Fish and Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021).

29. *Id.*

30. *Id.* at 786.

31. *Id.*

32. *Id.*

the type of formal communication of agency policy regarded by the Court as final, the draft biological opinion “died on the vine.”³³

While the name “draft” itself might suggest a preliminary opinion, the Court considered the context of the document within the agency’s process as the critical indicator of finality.³⁴ This required the Court to examine which step in the agency’s decision-making process the draft biological opinion reached.³⁵ The Court explained that the issuance of a draft biological opinion is typically followed by a period of review where changes may be made, with final opinions generally not being issued during the review period.³⁶ In this instance, the notion of finality was defeated by the fact that the agencies submitted their draft biological opinion at a point in time that left room for a two-week review period before the final opinion was due.³⁷ By intentionally leaving this two-week review period, the Services established that they expected EPA to provide comments that may impact the final opinion.³⁸ In this way, the Court defined the position of the draft biological opinion as lacking an operative effect because of the potential for comments that could change it.³⁹

To counter this notion, Sierra Club argued that submitting the draft biological opinion two weeks prior to the deadline was simply to warn EPA that a jeopardy opinion was about to be issued.⁴⁰ Thus, the draft biological opinion contained a communication that had the type of operative effect that constitutes a final biological opinion.⁴¹ Importantly, Sierra Club’s argument hinged on another FOIA policy rationale—that privileging the deliberations and drafts produced by an agency leading up to their decision would lead agencies to label documents as drafts in order to cover sensitive information, creating a confidential decision-making process that defeats the main thrust of FOIA.⁴²

The Court determined that Sierra Club’s argument was invalid for two main reasons.⁴³ The Court first identified an issue with the way Sierra Club defined “operative effect.” Here, the Court favored a definition that

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 787.

37. *Id.*

38. *See id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 788.

43. *See id.* at 787.

refers to the legal consequences rather than practical consequences of an agency's action.⁴⁴ The Court admitted that while the draft biological opinion has operated in a manner that caused EPA to change its rule (a practical consequence), other documents with less-than-draft status could be said do the same, creating a dangerous range of documents that would be required to be exposed to the public.⁴⁵ Allowing these types of documents to also be considered non-exempt would be a violation of the policy rationale the Court aims to protect.⁴⁶ Accordingly, the Court asserted that a different quality must have been identified as essential when considering operative effect.⁴⁷ That quality was embodied by the legal consequences arising from the agency decision, which was not inherent in any draft biological opinion.⁴⁸

Second, the Court rejected the "effects-based test" that Sierra Club relied upon when determining EPA reacted to an operative effect.⁴⁹ Here, the Court chose to carry out an evaluation of the Services' treatment of the opinion as final as opposed to examining the way EPA reacted to the Service's opinion as an indication of operative effect.⁵⁰ To conclude that the draft biological opinion was not "treated as final," rather than examining EPA's response, the Court looked to the behavior of decisionmakers from the Services, who did not formally approve the documents and determined that the consulting period needed to be extended.⁵¹ The overall conclusion by these decisionmakers that "more work needed to be done" indicated that a decision was yet to be made.⁵² To complete its analysis, the Court summarized that this determination of finality followed a "functional" inquiry rather than a "formal" one, where functionally final decisions would not be shielded by Exemption 5.⁵³ Because the draft biological opinion here did not meet the Court's definition of functionally final, it remained protected.⁵⁴

In this case, two dissenting Justices, Breyer and Sotomayor, offered an analysis leading to the conclusion that the draft biological opinion was

44. *Id.*

45. *See id.* at 787-88.

46. *Id.*

47. *Id.*

48. *See id.*

49. *Id.* at 789-90.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

sufficiently final, offering five factors as evidence.⁵⁵ First, the dissent looked to the content of the draft biological opinion.⁵⁶ Though the Services may decide to alter a draft biological opinion, the same can be done for a final biological opinion, defeating the Majority's discussion of a draft biological opinion "dying on the vine."⁵⁷ In this way, the potential for a change of content does not make the draft biological opinion any less final.⁵⁸ Second, the dissent considered the function of the document.⁵⁹ Both draft and final biological opinions describe the Services' findings, offer alternatives, and present EPA with the same options to proceed. Thus, the two forms of documents are functionally the same.⁶⁰ Third, the dissent asserted agency practice as a telling factor of a document's finality.⁶¹ Considering that out of 6,829 formal consultations, only two jeopardy decisions were reached via a final biological opinion rather than a draft, it was reaffirmed that the draft biological opinion served a final function.⁶² Fourth, the dissent referred to the awareness of agency members as a factor in recognizing finality.⁶³ This factor addressed the majority's policy concerns surrounding limiting the Exemption. Based on the removal of Exemption 5 that occurs when a third party becomes involved, the dissent highlighted that agency members must have already acted under an awareness that a draft biological opinion may become publicly available.⁶⁴ Finally, the dissent conformed with the majority in recognizing the presence of legal consequences as a deciding factor in determining finality.⁶⁵ However, rather than denying the existence of legal consequences within the draft biological opinion, the dissent recognized that both final and draft biological opinions limit EPA to a fixed number of options: abandoning the action altogether, embracing the proposed alterations to the action, taking the action regardless of the repercussions, or requesting exemption at the Cabinet level.⁶⁶

55. *Id.* at 789-91 (Breyer, J., dissenting).

56. *Id.* at 789.

57. *Id.*

58. *Id.*

59. *Id.* at 790.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 791.

65. *Id.*

66. *Id.* at 790-91.

IV. ANALYSIS

The Court's decision reflects a view of the deliberative process privilege that overlooks the practicalities of agency deliberations under the ESA, favoring instead the use of FOIA to shield government documents. To come to its conclusion that a draft biological opinion should be protected by the deliberative process privilege, the Supreme Court relied primarily upon *N.L.R.B. v. Sears, Roebuck & Co.*⁶⁷ In doing so, the Court embraced an analysis that focuses more on the inquiry of whether the document in question was final rather than following the more traditional two-element approach of assessing the predecisional and deliberative nature of the document. While the Court still spent time discussing these elements, the bulk of its reasoning hinges on finality, which was defined in the noted case as a document having an "operative effect."⁶⁸ After rejecting Sierra Club's interpretation of operative effect, which used an "effects-based test" to conclude that EPA's actions in response to the draft opinion satisfied the requirement for finality, the Court focused two key components to indicate finality: the legal consequences flowing from the draft and the Service's treatment of the draft as final.⁶⁹ This view may be at odds with the reasoning used in *Sears*, which should be analyzed closely for the agency process it unravels and because of its prevalence in the noted case's reasoning. Awareness of the specific steps within these processes are vital in determining the finality of documents that qualify for protection under Exemption 5.⁷⁰

In *Sears*, the Court evaluated the steps that a charge of unfair labor practices goes through under the National Labor Relations Board (the Board) to be adjudicated.⁷¹ Here, two distinct agency bodies are at play: the Board itself, which serves as the primary adjudicator in an unfair labor claim, and the Office of General Counsel (OGC), which works on behalf of the Board and retains the authority to determine whether a complaint can be filed by drafting memoranda.⁷² In order for the Board to proceed with adjudication, it must receive an Appeals Memorandum from the OGC allowing for action to be taken.⁷³ The Court in *Sears* concluded that

67. *Id.* at 785-88 (citing *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975)).

68. *Id.* at 786.

69. *Id.* at 787-88.

70. *See* *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980).

71. *Sears*, 421 U.S. at 138-42.

72. *Id.* at 138.

73. *Id.* at 157.

although the memorandum produced by the OGC was not a final draft, it did enable the Board to carry out litigation, and thus concluded the agency process, meaning that Exemption 5 should not protect the document.⁷⁴ The ability of the Board to carry out litigation qualifies the memorandum as having operative effect and indicating a “decision already reached.”⁷⁵

Contrary to the Supreme Court’s reasoning, EPA’s decision to change its rule in response to the Services’ draft biological opinion suggests that the decision was final in accordance with the reasoning in *Sears*.⁷⁶ Just as the Board may only adjudicate a case if the OGC produces memoranda suggesting that it does so, EPA may only go forward with a proposed action that could impact a protected species if the Services produce a “no jeopardy” biological opinion.⁷⁷ Instead of focusing on the actions taken by each agency as steps in the formal consultation process, the Court in the noted case focused on the legal consequences that flowed from the biological opinion and the signals by the Services, which suggested they did not view the opinion as final. Though the Court acknowledged its rejection of Sierra Club’s “effects-based test,” this goes against the crux of the analysis for deliberative process privilege cases, which clearly emphasize the significance of the context of the agency process.⁷⁸ At the end of the opinion in the noted case, the Court emphasized that its inquiry was functional rather than formal. But its analysis suggests the opposite: rather than taking into account agency process and EPA’s actions in response to the Services’ draft biological opinion, the Court focused only on how the Services interpreted their own biological opinion and its qualities.⁷⁹ These considerations fall outside the rationale for FOIA because EPA’s actions following the issuance of the draft opinion have a direct impact on the public, they reflect the decided policy of the agency, and therefore the documents should be made available to the public.⁸⁰

The Court’s blindness to the realities of the agency process become more evident when considering the dissent, which referred to a study that found that, over a span of eight years, only two final biological opinions

74. *Id.* at 160. The Court ultimately held that Exemption 5 did apply to protect attorney work-product, a privilege not relevant to the deliberative process privilege being questioned in the noted case. *Id.* at 149.

75. *Id.* at 160.

76. *See id.*

77. *See id.* at 138; 16 U.S.C. §1536(a)(2).

78. *Sears*, 421 U.S. at 138; *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 858 (D.C. Cir. 1980).

79. *U.S. Fish and Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 787-88 (2021).

80. *See Sears*, 421 U.S. at 153; *Sterling Drug v. F.T.C.*, 450 F.2d 698, 708 (D.C. Cir. 1971).

were issued out of thousands.⁸¹ This reveals that the provisions for formal consultation under Section 7 of the ESA do not necessarily align with the specific actions and expectations of agencies in practice. Other reviews of the data behind biological opinions have also found the frequency of jeopardy final biological opinions to be low, and scientists contributing to the formulation of biological opinions have indicated an awareness of the practice of using draft and final opinions to serve the same purpose: allowing for an agency to change its proposed action.⁸² This roundabout implementation of jeopardy opinions may stem from a larger issue with the implementation of the consultation process under Section 7 of the ESA as a whole.⁸³ Among other factors impacting the infrequent assertion of jeopardy opinions, the biological opinion and its lack of public oversight has been recognized as a problem.⁸⁴ While other agency decisions that may impact the public typically include the release of documents to aid the public's understanding, biological opinions do not accommodate for formal public review before final decisions have been reached.⁸⁵ Though the potential problems that arise from a lack of the public comment element lie outside the scope of FOIA, precedent indicates that the way in which an agency carries out its formal consulting process has consequences on the public that should become relevant to the Court's analysis.

Coastal States Gas Corp. v. Department of Energy refers to the "secret law" created as a result of agencies stashing decisions that actually have operative effect behind the barrier of Exemption 5, and recognizes that the negative impact this can have on the public should be a consideration in the Court's analysis of the deliberative process privilege.⁸⁶ *Sterling Drug, Inc. v. F.T.C.* further cautions against protecting agency actions which act as "the law itself" under FOIA exemptions.⁸⁷ This concern should become especially relevant when the specific agency process being analyzed provides opportunity for "secret law."⁸⁸ Keeping in mind the unique vulnerability of the biological opinion-producing formal consultation

81. *Sierra Club*, 141 S. Ct. at 790 (Breyer, J., dissenting).

82. Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 FLA. L. REV. 141, 164 n.167 (2012).

83. Oliver A. Houck, *The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 322 (1993).

84. *Id.* at 325-26.

85. *Id.* at 326.

86. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980).

87. *Sterling Drug v. F.T.C.*, 450 F.2d 698, 708 (D.C. Cir. 1971).

88. *Id.*

process for the tucking away of draft opinions declaring “jeopardy,” a feature which grants agencies time to change their course without the issuance of a final opinion, the Court in the noted case should have further contemplated the potential for creating “secret law” and the impact on the public.⁸⁹

V. CONCLUSION

The noted case illustrates the tension that exists between the desire to prevent agencies from “operating in a fishbowl” while simultaneously ensuring that they are not developing “secret law” when determining if the deliberative process privilege applies.⁹⁰ The realities and implementation issues with the ESA’s consulting process create a treacherous context for the Court to analyze the finality of draft biological opinions.⁹¹ The Supreme Court’s majority opinion neglected to acknowledge these issues, instead choosing to rely on specific qualities of a document which suggested a lack of finality.⁹² In doing so, the Court skipped over the importance of integrating the context of the agency’s process in its analysis and recognized that EPA’s actions in response to the draft biological opinion indicated that a decision was reached.⁹³ If these critical factors were taken into account, the Court may have acknowledged that this particular agency process creates conditions ideal for creating “secret law” concerning a matter that greatly impact the public—the protection of threatened and endangered species.

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89. Houck, *supra* note 83, at 322-26.

90. *Dudman Comm’n Corp. v. Dep’t of Air Force*, 815 F.2d 1565, 1567 (D.C. Cir. 1987); *Coastal States Gas Corp.*, 617 F.2d at 867.

91. Houck, *supra* note 83, at 322-26; Owen, *supra* note 82, at 164.

92. *U.S. Fish and Wildlife Serv. Sierra Club*, 141 S. Ct. 777, 788 (2021). The Court derived this “lack of finality” test from the analysis of deliberative process privilege in *Sears. Id.*

93. *Sears, Roebuck & Co.*, 421 U.S. 132, 137-138 (1975); *Coastal States Gas Corp.*, 617 F.2d at 858-59.

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