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Tuna, Dolphins, and Purse Seine Fishing in the Eastern Tropical Pacific: The Controversy Continues

*Denis A. O'Connell*¹

*Like peace, the real work of saving the ocean is not only carried out in diplomatic chambers and government offices. It is carried out in the hearts and hands of the people.*²

INTRODUCTION: DOLPHIN DEATHS AND THE MARINE MAMMAL PROTECTION ACT

During the early 1970's, a historic peak in the environmental movement, fueled by public outrage and activism, resulted in the passage of several new U.S. laws designed to protect the environment. Congress enacted the Marine Mammal Protection Act (MMPA)³ in 1972 to address, among many problems concerning marine mammals, the large number of dolphins killed by the purse seine method of fishing for yellowfin tuna in the eastern tropical Pacific Ocean (ETP),⁴ a 5 to 7 million square-mile area of ocean that extends roughly from Southern California to the Chilean coastline, and west to Hawaii.⁵

The MMPA established a moratorium on the taking (or killing) and importation of marine mammals, including dolphins, except those taken incidentally during commercial fishing operations.⁶ Recent MMPA amendments have reiterated the

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2. ANATOLY SAGALEVITCH, *Epilogue to SAVING THE OCEANS* 157 (Joseph MacInnis ed., Key Porter Books 1992).

3. 16 U.S.C. §§ 1361 et. seq.

4. *Earth Island Inst. v. Mosbacher*, 929 F.2d 1449, 1453 (9th Cir. 1991).

5. *Brower v. Evans*, 257 F.2d 1058, 1061 (9th Cir. 2001).

6. 16 U.S.C. § 1371 (a)(2) (2004).

fundamental views of Americans and the original intent of Congress that marine mammals “have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected . . .”⁷

It was the voice of an entire nation that pressured Congress to enact the MMPA, but it was the acts of one man that brought public attention to the decimation of dolphin populations in the ETP as a result of the yellowfin tuna industry’s fishing practices. In 1988, American marine biologist Sam LaBudde undertook a daring and dangerous mission: he enlisted as a cook on a Panamanian tuna vessel and secretly filmed purse seine fishing activities.⁸ LaBudde was the first person to successfully capture this slaughter on film.⁹ LaBudde’s widely publicized images depict the brutal annihilation of dolphins then commonplace in purse seine fishing.¹⁰

LaBudde’s pictures were the catalyst for a shifting debate regarding dolphins and the ETP purse seine tuna fishing industry.¹¹ In the beginning, it was purely a domestic dispute concerned with the large number of dolphin deaths. After the MMPA and its amendments successfully lowered dolphin mortality rates, the debate’s focus shifted. The issues of recovery of dolphin populations, protection of marine biodiversity, international relations, and consumer fraud have now largely replaced dolphin mortality as the debate’s central issues.¹² The debate also broadened from a domestic outlook to an international one with the passage of treaties such as the La Jolla Agreement and the Panama Declaration.

Along with this shift in focus, a schism has occurred in the previously united environmental community. Several environmental groups have backed what they believe to be a workable balance between the economics of fishing and dolphin mortality. Other organizations have taken a hard line approach against any dolphin mortality and have brought lawsuits against the U.S.

7. 16 U.S.C. §1361 (6) (2004).

8. MICHAEL DONOGHUE, *Protecting the Oceans*, in *SAVING THE OCEANS* 153 (Joseph MacInnis ed., Key Porter Books 1992).

9. *Id.*, at 153.

10. *Id.*, at 153.

11. *Id.*, at 153.

12. Michael Scott, *The Tuna-Dolphin Controversy*, *Man In Nature*, at <http://www.maninnature.com/Fisheries/Tuna/tuna1a.html> (on file with the American Cetacean Society in their journal *Whalewatcher*, last visited Aug. 6, 2004).

government challenging legislation ratifying recent international agreements. This paper will provide a history of the tuna-dolphin debate, beginning with an analysis of the tuna-dolphin relationship. A chronological overview of both domestic and international legislative developments regarding ETP purse seine fishing follows. Finally, two recent court cases, *Brower v. Evans*¹³ and *Defenders of Wildlife v. Hogarth*,¹⁴ are discussed and analyzed for their potential impact on the continuing debate.

TUNA, DOLPHINS, AND PURSE SEINE NETS IN THE ETP

Yellowfin tuna is the most economically significant tuna species caught in the ETP.¹⁵ Yellowfin can grow to be 6 feet long (180 cm), and generally weigh anywhere from 11 to 44 pounds (5 to 20 kg).¹⁶ Their size makes yellowfin well fit for solid packing in cans and causes the market demand to be greater for yellowfin than it is for other fish species.¹⁷ Approximately 30 percent of the world's yellowfin harvest is taken from the ETP.¹⁸ For reasons that are still scientifically unexplained, yellowfin swim below dolphin schools in this oceanic area.¹⁹ Because dolphins must surface to breathe, this tuna-dolphin relationship has provided an easy means for fishermen to locate yellowfin²⁰

Prior to 1959, fishermen catching tuna rarely harmed dolphins because they predominantly fished by using a baited hook-and-line.²¹ Then, U.S. fishing vessels began to encircle dolphins with large purse seine nets to capture the yellowfin tuna swimming beneath them.²² Purse seine nets are up to a mile long, and may hang as deep as 600 to 800 feet beneath floats on the ocean sur-

13. *Brower*, 257 F.3d at 1058.

14. *Defenders of Wildlife v. Hogarth, et al.*, 330 F. 3d 1358 (Fed. Cir. 2003); Rehearing and rehearing en banc denied 344 F.3d 1333 (Fed. Cir. 2003); certiorari denied 124 S. Ct. 2093 (2004).

15. *Defenders of Wildlife*, 330 F.3d at 1360.

16. *Id.*

17. *Yellowfin Tuna Species Datasheet*, (site visited Aug. 6, 2004) Atuna.com Home Page, at http://www.atuna.com/species/species/datasheet%20yellowfin_index.htm (last visited Aug. 6, 2004).

18. Eugene H. Buck, *Dolphin Protection and Tuna Seining*, Env'tl. & Nat'l Resources Policy Pol'y Div., Cong. Research Service 2 (August., Aug. 29, 1997, microformed on 98-IB-96011 (Cong. Research Serv., 1997).

19. *Earth Island Inst.*, 929 F.2d at 1449.

20. Rachel C. Hampton, Note, *Of Dolphins and Tuna: The Evolution to an International Agreement*, 10 Fordham Env'tl. Law J. 99 (1998).

21. Susan C. Alker, Note, *The Marine Mammal Protection Act: Refocusing the Approach to Conservation*, 44 UCLA L. Rev. 527, 529 (1996).

22. Buck, *supra* note 18, at 2.

face.²³ The process known as “setting on dolphins” begins shortly after a dolphin school is sighted. Speedboats are launched to chase, tire, and herd the dolphins into a tight group that can easily be encircled.²⁴ Explosives, helicopters, and other devices are also sometimes used to herd the dolphins into the center of the nets.²⁵ Chase and herding activity lasts an average of 20 minutes, with some extreme chases lasting more than an hour.²⁶ During the chasing and herding, yellowfin tuna remain below the dolphins on the surface.²⁷

The fishermen surround the dolphin school with the net, with a small boat holding one end of the net stationary.²⁸ Upon encirclement, the bottom of the net is drawn together (“pursed”) by cables to keep the tuna below from diving underneath the net to escape.²⁹ The fishermen then haul the net on board to recover the tuna.³⁰ Dolphins are released through a back-down procedure, where the fishermen reverse the vessel’s direction after about half of the net has been taken onboard.³¹

A variety of factors can cause dolphin mortality on the ocean’s surface during purse seine operations. Sudden strong currents can collapse the net, catching dolphins inside.³² Dolphins sometimes panic at the sight of the boats and net and become entangled in the net’s sides.³³ When setting the nets at night (“sunset sets”), it is difficult for fishermen to see the dolphins or predict their movements, and dolphins can become entangled in the net as it is set.³⁴ Additionally, nets lost or abandoned in rough weather (“ghost nets”) can continue to trap dolphins as they float unattended through the ocean.³⁵

The Earth Island Institute and Humane Society claim that encirclement methods harass, injure, and potentially kill dolphins,

23. *Id.*

24. *Id.*

25. Thomas E. Skilton, Note, *GATT and the Environment in Conflict: The Tuna-Dolphin Dispute and the Quest for an International Conservation Strategy*, 26 Cornell Int’l L.J. 455, 458 n.23 (1993).

26. Buck, *supra* note 18, at 2.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Defenders of Wildlife* 330 F.3d at 1361.

31. *Id.*

32. Alker, *supra* note 21, at 529.

33. *Id.* at 529.

34. *Id.* at 529.

35. VICTOR B. SCHEFFER, *THE SHAPING OF ENVIRONMENTALISM IN AMERICA* 195 (University of Washington Press 1991).

whether or not dolphins are brought on board the ship.³⁶ In addition to direct surface mortality, hidden dolphin mortality resulting from encirclement has also been an important concern to these organizations.³⁷ Dolphins are often injured during chase and herding activities and, even if released alive, are more vulnerable to predator attack and death from their injuries.³⁸ During the confusion of the chase, young dolphins may be separated from their mothers, resulting in an increased chance of death from predator attack or starvation.³⁹ The Humane Society also claims that chase and encirclement repress dolphins' reproductive output to the point where population numbers are not recovering from the massive mortality that has taken place in the past.⁴⁰

Although it is undisputed that purse seine net fishing has taken a toll on ETP dolphin populations, the estimates of dolphin mortality have varied over the last thirty years.⁴¹ By some counts, over seven million dolphins have died as a direct result of contact with the yellowfin tuna fishery since the advent of purse seine fishing in 1959.⁴² In the early 1970's, the U.S. fishing fleet alone was responsible for the slaughter of over 300,000 dolphins annually.⁴³

Even though direct dolphin mortality has largely been curtailed, ETP dolphin population sizes are not returning to their pre-1950's levels. One explanation for the lack of recovery is that dolphin populations are thought to grow slowly, and the measures of abundance trends are designed to be long-term indicators and are insensitive to short-term changes.⁴⁴ An alternative explanation, as discussed above, is that stress to individual

36. Margot Higgins, *U.S. Implements New Dolphin-Safe Standards*, Environmental News Network, at <http://www.enn.com/arch.html?id=12281> (Jan. 4, 2000).

37. *Id.*

38. Nancy Kubasek, et al., *Protecting Marine Mammals: Time for a New Approach*, 13 UCLA J. Env't'l L. & Policy 1, 5 (1994-95).

39. Nathan LaBudde, *Dolphins Under Attack in Congress: Behind the "Dolphin Death" Bill*, 11 (1) Earth Island J. 6, 7 (Wtr. 1995-6).

40. Higgins, *supra* note 36.

41. Teresa Platt, *A Tuna Tale: Managing a Fishery to Increase Positives, Reduce Negatives*, Man In Nature, at <http://www.maninnature.com/Fisheries/Tuna/tuna1b.html> (on file with the Alliance for America in their newsletter Trumpet Call, last visited Aug. 11, 2004).

42. *Keeping America's Tuna Dolphin-Safe*, Defenders of Wildlife, at <http://www.defenders.org/wildlife/new/dolphins.html>. (last visited Aug. 6, 2004) [hereinafter *Keeping Tuna Dolphin-Safe*]

43. *Earth Island Inst.*, 929 F.2d at 1450.

44. Scott, *supra* note 12.

dolphins during encirclement hinders their reproductive output, thus also hindering the recovery of the dolphin population.⁴⁵

CONGRESS ADDRESSES DOLPHIN MORTALITY CAUSED BY
FOREIGN VESSELS: THE 1988 MMPA AMENDMENTS

In the early 1980's, the MMPA had successfully reduced dolphin mortality in the ETP caused by the U.S. tuna boat fleet, but the growth of foreign fleets offset that reduction.⁴⁶ One reason for the reduction of U.S.-caused dolphin deaths was the decreased numbers of U.S. fishing vessels in the ETP.⁴⁷ Over the years, the size of the U.S. tuna fleet had diminished from 35 vessels to 6.⁴⁸ Most U.S. vessels moved to the western Pacific (an area where purse seine net use is still not regulated), were inactivated, or were sold to foreign companies.⁴⁹ The U.S. dominance of the ETP tuna fishing industry fell to Mexico, Ecuador, Venezuela, Vanuatu, and Colombia.⁵⁰ Dolphin slaughter by fishing vessels from these and other countries remained a growing problem because there were no international regulations governing tuna fishing.⁵¹

Through amendments to the MMPA in 1984 and 1988, Congress enacted specific standards intended to ensure that foreign tuna fishing fleets in the ETP would reduce the number of dolphins they killed.⁵² Congress chose to bring about dolphin mortality rate reductions by imposing a mandatory embargo on the importation of yellowfin tuna from countries whose fleets failed to meet certain standards.⁵³ The embargo caught the attention of other tuna-fishing nations because the U.S. tuna market had been expanding for years, with per capita tuna consumption more than doubling between 1950 and 1965 until, by 1974, more than one quarter of all fish consumed in the U.S. were tuna.⁵⁴

Tuna was banned from importation into the U.S. if it was "caught with commercial fishing technology which results in the

45. *Id.*

46. Jennifer Ramach, *Note, Dolphin-Safe Tuna Labeling: Are the Dolphins Finally Safe?*, 15 Va. Envtl. L.J. 743, 749 (1996).

47. Scott, *supra* note 12.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Earth Island Inst.*, 929 F.2d at 1450.

52. *Id.*

53. *Id.*

54. Buck, *supra* note 18, at 2.

incidental kill or incidental serious injury of ocean mammals in excess of U.S. standards.”⁵⁵ Specifically, if purse seine nets were used in the ETP, the exporting nation’s government had to meet two requirements. First, they had to have a program in place comparable to the U.S. program governing the incidental taking of dolphins during fishing activity.⁵⁶ Second, the average rate of incidental taking of dolphins had to be comparable to the average rate of incidental taking of dolphins by U.S. vessels.⁵⁷

By the beginning of the 1990 fishing season, foreign vessels could not export their tuna to the U.S. if they intentionally encircled dolphins or conducted “sunset sets.”⁵⁸ The average rate of dolphin incidental takings by foreign vessels could be no greater than twice that of U.S. vessels through 1989, and no greater than 1.25 times that of U.S. vessels by the end of the 1990 fishing season.⁵⁹ The amendments also required the implementation of a dolphin mortality observer program, with foreign and U.S. vessels receiving the same amount of observer coverage.⁶⁰

The MMPA amendments specifically addressed two dolphin species. Eastern spinner dolphins (*Stenella longirostris*) incidentally taken by foreign vessels could not exceed 15 percent of the total number of all marine mammals incidentally taken by such vessels in any given year.⁶¹ Coastal spotted dolphins (*Stenella attenuata*) could not exceed 2 percent of the total number of all marine mammals incidentally taken.⁶² In the ETP, these two dolphin populations, as well as the northeastern offshore spotted dolphin (*Stenella attenuate*), have been designated “depleted” under the MMPA.⁶³

To obtain a designation of “depleted,” the population of a species must fall below “optimal sustainable population” (OSP) levels.⁶⁴ An OSP is defined as “a population size which falls within a range from the population level of a given species or stock which is the largest supportable within the ecosystem to the

55. 16 U.S.C. § 1371(a)(2).

56. *See id.* § 1371(a)(2)(B)(i).

57. *See id.* § 1371(a)(2)(B)(ii).

58. *See id.* § 1371(a)(2)(B)(ii)(I).

59. *See id.* § 1371(a)(2)(B)(ii)(II).

60. *See id.* § 1371(a)(2)(B)(ii)(IV).

61. *See id.* § 1371 (a) (2) (B) (ii) (III).

62. *See id.* § 1371 (a) (2) (B) (ii) (III).

63. *Keeping Tuna Dolphin-Safe*, *supra* note 42.

64. 16 U.S.C. § 1362(1)(A).

population level that results in maximum net productivity.”⁶⁵ Once designated as “depleted,” a conservation plan must be implemented to restore the species to its OSP.⁶⁶

A species that has obtained a status of “depleted” under the MMPA is not afforded as much protection as those species protected by the Endangered Species Act (ESA). A species gains protection under the ESA when either the Secretary of Commerce or the Secretary of Interior makes the determination that a species is either “threatened” or “endangered.”⁶⁷ A species is considered “endangered” if it is “in danger of extinction throughout all or a significant portion of its range,”⁶⁸ and is regarded as “threatened” if it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”⁶⁹ Despite past high mortality rates, no ETP dolphin species have been listed as endangered or threatened under the ESA: petitions seeking such designations have been denied.⁷⁰

The 1984 and 1988 MMPA amendments succeeded in decreasing the number of dolphin deaths resulting from purse seine fishing. Individual dolphin mortality in the ETP steadily declined from a high of about 133,000 a year in 1986.⁷¹ There were 3,605 reported deaths in 1993; 4,096 in 1994; 3,274 in 1995; and 2,547 in 1996.⁷² In 1998, there were fewer than 2,000 dolphin deaths reported.⁷³ The amendments also resulted in a U.S. embargo against importation of tuna from several fishing countries, including Mexico, Japan, Venezuela, Vanuatu, Colombia, Panama, Belize, Costa Rica, and Italy.⁷⁴

THE U.S. MARKETPLACE ADDS ITS TWO CENTS: THE 1990
DOLPHIN CONSUMER PROTECTION INFORMATION ACT

After the passage of the MMPA amendments, concern over the “dolphin-safe” tuna label became widespread as publicity

65. 50 C.F.R. § 216.3.

66. JOSEPH J. KALO ET. AL, COASTAL AND OCEAN LAW 557 (West Group 1999).

67. 16 U.S.C. § 1533 et seq.

68. *See id.* § 1532(6).

69. *See id.* § 1532(20).

70. Buck, *supra* note 18, at 2.

71. Higgins, *supra* note 36.

72. Scott, *supra* note 12.

73. Higgins, *supra* note 36.

74. Scott, *supra* note 12.

about ETP dolphin deaths increased.⁷⁵ Environmental groups such as Greenpeace organized boycotts of the purchase of tuna captured by using purse seine nets on dolphins, and took actions to support “dolphin-safe” tuna.⁷⁶ These actions led to changes in the business practices of leading American tuna processing companies such as StarKist, who cited consumer pressure as a reason for its decision to stop purchasing tuna caught by setting nets on dolphins.⁷⁷ StarKist and two other major tuna processors, Bumblebee and Chicken of the Sea, comprise 90 percent of the U.S. tuna market.⁷⁸ All three processors implemented new corporate policies halting their purchase of tuna caught by setting nets on dolphins.⁷⁹

The increased public concern, coupled with the changes in business practices by the major tuna processors, led to additional legislation regarding American tuna processors and their use of the “dolphin-safe” label. Congress recognized the importance of the ability of the average consumer to differentiate between tuna caught without harming dolphins and tuna caught using purse seine fishing techniques.⁸⁰ To distinguish between the two, Congress enacted the Dolphin Consumer Protection Information Act (DCPIA)⁸¹ in 1990.⁸²

Under the DCPIA, tuna sold in the U.S. could not be labeled “dolphin-safe” if it was caught using purse seine nets that were intentionally deployed on or encircled about dolphins.⁸³ The DCPIA made it a violation of the Federal Trade Commission Act to label a product as “dolphin-safe” if it contained tuna harvested in the ETP through purse seine methods.⁸⁴ The only exception to this rule arose if certain statements accompanied the tuna averring that no dolphins were intentionally encircled during the fishing trip.⁸⁵

75. Ramach, *supra* note 46 at 751-752.

76. *Id.* at 752.

77. *See id.* at 753.

78. David Phillips, et al., *Update on Tuna/Dolphin Issues in U.S.*, Earthtrust, at http://www.earthtrust.org/dolphin_hotline/eii_update_9mar99.html (Mar. 9, 1999)

79. Ramach, *supra* note 46, at 753.

80. *Brower*, 257 F. 3d at 1058

81. 16 U.S.C. § 1385.

82. *Brower*, 257 F. 3d at 1061.

83. 16 U.S.C. § 1385.

84. *Defenders of Wildlife*, 330 F.3d at 1361-62.

85. The DCPIA also made it a violation of the Federal Trade Commission Act to label a product as “dolphin-safe” if it contained tuna harvested on the high seas by a vessel engaged in drift net fishing. *Id.*

AN INTERNATIONAL COMPROMISE BETWEEN ECONOMICS AND ENVIRONMENTALISM: THE 1992 LA JOLLA AGREEMENT

The DCPIA's rigorous "dolphin-safe" labeling standard, in combination with the U.S. embargo under the MMPA of all ETP tuna captured by foreign vessels setting on dolphins, had detrimental economic effects on those nations that continued to fish for tuna using purse seine nets.⁸⁶ In April of 1992, the Inter-American Tropical Tuna Commission (IATTC) held a special meeting in La Jolla, California to settle conflicts created by the MMPA amendments and ensuing embargo.⁸⁷ The IATCC is an advisory board that was formed by international convention in 1950. It is responsible for conserving and managing tuna fisheries and the fisheries of other species taken by tuna vessels in the ETP.⁸⁸

Ten countries, including the U.S. and Mexico, negotiated the Agreement for the Conservation of Dolphins, better known as the La Jolla Agreement.⁸⁹ This agreement implemented a conservation program that, for the first time, established international limits on dolphin mortality, which would be lowered to less than 5,000 dolphins by 1999.⁹⁰ This dolphin mortality limit was divided among the individual tuna boats to promote responsibility and accountability for each boat.⁹¹ The countries also agreed to 100 percent observer coverage, and to an international panel that would review fleet infractions and recommend penalties for countries to impose on their vessels.⁹²

MEXICO CHALLENGES LA JOLLA:
THE 1995 PANAMA DECLARATION⁹³ AND THE AIDCP

Mexico attempted to lift the U.S. tuna embargo in 1991 by appealing to the World Trade Organization (WTO) through the in-

86. *Brower*, 257 F. 3d at 1061.

87. George A. Chmael II and Nancy E. Whiteman, *Caught in the Net of Environmental Law and Policy: Moral Outrage Versus Cool Analysis in the ETP Tuna-Dolphin Controversy*, 6 U. Balt. J. Envtl. L. 163, 174 (1998).

88. *Inter-American Tropical Tuna Commission Home Page*, Inter-American Tropical Tuna Commission, at <http://www.iattc.org/HomeENG.htm> (last modified July 21, 2004).

89. *Brower*, 257 F. 3d at 1061.

90. Scott, *supra* note 12.

91. *Id.*

92. *Id.*

93. 145 Cong. Rec. S397 (<daily ed./permanent ed.> <month> <day>, 1997) (<summary of record content>).

vocation of panel dispute resolution mechanisms under the General Agreement on Tariffs and Trade (GATT).⁹⁴ In a ruling that many considered odd incorrect, the WTO determined that the U.S. embargo violated GATT rules.⁹⁵ The WTO panel reasoned that a country cannot block the importation of a product (tuna) that is not environmentally harmful, even if it is produced in a way that harms the environment (killing dolphins).⁹⁶

This WTO decision was one factor that led to the formalization of the La Jolla Agreement into a binding agreement known as the Panama Declaration,⁹⁷ under which the U.S. agreed to seek changes in U.S. laws pertaining to tuna embargoes, market access, and the “dolphin-safe” label.⁹⁸ The Panama Declaration eliminated the embargo provisions based on rate of dolphin kill and allowed Mexico and the other signing nations to import tuna into the U.S.⁹⁹ It also redefined the term “dolphin-safe” tuna to include tuna caught in dolphin net sets that result in zero dolphin mortality.¹⁰⁰ In return for these two U.S. concessions, the other fishing countries agreed to implement a legally binding treaty known as the Agreement on the International Dolphin Conservation Program (AIDCP).

The AIDCP sought to achieve five major goals, many of which were founded upon objectives first established by the La Jolla Agreement. First, a total international mortality limit of 5,000 dolphins per year in the ETP was instituted.¹⁰¹ Second, more restrictive per-stock limits were instituted based upon the U.S. Zero Mortality Rate Goal.¹⁰² Third, the IATTC strengthened its role in monitoring dolphin mortality and managing and conducting research on populations of tuna, dolphins, and other marine life.¹⁰³ Fourth, steps were outlined to reduce or eliminate all by-catch fish other than tuna caught while fishing for tuna in the fishery.¹⁰⁴ Finally, it was decided that environmental, industrial, and national scientific advisory groups would maintain

94. Ramach, *supra* note 46 at 755.

95. GATT Dispute Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594, 1599 (1991).

96. *Keeping Tuna Dolphin-Safe*, *supra* note 42.

97. *Defenders of Wildlife*, 330 F.3d at 1362.

98. *Brower*, 257 F. 3d at 1061.

99. *Keeping Tuna Dolphin-Safe*, *supra* note 42.

100. Scott, *supra* note 12.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

oversight of the program.¹⁰⁵ To date, the nations that have ratified, and thus remain bound by, the AIDCP include the U.S., Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, Vanuatu, and Venezuela.¹⁰⁶ Countries and regional economic integration organizations that are provisionally applying to the AIDCP include Bolivia, Columbia, and the European Union.¹⁰⁷

The AIDCP and the Panama Declaration created a deep division in the environmental community over the tuna-dolphin debate. Citing the need for a workable compromise between all involved parties (environmentalists, governments, and the fishing industry), five environmental organizations supported the Panama Declaration: Greenpeace International, Center for Marine Conservation, Environmental Defense Fund, World Wildlife Fund, and the National Wildlife Federation.¹⁰⁸ These groups believed that not ratifying the Declaration would cause countries to walk out on the La Jolla Agreement, thereby increasing dolphin mortality and destroying the IATTC observer program.¹⁰⁹

The Declaration's proponents believed that passage of the Declaration would create international management of the fishery that was more consistent with U.S. policy, through more restrictive dolphin limits.¹¹⁰ They also believed that the "dolphin-safe" label promoted fishing, resulting in large by-catches of other species and thus putting the ecosystem at risk, and that the label included tuna caught with methods known to kill dolphins and caught without observers onboard.¹¹¹ Finally, proponents felt that gains made under the voluntary La Jolla Agreement would be locked into place through national legislation by all the participating countries.¹¹²

Other environmental organizations, including Defenders of Wildlife and Earth Island Institute, opposed the Panama Declaration because they viewed it as a retreat from the "dolphin-safe" label policy, and one that did not properly address stress to dol-

105. *Id.*

106. *International Dolphin Conservation Program*, Inter-American Tropical Tuna Commission, at <http://www.iattc.org/IDCPENG.htm> (last modified July 21, 2004).

107. *Id.*

108. Scott, *supra* note 12.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

phins resulting from encirclement fishing techniques.¹¹³ They believed that the Declaration constituted consumer fraud by allowing dolphins caught by encirclement methods to be labeled "dolphin-safe."¹¹⁴ They also felt that infractions under the involuntary La Jolla Agreement were not being enforced.¹¹⁵ They attacked what they viewed as weak by-catch reduction provisions, minimum dolphin kill levels above then-current dolphin death rates, the absence of specific steps to annually reduce dolphin mortality, and the lack of a science-based definition of "dolphin-safe."¹¹⁶ They also cited the lack of incentives for fishermen to fish dolphin safe, instead noting the encouragement to kill the maximum number of dolphins allowed by the assignment of a Dolphin Mortality Limit (DML) to each boat and the reassignment of any unused DML to boats that had already used up their entire DML quota.¹¹⁷

CONGRESS RESPONDS TO THE PANAMA DECLARATION: THE
1997 INTERNATIONAL DOLPHIN CONSERVATION
PROGRAM ACT¹¹⁸

In what has been labeled by some as a compromise between international trade and public concern for dolphins.¹¹⁹ Congress passed the International Dolphin Conservation Program Act (IDCPA) in 1997 in part to implement the International Dolphin Conservation Program (IDCP) called for in the Panama Declaration and in part to eliminate the ban on tuna imports from countries complying with the La Jolla Agreement.¹²⁰ Because the Panama Declaration was not self-executing, it did not become legally binding until Congress implemented it through the IDCPA.¹²¹

The IDCPA became effective in March 1999 when two certifications were made to Congress. First, the Secretary of State certified that a binding legal instrument establishing the IDCPA had

113. *Id.*

114. *Id.*

115. *Id.*

116. *Keeping Tuna Dolphin-Safe*, *supra* note 42.

117. *Id.*

118. Pub. L. No. 105-42, 111 Stat. 1122.

119. Deidre McGrath, Note, *Writing Different Lyrics to the Same Old Tune: The New (and Improved) 1997 Amendments to the Marine Mammal Protection Act*, 7 *Minn. J. Global Trade* 431, 432 (1998).

120. *Brower*, 257 F. 3d at 1061.

121. *Defenders of Wildlife*, 330 F.3d at 1366.

been adopted and was in force.¹²² Second, the Secretary of Commerce certified that research had begun on the effects of intentional chase and encirclement on ETP dolphins, and that funds were available to complete the first year of mandated research to determine whether intentional encirclement of dolphins with purse seine nets had a “significant adverse impact” on any depleted marine mammal stock in the ETP.¹²³

The IDCPA altered the use of the term “dolphin-safe” to allow tuna harvested in the ETP to be labeled as such if particular requirements were met. The “dolphin-safe” label could be applied to tuna harvested by vessels of certain types and sizes considered to be incapable of deploying purse seine nets or encircling dolphins.¹²⁴ Also, the label could be applied if the captain of the fishing vessel certified in a written statement that tuna were not harvested using a purse seine net intentionally deployed to encircle dolphins.¹²⁵ Finally, tuna could be labeled “dolphin-safe” if accompanied by certification that an approved observer was on board the vessel during the entire trip and that purse seine nets were not intentionally deployed to encircle dolphins.¹²⁶ Ensuring the presence of observers would be the responsibility of the Secretary of Commerce (hereinafter Secretary), the Secretary’s designee, or an IATTC representative.¹²⁷

The majority of the IDCPA’s language was taken from the Panama Declaration, and Congress was concerned that the Panama Declaration did not properly address the physiological stress suffered by dolphins from year-round chasing and encirclement activities.¹²⁸ Therefore, they included in the IDCPA the requirements of population abundance surveys and scientific research on stress to dolphins induced by encirclement fishing techniques.¹²⁹ The IDCPA included provisions that required observers on each vessel, ensured that backdown procedures began 30 minutes before sundown, and established dolphin mortality limits (DMLs).¹³⁰

122. *International Dolphin Conservation Program Act*, National Marine Fisheries Service, at http://www.nmfs.noaa.gov/prot_res/PR2/Tuna_Dolphin/IDCPA.html (last visited Aug. 6, 2004).

123. *Id.*

124. 16 U.S.C. § 1385(d)(2)(A).

125. *See id.* § 1385(d)(2)(B)(i).

126. *See id.* § 1385(d)(2)(B)(ii).

127. *See id.* § 1385(d)(2)(B)(ii).

128. *Brower*, 257 F. 3d at 1061.

129. *Id.*

130. 16 U.S.C. § 1413(a)(2)(B).

Congress charged the Secretary with drafting these implementing regulations.¹³¹ The Secretary was required to make an Initial Finding to determine whether the practice of setting on dolphins with purse seine nets has a significant adverse impact on any ETP depleted dolphin stock.¹³² A change in the meaning of the term “dolphin-safe,” which would allow the label to be applied to tuna caught through the encirclement method, hinged on a finding of no significant adverse impact to the depleted dolphin populations.¹³³ Thus, the Secretary could weaken the standards of the U.S. “dolphin-safe” tuna label after making a finding that chasing and encirclement does not cause “significant adverse impacts.”¹³⁴

Congress also required the Secretary to make a Final Rule by December 31, 2002, based on information gained by the required stress studies.¹³⁵ The Final Rule was to be based upon a review of relevant stress-related research, a one year review of relevant historical demographic and biological data relating to dolphin stocks, and an experiment involving the repeated chasing and capturing of dolphins by means of intentional encirclement.¹³⁶

The National Marine Fisheries Service (NMFS) was given the responsibility to conduct the stress studies and promulgate the Final Rule. Based primarily only on a review of existing literature, NMFS submitted a report to Congress in March 1999 concluding that “it did not have evidence to determine whether there was physiological evidence of stress in individual dolphins” as a result of chase and encirclement fishing techniques.¹³⁷ NMFS also concluded that the northeastern offshore spotted dolphin and eastern spinner dolphin populations were not increasing at expected rates based on lower reported mortalities from the fishery since 1991 and the reproductive potential for these populations.¹³⁸ NMFS also concluded that the “information suggests but by no means conclusively that the fishery has

131. *See id.* § 1413 et seq.

132. *See id.* § 1385(g)(1) and (g)(2).

133. Phillips, *supra* note 78.

134. *Id.*

135. 16 U.S.C. § 1385(g)(2).

136. *See id.* §1414(a).

137. *Brower*, 257 F. 3d at 1063.

138. *Defenders of Wildlife*, 330 F.3d at 1370.

been the source of significant adverse impact on these two populations."¹³⁹

Based on NMFS's research, the Secretary issued his Initial Finding in May of 1999 and concluded "there is insufficient evidence that the chase and encirclement by tuna purse seine fishery is having a significant impact on depleted dolphin stocks in the ETP."¹⁴⁰ The Secretary then announced that, because the study results did not conclusively prove that chase and encirclement causes significant adverse impacts to depleted dolphin populations, the meaning of the "dolphin-safe" label would be changed to allow it to apply to tuna caught by encirclement, as long as an on-board observer claimed that no dolphins were killed or seriously injured during the fishing set.¹⁴¹

Subsequently, Commerce published its Interim-Final rule.¹⁴² Under the National Environmental Policy Act (NEPA),¹⁴³ federal agencies recommending or reporting on proposed legislation (or other major Federal actions) that may significantly effect the human environment must assess the environmental impact of that proposal or action through an environmental impact statement (EIS).¹⁴⁴ In order to determine the necessity of an EIS, agencies prepare environmental assessments addressing the proposal's impact on the human environment.¹⁴⁵ NMFS prepared an environmental assessment to determine the impact of the Interim-Final Rule on the human environment. They concluded that allowing U.S. vessels to encircle dolphins during tuna purse seine fishing in the ETP, and allowing the import of yellowfin tuna caught in this manner, should not have a significant impact

139. *Brower*, 257 F. 3d at 1063-64. Because only sparse, unreliable data on the coastal spotted dolphins (the third dolphin stock listed as depleted) was available, NMFS concluded that "it is not possible at this time to determine if chase and encirclement by the purse seine fishery is having a significant adverse impact on the coastal stock of spotted dolphins."

140. Taking of Marine Mammals Incident to Commercial Fishing Operation; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP); Initial Finding, 64 Fed. Reg. 24,590, 24,591 (May 7, 1999).

141. *Keeping Tuna Dolphin-Safe*, *supra* note 42.

142. Taking of Marine Mammals Incident to Commercial fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP), 65 Fed. Reg. 30 (Jan. 3, 1999).

143. 42 U.S.C.A. §§ 4321 to 4370(f).

144. *See id* § 4332(2)(c). Preparation of an EIS is a lengthier process than preparation of an environmental assessment, because an EIS is required to contain descriptions of alternatives, including all potential environmental impacts, of the proposed rule or action.

145. *Defenders of Wildlife*, 330 F.3d at 1363.

on any ETP dolphin stocks.¹⁴⁶ As a result of this finding, NMFS did not prepare an EIS.

THE SCHISM IN THE ENVIRONMENTAL COMMUNITY WIDENS

This Secretary's announcement redefining the "dolphin-safe" label caused environmental organizations to take either a pro-IDCPA or anti-IDCPA stance. The battle lines drawn by the Panama Declaration were widened. The five environmental organization¹⁴⁷ that supported the Panama Declaration also supported the IDCPA. The Ocean Conservancy viewed the change in dolphin-safe standards as an incentive for foreign fisheries to improve encirclement practices and foresaw nations "banding together to eliminate dolphin mortality."¹⁴⁸

Critics of the IDCPA included Earth Island Institute, Marine Mammal Fund, Sierra Club, Defenders of Wildlife and the Humane Society.¹⁴⁹ They quickly labeled the new legislation the "Dolphin Death Act,"¹⁵⁰ and Earth Island Institute referred to the law as "a full assault on our dolphin protection laws."¹⁵¹ Earth Island Institute believed that IDCPA allowed those engaged in the slaughter of dolphins to label the tuna they caught as "dolphin-safe."¹⁵² These critics feared that the new "dolphin-safe" standards would encourage the practice of setting on dolphins.¹⁵³

The anti-IDCPA contingency also included leading tuna producers and retailers.¹⁵⁴ The three biggest tuna processors, one national grocery chain (Safeway), and restaurants and stores around the country pledged to remain "dolphin-safe" regardless of a label change.¹⁵⁵ StarKist, Chicken of the Sea, and Bumble-Bee banded together and sent a letter to the Secretary announcing their plans to continue to buy and sell "dolphin-safe" tuna only under their current strong standards (i.e. no tuna from fish-

146. *Id.*

147. Greenpeace, Ocean Conservancy, National Wildlife Federation, Environmental Defense Fund and World Wildlife Fund.

148. Higgins, *supra* note 36.

149. Joshua R. Floum, *Defending Dolphins and Sea Turtles: On the Front Lines in an "Us-Them" Dialectic*, 10 *Geo. Int'l Env'tl. L. Rev.* 943, 944 (1998).

150. Mark J. Palmer, *IMMP Launches Honest Label Campaign*, Earth Island Institute, at <http://www.earthisland.org/immp/>. (last visited Aug. 6, 2004).

151. Phillips, *supra* note 78.s

152. Higgins, *supra* note 36.

153. Defenders of Wildlife, *supra* note 42.

154. Higgins, *supra* note 36.

155. *Keeping Tuna Dolphin-Safe*, *supra* note 42.

ing vessels setting purse seine nets on dolphins), regardless of what the U.S. government determined the labeling standard should be.¹⁵⁶

The debate included a fair amount of mudslinging. Greenpeace said that although they were supporting a program to reduce dolphin mortality, they were making themselves "vulnerable to cheap shots from those who would simplify and mischaracterize a very complex issue."¹⁵⁷ Earth Island Institute had accused Greenpeace of "selling out."¹⁵⁸ Greenpeace responded by characterizing Earth Island Institute's verbal attacks as irrational.¹⁵⁹ Greenpeace also pointed out that their policy forbids accepting corporate donations, while Earth Island Institute accepts contributions from the tuna industry.¹⁶⁰ In addition to verbally attacking their opponents, Earth Island Institute and Defenders of Wildlife took the battle to the courtroom.

*BROWER V. EVANS*¹⁶¹

The Secretary had initially found that there was insufficient evidence to prove that tuna purse seine fishing harmed depleted ETP dolphin stocks.¹⁶² The Secretary further stated that this lack of evidence allowed for changes to be made to the "dolphin-safe" label. Earth Island Institute, David Brower,¹⁶³ Sam LaBudde, and others brought suit in the U.S. District Court for the Northern District of California challenging the Secretary's initial finding under the Administrative Procedure Act. They requested summary judgment, contending that the Secretary's initial finding should be set aside because it was "arbitrary, capricious, an abuse of discretion, and contrary to law."¹⁶⁴ The basis of their claim was the Secretary's failure to consider preliminary data from the dolphin stress studies mandated by the IDCPA.¹⁶⁵

The Secretary contended that a presumption was established under which a failure to find a significant adverse impact would

156. Phillips, *supra* note 78.

157. Barbara Dudley, *It's Time to Set the Record Straight about Tuna and Dolphins*, THE NATION, Oct. 28, 1996, at 39.

158. Scott, *supra* note 12.

159. Dudley, *supra* note 157.

160. Scott, *supra* note 12.

161. *Brower*, 257 F.3d 1058.

162. *Id.* at 1064.

163. David Brower is the President and Founder of Earth Island Institute.

164. *Brower*, 257 F. 3d at 1064.

165. *Id.* at 1063.

automatically trigger the less protective dolphin labeling standard.¹⁶⁶ Agreeing with Earth Island Institute, the U.S. District Court held that the Secretary did not meet his burden of proof because he failed to consider preliminary data from the Congressionally mandated stress studies and failed to apply the proper legal standard to the available scientific information¹⁶⁷

In another victory for Earth Island Institute, the U.S. Court of Appeals for the Ninth Circuit affirmed the decision of the U.S. District Court, holding that the Secretary was required to make an initial finding to determine “whether or not” the purse seine net fishery was having a significant adverse impact on any depleted ETP dolphin stock.¹⁶⁸ The Court of Appeals further stated that the Secretary’s presumption theory, that he is not required to affirmatively find that there is no significant adverse impact, was contrary to Congressional intent and would lead to “absurd results,” including rendering the required stress studies irrelevant.¹⁶⁹ To exemplify Congress’ intent, they looked directly to the language of the IDCPA, which is stricter than what is required by the Declaration of Panama.¹⁷⁰

The Court of Appeals did not find any compliance by the Secretary in the record, nor a valid excuse for the failure to comply with Congress’ requirement that the Secretary make an initial finding on the basis of the specific research.¹⁷¹ In light of all of the facts presented, the court found the Secretary’s initial finding “contrary to law and an abuse of discretion”¹⁷² and granted the plaintiffs’ motion for summary judgment. Because of this decision, a change in the “dolphin-safe” labeling standard is on hold until the Secretary makes a finding based on the results of the stress research required by the IDCPA.

*DEFENDERS OF WILDLIFE V. HOGARTH*¹⁷³

Defenders of Wildlife (Defenders) brought suit against NMFS,

166. *Id.* at 1066.

167. *Brower v. Daley*, 93 F.Supp.2d 1071, 1089 (N.D.Cal. 2000).

168. *Brower*, 257 F. 3d at 1066.

169. *Id.* at 1067.

170. *Id.* at 1067.

171. *Id.* at 1070.

172. *Id.*

173. *Defenders of Wildlife v. Hogarth, et al.*, 330 F. 3d 1358 (Fed. Cir. 2003); Rehearing and rehearing en banc denied 344 F.3d 1333 (Fed. Cir. 2003); certiorari denied 124 S. Ct. 2093.

through William Hogarth¹⁷⁴ and others, in the U.S. Court of International Trade, challenging three administrative determinations made by NMFS.¹⁷⁵ They alleged that the Secretary's Interim-Final Rule was contrary to the IDCPA and therefore not in accordance with the law.¹⁷⁶ Defenders also alleged that the environmental assessment prepared by NMFS was defective and violated NEPA and that an EIS should have been prepared.¹⁷⁷ Finally, Defenders alleged that the Secretary's findings with regard to Mexico were not in accordance with the IDCPA and therefore did not support the lifting of the tuna embargo against Mexico.¹⁷⁸

Defenders sought a preliminary injunction and/or temporary restraining order that would have prevented NMFS from lifting the embargo against Mexico, alleging that the lifting of the embargo would cause "irreparable injury from the likely extinction of three depleted stocks of dolphins."¹⁷⁹ This request was quickly denied because Defenders "failed to prove irreparable injury."¹⁸⁰ They also "presented no evidence that more dolphin deaths would occur as a result of the lifting of the embargo."¹⁸¹

Defenders moved for summary judgment on the administrative record and sought a declaratory judgment that the Interim-Final Rule violated both the IDCPA and NEPA.¹⁸² The IDCPA states that backdown procedures must be completed 30 minutes *before* sundown,¹⁸³ while the Interim-Final Rule states that backdown procedures must be completed 30 minutes *after* sundown.¹⁸⁴ The Court of International Trade held that although the Interim-Final Rule's language conflicted with express statutory language, it did not conflict with Congressional intent because Congress intended to use the word "after" rather than "before."¹⁸⁵ The Court fur-

174. At the time of the lawsuit, Hogarth was Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration.

175. *Defenders of Wildlife*, 330 F.3d at 1358.

176. *Id.* at 1363.

177. *Id.*

178. *Id.*

179. *Defenders of Wildlife v. Dalton*, 97 F. Supp 2d 1197, 1198 (Ct. Intl. Trade 2000).

180. *Id.* at 1202.

181. *Id.* at 1200.

182. *Defenders of Wildlife*, 330 F.3d at 1364.

183. 16 U.S.C. § 1413(a)(2)(B)(v)

184. 50 C.F.R. § 216.24(c)(6)(iii) (emphasis added).

185. *Defenders of Wildlife v. Hogarth*, 177 F.Supp.2d 1336, 1345-46 (Ct. Int'l Trade 2001).

ther concluded that this statutory mistake properly expressed the intent of Congress when corrected.¹⁸⁶ The Court also concluded that NMFS's decision not to prepare an EIS was not arbitrary, capricious, or an abuse of discretion.¹⁸⁷ Finally, the Court upheld the lifting of the Mexican tuna embargo.¹⁸⁸

Defenders did not appeal the decision regarding the lifting of the embargo against Mexico, but they did appeal the other two issues. Defenders repeated their argument that the Interim-Final Rule is not in accordance with the IDCPA because it is contrary to the plain language of the statute, and that the Rule frustrates Congressional intent.¹⁸⁹ Hogarth argued that the discrepancy was merely a drafting error and argued alternatively that Congress authorized the Secretary to alter the statute's requirements at his discretion as long as the alterations are consistent with the IDCPA.¹⁹⁰ The U.S. Court of Appeals held that the Court of International Trade did not err in concluding that the Interim-Final Rule promulgated by NMFS is in accordance with the IDCPA.¹⁹¹ The Court of Appeals did not agree that the discrepancy was a drafting error but did conclude that NMFS was authorized to alter the backdown procedure in the IDCPA to allow sets to end 30 minutes after sunset.¹⁹² The Court noted that language in the IDCPA says "after" and not "before."¹⁹³

Defenders further argued that NMFS did not comply with NEPA requirements in four ways. First, they argued that NMFS's environmental assessment was based upon inaccurate and dated information because it did not include several recent scientific research papers or NMFS's 1999 report to Congress concluding that two ETP dolphin populations were not increasing at expected rates.¹⁹⁴ The Court held that NMFS's failure to cite the 1999 Report and research papers did not mean that NMFS did not consider them: it only meant NMFS did not specifically rely on them to reach its finding of no significant impact.¹⁹⁵

186. *Id.* at 1346.

187. *Id.* at 1359.

188. *Id.* at 1368.

189. *Defenders of Wildlife*, 330 F.3d at 1365.

190. *Id.* at 1366.

191. *Id.* at 1374.

192. *Id.* at 1367.

193. *Id.*

194. *Id.* at 1370.

195. *Id.* At 1371

Defenders next argued that NMFS illegally separated its environmental assessment for the Interim-Final Rule from the environmental assessment for three earlier regulatory actions and failed to consider the cumulative effects of these earlier regulatory actions¹⁹⁶ on the dolphin populations.¹⁹⁷ The Court was not persuaded by this argument because they did not believe the Interim-Final Rule was so closely related to the other regulatory actions that they comprised a single course of action requiring a single environmental assessment.

Third, Defenders argued that NMFS's environmental assessment failed to address several problems with the dolphin-safe label program, specifically claiming that the holding in *Brower* was inconsistent with the NMFS's finding of no significant impact.¹⁹⁸ The Court noted that *Brower* interpreted the statutory provisions regarding the Secretary's Initial Finding, then considered the sufficiency of that Finding.¹⁹⁹ However, the Court felt that *Brower* did not address the question at issue in this case: whether NMFS's finding that the Interim-Final Rule does not pose a significant impact to the affected environment was arbitrary or capricious.²⁰⁰ Defenders also felt the environmental assessment was based on incorrect assumptions that the "dolphin-safe" labeling standard would change and that the U.S. Customs Service had the ability to regulate the proper importation of tuna.²⁰¹ The Court held that Defenders failed to prove how these assumptions would render the environmental assessment arbitrary.²⁰²

Finally, Defenders argued that the environmental assessment was flawed by a lack of participation in the process by the public and various governmental agencies.²⁰³ The Court concluded that NMFS's environmental assessment was not the functional equivalent of an EIS, and therefore there was no need for a pub-

196. *Id.* The previous regulatory actions were as follows: (1) Regulations to Implement Management and Conservation Measures Under the Pacific Tunas Conventions Act (1999); (2) Measures to Reduce Bycatch by U.S. Vessels in the ETP Purse Seine Fisheries and Information Collection for a Regional Vessel Register (2000); and (3) Chase-Recapture Experiment Under the International Dolphin conservation Program Act (2001).

197. *Id.*

198. *Id.* at 1372-73.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. Plaintiffs believed that the State Department, Department of Treasury, and Customs Service should have participated in the environmental assessment. *Id.*

lic comment period.²⁰⁴ The Court concluded that NMFS complied with all of the requirements of NEPA.²⁰⁵

A STEP CLOSER TO STRESS-FREE DOLPHINS AND A HEALTHY
TUNA FISHERY?

The complexion of the ETP tuna-dolphin debate has once again changed. The embargo against tuna from Mexico and other countries that fish for tuna by "setting on dolphins" has been lifted. The ruling in *Defenders of Wildlife v. Hogarth* has paved the way to allow the standards of the "dolphin-safe" tuna label to be altered. Environmental organizations continue to harbor opposing viewpoints relating to the recently enacted legislation and court rulings. This activity appears to be yet another chapter in a continuing saga. If a genuine compromise that will ensure both the protection of dolphins and the continued economic benefits of yellowfin tuna fishing is to ever be reached, three problems must be addressed and solved.

First, a solid foundation of scientific data must be obtained and relied upon in making future decisions. The decision in *Brower* highlighted the importance of reliable scientific data by requiring the Secretary to withhold his initial finding until dolphin stress studies could be completed and data could be analyzed. Due to the ocean's vastness and dolphins' mobility, it is difficult to obtain accurate data regarding population sizes, encirclement-induced stress, and predation after encirclement.

To date, most dolphin population estimates have come from either research vessels or tuna vessels, both of which have engaged in limited sampling and have biases that must be taken into account.²⁰⁶ Estimates from research vessels are imprecise due to the difficulty of randomly sampling an entire area occupied by dolphins.²⁰⁷ Estimates from tuna vessels may be untrustworthy because these vessels have a vested interest in earning a living from the resource, and they may hide their knowledge of population sizes and locations to maintain an upper hand over their competition.²⁰⁸ Also, most tuna vessels do not carry crews educated in the procedures of scientific research.

204. *Defenders of Wildlife*, 330 F.3d at 1374.

205. *Id.*

206. Hampton, *supra* note 20, at p. 102.

207. *Id.*

208. *Id.*

Second, care must be taken to guarantee that the observer program is properly implemented, managed, and respected by fishing vessels' crews. The observer program can provide a source of dependable, unbiased scientific data. However, observers in the past have reported harassment by tuna boat crews, as well as frequent attempts to bribe them into altering their report statistics.²⁰⁹ Some crewmembers have even threatened observers with violence.²¹⁰ If an observer is isolated on a small vessel in the middle of a vast sea with people threatening them, it is not unforeseeable that they would alter data in an attempt to ensure their own safety.

Finally, the debate surrounding the relationship between tuna and dolphins should not be geographically limited to the ETP, but should also take into account other oceanic areas where tuna fishing is prevalent. To date, there are virtually no observers on board boats outside the ETP, and many fear that dolphins are killed in supposed "dolphin-safe" trips in these other areas.²¹¹ Greenpeace has criticized "dolphin-safe" labeling schemes in the past because they felt that the schemes only guaranteed that one method of tuna fishing (encirclement) was not used in one region (the ETP) by a small percentage of the world's fleet.²¹²

Encirclement fishing techniques are regulated only in the ETP even though approximately 70 percent of the world's yellowfin tuna is caught in other areas of the ocean.²¹³ These regulations have driven U.S. and other nations' vessels to fish in other oceanic areas in an effort to avoid restrictions on their fishing techniques. A wider geographical view of the tuna-dolphin debate will help to ensure that workable international laws, treaties, and compromises will be created that balance economic and environmental interests. "A truly workable law of the sea will call for the adoption of an ocean ethic,"²¹⁴ which in turn will ensure that the original intent of the MMPA is met by providing dolphins with protection from the yellowfin tuna industry throughout the world's oceans.

209. Nancy Kubasek et al., *Note: Protecting Marine Mammals: Time for a New Approach*, 13 UCLA J. Envtl. L. & Pol'y 1, 5-6 (1994-95).

210. *Id.* at 5.

211. Scott, *supra* note 12.

212. Dudley, *supra* note 157, at 39.

213. Eugene H. Buck, *supra* note 18, at 2.

214. SCHEFFER, *supra* note 30, at 49.