

COMMENT

Dolphin-Safe or Fisherman-Friendly? Abuse of Discretion in Amendment of the Dolphin-Safe Tuna Labeling Standard

*Donald W. McChesney**

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* Articles Editor, U.C. Davis Law Review; J.D. Candidate, U.C. Davis School of Law, 2005; B.A., English, U.C. Berkeley, 2000. I would like to offer my sincerest thanks to all those who contributed, however tangentially, to the production of this article. Special thanks to Brian Schusterman, Patrick Wong, Alicia Gossoo, Lila Hayatdavoudi, and Stephanie Zook for their editorial contributions. Thanks to Eric Hing, who collaborated on the original title of this article, "Porpoisely Endangered." Unfortunately, due to the accepted taxonomic nomenclature of order Cetacea, that title was inappropriate. Thanks also to Louise Ma, Timothy Cahn, and all the other people at Legal Strategies Group for their advice and encouragement. Finally, thanks to my parents, David and Beverley McChesney, who have been of immeasurable support throughout my law school career.

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INTRODUCTION

Over the past century, humanity has rapidly depleted the ocean's resources.¹ As is the case with many environmentally detrimental human activities, most consumers are unaware of the repercussions of overfishing.² Many Americans simply drive to their local supermarket

¹ *Empty Oceans, Empty Nets* (PBS television broadcast, Apr. 22, 2002); see Marine Mammal Protection Act, 16 U.S.C. § 1361 (1), (6) (2000); G. TYLER MILLER, *LIVING IN THE ENVIRONMENT* 301-05 (13th ed. 2003); Gary K. Meffe et al., *Marine Mammal Conservation: Guiding Principles and Their Implementation*, in *CONSERVATION AND MANAGEMENT OF MARINE MAMMALS* 437, 438 (John R. Twiss & Randall R. Reeves eds., 1999).

² MILLER, *supra* note 1, at 640; *Empty Oceans, Empty Nets*, *supra* note 1. See generally David M. Lavigne et al., *The Evolution of North American Attitudes toward Marine Mammals*, in *CONSERVATION AND MANAGEMENT OF MARINE MAMMALS* 10 (John R. Twiss & Randall R. Reeves eds., 1999) (discussing public perception of and attitudes toward marine mammals).

and purchase a conveniently packaged can of tuna for their family.³ Unless they are in some way connected with the tuna fishing industry, they have no reason to suspect the consequences of their consumption.⁴ Little do they realize that they are participating in the wholesale and systematic slaughter of dolphins, one of the most intelligent and universally beloved species of mammals.⁵

Since 1972, Congress has passed a large body of legislation aimed at protecting declining worldwide dolphin populations.⁶ Unfortunately, prevailing economic realities from around the globe often conspire to undermine what should otherwise be a noble and straightforward aim.⁷ Impoverished nations, particularly in South and Central America, often prioritize economic stability for their burgeoning populations over environmental protection.⁸ With this global economic climate in mind, the Clinton and Bush Administrations have abused their discretion and attempted to undermine the letter and spirit of environmental legislation.⁹

Specifically, in order to accommodate foreign tuna fleets, the Clinton Administration acted concertedly to weaken the standards promulgated

³ See MILLER, *supra* note 1, at 640; *Empty Oceans, Empty Nets*, *supra* note 1. See generally Lavigne et al., *supra* note 2 (discussing public perception of and attitudes toward marine mammals).

⁴ See MILLER, *supra* note 1, at 640; *Empty Oceans, Empty Nets*, *supra* note 1. See generally Lavigne et al., *supra* note 2 (discussing public perception of and attitudes toward marine mammals).

⁵ See *Brower v. Evans*, 257 F.3d 1058, 1060 (9th Cir. 2001); *Brower v. Daley*, 93 F. Supp. 2d 1071, 1073 (N.D. Cal. 2000); THE ENCYCLOPEDIA OF MAMMALS 220-21 (David McDonald ed., 2001); MILLER, *supra* note 1, at 643-46.

⁶ Marine Mammal Protection Act, 16 U.S.C. § 1361; Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385 (2000); International Dolphin Conservation Program Act, 16 U.S.C. § 1414 (repealed 1997); *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358, 1362-63 (Fed. Cir. 2003); see *Evans*, 257 F.3d at 1058, 1062-63; *Earth Island Inst. v. Evans*, 256 F. Supp. 2d 1064, 1067-68 (N.D. Cal. 2003); *Daley*, 93 F. Supp. 2d at 1074-77; *Defenders of Wildlife v. Hogarth*, 177 F. Supp. 2d 1336, 1340-42 (Ct. Int'l Trade 2001); Donald C. Baur et al., *The Laws Governing Marine Mammal Conservation in the United States*, in CONSERVATION AND MANAGEMENT OF MARINE MAMMALS 48, 51-68 (John R. Twiss & Randall R. Reeves eds., 1999); Michael L. Gosliner, *The Tuna-Dolphin Controversy*, in CONSERVATION AND MANAGEMENT OF MARINE MAMMALS 120, 121-25, 138-51 (John R. Twiss & Randall R. Reeves eds., 1999).

⁷ See *Hogarth*, 177 F. Supp. 2d at 1341-42; G. TYLER MILLER, *LIVING IN THE ENVIRONMENT* 579-80 (9th ed. 1996).

⁸ See *Evans*, 257 F.3d at 1061; *Earth Island*, 256 F. Supp. 2d at 1064; MILLER, *supra* note 7, at 581-82; cf. *Hogarth*, 330 F.3d at 1362 (discussing the United States embargo on Mexican tuna); *Hogarth*, 177 F. Supp. 2d at 1339-40 (discussing the United States embargo on Mexican tuna).

⁹ See *Evans*, 257 F.3d at 1064; *Earth Island*, 256 F. Supp. 2d at 1075-76; *Daley*, 93 F. Supp. 2d at 1089.

by Congress for what tuna producers can and cannot label as “dolphin-safe.”¹⁰ When such executive action threatens both wildlife and the integrity of the law itself, the courts must intervene to ensure that a miscarriage of justice does not prevail.¹¹ Furthermore, Congress must take action to ensure that administrative agencies do not ride roughshod over its clearly expressed intent.¹²

Part I of this Comment reviews the environmental, legislative, and administrative history of the dolphin-safe tuna standard in the United States. Part II details the attempts by the Clinton and Bush Administrations to weaken the standard. It then discusses the ensuing legal challenges to the modification of the standard in *Brower v. Evans* and *Defenders of Wildlife v. Hogarth*. Part III identifies a contradiction in the disposition of these two recent federal appellate cases; one setting aside and the other upholding the weakening of the dolphin-safe label. In Part IV, this Comment proposes the basis on which the United States Supreme Court should resolve this issue. It also recommends appropriate federal legislation that would mandate compliance with Congress’ original intent. Lastly, it argues that, as a matter of policy, we should afford the highest standards of protection to affected dolphin species.

I. BACKGROUND

A. A Brief History of Purse Seine Fishing

In 1959, tuna fishermen in the Eastern Tropical Pacific (“ETP”) began widely employing the “purse seine” fishing technique to catch yellowfin tuna.¹³ This method exploits the natural interrelationship between schools of tuna and pods of dolphins.¹⁴ Under natural conditions,

¹⁰ *Evans*, 257 F.3d at 1064; *Earth Island*, 256 F. Supp. 2d at 1075-76; *Daley*, 93 F. Supp. 2d at 1089.

¹¹ Administrative Procedures Act, 5 U.S.C. § 706 (2000).

¹² See *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979); *United States v. Mohrbacher*, 182 F.3d 1041, 1049 (9th Cir. 1999).

¹³ The Eastern Tropical Pacific is the area of roughly seven million square miles from the southern California coast to the coast of Chile, accounting for one-fourth of the world’s tuna harvest. *Evans*, 257 F.3d at 1060; *Hogarth*, 330 F.3d at 1361-62; *Earth Island*, 256 F. Supp. 2d at 1075-76; *Daley*, 93 F. Supp. 2d at 1073; *Hogarth*, 177 F. Supp. 2d at 1339-40; MILLER, *supra* note 1, at 302; Gosliner, *supra* note 6, at 120-21.

¹⁴ MILLER, *supra* note 1, at 302; Simon P. Northridge & Robert J. Hofman, *Marine Mammal Interactions with Fisheries*, in CONSERVATION AND MANAGEMENT OF MARINE MAMMALS 103 (John R. Twiss & Randall R. Reeves eds., 1999); William F. Perrin, *Selected*

dolphins tend to congregate immediately above large schools of tuna.¹⁵

This phenomenon allows fishermen to easily locate large concentrations of tuna that would otherwise be invisible from the surface.¹⁶ The fleet then "herds" both dolphins and tuna into a large net deployed in a circle, using speed boats, explosive charges, and helicopters.¹⁷ Fishermen refer to the procedure of herding and encircling dolphins in purse seine nets as a "set" or "setting on dolphins."¹⁸ The fishermen draw the net together like a purse, trapping both tuna and dolphins inside.¹⁹ They then lift the net out of the water and onto the deck of the fishing vessel, where they proceed to collect the tuna.²⁰ In purse seine tuna fishing, the dolphins are what is known as the "bycatch."²¹ That is, they have little or no commercial value to the fishing fleets, and are only caught incidental to the tuna fishing operation.²²

Unfortunately, dolphins frequently suffer severe stress from this type of chase and capture.²³ Worse still, the nets entangle and asphyxiate many of the air-breathing mammals by trapping them under water during the procedure.²⁴ Others die from atmospheric exposure when fishermen haul them aboard along with the tuna and fail to return them to the water in a timely fashion.²⁵ Between 1959 and 1972, fishermen entangled and killed untold millions of dolphins in purse seine nets.²⁶ By

Examples of Small Cetaceans at Risk, in CONSERVATION AND MANAGEMENT OF MARINE MAMMALS 300 (John R. Twiss & Randall R. Reeves eds., 1999); see Gosliner, *supra* note 6, at 121; see also Evans, 257 F.3d at 1060; Hogarth, 330 F.3d at 1360; Daley, 93 F. Supp. 2d at 1073; Hogarth, 177 F. Supp. 2d at 1338.

¹⁵ See sources cited *supra* note 14.

¹⁶ See sources cited *supra* note 14.

¹⁷ MILLER, *supra* note 1, at 302; Gosliner, *supra* note 6, at 122-23; *Empty Oceans, Empty Nets*, *supra* note 1; see also Evans, 257 F.3d at 1060; Hogarth, 330 F.3d at 1360-61; Daley, 93 F. Supp. 2d at 1073.

¹⁸ Evans, 257 F.3d at 1060; Daley, 93 F. Supp. 2d at 1073.

¹⁹ Evans, 257 F.3d at 1060; Hogarth, 330 F.3d at 1361; Daley, 93 F. Supp. 2d at 1073; Hogarth, 177 F. Supp. 2d at 1338; MILLER, *supra* note 1, at 302; Gosliner, *supra* note 6, at 121; *Empty Oceans, Empty Nets*, *supra* note 1.

²⁰ Hogarth, 330 F.3d at 1361; Hogarth, 177 F. Supp. 2d at 1338-39; see Gosliner, *supra* note 6, at 121.

²¹ See Northridge & Hofman, *supra* note 14, at 103.

²² *Empty Oceans, Empty Nets*, *supra* note 1.

²³ Hogarth, 330 F.3d at 1361; Daley, 93 F. Supp. 2d at 1073; MILLER, *supra* note 1, at 302.

²⁴ Hogarth, 330 F.3d at 1361; MILLER, *supra* note 1, at 302; see Gosliner, *supra* note 6, at 121, 130.

²⁵ Hogarth, 177 F. Supp. 2d at 1339-40; MILLER, *supra* note 1, at 302.

²⁶ Evans, 257 F.3d at 1060; Hogarth, 330 F.3d at 1361; *Earth Island Inst. v. Evans*, 256 F. Supp. 2d 1064, 1075-76 (N.D. Cal. 2003); Daley, 93 F. Supp. 2d at 1073.

the early 1970s, this practice culminated in the average deaths of approximately 350,000 dolphins each year, and an estimated 423,678 in 1972 alone.²⁷

B. The Marine Mammal Protection Act

In response to public outcry against purse seine fishing, Congress passed the Marine Mammal Protection Act ("MMPA") in 1972.²⁸ In enacting the MMPA, Congress found that:

(Dolphin) population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population. Further measures should be immediately taken to replenish any species or population stock which has already diminished below that population.²⁹

In accordance with the MMPA's general directives, the National Marine Fisheries Service ("NMFS") found that three ETP dolphin species were below their optimum sustainable population levels and considered them "depleted" under the MMPA's definition.³⁰ These three species of dolphin were the coastal dolphin, the northeastern offshore spotted dolphin, and the eastern spinner dolphin.³¹

²⁷ *Hogarth*, 177 F. Supp. 2d at 1339; *Gosliner*, *supra* note 6, at 124.

²⁸ Marine Mammal Protection Act, 16 U.S.C. § 1361 (2000); *Daley*, 93 F. Supp. 2d at 1073.

²⁹ 16 U.S.C. § 1361(1), (2); *see also Daley*, 93 F. Supp. 2d at 1073-74; *Baur et al.*, *supra* note 6, at 50-68. Congress defined "optimum sustainable population" as 60% of estimated historical levels. Taking of Marine Mammals Incidental to Commercial Fishing Operations; Permits, etc., 45 Fed. Reg. 72,178 (1980).

³⁰ Taking and Importing of Marine Mammals; Listing of the Northeastern Offshore Spotted Dolphin as Depleted, 58 Fed. Reg. 58,285 (1993); Taking and Importing of Marine Mammals; Listing of Eastern Spinner Dolphin as Depleted, 58 Fed. Reg. 45,066 (1993); Regulation Governing the Taking and Importing of Marine Mammals, 42 Fed. Reg. 64,548-60 (1977).

³¹ Taking and Importing of Marine Mammals; Listing of the Northeastern Offshore Spotted Dolphin as Depleted, 58 Fed. Reg. at 58,285; Taking and Importing of Marine Mammals; Listing of the Eastern Spinner Dolphin as Depleted, 58 Fed. Reg. at 45,066; Regulation Governing the Taking and Importing of Marine Mammals, 42 Fed. Reg. at 64,560.

C. *The Dolphin Protection Consumer Information Act Establishes the Dolphin-Safe Standard*

In 1990, Congress passed the Dolphin Protection Consumer Information Act ("DPCIA") in furtherance of the MMPA's goals.³² Specifically, Congress was concerned with American tuna processors' new "dolphin-safe tuna" labeling practices and consumer perception of that label's meaning.³³ The DPCIA established a standard that American tuna processors must meet to label their tuna with the "dolphin-safe" legend.³⁴ The statute precluded tuna companies from labeling any tuna sold in the United States as "dolphin-safe" if it had been caught using the purse seine fishing method.³⁵ This new legislation encouraged alternative fishing practices.³⁶ Unfortunately for countries whose fleets continue to practice purse seine fishing, it also effectively barred them from the huge U.S. tuna market.³⁷

³² See Taking and Importing of Marine Mammals; Listing of the Northeastern Offshore Spotted Dolphin as Depleted, 58 Fed. Reg. at 58,285; Taking and Importing of Marine Mammals; Listing of the Eastern Spinner Dolphin as Depleted, 58 Fed. Reg. at 45,066; Regulation Governing the Taking and Importing of Marine Mammals, 42 Fed. Reg. at 64,560; Gosliner, *supra* note 6, at 144.

³³ Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385 (2000); Daley, 93 F. Supp. 2d at 1074; Gosliner, *supra* note 6, at 144.

³⁴ The DPCIA's labeling standard reads in relevant part:

(d) Labeling standard. (1) It is a violation of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, for any producer, importer, exporter, distributor, or seller of any tuna product that is exported from or offered for sale in the United States to include on the label of that product the term "dolphin safe" or any other term or symbol that falsely claims or suggests that the tuna contained in the product were harvested using a method of fishing that is not harmful to dolphins if the product contains tuna harvested . . . (C) in the eastern tropical Pacific Ocean by a vessel using a purse seine net unless the tuna meet the requirements for being considered dolphin safe under paragraph (2); . . . (2) For purposes of paragraph (1)(C), a tuna product that contains tuna harvested in the eastern tropical Pacific Ocean by a vessel using purse seine nets is dolphin safe if — (A) the vessel is of a type and size that the Secretary has determined, consistent with the International Dolphin Conservation Program, is not capable of deploying its purse seine nets on or to encircle dolphins; or (B)(i) the product is accompanied by a written statement executed by the captain providing the certification required under subsection (h).

16 U.S.C. § 1385.

³⁵ *Id.*; Daley, 93 F. Supp. 2d at 1074; see Gosliner, *supra* note 6, at 144.

³⁶ See 16 U.S.C. § 1385; Daley, 93 F. Supp. 2d at 1074.

³⁷ La Jolla Agreement, June 1992, 33 I.L.M. 936; see Daley, 93 F. Supp. 2d at 1074; Gosliner, *supra* note 6, at 145.

D. International Agreements on the Tuna Fishing Industry

In response to these new restrictions, a group of nations, including the United States, gathered in 1992 to forge what has become known as "The La Jolla Agreement."³⁸ The La Jolla Agreement established the International Dolphin Conservation Program ("IDCP") in which participating nations agreed to adopt dolphin mortality limits.³⁹ Under these mortality limits, each vessel from a signatory country's tuna fleet could not exceed a set number of dolphin deaths.⁴⁰ The eventual goal was for tuna fleets to eliminate dolphin mortality altogether.⁴¹ The IDCP attempted to reduce dolphin mortality by prohibiting sets upon large pods; sets that finish after dark; sets under conditions of strong underwater currents, winds, or storms; and sets of excessive duration.⁴² It also sought to limit equipment malfunctions and misuse, which could result in dolphin mortality or stress.⁴³

In 1995, the Clinton Administration issued the Panama Declaration, formalizing the IDCP and making it binding between signatory countries.⁴⁴ In the Declaration, the Administration agreed to seek the lifting of embargoes and market access restrictions.⁴⁵ Most significantly, however, it also sought changes in the dolphin-safe labeling standard.⁴⁶ The Panama Declaration sought the immediate amendment of the

³⁸ La Jolla Agreement, *supra* note 37; *Brower v. Evans*, 257 F.3d 1058, 1062 (9th Cir. 2001); *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358, 1363 (Fed. Cir. 2003); *Daley*, 93 F. Supp. 2d at 1075; *Defenders of Wildlife v. Hogarth*, 177 F. Supp. 2d 1336, 1340-41 (Ct. Int'l Trade 2001); *Gosliner*, *supra* note 6, at 145.

³⁹ *Evans*, 257 F.3d at 1062; *Hogarth*, 330 F.3d at 1363; *Daley*, 93 F. Supp. 2d at 1075; *Hogarth*, 177 F. Supp. 2d at 1340-41; *Gosliner*, *supra* note 6, at 145.

⁴⁰ *Evans*, 257 F.3d at 1062; *Hogarth*, 330 F.3d at 1363; *Daley*, 93 F. Supp. 2d at 1075; *Hogarth*, 177 F. Supp. 2d at 1340-41; *Gosliner*, *supra* note 6, at 145.

⁴¹ La Jolla Agreement, *supra* note 37; *Evans*, 257 F.3d at 1062; *Hogarth*, 330 F.3d at 1363; *Daley*, 93 F. Supp. 2d at 1075; *Hogarth*, 177 F. Supp. 2d at 1340-41.

⁴² *Evans*, 257 F.3d at 1062; *Hogarth*, 330 F.3d at 1363; *Daley*, 93 F. Supp. 2d at 1075; *Hogarth*, 177 F. Supp. 2d at 1340-41.

⁴³ *Evans*, 257 F.3d at 1062; *Hogarth*, 330 F.3d at 1363; *Daley*, 93 F. Supp. 2d at 1075; *Hogarth*, 177 F. Supp. 2d at 1340-41.

⁴⁴ Signatory countries to the Panama Declaration included the United States, Mexico, Belize, Columbia, Costa Rica, Ecuador, Honduras, Panama, Vanuatu, and Venezuela. President's Transmittal of the United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI to the U.S. Senate with Commentary, Sept. 1995, 34 I.L.M. 1393, 1448 [hereinafter Panama Declaration]; *see also Evans*, 257 F.3d at 1062; *Hogarth*, 330 F.3d at 1363; *Daley*, 93 F. Supp. 2d at 1075; *Hogarth*, 177 F. Supp. 2d at 1341; *Gosliner*, *supra* note 6, at 148.

⁴⁵ *Evans*, 257 F.3d at 1061; *Daley*, 93 F. Supp. 2d at 1074; *Hogarth*, 177 F. Supp. 2d at 1340; *Gosliner*, *supra* note 6, at 148.

⁴⁶ *Evans*, 257 F.3d at 1061; *Daley*, 93 F. Supp. 2d at 1074; *Hogarth*, 177 F. Supp. 2d at 1340.

dolphin-safe standard from “no purse seine-fished tuna” to “no dolphins observed killed or seriously injured during purse seine sets.”⁴⁷ These changes would have effectively reopened the U.S. market to purse seine-fished tuna, so long as foreign tuna fleets complied with the monitoring requirements of the IDCP.⁴⁸ Because international administrative agreements are not self-executing in the United States, Congress needed subsequent legislation to implement the IDCP.⁴⁹ Thus, the Administration began seeking legislation to give the Panama Declaration domestic effect.⁵⁰

E. The International Dolphin Conservation Program Act Threatens the Dolphin-Safe Standard

Finally, Congress passed the International Dolphin Conservation Program Act (“IDCPA”) in 1997.⁵¹ The IDCPA had the twin aims of incorporating the Panama Declaration into United States law and lifting the existing embargoes on signatory countries.⁵² Observed ETP dolphin mortality rates in purse seine sets had been decreasing precipitously since Congress passed the MMPA into law.⁵³ Such fatalities had dropped from 423,678 in 1972, to 15,550 in 1992, 3716 in 1993, and an estimated 1900 in 1998.⁵⁴

Despite this decrease in observed dolphin mortality, Congress was concerned that purse seine fishing would continue to adversely impact

⁴⁷ See *Evans*, 257 F.3d at 1061; *Daley*, 93 F. Supp. 2d at 1074; *Hogarth*, 177 F. Supp. 2d at 1340; *Gosliner*, *supra* note 6, at 148.

⁴⁸ See *Evans*, 257 F.3d at 1061; *Hogarth*, 330 F.3d at 1362; *Daley*, 93 F. Supp. 2d at 1074; *Hogarth*, 177 F. Supp. 2d at 1340; *Gosliner*, *supra* note 6, at 148.

⁴⁹ In contrast to international treaties, international agreements entered into by the executive branch do not require congressional ratification. See DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION’S THIRD CENTURY 1079 (3d ed. 2003); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 343-44 (14th ed. 2001) (stating provisions of international executive agreements do not have domestic effect until implemented into federal law by Congress).

⁵⁰ *Hogarth*, 330 F.3d at 1362; see *Evans*, 257 F.3d at 1061; *Daley*, 93 F. Supp. 2d at 1074; *Hogarth*, 177 F. Supp. 2d at 1340.

⁵¹ International Dolphin Conservation Program Act, 16 U.S.C. § 1414, *repealed by* Pub. L. No. 105-42, § 6(c), 111 Stat. 1130 (1997); *Evans*, 257 F.3d at 1062; *Hogarth*, 330 F.3d at 1363; *Daley*, 93 F. Supp. 2d at 1075; *Hogarth*, 177 F. Supp. 2d at 1341; see *Gosliner*, *supra* note 6, at 150-51.

⁵² 16 U.S.C. § 1414 (repealed 1997); *Evans*, 257 F.3d at 1062; *Hogarth*, 330 F.3d at 1363; *Daley*, 93 F. Supp. 2d at 1075; *Hogarth*, 177 F. Supp. 2d at 1341; see *Gosliner*, *supra* note 6, at 150-51.

⁵³ See *Daley*, 93 F. Supp. 2d at 1074.

⁵⁴ *Id.*

dolphin population recovery.⁵⁵ Congress manifested this concern by rejecting the IDCP language seeking an immediate amendment to the dolphin-safe standard embodied in the DPCIA.⁵⁶ Instead, Congress delegated substantial research requirements to the Department of Commerce before the Administration could implement any such change to the dolphin-safe standard.⁵⁷ In the IDCPA, Congress amended the MMPA to require detailed population abundance surveys and specific stress studies.⁵⁸ The required ETP stress studies consisted of the following: a three-year necropsy study of dolphins killed during purse seine sets; a one-year review of historical, demographic, and biological data; and an experiment studying the repeated chase and capture of dolphins by means of encirclement.⁵⁹

In addition, the IDCPA amended the DPCIA to require the Secretary of Commerce ("Secretary") to make two findings.⁶⁰ First, the DPCIA required the Secretary to issue an Initial Finding by March 31, 1999.⁶¹ Second, Congress directed the Secretary to issue a Final Finding by December 31, 2002. Congress required the Secretary to base both findings on the aforementioned research and "other relevant information."⁶² The IDCPA provided for modification of the dolphin-safe standard if the Secretary concluded that there was no significant adverse impact on dolphin population recovery in the ETP.⁶³ This modification would allow purse seine-fished tuna to be labeled dolphin-safe so long as no dolphins were observed being killed or injured during the set.⁶⁴

II. STATE OF THE LAW

As proscribed by Congress, the dolphin-safe labeling standard was to remain static until the Secretary of Commerce issued his findings.⁶⁵

⁵⁵ *Id.* at 1089; see 16 U.S.C. § 1414 (repealed 1997); Gosliner, *supra* note 6, at 150-51.

⁵⁶ *Evans*, 257 F.3d at 1061; *Daley*, 93 F. Supp. 2d at 1089; see Gosliner, *supra* note 6, at 150-51.

⁵⁷ 16 U.S.C. § 1414 (repealed 1997); *Daley*, 93 F. Supp. 2d at 1075; Gosliner, *supra* note 6, at 150-51.

⁵⁸ 16 U.S.C. § 1414 (repealed 1997).

⁵⁹ *Id.*

⁶⁰ *Id.*; *Evans*, 257 F.3d at 1062-63; *Daley*, 93 F. Supp. 2d at 1076; Gosliner, *supra* note 6, at 150.

⁶¹ See sources cited *supra* note 60.

⁶² See sources cited *supra* note 60.

⁶³ See sources cited *supra* note 60.

⁶⁴ See sources cited *supra* note 60.

⁶⁵ *Daley*, 93 F. Supp. 2d at 1076.

Before making any findings, the Secretary delegated much of the IDCPA-mandated research to the NMFS.⁶⁶ Subsequently, the Commerce Department and the NMFS failed to carry out most of the research mandated by Congress.⁶⁷ Nevertheless, the Secretary quickly made his findings and moved to implement the proposed change to the standard.⁶⁸

A. *The NMFS's Preliminary Report to the Department of Commerce*

On March 25, 1999, the NMFS made its preliminary report to the Secretary.⁶⁹ This report concluded that two of the three depleted dolphin populations had remained static or continued to decline.⁷⁰ The NMFS admitted that there was insufficient evidence regarding the third population to determine whether or not it was recovering.⁷¹ It did, however, acknowledge that the other two populations were failing to recover at the expected rate.⁷²

Furthermore, the NMFS identified only one nonfishery-related pressure potentially limiting the dolphin population recovery: "large-scale environmental variability in the ocean habitat."⁷³ It ruled out this possibility, however, finding that "the review of environmental conditions did not disclose any large-scale oceanographic regime shifts during recent decades."⁷⁴ Accordingly, the NMFS concluded that the best available data suggested that fishery-related stress was responsible for adverse impacts on the dolphin population.⁷⁵ It reported that such

⁶⁶ Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP), 65 Fed. Reg. 30 (Jan. 3, 2000); Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP); Initial Finding, 64 Fed. Reg. 24,590 (May 7, 1999).

⁶⁷ Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific (ETP), 65 Fed. Reg. at 30; Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific (ETP); Initial Finding, 64 Fed. Reg. at 24,590.

⁶⁸ See Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific (ETP), 65 Fed. Reg. at 30; Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific (ETP); Initial Finding, 64 Fed. Reg. at 24,590.

⁶⁹ Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific (ETP); Initial Finding, 64 Fed. Reg. at 24,590.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Brower v. Daley*, 93 F. Supp. 2d 1071, 1077 (N.D. Cal. 2000).

⁷⁵ *Brower v. Evans*, 257 F.3d 1058, 1063 (9th Cir. 2001); *Daley*, 93 F. Supp. 2d at 1076.

stress could include general stress from chase, encirclement, and capture during purse seine sets.⁷⁶ The NMFS also noted the potential for females to become separated from their calves during sets, resulting in the calves' subsequent deaths.⁷⁷ The preliminary report further identified underreporting of purse seine-related deaths as a possible explanation for the lack of dolphin population recovery.⁷⁸ The NMFS also included in the report a letter from sixteen marine mammal scientists.⁷⁹ This letter stated their belief that fishery-related stress was in fact responsible for the lack of expected population recovery.⁸⁰

B. The Department of Commerce's Initial Finding of No Adverse Impact on Dolphin Population Recovery

On April 29, 1999, the Secretary of Commerce issued his Initial Finding in compliance with the IDCPA.⁸¹ The Secretary found there was insufficient evidence that purse seine fishing was adversely impacting the recovery of dolphin populations in the ETP.⁸² In fact, the Secretary

⁷⁶ *Evans*, 257 F.3d at 1063; *Daley*, 93 F. Supp. 2d at 1076.

⁷⁷ *Evans*, 257 F.3d at 1063; *Daley*, 93 F. Supp. 2d at 1076.

⁷⁸ *See Evans*, 257 F.3d at 1063; *Daley*, 93 F. Supp. 2d at 1076.

⁷⁹ *Evans*, 257 F.3d at 1064.

⁸⁰ *Id.*

⁸¹ Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific (ETP); Initial Finding, 64 Fed. Reg. 24,590 (Apr. 29, 1999). The Initial Finding was published on April 29, 1999, almost one full month after the deadline specified by Congress in the IDCPA of March 31, 1999. Compare International Dolphin Conservation Program Act, 16 U.S.C. § 1414 (repealed 1997), with *Daley*, 93 F. Supp. 2d at 1076. This is another instance of the administration's lack of compliance with congressional mandates that seems to have been overlooked and unenforced by the legislative and judicial branches. *Id.*

⁸² The Secretary's Initial Finding reads in relevant part:

The initial finding relies on two determinations: that there is a significant adverse impact on the depleted stocks; and that the significant impact is due to the practices of the purse seine fishery. For the reasons briefly outlined below, NMFS has determined that there is insufficient evidence to conclude that intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the ETP. Because of this initial finding, the "dolphin safe" labeling standard specified in paragraph (h)(1) of the DPCIA will change on the effective date of the final regulations to implement the IDCPA. While the rate of recovery of the dolphin stocks may be lower than expected, there is insufficient information to conclude that there has been a significant adverse impact on the depleted stocks. Additionally, observed dolphin mortality is extremely low. The numbers of dolphins currently killed by the purse seine fishery is in the low thousands, as opposed to the hundreds of thousands in the early 1970s. Furthermore, the total annual mortality of all dolphins in the ETP due to the purse seine fishery is capped at 5,000 by a binding international agreement. The dramatic reduction in

declined to make an affirmative finding of “yes” or “no” on this question.⁸³ Instead, he claimed that it was impossible to make a conclusive finding for want of available evidence.⁸⁴

C. The Department of Commerce’s Interim Final Rule Implements the Modification of the Dolphin-Safe Standard

Pursuant to the Secretary’s Initial Finding, the Clinton Administration prepared to modify the dolphin-safe labeling standard.⁸⁵ The

dolphin mortality over the past 12 years can be attributed to continued cooperation in the International Dolphin Conservation Program through the auspices of the IATTC. The current low level of observed dolphin mortalities in the ETP tuna purse seine fishery creates an expectation that the fishery will not prevent the depleted populations from recovering. Finally, there is no solid evidence in any of the scientific studies to date that links the apparent failure of dolphin stocks to recover at the rate expected based on historical data to the current tuna purse seine fishery practices. The Report to Congress does not provide evidence that the ETP tuna purse seine fishery is the cause of the apparent failure of the northeastern offshore spotted dolphin and eastern spinner dolphin stocks to recover as expected; nor does it dismiss the fishery as a possible cause.

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific (ETP); Initial Finding, 64 Fed. Reg. at 24,590.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ The new requirements would read in relevant part:

(b) *Imported tuna.* Tuna or tuna products harvested in the ETP by purse seine vessels of greater than 400 st (362.8 mt) carrying capacity and presented for import into the United States are dolphin safe if: (1) The tuna was harvested by a U.S. vessel fishing in compliance with the requirements of the IDCP and applicable U.S. law, or by a vessel belonging to a nation that has obtained an affirmative finding of § 216.24(f)(9); (2) The tuna or tuna products are accompanied by a properly completed FCO; (3) The tuna or tuna products are accompanied by valid documentation signed by a representative of the appropriate IDCP member nation, certifying that: (i) There was an IDCP approved observer on board the vessel(s) during the entire trip(s); and (ii) The tuna contained in the shipment were caught according to the dolphin-safe labeling standards of § 216.91; (4) The documentation provided in paragraph(b)(3) of this section includes a listing of vessel names and identifying numbers of the associated Tuna Tracking Forms for each trip of which tuna in the shipment originates; and (5) The FCO is properly endorsed by each exporter, importer, and processor certifying that, to the best of his or her knowledge and belief, the FCO and attached documentation are complete and accurate.

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP), 65 Fed. Reg. 30 (Jan. 3, 2000); see *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358, 1363 (Fed. Cir. 2003); *Defenders of Wildlife v. Hogarth*, 177 F. Supp. 2d 1336, 1343 (Ct. Int’l Trade 2001).

modification was to become effective February 2, 2000.⁸⁶ Accordingly, the Secretary issued a proposed rule adopting the new dolphin-safe labeling standard on June 14, 1999.⁸⁷ The rule was open for comment until July 14, 1999.⁸⁸ On January 3, 2000, the Commerce Department published the "Interim Final Rule." This rule implemented the Initial Finding and the proposed change to the dolphin-safe labeling standard.⁸⁹ Subsequently, the Department of Commerce would permit purse seine-fished tuna under the dolphin-safe label, at least until the Secretary's Final Finding was issued.⁹⁰

D. Brower v. Evans

Shortly after the Commerce Department's Initial Finding was published, David Brower and his organization, Earth Island Institute, joined by a number of other environmental and conservation groups, filed suit against the Secretary of Commerce, William Daley.⁹¹ In *Brower v. Evans*, the various organizations brought suit under the Administrative Procedures Act ("APA") in the United States District Court for the Northern District of California.⁹² The APA requires a court reviewing an agency action to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."⁹³ The

⁸⁶ *Brower v. Daley*, 93 F. Supp. 2d 1071, 1076 (N.D. Cal. 2000).

⁸⁷ *Hogarth*, 177 F. Supp. 2d at 1342.

⁸⁸ *Id.*

⁸⁹ *See id.* at 1342; Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific (ETP), 65 Fed. Reg. at 30.

⁹⁰ The Secretary of Commerce's second finding was to be made by December 31, 2002, and was to be based on the required research conducted in accordance with the IDCPA. *Brower v. Evans*, 257 F.3d 1058, 1062-63 (9th Cir. 2001); *Daley*, 93 F. Supp. 2d at 1076; *Hogarth*, 177 F. Supp. 2d at 1341-42.

⁹¹ *Evans*, 257 F.3d at 1064; *Daley*, 93 F. Supp. 2d at 1076. David Brower was a legendary figure in the environmentalist/conservationist movement. Earth Island Inst., *David Brower's Enduring Legacy*, available at http://www.earthisland.org/brower/brower_legacy.html (last visited Jan. 26, 2004). During his distinguished career, he was the first Executive Director of the Sierra Club, founder of Friends of the Earth and its related international organizations (now active in 69 countries), co-founder of the League of Conservation Voters, and a three-time nominee for the Nobel Peace Prize. *Id.* He was a lifelong advocate for the environment who actively fought for a variety of conservation causes until his death in 2000 at the age of 88. *Id.* Brower was a named Plaintiff in both the Northern District of California and Ninth Circuit cases primarily at issue in this Article. *Id.*

⁹² Administrative Procedures Act, 5 U.S.C. § 706 (2000); *Evans*, 257 F.3d at 1064; *Daley*, 93 F. Supp. 2d at 1089.

⁹³ 5 U.S.C. § 706.

lawsuit alleged that the Secretary failed to obtain and consider preliminary data from the various congressionally mandated stress research projects in making the Initial Finding.⁹⁴ The suit also alleged that the Secretary failed to apply the appropriate legal standard to the best available data.⁹⁵

On April 11, 2001, the district court struck down the Secretary's Initial Finding.⁹⁶ The court held that the administrative finding was "arbitrary and capricious" and that the Secretary had acted "contrary to law."⁹⁷ The court set aside the Initial Finding until the Secretary had the opportunity to consider the preliminary results from the congressionally mandated stress research studies.⁹⁸

1. The Ninth Circuit Sets Aside the Initial Finding

The Secretary appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit in *Brower v. Evans*.⁹⁹ Donald Evans was the new Secretary of Commerce under the Bush administration and was substituted for his predecessor, William Daley, as defendant on appeal.¹⁰⁰ On July 23, 2001, the Ninth Circuit affirmed the decision of the district court.¹⁰¹

The Secretary argued that the dolphin-safe standard should change to the new standard because the evidence was inconclusive.¹⁰² The Secretary claimed that there was insufficient evidence to make an affirmative finding of "yes" or "no" on the question of whether purse seine fishing would have significant adverse impact on ETP dolphin populations.¹⁰³ According to the Secretary, this lack of affirmative evidence regarding adverse impact bestowed on the Commerce

⁹⁴ See *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358, 1360-61 (Fed. Cir. 2003); *Hogarth*, 177 F. Supp. 2d at 1339.

⁹⁵ *Evans*, 257 F.3d at 1064; *Daley*, 93 F. Supp. 2d at 1089.

⁹⁶ *Evans*, 257 F.3d at 1064; *Daley*, 93 F. Supp. 2d at 1089.

⁹⁷ *Evans*, 257 F.3d at 1064; *Daley*, 93 F. Supp. 2d at 1089; see 5 U.S.C. § 706.

⁹⁸ *Daley*, 93 F. Supp. 2d at 1089.

⁹⁹ *Evans*, 257 F.3d at 1061.

¹⁰⁰ *Id.* at 1058.

¹⁰¹ FED. R. APP. P. 43(c)(2); *Evans*, 257 F.3d at 1071 ("Donald Evans is substituted for his predecessor, William M. Daley, as Secretary of Commerce.").

¹⁰² The new standard sought by the Panama Declaration would not exclude tuna caught in purse seine nets, but rather allow any tuna caught in a set that did not result death or serious bodily injury to a dolphin. *Evans*, 257 F.3d at 1062; *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358, 1363 (Fed. Cir. 2003); *Daley*, 93 F. Supp. 2d at 1075; *Defenders of Wildlife v. Hogarth*, 177 F. Supp. 2d 1336, 1341 (Ct. Int'l Trade 2001).

¹⁰³ *Evans*, 257 F.3d at 1066.

Department the power to modify the dolphin-safe standard.¹⁰⁴ The court dismissed this argument for several reasons.¹⁰⁵

The court held that the Secretary's interpretation of the IDCPA's required studies was invalid because that construction of the statute leads to an absurd result.¹⁰⁶ It found that Congress intended the Commerce Department to make an affirmative finding.¹⁰⁷ The court held that, to make such an affirmative finding, the applicable statutes required the Secretary to answer the adverse impact question with either a definitive "yes" or "no."¹⁰⁸ In both the DPCIA and the IDCPA, Congress had directed the Secretary to "make a finding regarding whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dolphin stock."¹⁰⁹ The court held that the plain meaning of "whether" in the two statutes was "whether or not."¹¹⁰ It held that to suggest otherwise would flout the statutory scheme and render the studies

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1066-68.

¹⁰⁶ The court in *Evans* held:

Finally, this default construction should be avoided because it would lead to absurd results. Statutory interpretations "which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." Such a default construction would render the required stress studies irrelevant. The use of a default does not encourage active, aggressive fact-finding and research or conclusive answers.

Id. at 1067 (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982)); see MARGARET Z. JOHNS & REX R. PERSCHBACHER, *THE UNITED STATES LEGAL SYSTEM: AN INTRODUCTION* 106 (2002).

¹⁰⁷ *Evans*, 257 F.3d at 1068.

¹⁰⁸ *Id.*

¹⁰⁹ International Dolphin Conservation Program Act, 16 U.S.C. § 1414(g) (repealed 1997); Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385(g) (1990).

¹¹⁰ The IDCPA and DPCIA both require the following for the Initial Finding:

(g) Secretarial Findings. — (1) Between March 1, 1999, and March 31, 1999, the Secretary shall, on the basis of the research conducted before March 1, 1999, under section 304(a) of the Marine Mammal Protection Act of 1972, information obtained under the International Dolphin Conservation Program, and any other relevant information, make an initial finding regarding whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the eastern tropical Pacific Ocean. The initial finding shall be published immediately in the Federal Register and shall become effective upon a subsequent date determined by the Secretary.

16 U.S.C. § 1414(g); 16 U.S.C. § 1385(g); see *Evans*, 257 F.3d at 1066.

merely optional.¹¹¹ It noted that this interpretation would relegate Congress' research requirements to the status of mere surplusage.¹¹² In fact, Congress mandated that the Commerce Department "shall on the basis of the research conducted before March 1st, . . . make an initial finding."¹¹³ The court held that Congress' use of the word "shall" constituted the strongest possible expression of an absolute requirement.¹¹⁴

The Secretary urged that the Initial Finding, unlike the Final Finding, could be made on the basis of limited evidence.¹¹⁵ The court, however, distinguished the instant case as an initial finding with express statutory requirements.¹¹⁶ In this case, the Secretary issued his Initial Finding without first fulfilling the specific research requirements of the statute.¹¹⁷ At the time of the Initial Finding, the NMFS had only conducted its literature review.¹¹⁸ It had failed to complete the required stress research.¹¹⁹ It also failed to produce the required three-year, 500-sample size necropsy report, and the one-year relevant historical demographic and biological data survey.¹²⁰ Finally, the NMFS failed to conduct the experiment involving repeated chase and capture of dolphins in a timely manner.¹²¹ As further evidence of administrative intransigence, the court noted that the NMFS had waited two years before even initiating planning for the experiment.¹²²

¹¹¹ *Evans*, 257 F.3d at 1071-72.

¹¹² *Id.*; *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) (holding statutory interpretations "which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

¹¹³ 16 U.S.C. § 1414.

¹¹⁴ *Evans*, 257 F.3d at 1067. By using "shall," "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory." *United States v. Monsanto*, 491 U.S. 600, 607 (1989); *see* *Ctr. for Biological Diversity v. Norton*, 254 F.3d 833 (9th Cir. 2001) (holding that "'Shall' means shall."); *see also* *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187-88 (10th Cir. 1999).

¹¹⁵ The Secretary based this argument on evidence in the legislative history. *Evans*, 257 F.3d at 1068.

¹¹⁶ *Id.*; *see* *NRDC v. EPA*, 966 F.2d 1292, 1300 (9th Cir. 1992) ("This court must uphold adherence to the law, and cannot condone the failure of an executive agency to conform to the express statutory requirements.").

¹¹⁷ *Evans*, 257 F.3d at 1068.

¹¹⁸ *Id.* at 1069.

¹¹⁹ *Id.*

¹²⁰ *Id.* The three-year, 500-sample size necropsy report and the one-year relevant historical and biological data survey were two of the stress study requirements set forth by Congress in the IDCPA. International Dolphin Conservation Program Act, 16 U.S.C. § 1414 (repealed 1997).

¹²¹ *Evans*, 257 F.3d at 1069.

¹²² *Id.* at 1069-70.

After reviewing the evidence, the Ninth Circuit concluded that the Commerce Department had failed to conduct both the abundance surveys and the stress studies mandated by Congress in the IDCPA.¹²³ The court also noted that the NMFS's own report discounted the possibility of a non-purse seine environmental factor responsible for the dolphin populations' failure to recover.¹²⁴ Thus, the court held that the Secretary had abused his discretion in making his Initial Finding.¹²⁵ It found the Secretary had failed to apply both the congressionally mandated research and the appropriate legal standard to the available information.¹²⁶ Based on the available research, the court held that the Secretary's Initial Finding was arbitrary, capricious, and an abuse of discretion under the APA.¹²⁷ Consequently, in 2001, the Ninth Circuit affirmed the trial court's injunction against any modification of the standard.¹²⁸

E. Defenders of Wildlife v. Hogarth

In 2001, numerous environmental groups, many of them parties to *Brower v. Daley* and *Brower v. Evans*, filed suit against the Secretary of Commerce in the Court of International Trade.¹²⁹ This time the issue was the Interim Final Rule, the direct implementation of the Initial Finding's modification of the dolphin-safe labeling standard.¹³⁰ The Secretary

¹²³ *Id.*

¹²⁴ *Id.* at 1072.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 1070-71. The court took into account four possible reasons to invalidate an administrative finding under the APA, if the administration: (1) does not rely on factors which Congress intended it to consider; (2) entirely fails to consider an important aspect of the problem; (3) offers an explanation for its decision that runs counter to evidence before the agency; and (4) offers a justification so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Administrative Procedures Act, 5 U.S.C. § 706 (2000); *Evans*, 257 F.3d at 1065; *Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1448 (9th Cir. 1996).

¹²⁸ *Evans*, 257 F.3d at 1070.

¹²⁹ *Defenders of Wildlife v. Hogarth*, 177 F. Supp. 2d 1336, 1338 n.2 (Ct. Int'l Trade 2001).

¹³⁰ Compare Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP), Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP), 65 Fed. Reg. 30 (Jan. 3, 2000), with Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP); Initial Finding, 64 Fed. Reg. 24,590 (Apr. 29, 1999) (both implementing identical provisions with regard to weakening of dolphin-safe tuna standard to include purse seine-fished tuna).

issued the Interim Final Rule in part to implement the weakening of the dolphin-safe labeling standard.¹³¹ In *Defenders of Wildlife v. Hogarth*, the plaintiffs challenged the Interim Final Rule under the IDCPA and the APA.¹³²

The Court of International Trade upheld the Interim Final Rule as not arbitrary, capricious, or an abuse of discretion.¹³³ It scrutinized the Interim Final Rule for legality under the APA and IDCPA.¹³⁴ The plaintiffs argued that the Interim Final Rule and its accompanying environmental assessment were inconsistent with the Ninth Circuit's holding of abuse of discretion in *Brower v. Evans*.¹³⁵ The Court of International Trade, however, refused to accept the plaintiffs' argument.¹³⁶ Instead, the court distinguished this case from *Evans*.¹³⁷ It held that *Evans* dealt exclusively with the dolphin-safe standard, whereas *Hogarth* dealt with the lifting of the tuna embargo.¹³⁸ The court confined the *Evans* requirement, that the Secretary make an affirmative determination of significant adverse impact, to the Initial Finding.¹³⁹ It refused to extend that requirement to the Interim Final Rule.¹⁴⁰

1. The Federal Circuit Upholds the Interim Final Rule

The plaintiffs appealed to the Court of Appeals for the Federal Circuit.¹⁴¹ The Federal Circuit affirmed the trial court's decision, holding that the Interim Final Rule did not violate either the APA or the IDCPA.¹⁴² Like the Court of International Trade, the Federal Circuit distinguished the Secretary's finding of no adverse impact in the Interim Final Rule from his abuse of discretion in the Initial Finding.¹⁴³ In 2003, the Federal Circuit denied a petition for rehearing en banc.¹⁴⁴

¹³¹ See *Hogarth*, 177 F. Supp. 2d at 1342; Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP), 65 Fed. Reg. at 30.

¹³² *Hogarth*, 177 F. Supp. 2d at 1338.

¹³³ *Id.* at 1372-73.

¹³⁴ *Id.* at 1343-44.

¹³⁵ See *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358, 1373 (Fed. Cir. 2003).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See *Hogarth*, 177 F. Supp. 2d at 1361.

¹³⁹ See *id.*

¹⁴⁰ See *id.*

¹⁴¹ *Hogarth*, 330 F.3d at 1360.

¹⁴² *Id.* at 1374.

¹⁴³ *Id.* at 1372-73.

¹⁴⁴ *Id.*, reh'g en banc denied, 2003 U.S. App. LEXIS 19718 (2003).

2. The United States Supreme Court Denies Certiorari

The plaintiffs appealed the Federal Circuit's decision in *Hogarth*.¹⁴⁵ In May of 2004, the United States Supreme Court denied certiorari.¹⁴⁶ The Court did not explain the reasoning behind this denial and refused to hear the case without further comment.¹⁴⁷

F. *The Northern District of California Sets Aside the Secretary's Final Finding in Earth Island Institute v. Evans*

Recently, another case dealing with the Secretary of Commerce's administrative discretion arose in the United States District Court for the Northern District of California.¹⁴⁸ In *Earth Island Institute v. Evans*, various environmental groups filed suit against the Secretary seeking an injunction against the modification of the dolphin-safe labeling standard.¹⁴⁹ At issue was a third administrative action by the Commerce Department: the Final Finding required by the IDCPA.¹⁵⁰ As it had in *Daley*, the United States District Court for the Northern District of California found that the Secretary's latest finding was "arbitrary and capricious and an abuse of discretion."¹⁵¹ It further found that the Department of Commerce had yet to fulfill even the low level of research required prior to issuing the Initial Finding.¹⁵² Initially, the court issued a preliminary injunction against modification of the dolphin-safe standard.¹⁵³ In 2004, the court entered summary judgment on behalf of the plaintiffs.¹⁵⁴ It precluded any amendment of the dolphin-safe standard and any labeling of purse seine-fished tuna as dolphin-safe.¹⁵⁵

¹⁴⁵ *Defenders of Wildlife v. Hogarth*, 514 U.S. 1029 (2004).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Earth Island Inst. v. Evans*, *prelim. inj. granted*, 256 F. Supp. 2d 1064, 1079-80 (N.D. Cal. 2003), *summ. j. granted*, No. C 03-0007, 2004 U.S. Dist. LEXIS 15729 (N.D. Cal. 2004).

¹⁴⁹ Again, most of these organizations were also parties to the aforementioned actions. Plaintiffs were a number of nonprofit organizations, including Earth Island Institute, the Humane Society of the United States, The Oceanic Society, and the International Wildlife Coalition. *Earth Island*, 265 F. Supp. 2d at 1068, 1079-80.

¹⁵⁰ International Dolphin Conservation Program Act, 16 U.S.C. § 1414 (repealed 1997).

¹⁵¹ *Earth Island*, 265 F. Supp. 2d at 1069-70.

¹⁵² These research prerequisites were supposed to have been fulfilled four years previously, before the Initial Finding was issued. *Id.* at 1079-80.

¹⁵³ *Id.*

¹⁵⁴ *Earth Island Inst. v. Evans*, No. C 03-0007, 2004 U.S. Dist. LEXIS 15729 (N.D. Cal. 2004).

¹⁵⁵ *Id.* at 98-99.

III. ANALYSIS

The holdings of the Ninth Circuit in *Evans* and the Federal Circuit in *Hogarth* are at odds with one another.¹⁵⁶ *Evans* sets aside an administrative action purporting to weaken the dolphin-safe labeling standard.¹⁵⁷ Conversely, *Hogarth* upholds another administrative action with an identical provision.¹⁵⁸ This Comment argues that the Interim Final Rule upheld in *Hogarth* is merely an attempt to circumvent the injunction that the Ninth Circuit issued in *Evans*.¹⁵⁹ The United States Supreme Court incorrectly denied certiorari to resolve this circuit split and to invalidate the Interim Final Rule.¹⁶⁰ Congress should also amend the relevant statutes to clarify the prerequisites for modification of the dolphin-safe standard.¹⁶¹ Though there are several good faith arguments in favor of modification, the administration must follow proper procedure before it can legally amend the dolphin-safe standard.¹⁶²

A. *An Implicit Circuit Split Exists on Amendment of the Dolphin-Safe Standard*

Though *Evans* and *Hogarth* reach opposite conclusions, both cases were triggered by the NMFS's attempts to weaken the dolphin-safe standard.¹⁶³ Both the Initial Finding and the Interim Final Rule weaken the standard from "no purse seine-fished tuna" to "no dolphins observed killed or seriously injured during purse seine sets."¹⁶⁴

¹⁵⁶ Compare *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358, 1373 (Fed. Cir. 2003), with *Brower v. Evans*, 257 F.3d 1058, 1071 (9th Cir. 2001) (reaching opposite conclusions on validity of administrative actions).

¹⁵⁷ *Evans*, 257 F.3d at 1071; Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP); Initial Finding, 64 Fed. Reg. 24,590 (Apr. 29, 1999).

¹⁵⁸ *Hogarth*, 330 F.3d at 1361; Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP), 65 Fed. Reg. 30 (Jan. 3, 2000).

¹⁵⁹ See *Evans*, 257 F.3d at 1070-71.

¹⁶⁰ See *Hogarth*, 330 F.3d at 1373; *Evans*, 257 F.3d at 1071.

¹⁶¹ See International Dolphin Conservation Program Act, 16 U.S.C. § 1414 (repealed 1997); Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385 (2000); Marine Mammal Protection Act, 16 U.S.C. § 1361 (2000).

¹⁶² See *Evans*, 257 F.3d at 1065-66; *Earth Island Inst. v. Evans*, 256 F. Supp. 2d 1064, 1069-70 (N.D. Cal. 2003).

¹⁶³ *Evans*, 257 F.3d at 1062; *Hogarth*, 330 F.3d at 1363; *Brower v. Daley*, 93 F. Supp. 2d 1071, 1075 (N.D. Cal. 2000); *Defenders of Wildlife v. Hogarth*, 177 F. Supp. 2d 1336, 1341 (Ct. Int'l Trade 2001).

¹⁶⁴ *Evans*, 257 F.3d at 1062; *Hogarth*, 330 F.3d at 1363; *Daley*, 93 F. Supp. 2d at 1075; *Hogarth*, 177 F. Supp. 2d at 1341.

At the time of both the Initial Finding and the Interim Final Rule, the NMFS failed to conduct the research specifically required by Congress as a prerequisite to any change in the standard.¹⁶⁵ Yet the Ninth Circuit and the Federal Circuit split on whether these two respective administrative actions were an abuse of the Secretary's discretion.¹⁶⁶ In *Evans*, the Ninth Circuit found that the Initial Finding's attempt to weaken the standard was "arbitrary, capricious and an abuse of discretion" under the APA.¹⁶⁷ However, in *Hogarth*, the Federal Circuit ruled that identical language modifying the dolphin-safe standard in the Interim Final Rule did not constitute an abuse of administrative discretion.¹⁶⁸ It held that *Evans* was concerned only with the substance of the Initial Finding.¹⁶⁹ The court refused to construe *Evans* to invalidate subsequent findings of "no adverse impact," such as in the Interim Final Rule itself.¹⁷⁰ Thus, functionally identical administrative findings were overturned by the Ninth Circuit, and upheld by the Federal Circuit, representing a split in authority the United States Supreme Court should resolve.¹⁷¹

B. *The Department of Commerce's Interim Final Rule Circumvents Brower v. Evans*

The provision of the Interim Final Rule modifying the dolphin-safe standard accomplishes precisely what the Ninth Circuit specifically ruled as an abuse of the Secretary's discretion in *Evans*.¹⁷² In fact, it attempts to circumvent the injunction issued by the Ninth Circuit in *Evans*.¹⁷³ The Interim Final Rule's dolphin-safe provision consists of identical language with identical effect.¹⁷⁴ It was, however, semantically disguised as an administrative rule rather than a finding.¹⁷⁵ In effect, the dolphin-safe provision of the Interim Final Rule is merely a regulatory implementation of the substance of the Initial Finding.¹⁷⁶

¹⁶⁵ *Evans*, 257 F.3d at 1070-71.

¹⁶⁶ Compare *Hogarth*, 330 F.3d at 1373, with *Evans*, 257 F.3d at 1071 (reaching opposite conclusion on validity of administrative actions).

¹⁶⁷ *Evans*, 257 F.3d at 1071.

¹⁶⁸ *Hogarth*, 330 F.3d at 1372-73.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Compare *Hogarth*, 330 F.3d at 1373, with *Evans*, 257 F.3d at 1071 (reaching opposite conclusion on validity of administrative actions).

¹⁷² See *Evans*, 257 F.3d at 1070-71.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Compare Taking of Marine Mammals Incidental to Commercial Fishing Operations;

In considering the legality of the Interim Final Rule, the Federal Circuit improperly distinguished *Hogarth* from *Evans*.¹⁷⁷ It failed to carry *Evans* to its logical conclusion.¹⁷⁸ *Evans*' ultimate holding is that any administrative action that modifies the dolphin-safe standard is an abuse of discretion in the absence of congressionally mandated research.¹⁷⁹ The Federal Circuit, however, ignored the provision of the Interim Final Rule that weakened the dolphin-safe standard.¹⁸⁰ It focused myopically on the provisions lifting the tuna embargo on Mexico and defining the "backdown" procedure.¹⁸¹ While important issues, these are both peripheral to the Secretary's abuse of administrative discretion.¹⁸² By focusing on them, the court missed the dispositive issue.¹⁸³

Furthermore, there is evidence that the Secretary himself considered the dolphin-safe provision of the Interim Final Rule the functional equivalent of its counterpart in the Initial Finding.¹⁸⁴ The Secretary specifically updated the Interim Final Rule to implement the dolphin-safe modification of the Initial Finding: "NMFS has updated all the sections in the Interim Final Rule to reflect the current status of the Initial Finding."¹⁸⁵

Because the Interim Final Rule is simply a rote implementation of the Initial Finding, the Interim Final Rule should also be set aside as an abuse of administrative discretion under the IDCPA and the APA.¹⁸⁶ The fact that the Interim Final Rule is a rulemaking version of the Secretary's Initial Finding should not shield it from scrutiny by the courts.¹⁸⁷ To

Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP); Initial Finding, 64 Fed. Reg. 24,590-01 (May 7, 1999), *with Taking of Marine Mammals Incidental to Commercial Fishing Operations*; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP), 65 Fed. Reg. 30 (Jan. 3, 2000) (containing identical language weakening dolphin-safe standard).

¹⁷⁷ *Brower v. Evans*, 257 F.3d 1058 (9th Cir. 2001).

¹⁷⁸ See sources cited *supra* note 176.

¹⁷⁹ *Id.* at 1064.

¹⁸⁰ See sources cited *supra* note 176.

¹⁸¹ Compare *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358, 1374 (Fed. Cir. 2003) (discussing only backdown procedure and lifting of embargo, ignoring weakening of dolphin-safe label), *with Brower v. Evans*, 257 F.3d 1058, 1065-71 (9th Cir. 2001) (granting summary judgment for Plaintiffs under APA for abuse of discretion).

¹⁸² See cases cited *supra* note 181.

¹⁸³ See cases cited *supra* note 181.

¹⁸⁴ 65 Fed. Reg. 30, cmt. 123 (Jan. 3, 2000).

¹⁸⁵ See *id.*

¹⁸⁶ See *Brower v. Evans*, 257 F.3d 1058 (9th Cir. 2001).

¹⁸⁷ See *NRDC v. EPA*, 966 F.2d 1292, 1300 (9th Cir. 1992) (holding that courts are obligated to invalidate administrative actions that do not fulfill statutory requirements). Compare *Taking of Marine Mammals Incidental to Commercial Fishing Operations*; Tuna

allow the Secretary to circumvent the IDCPA and the APA merely by converting an illegal finding into a legal administrative regulation would flout congressional intent.¹⁸⁸ Such a construction of the IDCPA would render Congress' research requirements merely optional.¹⁸⁹ It is axiomatic that courts should interpret statutes to preserve the independent meaning of their provisions under the assumption that nothing in the statute is superfluous.¹⁹⁰ Furthermore, courts should avoid constructions that would lead to absurd results.¹⁹¹ For courts to construe Congress' research requirements as merely elective would be both absurd and render them superfluous.¹⁹²

C. The Interim Final Rule Must Be Invalid if the Final Finding is Invalid

The recent injunction and summary judgment in *Earth Island Institute v. Evans* supports a broad interpretation of *Brower v. Daley* and *Brower v. Evans*.¹⁹³ When the dolphin-safe standard again found itself under siege by the Secretary's Final Finding, the United States District Court for the Northern District of California granted a preliminary injunction against the Secretary.¹⁹⁴ The court enjoined him from taking any further action to modify the dolphin-safe standard.¹⁹⁵ It based its injunction and the subsequent summary judgment on the fact that the Secretary had yet to fulfill even the minimal research requirements of the Initial Finding.¹⁹⁶ Although *Earth Island* constitutes only persuasive authority, it is indicative of the line of reasoning of the district court, which was upheld

Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP), 65 Fed. Reg. 30 (Jan. 3, 2000), *with* Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP); Initial Finding, 64 Fed. Reg. 24,590 (Apr. 29, 1999) (implementing identical provisions with regard to weakening of dolphin-safe tuna standard to include purse seine-fished tuna).

¹⁸⁸ See Administrative Procedures Act, 5 U.S.C. § 706 (2000).

¹⁸⁹ International Dolphin Conservation Program Act, 16 U.S.C. § 1414 (repealed 1997).

¹⁹⁰ Fed. Deposit Ins. Corp. v. Laidlaw Transit, Inc., 21 P.3d 344, 353 (Alaska 2001); *see* JOHNS & PERSCHBACHER, *supra* note 106, at 106.

¹⁹¹ United States v. X-Citement Video, Inc., 513 U.S. 64, 69-70 (1994); *Rucker v. Davis*, 237 F.3d 1113, 1119 (9th Cir. 2001).

¹⁹² 5 U.S.C. § 706; *Brower v. Evans*, 257 F.3d 1058 (9th Cir. 2001); *see* Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) (holding default constructions should be avoided when leading to absurd results); JOHNS & PERSCHBACHER, *supra* note 106, at 106.

¹⁹³ *Earth Island Inst. v. Evans*, *prelim. inj. granted*, 256 F. Supp. 2d 1066, 1079-80 (N.D. Cal. 2003), *summ. j. granted*, 2004 U.S. Dist. LEXIS 15729 (N.D. Cal. Aug. 9, 2004).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 1070.

¹⁹⁶ *Id.*

by the Ninth Circuit in *Evans*.¹⁹⁷ Applying this analysis to the Interim Final Rule can only result in its invalidation.¹⁹⁸ If courts hold the Final Finding invalid for want of research, they must also hold the Interim Final Rule invalid, a fortiori.¹⁹⁹

D. *Arguments in Favor of Modifying the Dolphin-Safe Labeling Standard and Why They Fail*

In denying certiorari, it is conceivable the Supreme Court concluded that the requirements imposed on the Department of Commerce by the IDCPA do not apply to the NMFS's Interim Final Rule.²⁰⁰ Even though this action was taken by the NMFS on behalf of the Department of Commerce, it is possible that the Supreme Court embraced the reasoning of the Federal Circuit and distinguished *Hogarth* from *Evans*.²⁰¹ This approach, however, is unlikely to be an attractive solution for the Court, as it negates the clearly discernible will of the legislative branch.²⁰² In *Hogarth*, the Federal Circuit did not dispute the Ninth Circuit's finding in *Evans*, that Congress intended the Secretary to conduct the required research before weakening the dolphin-safe standard.²⁰³ Instead, the *Hogarth* court merely distinguished formalistically between the Initial Finding and the Interim Final Rule.²⁰⁴ It failed to acknowledge their functional equivalence with respect to the dolphin-safe standard, resulting in a split in authority between the two circuit courts.²⁰⁵

There is also an argument to be made from a public policy standpoint that dolphins in the ETP would be better served by a relaxation of the

¹⁹⁷ See *Evans*, 257 F.3d at 1071.

¹⁹⁸ See *Earth Island*, 256 F. Supp. 2d at 1079.

¹⁹⁹ See *id.*

²⁰⁰ See *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358, 1373 (Fed. Cir. 2003).

²⁰¹ The Federal Circuit distinguished *Hogarth* from *Evans*:

[*Evans*], however, interpreted the provisions in 16 U.S.C. § 1385(g) regarding the Secretary's initial finding requirement and then considered the sufficiency of the Secretary's Initial Finding. [*Evans*] did not address the question involved here, i.e., whether NMFS's finding that the Interim Final Rule does not pose a significant impact to the affected environment was arbitrary or capricious.

Id.

²⁰² See *Natural Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1300 (9th Cir. 1992) (holding that courts are obligated to invalidate administrative actions that do not fulfill statutory requirements).

²⁰³ *Hogarth*, 330 F.3d at 1372-73.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

labeling standard.²⁰⁶ Retaining the original labeling standard effectively denies United States market access to foreign purse seine fishermen who would otherwise be in compliance with the IDCP's monitoring standards.²⁰⁷ These standards theoretically ensure that no dolphins are killed or injured during the purse seine sets.²⁰⁸ Conceivably, denying access to the important United States tuna market, even to those in compliance with the IDCP, may eliminate any incentive for countries to participate in the program.²⁰⁹ This could lead to wholesale abandonment of the IDCP and a return to the cruel and unsustainable tuna fishing practices of the past.²¹⁰ It is, however, unlikely that any country could afford to completely forgo the lucrative United States tuna market, making defections from the IDCP highly improbable.²¹¹ Furthermore, Congress, not the executive branch, is the institution best suited to making such an assessment.²¹² Therefore, the priority must be to curtail purse seine fishing until dolphin populations recover to their optimal sustainable levels.²¹³ If the Commerce Department demonstrates through good faith research that purse seine fishing does not adversely impact dolphin populations or their recovery, it may then re-evaluate the standard.²¹⁴

IV. PROPOSAL

A. The United States Supreme Court Should Resolve the Circuit Split and Invalidate the Interim Final Rule

The United States Supreme Court erred when it denied certiorari in *Hogarth*.²¹⁵ The Court should recognize the contradiction between the Ninth Circuit's and the Federal Circuit's divergent holdings.²¹⁶ Because

²⁰⁶ See *Brower v. Evans*, 257 F.3d 1058, 1065-66 (9th Cir. 2001); *Earth Island Inst. v. Evans*, 256 F. Supp. 2d 1064, 1069-70 (N.D. Cal. 2003); *Gosliner*, *supra* note 6, at 147.

²⁰⁷ See *Earth Island*, 256 F. Supp. 2d at 1069-70; *Gosliner*, *supra* note 6, at 147.

²⁰⁸ *Panama Declaration*, *supra* note 44; *La Jolla Agreement*, *supra* note 37.

²⁰⁹ *Earth Island*, 256 F. Supp. 2d at 1069-70; see *Gosliner*, *supra* note 6, at 147.

²¹⁰ *Earth Island*, 256 F. Supp. 2d at 1069-70; see *Gosliner*, *supra* note 6, at 147.

²¹¹ *Earth Island*, 256 F. Supp. 2d at 1069-70.

²¹² *Brower v. Evans*, 257 F.3d 1058, 1065-66 (9th Cir. 2001); *Earth Island*, 256 F. Supp. 2d at 1069-70.

²¹³ See *Earth Island*, 256 F. Supp. 2d at 1069-70.

²¹⁴ *Id.*

²¹⁵ *Defenders of Wildlife v. Hogarth*, 541 U.S. 1029 (2004).

²¹⁶ See *Evans*, 257 F.3d at 1071; *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358, 1373 (Fed. Cir. 2003).

both administrative actions at issue in these cases accomplish precisely the same end, the Court should have granted certiorari to review the *Hogarth* decision.²¹⁷ At its next opportunity, the Court should acknowledge the functional equivalence of the Initial Finding and the Interim Final Rule.²¹⁸ Because the Federal Circuit failed to acknowledge the equivalence of the two administrative actions in *Hogarth*, the Court should reverse that decision.²¹⁹ Because the Interim Final Rule circumvents *Evans*'s holding and congressional research requirements, the Court should invalidate it as an abuse of administrative discretion and usurpation of legislative power.²²⁰ The Court should clarify that the dolphin-safe labeling standard will retain its original prohibition on purse seine-fished tuna.²²¹ It should require that the original standard remain in place until the Secretary of Commerce conducts the congressionally mandated research.²²²

B. Congress Should Amend the IDCPA to Clarify its Intent

Additionally, Congress should amend the IDCPA to explicitly require the completion of research prior to any change in the dolphin-safe label.²²³ It should place specific and clear evidentiary burdens into the IDCPA.²²⁴ Furthermore, Congress should explicitly require an affirmative finding of negative or no negative impact on dolphin population recovery prior to any administrative action.²²⁵ Congress should also reconsider vesting its authority in the Department of Commerce, given the Department's recent history of abuse of

²¹⁷ Compare Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP); Initial Finding, 64 Fed. Reg. 24,590-01 (May 7, 1999), with Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP), Interim Final Rule, 65 Fed. Reg. 30 (Jan. 3, 2000) (containing identical language weakening dolphin-safe standard).

²¹⁸ See sources cited *supra* note 217.

²¹⁹ See sources cited *supra* note 217.

²²⁰ Compare *Hogarth*, 330 F.3d at 1374 (ignoring weakening of dolphin-safe label and concerning itself only with backdown procedure), with *Brower*, 257 F.3d at 1058 (granting summary judgment for Plaintiffs under APA for abuse of discretion).

²²¹ Cf. *Earth Island*, 256 F. Supp. 2d at 1079-80 (granting preliminary injunction against modification of dolphin-safe label).

²²² *Brower v. Daley*, 93 F. Supp. 2d 1071, 1073 (N.D. Cal. 2000).

²²³ International Dolphin Conservation Program Act, 16 U.S.C. § 1414a (repealed 1997); see Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385 (2000); Marine Mammal Protection Act, 16 U.S.C. § 1361 (2000).

²²⁴ 16 U.S.C. § 1414a; see 16 U.S.C. § 1385; 16 U.S.C. § 1361.

²²⁵ 16 U.S.C. § 1414a; see 16 U.S.C. § 1385; 16 U.S.C. § 1361.

discretion.²²⁶ It should continue to delegate such research to an administrative body with more expertise, but should consider reserving the amending power of the MMPA and DPCIA for itself.²²⁷

These measures would limit the flexibility and latitude traditionally afforded the executive branch.²²⁸ The Department of Commerce has argued that this degree of autonomy is necessary for the smooth operation of the federal government.²²⁹ In this case, however, the Department of Commerce has overstepped the bounds of its congressionally granted authority.²³⁰ When it does so, it impinges upon the fundamental constitutional principle of separation of powers.²³¹ At this point, the judiciary must step in to provide a check against such an abuse of discretion.²³²

CONCLUSION

Over the course of the last century, humans have abused our power over nature by perpetrating the mass slaughter of one of the most intelligent animals to evolve alongside us.²³³ Unfortunately, most people do not realize the harm that we have caused dolphins, so insulated have we become to the natural world.²³⁴ Because of our ignorance, we have allowed our government to bow to international pressure and thwart the will of the people as codified by Congress.²³⁵ It is now up to the legislative branch and the judiciary to preserve our system of checks and balances against the exercise of executive authority.²³⁶ Accordingly, we must not allow the lawmaking functions of Congress to be usurped under a pretext of semantics and administrative discretionary

²²⁶ *Brower v. Evans*, 257 F.3d 1058, 1064 (9th Cir. 2001); *Daley*, 93 F. Supp. 2d at 1089.

²²⁷ 16 U.S.C. § 1414; *see* 16 U.S.C. § 1385; 16 U.S.C. § 1361.

²²⁸ *See Daley*, 93 F. Supp. 2d at 1086.

²²⁹ *Id.*

²³⁰ *See generally* U.S. CONST. arts. I-III (creating system of separation of powers and checks and balances).

²³¹ *Id.*

²³² *Id.*

²³³ *See Brower v. Evans*, 257 F.3d 1058, 1060 (9th Cir. 2001); *Daley*, 93 F. Supp. 2d at 1073; THE ENCYCLOPEDIA OF MAMMALS 220-21 (David McDonald ed., 2001); MILLER, *supra* note 1, at 643-46. *See* Lavigne et al., *supra* note 2; Randall R. Reeves & James G. Mead, *Marine Mammals in Captivity*, in CONSERVATION AND MANAGEMENT OF MARINE MAMMALS 412, X (John R. Twiss & Randall R. Reeves eds., 1999).

²³⁴ *See Evans*, 257 F.3d at 1060; *Daley*, 93 F. Supp. 2d at 1073; *Empty Oceans, Empty Nets*, *supra* note 1.

²³⁵ *See* sources cited *supra* note 234.

²³⁶ *See* sources cited *supra* note 234.

authority.²³⁷ An abuse of power in any other guise is still an abuse of power, and we must not permit it to stand.²³⁸

²³⁷ See *Evans*, 257 F.3d at 1060; *Daley*, 93 F. Supp. 2d at 1073.

²³⁸ See *Evans*, 257 F.3d at 1060; *Daley*, 93 F. Supp. 2d at 1073.
