Appeal No. 02-1224

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DEFENDERS OF WILDLIFE, EARTH ISLAND INSTITUTE, THE HUMANE SOCIETY OF THE UNITED STATES, ENVIRONMENTAL SOLUTIONS INTERNATIONAL, ANIMAL WELFARE INSTITUTE, INTERNATIONAL WILDLIFE COALITION, AMERICAN HUMANE ASSOCIATION, EARTHTRUST, GREENPEACE FOUNDATION, ANIMAL FUND, AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, SIERRA CLUB, SAMUEL LABUDDE, and CRAIG VAN NOTE,

Plaintiffs-Appellants,

and

FUND FOR ANIMALS and DAVID BROWER,

Plaintiffs,

v.

WILLIAM T. HOGARTH, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, DONALD L. EVANS, Secretary of Commerce, UNDER SECRETARY OF COMMERCE, Administrator of the National Oceanic and Atmospheric Administration, ASSISTANT SECRETARY, National Oceanic and Atmospheric Administration, SECRETARY OF STATE, SECRETARY OF THE TREASURY, and COMMISSIONER OF THE UNITED STATES CUSTOMS SERVICE,

Defendants-Appellees.

Appeal from the United States Court of International Trade in
Case No. 00-02-00060, Judge Judith M. Barzilay

BRIEF FOR PLAINTIFFS-APPELLANTS

WILLIAM J. SNAPE, III
DEFENDERS OF WILDLIFE
Attorney for Plaintiffs-Appellants
1101 14th Street, N.W., 14th Floor
Washington, DC 20005
(202) 682-9400
April 29, 2002

STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, counsel for Plaintiffs-Appellants (hereinafter "Plaintiffs") certify that there are no present cases within their knowledge that are related to this case.

INTRODUCTION

For at least a decade, three populations of dolphins in the Pacific Ocean have been "depleted" under the Marine Mammal Protection Act (MMPA). Yet instead of acting to recover these populations as the law mandates, Defendants-Appellees (hereinafter "Defendants") have steadfastly avoided honest analysis as to why these three populations of dolphins are still biologically imperilled and what can be done to better conserve these dolphins. The National Environmental Policy Act (NEPA), our country's basic charter for protection of the environment, requires it.

The administrative record for this case demonstrates that intense foreign government pressure and fear of an adverse World Trade Organization (WTO) decision have driven both the U.S. Congress and Executive Branch to make certain accommodations to foreign fishing fleets in the eastern tropical Pacific Ocean (ETP). Many of these accommodations have reflected sound policy considerations, and some of these accommodations are now reflected in U.S. law itself as part of the International Dolphin Conservation Program (IDCP). None of

these accommodations, however, relieve Defendants of their existing and continuing legal duties, both to recover depleted populations of marine mammals and to progressively reduce dolphin mortality to "a level approaching zero""with the goal of eliminating dolphin mortality." And none of these accommodations allow Defendants to literally re-write the plain statutory language of Congress with regard to any aspect of the tuna/dolphin program.

STATEMENT OF JURISDICTION

The subject matter jurisdiction of the Court of International Trade (CIT) rested on 28 U.S.C. § 1581(i)(3) and (4), as well as 16 U.S.C. § 1371(a)(2), which codifies the Marine Mammal Protection Act, including 1997 amendments known as the International Dolphin Conservation Program Act. This Court's jurisdiction rests on 28 U.S.C. § 1295(a)(5). On December 7, 2001, the CIT entered a final judgment and order, denying Plaintiffs' motion for summary judgment. On February 5, 2002, Plaintiffs-Appellants timely filed a notice of appeal. Fed. R. App. P. 4(a)(1); Clerk's Record 91, Appendix (A) 77.

ISSUES PRESENTED FOR REVIEW

1) Whether Defendants Department of Commerce and its agencies violated the 1997 International Dolphin Conservation Program Act (IDCPA), P.L. 105-42, by

promulgating a final regulation on "sundown sets" that is contrary to the plain language of the statute?

2) Whether Defendant federal agencies Department of Commerce, Department of State and Department of the Treasury violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., by: a) issuing an arbitrary, capricious and illegal Environmental Assessment on the International Dolphin Conservation Program that contains fundamental errors and omissions, b) failing to prepare an Environmental Impact Statement on a major new program and regulatory scheme that has several significant effects upon the environment, and c) failing to take a hard look at several key issues in the NEPA process that would help recover depleted marine mammals under the Marine Mammal Protection Act (MMPA), as amended, 16 U.S.C. § 1361 et seq., with the objective of progressively reducing dolphin mortality in the ETP to a level approaching zero?

STATEMENT OF THE CASE

Plaintiffs filed an initial complaint in the U.S. Court of International Trade (CIT) on February 8, 2000, alleging that Defendants' 2000 interim final rule, 65 Fed. Reg. 30-59 (January 3, 2000), A1861-1890, and associated actions violated the MMPA (including the 1997 IDCPA), NEPA, and the Administrative Procedure Act, 5 U.S.C. § 551 et seq. On April 7, 2000, Plaintiffs filed an amended

complaint before the CIT, along with a motion for a preliminary injunction against lifting the tuna embargo against the Government of Mexico. On April 14, the CIT denied the motion for a preliminary injunction, a decision that was not appealed. Defenders of Wildlife v. Dalton, 97 F.Supp.2d 1197 (CIT, 2000). On August 8, 2000, Plaintiffs filed a motion to complete the administrative record, which the CIT granted in part and denied in part on October 12, 2000. Defenders of Wildlife v. Dalton, Slip. Op. 129 (CIT, 2000). Consequently, Defendants were required to include the eastern spinner dolphin depleted finding, the affirmative finding for the Government of Mexico, and numerous Inter-American Tropical Tuna Commission (IATTC) documents that had been omitted from the original record.

On February 28, 2001, Plaintiffs filed a motion for judgment upon the agency record, which explicitly did not include any request for injunctive relief. Plaintiffs sought a declaratory judgment that the many U.S. federal agency actions that helped create and implement the International Dolphin Conservation Program violated both MMPA and NEPA. Plaintiffs asked that the MMPA/IDCPA final rule, the IDCP environmental assessment under NEPA, and the 2000 affirmative finding for Mexico be set aside and remanded back to Defendants.

After oral argument on October 23, 2001, the CIT entered a memorandum and order denying Plaintiffs' motion for judgment upon the agency record in its

entirety on December 7, 2001. Defenders of Wildlife v. Hogarth, 177 F.Supp.2d 1336 (CIT, 2001), A1-70. Plaintiffs timely filed their appeal on February 5, 2002.

STATEMENT OF FACTS

Since the emergence of modern purse-seine net fishing technologies in the late 1950s, at least seven million dolphins have died, and countless more injured, as a result of the yellowfin tuna fishery of the eastern tropical Pacific Ocean (ETP). A still not fully understood biological association exists between dolphins and yellowfin tuna in the ETP, which is an approximately seven million square mile stretch of ocean running from the coast of southern California to Peru, and out into the high seas at 160 degrees West longitude. The ETP is roughly the size of the continental United States. In this expanse of ocean, fishermen catch tuna in several ways, including intentionally casting purse seine nets on the more visible and air breathing dolphins in order to catch the yellowfin tuna below. See generally A212-213, 478-483, 1930-1937.

The major and significant impact upon dolphins by the modern purse-seine fishery technologies cannot be overstated. The fishing process involves first using speedboats and/or a helicopter to chase and herd the dolphins, encircling them with a net that extends down hundreds of feet, then using a cable to draw the net taught at the bottom, thus preventing the under-water escape of any tuna or dolphins. The

chase phase usually lasts 20-40 minutes, though sometimes up to several hours. Encirclement takes approximately 40 minutes, while dolphins may be confined for an additional hour before the fishermen begin the backdown release procedure. See, e.g., A1359-65.

The dolphin carnage is hardly surprising given the fact that dolphins are subjected to several hours of extreme disturbance, frequently subjected to explosive bomb devices, and surrounded by mile-long nets that often entangle them in some fashion. At least three populations of ETP dolphins – the northeastern offshore spotted dolphin, the eastern spinner dolphin and the coastal spotted dolphin – have suffered so many casualties from this fishery that they are officially designated as "depleted" under the U.S. Marine Mammal Protection Act.[1] The northeastern offshore spotted dolphin was 19-28% of its pre-exploitation size when listed as depleted in 1993. A668-80. The eastern spinner dolphin was 44%

[1] "Depleted" is defined under the MMPA as "a species or population stock [] below its optimum sustainable population." 16 U.S.C. § 1362(1). "Optimum sustainable population" (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 population level that results in maximum net productivity." 50 C.F.R. § 216.3. The MMPA requires the Secretary of Commerce to base decisions affecting depleted marine mammals "consistent" with keeping such species above, not below, OSP. 16 U.S.C. §§ 1373-74, 1361. These statutory provisions, inter alia, constitute the general duty to recover depleted marine mammals.

of its pre-exploitation size when listed as depleted in 1993. A681-89. And the coastal spotted dolphin was 42% of its estimated pre-exploitation levels when listed as depleted in 1980. A2163-2201. Since the time that the three populations were designated as depleted, U.S. National Marine Fisheries Service (NMFS) scientists have determined that the northeastern offshore spotted dolphin and eastern spinner dolphin are still likely being negatively impacted by intentional net sets in the ETP (the only area in the world where such a practice is known to occur), that neither species is recovering, and that at least the northeastern offshore spotted dolphin is still likely declining. Report to Congress, A1269, 1294-97.

Most ETP dolphins travel in pods or herds ranging from a handful to over a thousand individuals. Dolphins also possess a distinct social structure within pods. Just one set on dolphins can entangle, injure and kill an entire community of 500-2000 dolphins, as well as fatally disrupt familial bonds. These so-called "disaster sets" have untold negative impacts on the population. A765-77 ("one tuna boat has the potential to kill more than 5,000 dolphins in a single day"). In addition, because of visibility problems posed by darkness, many sets that take place at sunset become disaster sets, resulting in numerous deaths. A432 (revealing comparison of mortalities during day sets and sundown sets); A483 (National Academy of Sciences states "dolphin mortality increases markedly after dark").

Despite considerable scientific evidence of the nature of current dolphin deaths in the ETP, these deaths have never been adequately quantified, and in fact have likely been vastly underestimated. For example, NMFS scientists now believe, and have suspected for some time, that "the observation of a calf [young dolphin] deficit indicates that the reported dolphin kill fails to measure the full impact of purse-seine fishing on spotted and spinner dolphin populations." A2278 (Marine Mammal Science peer-reviewed article);A1264 (1999 memo from NMFS scientist Bill Perrin to NMFS scientist Steve Reilly regarding "missing juveniles"). Young dolphins, like most mammals, are extremely dependent upon their mothers for nourishment and protection, and a chase-induced separation of the two–which frequently occurs unobserved–is often fatal for the young. A2280. In addition to mother-calf separation, other types of unobserved deaths regularly occur as a result of the ETP tuna fishery, such as from acute injury to muscles or organs, predation from open wounds, and other physiological damage. See, e.g., A1280-83, 1354-55, 743-45, 178-80, 952.

The MMPA was originally passed in 1972 in large part because of public concern over the ETP yellowfin tuna fishery. Since that time, the MMPA has been amended several times – e.g., 1984, 1988, 1990, 1992, and 1997 – to address developments in this fishery. After the yellowfin tuna embargo was imposed

against Mexico in 1990 as a result of federal litigation brought by environmental plaintiffs, Mexico asked a General Agreement on Tariffs and Trade (GATT) arbitral dispute panel to be convened. A1657. One year later, a dispute panel concluded that the U.S. tuna embargoes violated the GATT despite the fact that the U.S. had applied arguably stricter dolphin safety standards to domestic vessels than against foreign fleets. United States – Restrictions on Imports of Tuna, DS21/R (September 3, 1991). This panel decision was never adopted by the full GATT, and the U.S. Government maintained that it possessed the sovereign right to keep the MMPA as it was written. See, e.g., H. Con. Res. 246 (1992). However, it was equally evident that the GATT panel decision, and accompanying arm-twisting by the Government of Mexico, had the effect of pushing the U.S. executive branch of government to seek an international agreement as quickly as possible. See, e.g., A715-716, 758, A1917-18.

In June 1992, the U.S. Government entered into the La Jolla Agreement, which sought to validate the practice of intentionally setting nets on dolphins with certain dolphin mortality caps, and which ushered in a new era with the tuna/dolphin program. A640-47. The La Jolla Agreement led in 1995 to the Panama Declaration, which was signed by eleven countries including the United States and Mexico. A732-40. The Panama Declaration, inter alia, sought to

progressively reduce dolphin mortality to levels approaching zero with the goal of eliminating dolphin mortality in the fishery, and to seek ecologically sound means of capturing yellowfin tunas not in association with dolphins. It also sought to establish annual dolphin mortality limits (DML), avoid bycatch of immature yellowfin tuna and other non-target species such as sea turtles, strengthen national scientific advisory committees, create incentives for vessel captains, and enhance compliance with the nations' commitments. But, significantly, the Panama Declaration sought to formalize a binding international agreement that nations recognized was "contingent upon the enactment of changes in United States law." A732,736, 741. Indeed, it was the Panama Declaration that prompted both the Clinton Administration and Congress to begin intense domestic deliberations on what would become the 1997 International Dolphin Program Conservation Act (IDCPA), codified at 16 U.S.C. § 1361 et seq.,

After passage of the IDCPA, which changed the U.S. embargo triggers for foreign tuna products, the nations that signed the Panama Declaration signed the Agreement on the International Dolphin Conservation Program ("international agreement") in February 1998. A957-990. The international agreement, which was not ratified by the Senate and is not a treaty, became effective in March 1999. Defendants, including Commerce, NMFS, and the Department of State, did not

engage the general public during the drafting of the international agreement. For instance, nothing in the record indicates that Defendants even attempted to comply with NEPA, 42 U.S.C. §§ 4321 et seq., in negotiating or finalizing the agreement.

On June 14, 1999, the U.S. National Marine Fisheries Service (NMFS), an agency under the Department of Commerce, published proposed regulations in the Federal Register to implement the IDCPA. A1591-1607. Public comments on the proposed rule were accepted through July 14, 1999. Two public hearings were held on the proposed rule. Plaintiff organizations both commented on the proposed rule and made comments at the public hearings relating to the proposed regulations. The record unquestionably indicates, however, that Defendants never provided public notice or comment opportunities on the draft Environmental Assessment (EA) pursuant to NEPA. A1596. Upon hearing nothing from Defendants on NEPA compliance, environmental groups sent a letter to them inquiring about the status of NEPA compliance. A1789-93. These groups never did receive public or direct notice that an EA was available for review. Meanwhile, the record of decision (ROD) for the IDCP EA was issued quietly in December 1999, and interim final rule was published in the January 3, 2000 Federal Register, with an effective date of February 2, 2000. A1861-90.

STANDARD OF REVIEW

This Court reviews a lower court's grant of summary judgment upon the administrative record without deference to the lower court and reapplies the summary judgment standard in an independent review to determine whether the moving party is entitled to judgment as a matter of law. See, e.g., Advanced Data Concepts, Inc. v. U.S., 216 F.3d 1054, 1057 (Fed. Cir. 2000)). See also Bestfoods v. U.S., 260 F.3d 1320, 1323 (Fed. Cir. 2001) ("We review the Court of International Trade's consideration of Customs' regulations, a pure question of law, de novo")(citing Texport Oil Co. v. U.S., 185 F.3d 1291, 1294 (Fed. Cir. 1999)); Blue Mountains Biodiversity Project v. Blackwood,161 F. 3d 1208, 1211 (9th Cir. 1998), cert. denied 527 U.S. 1003 (1999)(in a NEPA case, court reviews "de novo the grant and denial of a district court's order granting and denying summary judgment") (citations omitted).

Issues involving questions of the law are also reviewed de novo. McCall Stock Farms v. United States, 14 F.3d 1562, 1567 (Fed. Cir. 1993) (question before the court involved application of law to facts); Kane v. United States, 43 F.3d 1446, 1448 (Fed. Cir. 1994) (issues of statutory construction reviewed de novo). Statutory interpretation is thus a matter of law that this Court decides without deference to the interpretation reached by the Court of International Trade. Turtle Island Restoration Network v. Evans, 2002 U.S. App. LEXIS 4521 (March 21,

2002) at 25; SKF USA Inc. v. United States, 263 F.3d 1369, 1378 (Fed. Cir. 2001); U.S. Steel Group v. United States, 225 F.3d 1284, 1286 (Fed. Cir. 2000).

SUMMARY OF ARGUMENT

Defendants possess no authority to re-write the plain language of Congress when promulgating regulations. When Congress in 1997 clearly and unambiguously mandated that injurious "sundown sets" be completed "no later than 30 minutes before sundown," Defendants were not permitted to then issue a rule that states such fishing sets can be completed "no later than one-half hour after sundown." Congress' intent here is not murky, the legislative language is not "absurd" or an obvious mistake, and the sundown set language unquestionably helps and supports dolphin protection. The regulation must fall.

Defendants also prepared an arbitrary, capricious and unlawful Environmental Assessment (EA) for the IDCPA final rule. This EA has multiple fatal defects, including: blatantly inaccurate scientific analysis; illegal segmentation of key issues to avoid cumulative impacts analysis; obvious omissions and mistakes in analyzing the efficacy of the dolphin-safe tuna tracking and verification system; and a bevy of planning defects such as no public participation in the EA, no early scoping of important issues, and use of NEPA as a pre-ordained rubber stamp.

Accordingly, Defendants should have prepared an Environmental Impact Statement (EIS) for the number of major actions that together make up or contribute to the "International Dolphin Conservation Program" (IDCP): LaJolla Agreement (1992); Panama Declaration (1995); IDCPA (1997); International Agreement (1998-99); Pacific Tunas EA (1999); Interim Final Rule (2000); ETP Bycatch Rule and EA (2000); and Chase-Recapture Experiment EA (2001). Although no NEPA document had been prepared on the tuna/dolphin program since 1980, when an EIS was prepared, Defendants incredibly concluded that the major changes to the program over the last decade do not significantly affect the environment, nor even possibly do so. This conclusion was reached by Defendants despite the fact that legally "depleted" populations are clearly not recovering, endangered species of sea turtles are impacted, American consumers depend upon the program to buy accurately labeled tuna, international trade rules are precedentially affected, and the entire ETP fishery is undergoing dramatic pressures. Case law, CEQ Regulations, and Defendants' own rules and guidance all militate strongly in favor of a full EIS for the new tuna/dolphin program. Further, the law unambiguously requires the State Department and Treasury Department to participate in the NEPA process as cooperating agencies with the Commerce Department and its agencies.

The decision of the CIT must be overturned with respect to Defendants' MMPA sundown set provision and their woeful NEPA compliance on the new tuna/dolphin program.

ARGUMENT

I. Defendants' Re-Write of Congress' Clear Sundown Set Provision is Illegal.

A. The Statute Means What It Says.

Defendants dismiss as a "drafting error" the clear language of the statute requiring completion of the backdown procedure no later than 30 minutes before sundown for U.S. vessels participating in the IDCP. A1870(Comment 81). Compare MMPA/IDCPA, 16 U.S.C. § 1413(a)(2)(B)(v) with 50 C.F.R. § 216.24(c)(6)(i)("must be completed no later than one-half hour after sundown."). See also, A1644 (Consultation letter from Marine Mammal Commission to NMFS, arguing that the statute's meaning is clear and should not be changed unilaterally by the agency without going to Congress).[2]

[2] The U.S. Marine Mammal Commission (MMC) is an independent federal entity created by Congress to offer expert scientific and legal advice on marine mammal conservation. 16 U.S.C. §§ 1401-1407. Congress specifically asked Defendants to consult with the MMC on, inter alia, the regulations promulgated pursuant to the IDCPA and research relating to dolphin conservation in the ETP. See, e.g., 16 U.S.C. §§ 1413(b), 1414a.

In reviewing an agency's construction of a statute that it administers, this Court addresses two questions. The first question is "whether Congress has directly spoken to the precise question at issue." Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984). If so, the Court "must give effect to the unambiguously expressed intent of Congress." Id. at 843. If Congress has not spoken directly on the issue, the court addresses the second question of whether the agency's interpretation "is based on a permissible construction of the statute." Id.

In deciding whether Congress has addressed a specific issue under Chevron, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron at 842-843. "To determine Congress' intent, we employ the traditional tools of statutory construction." Splane v. Secretary of Veterans Affairs, 216 F.3d 1058, 1068 (Fed. Cir. 2000) (citing Chevron at 843 n. 9). 'We begin with the text of the statute itself." Splane at 1068. Thus, Congress's precise words in the statute–"30 minutes before sundown"–must prevail over the non-conforming regulations. 16 U.S.C. § 1413(a)(2)(B)(v) (emphasis added).[3]

[3] The CIT's statement "30 minutes after sundown does not conflict with express Congressional intent" when the statute states "30 minutes before sundown" flirts with the surreal. A18.

"That this is so seems evident from the plain language of the statute." Department of Housing and Urban Development v. Rucker, U.S. , 2002 U.S. LEXIS 2144 at 11 (March 26, 2002) (holding that plain language of statute unambiguously requires lease terms that give public housing authorities the discretion to terminate the lease of a tenant when a member of the household or guest engages in drug-related activity, regardless of whether tenant knew, or should have known, of the drug-related activity). "Where Congress has directly spoken to the precise question at issue," Chevron at 842, the Court need go no further.[4]

This situation is similar to that in Newman v. Teigeler, 898 F.2d 1574 (Fed Cir. 1990), in which the U.S. Office of Personnel Management argued that a provision of law was an "obvious drafting error." Id. at 1576. The Court stated, "It is well settled law that the plain and unambiguous meaning of the words used by Congress prevails in the absence of a clearly expressed legislative intent to the contrary." Id. Here, as in Newman v. Teigeler, the statute "is clear and unambiguous and the legislative history reveals nothing to indicate that Congress

[4] Even the Defendants' own 2000 legislative proposal to Congress to amend the MMPA includes changing the sundown set provision to "30 minutes after", indicating their recognition that only Congress (not the agency or the courts) can change this language. A2036, 2061.

intended an interpretation contrary to the plain meaning of these words." Id. No formal legislative history exists regarding this provision, which was added into the Senate bill that became law, after the House had passed its earlier but different bill.[5]

The CIT's reliance on U.S. Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc., 508 U.S. 439 (1993), was greatly misplaced. In that case, obviously misplaced punctuation led the D.C. Circuit to conclude erroneously that a section of law had been repealed. Id. at 462. In reversing, the Supreme Court relied upon "overwhelming evidence from the structure, language, and subject matter of the 1916 Act" to convince it that "the placement of the quotation marks in the 1916 Act was a simple scrivener's error, a mistake made by someone unfamiliar with the law's object and design.[6] "Courts, we have said, should

---

[5] The House later accepted the small handful of Senate changes in their entirety, including this sundown set provision. In addition to changing this sundown set provision, the Senate also rejected Panama Declaration language with regard to the definition of the dolphin-safe label. See Brower v. Evans, 257 F.3d 1058, 1061 (9th Cir. 2001).

[6] In conducting an exhaustive analysis, the Court concluded that a paragraph in the 1916 Act at issue was actually intended to be a part of the preceding paragraph and that quotation marks had been misplaced. Id. at 458-459. The Court also based its conclusion on "[a] comparison of the layout of the two Acts" as they appeared in the Statutes at Large, including spacing and paragraph breaks. Id. at 459 n9 ("With one exception, a paragraph break separates each of the introductory phrases in the 1916 Act from the text that follows within quotation

'disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute.'" Id. (quoting Hammock v. Loan and Trust Co., 105 U.S. 77, 84-85 (1882))(emphasis added).

Here, there are no issues regarding layout, spacing, repetition of language, or "the provisions of the whole law, and . . . its object and policy." Id. at 455. None of the "overwhelming evidence," Id. at 462, A16, that existed in U.S. Nat'l Bank exists here. Congress amended the law, and the amendment makes sense for dolphin protection. See also United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 543 (1940) ("There is ... no more persuasive evidence [intent] of than the words by which the legislature undertook to give expression to its wishes.").

The CIT also never justified why it looked beyond "traditional sources of legislative history" to reach its conclusion about Congressional intent. A16-17, citing Griffin v. Oceanic Contractors Inc., 458 U.S. 564 (1982). Griffin states in relevant part "Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive ... There is, of course, no more persuasive evidence of the

---

marks. The exception is the phrase mentioning Rev. Stat. § 5202, the text within quotation marks following on the same line after only a space. That, significantly, is precisely the layout of the amendment to Rev. Stat. § 5202 in § 13 of the 1913 Act.").

purpose of a statute than the words by which the legislature undertook to give expression to its wishes." Id. at 570. (citations omitted). The Supreme Court went on to hold that requiring a payment of over $300,000 by one party according to statute, where that same party wrongfully withheld only $412 in wages, was not absurd. Id. at 575.

The only legislative history on the sundown set timing change, besides the plain and logical legislative language itself, is the Declaration of U.S. Senator Barbara Boxer, A2099-2100, which the CIT inexplicably did not consider despite its potentially central relevance.[7] The other legislative history that is available is from the House of Representatives, which passed their original bill well before Senate action. See Department of Housing and Urban Development v. Rucker at 15 n4 (refusing to rely on passages from a Senate Report on proposed amendment where that amendment was rejected at Conference).

B. Congress' Plain Meaning is Overturned Only When the Result is Absurd or an Obvious Mistake.

[7] Although the CIT claimed that the Declaration of U.S. Senator Barbara Boxer was extra-record evidence, it failed to address why this crucial glimpse of legislative intent, by one of the key Senate bill architects, should not have been considered. This omission of the Boxer Declaration is particularly troubling given the Court's reliance on another (extremely biased) extra-record document -- a law review article by Richard Parker -- cited prominently in footnote 1 of the opinion. A2.

Courts have allowed an agency to re-draft a statute, but the standard for doing so is an extremely high one. One example is "an absurdity . . . so gross as to shock the general moral or common sense," and "something to make plain the intent of Congress that the letter of the statute is not to prevail." Crooks v. Harrelson, 282 U.S. 55, 60 (U.S. 1930)(citations omitted).

Other instances include an "obvious mistake," where the words make no sense, Bohac v. Department of Agriculture, 239 F.3d 1334, 1338 (Fed. Cir. 2001) (language referring to "consequential changes" was "obviously a mistake" in that Whistleblower Protection Act was intended to provide compensation for "consequential damages")[8]; an internal inconsistency in the statute, U.S. v. Colon-Ortiz, 866 F.2d 6, 9 (1st Cir. 1989), cert. denied, 490 U.S. 1051 (1989)(two provisions of criminal statute are "not only inconsistent, but . . . directly contradictory"). As the Supreme Court stated, for a court to allow the application of a meaning that the words of a statute do not literally bear "approaches the boundary between the exercise of the judicial power and that of the legislative

[8] Significantly, in Bohac, both parties acknowledged the error, and their position was supported by legislative history: "At the outset we are confronted by the inconvenient fact that the WPA does not in fact provide for the recovery of consequential 'damages,' although both parties urge us to treat it as though it did. . . (t)he reference to 'changes' is obviously a mistake." Id. at 1338.

power as to call rather for great caution and circumspection in order to avoid usurpation of the latter." Crooks at 60 (citations omitted).

C. The Sundown Set Provision Furthers the Congressional Goal of Dolphin Protection.

The CIT is correct in stating that "Congressional intent is paramount." A15. It is further puzzling, therefore, that the CIT would seek to redraft the statute, given that the plain language actually furthers the goal of the statute rather than frustrates it. The new standard secured by Senator Boxer clearly helps dolphin protection, particularly depleted dolphin conservation, and is consistent with the IDCPA requirement of "progressively reducing dolphin mortality to a level approaching zero." See 16 U.S.C. §§ 1361, 1362, 1371(a)(2), 1373, 1374.

It is clear that sundown sets are extremely deadly. A432 (scientific comparison of mortalities during day sets and sundown sets); A765 ("such equipment breakdowns and night-time problems were common and almost always resulted in all of the dolphins in the net dying"); A483 (National Academy of Sciences states "dolphin mortality increases markedly after dark"). Here, as in Newman v. Teigeler, "the legislative history reveals nothing to indicate that Congress intended an interpretation contrary to the plain meaning of these words." Id. at 1576. As this Court has concluded, "We do not fulfill our duty to say what the law is, by merely agreeing to Commerce's interpretation of the statutory

provision at issue if it is 'reasonable,' regardless of whether we think it correct." Timex, V.I., Inc. v. United States, 157 F.3d 879, 881 (Fed.Cir. 1998)(citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

The CIT, however, reaches the spurious conclusion that "[w]hen the language is placed in the context of twenty-five years of legislative enactments and enforcement congressional intent is clear." A16. The CIT surprisingly cites the 1988 amendments to the MMPA, which contain the "30 minutes after sundown" language. Id. Yet the court never explains how this history lesson can supersede the plain language of the statute passed almost a decade after the 1988 Act. The burden is on those who seek to change the plain language of Congress.[9]

Equally troubling is the CIT's reliance on the International Agreement to justify the agency re-write of Congress' plain language, considering the International Agreement was reached after the 1997 IDCPA. A17. See United States v. Guy Capps, 204 F.2d 655 (4th Cir. 1953), aff'd on other grounds, 348 U.S. 296 (1955)(US-Canada potato trade executive agreement cannot override Congressional provisions on same topic); Swearingen v. United States, 565

[9] The CIT, instead, improperly placed the burden on Plaintiffs to prove legislative intent despite the clear and logical language of Congress. See, e.g., A18 ("Defenders do not convince the court that Congress' use of the word 'before' is a true expression of Congress' intent; therefore, the Interim-Final Rule is not contrary to law").

F.Supp. 1019 (D. Colo. 1983)(international executive agreement void as conflicting with Internal Revenue Code section); Metropolitan Petroleum Corp v. U.S., 31 Cust.Ct. 71, 84 (1953)(Customs Service action based on Presidential proclamation, not Congressional statute, held void).

II. Defendants Have Violated NEPA.

The National Environmental Policy Act (NEPA) is our national charter for protection of the environment, and its well-established procedures ensure that accurate environmental information is available to public officials and citizens before actions are taken. 42 U.S.C. § 4331; 40 C.F.R. § 1500.1. "NEPA has twin aims." First, it places upon agencies the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that agencies will inform the public that they have indeed thoroughly considered environmental concerns in the decision-making process. Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983).

NEPA requires federal agencies to take a "hard look" at the environmental consequences of their actions as well as reasonable alternatives to them. Kleppe v. Sierra Club, 427 U.S. 390, 410, fn. 21 (1976), citing Natural Resources Defense Council v. Morton, 458 F.2d 827, 837 (D.C. Cir. 1972). The "hard look" doctrine applies to EAs. Sierra Club v. United States Dep't of Transp., 753 F.2d 120, 127

(D.C. Cir. 1985) (describing criteria for reviewing an agency's decision to forgo preparation of an EIS: " . . . once the agency has identified the problem it must have taken a "hard look" at the problem in preparing the EA.").

In this case, the "hard look" required of Defendants is driven largely (though not completely) by legal requirements of the MMPA, specifically the obligation to recover "depleted" populations of dolphins in the ETP, 16 U.S.C. §§ 1361, 1362, 1373-74, as well as "the objective of progressively reducing dolphin mortality to a level approaching zero ... with the goal of eliminating dolphin mortality." MMPA/IDCPA 16 U.S.C. §§ 1361, 1371, 1412. The "hard look" required of Defendants also must include close consultation with the Marine Mammal Commission on the new tuna/dolphin program, 16 U.S.C. §§ 1413 and 1414a(a), and serious consideration of recommendations made by entities such as the U.S. National Academy of Sciences. A562-75, 586-90. See also Federation of Japan Salmon Fisheries Cooperative Ass'n v. Baldridge, 679 F.Supp. 37 (D.D.C. 1987), affirmed Kokechik Fishermen's Ass'n v. Secretary of Commerce et al., 839 F.2d 795 (D.C. Cir. 1988), cert. denied 488 U.S. 1004 (1989)(protection of marine mammals under the MMPA is strongly in the public interest and relief should be granted to avoid needless harm to dolphins); Committee for Humane Legislation v. Richardson, 540 F.2d 1141, 1148 (D.C. Cir. 1976)(The MMPA is "to be

administered for the benefit of protected species rather than for the benefit of commercial exploitation.").

The Council on Environmental Quality (CEQ) NEPA regulations apply to all federal agencies. 40 C.F.R. § 1507.1 ("All agencies of the Federal Government shall comply with these regulations"). "CEQ's interpretation of NEPA is entitled to substantial deference." Andrus v. Sierra Club, 442 U.S. 347, 351 (1979). "NEPA's purpose is . . . to foster excellent action." 40 C.F.R. § 1500.1(b). NEPA contains "action-forcing" provisions to make sure federal agencies act according to the letter and spirit of the Act." 40 C.F.R. § 1500.1(a).

A. The IDCP EA[10] is Arbitrary, Capricious and Contrary to Law.

The October 1999 EA of the "Interim Final Rule to Implement the International Dolphin Conservation Program Act" (hereinafter "IDCP EA" or "EA"), A1652-1718, must be remanded back to the federal agencies for four fundamental reasons: 1) The EA contains blatant scientific inaccuracies, 2) The EA

[10] Although Plaintiffs' arguments on why an EIS should have been prepared are presented, infra, it is instructive up front to note that the 63-page IDCP EA is significantly longer than the suggested 10-15 page limit identified by CEQ for an EA, A414 ("lengthy EA indicates EIS is needed"), and is twelve pages longer than the 1980 EIS for the tuna/dolphin program. A186-249. There was also an EIS published on the tuna/dolphin program in 1977. A247. *No NEPA tuna/dolphin EIS or document had been prepared in almost twenty years when the IDCP EA was issued.*

illegally segments a number of interrelated ETP dolphin conservation and fishery management actions, which together possess significant cumulative impacts, 3) The EA fails to address serious problems with the crucial dolphin-safe label program; and 4) The EA failed to include any meaningful early planning or public participation, which led directly to its flaws.

1. The EA Possesses Blatantly Inaccurate and Dated Science on Dolphins.

Environmental information used in making NEPA decisions "must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b). NEPA mandates scientific and professional integrity, 40 C.F.R. § 1502.24, and honesty with regard to incomplete or unavailable information. 40 C.F.R. § 1502.22. "The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences. . ." 40 C.F.R. § 1500.1(c). Agencies "shall utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment." 42 U.S.C. § 4332(2)(A). Agencies "shall identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in

decisionmaking along with economic and technical considerations." 42 U.S.C. § 4332(2)(B). Agencies "shall initiate and utilize ecological information in the planing and development of resource-oriented projects." 42 U.S.C. § 4332(2)(H).

The March 1999 NMFS Report to Congress, A1269-1336, is by definition the highest quality information available regarding dolphin health in the ETP, containing the best cutting-edge dolphin science. Yet, incredibly, NMFS clearly did not utilize or rely upon the Report in any cognizable way in preparing the IDCP EA. None of the Report's analysis or conclusions are reflected in the EA.

Not only does the EA fail to cite the Report in its list of References, but it also fails to cite the four primary research documents prepared for the Report: 1) Curry, B.E., Stress in Mammals: The Potential Influence of Fishery-Induced Stress on Dolphins in the Eastern Tropical Pacific Ocean, A1345-1477; 2) Fiedler, P.C., Eastern Tropical Pacific Dolphin Habitat Variability; 3) Gerrodette, T., Preliminary Estimates of 1998 Abundance of Four Dolphin Stocks in the Eastern Tropical Pacific; and 4) Goodman, D., Decision Framework for Assessing the Status of the Eastern Tropical pacific Dolphin Stocks. These documents, all dated 1999, were written for NMFS by its own staff or contractors. But NMFS and other Defendants then ignored their own scientific experts, whose views were consistent with each other and not in conflict.

The EA relies on abundance estimates from dated surveys almost one decade old for the three depleted dolphin stocks, without analyzing the more recent data, which was available and indicates continued biological problems for the dolphins. Compare A1672-1675 (October 1999 IDCPA EA) with A1274-1276, A1292-1300 (March 1999 Report to Congress with more recent government studies included). The EA even admits, regarding NMFS's long-term large-scale research program to monitor trends in the abundance of ETP dolphin populations, that "subsequent surveys were made over the same general area in 1992, 1993, and 1998; however, the data from these surveys are still being analyzed." A1673. For reasons Defendants cannot seem to explain, this precise data was included in the Report to Congress, which pre-dated the EA. It was clearly arbitrary and capricious for the EA to ignore this readily available data, as well as the four new major studies that Defendants' own experts prepared for the Report to Congress. These omissions harmed Plaintiffs and completely skewed Defendants' NEPA analysis.

Consequently, the EA erroneously states that the depleted eastern spinner stock and depleted northeastern offshore spotted stock are "stable or slightly increasing." A1697. The Report to Congress correctly states a very different conclusion. Regarding the Northeastern offshore spotted dolphin, the Report states that the data demonstrate that it has declined from 1991 to 1998, the most recent

years for which data is available in the record. A1294. Regarding the Eastern spinner population, the Report states that the data "implies that the population was nearly stable or declined slightly from 1991 to 1998." A1295 The Report concludes that "[T]he currently depleted populations of both northeastern offshore spotted dolphins . . . and eastern spinner dolphins . . . are not increasing at the rate expected based on the low rate of reported mortalities from the fishery since 1991 and the reproductive potential for these populations." A1275. Regarding the coastal spotted dolphin population: the Report states that much essential information is lacking, and "consequently, 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 this species. A1297.

The Report to Congress states that the fishery is likely having a significant adverse impact on depleted dolphin populations. A1298.[11] The Report states that

---

[11] The Ninth Circuit, in the dolphin-safe label case, recently stated that the "the available information from the mandated abundance study and the stress literature review indicated that the fishery was having a significant adverse impact on the dolphin stocks. The abundance survey revealed that the dolphins were not recovering at expected levels, while the stress literature indicated that 'stress resulting from chase and capture in the ETP tuna purse-seine fishery could have a population level effect on one or more dolphin stocks'." Brower v. Evans, 257 F.3d 1058, 1071 (9th Cir. 2001). "Here, all the evidence indicated that dolphins were adversely impacted by the fishery." Id. The CIT completely failed to acknowledge these relevant scientific (i.e., factual) findings by the 9th Circuit, which completely contradict the CIT's own factual conclusions about the impact of

"the available information and evidence point to the likelihood that physiological stress is induced by fisheries activities. It is therefore plausible that stress resulting from chase and capture in the ETP tuna purse-seine fishery could have a population level effect on one or more dolphin stocks." A1281. The Report also states, "Fishery related stresses could plausibly affect mortality or reproduction." A1299. "[I]t is not appropriate to dismiss fishery-related stress as a source of the observed depression in growth rates." A1276.

NMFS's literature review similarly revealed a variety of stress and physiological effects. "Search operations may disrupt habitat utilization, foraging activities, and social activities. Capture and pursuit have been documented to cause stress. . . ." A1280. Other effects include severe muscle damage, which "could cause unobserved mortality." Id. The Report, in addition, addresses the likely disruption of reproductive cycles and the effects of the fishery on calf mortality: "[I]t seems likely that the reproductive cycle for some female dolphins will be disrupted." A1281. Furthermore, "Cow-calf separation can occur as the result of chase and capture, and it is likely that this separation will result in the calf's death ..." Id. "The assumption is that calves, by and large, will not survive on their own." A1282. "Considering the huge numbers of lactating females

---

the fishery on dolphins. A44 (footnote 17).

encircled on a yearly basis and released alive, even very conservative assumptions about calf mortality during the separation could account for a very high additional number of dead dolphins not included in the reported kill." A1283. "[I]t appears that young animals may be particularly vulnerable to impacts of fisheries operations." A1281.

The IDCP EA discusses none of these issues pertaining directly to dolphin conservation, and subsequently reaches conclusions contrary to its scientific conclusions reached elsewhere by Defendants, including the Report to Congress. Most disturbingly, the EA fails to acknowledge or explain findings in the Report that indicate, despite reported decreases in observed or reported dolphin mortality, these species are not recovering. A1264-65, 1298-99, 2278. The dolphin science in the EA and the Report simply cannot be reconciled despite the CIT's tortured attempt to do so. Unlike the Report to Congress, the EA fails to note that depleted dolphin stocks are not recovering and completely ignores the fact that the depleted northeastern offshore spotted dolphin declined from 1991-98, the most recent years available at the time of both the EA and the Report to Congress. A1294-95.

2. The IDCP EA Illegally Segments Environmental Impacts, and Fails to Consider Cumulative Effects.

One of the fundamental flaws in the CIT's NEPA decision in this case is its illegal allowance of "segmentation." Segmenting coordinated proposals in order to

restrict the scope of the environmental review process, as Defendants have done here, is clearly prohibited by NEPA.

NEPA specifically requires a single EIS when closely related actions are to be taken in concert with each other. "Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement." 40 C.F.R. § 1502.4(a). "Significance cannot be avoided by . . . breaking it down into small component parts." 40 C.F.R. § 1508.27(b)(7). The scope of a NEPA document must include "[c]onnected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they. . . are interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1), a(1)(iii). An agency should analyze actions involving common timing or geography in the same impact statement "when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement." 40 C.F.R. § 1508.25(a)(3).[12]

---

[12] See also Fund for Animals v. Clark, 27 F. Supp. 2d 8, 13 (D.D.C. 1998) ("[A]n agency may not segment actions to unreasonably restrict the scope of the environmental review process") (declaring an EA for bison management plan inadequate because it failed to consider environmental impact of existing elk and bison feeding programs in same geographic area).

For example, the court below attempts to defend the Defendants' October 1999 IDCPA EA, by pointing toward a second EA, A1056-1080, completed by Defendants in January 1999 "For Regulations to Implement Management and Conservation Measures Under the Pacific Tunas Conventions Act." A50. But, in reality, this second EA, closely-related in both subject matter and time to the IDCP EA, reinforces Plaintiffs' position. Despite the fact that the Pacific Tunas EA predates it by nine months, the IDCP EA does not reference the Pacific Tunas EA in any way, and does not attempt to meaningfully utilize available fisheries management information for dolphin protection. This is irrational and illegal.[13]

In fact, Defendants have issued two additional and closely-related EA s subsequent to the October 1999 IDCP EA: an October 2000 EA, A2000-2015, on "Measures to Reduce Bycatch by U.S. Vessels in the ETP Purse Seine Fisheries and Information Collection for a Regional Vessel Register" and a June 2001 EA, A2110-2136, on the "Chase-Recapture Experiment Under the International Dolphin Conservation Program Act." Although the subject matter in all four of

---

[13] See, e.g., 40 C.F.R. § 1502.20 ("The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions"); 40 C.F.R. § 1508.28 ("Tiering" refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses ...").

these EA s possesses obvious synergies, the four documents lack any sort of coordinated analysis and fail to provide overarching coverage on the key issues preventing dolphin recovery in the ETP. Together, the four total EA s help demonstrate one of Plaintiffs' central points: Defendants have never taken a comprehensive and complete environmental look at the new tuna/dolphin program, which began being built in 1992 when the LaJolla Declaration was signed.[14] See also A5-9, 55 (The LaJolla Agreement led to the Panama Declaration, which led to the 1997 IDCPA, which led to the International Agreement).

Similarly, cumulative impacts are those that result from "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. . . . (and) can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7. An

---

[14] The CIT implicitly accepts the relevance here of Public Citizen v. Office of the U.S. Trade Representative, 970 F.2d 916, 918 (D.C. Cir. 1992), that IDCP negotiations were "not concrete enough" to constitute an action needing NEPA review. No one disputes that all the major actions by Defendants over the last decade were built upon the previous action, each with no environmental review. See 40 C.F.R. § 1506.1(a). Defendants simply are not allowed under NEPA to cherry-pick one portion of the new tuna/dolphin program in isolation to conclude no major environmental impact. But see A55 ("The Interim-Final Rule was promulgated to implement the IDCPA. It did not fundamentally change the tenets of the LaJolla Agreement or the Panama Declaration, with which tuna-harvesting nations in the ETP were already bound to comply. As such, it would not significantly affect the quality of the environment.").

agency should evaluate in the same EIS "[c]umulative actions, which when viewed with other proposed actions have cumulatively significant impacts." 40 C.F.R. § 1508.25(a)(3). In the case at hand, "(N)o document explores the collective impact of"a new all-time record 28,333 total sets in 1998 under the new tuna/dolphin regime, including dolphin sets up to over 11,000, which is the highest level since 1989 (the year before the U.S. tuna embargoes kicked in). Blue Mountains Biodiversity Project at 1215. See also A1531, 1510. Given available evidence on the physiological stress and unobserved mortality to dolphins in the ETP fishery, there is no denying the cumulative impact of so many dolphin sets upon depleted dolphin populations.

By failing to coordinate the four obviously-related EA s – as well as by failing to meaningfully analyze key issues such as undercounting of killed dolphins, overfishing of marine resources in the ETP, and utilizing all feasible technological alternatives for avoiding setting nets on dolphins – Defendants have clearly failed to consider the cumulative impacts of all actions upon the lack of dolphin recovery in the ETP. See Proposed Amici Brief of Dr. Albert Myrick et al. NEPA and CEQ regulations require that all related actions be addressed in the same analysis. See, e.g., Kern v. BLM, U.S. App. LEXIS 4602 (9th Cir. March 22, 2002) at 32 ("If the cumulative impact of a given project or other planned projects

is significant, an applicant cannot simply prepare an EA for its project, issue a FONSI, and ignore the overall impact of the project ...")(citations omitted).[15]

3. The EA Makes the Dolphin-Safe Label a Paper Tiger.

Also confounding is the CIT's treatment of Brower v. Evans, 93 F.Supp.2d 1071 (N.D. Cal. 2000), aff'd 257 F.3d 1058 (9th Cir. 2001), which held that the Secretary of Commerce must keep the present dolphin-safe label definition of "no intentional netting of dolphins" as a result of the scientific studies conducted by the Secretary and his delegatees.[16] The IDCP EA, however, states the opposite. See, e.g., A1656 ("The standard for use of dolphin-safe labels for tuna products will change."); A1695("[U]nder the IDCPA, the definition of dolphin-safe tuna will

---

[15] See also Council on Environmental Quality, Executive Office of the President. Considering Cumulative Effects under the NEPA (January 1997). A768-A889.

[16] In order to have changed the dolphin-safe definition from the current and twelve-year old standard of "no intentional netting of dolphins," the Secretary must have first not found that "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 (ETP)." MMPA/IDCPA, 16 U.S.C. § 1385(d), (g), (h). If he did so "find," the Secretary could not change the label. Id. See also Brower v. Evans at 1061, 1064. If the dolphin-safe label were to be changed, the present standard of "no intentional netting of dolphins" would be replaced with "no observed deaths or likely mortalities." Id. See also 50 C.F.R. § 216.3. For purposes of this appeal on NEPA, the actual definition of dolphin-safe is largely irrelevant. What is relevant are cutting-edge scientific and technical studies and data that went into the findings that led to the Report to Congress. See, e.g., 16 U.S.C. § 1414a.

change. Specifically, tuna harvested in a set with no observed dolphin mortality or serious injury will be considered dolphin-safe, regardless of whether the set intentionally encircled dolphins to catch tuna."). This incorrect and inadequately qualified assertion undermines the entire dolphin-safe program, and specifically the elaborate tuna tracking and verification system created by Congress. See MMPA/IDCPA, 16 U.S.C. § 1385(f).

Brower v. Evans is now a binding U.S. Court of Appeals decision that the Secretary of Commerce declined to appeal to the U.S. Supreme Court; it is not merely "the subject of litigation in the Northern District of California." A9. More substantively, the CIT misunderstood the full relevance of the relationship between the label definition and the overall tuna/dolphin program when it opined, "Whether the decision in Brower, combined with non-corresponding IATTC reports, means that some tuna harvested by the Mexican fleet will be excluded is not an issue the Secretary was required to consider when making his findings with regard to Mexico." A64. While this may be correct with regard to the Secretary's decision to embargo Mexican tuna, a decision Plaintiffs do not appeal here, it is not correct with regard to NEPA compliance. Consumers in the United States have a right to know whether the tuna they buy with the "dolphin-safe" label is truly dolphin-safe. It does not matter whether that tuna is from an American, Mexican,

or other national vessel. The entire integrity of the program, once the ground rules are set, depends upon a net-to-boat-to-port-to-processor-to cannery-to-shipment-to-wholesaler-to-retailer-to-consumer system that produces verification of the sold commercial product (i.e., dolphin-safe tuna). See NEPA, 42 U.S.C. § 4332(2)(A), (C), (E), (F), (G), (H).

Thus, there are at least six major reasons why Defendants' cavalier treatment of the dolphin-safe label run afoul of NEPA's mandate for "excellent action" with "accurate analysis" and "public scrutiny" on behalf of environmental mandates such as dolphin conservation. 40 C.F.R. § 1500.1 - 1500.3. These six reasons painfully demonstrate why the IDCPA EA's rosy assertion that the "proposed U.S. tracking and verification program will be successful in tracking 'non-dolphin safe' and 'dolphin-safe' tuna from domestic and foreign sources" is both wrong and prejudicial. A1696, 1665.

First are the IATTC tuna tracking forms (TTF) – the very basis of the entire tuna tracking and verification system – that simply do not contain the necessary information to determine "dolphin-safe" status of imported tuna into the United States. See A2244-47. The fact that these TTFs do not say whether dolphins have been encircled, which is the present label definition, is nothing less than outrageous. The TTFs are the forms used throughout the entire process to ensure

that truly dolphin-safe tuna gets labeled that way for consumers. A2293 (tracking system flow chart prepared by Defendants).

Second is an apparent knowing falsehood by Defendants in the EA about the framework assertion, where they say "Given the opportunity, the U.S. canned tuna processing industry will buy tuna caught by chasing and encircling dolphins, provided no dolphins were killed or injured." A1695-96. Contrary to this assertion, the U.S. canned tuna processing industry had already told Defendants that it would not and will not "buy tuna caught by chasing and encircling dolphins." See A1266-7 (February 18, 1999 letter from David Burney, U.S. Tuna Foundation, written well before October 1999 Final IDCPA EA, stating that "each of the U.S. canned tuna processors notified me that they intend to retain their non-encirclement policy regardless of the findings that you make in March of this year."). The NEPA implications of this significant tracking and verification problem are numerous. See 40 C.F.R. §§ 1500.1(b), 1500.2(b), (c), (f), 1502.22, 1508.27(b)(10).

Third is the saga of Mexico's Dolores-brand tuna, large quantities of which were found in the United States without any legal documentation but with thousands (if not multiple millions) of unverifiable dolphin-safe labels. A2016-2029. These illegal shipments amply support the concern of the U.S. Marine

Mammal Commission, which told Defendants "[I]t is difficult to ascertain whether the proposed series of spot-checks will in fact provide the needed oversight of what otherwise will be only a paper trail." A1645.[17]

Fourth is the serious doubt by the U.S. Customs Service about whether it can monitor compliance of the label the way NMFS has configured the program. A1938-1942. Even some NMFS staff expressed honest challenges about the difficulties in changing the tracking and verification system that should have found their way into the EA. See, e.g., A2088 ("the U.S. tuna tracking and verification program would be 'mostly paperwork in the office.'"); A2301 ("Assuring the integrity of dolphin safe tuna from foreign canneries will require the development of new inspection and verification programs.").

Fifth is the curious situation of a Mexican national receiving the first U.S. permit to set nets on dolphins in almost a decade, A1774-84, and the ability of this and similar individuals to exploit the system. The extremely curious matter of Mr. Phillipe (Felipe) Charat of Mexico demonstrates, at the very least, how the new tracking and verification system can be severely manipulated. See also A2306-08 (particularly ¶¶17-18).

---

[17] See also "The axe is falling on our budget," says NMFS official. A1054 (further reducing ability to implement program).

Sixth are the rampant tuna/dolphin program violations and reported violations by foreign vessels in the record, which may not be enough to trigger the MMPA's embargo provisions, but certainly are worthy of honest discussion and analysis in the EA. See, e.g., A899-915, 927-945, 2309-2325 (detailing numerous potential infractions, including highly serious use of illegal explosives, improper backdown procedures, unlawful night sets); A2327 ("The representative of the United States noted that the reports of the nations to the IRP regarding possible infractions were incomplete, which damaged the credibility of the program."); A2364 (Mexican observers being paid large sums of money to falsify reports); A2359-61 (discussion of major discrepancies with Mexican observers and illegal dolphin sets by small boats). Instead of reflecting this undeniable problem with enforcement, the EA wishes the problem away with no discussion of the issue and actually concludes without any qualification that the new tracking system will "accurately document the dolphin-safe condition of tuna as it is fished, processed, and sold to the wholesale and retail markets in the United States and throughout the world." A1665, 1696.

In sum, the IDCP EA makes many fundamentally incorrect framework assertions and assumptions[18] about the dolphin-safe label program, leading to highly misleading and illegal actions, which contravene Congress' intent on implementing the tracking and verification system, and violate high quality information and excellent action requirements. See generally 40 C.F.R. Part 1500.

4. The NEPA Process Excluded Timely "Outside Expert" and "Public" Participation.

Public scrutiny and early participation is essential to implementing NEPA and, indeed, helps reduce the type of accuracy problems already identified by Plaintiffs. In the NEPA process governing the new tuna/dolphin program, however, the public was intentionally excluded and the process short-circuited. No legal notice or opportunity for public comment was provided during this NEPA process, resulting in a final EA virtually identical to the draft EA, and devoid of meaningful analysis, alternatives, and assumptions.

An EA "should provide a springboard for public comment" on the agency's decision. Illinois Commerce Comm'n v. Interstate Commerce Comm'n, 848 F.2d 1246, 1260(D.C. Cir. 1988), cert. denied 488 U.S. 1004 (1989). See also

[18] Again contrary to the IDCP EA, Defendants have no basis to conclude that "U.S. consumers will purchase 'dolphin-safe' tuna under the new labeling standards." A1696. This framework assumption is important because of U.S. consumer buying power in the world tuna market. A1694.

Baltimore Gas & Elec. Co. at 97. (NEPA "ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process," citing Weinberger v. Catholic Action of Hawaii/Peace Education Project, 454 U.S. 139, 143 (1981)). "Agencies shall make diligent efforts to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. § 1506.6(a). "Agencies shall provide public notice of NEPA-related hearings. . . and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected." 40 C.F.R. § 1506.6(b). "In all cases the agency shall mail notice to those who have requested it on an individual action." 40 C.F.R. § 1506.6(b)(1). "In the case of an action with effects of national concern notice shall include publication in the Federal Register and notice by mail to national organizations reasonably expected to be interested in the matter . . . ." 40 C.F.R. § 1506.6(b)(2).

Here, Defendants buried the draft EA's existence in one phrase within the middle of an 18,000+ word Federal Register notice, A1596, which does not even say the EA was a draft, available for public review or could be obtained. Despite specific inquiries by Plaintiffs, A1789-93, Defendants did not contact them about NEPA compliance with the new tuna/dolphin program until two days after this

litigation commenced. A1914-1915. The first public notice about either the final or draft EA was in conjunction with the final rule. A1878.

Defendants clearly failed in their responsibilities for public scrutiny, 40 C.F.R. § 1500.1(b), and public involvement, 40 C.F.R. § 1501.4(b) during the IDCP NEPA process.[19] Defendants held two hearings on the proposed rule to implement the IDCPA, and accepted comments on the proposed rule. It would have been quite helpful, and not overly burdensome at all, to accept comments on the draft EA, which by definition encompasses a broader range of questions and issues than did the proposed rule to implement the 1997 IDCPA.

In this regard, Hanley v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), cert. denied 412 U.S. 908 (1973), is instructive. Before "a preliminary or threshold determination of significance is made the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision." Id. at 836. There, the court found that the agency overlooked several important issues and facts, the court remanded for a further investigation with directions "to accept from

[19] "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before action is taken." Federal agencies "shall involve" "the public" "to the extent practicable" in preparing environmental assessments. Id.

appellants and other concerned citizens such further evidence as they may proffer within a reasonable period . . . and to redetermine whether the [project] 'significantly affects the quality of the human environment.'" Id. See also Save our Ecosystems v. Clark, 747 F.2d 1240, 1247 (9th Cir. 1984)(draft EA was the "functional equivalent" of EIS); Sierra Club v. Hodel, 848 F.2d 1068, 1093 (10th Cir. 1988)(describing NEPA's "express policy" to involve the public in the study process).

Excluding the public and outside scientific experts from participating in the draft EA was indicative of the lack of early planning throughout the entire NEPA process for the new tuna/dolphin program, a lack of planning that precluded win-win opportunities.[20] See generally 40 C.F.R. §§ 1500.5(a), (d), 1501.1(a), (d),

[20] Indicative of the mindset that gripped the federal agencies as they attempted to ram their final rule through the approval process was the following admission about the biological opinion for sea turtles and other listed species under the Endangered Species Act (ESA): "[T]he BO is now going to hold up the package. This is a problem. The BO needs to be signed before Penny signs the interim final rule ... [Craig] thinks the BO needs a lot of work and they are not comfortable standing behind it." A1785. This statement was made after the Final IDCP EA was finished and just weeks before the record of decision was signed by the head of NMFS. Not surprisingly, Defendants failed to prepare a biological assessment, as required under ESA. See 16 U.S.C. § 1536(c); 40 C.F.R. § 1500.5(g)("Integrating NEPA requirements with other environmental review and consultation requirements."); 40 C.F.R. § 1508.27(b)(9), (10).

1501.2.[21] Here, because they never asked the interested public, the federal agencies did not consider the full impacts of intentionally chasing and setting nets on dolphins upon dolphin conservation, did not consider the impacts of overall tuna overfishing upon dolphin conservation, and did not consider viable management and technological alternatives previously identified by the U.S. National Academy of Sciences. A562-75, 586-90.

In fact, Defendants limited their alternatives to really only two in the IDCP EA, while a third (the required status quo alternative) was clearly illegal because it expressly contravened the requirements of the 1997 IDCPA. A1660. Between these remaining two alternatives, the only real difference was that certain legislative language was interpreted in different ways. A1665-66. All of the basic faulty or limited assumptions were the same for both alternatives. Not once did Defendants ask for or consider truly different alternatives from outside scientists or the public that was both consistent with the IDCPA and perhaps more protective of dolphins. The court below perpetuated this unlawful result by confusing the true

---

[21] "Agencies shall reduce delay by integrating the NEPA process into early planning" and "(u)sing the scoping process for early identification of what are and what are not the real issues." "Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." Id.

impacts of setting nets on dolphins (e.g., cryptic kill problems) with the alternatives in the IDCP EA, A47, not realizing that the alternatives section is "the heart" of the NEPA process. 40 C.F.R. § 1502.14, 1505.1(e).[22]

The purpose behind NEPA's review processes is not "to rationalize or justify decisions already made" or to take action "that limit[s] the choice of reasonable alternatives." 40 C.F.R. §§ 1502.5, 1506.1(a). "The phrase 'range of alternatives' refers to the alternatives discussed in environmental documents. It includes all reasonable alternatives, which must be rigorously explored and objectively evaluated. . . " A391(Answer to Question 1) (emphasis added). "[C]onsideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process." Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29(9th Cir. 1988), cert. denied, 489 U.S. 1066 (1989). Consideration of alternatives should be "more than an excuse in frivolous boilerplate." Vermont Yankee Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 551 (1978).

[22] Agencies shall "study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). "This requirement extends to all such proposals" including EA s. 40 C.F.R. § 1507.2(d).

In a recent analogous case, a U.S. Court of Appeals held that the Department of Commerce's EA was illegal where the defendants failed to start the NEPA process "at the earliest possible time" in order to ensure that all planning and decisions reflected full environmental values, where officials were "predisposed" to finding that proposal had no significant environmental impacts, and where the agency's decision not to prepare an EIS lacked a "convincing statement of reasons." Metcalf v. Daley, 214 F.3d 1135 (9th Cir. 2000). "[T]he comprehensive 'hard look' mandated by Congress and required by the statute must be timely, and it must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." Id. at 1142. "Federal Defendants did not engage the NEPA process 'at the earliest possible time' [as required by 40 C.F.R. § 1501.2] . . . did not even consider the potential environmental effects of the proposed action until long after they had already committed in writing to support the . . . proposal." Id. at 1143. See also Save the Yaak Committee v. Block, 840 F.2d 714, 718 (9th Cir. 1988) (agency failed to take the required "hard look" where EA was prepared after award of construction contracts, thus limiting its usefulness in planning agency action).

B. Defendants Must Prepare an EIS.

NEPA requires an EIS for any "major federal action" "significantly" "affecting" the quality of the "human environment" 42 U.S.C. § 4332(2)(C). There is no single test to determine whether an EIS is necessary. See, e.g., Sierra Club v. Peterson, 717 F2d 1409, 1413 (D.C. Cir. 1983) (four-part test in determining whether agency should prepare an EIS).[23] "Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial." 40 C.F.R. § 1508.8(b). Federal agencies must "supply a convincing statement of reasons to explain why potential effects are insignificant" and should prepare an EIS when an action 'may have' significant environmental effects." Blue Mountains Biodiversity Project at 1211-12(emphasis added).

1. The New Tuna-Dolphin Program is "Major" and Will "Significantly" Affect the Environment.

"Major Federal action" includes actions with effects that may be major. . ." 40 C.F.R. § 1508.18 (emphasis added). "Major reinforces but does not have a

[23] If the agencies fail to perform any one of the four parts, the FONSI will be overturned. Here, Defendants failed all four parts by: a) not taking a hard look at several important issues; b) omitting accurate or useful analysis as to why dolphins are not recovering in the ETP, c) not making a convincing case the environmental impacts of the new tuna/dolphin regime would be insignificant, and d) not attempting to reduce the impacts of its actions by, inter alia, reducing the total number of sets on dolphins, devising strategies to combat overfishing, identifying alternatives that could catch tuna and protect dolphins simultaneously. Id.

meaning independent of significantly." Id. "Federal actions" include "[a]doption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act. . . ; treaties and international conventions or agreements. . . [a]doption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive." 40 C.F.R. § 1508.18(b).

"Significantly" as used in NEPA requires considerations of both context and intensity." 40 C.F.R. § 1508.27. "Context" means that the significance of the actions should be analyzed at various levels, including international and national contexts, and specifically includes "society as a whole. . . . Both short- and long-term effects are relevant." 40 C.F.R. § 1508.27(a). Thus, the International Agreement's precedential value for international conservation collaboration, the new program's impact on U.S. domestic tuna embargoes within a world trading system, the efficacy of one of the heretofore most successful and popular environmental consumer initiatives ever, and the overall impacts to dolphin sustainability and other marine wildlife conservation are among the intense contextual issues at stake.

"Intensity" "refers to the severity of impact," 40 C.F.R. § 1508.27(b), and includes a consideration of ten factors, such as: 1) impacts that may be beneficial and adverse, even if on balance the effect is believed to be beneficial, 4) the degree to which the effects on the quality of the human environment are likely to be highly controversial, 5) the degree to which possible effects are highly uncertain, or involve unique or unknown risks, 6) the degree to which the action may establish a precedent for future actions or represents a decision in principle about a future consideration, 7) whether the action is related to other actions with cumulatively significant impacts, 9) the degree to which the action may adversely affect an endangered or threatened species under the Endangered Species Act, 16 U.S.C. § 1531 et seq., and 10) whether the action threatens a violation of federal law for environmental protection.

Recognizing that factor number 1 and factor number 7, supra, each address the segmentation and cumulative impacts issues discussed in Section II.A.2., the remaining five applicable factors each also gravitate strongly toward a significant environmental impact from the new tuna/dolphin program. For instance, the proposed action is undeniably controversial as Defendants admit numerous times in the record. 40 C.F.R. § 1508.27(b)(4). "This action is controversial." A1340; "This action is controversial." A1767; "CONTROVERSIAL" interim final rule")

(emphasis in original). A1797; "controversy," A1343. A new major environmental program beset with the intense attention of multiple sides of the debate[24] "is precisely the type of 'controversial' action for which an EIS must be prepared." Foundation for North American Wild Sheep v. United States Dep't of Agric., 681 F.2d 1172, 1182 (9th Cir. 1982) (where court referred to the "numerous responses from conservationists, biologists, and other knowledgeable individuals, all highly critical of the EA and all disputing the EA's conclusion"). An EA is also insufficient when it fails to provide a "well-reasoned explanation" addressing substantial disputes regarding its impact on the environment. LaFlamme v. FERC, 852 F.2d 389, 400-01 (9th Cir. 1988).

Consideration of "intensity" also includes degree to which effects on environment are "highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b)(5). Whatever one's opinion on the tuna/dolphin debate, it is impossible to argue that intentionally setting nets on dolphins possesses certain or known risks. As the available scientific evidence indicates, supra, there are uncertain or unknown impacts to setting nets on dolphin pods over 10,000 times annually, including the reality that no one is certain precisely how many dolphins

[24] Plaintiffs alone total approximately 10 million members and supporters in the United States, who were never able to submit an alternative to Defendants on the IDCPA EA and who were never invited to participate in the NEPA process.

are actually killed (i.e., not merely observed killed) by the fishery annually. Overfishing and excessive fleet capacity are further hurting the dolphin's ecosystem, though the exact extent is also not completely clear. See, e.g., A1544("[T]he annual effort [for ETP yellowfin tuna] has increased by 27% in the last five years, and . . . "this is greater than the optimum level of effort and could cause a slight decline in sustainable production. These declines will take several years to manifest themselves fully."); Lifting a long-standing trade embargo is also "unique" and "highly uncertain." See IDCPA Environmental Assessment, A1697. ("These embargoes have likely benefitted ETP dolphin stocks.")

Because the International Agreement was struck, at least in part, to address concerns of both the Government of Mexico and the World Trade Organization[25], and because, in any event, the International Dolphin Conservation Program is a new chapter in multilateral environmental protection for global fisheries, it surely appears at this point that the new tuna/dolphin program is "precedential." 40 C.F.R.

[25] See, e.g., A1657 (comment in EA); A690-91(memo from NOAA Senior Counselor to Will Martin discussing "implications" of EU GATT tuna/dolphin decision against U.S.); A715 (memo from Will Martin to Secretary of Commerce stating that Mexican Fisheries Minister is "frustrated and fed up" with lack of movement on tuna/dolphin issue, and that Mexico is considering "extreme measures" including "new case against U.S. 'dolphin-safe' laws in the WTO" if situation cannot be resolved).

§ 1508.27(b)(6). See A1917-18.[26] "Even if federal authorities were to have an opportunity to consider the environmental effects of the [project] at a later time, that later consideration would be unlikely to offer the decisionmaker a meaningful choice about whether to proceed." Sierra Club v. Marsh, 769 F.2d 868, 879-881 (1st Cir. 1985) (Breyer, J.) (setting aside an agency's EA and FONSI that failed to evaluate precedential effects of proposed cargo port and causeway).

The final agency actions at issue may also adversely affect an endangered or threatened species" under the ESA. 40 C.F.R. § 1508.27(b)(9).[27] The action affects five species of ESA-listed sea turtles that are incidentally taken (as "bycatch") during fishing operations in the ETP and for which the U.S. Fish and Wildlife Service prepared a Biological Opinion under the ESA. A1681-84, 1798-58. Defendants, in fact, have been so concerned about the biological health of sea turtles that they prepared both a Bycatch EA, A2000-2015, discussed in Section

---

[26] The Mexican Ambassador to the U.S. stated, "It is important to underscore that a negative result could imply a reversal of presidential commitments, and of an international accord which has become a model for international cooperation on environmental matters. For the future, this undoubtedly would have an adverse impact on marine ecosystems, well beyond the Eastern Pacific Ocean."

[27] The leatherback turtle, for instance, is in severe danger of going extinct after over 100 million years on Earth. A2345-2358, 1684, 2365-70, 2380 (NMFS Recovery Plan states "In the Pacific, leatherback populations are in severe decline and recovery actions must be given highest priority.").

II.A.2., and a final rule implementing this sea turtle protective plan. 66 Fed. Reg. 49317 (September 27, 2001).

Finally, Defendants should have more seriously considered whether the new tuna/dolphin program threatens a violation of federal law or requirements imposed for the protection of the environment." 40 C.F.R. § 1508.27(b)(10). While Plaintiffs are only appealing one of their several MMPA claims before this Court, it bears repeating that the entire efficacy of the tuna tracking and verification system is seriously in doubt, as discussed in Section II.A.3. The fact that such major questions exist about this centrally important system is indicative of the need to have prepared a full EIS, addressing and exploring all foreseeable problems in a straight-forward manner. In addition, there is a continued failure of the IDCP to designate per-stock per-year DMLs for the depleted coastal spotted dolphin.[28]

2. NOAA NEPA Guidelines Require an EIS.

NOAA NEPA guidelines are binding on both NOAA and NMFS. See Sierra Club v. Babbitt, 15 F.Supp. 2d 1274, 1281 (S.D. Ala. 1998) (FWS decision

[28] See A2344 (depleted coastal spotted not protected under IDCP); A1664 ("unless and until the IDCP nations allocate per-stock mortality limits among nations."); A1643 (Marine Mammal Commission stating "That per-stock limits will be allocated in such a fashion is more certain than this discussion suggests" referring to what is now 50 C.F.R. § 216.24(f)(9)(D)(2)("If a per-stock per year quota is allocated ...")).

to issue incidental take permits was arbitrary and capricious because agency ignored its own guidelines, including internal conservation handbooks.) In re Glacier Bay United Cook Inlet Drift Assoc., 71 F.3d 1447, 1451-1452 (9th Cir. 1995) (NOAA does not possess discretion to ignore Department of Commerce's "hydrographic manual" when preparing charts.)

NOAA guidelines require an EIS in this case. NOAA's Environmental Review Procedures for Implementing NEPA, Administrative Order 216-6, A1478-1509, contains "Specific Guidance on Significance of Fishery Management Actions." §§ 6.01(b), 6.02. The latter section requires an EIS when:

- the proposed action may be reasonably expected to jeopardize the sustainability of any target species that may be affected by the action. § 6.02(a). A1497.
- the proposed action may be reasonably expected to jeopardize the sustainability of any non-target species. § 6.02(b). A1497.
- the proposed action may be reasonably expected to adversely affect marine mammals. § 6.02(e). A1497-98.
- the proposed action may be reasonably expected to result in the cumulative adverse effects that could have a substantial effect on the target species or non-target species." § 6.02(f). A1498.
- the proposed action may be expected to have a substantial impact on biodiversity and ecosystem function within the affected area. § 6.02(g). A1498.

Furthermore, controversial actions receive special review. § 6.02(i). A1498. "Although no action should be deemed to be significant solely on its controversial nature, this aspect should be used in weighing the decision on the proper type of environmental review needed to ensure full compliance with NEPA." Id.

The NOAA Guidelines also state that the "purpose of scoping" – which Defendants did not remotely conduct -- is to "facilitate an efficient EA/EIS preparation process, define the issues and alternatives that will be examined in detail, and save time by ensuring that draft documents adequately address relevant issues." § 5.02(a). A1485. "Public involvement is essential to implementing NEPA. Public involvement helps the agency understand the concerns of the public regarding the proposed action and its environmental impacts, identify controversies, and obtain the necessary information for conducting environmental analysis." § 5.02(b). A1485. This type of inviting involvement simply did not occur with the IDCP NEPA process for the creation and finalization of the International Dolphin Conservation Program that many have called "historic."

3. The State Department and Treasury Departments Must Participate in NEPA.

The law could not be more clear in regard to its applicability to the State Department: NEPA emphatically applies to international agreements. "Actions" covered by NEPA include "adoption of official policy such as . . . international

conventions or agreements" 40 C.F.R. § 1508.18(b)(1). Moreover, the State Department's own NEPA regulations mandate the NEPA process for international agreements. See generally 22 C.F.R. §§ 161.1 - 161.12 (State Department NEPA regulations); 44 Fed. Reg. 67004 (November 21, 1979)(implementing Executive Order 12114 and confirming NEPA obligations for actions on high seas). See also 22 C.F.R. § 161.1 (State Department regulations express a goal of ensuring that "environmental considerations and values are incorporated into the Department's decisionmaking process"). Yet the CIT somewhat casually dismissed our claim that the State Department, as well as the Department of the Treasury and/or the Customs Service, should have been involved at the outset as a cooperating agency, and in fact should have undertaken the NEPA process before concluding the international agreement. A50.

NEPA and agency regulations clearly require the State Department to have been involved in the NEPA process before the negotiation of the international agreement. For starters, NEPA's EIS requirement is triggered by, inter alia, a "proposal." NEPA, 42 U.S.C. § 4332(2)(C) ("include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment . . .") Contrary to the CIT's view that a proposal did not come into being until after the international agreement was

entered into, NEPA's requirements were immediately triggered once the State Department began planning to negotiate the international agreement. 40 C.F.R. § 1508.18(b)(1) (NEPA regulations apply to "adoption of official policy, such as . . . treaties and international conventions or agreements").

State Department regulations specifically address situations involving time constraints. "An environmental document required in conjunction with conclusion of an international agreement shall, where possible, be prepared and circulated for review and comment before final negotiations begin." 22 C.F.R. § 161.5(c). "If the content and dimensions of a proposed action will not be clear until after the conclusion of an international negotiation or if a decision to proceed on an action involving another nation or international organization is required on short notice and before the environmental document can be prepared, the environmental document should be prepared as soon as possible after the conclusion of an agreed text of a treaty or agreement on the proposed action." 22 C.F.R. § 161.5(d). Thus, the State Department, while bound by NEPA's absolute requirements, had ample flexibility to fulfill its responsibilities.

Indeed, the State Department is well aware of its responsibilities, having complied with NEPA when concluding numerous international conventions and agreements. See, e.g., START treaty (1990); Panama Canal Treaty (1977); Int'l

Regime for Antarctic Mineral Resources (undated); Conv. on Prevention of Marine Pollution by Dumping Wastes (1973); Incineration of Wastes at Sea Under Ocean Dumping Conv. (prepared with EPA, 1978 & 1979); U.S.-Canada Conv. for Conserv. Of Migratory Caribou (1980); Ocean Dumping Conv. (1972); Conv. on Conserv. Of Migratory Species of Wild Animals (1979); Conv. for Conserv. Of Antarctic Seals (1974 & 1975); Office of Micronesian Status Negot. Compact of Free Ass'n (1984); Dep't of Interior, World Heritage Conv. (1973); EPA, Montreal Protocol on Substances that Deplete the Ozone Layer (1988). Given this extensive history, it is all the more incredible that in this case, the State Department failed to even contemplate NEPA compliance.

CONCLUSION

For all the reasons so stated, Plaintiffs-Appellants ask this Court to vacate Defendants-Appellees' illegal final rule on sundown sets, and to reverse the CIT's decision with respect to Defendants-Appellees' legally inadequate Environmental Assessment on the International Dolphin Conservation Program Act. Plaintiffs-Appellants further request this Court to remand the NEPA compliance issues back to the CIT, with instructions for Defendants-Appellees to prepare a Draft Environmental Impact Statement (DEIS) for the new International Dolphin Conservation Program.

Respectfully submitted,

William J. Snape, III
Attorney for Plaintiffs-Appellants

Dated: April 28, 2002

Of Counsel:
Kumar Vaswani, Esq.
Defenders of Wildlife