



## Washington DC Update

*Election Results.* With a projected 306 Electoral Votes, President-elect Joe Biden will become the 46th President of the United States on January 20, 2021. Biden's narrow victories in Arizona and Georgia not only flipped these states to the Democrats but made President Trump's efforts to contest the results in other swing states, including the supposed "Blue Wall" states, more difficult. Like President Trump's victory over Hillary Clinton in 2016, a relatively small number of votes in several swing states, including Arizona, Georgia, and Wisconsin, provided the difference for the Biden-Harris ticket.

While Democrats will be ecstatic to recapture the White House, the results in Senate, House, and state legislative races were a major disappointment for the party. Pending the results of two Senate runoff elections in Georgia it appears that Republicans will hold the U.S. Senate with the net loss of just one seat – a significant accomplishment considering a loss of 5+ seats looked possible. Senator Steve Daines (R-MT) exceeded expectations in his margin of victory over incumbent Democratic Governor Steve Bullock. Daines provides critical leadership on forestry issues in the Congress. However, Democrats defeated incumbent Senators Cory Gardner (R-CO) and Marth McSally (R-AZ), who couldn't overcome President Trump's unpopularity in growing metro areas like Denver and Phoenix.



While one race remains too close to call, House Republicans have picked up at least 11 seats in the U.S. House, where Democrats expected to increase their majority in the election. With a narrow 223-212 House majority, Democrats may find it difficult to pass progressive policies like the Green New Deal and Medicare for All. There is already a growing rift between the progressive wing of the caucus and more moderate Democrats with each blaming each other for the election losses. One of the most notable losses for House Democrats was Minnesota Congressman Collin Peterson, who is the current chair of the House Agriculture Committee and has represented a rural, farm-heavy district since 1991.

Peterson's loss, retirements like that of Congressman Greg Walden (R-OR), and Senate term limit rules on committee chairmanships, will cause a reshuffling of committee chairmanships and ranking member positions. An overview of the key changes will be highlighted in the December newsletter.

In addition to the stinging losses in the House and the failure to capture the Senate, Democrats also missed an opportunity to capture more state legislatures and governorships. Following a strong wave election in 2010, Republicans used their majorities in key states to create a structural advantage for their

party in the decadal redistricting process for congressional and legislative districts in certain states. Democrats had hoped to make more ground ahead of this round of redistricting.

*Biden Transition.* On November 23 the General Services Administration relented to growing pressure and gave President-elect Biden the green light to begin the formal transition process, opening the door for federal funding, office space, and access to government information. Prior to the announcement the Biden Administration had already named some White House staff and established transition teams for the various federal agencies. Transition team leaders often make up some of the first key cabinet and subcabinet selections.

For the Department of Agriculture, which includes the Forest Service, the transition team is being led by Robert Bonnie, who served as Undersecretary for Natural Resources and the Environment during the Obama Administration. In his role overseeing the Forest Service, Bonnie was an advocate for increasing the pace and scale of forest management and restoration. The transition team for the Department of the Interior is also led by veterans of the Obama Administration who have a background in tribal affairs, green energy, and climate change – perhaps signaling likely focus areas under the Biden Administration.

*Lame Duck.* Congress has returned from the Thanksgiving break and faces a looming deadline to act on Fiscal Year 2021 appropriations with the current Continuing Resolution (CR) set to expire on December 11. Senate Republicans and House Democrats remain at odds over the next round of COVID relief legislation. Republicans are calling for a \$500 billion package focused on vaccine distribution and a continuation of the Paycheck Protection Program, while Democrats are calling for a package near \$2 trillion with funding for state and local governments and other relief programs. The Trump Administration has largely withdrawn from the negotiations.

Rather than passing another CR that would punt spending decisions to the next Congress, House and Senate leaders have expressed interest in reaching agreement on an omnibus appropriations bill to fund the government through the remainder of Fiscal Year 2021. There will be immense pressure on both sides to reach agreement on funding for vaccine distribution and other COVID-related programs if a broader COVID deal can't be reached. The Congress is also facing a deadline to pass the annual National Defense Authorization Act, to which Democrats hope to attach several public lands and Wilderness proposals. /Heath Heikkila

## **Forest Service Final NEPA Rule Published in Federal Register**

On November 19, the Forest Service's final National Environmental Policy Act (NEPA) [rule](#) was published in the Federal Register, capping a nearly three-year process by agency staff to update and streamline environmental analysis and decision-making procedures. Adoption of the rule was delayed for months as the Forest Service worked to ensure the proposal was consistent with the overarching NEPA reform regulations issued by the White House Council on Environmental Quality (CEQ) this summer.

The primary elements of the rule are: 1) a new restoration Categorical Exclusion (CE) for up to 2,800 acres of treatment; 2) adoption of a "determination of NEPA adequacy" (DNA) procedure; and 3) a series of additional CEs for routine agency actions, including the renewal of special use permits and issuance of certain recreation permits.

Because of the intervening CEQ rules, the Forest Service was forced to reduce the scope of the rule compared to what was originally proposed. AFRC strongly supported the original proposal and urged the agency to further strengthen key provisions. The agency has indicated that it plans to review other aspects

of its original proposal and potentially issue further rules by September 2021, although it is unclear whether that would proceed under a Biden Administration.

AFRC strongly supports this modest, but important, effort by career agency staff to streamline environmental analysis procedures. Reviews have shown that the Forest Service frequently tops the federal government in the amount of time and money spent for NEPA compliance, which has proven to be a major barrier to the agency's efforts to treat tens of millions of acres of at-risk forests. We hope the Biden Administration will recognize the importance of these changes and prioritize additional, modest reforms.

Unsurprisingly, environmental groups have responded with the usual sky is falling claims and may file litigation challenging the rule. AFRC is already involved in the legal effort to defend the CEQ NEPA regulations and is prepared to mount a similar defense in support of the Forest Service rule.

The rule's text is available [here](#). You can also read [USDA's press release](#) and find additional background information about the rule [here](#). AFRC is closely tracking several other pending regulations proposed by the Trump Administration, including a fix to the Cottonwood litigation hook, a 5,000-acre salvage CE proposed by the BLM, and another proposal by the BLM to reform its broken administrative protest process for forest management decisions. These are priorities that AFRC is eager to see finalized before the end of the Trump Administration. /Heath Heikkila

## **New Data Illustrates Wildfire Impacts to BLM Lands**



This summer's wildfires had a profound impact on western Oregon forests and the communities that surround them to a degree not seen in recent years. The fires crossed over multiple ownerships including the Forest Service, Bureau of Land Management (BLM), Bureau of Indian Affairs, Oregon Department of Forestry, and others. Land managed by the BLM for timber production under the principles of sustained yield in conformity with the O&C Act are of particular concern due to the agency's clear management direction to conduct timber salvage.

The 2016 Resource Management Plans (RMPs) provide this direction and are clear on where the agency is required to conduct salvage and where they are prohibited from conducting salvage. In short, damaged timber on lands designated as Harvest Land Base (HLB) must be salvaged where economically feasible. Damaged timber on lands designated as Reserve is prohibited from being salvaged unless that timber poses a public safety risk.

The BLM assessed the impacts of the fires and compiled information across several critical elements including burn severity, forest age class, and land designation. AFRC summarized the data to outline the BLM's opportunities as well as to contextualize the scale and proportion of potential timber salvage related to the overall fire impacts:

### **Total acres impacted by land designation**

	Archie Creek	Beachie Creek	Holiday Farm	Riverside	South Obenchain	Other	<b>Total</b>
HLB	13,056	13,437	5,270	5,886	1,550	665	<b>39,864</b>
Reserve	27,560	25,175	13,275	6,711	13,242	3,205	<b>89,168</b>

Burn severity by land designation and forest age-class\*

	HLB			Reserve		
	High	Moderate	Low	High	Moderate	Low
0-30	2,492	2,663	1,243	1,258	2,213	900
40-70	4,610	5,710	3,298	2,978	5,624	3,144
80-120	1,122	4,272	1,657	1,406	5,560	1,857
120+	948	1,436	1,054	10,875	16,592	5,945

\*Only includes the four large wildfires (Riverside, Holiday Farm, Beachie Creek, Archie Creek). Data for other fires is not yet available

Key takeaways include:

- 128,336 acres of BLM managed land were impacted by wildfire in western Oregon.
- 31% of those acres are available for timber salvage and 69% of those acres are prohibited from salvage as directed by the agency’s RMPs.\*
- 78% of the four large fires burnt at moderate to high severity.
- 81% of impacted mature forest over the age of 120 burnt at moderate to high severity.
- Roughly 18,000 acres of lands designated as HLB burnt at moderate to high severity and likely contain merchantable timber suitable for salvage (>40 years old). The equates to roughly 15% of the total BLM acres burnt.
- 46,506 acres of forest land managed by the BLM that burnt at moderate to high severity is prohibited from timber salvage as directed by the agency’s RMPs.\*

\*BLM is permitted to remove hazard trees along roads and recreation sites in lands designated as Reserve

The data above illustrates that the majority (85%) of BLM managed forest land impacted by wildfire will not be available for timber salvage due to burn severity, RMP direction, or timber merchantability. The likelihood of timely and effective timber salvage on the remaining 15% is uncertain due to a plethora of procedural obstacles facing the agency. Regardless, AFRC hopes to assist the BLM in planning and developing economically viable salvage sales on that 15% that will provide useful timber products to local mills. /Andy Geissler

## **Federal Timber Purchasers Committee Meeting**

The Federal Timber Purchasers Committee (FTPC) recently met with Forest Service and BLM leadership from around the country. The committee meets with agency personnel twice a year to discuss issues pertinent to the timber sale program. This fall’s meeting was held virtually and covered topics such as wildfire response, updates to Forest Service manuals and handbooks, and forest plan revision timelines.

Fiscal Year 2020 began with an anticipation to see the Forest Service inch closer to the benchmark level of 4.0 billion board feet (BBF) of timber production with an established target of 3.7 BBF. This target mirrors the initial target level at the onset of Fiscal Year 2019 before it was lowered following the government shutdown. A formal target reduction was not issued this year, yet complications associated with the COVID-19 pandemic, wildfires and hurricanes, and injunctions related to threatened and endangered species, contributed to the agency’s attainment of 3.2 BBF of its target.

Despite the agency's ambitious goals and efforts, this 13% shortfall represents a continuation of relatively flat level timber outputs over the past three years. On a positive note, Region 6 continued its upward trend of timber accomplishments by hitting its Fiscal Year 2020 target of 720 million board feet (mmbf). This represents a 20% increase from last year, a 25% increase from 2010 and 50% increase from 2005.

The preliminary target for Fiscal Year 2021 has been set at 4.0 BBF. The makeup of the contribution to this total from Regions 5 and 6 is uncertain given the level of wildfire impact to national forest land in California and Oregon. The committee discussed the prospects of post-fire timber salvage in those states and its contribution to each Region's outputs. There seemed to be a consensus that successful post-fire timber salvage, although desirable from a land management perspective, is a tenuous pursuit and should be taken on thoughtfully and strategically. Many on the committee also asserted that the proportion of salvage timber should be appropriately balanced with green timber to meet the diverse needs of the local industry.

The recently unveiled Forest Service budget "modernization" was discussed. This effort was initiated by directives from the Office of Management and Budget to eliminate cost pools and make the budget more transparent. Among other things, the new structure will create a new line-item for Salary & Expenses (S&E) for each fund. For example, the National Forest System (NFS) fund contains twelve individual Programs including Forest Products, Recreation, and Wildlife & Fisheries.

Previously, S&E for each Program was included in that Program's budget line. The new format extracts S&E from each Program and merges them into a single line-item. This new S&E line-item comprises approximately 80% of the total NFS program in Fiscal Year 2021. While this new format provides transparency on the level of funding dedicated to S&E, it also creates a level of ambiguity regarding the level of funding dedicated to each Program. The Forest Service acknowledged that the new structure would complicate the calculation of unit-costs, which previously served as a measure of fiscal efficiency.

Finally, the Forest Service provided the committee with a list of upcoming potential new Forest Plan revision starts; many of which are within the western Regions and several of which are within the range of the Northwest Forest Plan:

- Fiscal Year 2021: Shasta-Trinity, Mendocino, Klamath, Six Rivers, Rogue River-Siskiyou
- Fiscal Year 2023: Lolo, Fremont-Winema, Umpqua, Willamette /*Andy Geissler*

### **The Middle May Timber Sale and Reiter Foothills Saga Continues**

Located in the Reiter Foothills of Snohomish County, the DNR Middle May timber sale will benefit a variety of beneficiaries including the Sultan School District. Anti-forestry groups, led by the Washington Forest Law Center, continue their relentless campaign to block the sale, including recent efforts to promote the reconveyance of 5,300 acres of Reiter Foothills trust lands managed on behalf of beneficiaries for a county park.

As we reported in the [September newsletter](#), this reconveyance is opposed by the Tulalip Tribes, and the sale was approved for auction by the Board of Natural Resources (BNR). The approval of the sale was contingent on waiting 90 days – to November 30 - to bring the sale to auction in case Snohomish County decided to peruse the reconveyance. To accommodate this timeline, DNR delayed the entire November NW Region auction for 12 days from its originally scheduled date of November 18. It is our understanding that the Tulalip Tribe continues to oppose reconveyance of the 5,300 acres due to concerns

over impacts to tribal treaty rights and use of the area. Additionally, the Tulalips have stated they support working forests and the Middle May timber sale.

In a latest effort to stop Middle May and push for reconveyance, the Washington Forest Law Center persuaded the Sauk-Suiattle tribe to send a letter to Snohomish County the day before the November BNR meeting, requesting “Government to Government” consultation. The consultation request was regarding their support for a “conditional reconveyance” request of the 5,300 acres for a “park” and concerns with the Middle May sale. The tribe conditioned its support for reconveyance on significantly limiting public access, particularly for recreation, within the so-called “park.” The letter also asked for a delay or removal of the proposed Madera Sorts timber sale in the Reiter Foothills. Madera Sorts was approved by BNR at the November meeting but was moved from the December auction to the January 2021 auction to allow time for the county and the tribe to meet.

On November 20, the Sauk-Suiattle tribe sent another letter to Commissioner of Public Lands Hilary Franz requesting “Government to Government” consultation. This letter requests that the Middle May timber sale be postponed for three months due to the ongoing reconveyance efforts and their identification of culturally modified trees. It also includes a list of additional grievances the tribe has with DNR, including a land transaction in Skagit County with the Upper Skagit Tribe, which BNR is set to approve at its December meeting.

The Washington Forest Law Center, on behalf of the “Wild Wallace Steering Committee” (a group of local anti-forestry activists) sent an additional letter on November 27, promoting their 5,300 acre park concept and requesting a delay in the Middle May sale as well as the Madera Sorts sale. The letter outlines their views on the impacts of logging and supports the letter sent by the Sauk-Suiattle tribe - despite the tribe’s expressed interest in limiting or excluding public access from these lands if reconveyed for a park, which likely violates the requirements of the reconveyance statute. Despite the repeated attempts by the anti-forestry activists to block DNR timber management activities in the Reiter Foothills, they have yet to put forward any proposed solutions to mitigate for the lost revenue to local beneficiaries like the Sultan School District or the impacts to jobs in the forest products sector due to a reduction in volume.

As anticipated, the Middle May timber sale was offered at auction on November 30. The minimum bid was \$286/MBF with an advertised volume of 9,577 MBF. Excluding additional fees, such as road access fees the purchaser pays to DNR, this would make the sale value approximately \$2,739,022. Three bids were submitted with the high bid being \$383.74/MBF (\$97.74 above minimum) for an approximate sale value of \$3,675,077.98. This means that after the 25% management fee is removed, roughly \$2,756,308 will be distributed to the various beneficiaries, of which the Sultan School District is one of the largest recipients. We will continue to update the saga of the Middle May timber sale and the Reiter Foothills in future newsletters. */Matt Comisky*

## **Washington State Political Updates**

In Washington state, Democratic incumbents Governor Jay Inslee, Commissioner of Public Lands Hilary Franz, and Superintendent of Public Instruction Chris Reykdal all easily won reelection. For Inslee, this will be his third term as Governor, a first since Republican Governor Dan Evans served three terms from 1965-1977. Meanwhile, Congressman Denny Heck (D) bested fellow Democratic state Senator Marco Liias in the open race for Lt. Governor. With rumors of Inslee being offered a potential Cabinet position in the Biden Administration, there was added interest in the outcome of the race of Lt. Governor.

The Blue Wave that many pundits predicted would give Democrats control of the U.S. Senate and a larger majority in the U.S. House also failed to materialize in Washington state legislative races, where Republicans were able to maintain their current numbers in both legislative chambers. Democrats will again hold a 58-40 majority in the House and a 28-21 majority in the Senate after both parties swapped a single seat in each chamber.

Republicans were able to pick up a House and Senate seat in rural southwest Washington's 19th legislative district, which for decades has been a blue-collar Democratic stronghold. Two conservative Democrats, Sen. Dean Takko (Longview) and Rep. Brian Blake (Aberdeen), couldn't overcome the continued drift of this natural resource-based district towards Republicans. Rep. Brian Blake is the long-time chairman of the House Agriculture and Natural Resources Committee and a strong supporter of natural resource industries.

However, Democrats were able to defeat Senator Steve O'Ban in a Tacoma-area district. O'Ban was one of the last remaining Republican Senators in the central Puget Sound region. Democrats also captured a House seat in District 42 that stretches from Bellingham to the Canadian border in Whatcom County. One of the most hotly contested races occurred between incumbent moderate Democrat Sen. Mark Mullet (Issaquah) and a more progressive Democrat Ingrid Anderson, who was endorsed by liberal groups and Governor Jay Inslee. Mullet, a small business owner who enjoyed strong support from the business community, won by just 57 votes – a margin that will trigger a recount.

Planning is underway for the 2021 legislative session, which will look very different due to the ongoing COVID pandemic. House sessions are expected to occur virtually while the Senate may attempt a hybrid approach. Access to the capitol campus is likely to be limited to lawmakers, staff, and the media, although many legislators will likely participate virtually from their homes or offices. Committee hearings are also expected to take place online. Given these restrictions, the legislature will likely focus on the state budget for the 2021-2023 biennium, COVID relief measures, and any essential legislation.

Commissioner of Public Lands Hilary Franz is expected to once again champion legislation to create a dedicated funding source for wildfire preparedness and forest health activities. Following this summer's devastating wildfire season on the West Coast, Franz pledged to significantly accelerate forest health work on federal, state, and private lands, including calling for reforms to streamline forest management activities. AFRC has provided a series of recommendations to Commissioner Franz and looks forward to engaging in the effort. */Heath Heikkila*

### **AFRC's Forest Products and Carbon Committee**

State, regional, and national climate change policies are being proposed that could have a significant impact to domestic timber supply from private and federal lands, posing short-term risks, long-term risks and uncertainty to AFRC members. In fact, a group composed largely of President-Elect Biden's Transition team members recently [issued recommendations](#) to achieve net zero carbon emissions in the U.S. by 2050. Additionally, tens of millions of acres have burned in the West over the last decade including some of the most destructive fires and fire seasons in the last half century.

The media, non-governmental organizations, academics, and decision-makers have emphasized and focused on the intersection between wildfire, emissions, climate change, active forest management and public health. These ongoing discussions present both challenges and opportunities to AFRC's members and mission. Anti-forestry activists are using climate change to undermine and attack the timber industry

and active forest management. On the other hand, climate change presents industry with a new opportunity to position itself and active forest management as a climate solution.

Since no organization or formal group exists to protect the interests of manufacturers in climate change policy, AFRC formed a Forest Products and Carbon Committee. The committee will meet quarterly and act as a clearinghouse for climate change science and policies to develop organized strategies and provide a collective voice on behalf of manufacturers in response to changes that would affect forest management, fiber supply, forest products manufacturing, and the use of forest products. The committee will also educate and engage AFRC staff, members, and partners regarding climate change-related science and policies.

The committee will meet quarterly with its members to discuss the current status of issues that would impact the forest products manufacturing industry. It will be managed collaboratively by co-chairs Sara Ghafouri (AFRC) and Amanda Astor (AOL) to best coordinate efforts between AFRC's Programs and share information with partners and organizations in the forest products manufacturing sector. For more information about the committee and its membership, please contact Sara ([sghafouri@amforest.org](mailto:sghafouri@amforest.org)) and Amanda ([aastor@oregonloggers.org](mailto:aastor@oregonloggers.org)) /Sara Ghafouri

## Custer-Gallatin Conducts Forest Plan Resolution Meetings



The Custer-Gallatin National Forest (C-G) is currently undergoing its Forest Plan Revision and recently held Objection Resolution meetings on November 17-19. The Forest, which spans over three million acres in southern Montana and the northwest corner of South Dakota, started the Forest Plan Revision process in 2016 and issued its final Draft Decision Notice on July 9, 2020. Nearly 700 objections were filed to the new Plan including those by AFRC, Montana Logging Association (MLA) and Sun Mountain Lumber Company.

The meetings were held virtually with Regional Forester Leanne Marten serving as the Reviewing Officer. The meetings addressed objections related to land allocations and their plan components, Forest-wide impacts from timber harvest, livestock grazing, and wildlife habitat management, and the conservation of bison and other species .

A good portion of the discussion regarding land allocations centered on various groups wanting to add more wilderness, wild and scenic rivers, and hiking, biking and horse trails. There is no doubt that the Bozeman and Billings area is center for recreation, but AFRC/MLA reminded the national forest that under the Preferred Alternative only 19% of the land base was listed as suitable for timber production and an additional 20% could have timber harvest conducted if it benefited other resources. Hence only 39% of the national forest could have timber harvest take place, thus industry did not want to lose any of those acres to more single-use management such as wilderness. The photos in this article help illustrate the need for active forest management across the landscapes.

AFRC/MLA was very disappointed that only one hour was set aside for the important topics of timber harvest and livestock grazing. The crux of the industry objections centered on the Plan's low Potential Timber Sale Quantity (TSQ) projection which is only 10 mmbf for the Preferred Alternative. This is also

disappointing since the Long-term Sustained Yield volume for the C-G was listed at 38.3 mmbf. The Forest Products industry relying on the C-G for a good portion of their raw materials includes Sun Mountain Lumber located in Deer Lodge, R-Y lumber located in Townsend and Livingston, several large post and pole plants, a variety of smaller operations, and the entire logging industry in eastern Montana.

Further exacerbating the timber volume level argument, the national forest reduced the TSQ from 15 mmbf to 10 mmbf from the Draft EIS to the Final Plan, and during that interim period R-Y Lumber announced it was closing its Townsend mill due to lack of sawlogs.

The formal objections submitted by the industry included:

- The Plan does not consider a reasonable range of Alternatives to address the needs of the national forest for needed restoration.
- The Plan inappropriately ties timber harvest to current budget levels.
- The Plan does not consider the needs of the existing sawmilling infrastructure.
- The Economic Analysis was flawed pertaining to expected number of new jobs created in the timber sector.
- The Forest did not prepare an Alternative that would have produced the Sustained Yield Limit of timber.
- The Plan did not meet the intent of the Multiple-Use Sustained Yield Act of 1960.
- The Plan is invalid where it relies on unlawful portions of the 2012 Planning Rule.



Following the three days of Resolution meetings Regional Forester Marten announced she will be extending the 90-day objection review period to allow a thorough review of the issues. AFRC/MLA hope the national forest and reviewing team will take an honest look at the importance of the C-G to the timber industry in southeastern Montana. The final Plan will make the difference in the both the health and survivability of sawmilling and logging industries and the C-G itself. /Tom Partin-AFRC, Bryan Lorengo-MLA

## **Advocates Press for Government Transparency Before the Supreme Court**

On November 2, the U.S. Supreme Court heard [oral argument](#) for *U.S. Fish and Wildlife Service v. Sierra Club*, a case that centers on Freedom of Information Act (FOIA) disclosure requirements and the scope of the deliberative process exemption. This was the first argument in which newly-confirmed Justice Amy Coney Barrett participated.

FOIA requires agencies to disclose information to requesting parties relating to the formation of an agency's decision. When pre-decisional documents are part of the agency's deliberative process, however, the Act exempts those documents from mandatory disclosure. But environmentalists and the forest products industry believe that the government is applying the exception too broadly. AFRC filed an [amicus brief](#), joined by the National Association of Home Builders, American Farm Bureau Federation, and NFIB Small Business Legal Center, urging the court to permit disclosure of so-called "draft" biological opinions that were the Services' final determination on a particular version of the EPA rule at issue. See [August newsletter](#).

Assistant solicitor general Matthew Guarnieri, representing the U.S Fish and Wildlife Service, argued that the Service's 2013 biological opinion "died on the vine," and was not a final draft because it was not submitted to EPA in full. Justice Alito wondered whether any draft biological opinion can ever be final. "If it is a draft opinion . . . it is pre-decisional and deliberative because the agency has not yet made up its mind," Mr. Guarnieri replied.

Ordinarily, protecting deliberative materials facilitates and protects open discussion for agencies during the decision-making process. Justice Kagan, noting that everyone treated the draft document as effectively final, asked "What more work needed to be done?" Justice Kavanaugh, also expressed concern, asking whether officials would avoid disclosure by stamping "draft" on everything. Justice Thomas asked if all that needed to happen was for the Services to hit the "send" button.

Several justices, including Justice Kavanaugh and Justice Barrett, asked for clarification on a bright line rule. Mr. Guarnieri articulated that anything short of a final decision is *per se* pre-decisional, especially in light of the ESA and its implementing regulations. However, if the Court were concerned that such a rule would leave agencies room to evade disclosure, a multi-factored test might be appropriate. He suggested that the Court could look to see whether a document was labeled "draft," but that such a factor would not be dispositive in determining whether a draft document had been finalized for the purposes of FOIA disclosure.

Sierra Club managing attorney Sanjay Narayan, argued that the Court's position in *N.L.R.B. v. Sears, Roebuck & Co* is informative in that documents that explain agency decisions and have "appreciable legal consequences" should be subject to FOIA's disclosure requirements, regardless of whether a given document is labeled as "draft" or "final." He also explained that lower courts have been applying this standard for 40 years, and a more clear, bright-line test is unnecessary.

More specific to the case at hand, the ESA "gives the Services decisive gate-keeping authority over other agency's actions." The Supreme Court held in *Bennett v. Spear* that biological opinions have powerful influence over agency actions and are therefore reviewable by the courts. Mr. Narayan articulated that the public should have access to the reasons underlying the Service's exercise of this statutory authority. Although the EPA chose a different regulatory approach as a result of the Service's draft jeopardy opinion, access to the opinion is useful for groups that want to ensure that future decisions are consistent with the basis for the regulation change. For industry, the concern is that EPA – or any agency – is exercising its authority on sound grounds.

Several justices questioned Mr. Narayan on a potential bright line rule to distinguish between drafts and opinions labeled as "drafts." Again he articulated the test presented in *Sears*: "If the draft opinion reflects a decision made by the agency with appreciable legal consequences, then it needs to be released."

Justice Sotomayor wondered how the *Sears* test could apply in this case, when it is unclear what portions of the Service's draft opinion EPA actually saw. Mr. Narayan pointed out agency determinations affect more than the action agency: jeopardy opinions, for example, affect regulated communities and everyone else. He also articulated that legal consequences could flow from draft opinions because those opinions are still based on an administrative record that receives deference. A decision is expected by February 2021. /Heidi Logan