
(credit: The Guardian)

Earlier this month, the U.S. Supreme Court issued its first environmental law-related decision of its current Term–*U.S. Fish and Wildlife Service v. Sierra Club*. I say "environmental law-related" because the heart of the case concerns whether certain federal government documents are disclosable to the public under the Freedom of Information Act (FOIA). But the case arises in the context of the federal Endangered Species Act (ESA), and for that reason it's important to environmental folk.

Equally noteworthy, the *Sierra Club* decision represents the first authored by the Supreme Court's newest justice, Amy Coney Barrett. Justice Barrett's majority opinion comes in the very first case in which she participated in oral arguments last fall, after her contentious but ultimately successful confirmation to the Court by the U.S. Senate.

The *Sierra Club* case arises out of the "consultation" process mandated under section 7 of the ESA. Section 7 requires that whenever a federal agency proposes to undertake an action that could "adversely affect" a plant or animal species listed under the ESA, that agency must consult with the U.S. Fish & Wildlife Service and/or the National Marine Fisheries Service (collectively "the Services") before proceeding. This Section 7 consultation process is designed to assist those wildlife agencies in preparing a "biological opinion" to formally determine whether the action agency's proposal will jeopardize the continued existence of the listed

species.

Here the action agency was the U.S. Environmental Protection Agency. In 2011, EPA proposed a rule concerning the design and operation of "cooling water intake structures" designed to cool industrial equipment such as power plants. But it was unclear whether the EPA proposed rule would minimize harm to aquatic wildlife that can become entrapped and killed by these intake structures. So EPA commenced a Section 7 consultation process with the Services. Over the next four years, EPA and the Services had numerous meetings and other communications, with the Services going so far as to complete draft biological opinions and sharing those drafts with EPA. Ultimately, this back-and-forth consultation resulted in EPA revising its rule in a manner that satisfied the Services that the amended EPA rule would likely cause no harm to listed species. Accordingly, the Services issued a joint "no jeopardy" decision, concluding the Section 7 consultation process.

Dissatisfied, the Sierra Club filed a request under the FOIA for records relating to the Services' consultations with EPA, including the Services' draft biological opinions. The federal agencies refused to disclose those documents, claiming they were exempt from disclosure under FOIA's "deliberative process privilege." The Sierra Club sued to compel disclosure. The district court and Ninth Circuit Court of Appeals agreed with the Sierra Club's position and ordered disclosure.

However, in a 7-2 decision authored by Justice Barrett, the Supreme Court reversed. The Court ruled that the contested documents properly fell within the deliberative process privilege and were therefore not subject to disclosure. Specifically, Justice Barrett concluded, the draft biological opinions were subject to modification and thus had no legal consequence. As such, they were not disclosable because neither EPA nor the Services treated the drafts as final. (Justice Breyer, joined by Justice Sotomayor, dissented, concluding that the contested documents were subject to public disclosure under FOIA.)

So what can be gleaned from Justice Barrett's decision for the Court in the *Sierra Club* case?

First, this is not a decision that fall easily along conservative vs. progressive lines. Rather, Justice Barrett's opinion reaches a plausible result on which reasonable minds can differ. Moreover, this Sierra Club lawsuit was brought against the *Obama* Administration, which first advanced the legal arguments against FOIA disclosure that the Supreme Court ultimately embraced. (In its waning days, President

Trump's Justice Department was simply continuing to advance a legal position originally crafted by President Obama's.). And there is at least some merit in the *Sierra Club* majority's view that disclosure of these draft materials could have a chilling effect on full and candid deliberations within a large federal bureaucracy–in this case, a spirited dialogue fostering effective decision-making among action and wildlife agencies under the ESA.

Second, Justice Barrett displays impressive judicial chops in her first majority opinion. Her *Sierra Club* decision is clearly written and persuasive. It distills a complex ESA and FOIA legal controversy into a slim 11-page opinion–quite concise by Supreme Court standards.

Finally, Justice Barrett's decision in *Sierra Club* offers little guidance as to how conservative a voice she will be on the Court in environmental and other types of public law cases in the future. The issue in *Sierra Club* did not split the justices along traditional ideological lines–Justice Kagan abandoned her fellow progressive justices to join in Justice Barrett's majority opinion.

Environmentalists and Supreme Court observers will get a far better sense of just how conservative Justice Barrett will turn out to be later in the Court's current Term, when a series of more conventional environmental law disputes will be argued and decided. Next up: *Cedar Point Nursery v. Hassid*, an important property rights case from California . *Cedar Point Nursery* is scheduled for argument before the justices next Monday and will be decided by the end of June. Those still-pending environmental cases will provide clearer insight as to how Justice Barrett–and the entire six-member bloc of conservatives on the Court–will shape environmental law in the coming years.

(I'll preview the issue and upcoming arguments in the Cedar Point Nursery *case in a post later this week.)*