No. 19-547

In the Supreme Court of the United States

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

v.

SIERRA CLUB, INC.

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

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), by incorporating the deliberative process privilege, protects against compelled disclosure of federal agencies' 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.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-37a) is reported at 925 F.3d 1000. The order of the district court (Pet. App. 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 (Pet. App. 2a). On August 19, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including September 27, 2019. On September 17, 2019, Justice Kagan further extended the time to and including October 25, 2019, and the petition was filed on that date. The petition for a writ of certiorari was granted on March 2, 2020. The jurisdiction of this Court rests on 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*, 1a-19a.

STATEMENT

This case involves Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(5), which protects against compelled disclosure of documents reflecting a federal agency's deliberations over a governmental decision. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). The district court refused to apply the deliberative process privilege to certain draft documents prepared by petitioners (two federal agencies) during a formal interagency consultation process under Section 7 of the Endangered Species Act of 1973 (ESA), Pub. L. No. 93-205, 87 Stat. 892 (16 U.S.C. 1536). See Pet. App. 38a-53a. The court of appeals affirmed. *Id.* at 1a-37a. The courts ordered the agencies to release their discussion drafts even though those documents were created to assist the agencies during their ongoing deliberations, and even though the preliminary analysis in those drafts was not adopted by the relevant agency decisionmakers.

A. Legal Framework

1. FOIA generally mandates disclosure upon request of records held by a federal agency, "unless the documents fall within enumerated exceptions." *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001); see 5 U.S.C. 552(a); 5 U.S.C. 552(b) ("This section does not apply to matters that are" covered by one of the listed exemptions.). FOIA Exemption 5 authorizes an agency to withhold "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).

One of the most well-established litigation privileges for government agencies is the 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). Congress intentionally incorporated the deliberative process privilege into FOIA in order "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." *Klamath Water Users*, 532 U.S. at 8-9 (quoting *Sears*, 421 U.S. at 151); see *National Sec. Archive* v. *CIA*, 752 F.3d 460, 462 (D.C. Cir. 2014) (Kavanaugh, J.).

This Court has described the deliberative process privilege through FOIA Exemption 5 in straightforward terms: The privilege "distinguish[es] between predecisional memoranda prepared in order to assist an agency decision-maker in arriving at his decision, which are exempt from disclosure, and postdecisional memoranda setting forth the reasons for an agency decision already made, which are not." *Renegotiation Bd.* v. *Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975). Consistent with that holding, federal courts have repeatedly held that agencies' "draft[s] of what will become a final document" are privileged and exempt from compelled disclosure. *Coastal States Gas Corp.* v.

Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980); see, *e.g.*, *Abdelfattah* v. *U.S. Dep't of Homeland Sec.*, 488 F.3d 178, 183-184 (3d Cir. 2007) (per curiam); *City of Virginia Beach* v. *United States Dep't of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993); *Town of Norfolk* v. *United States Army Corps of Eng'rs*, 968 F.2d 1438, 1458 (1st Cir. 1992); *Florida House of Representatives* v. *United States Dep't of Commerce*, 961 F.2d 941, 945-946 (11th Cir.), cert. dismissed, 506 U.S. 969 (1992); *National Wildlife Fed'n* v. *United States Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988); *Lead Indus. Ass'n* v. *OSHA*, 610 F.2d 70, 86 (2d Cir. 1979); see also U.S. Dep't of Justice, *Guide to the Freedom of Information Act, Exemption 5*, at 39 & n.174 (Aug. 26, 2019) (citing several district court decisions), https://go.usa.gov/xvXxS.

FOIA Exemption 5 differs from agencies' litigation-discovery privileges in one important respect: FOIA "by its terms" does not "permit inquiry into particularized needs of the individual seeking the information, although such an inquiry would ordinarily be made of a private litigant." *EPA* v. *Mink*, 410 U.S. 73, 86 (1973). Thus, Exemption 5 applies to all documents "'*normally* privileged,'" and privileged documents do not become subject to disclosure under FOIA based on a party's claim of "need," even if that "party's need * * * would be sufficient to override the privilege" in a litigation context. *FTC* v. *Grolier Inc.*, 462 U.S. 19, 28 (1983) (quoting *Sears*, 421 U.S. at 149).[1]

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[1] In 2016, after the events in this case, Congress amended FOIA to provide that an agency is entitled to withhold information "only if * * * the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in" Section 552(b). FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2(1), 130

2. 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 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 [critical] habitat." 16 U.S.C. 1536(a)(2).

Agencies carry out their ESA responsibilities "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 delegatees of the Secretaries of the Interior and Commerce, respectively. 16 U.S.C. 1536(a)(2). The consultation process may be informal in some circumstances. 50 C.F.R. 402.13. But if an agency determines that its proposed action is likely to adversely affect a listed species or critical habitat, then the agency must

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Stat. 538-539 (5 U.S.C. 552(a)(8)(A)). Congress also added a sunset provision to Exemption 5 that limits the deliberative process privilege to documents less than 25 years old when the FOIA request is made. § 2(2), 130 Stat. 539-540 (5 U.S.C. 552(b)(5)). Those amendments apply only to prospective FOIA requests, § 6, 130 Stat. 544-545, and they do not affect this case. See Pet. App. 12a n.7. The FOIA Improvement Act also made a minor grammatical change to the phrasing of Section 552(b)(5) that does not affect its substance. § 2(2), 130 Stat. 539-540 (5 U.S.C. 552(b)(5)). For the Court's convenience, this brief cites the current version of the statute.

engage in a formal consultation with one or both Services, depending on the species involved. 50 C.F.R. 402.14(a) and (b).[2]

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's effects, taken together with cumulative effects and added to an environmental baseline, are "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); see 50 C.F.R. 402.14(h) (describing a "biological opinion"); see also *Bennett* v. *Spear*, 520 U.S. 154, 158 (1997). If a Service concludes that jeopardy to ESA-listed species or adverse modification of critical habitat will likely result from the agency's action—that is, if it issues what is known as a "jeopardy opinion"—then it must suggest any "reasonable and prudent alternatives" (RPAs) to the agency action that the Service believes will avoid jeopardy or adverse modification. 16 U.S.C. 1536(b)(3)(A); see 50 C.F.R. 402.14(h)(2). If a Service concludes that the agency action will not result in jeopardy or adverse modification of critical

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[2] Subsequent to the events of this case, the regulations governing ESA Section 7 consultation were amended in 2015 and 2019 in certain respects not material 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 were amended or redesignated without material change to the points for which they are cited. For the Court's convenience, this brief cites the current version of the regulations.

habitat, or if it issues RPAs, then the Service must provide a written statement (called an "incidental take statement") specifying the "impact of such incidental taking on the species," any "reasonable and prudent measures that the [Service] considers necessary or appropriate to minimize such impact," and "the terms and conditions * * * that must be complied with by the [action] agency * * * to implement th[ose] measures." 16 U.S.C. 1536(b)(4); see 50 C.F.R. 402.14(i).

ESA Section 7 and the regulations implementing it provide for the interagency consultation process to be collaborative. See 16 U.S.C. 1536(a)(2); 50 C.F.R. 402.14. The Services and the action agency work together to determine the likely effects on listed species and critical habitat from the agency's action, and if necessary, how best to mitigate adverse effects. See 50 C.F.R. 402.14(g). The Services must "[d]iscuss" with the action agency their "review and evaluation" in the consultation process, as well as "the basis for any finding" in their opinion. 50 C.F.R. 402.14(g)(5). The Services must also provide a "draft biological opinion" to the action agency upon request "for the purpose of analyzing the [RPAs]," and "while the draft is under review," the Services "will not issue" a final biological opinion. *Ibid.* The Services are then provided extra time, if necessary, to modify the draft opinion in response to agency comments. *Ibid.*

B. The Present Controversy

1. 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). The Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, directs EPA to establish

standards for cooling water intake structures that reflect the best available technology to "minimiz[e] adverse environmental impact." 33 U.S.C. 1326(b). Some cooling water intake structures have the potential to adversely affect some ESA-listed species or their critical habitat, so after informally consulting with the Services, EPA requested formal consultation on its Intake-Structures Rule in 2013. Pet. App. 2a-4a.

The consultation process was lengthy and involved extensive back-and-forth among the three agencies, which worked collaboratively to achieve a regulatory solution that would benefit ESA-listed species. Pet. App. 4a-6a; see J.A. 32-33 (declaration of Samuel Rauch, Acting Assistant Administrator for NMFS); J.A. 56-58 (declaration of Gary Frazer, Assistant Director of FWS Ecological Services). For almost two years, personnel from the agencies "met routinely, sometimes more than once a week," J.A. 32; held "multiple conference calls," *ibid.*; and "exchanged thousands of emails," J.A. 58. Over the course of the consultation, agency staff circulated, either within their own agency or among each other, "[m]ultiple pre-decisional drafts" of the final EPA rule, the Services' biological opinions, and portions of each of those documents, as well as related documents such as "briefing and options papers." J.A. 32. Those drafts were the subject of "frank discussions" as the agencies "considered and reconsidered" "multiple options for EPA's regulation and the [Services'] biological opinion," with "many" of those options being "rejected." J.A. 58. During that period, agency employees routinely solicited and received "comments and suggestions" on their draft documents, which were then "revised on the author's own initiative or in response to comments[,] and then recirculated." J.A. 32.

Amid the ongoing consultation process, the agencies agreed that the Services would provide EPA with a draft biological opinion prior to making their final decision, consistent with the Services' regulatory obligations under 50 C.F.R. 402.14(g)(5) to discuss their findings with the action agency and share a draft jeopardy opinion upon request before final issuance. See, *e.g.*, J.A. 89, 91. In November 2013, the Services received a draft of EPA's final rule for inter-agency review from the Office of Management and Budget. Pet. App. 4a-5a. The Services then "tentatively agreed" with EPA that they would provide "a draft biological opinion" to EPA for its review by December 6, 2013, with final biological opinions anticipated to follow by December 20, 2013. *Id.* at 5a; see J.A. 37.

Staff at each Service thereafter continued to work on draft biological opinions, first to be circulated in draft form to EPA if supervisors approved transmission, and then subsequently, if signed and approved, to be finally issued. J.A. 37-38, 58. Those draft opinions reached preliminary conclusions that EPA's draft final Intake-Structures Rule was likely to cause jeopardy for certain ESA-listed species and adversely modify critical habitat. Pet. App. 5a. The Services' staffs also prepared draft RPAs and other documents potentially to accompany the draft jeopardy opinions if they were issued. *Ibid.*; see *id.* at 9a-12a (describing the relevant documents). Those draft documents "reflect[ed] only the preliminary thinking of the [Services] at the time of the draft." J.A. 67 (FWS); see J.A. 39 (NMFS draft was "a preliminary analysis").

As the anticipated time for the Services to share their draft opinions with EPA approached, the "staff members and lower level managers" who had prepared

the draft biological opinions and other documents sent them as "recommendations * * * to individuals with decision-making authority" at the Services. J.A. 67. Around the same time, agency personnel began making preparations to circulate those drafts to EPA if they received authorization for that step. For example, FWS employees prepared a cover letter on agency letterhead for transmitting the FWS draft biological opinion. Pet. App. 25a. Agency staff also prepared "talking points" for legislative-affairs staff regarding the biological opinions, and they discussed how the opinions should be distributed outside the Services if decisionmakers gave their authorization. See *id.* at 5a, 19a, 25a.

The Services' decisionmakers did not, however, finalize the provisional draft biological opinions that were sent to them in December 2013. J.A. 37-38, 58. In fact, the Services did not even reach the stage of "formally transmit[ing]" draft opinions to EPA for its review. Pet. App. 5a. Instead, while the December 2013 recommendation drafts were still under "internal review," J.A. 58-59, the Services' decisionmakers determined that "more work needed to be done," J.A. 37. The FWS decisionmaker, Gary Frazer, decided that "additional consultation was needed to better understand and consider the operation of key elements of EPA's rule," and he observed that some of those elements "were still being deliberated within EPA." J.A. 58. The NMFS decisionmaker, Samuel Rauch, similarly observed that "EPA was still considering provisions in" the Intake-Structures Rule at the time. J.A. 37. As a result, rather than share their draft biological opinions with EPA as originally planned by December 6, the Services merely sent EPA portions of the draft opinions and the draft RPAs. See Pet. App. 5a-6a; J.A. 38 ("NMFS never sent

its" December 2013 draft opinion "to EPA."); J.A. 58-59 (FWS's December 2013 draft opinion was "never * * * distributed to EPA as the [Service's] official preliminary position."). The Services and EPA then "agreed to extend the time frame for the consultation." J.A. 59.

Over the next few months, the Services engaged in further "extensive discussions with the EPA," Pet. App. 41a, including about "changes to EPA's Regulation" that might affect ESA-listed species or critical habitat, J.A. 39. In March 2014, EPA sent an updated version of its draft final Intake-Structures Rule to the Services, and the agencies continued consultation. Pet. App. 6a. That updated version "differed from" EPA's 2013 draft Intake-Structures rule, and those revisions caused the Services to change their preliminary conclusion regarding the likelihood of jeopardy. J.A. 39. Thus, the Services signed and issued a joint final biological opinion in May 2014, finding that EPA's rule would not jeopardize any ESA-listed species or adversely modify critical habitat. Pet. App. 6a; see J.A. 33, 56-57; see also 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) (Final Biological Opinion), https://go.usa.gov/xvBuK. EPA issued its final Intake-Structures Rule the same day. Pet. App. 6a; see 79 Fed. Reg. 48,300 (Aug. 15, 2014).

2. Shortly after EPA published its final Intake-Structures Rule, respondent in this Court (Sierra Club, Inc.) and others filed petitions for review challenging both the EPA rule and the Services' no-jeopardy biological opinion. See *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, Sierra Club and others sought to compel the agencies to supplement the administrative record by publicly filing various documents, including the Services' December 2013 draft biological opinions prepared during the consultation process. See *Cooling Water Intake Structure Coalition*, 905 F.3d at 65 n.9. The agencies invoked the deliberative process privilege over those drafts. See *ibid.* The Second Circuit sustained the privilege and denied the request to order supplementation of the administrative record, holding 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.*

3. Separately, shortly after EPA's final Intake-Structures Rule was issued in 2014, respondent submitted broad FOIA requests to each Service for records related to the consultation process. Pet. App. 6a; see J.A. 33-36. The Services released thousands of documents, but withheld others under FOIA Exemption 5 based on the deliberative process privilege. Pet. App. 6a-7a. The NMFS official responsible for supervising the consultation process has explained that he invoked the deliberative process privilege because "candid and frank discussions" had been "[c]entral" to this consultation, and he did not want those types of discussions "to be in [any way] discouraged or chilled." J.A. 38. The FWS supervising official has similarly explained his judgment that, "[i]f the candid views of staff contained

in the [withheld] [d]ocuments were disclosed, the quality of future internal deliberations on resource issues would suffer," because "personnel may hesitate to provide their frank and forthright opinions and recommendations on these draft documents based on fears that candid recommendations would be broadcast outside the executive branch and misunderstood outside of context." J.A. 63. In addition, the Services' officials explained that, because "some of these documents reflect positions that [the Services] did not adopt," the Services "d[id] not want to create confusion with their release" or be forced to use "resources to defend those rejected positions." J.A. 38 (NMFS).

Respondent then filed this suit in 2015 against the Services under FOIA in the Northern District of California. Pet. App. 8a. Respondent argued that the Services had improperly withheld documents under Exemption 5, including several of the same documents that it and others were attempting to obtain (ultimately unsuccessfully) in the Second Circuit. The parties worked together to narrow the dispute to a small number of documents, which the district court reviewed in camera. See *id.* at 42a; see also 5 U.S.C. 552(a)(4)(B).

On cross motions for summary judgment, the district court found that some of the disputed documents were protected by the deliberative process privilege, but it ordered the Services to disclose 11 documents in full and another with one sentence redacted. Pet. App. 38a-53a. The court ordered the Services to release: the December 2013 provisional draft biological opinions; draft RPAs prepared as possible parts of a biological opinion; a series of species-specific documents describing steps that operators of cooling water intake structures should follow if particular species may be affected

by their operations; a statistical chart showing estimated aggregated effects of cooling water intake structures on protected species; and a set of terms and conditions that operators of cooling water intake structures must follow to qualify for a particular kind of ESA exemption. See *id.* at 46a-52a. The court reasoned that those documents were unprotected because they were "relatively polished drafts." *Id.* at 45a (citation omitted).

4. The government appealed. A divided panel of the court of appeals affirmed in part and reversed in part. Pet. App. 1a-29a. After reviewing the disputed documents in camera, the panel majority concluded that the deliberative process privilege through FOIA Exemption 5 protected three of the documents, but that the Services must disclose the other nine: the two December 2013 provisional draft biological opinions; the species-specific measures, statistical chart, and terms and conditions, all of which the Services' staff had prepared potentially to accompany the December 2013 draft jeopardy opinions; and one set of draft RPAs from March 2014. See *id.* at 15a-28a.

a. The panel majority stated that the deliberative process privilege required the government to show that the challenged documents were "both 'pre-decisional and deliberative,'" factors the majority "analyzed separately although the issues they address overlap." Pet. App. 14a-15a (citation omitted). The majority acknowledged that the Services' December 2013 draft biological opinions and the other documents at issue were prepared during the Services' decisionmaking process in the ESA consultation, that the Services' draft opinions were not signed or issued by decisionmakers, and that those drafts were never even transmitted in full to EPA.

See *id.* at 4a-6a, 18a. The majority further acknowledged that the Services' December 2013 provisional draft biological opinions were abandoned and replaced before the Services issued their joint Final Biological Opinion in May 2014. See *id.* at 19a-20a, 24a. But the majority nevertheless concluded that the December 2013 discussion drafts were not pre-decisional or deliberative, because the May 2014 final biological opinion addressed a "different version of the EPA's rule," *id.* at 20a, whereas the December 2013 drafts "represent the final view of the Services regarding the *then-current*" version of EPA's draft rule, *id.* at 18a (emphasis added); see *id.* at 24a, 26a.[3]

After the panel majority thus limited its focus to the Services' views of EPA's "then-proposed" draft rule, the majority concluded that the Services' December 2013 discussion drafts were not pre-decisional because they gave the Services' "final conclusions" about that earlier draft rule. Pet. App. 18a. The majority stated that the Services' drafts "had been approved by final decision-makers at each agency"; that the FWS decisionmaker had "made final edits" to that draft opinion and "the document was awaiting his autopen signature"; and that NMFS "was preparing 'talking points' for its legislative affairs staff" and "preparing to release

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[3] The panel majority gave a similar rationale for ordering the Services to disclose the draft RPA from March 2014: In the majority's view, that document "appears to be the final version in a progression of agency recommendations about how to amend the November 2013 proposed rule." Pet. App. 28a. The majority did not take issue with the Services' showing (J.A. 69) that they did not adopt or finalize that draft RPA, but the majority nevertheless reasoned that, because the Services did not prepare "any subsequent versions of this RPA," the document "is therefore not deliberative" or predecisional. Pet. App. 28a; see *id.* at 17a.

the drafts to the public." *Id.* at 19a. The majority further held that the other draft documents at issue were not pre-decisional because they likewise addressed a prior version of EPA's proposal. *Id.* at 20a-21a.

The panel majority went on to conclude, on similar grounds, that the December 2013 draft biological opinions and the other documents prepared to accompany those drafts were not "deliberative." Pet. App. 21a-28a. The majority again invoked the fact that those drafts addressed "a different version" of EPA's proposal. *Id.* at 24a; see *id.* at 26a. And the majority stated that the Services' December 2013 discussion drafts were "final products," reasoning that they "d[id] not contain line edits, marginal comments, or other written material" that would reveal internal agency discussion; that the documents did not reflect the views of only "lower level employees" but had been sent to decisionmakers; and that the FWS draft opinion had a cover letter on agency letterhead. *Id.* at 25a-26a.

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. Pet. App. 30a-37a. He criticized the majority for "overlook[ing] the 'context of the administrative process which generated' the December [2013] draft opinions," specifically, 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 views and their draft documents 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). Judge Wallace noted, in particular, the declarations by the Services' officials explaining that the December 2013 draft biological opinions were never signed or finalized,

and were never even transmitted in full to EPA, because: (1) the agencies agreed that more work needed to be done in the consultation process, and (2) EPA later modified its proposal for the Intake-Structures Rule in ways that caused the Services to change their conclusions regarding potential jeopardy to ESA-listed species and critical habitat. *Id.* at 31a-32a. Therefore, Judge Wallace explained, the regulations and the record both showed 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 that a draft document 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.'" Pet. App. 33a (quoting *National Security Archive*, 752 F.3d at 463) (brackets omitted).

c. A majority of the panel voted to deny the Services' petition for rehearing, and the court of appeals denied the Services' petition for rehearing en banc. Pet. App. 2a.

SUMMARY OF ARGUMENT

FOIA "does not apply" to documents identified in its exemptions, 5 U.S.C. 552(b)—including, under Exemption 5, "inter-agency or intra-agency memorandums or letters that would not be available by law to a party" in litigation with the agency because of the deliberative process privilege. 5 U.S.C. 552(b)(5); see *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). That privilege protects the Services' draft decision documents in an interagency consultation process under ESA Section 7.

A. Congress incorporated the deliberative process privilege into FOIA because it found that effective governmental decisionmaking depends on agencies' ability to have "'frank discussion of legal or policy matters' in writing," which in turn depends critically on protecting agencies' documents "'reflecting * * * recommendations and deliberations'" concerning their decisions. *Sears*, 421 U.S. at 150 (citations omitted). For the deliberative process privilege to succeed at promoting candor in individual agency employees, the privilege must have clear rules. See *National Security Archive* v. *CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014) (Kavanaugh, J.). Accordingly, this Court has described FOIA Exemption 5 in straightforward terms: FOIA "distinguish[es] between predecisional memoranda prepared in order to assist an agency decision-maker in arriving at his decision, which are exempt from disclosure, and postdecisional memoranda setting forth the reasons for an agency decision already made, which are not." *Renegotiation Bd.* v. *Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975).

B. The draft documents at issue in this case fall well within the bounds of the deliberative process privilege.

1. The ESA Section 7 regulations and *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997), establish that the Services made their decision in the consultation process only when they signed and issued their *Final* Biological Opinion in May 2014. Before the Services' made their decision, in December 2013, they prepared provisional drafts of biological opinions and related materials under consideration to accompany those draft opinions if they were finally issued. Those drafts were created for purposes of discussion, and they provided a "valuable de-

liberative tool" in the ESA Section 7 process that improved the Services' ability to protect species. *Grumman Aircraft*, 421 U.S. at 190. But those provisional drafts were twice removed from being final: they had not yet even been approved for circulation to EPA in draft form, as the Services committed to doing and as called for by the ESA Section 7 regulations, nor had they been approved for final issuance, at which point they would be subject to judicial review.

The Services' December 2013 provisional drafts—containing preliminary analysis by agency staff and prepared as recommendations to supervisors with decisionmaking authority, J.A. 67—are "classic example[s] of a deliberative document." *Abtew* v. *United States Dep't of Homeland Sec.*, 808 F.3d 895, 899 (D.C. Cir. 2015) (Kavanaugh, J.). Those documents are privileged because, until the Final Biological Opinion was issued, the Services' decisionmakers were free to "change their minds." *Grumman Aircraft*, 421 U.S. at 189-190. And that is just what occurred here. Decisionmakers did not adopt the December 2013 drafts prepared by their staffs, or even circulate those drafts in full to EPA, because they decided that more work was needed. The record thus demonstrates that the draft documents in this case were part of the Services' ongoing deliberations, not "postdecisional memoranda." *Id.* at 184.

2. Respondent contends that the Services' December 2013 draft documents were not really drafts at all, but documents with the force of law that carried binding legal consequences. That is incorrect. The Services could not have imposed legal obligations through draft documents that were not adopted by decisionmakers. The ESA Section 7 regulations required that, before the

Services made a final decision, they discuss their findings with EPA and share a draft of a jeopardy opinion for EPA's review upon request—a step that undisputedly did not occur. Moreover, the non-final documents at issue in this case are fundamentally unlike the agency documents that this Court has found to carry the force of law. The Services' drafts are instead much more like the recommendations in *Grumman Aircraft* that this Court found did not have binding effect. 421 U.S. at 185-190.

C. The court of appeals erred in concluding that the Services' non-final discussion drafts were neither "predecisional" nor "deliberative."

1. No precedent supports the Ninth Circuit's principal conclusion that the Services' December 2013 discussion drafts were not privileged because they were the Services' last word on "EPA's then-proposed regulation." Pet. App. 18a. This Court has held that the protection of the deliberative process privilege reaches its limit at documents that describe an agency's final *decision* or carry the force of law, not draft documents that the agency abandoned. See *Grumman Aircraft*, 421 U.S. at 184-190; *Sears*, 421 U.S. at 155-160. The record shows that the Services' decisionmakers never made a final decision regarding EPA's earlier proposal. And as then-Judge Kavanaugh explained for the D.C. Circuit, "[t]here may be no final agency document because a draft died on the vine," but the "draft is still a draft and thus still pre-decisional and deliberative." *National Security Archive*, 752 F.3d at 463.

2. The Ninth Circuit also erred by concluding that the Services' December 2013 discussion drafts were "final products." Pet. App. 25a. The court relied on facts showing agency staff making *preparations* to share the

provisional draft opinions with EPA in December 2013, but those facts do not rebut the Services' showing that the preliminary analysis in those drafts was not adopted or finalized. Indeed, as mentioned, it is undisputed that the Services never did circulate the December 2013 draft biological opinions in full to EPA.

3. The court of appeals' reasoning would severely undermine Congress's purposes in incorporating the deliberative process privilege into FOIA. The Ninth Circuit's amorphous standard for the deliberative process privilege eliminates the clarity that is necessary for the privilege to be effective. If the privilege for agencies' draft documents were made dependent on contingent events like whether the agency action under review was later modified, or whether staff members polished the drafts and made preparations to finalize them, then agency personnel could not have confidence that their draft analyses and recommendations would be protected, and some employees would likely be less candid as a result. See *National Security Archive*, 752 F.3d at 463. The Ninth Circuit's flawed standard for the deliberative process privilege would also undermine the authority of agency decisionmakers to pause a decisionmaking process that is nearing completion, and it would force agencies to face criticism for, and potentially litigation over, matters the agency considered before making up its mind.

Finally, respondent contends that the Services do not need protection for their deliberative materials. But that argument simply contradicts Congress's judgment about agency decisionmaking and this Court's crediting of the force of human experience.

ARGUMENT

THE DELIBERATIVE PROCESS PRIVILEGE THROUGH FOIA EXEMPTION 5 PROTECTS THE SERVICES' DRAFT DOCUMENTS PREPARED DURING THE INTERAGENCY ESA CONSULTATION PROCESS

The agency documents at issue in this case are unfinalized, un-circulated discussion drafts. Both the record and the ESA Section 7 regulations show conclusively that those draft documents "reflect[] * * * recommendations and deliberations comprising part of a process by which" the Services "formulated" their assessment of EPA's Intake-Structures Rule. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (citation omitted). The drafts are therefore exempt from compelled disclosure under the deliberative process privilege through FOIA Exemption 5.

A. Congress Incorporated The Deliberative Process Privilege Into FOIA To Protect Effective Governmental Decisionmaking

1. FOIA "does not apply" to documents identified in its exemptions. 5 U.S.C. 552(b). The exemptions serve "important interests," and they are "as much a part of FOIA's purposes and policies as the statute's disclosure requirement." *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (brackets and citations omitted). 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).

When Congress enacted FOIA Exemption 5 and protected "inter-agency or intra-agency memorandums or

letters that would not be available" in litigation with an agency, 5 U.S.C. 552(b)(5), it had the deliberative process privilege "specifically in mind." *Sears*, 421 U.S. at 150. That well-established privilege "protect[s] the 'decision making processes of government agencies'" by withholding "documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Ibid.* (citations omitted).

The deliberative process privilege pre-dates FOIA, and was recognized by federal courts based on the public policy of encouraging candor in governmental decisionmaking. See *EPA* v. *Mink*, 410 U.S. 73, 86-87 (1973). Congress endorsed that rule when it enacted FOIA, and it "echoed again and again during legislative analysis" the "importance" of ensuring that agencies can conduct "'frank discussion of legal or policy matters in writing,'" which Congress believed would be "'impossible'" if such documents were subject to disclosure. *Id.* at 87 (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (Senate Report)); see *Federal Open Mkt. Comm. of the Fed. Reserve Sys.* v. *Merrill*, 443 U.S. 340, 355 (1979) (observing that the deliberative process privilege was "expressly mentioned in the legislative history of" Exemption 5); see also H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).

Thus, as this Court has explained, Congress incorporated the deliberative process privilege into FOIA because it found it "obvious" that agency personnel "will not communicate candidly among themselves" without protection for deliberative material, *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001), and Congress believed "that the 'decisions' and 'policies formulated' would be

the poorer as a result," *Sears*, 421 U.S. at 150 (citing Senate Report 9); see *Mink*, 410 U.S. at 86-87. This Court has observed that "human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process." *Sears*, 421 U.S. at 150-151 (quoting *United States* v. *Nixon*, 418 U.S. 683, 705 (1974)) (brackets and emphasis omitted). Indeed, as then-Judge Kavanaugh, writing for the D.C. Circuit, observed, protecting deliberative material is "as old as the Republic": the delegates to the Constitutional Convention "agreed at the outset that none of the deliberations would be shared with outsiders." *National Security Archive* v. *CIA*, 752 F.3d 460, 462 (2014).

In addition to promoting candor, the deliberative process privilege advances other important interests. It prevents "premature disclosure of proposed policies" that have not yet been "finally formulated or adopted." *Coastal States Gas Corp.* v. *Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). And it "protect[s] against confusing the issues and misleading the public by" releasing documents containing "rationales for a course of action which were not in fact the ultimate reasons for the agency's action." *Ibid.* The privilege thereby ensures that agency officials are "judged by what they decided, not for matters they considered before making up their minds." *National Security Archive*, 752 F.3d at 462 (citation omitted).

At the same time, this Court has explained that the deliberative process privilege poses no threat to FOIA's general objective of promoting transparency in government, because "the public is only marginally concerned with reasons supporting a policy which an

agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a policy which was actually adopted on a different ground." *Sears*, 421 U.S. at 152.

2. For the deliberative process privilege to succeed at promoting candor in individual agency employees, the privilege must have clear rules. See *National Security Archive*, 752 F.3d at 463. For "in order for a privilege to encourage frank and candid debate, the speaker or writer must have some strong assurance at the time of the communication that the communication will remain confidential." *Id.* at 464; see *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981).

Consistent with that need for clear and workable rules, this Court's cases have described the deliberative process privilege under FOIA Exemption 5 in straightforward terms. In *Sears*, for example, the Court distinguished two kinds of memoranda prepared by the General Counsel of the National Labor Relations Board (NLRB), based on whether the document was the agency's "final" "disposition" or an interim step along the way. 421 U.S. at 155 (citation omitted); see *id.* at 155-160. The Court held that a memorandum constituting a decision not to file an unfair labor practice complaint was not privileged, because under NLRB rules, that decision was "unreviewable" and "'constitutes final agency action of precedential import.'" *Id.* at 155, 157 (citation omitted). By contrast, a memorandum directing the filing of a complaint *was* privileged, because that document "d[id] not finally dispose" of an NLRB proceeding, and instead preceded the Board's decision that would ultimately resolve the case. *Id.* at 159; see *id.* at 159-160.

Similarly, in *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (1975), this Court again focused on whether the documents at issue were final agency decisions. The Court explained that the deliberative process privilege "distinguish[es] between predecisional memoranda prepared in order to assist an agency decision-maker in arriving at his decision, which are exempt from disclosure, and postdecisional memoranda setting forth the reasons for an agency decision already made, which are not." *Id.* at 184. Applying that standard, the Court held that reports and recommendations to the administrative entity with decisionmaking authority (the Renegotiation Board) were privileged. *Id.* at 185-190. Those recommendations did not "ha[ve] the force of law" akin to the decision of a federal district court, *id.* at 186, because the Board was "free, after discussion, to reject [them]," *id.* at 177. The reports had been "created for the purpose of discussion," and the Court explained that it was "unwilling to deprive the Board of a thoroughly uninhibited version of this valuable deliberative tool by making [the reports] public." *Id.* at 189-190.

Based on those precedents, the federal courts of appeals have reached a consensus that the deliberative process privilege has two requirements: The agency material at issue must be "'predecisional'"—*i.e.*, it was prepared "before any final agency decision on the relevant matter"—and it must be "'deliberative'"—*i.e.*, it was "intended to facilitate or assist development of the agency's final position on the relevant issue." *National Security Archive*, 752 F.3d at 463 (citation omitted); see also, *e.g.*, *Florida House of Representatives* v. *United States Dep't of Commerce*, 961 F.2d 941, 945-946 (11th Cir.), cert. dismissed, 506 U.S. 969 (1992); *National*

Wildlife Fed'n v. *United States Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988).

B. The Services' Discussion Drafts Prepared During Their Deliberations Before Making A Decision Are Privileged

"[T]he function of the documents in issue [here] in the context of the administrative process which generated them"—which this Court has called "[c]rucial" to application of the deliberative process privilege—makes this a straightforward case for applying the privilege. *Sears*, 421 U.S. at 138.

The documents at issue in this case are non-final drafts of biological opinions, and drafts of materials that were under consideration to accompany those opinions if they had been issued in final form. See Pet. App. 5a, 9a-12a. It is undisputed that the documents are "inter-agency or intra-agency records." 5 U.S.C. 552(b)(5). And the record shows that the Services created those documents to facilitate their "deliberations" in assessing the likely effect of EPA's Intake-Structures Rule on protected species and critical habitat, as part of a consultation process that concluded when the Services issued their Final Biological Opinion. *Sears*, 421 U.S. at 150 (citation omitted).

The only remaining question in this case, therefore, is whether the Services' draft documents were just that—drafts. They were. The record and the Section 7 regulations show that the provisional draft documents at issue here were "prepared in order to assist" the Services' "decision-maker[s] in arriving at [their] decision"; none was a "postdecisional memorand[um] setting forth the reasons for" a final decision "already made." *Grumman Aircraft*, 421 U.S. at 184.

1. The Services continued deliberating until they issued their Final Biological Opinion Addressing EPA's Final Rule

The Services made their final decision regarding EPA's rule when they issued their Final Biological Opinion in May 2014, not when agency personnel sent recommendations to the Services' decisionmakers in December 2013. The ESA regulations provide that "[f]ormal consultation is terminated with the issuance of the biological opinion." 50 C.F.R. 402.14(m)(1). And this Court has held that it is the *issuance* of a final biological opinion that marks the "'consummation' of the [Service's] decisionmaking process," and constitutes final agency action that is subject to judicial review. *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997) (citation omitted). The Services' Final Biological Opinion stated that it was the agencies "final" decision, J.A. 110, and it was signed by decisionmakers, which signified the agencies' official adoption of that position, J.A. 112. The Services also made that document publicly available, p. 11, *supra*, thereby enabling any interested person to determine "the basis for" the decision they "actually adopted." *Sears*, 421 U.S. at 152.

By sharp contrast, the Services' December 2013 draft biological opinions, and the other draft documents at issue in this case, were not finalized or signed by decisionmakers, were not publicly disseminated, and were not treated by the Services as official conclusions. Rather, the Services' officials who supervised the consultation process have stated in sworn declarations that those documents "reflect[ed] only the *preliminary thinking* of the [Services] at the time." J.A. 67 (FWS official) (emphasis added); see J.A. 39 (NMFS official

stating that its December 2013 draft "reflec[ted] a preliminary analysis"). The documents were prepared by the Services' "staff members and lower level managers" and then provided as "*recommendations* * * * to individuals [at the Services] with decision-making authority," who reviewed and edited the drafts but did not finalize them. J.A. 67 (emphasis added); see J.A. 37, 58-59. As then-Judge Kavanaugh explained for the D.C. Circuit, "[a] recommendation to a supervisor on a matter pending before the supervisor is a classic example of a deliberative document." *Abtew* v. *United States Dep't of Homeland Sec.*, 808 F.3d 895, 899 (2015).

Even though some of the draft documents at issue in this case were *close* to being ready for circulation to EPA, and were moving toward final issuance if the ongoing consultation had not prompted revisions, the Services' deliberative process over EPA's rule remained ongoing until the Services "made" their "decision." *Grumman Aircraft*, 421 U.S. at 184. And that occurred only when the Services finalized and issued their Final Biological Opinion. Under this Court's FOIA Exemption 5 precedents, the determinative fact for applying the deliberative process privilege is that, until the Services issued their Final Biological Opinion, the decisionmakers were free to "change their minds." *Id.* at 189-190; cf. *Sears*, 421 U.S. at 155-157 (NLRB General Counsel memorandum declining to file a complaint was not privileged because it was "'final'" and "unreviewable") (citation omitted).

In fact, a change of mind is just what happened here. The recommendations that were given to the Services' decisionmakers in December 2013 "w[ere] not adopted," J.A. 39, because those officials determined "that more

work needed to be done," J.A. 58-59. Indeed, as respondent concedes, the decisionmakers never even circulated the December 2013 draft biological opinions in full to EPA. Pet. App. 5a; J.A. 39, 58-59; see Br. in Opp. 9 (acknowledging that the December 2013 draft opinions were only "partially transmitted"). Thus, the documents at issue in this case are really drafts *of drafts* that were two steps removed from finality: they were provisional drafts of what would be a *draft circulation* for EPA's review. Such documents do not describe final "agency decision[s] already made." *Grumman Aircraft*, 421 U.S. at 184.

2. The Services' draft documents that were not adopted and were not shared in full with EPA did not have binding legal force

Respondent's answer to all of the evidence in the record showing the draft status of the Services' December 2013 documents—including the absence of a signature, the decisionmakers declining to accept the preliminary analysis because more work was needed, and the lack even of circulation in full to the action agency—is to dismiss those facts as "formalities" and argue that the Services' draft documents actually "had the 'force and effect' of a final jeopardy finding." Br. in Opp. 29-30 (quoting *Sears*, 421 U.S. at 153). Respondent is incorrect.

a. First, respondent's attempt to attribute binding legal force to the Services' December 2013 draft documents conflicts with the regulations implementing ESA Section 7. Consistent with Congress's objective that the consultation process would operate through "[i]nteragency cooperation," 16 U.S.C. 1536 (title), the applicable regulations require the Services to "[d]iscuss" their "review and evaluation" with the action agency (here,

EPA), as well as any "finding" in their biological opinion. 50 C.F.R. 402.14(g)(5). Moreover, the regulations require that, if the Services prepare a draft jeopardy opinion, the Services "shall make available * * * the draft biological opinion" to the action agency upon request, "for the purpose of analyzing the reasonable and prudent alternatives," and the Services "*will not issue*" a final biological opinion "while the draft is under review by the [action] agency." *Ibid.* (emphasis added).

The self-evident purpose of those cooperation requirements is to "allow the Services to consider changes to the draft opinion based on the agency's comments." Pet. App. 30a (Wallace, J. dissenting in part). The Services have explained that sharing draft opinions with other agencies has several benefits: Circulating drafts "may result in the development and submission of additional data, and the preparation of more thorough biological opinions"; it "helps ensure the technical accuracy of the opinion"; and it can prompt an action agency to identify "valid biological reasons [that] mandate a change" in the Services' preliminary views. 51 Fed. Reg. 19,926, 19,952 (June 3, 1986). In the consultation here, the Services committed to sharing a draft biological opinion with EPA before finalizing the opinion, consistent with the Section 7 regulations. See p. 9, *supra*.

The Services' regulatory obligations to discuss their findings with EPA and share upon request a draft jeopardy opinion before final issuance establish as a matter of law that, contrary to respondent's contention, draft biological opinions like those at issue here do not carry binding legal force. As Judge Wallace correctly observed in his dissent below, "[s]eeking comments on a document presupposes the ability to make changes to it." Pet. App. 31a. Respondent gains nothing by invoking

(Br. in Opp. 20-21) the "direct and appreciable legal consequences" that flow from a final biological opinion, *Bennett*, 520 U.S. at 178, because only a *final* biological opinion carries those consequences, see *id.* at 177-178. And a final biological opinion is issued only "[o]nce the consultation process contemplated by [the ESA] has been completed," which is *after* the Services have discussed their findings with the action agency. *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 652 (2007); see 50 C.F.R. 402.14(g)(5). If respondent or any other party had attempted to bring suit based on something in the Services' December 2013 provisional draft biological opinions, that claim would have been swiftly dismissed for lack of final agency action.

Respondent invokes *United States Army Corps of Engineers* v. *Hawkes Co.*, 136 S. Ct. 1807 (2016), and argues that the fact that the Services retained authority to make changes to the draft biological opinions in December 2013 "does not make an otherwise definitive decision nonfinal." Br. in Opp. 30-31 (quoting 136 S. Ct. at 1814). But this Court in *Hawkes* referred to the possibility that the agency would revise its completed decision later "based on 'new information.'" 136 S. Ct. at 1814 (citation omitted). The critical point in *Hawkes* was that, as it stood, the agency's work was done. *Id.* at 1813-1814 (finding that the agency decision at issue "is typically not revisited"). Whereas here, the record proves that the Services' consultation was still active and ongoing in December 2013.

Even if the Services had shared their drafts for EPA's review in December 2013, therefore, that would not have rendered them final decisions. See J.A. 38 ("By 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."). It follows *a fortiori* that the draft documents at issue here—which undisputedly were never shared in full with EPA for its review because decisionmakers determined that more work was needed—are privileged.

b. Respondent's attempt to attribute the force of law to the Services' un-finalized, un-circulated draft documents also conflicts with this Court's Exemption 5 precedents, as well as cases from multiple other courts of appeals.

Respondent contends (Br. in Opp. 30) that, when EPA learned about the Services' preliminary jeopardy conclusion, it was motivated to make changes to its draft final rule. But even if true, that does not show that the Services' preliminary analysis imposed *binding* legal obligations on EPA. This Court has explained that an agency document falls outside the deliberative process privilege when it "carries * * * *legal* weight" akin to the decision of a federal district court; not merely because it prompts another party voluntarily to take some action. *Grumman Aircraft*, 421 US. at 186-187. The Court in *Grumman Aircraft* specifically contrasted legally binding documents with a draft or "recommendation," which "has no operative effect independent of" review by a decisionmaker, and is privileged for that reason. *Ibid.*

The Court in *Grumman Aircraft* went on to explain that protecting such documents advances Congress's purpose for FOIA Exemption 5, because discussion drafts or recommendations can provide a "valuable deliberative tool" that should remain "thoroughly uninhib-

ited." 421 U.S. at 189-190. The ESA Section 7 consultation process in this case proves the Court's point. The Services and EPA participated in "frank discussions" in which their staff considered and reconsidered "multiple options" (many of which were "rejected"), and they exchanged "comments and suggestions" on their drafts, J.A. 32, 57-58—a process that "enhance[d] 'the quality of'" their decisions, *Klamath Water Users*, 532 U.S. at 8-9 (quoting *Sears*, 421 U.S. at 151).

Thus, to the extent respondent is correct (Br. in Opp. 30) that EPA "reduce[d] the [Intake-Structures] Rule's impact on protected species" as a result of learning the Services' *preliminary* views, that shows only that the ESA consultation process here worked as Congress intended for the benefit of protected species, and that the Services worked with EPA to strengthen their decisionmaking process in just the sorts of ways that the deliberative process privilege exists to facilitate. See *Grumman Aircraft*, 421 U.S. at 188 ("Exemption 5 does not distinguish between *inter*-agency and *intra*-agency memoranda."). But the Services' preliminary analysis that was under internal review by decisionmakers in December 2013 could not possibly have imposed any binding legal obligations on EPA—as explained above, that preliminary analysis was not adopted, and was not even shared in full with EPA. J.A. 39, 58-59.

This Court has also explained that agencies' documents generated in a deliberative process remain privileged after the decision is made, because in Congress's judgment, that protection is critical to prompting open and frank discussions in the first place. See *Sears*, 421 U.S. at 150-151. Consistent with that holding, multiple courts of appeals have applied the deliberative process privilege to various kinds of internal agency documents

even after decisions were issued. In *Abtew*, for example, the D.C. Circuit held that Exemption 5 protected a document prepared within the Department of Homeland Security that summarized an alien's asylum interview and made a recommendation to a supervisor on whether he should be granted asylum, because the document was "written as part of the process by which the supervisor came to that final decision." 808 F.3d at 898-899. In *Town of Norfolk* v. *United States Army Corps of Engineers*, 968 F.2d 1438 (1st Cir. 1992), the court upheld the privilege for "an unsigned draft letter" prepared by an agency official, because the letter "reflects a preliminary position by the [agency] that was subsequently rejected." *Id.* at 1458. In *American Federation of Government Employees* v. *U.S. Department of Commerce*, 907 F.2d 203 (D.C. Cir. 1990), the court found that FOIA Exemption 5 precluded compelled disclosure of documents recommending personnel actions for agency employees, explaining that those documents reflected positions "to which the [agency] was not yet committed." *Id.* at 208. And as discussed above, when the Second Circuit considered respondent's petition for review of the Services' Final Biological Opinion, it sustained the agencies' invocation of the deliberative process privilege over the very same documents that respondent has attempted to obtain in this suit under FOIA. See *Cooling Water Intake Structure Coal.* v. *United States Envtl. Prot. Agency*, 905 F.3d 49, 65 n.9 (2d Cir. 2018).

C. The Court Of Appeals Erred By Refusing To Sustain The Deliberative Process Privilege For The Services' Draft Documents

The Ninth Circuit acknowledged that the documents at issue in this case were *drafts*, and that the Services

did not make their final decision in the interagency consultation until May 2014. See Pet. App. 18a. But the court nevertheless concluded that the December 2013 discussion drafts were neither "pre-decisional" nor "deliberative," reasoning that those documents "represent the final view of the Services regarding the *then-current* November 2013 [EPA] proposed rule," whereas the Final Biological Opinion "represents the final view of the Services regarding the later March 2014 revised, [EPA] proposed rule." *Ibid.* (emphasis added); see *id.* at 24a. That reasoning is flawed both legally and factually, and it conflicts with Congress's purposes for incorporating the deliberative process privilege into FOIA.

1. Draft documents do not lose their privilege when the agency action under review is abandoned or modified

The Ninth Circuit's most fundamental mistake, which it repeated throughout its opinion, was concluding that the Services' December 2013 draft documents could not be pre-decisional or deliberative because they addressed "a different version" of the EPA rule than did the Final Biological Opinion. Pet. App. 20a; see *id.* at 18a, 21a, 24a, 26a, 28a. No precedent of this Court supports that reasoning.

This Court has explained that the deliberative process privilege reaches its limit at "communications * * * occurring after the [agency's] decision is finally reached," *Sears*, 421 U.S. at 151, or documents "setting forth the reasons for an agency decision already made," *Grumman Aircraft*, 421 U.S. at 184. None of the Court's Exemption 5 cases has suggested that an agency's draft document can lose its privilege when the proposed agency action under consideration is abandoned or modified. On the contrary, the Court observed in *Sears*

that agencies' work will commonly "generate memoranda containing recommendations which do not ripen into agency decisions," and the Court cautioned "the lower courts" to "be wary of interfering with this process." 421 U.S. at 151 n.18. The mere fact that the December 2013 drafts may have been the last documents the Services prepared regarding EPA's 2013 version of its draft final rule is irrelevant to the deliberative process privilege, because the record and the Section 7 regulations show that the Services never made a *final decision* about the 2013 EPA proposal.

The text of FOIA's affirmative disclosure mandate reinforces the basic distinction this Court has drawn between agencies' final decisions and documents that were prepared during their deliberations about a decision not yet made. FOIA requires agencies to disclose their "*final opinions*" and "statements of policy and interpretations which have been *adopted*." 5 U.S.C. 552(a)(2)(A) and (B) (emphases added). The statutory text thus shows that Congress separated protected documents from unprotected ones based on whether the document actually established a final opinion, policy, or interpretation, not whether the document addressed an earlier version of an agency proposal.

The Ninth Circuit's "different version" rationale would severely undermine agencies' ability to protect their deliberative material. Throughout the government, it is routine for deliberative processes of many kinds to involve multiple successive drafts of a proposal under review, or for agency personnel to prepare drafts for decisionmakers that ultimately go unadopted. Under the Ninth Circuit's decision, plaintiffs seeking to discover pre-decisional agency communications would simply argue that the agency's decisionmaking process

must be subdivided according to its different "versions," and then would claim entitlement to documents that purportedly were the last word on earlier versions. Such a rule would gut agencies' ability to protect their deliberations. And that is especially true for an interagency process like the ESA Section 7 consultation here, which involved back-and-forth over multiple draft versions from EPA. See J.A. 32.

Moreover, the Ninth Circuit's holding would undermine Congress's core purpose for Exemption 5 to improve the quality of agency decisionmaking by promoting candid discussions. If agency employees believed that their drafts and recommendations could cease to be privileged simply because a new "version" of the proposal under review might be developed, then some employees might stop providing their best advice, and agency deliberations "would be the poorer as a result." *Sears*, 421 U.S. at 150. As then-Judge Kavanaugh explained in *National Security Archive*, the writer of a document "does not know at the time of writing whether the draft will evolve into a final document. But the writer needs to know at the time of writing that the privilege will apply and that the draft will remain confidential, in order for the writer to feel free to provide candid analysis." 752 F.3d at 463. If the Ninth Circuit's approach were adopted and the deliberative process privilege were made "contingent" on future developments—like whether EPA prepared a subsequent version of its draft final rule—then the privilege would be decidedly "uncertain" for agency employees, which is "'little better than no privilege at all.'" *Ibid.* (quoting *Upjohn*, 449 U.S. at 393).

The FOIA requester in *National Security Archive* sought a draft of Volume V of the CIA's official history

of the Bay of Pigs invasion, arguing that, even if a draft history would ordinarily be privileged, "there was no final CIA history that arose out of or corresponded to Volume V." 752 F.3d at 462-463. The D.C. Circuit rejected that argument, holding 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 still pre-decisional and deliberative." *Ibid.* The court pointed out that any number of agency documents may not "actually evolve into final Executive Branch actions": "a draft speech that the President never gives," or "a draft regulation that the Attorney General never issues." *Ibid.* But "[t]hose kinds of documents are no less drafts than the drafts that actually evolve into final Executive Branch actions." *Ibid.*

The D.C. Circuit's reasoning in *National Security Archive* shows why the Ninth Circuit erred in this case: The Services' December 2013 draft biological opinions may have died on the vine when EPA modified the proposal that was discussed in those drafts, but that fact does nothing to alter the documents' status as *drafts* reflecting the agency's deliberations over their decision concerning EPA's action. The D.C. Circuit's position refusing to order disclosure of drafts that do not ripen into final agency decisions is shared by multiple other courts of appeals. See, *e.g.*, *Florida House of Representatives*, 961 F.2d at 950 ("draft policy options which are ultimately rejected are protected from disclosure under the deliberative process privilege"); *Schell* v. *United States Dep't of Health & Human Servs.*, 843 F.2d 933, 941 (6th Cir. 1988) ("When specific advice is provided, * * * it is no less predecisional because it is * * * rejected in silence."); see also pp. 3-4, *supra*. It is telling that the Ninth Circuit below did not cite a single

decision from any other court of appeals—in the more than 50 years since Congress enacted Exemption 5—holding that an agency's draft documents cease to be privileged because the drafts were abandoned.

2. A discussion draft does not become final unless and until an official with authority makes a decision to adopt the draft

Rejecting the Ninth Circuit's "different version" analysis for the deliberative process privilege is sufficient by itself to reverse the decision below. In addition, though, the Ninth Circuit compounded its error by concluding that the Services' December 2013 draft biological opinions were "final conclusions by the final decisionmakers" on the earlier EPA proposal. Pet. App. 18a; see *id.* at 19a, 25a, 27a. The record and the ESA Section 7 regulations both refute that conclusion.

a. As explained above, decisionmakers at each Service have stated in sworn declarations that the December 2013 drafts "reflect[ed] a preliminary analysis." J.A. 39 (NMFS); see J.A. 67 (FWS draft was "a preliminary narrative analysis"). But that preliminary analysis "was not adopted" by the decisionmakers, J.A. 39, who decided during internal review "that more work needed to be done," including because EPA was "still considering provisions in the draft Regulation," J.A. 37; see J.A. 58-59. As a result, the Services' December 2013 discussion drafts were never even "distributed to EPA as the [Services'] official preliminary position." J.A. 58-59 (FWS); see J.A. 39 (NMFS).

As also explained above, even if the Services *had* circulated their December 2013 provisional drafts to EPA, that exchange would not have constituted final agency action, because the Services committed, consistent with the ESA Section 7 regulations, to providing a draft

opinion for EPA's review before finalizing their decisions. See pp. 30-33, *supra*. Therefore, the undisputed fact that the Services never even reached the stage of being ready to provide the December 2013 draft biological opinions in full for EPA's review proves that those drafts did not, and could not, contain the Services' "final conclusions." Pet. App. 18a.

b. The reasons given by the court of appeals for nevertheless attributing finality to these draft documents are not persuasive, and the court's reasoning conflicts with this Court's precedent.

i. The Ninth Circuit invoked the fact that the December 2013 draft opinions were not solely the work of "low-level officials," because those documents had been sent to the Services' decisionmakers, who edited them. Pet. App. 25a; see *id.* at 19a (referring to "email correspondence" and stating the FWS decisionmaker, Gary Frazer, had "made final edits" to FWS's December 2013 draft biological opinion and "the document was awaiting his autopen signature").

In the first place, the Ninth Circuit's conclusion that Mr. Frazer made "final" edits to FWS's December 2013 draft biological opinion is contrary to the record. Mr. Frazer has explained in his declaration that, although he edited that document, he did not *finalize* it, because he concluded during internal review that the draft needed more work and additional consultation with EPA. J.A. 58-59. And again, the undisputed fact that Mr. Frazer did not share the December 2013 FWS draft with EPA confirms his explanation. The "email correspondence" to which the Ninth Circuit referred is fully consistent with Mr. Frazer's declaration. That single email—which was sent by Mr. Frazer's administrative assistant—attached a "letter" with a "Draft" biological

opinion that contained "instructions" to a subordinate employee, and the email stated that those instructions needed to be completed before the attachment would be ready to be sent out. J.A. 105. The email itself thus confirms that the administrative assistant referred to signing by "autopen" the letter that would merely have transmitted FWS's draft biological opinion *in draft form* to EPA. See also J.A. 66-67. And in all events, a draft document that is prepared for a decisionmaker's signature but is *not signed* is not final, and the Ninth Circuit erred by holding otherwise.

Even setting aside the Ninth Circuit's flawed factual analysis, this Court has already rejected the contention that the fact that an agency decisionmaker like Mr. Frazer worked on a draft document removes its privileged status. See *Grumman Aircraft*, 421 U.S. at 189-190. The plaintiffs in *Grumman Aircraft* argued that the privilege should not apply to agency reports that had been prepared in part by "those who participate in the" agency's ultimate "decision," *id.* at 189, but this Court rejected that argument, observing that the official "may change his mind as a result of" further discussion. *Id.* at 190. The decisive point, the Court held, "is that the report [was] created for the purpose of discussion," and the Court would not endorse "the unsupported assumption" that discussion drafts "always disclose the final views of" decisionmakers who work on them. *Ibid.* The Services' December 2013 draft opinions were likewise prepared for internal discussion and then consultation with EPA before being finalized, which confirms their privileged status.

ii. The remainder of the Ninth Circuit's reasoning similarly does not support its conclusion that the December 2013 draft opinions were final products that

were not "deliberative." The court observed that the draft documents "do not contain line edits" or "marginal comments," Pet. App. 25a; that FWS staff had created a cover letter for its draft biological opinion with the "agency's seal/header," *ibid.*; and that NMFS "was preparing 'talking points' for its legislative affairs staff and preparing to release the drafts to the public" *if* they had received authorization from decisionmakers, *id.* at 19a.

The court of appeals' reasoning misunderstands what it means for agency documents to be "deliberative." All of the provisional drafts in this case were deliberative because they were "intended to facilitate or assist development of the [Services'] final position on" EPA's rule. *National Security Archive*, 752 F.3d at 463. None of the facts identified by the Ninth Circuit suggests otherwise. It is common for draft documents of many different kinds to become increasingly polished as they approach completion, through steps like resolving the line edits and margin comments or preparing a cover letter on letterhead. And it is also common for agency staff to prepare in advance for the issuance of a document that is expected to be made public soon, including by deciding on the format for its release and informing staff who will liaise about that document when it is released. But taking those steps does not convert a nearly final draft document into a final decision when agency decisionmakers still have the authority to change their mind—as they did here. See *Grumman Aircraft*, 421 U.S. at 189-190. The deliberative process privilege stops at *final* agency documents, *id.* at 184, and a Service's decision in an ESA Section 7 consultation is not final until it issues a final biological opinion. See p. 28, *supra*.

3. The court of appeals' reasoning would undermine Congress's purposes in incorporating the deliberative process privilege into FOIA

The Ninth Circuit's watered down standard for applying the deliberative process privilege to draft agency documents would produce several of the very harms that Congress sought to prevent when it incorporated the deliberative process privilege into FOIA Exemption 5.

a. First, as explained above, the decision below eliminates the clarity that is necessary for the deliberative process privilege to preserve "open and frank discussion[s]" as Congress intended. *Klamath Water Users*, 532 U.S. at 8-9. The Ninth Circuit replaced this Court's straightforward articulation of the privilege—was the document prepared "to assist an agency decision-maker in arriving at his decision," or did it explain "the reasons for an agency decision already made," *Grumman Aircraft*, 421 U.S. at 184—with an amorphous, multi-factor "functional approach," Pet. App. 21a (citation omitted), that gives weight to facts like whether a new version of the proposal under review was developed, whether agency staff began preparing for the possibility of a draft decision becoming final, and whether line edits and margin comments were added or removed from the document. The individual agency employees who prepare draft documents will not know at the time of writing whether any of those things will occur in the future, so the Ninth Circuit's approach to the privilege would not allow them to have confidence that their candid recommendations will remain protected, which Congress found would obviously impact the quality of their advice. See *National Security Archive*, 752 F.3d at 463; see also J.A. 63-64 (FWS official explaining that he did not want

agency personnel to "hesitate to provide their frank and forthright opinions and recommendations on these draft documents based on fears that candid recommendations would be broadcast outside the executive branch"); J.A. 38 (NMFS official explaining that he "d[id] not want these communications to be in [any way] discouraged or chilled for fear of disclosure").

Second, the court of appeals' ruling would undermine the ability of agency decisionmakers to pause a deliberative process that is approaching its conclusion and decide that the agency has more work to do before making a final decision. The fact that the decisionmakers in this case decided during their internal review to hold off on finalizing the December 2013 drafts, see J.A. 37, 58-59, is a sign of a healthy deliberative process, and the Ninth Circuit erred by treating that pause as a reason to lift the privilege on deliberative material.

Third, the court of appeals' decision would risk forcing agencies to defend their final decisions in light of preliminary analysis that was *not* adopted. See J.A. 38 (NMFS official invoked the deliberative process privilege over these drafts in part because he "d[id] not want to create confusion with their release or to use NMFS's resources to defend those rejected positions"). Respondent told the court of appeals that it wanted the Services' deliberative drafts in order to litigate challenges to federal agency actions and engage in public advocacy. See Resp. C.A. Unopposed Motion to Expedite Appeal 6-8 (Sept. 21, 2017). But "[s]ubjecting a policymaker to public criticism on the basis of such tentative assessments is precisely what the deliberative process privilege is intended to prevent." *National Wildlife Fed'n*, 861 F.2d at 1120; see *Lead Indus. Ass'n* v.

OSHA, 610 F.2d 70, 86 (2d Cir. 1979) (Friendly, J.) (rejecting the plaintiff's claim to "know in just what respects the Assistant Secretary departed from the staff reports she had before her," because "such disclosure of the internal workings of the agency is exactly what the law forbids"). "[A]gency officials 'should be judged by what they decided, not for matters they considered before making up their minds.'" *National Security Archive*, 752 F.3d at 462 (citation omitted).

b. Finally, respondent contends (Br. in Opp. 37) that there is no reason to think that ordering disclosure of the Services' provisional drafts would diminish the quality of their deliberations, because the Services have sometimes released *other* draft biological opinions in the past.

Respondent's argument amounts to little more than a disagreement with Congress's policy judgment—and this Court's recognition of human experience—that agency employees are likely to be less candid if they believe their suggestions and recommendations in draft documents are subject to disclosure, to the detriment of governmental decisionmaking overall. See *Sears*, 421 U.S. at 150-151. The text of FOIA is categorical: the statute "does not apply to" documents that fall within an exemption. 5 U.S.C. 552(b). Thus, FOIA does not permit respondent to "'second-guess'" the protection that Congress established for "the candor of present and future agency decisionmaking" by claiming "'case-by-case'" entitlement to disclosure of select agencies' drafts based on their decisions to waive a privilege in other contexts. *National Security Archive*, 752 F.3d at 464 (citation omitted). The Services' officials have explained the multiple reasons why they asserted the deliberative process privilege in this case—among other

things, because they wanted to protect the candid deliberations reflected in those drafts and to avoid revealing preliminary analysis that went un-adopted. See pp. 12-13, *supra*. Those are just the sorts of interests that Congress incorporated the deliberative process privilege into FOIA to protect. The fact that the Services weighed the benefits and drawback of disclosure differently in other proceedings does nothing to undermine the Services' officials' judgments here.[4]

Respondent has "concede[d]" throughout this litigation that the Services are not estopped from asserting the deliberative process privilege by having elected in some other instances to waive the privilege over similar documents. Pet. App. 35a (Wallace, J., dissenting); see Br. in Opp. 37 n.8; see also *Abtew*, 808 F.3d at 900 ("[A]n agency does not forfeit a FOIA exemption simply by releasing similar documents in other contexts."). And there is good reason why prior disclosures should not be held against the Services now: "[P]enalizing agencies in that way would discourage them from voluntarily releasing information, which would thwart the broader objective of transparent and open government." *National Security Archive*, 752 F.3d at 464; see *Florida House of Representatives*, 961 F.2d at 948; *Mobil Oil Corp.* v. *United States Envtl. Prot. Agency*, 879 F.2d 698, 701 (9th Cir. 1989) (O'Scannlain, J.). The

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[4] As explained above, the "reasonably foresee[able]" harm standard that Congress added in the FOIA Improvement Act, 5 U.S.C. 552(a)(8)(A), does not apply to this case. See p. 4 n.1, *supra*. But in any event, the Services have explained why they chose to invoke the deliberative process privilege over the documents in this case, which contain preliminary analysis that was not adopted, and why disclosure of those documents would harm interests protected by Exemption 5. See pp. 12-13, *supra*.

Services have sometimes found reason to voluntarily release draft biological opinions, but Congress found it obvious that such deliberative, pre-decisional documents should be protected against compelled disclosure.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 5 U.S.C. 552 provides in pertinent part:

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

(a) Each agency shall make available to the public information as follows:

* * * * *

(2) Each agency, in accordance with published rules, shall make available for public inspection in an electronic format—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

* * * * *

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

* * * * *

(5) 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, provided that the deliberative process privilege shall

not apply to records created 25 years or more before the date on which the records were requested;

* * * * *

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(a)-(b) provides:

Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(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.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required,

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

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close

of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a), 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) and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3), and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2), and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2), the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary 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 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

3. 50 C.F.R. 402.14 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.* (1) A written request to initiate formal consultation shall be submitted to the Director and shall include:

(i) A description of the proposed action, including any measures intended to avoid, minimize, or offset effects of the action. Consistent with the nature and

scope of the proposed action, the description shall provide sufficient detail to assess the effects of the action on listed species and critical habitat, including:

(A) The purpose of the action;

(B) The duration and timing of the action;

(C) The location of the action;

(D) The specific components of the action and how they will be carried out;

(E) Maps, drawings, blueprints, or similar schematics of the action; and

(F) Any other available information related to the nature and scope of the proposed action relevant to its effects on listed species or designated critical habitat.

(ii) A map or description of all areas to be affected directly or indirectly by the Federal action, and not merely the immediate area involved in the action (*i.e.*, the action area as defined at § 402.02).

(iii) Information obtained by or in the possession of the Federal agency and any applicant on the listed species and designated critical habitat in the action area (as required by paragraph (c)(1)(ii) of this section), including available information such as the presence, abundance, density, or periodic occurrence of listed species and the condition and location of the species' habitat, including any critical habitat.

(iv) A description of the effects of the action and an analysis of any cumulative effects.

(v) A summary of any relevant information provided by the applicant, if available.

(vi) Any other relevant available information on the effects of the proposed action on listed species or designated critical habitat, including any relevant reports such as environmental impact statements and environmental assessments.

(2) A Federal agency may submit existing documents prepared for the proposed action such as NEPA analyses or other reports in substitution for the initiation package outlined in this paragraph (c). However, any such substitution shall be accompanied by a written summary specifying the location of the information that satisfies the elements above in the submitted document(s).

(3) 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.

(4) 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, a programmatic consultation, or a segment of a comprehensive plan. The provision in this paragraph (c)(4) does not relieve the Federal agency of the requirements for considering the effects of the action or actions 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 representative. 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 and environmental baseline 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) Add the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat, formulate the Service's opinion as to whether the action 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 is reasonably certain to 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 as proposed or taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation. Measures included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize, or offset the effects of an action are considered like other portions of the action and do not require any additional demonstration of binding plans.

(h) *Biological opinions.* (1) The biological opinion shall include:

(i) A summary of the information on which the opinion is based;

(ii) A detailed discussion of the environmental baseline of the listed species and critical habitat;

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

(iv) The Service's opinion on whether the action is:

(A) 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

(B) 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).

(2) A "jeopardy" biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, the Service will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(3) The Service may adopt all or part of:

(i) A Federal agency's initiation package; or

(ii) The Service's analysis required to issue a permit under section 10(a) of the Act in its biological opinion.

(4) A Federal agency and the Service may agree to follow an optional collaborative process that would further the ability of the Service to adopt the information and analysis provided by the Federal agency during consultation in the development of the Service's biological opinion to improve efficiency in the consultation process and reduce duplicative efforts. The Federal agency and the Service shall consider the nature, size, and scope of the action or its anticipated effects on listed species or critical habitat, and other relevant factors to determine whether an action or a class of actions is appropriate for this process. The Federal agency and the Service may develop coordination procedures that would facilitate adoption of the initiation package with any necessary supplementary analyses and incidental take statement to be added by the Service, if appropriate, as the Service's biological opinion in fulfillment of section 7(b) of the Act.

(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 (A surrogate (*e.g.*, similarly affected species or habitat or ecological conditions) may be used to express the amount or extent of anticipated take provided that the biological opinion or incidental take statement: Describes the causal link between the surrogate and take of the listed species, explains why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and sets a clear standard for determining when the level of anticipated take has been exceeded.);

(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 216.105 and 222.301(h) 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.

(6) For a framework programmatic action, an incidental take statement is not required at the programmatic level; any incidental take resulting from any action subsequently authorized, funded, or carried out under the program will be addressed in subsequent section 7 consultation, as appropriate. For a mixed programmatic action, an incidental take statement is required at the programmatic level only for those program actions that are reasonably certain to cause take and are not subject to further section 7 consultation.

(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) *Expedited consultations.* Expedited consultation is an optional formal consultation process that a Federal agency and the Service may enter into upon mutual agreement. To determine whether an action or a

class of actions is appropriate for this type of consultation, the Federal agency and the Service shall consider the nature, size, and scope of the action or its anticipated effects on listed species or critical habitat and other relevant factors. Conservation actions whose primary purpose is to have beneficial effects on listed species will likely be considered appropriate for expedited consultation.

(1) *Expedited timelines.* Upon agreement to use this expedited consultation process, the Federal agency and the Service shall establish the expedited timelines for the completion of this consultation process.

(2) *Federal agency responsibilities.* To request initiation of expedited consultation, the Federal agency shall provide all the information required to initiate consultation under paragraph (c) of this section. To maximize efficiency and ensure that it develops the appropriate level of information, the Federal agency is encouraged to develop its initiation package in coordination with the Service.

(3) *Service responsibilities.* In addition to the Service's responsibilities under the provisions of this section, the Service will:

(i) Provide relevant species information to the Federal agency and guidance to assist the Federal agency in completing its effects analysis in the initiation package; and

(ii) Conclude the consultation and issue a biological opinion within the agreed-upon timeframes.

(m) *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.