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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EARTH ISLAND INSTITUTE, et al.,

No. C 03-0007 TEH

Plaintiffs,

v.

DONALD EVANS, et al.,

Defendants.

**ORDER GRANTING PLAINTIFFS’
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANTS’ MOTION FOR
SUMMARY JUDGMENT**

On December 31, 2002, the Secretary of Commerce made a “final finding” that the “intentional deployment on or encirclement of dolphins with purse seine nets is not having a significant adverse effect on any depleted dolphin stock in the Eastern Tropical Pacific ocean.” 68 Fed. Reg. 2010, 2011 (Jan. 15, 2003). Several organizations, including the Earth Island Institute, the Humane Society of the United States, and the Oceanic Society (collectively “Plaintiffs”) challenge the validity of this finding under the Administrative Procedures Act, 5 U.S.C. § 706(2).

This matter came before the Court on May 24, 2004, on simultaneous cross-motions for summary judgment. Having carefully considered the extensive briefing submitted by the parties and amicus, the voluminous administrative record, as well as the parties’ oral presentations, the Court concludes that Plaintiffs have met their burden of demonstrating that they are entitled to judgment as a matter of law. Accordingly, the final finding of the Secretary shall be set aside for the reasons set forth below.

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20 I. BACKGROUND

21 For reasons that are not well understood, yellowfin tuna tend to congregate under

22 schools of dolphins in the Eastern Tropical Pacific Ocean (“ETP”), which extends from

23 the Southern California coast to South America. Beginning in the 1950s, fishermen

24 started chasing and encircling dolphins with large purse seine nets in order to catch the

25 nearby tuna. As a result of this process – referred to as setting on dolphins – millions of

26 dolphins have died in the nets, mostly between 1959 and 1972.

27 This motion represents but the latest chapter in a lengthy history of disputes over

28 Congressional efforts to protect dolphins in the ETP. The Court will not attempt to fully

repeat this history here, as it is chronicled in previous decisions. *See, e.g., Brower v.*

1 *Daley (Brower I)*, 93 F. Supp. 2d 1071, 1073 (N.D. Cal. 2000), *aff'd*, *Brower v. Evans*
2 (*Brower II*), 257 F.3d 1058 (9th Cir. 2001); *Earth Island Inst. (“EII”) v. Brown*, 865
3 F.Supp. 1364 (N.D. Cal. 1994); *EII v. Mosbacher*, 746 F.Supp. 964 (N.D. Cal. 1990). The
4 Court will, however, attempt to provide sufficient background to place the instant dispute
5 in context.

6
7 A. Adoption of the International Dolphin Consumer Information Act (“DPCIA”)

8 Public outcry over the high number of dolphin deaths led Congress to pass the
9 Marine Mammal Protection Act (“MMPA”) in 1972, which, among other things, is
10 designed to protect dolphins in the ETP. *Brower II*, 257 F.3d at 1060. Pursuant to the
11 MMPA, three dolphin stocks in the ETP were found to be “depleted”: (1) the
12 Northeastern offshore spotted dolphin, (2) the Eastern Spinner dolphin, and (3) the
13 Coastal dolphin. *Id* at 1061.¹ Congress repeatedly strengthened the MMPA in 1984, 1988,
14 and 1992, to “ban importation of tuna that failed to meet certain conditions regarding
15 dolphin mortality.” *Id*. Then, in 1990, Congress passed the Dolphin Protection Consumer
16 Information Act (“DPCIA”), 16 U.S.C. § 1385, the statute at issue in this case. This Act
17 further aimed to protect dolphins in the ETP through the use of information disclosure.
18 Specifically, the Act provided that tuna fish for sale in the United States could only display
19 the label “dolphin safe” if the tuna was not caught using purse seine nets intentionally
20 deployed on or to encircle dolphins. *Id.* at § 1375(d).

21
22 B. Formation of the International Dolphin Conservation Program (“IDCP”)

23 The DCPIA “caused the loss of a large market for those countries that continued to
24 set on ETP dolphins with purse seine nets.” *Brower II*, 257 F.3d at 1061. In response, the
25 United States, along with various Central and South American countries that use purse
26 seine fishing vessels in the ETP agreed in 1992 to a voluntary International Dolphin

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28 ¹ A stock is depleted if its population falls below its “optimum sustainable
population” (“OSP”), i.e., if it falls below 60 percent of its estimated historic levels.
Brower I, 93 F. Supp.2d at 1073-74 and n.2.

1 Conservation Program (“IDCP”). “Nations participating in the IDCP agreed to maintain
2 dolphin kill levels at or below a ‘dolphin mortality limit’ assigned to each vessel, and to
3 work toward reducing dolphin mortality to levels approaching zero.” *Brower I*, 93 F. Supp.
4 2d at 1074. In 1995, the IDCP was formalized into a binding declaration, referred to as
5 the Panama Declaration. Signatories to the Declaration include, among others, the United
6 States, Mexico, Ecuador, and Venezuela. *Id.*²

7
8 C. Adoption of the International Dolphin Conservation Program Act (“IDCPA”)

9 As part of the Panama Declaration, the Administration agreed to seek changes in
10 United States laws that would ease embargoes and improve market access for ETP tuna
11 fish, including a relaxation of the dolphin safe label standard. *Id.* Specifically, the Panama
12 Declaration sought legislation that would have immediately allowed any tuna caught with
13 purse seine nets to be labeled dolphin safe so long as “no dolphins were observed to be
14 killed or seriously injured during the set.” *Brower I*, 93 F. Supp. 2d at 1075. By this time,
15 reported dolphin mortality had dropped dramatically from a high of 423,678 deaths per
16 year in 1972 to 3,716 per year in 1993 and continued to decline, due to a variety of
17 factors, including protective legislation, embargoes, and voluntary efforts by nations
18 fishing in the ETP to improve purse seine fishing techniques.

19 In response to the Panama Declaration, Congress enacted the International Dolphin
20 Conservation Program Act (“IDCPA”) in 1997. The IDCPA implemented a number of the
21 goals of the Panama Declaration relating to embargoes and access to the United States
22 market. *Id.* at 1074. The Act did not, however, embrace the Panama Declaration’s call for
23 an immediate weakening of the “dolphin-safe” standard. Congress remained concerned
24 that even if no dolphins were observed to have been killed or seriously injured during a set
25 – and notwithstanding the overall low reported mortality in recent years – that the stress

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27 ² Over the last 20 years, almost all United States vessels either transferred to
28 foreign flags or relocated to the western Pacific Ocean where sets are not made on
dolphins. By 2002, only three United States vessels remained in the ETP, and they do
not set on dolphins. The largest purse seine fleets currently operating in the ETP are
from Mexico, Venezuela, and Ecuador. Administrative Record (“AR”) 861 at 5518.

1 suffered by dolphins from repeated year-round chase and encirclement practices would
2 impede their ability to recover. *Brower II*, 257 F.3d at 1061; *Brower I*, 93 F.Supp. 2d at
3 1075. Accordingly, Congress rejected the Panama Declaration on this point and instead
4 adopted a compromise which provided that any change from the existing standard to the
5 less protective standard called for by the Panama Declaration would turn on the scientific
6 question of “whether the intentional deployment on or encirclement of dolphins with purse
7 seine nets is having a significant adverse impact on any depleted dolphin stock in the
8 [ETP].” 16 U.S.C. §1385 (g). Congress further directed that certain scientific research be
9 undertaken relevant to answering this question.

10 In particular, Congress mandated that the Secretary of Commerce take the
11 following actions. First, the Secretary was required, in consultation with the Marine
12 Mammal Commission (“MMC”) and the Inter-American Tropical Tuna Commission
13 (“IATTC”) to commence, by October 1, 1997 (1) population abundance studies, and (2)
14 three different specified stress studies designed to address the question of whether
15 encirclement with purse seine nets is having a significant adverse impact on any depleted
16 dolphin stock in the ETP. 16 U.S.C. § 1414a(a)(1)-(3). Second, the Secretary was
17 required to make, by March 31, 1999, an initial finding, as to whether the use of purse
18 seine nets is having a significant adverse impact on any depleted dolphin stock in the
19 ETP. 16 U.S.C. § 1385 (g)(1)-(2). By December 31, 2002, the Secretary was to make a
20 final finding with respect to this same question:

21 Between July 1, 2001, and December 31, 2002, the Secretary shall, on the
22 basis of the completed study conducted under section 1414a(a) of this title,
23 information obtained under the International Dolphin Conservation Program,
24 and any other relevant information, make a finding regarding whether the
25 intentional deployment on or encirclement of dolphins with purse seine nets
26 is having a significant adverse impact on any depleted dolphin stock in the
27 eastern tropical Pacific Ocean. The finding shall be published immediately
28 in the Federal Register and shall become effective upon a subsequent date
determined by the Secretary.

16 U.S.C. § 1385(g)(2).

1 D. The Initial Finding

2 On May 7, 1999, the Secretary issued his initial finding under the IDCPA that
3 “there is *insufficient evidence* that chase and encirclement by the tuna purse seine fishery
4 ‘is having a significant adverse impact’ on depleted dolphins stocks in the ETP.” *Brower II*,
5 257 F.3d at 1064 (citation omitted)(emphasis added). Based on this finding, the Secretary
6 initiated a change in the dolphin-safe standard pursuant to the IDCPA. *Id.* On April 11,
7 2000, this Court set aside the Secretary’s initial finding under the APA, 5 U.S.C. § 706(2),
8 on the grounds that the finding was an abuse of discretion and not in accordance with the
9 law. The Secretary had violated Congressional intent, this Court found, by failing to
10 undertake the mandated stress studies and then relying on “insufficient evidence” to justify
11 his finding. Such a result was particularly troubling, the Court concluded, given that the
12 evidence that was available all pointed toward significant adverse impacts:

13 [I]t would flout the statutory scheme to permit the Secretary to fail to
14 conduct mandated research, and then invoke a lack of evidence as a
15 justification for removing a form of protection for a depleted species,
particularly given that the evidence presently available to the Secretary is all
suggestive of a significant adverse impact.

16 *Brower I*, 93 F. Supp. 2d at 1089. The Ninth Circuit subsequently affirmed, finding that
17 the Secretary was required to affirmatively find that the fishery either was or was not
18 having a significant adverse impact, and could not rely on “insufficient evidence” to default
19 to a finding of no significant adverse impact. *Brower II*, 257 F.3d at 1066-67. Such an
20 approach, it reasoned, would discourage proactive fact-finding and research:

21 For example, the Secretary could deliberately drag his feet in commencing
22 studies or while conducting studies and then conclude there was insufficient
23 evidence to warrant finding a significant adverse impact on the ETP dolphin
24 stocks. Similarly, the Secretary could limit the studies’ breadth and then
discover that there was insufficient evidence to warrant finding a significant
adverse impact on the ETP dolphin stocks.

25 *Id.* at 1067. The Ninth Circuit further found that the Secretary had failed without
26 justification to obtain and consider preliminary data from any of the mandated stress
27 research projects, and that all of the available evidence indicated that dolphins were
28

1 adversely impacted by the fishery. *Id.* at 1068-71. Accordingly, the Secretary had acted
2 contrary to law and abused his discretion in making the initial finding. *Id.* at 1071.

3
4 E. The Final Finding

5 In preparation for the final finding, the Department of Commerce’s National
6 Oceanic and Atmospheric Administration (“NOAA”) Fisheries, also referred to as the
7 National Marine Fisheries Services (“NMFS”), expanded its dolphin research program
8 through its Southwest Fisheries Science Center in La Jolla, California. AR 861 at 5519-
9 20. The program, which was developed in consultation with the MMC and the IATTC,
10 underwent extensive peer review through the Center of Independent Experts, and resulted
11 in “a substantial body of information” including:

12 dolphin abundance data, fishery mortality estimates, a review of scientific
13 literature on stress in marine mammals, results from a necropsy study of
14 dolphins killed in the fishery, a review of historical demographic and
15 biological data related to dolphins involved in the fishery, results from an
16 experiment involving the repeated chasing and capturing of dolphins, and
17 information regarding variability in the biological and physical features of
18 the ETP ecosystem over time.

19 AR 861 at 5518, 5520. This effort culminated in NOAA’s peer reviewed, September 17,
20 2002 “Report of the Scientific Research Program under the International Dolphin
21 Conservation Program Act” (hereafter “Final Science Report” or “FSR”). AR 861.

22 In September 2002, NOAA also convened two expert panels: the Ecosystem Expert
23 Panel (which examined whether changes to the ecosystem could be affecting dolphin
24 populations in the ETP), and the Indirect Effects Panel (which examined whether stress or
25 other indirect effects of the fishery could be affecting dolphin populations in the ETP).
26 Panelists were nominated by the public, with the help of scientific and professional
27 societies and were selected by a committee which included representatives from NOAA,
28 the IATTC, the MMC, and an independent scientific body. AR 939 at 6034; AR 856. The
five panelists on each panel were asked to provide individual comments based on peer-
reviewed scientific information in the field and their own expertise. *Id.* In addition to the

1 Final Science Report and the expert panelist opinions, the MMC and the IATTC also
2 provided comments to the Secretary, as did members of the public.³

3 To further assist the Secretary in making the final finding, he adopted, after public
4 comment, a formal decision-making framework referred to as the “Organized Decision
5 Process” (“ODP”). 67 Fed. Reg. 54633 (Aug. 23, 2002); AR 817. The ODP directed the
6 Secretary to consider and address four separate questions in making his final finding:

7 (1) Ecosystem Question, (2) Direct Mortality Question, (3) Indirect Effects Question, and
8 (4) Growth Rate Question. AR 817 at 5322-23. On December 31, 2002, the Secretary
9 addressed these four questions and made his final finding, through his designee, Dr.
10 William T. Hogarth, NOAA Assistant Administrator for Fisheries, that “the intentional
11 deployment on or encirclement of dolphins with purse seine nets is not having a
12 significant adverse effect on any depleted dolphin stock in the ETP.” AR 939 at 6032. As
13 a result of this final finding, the Secretary re-defined the term dolphin safe pursuant to the
14 IDCPA. Whereas, previously, tuna caught using purse seine nets could not be labeled
15 dolphin safe, now such tuna would be labeled dolphin safe so long as no dolphins were
16 reported to have been “killed or seriously injured in the set in which the tuna was
17 harvested.” *Id.*; 16 U.S.C. § 1385(h)(1).

18 19 II. PROCEDURAL HISTORY

20 On December 31, 2002, Plaintiffs filed the instant complaint challenging the
21 Secretary’s final finding under the APA. The Secretary stipulated to a stay of his final
22 finding pending the Court’s consideration of Plaintiffs’ motion for preliminary injunction.
23 On April 10, 2003, the Court preliminarily enjoined the Secretary from changing the
24 dolphin safe standard, finding, *inter alia*, that Plaintiffs had shown a likelihood of success
25 on the merits. In particular, the Court observed certain “striking parallels” between the
26
27

28 ³ The IATTC also provided additional information and analysis but it was not peer reviewed and was submitted too late to be verified. AR 939a at 1; AR 939 at 6034.

1 initial finding and the final finding with respect to the state of the scientific evidence:

2
3 As was the case in 1999, the best available evidence before the Secretary,
4 while not conclusive, is ‘all suggestive of a significant adverse impact.’
5 *Brower I*, 93 F. Supp.2d at 1089. And again, the Secretary’s rationale for
6 declining to find a significant adverse impact is largely based on the absence
7 of more conclusive evidence regarding the stress and other effects of the
8 purse seine fishery – although conclusive evidence is not required. *Brower*,
9 257 F.3d at 1070-71. Finally, there is again a serious question as to whether
10 the Secretary can justify the lack of progress on the mandated research. . . .

11 *EII*, 256 F. Supp. 2d at 1074. A similar disturbing parallel was found with respect to the
12 injection of international trade politics into the decision-making process. *Id.* at 1069.

13 When the Court set aside the Secretary’s initial finding in 2000, the Court expressed its
14 concern that the Secretary was more attentive to trade policy interests than the scientific
15 data:

16 In urging affirmance of the Secretary, defendants repeatedly emphasize that
17 the Court should sustain the Secretary’s action because Congress, in
18 enacting the IDCPA, chose to embrace and implement the Panama
19 Declaration and thus change course from its previous approach to dolphin
20 conservation, which featured embargoes and strict import restrictions.
21 Changing the dolphin-safe label standard, the Secretary argues, is part of
22 Congress’ new approach and should not be impeded. Defendants, however,
23 overstate the matter. While Congress certainly embraced most of the
24 Panama Declaration . . .when it came to the issue of the dolphin safe label. .
25 .Congress ultimately rejected [the Panama Declaration] approach and instead
26 unanimously decided that, despite the low observed mortality rates, the
27 decision whether to change the label standard should await
28 scientific data from mandated studies. . . . It is to this Congressional
compromise that the Secretary must be held.

20 *Brower I*, 93 F. Supp. 2d at 1089; *see also Brower II*, 257 F.3d at 1066 (rejecting
21 Secretary’s “international concerns” and “policy” arguments because such issues can not
22 override Congress’ intent as reflected in the IDCPA). In April 2003, the Court noted that
23 the Secretary had “wisely refrained. . .from expressly invoking trade policy concerns as
24 grounds for affirming his final finding,” but that Plaintiffs had nonetheless raised a serious
25 question as to whether the Secretary’s final finding was influenced by international trade
26 policy considerations, thus compromising the integrity of the decision-making process.
27 *EII*, 256 F. Supp. 2d at 1069-71.

1 On June 2, 2003, the Secretary filed the massive Administrative Record in this case
2 which consists of thousands of pages. The Secretary, however, asserted that a number of
3 documents in the record were protected by privilege. Plaintiffs subsequently challenged
4 the assertions of privilege, as well as the completeness of the record. As a result of these
5 discovery proceedings, the Secretary amended and supplemented the record at various
6 points.⁴ Thus, the administrative record was not fully completed until June 2004.

7 As discussed below, the Administrative Record provides compelling corroboration
8 of this Court's preliminary observations in its ruling on Plaintiffs' Motion for Preliminary
9 Injunction. It reflects an agency that (1) continued to drag its feet on conducting critical
10 mandated research, (2) continued to ignore the fact that the best scientific evidence that
11 was available, while not conclusive, pointed toward the fishery as the cause of the
12 dolphins' failure to recover as expected, and (3) compromised the integrity of its finding
13 by allowing trade policy considerations to infect the decision-making process.

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18 ⁴ At the time of the preliminary injunction ruling, the Court did not anticipate the
19 need for extensive discovery proceedings. On June 6, 2003, however, Defendants
20 served an index of 359 documents that are part of the Record but were withheld in
21 whole or part on grounds of deliberative and/or attorney client privilege. On August 11,
22 2002, the Secretary released additional documents for which asserted privileges had
23 been withdrawn. The Court subsequently reviewed *in camera* all of the documents that
24 remained in dispute and ultimately ordered that certain documents be produced. The
25 Court, however, denied Plaintiffs' motion to supplement the record in light of further
26 verifications filed by Defendants. *See* Court's Sept. 8, 2003 Order Re Plaintiffs'
27 Motion to Compel; Court's October 28, 2003 Order Granting in Part, Denying in Part,
28 and Deferring in Part, Plaintiffs' Motions to (1) Compel and (2) Supplement and
Produce the Whole Administrative Record; Court's Nov. 26, 2003 Further Order
Granting in Part and Denying in Part Plaintiffs' Motion to Compel, and Denying
Plaintiffs' Motion to Supplement and Produce the Whole Administrative Record.

Then, on March 22, 2004, Plaintiffs filed a second motion to supplement the
record based on its inadvertent discovery of a document that had not been included in
the Administrative Record. On April 15, 2004, the Court granted this motion and
ordered the Secretary to undertake a search for certain limited categories of
documents. On May 10, 2004, the Secretary supplemented the Administrative Record
with additional documents and submitted other documents to the Court for *in camera*
review. On May 12, 2004, the Court orally ordered Defendants to produce additional
documents. *See* May 17, 2004 Order. While these documents were served on Plaintiffs
on May 14, 2004, they were inadvertently not filed until June 24, 2004.

1 III. LEGAL STANDARD

2 Under the APA, the Court reviews the Secretary’s final finding, in light of the
3 administrative record, to determine whether it is “arbitrary, capricious, an abuse of
4 discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A); *Havasupai*
5 *Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991) (limiting review to administrative
6 record). This is a narrow inquiry, and the Court should not substitute its judgment for that
7 of the agency. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).
8 Nonetheless, the Court is obliged to ensure that its inquiry, while narrow, is “searching and
9 careful.” *Brower II*, 257 F.3d at 1065. Thus, while deference to agency decisions involving
10 scientific expertise is appropriate, such deference is not “unlimited.” *Id.* at 1067;
11 *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 679 (D.D.C. 1997). “The
12 presumption of agency expertise may be rebutted if its decisions, even though based on
13 scientific expertise, are not reasoned.” *Brower I*, 93 F. Supp. 2d at 1083 (citation
14 omitted). “Nor may the agency disregard Congressional intent.” *Id.* (citation omitted).
15 Accordingly, agency action may be found arbitrary and capricious if: (1) the agency has
16 relied on facts which Congress has not intended it to consider, (2) entirely failed to
17 consider an important aspect of the problem, or (3) offered an explanation for its decision
18 that runs counter to the evidence before the agency or is so implausible that it could not be
19 ascribed to a difference in view or the product of agency expertise. *Brower II*, 257 F.3d at
20 1065 (citation omitted).

21
22 IV. DISCUSSION

23 A. The Statutorily Mandated Research

24 In *Brower I*, this Court emphasized the importance of the Congressionally
25 mandated stress research:

26 Congress was particularly concerned about the potential adverse stress
27 effects from repeated chase and encirclement. . . . Importantly, Congress
28 rejected language that would have immediately changed the label to allow
tuna caught with purse seine nets to be labeled dolphin safe. . . and instead
kept the purse seine net restriction in place *precisely so that the stress*

1 *effects could be investigated and considered before* any change in the label
2 standard.

3 93 F. Supp. 2d at 1083 (emphasis added). To this end, Congress required, through
4 “mandatory and direct” language that the Secretary carry out, *inter alia*, three stress
5 studies that included (1) a three-year series of necropsy⁵ samples from dolphins obtained
6 by commercial vessels, (2) a one-year review of relevant historical demographic and
7 biological data, and (3) an experiment involving the repeated chasing and capturing of
8 dolphins by means of intentional encirclement (referred to as the “chase and encirclement
9 stress study” or CHESS). *Id.* at 1084; *Brower II*, 257 F.3d at 1069-70;
10 16 U.S.C. §1414a. Nonetheless, as of his initial finding on April 29, 1999, the Secretary
11 had failed to heed Congress’ mandate to promptly undertake the prescribed stress studies.
12 *Brower I*, 93 F. Supp. 2d at 1073, 1083-87. Instead the Secretary “unreasonably delayed”
13 the stress studies and demonstrated no “valid excuse” for the agency’s failure to comply
14 with Congress’ directives. *Brower II*, 257 F.3d at 1070.

15 The prior decisions in this matter also highlighted the critical significance of this
16 failure. As this Court pointed out in 2000, “[t]he missing evidence that prevented firmer
17 conclusions. . . on the central issue of stress, and thus the ultimate issue of significant
18 adverse impact, was the actual physiological data from dolphins in the ETP that NMFS
19 was to obtain from the [mandated stress studies].” *Brower I*, 93 F. Supp. 2d at 1087. The
20 Ninth Circuit also underscored the importance of completing the mandated research when
21 it expressly warned the Secretary that he could not fail to comply with the required
22 research and then invoke a “lack of stress-related information to trigger a change” in the
23 dolphin-safe label standard. “This puts the cart before the horse. The agency was required
24 by law to conduct stress research as a *prerequisite* to its decision making.”

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28 ⁵ A necropsy is “generally equivalent to an autopsy in human medicine.” AR 861 (FSR) at 5510 n.4.

1 *Brower II*, 257 F.3d at 1070 (emphasis in original); *see also id.* at 1067 (expressly
2 warning the Secretary that he could not “drag his feet in commencing [the stress] studies
3 or while conducting studies” or “limit the studies’ breadth” and then rely upon “insufficient
4 evidence” to support a finding of no significant adverse impact). Even the Secretary
5 admitted, in 1999, that “[m]ore scientific research [was] necessary to better evaluate the
6 effect of the tuna purse seine fishery on depleted dolphins stocks in the ETP,” *Brower I*,
7 93 F. Supp.2d at 1087 (citation omitted), and that the answer to questions regarding
8 physiological evidence of stress would probably come from “the completion of the
9 necropsy sampling program.” 257 F.3d at 1063 (citation omitted).

10 Incredibly, however, and notwithstanding all of the above, the Secretary persisted in
11 his pattern of failing to diligently pursue two out of the three mandated stress studies: the
12 necropsy study and the CHESS study. Indeed, as discussed below, the Secretary
13 effectively concedes that so little was accomplished with respect to these two studies that
14 they were rendered meaningless.

15 (1) *Necropsy study*

16 The necropsy study involved placing trained necropsy technicians on board
17 commercial tuna vessels to collect tissue samples from dolphins killed in the ETP. *Id.* It
18 is undisputed that the NMFS determined that the *minimum* number of necropsies that
19 would be required to “allow scientifically valid extrapolation to the sampled population of
20 ETP dolphins” was 300 necropsies per stock or 600 total. AR 861 (FSR) at 5573; March
21 10, 2003 Hogarth Decl. ¶ 18(c) (“NOAA fisheries scientists had earlier determined that a
22 minimum sample size of 300 per dolphin stock was statistically necessary to reliably
23 detect potentially rare effects and to allow scientifically valid extrapolation to the
24 populations of dolphins”). Yet, by the time of the final finding in December 2002 – over
25 five years after enactment of the IDCPA – the Secretary had managed only to necropsy a
26 grand total of 56 dolphins – less than 10 percent of the *minimum* number needed.

1 As the Final Science Report makes clear, these sample sizes were too small to be
2 useful. “Sample sizes for both the necropsy program and the [CHESS] field studies were
3 insufficient to estimate potential population-level impact or to determine whether
4 population recovery of the depleted stocks may be delayed by these effects.” AR (FSR)
5 861 at 5511; AR 989 at 6037. The Secretary, through his designee, has also conceded that
6 this small sample size was “not sufficient to produce *meaningful and reliable scientific*
7 *insights.*” March 10, 2003 Hogarth Decl. ¶ 18(c) (emphasis added). Indeed, the Secretary
8 prominently relied on this fact in making his final finding:

9 [T]hese data [from the stress research] are insufficient to quantify potential
10 population-level impacts or determine whether population recovery might
11 be delayed, because sample sizes were small. . . For example, in
12 implementing a specifically mandated necropsy program that was conducted
13 between 1998 and 2000, it was possible to obtain samples from only 56
14 dolphins, a number that is insufficient to make population-level inference.

15 In sum the available information on indirect effects . . is limited, and
16 therefore bars population-level inferences of the effects of stress on
17 dolphin stocks. Additional research is necessary Accordingly, the best
18 available information. . . indicates that indirect effects. . . are not impacting
19 dolphins to a degree that would risk or appreciably delay recovery.

20 AR 939 at 6037. It thus appears plain that Defendants yet again failed to carry out the
21 mandated necropsy stress study.

22 The Government, however, advances the Orwellian argument that it in fact
23 “completed” the necropsy study. Defs.’ Opp’n at 14. Apparently, the Secretary contends
24 that so long as he has undertaken *any* necropsies he has discharged his statutory obligation
25 to complete the necropsy study because “the statute did not impose any sample size
26 requirements, leaving the scientific methodology to NOAA’s discretion.” *Id.* at 16. As
27 this Court previously held, however, the Secretary does not have unbridled discretion to
28 simply decree a study “complete” that he has barely begun:

While the Secretary clearly has discretion in how to manage a
congressionally mandated scientific study, it would be an abuse of that
discretion for the Secretary to fail to follow his own methodology (which in
this case required a minimum sample of 300 [per dolphin stock]), or
otherwise manage the study in such a way as to preclude scientifically
meaningful results, without compelling justification. Indeed, under the
Secretary’s approach, he could have discharged his mandate by exercising
his discretion to obtain a necropsy sample from a single dolphin. Nor can

1 we accept the suggestion that while Congress took the trouble to mandate a
2 specific scientific study – a study clearly central to the purpose of the
3 statute – it did not also intend that the Secretary carry out the study in such a
4 manner as to yield scientifically meaningful results. *See Brower*, 257 F.3d
5 at 1067 (rejecting interpretation of IDCPA that would allow the Secretary to
6 “limit the studies’ breadth and then discover that there was insufficient
7 evidence to warrant finding a significant adverse impact on the ETP dolphin
8 stocks’”).

9 *EII*, 256 F. Supp. 2d at 1071 n.9.

10 While the Secretary insists that he completed the necropsy study, he also argues
11 that a host of logistical and other difficulties made NOAA’s original sampling parameters
12 – of 300 necropsies per dolphin stock – “not achievable.” Defs.’ Opp’n at 15-16. The
13 Government’s point here is less than clear given its assertion that it is *not* raising an
14 “impossibility” defense given its belief that it fully completed the study. *Id.* at 15; Oral
15 Arg. Tr. at 44 (“[I]t was deemed possible [to obtain the 300 samples per stock]. However,
16 it was very difficult and NOAA did in fact fully complete the study. . .and did everything
17 possible . . . to overcome [the] difficulties”). To the extent, however, that the Government
18 is arguing that the difficulties posed by the studies excuse it from having to obtain
19 sufficient samples to achieve scientifically meaningful results, this argument is soundly
20 rejected.

21 First, excusing Defendants from having to obtain sufficient samples to achieve
22 scientifically meaningful results would, as discussed above, be tantamount to excusing
23 them from the Congressional mandate with which they were charged. This the Court can
24 not do absent proof of impossibility. *Brower II*, 257 F.3d at 1069 (finding that Secretary
25 had failed to show that study’s alleged complexity “prevented” NMFS from commencing
26 the data and obtaining data); *Sierra Club v. Gorsuch*, 551 F. Supp. 785, 787, 789 (N.D.
27 Cal. 1982) (agency must show it was impossible to comply with statutory requirement
28 since absent such proof it would effectively be asking the Court “to . . .repeal the
Congressional mandate”). As noted above, however, Defendants do not argue that they
should be excused from their statutory obligations based on impossibility.

1 Second, even if the Court were to address the impossibility question further, the
2 record does not sustain Defendants' claim that obtaining sufficient necropsy samples to
3 yield scientifically meaningful results was impossible, or – in Defendants' words – “not
4 achievable.” Defendants complain that they faced a lack of cooperation from Mexico, and
5 that although NOAA had trained Venezuelans and Ecuadorians to conduct necropsies, these
6 countries never placed any of the trained observers on vessels. Defs.' Opp'n at 16.

7 With respect to Mexico, the record reflects that “some cooperation [had] been
8 achieved” by September 2001, and that, “[a]t Mexico's request, NMFS conducted another
9 necropsy technician training session.” DP 113⁶ (Update on IDCPA Research Efforts/Need
10 for Mexico's Cooperation); AR 99 at 413-14 (Aug. 4, 2000 letter stating that Mexico had
11 volunteered to cooperate). At the same time, Defendants were aware that “much more
12 [cooperation][was] needed [from Mexico] to obtain an adequate number of samples.” DP
13 113. Yet, the record completely fails to explain or justify why Defendants were unable to
14 secure the additional needed cooperation after September 2001. Nor does it explain why
15 Defendants were agreeing to Mexico's request to *expedite* the final finding, *see* Part
16 IV(C), but not insisting on improved cooperation to obtain the necropsies needed to make
17 the final finding.

18 With respect to Ecuador and Venezuela (which have two of the largest purse seine
19 fleets in fishery), both offered their cooperation in July of 2000. AR 97 at 408 (July 28,
20 2000 letter from Ecuador requesting training date so that they can “carry on efficiently in
21 Necropsy Program”); AR 114 at 464 (letter from NMFS thanking Ecuador and stating that
22 NMFS would contact Ecuador regarding training); AR 99 at 414 (Venezuela). Yet, NMFS
23 did not train or supply them until roughly one year later. AR 390 at 1719-20. The
24 sampling portion of the necropsy program, however, was then terminated by the end of the
25 2001 in light of the timetable for the final finding. AR 551- 552. The Court also notes
26 that although Colombia “reaffirmed” its willingness to cooperate with the necropsy

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28 ⁶ DP refers to documents in the Administrative Record which Defendants
identified as being covered by deliberative privilege but were produced pursuant to one
of the Court's discovery rulings.

1 research in September 2001, *see* AR 461, Defendants have identified no documents that
2 indicate that this offer was ever pursued.

3 Defendants also point to the logistical difficulties posed by the need to use certain
4 equipment and “cumbersome permitting requirements.” Defs.’ Opp’n at 16; Defs.’ Mot. at
5 10-14. While the Court does not doubt that the study posed substantial logistical and
6 other bureaucratic challenges, Defendants wholly fail to show they were insurmountable
7 or that they genuinely prevented the agency from obtaining more than 56 necropsy
8 samples over the five-year period between 1997 and 2002. The record indicates, for
9 example, that even with respect to Mexico, Defendants were in fact able to send needed
10 equipment and obtain the required permits. *See, e.g.*, AR 494 at 2065; AR 1092 at 8196,
11 8204; AR 90; AR 259; AR 150.

12 In short, rather than supporting Defendants’ position, the record shows an agency
13 that continued to drag its feet, exercised little diligence, and put obstacles in its own road.
14 Indeed, it is clear that the Secretary once again, and without adequate justification, failed
15 to discharge his statutory mandate to carry out the necropsy study.

16
17 (2) *CHESS*

18 The purpose of the chase and encirclement stress study was to assist NOAA in
19 assessing whether the health, reproduction, and survival of dolphins may be negatively
20 impacted by repeated chase and encirclement. AR 861 (FSR) at 5577. Pursuant to this
21 study, dolphins were intentionally chased and encircled, tagged, and released. The radio-
22 tagged dolphins were then tracked, and attempts were made to recapture and sample the
23 blood or skin of the same individual and any associated dolphins over the course of several
24 days. *Id.* While the study provided some new information, the sample sizes obtained
25 were too small to address important questions or otherwise allow population-level
26 inferences. *Id.*

27 As Defendants point out, due to the nature of the study, it was recognized from the
28 outset that sample sizes would be limited and that population-level inferences from these

1 studies were unlikely. *Id.* at 5528. Nonetheless, the record again reflects a pattern of
2 delay and inattention that contributed to limited results.

3 Although NMFS held a planning workshop in July 1997, before the IDCPA was
4 enacted, and the study was anticipated to be very complex, “formal research planning” was
5 inexplicably delayed for two years, until 1999. *Brower II*, 257 F.3d at 1070. After a
6 September 1999 consultation session, over seven months elapsed until the next
7 consultation in April 2000, and another nine months passed until a blood parameters
8 workshop occurred in January 2001. AR 325 at 1463. The actual experiment did not take
9 place until the Fall of 2001. AR 584 at 2729. While the study was plainly complex – a
10 fact known from the start – the record fails to adequately explain why the study took four
11 years to plan. As a result, the agency was faced in 2001 with a “very tight” schedule, given
12 the time needed to process the data in time for inclusion in the final finding. AR 325 at
13 1469. Notably, this tight schedule is the only apparent explanation in the record as to why
14 the study was limited to one two-month trip, AR 584 at 2729, a fact which undoubtedly
15 contributed to the study’s small yield. In short, while the agency carried out a chase and
16 encirclement stress study, it did so in a manner that minimized rather than maximized the
17 results.

18
19 **B. The Best Available Scientific Evidence**

20 All parties agree that the Secretary was required to make the final finding based on
21 the “best available scientific evidence.” *See* Defs.’ Opp’n at 13 (“Congress mandated that
22 NOAA’s Final Finding must be based upon a scientific determination”); *Cf. Brower II*, 256
23 F. 3d at 1070 (applying “best available scientific evidence” standard to initial finding). As
24 *Brower II* emphasized, and Defendants acknowledge, this standard does not require that the
25 scientific data be complete or conclusive. 257 F.3d at 1070-71. Rather, “[s]cientific
26 findings in [the] marine mammal conservation area are often necessarily made from
27 incomplete or imperfect information.” *Id.* at 1070; Defs.’ Mot. at 16 (*Brower* provides
28 that “decisions under the IDCPA must be made using the best available evidence standard,

1 even if that evidence is not entirely conclusive or complete”). Further, this standard is
2 “intended to give ‘the benefit of the doubt to the species.’” *Brower II*, 257 F.3d at 1070.

3 The parties also agree that the “best available scientific evidence” in this case
4 consists of the Final Science Report (including the underlying research), along with the
5 reports of members of the Ecosystems and Indirect Effects expert panels. *See EII*, 256
6 F. Supp. 2d at 1071 (and citations therein); *see also* Defs.’ Mot. at 5.

7 As noted above, the Secretary adopted an Organized Decision Process or “ODP”
8 which directed the Secretary to focus on four general issues in making his final finding:
9 (1) whether there have been changes to the ETP ecosystem that have affected the ability of
10 depleted dolphin stocks to recover (the Ecosystem Question), (2) current direct mortality
11 levels (the Direct Mortality Question), (3) whether stress or other indirect effects of the
12 fishery are affecting the ability of dolphin stocks to recover (the Indirect Effects
13 Question), and (4) the grow rates of depleted dolphins stocks (the Growth Rate Question).
14 67 Fed. Reg. at 54641-42.

15 Defendants characterize the best available scientific evidence relating to these four
16 issues as being mostly inconclusive, with the remaining evidence divided equally between
17 evidence that supports the Secretary’s finding and evidence that does not support the
18 finding. *See* Defs.’ Opp’n at 12 (The “scientific record. . .contains evidence supporting a
19 ‘significant adverse’ impact, evidence supporting a ‘no significant adverse impact’ finding
20 and mostly equivocal evidence”). This Court concludes, however, that Defendants’ effort
21 to portray the record as providing even-handed support for either finding does not
22 withstand scrutiny. Rather, while the record is hampered by the limited data obtained from
23 the necropsy and CHESS studies, a fair reading of the science that is available – and one
24 that does not improperly ignore evidence simply because it is not conclusive – indicates
25 that virtually all of the best available scientific evidence points toward the fishery having a
26 significant adverse impact. In reaching this conclusion, the Court examined the record
27 with respect to each of the four issues identified in the ODP, as set forth below.
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(1) The Growth Rate Question

Currently, the populations of the Northeastern offshore spotted dolphins and the Eastern Spinner dolphins remain severely depleted. The former are estimated to be at only 20 percent of their pre-fishery abundance; the estimate for the latter is 35 percent. AR 861 (FSR) at 5514. Thus, NOAA, as part of its dolphin research program, studied how well these populations are recovering from the damage to their stocks. Specifically, the ODP required NOAA to study the dolphin population abundance rates and answer the question: “is the observed population growth rate sufficient to ensure that each stock’s recovery to OSP [optimum sustainable population] is *not risked or appreciably delayed?*” 67 Fed. Reg. at 54642 (emphasis added).⁷ The ODP further provides that “If the Secretary answers “no” to the Growth Rate Question, the Secretary will conclude that the fishery is having a significant adverse impact.” *Id.* at 54641.

There can be little genuine dispute that the Final Science Report’s findings on this question paint a bleak picture. “With [the] dramatic reduction in mortality, indications of the initial stages of a recovery of the affected populations to near pre-exploitation abundance levels would be expected.” AR 861 (FSR) at 5507. Yet, the expected rate of recovery for the depleted stocks of four percent per year, *see id.* at 5513, 5601, has not occurred. Instead, the Report found as follows:

The *most striking result* from the trend and assessment analyses for both Northeastern offshore spotted dolphins and Eastern Spinner dolphins is that their population growth rates are *very low*. Depending on the model used, estimates of population growth rates ranged from -2% to 2% per year. For eastern spinner dolphins, analyses indicating a decline during the past decade were slightly more probable. *Taking all the assessment analyses together, the results are not consistent with recovery from depletion for either stock. This conclusion is not dependent upon a specific model or subset*

⁷ The term “appreciably delayed” is not defined with any specificity in the Administrative Record. In responding to a comment on the ODP, NMFS states only that “the term ‘appreciably delay’ will be interpreted in a manner that is consistent with NMFS policies for managing . . . recovery of depleted marine mammal stocks that interact with commercial fisheries.” 67 Fed. Reg. at A54635; *see also id.* at 54641 (projected growth rates will be assessed to determine if the dolphin stocks “are growing (i.e. recovering to OSP levels) at an acceptable rate”).

1 *of analyses. These rates appear too low overall and suggest some process*
2 *is acting to suppress population growth . . . Regardless of the source of*
3 *depression [of population growth], these low rates are a conservation*
4 *concern given the depleted state of the populations.*

5 *Id.* at 5512 (emphasis added).

6 The above conclusions were based on the fact that, even assuming *zero* reported
7 mortality during purse seine sets, the “best supported” models predicted that it would take
8 78 years for the Northeastern offshore spotted dolphins to recover, and that the Eastern
9 Spinner dolphins would *never recover* and would decline. *Id.* at 5514, 5601. Another set
10 of models, “slightly less well supported by the data,” showed that Northeastern offshore
11 spotted dolphins would recover in *over 200 years* and the Eastern Spinner dolphins would
12 recover in *64 years*. *Id.* If the populations recovered at the expected four percent a year,
13 recovery times would be 29 and 18 years respectively. *Id.*; *see also id.* at 5530. Thus,
14 fairly read, the Report indicates that the recovery of the dolphin populations at issue is
15 being either “risked or appreciably delayed.”

16 Notwithstanding the above, Defendants argue that the Final Science Report’s
17 findings regarding growth rates are evidence that affirmatively supports a finding that the
18 purse seine fishery is not having a significant adverse impact. *See, e.g.,* Defs.’ Opp’n at
19 13-14 (describing the evidence as showing “mostly positive growth rates”). To be sure,
20 some of the projected growth rates are literally “positive” rather than negative. The
21 Secretary’s attempt, however, to spin the above data into evidence that *supports* an
22 affirmative finding that the fishery is not having a significant adverse impact simply serves
23 to underscore the weakness of the Secretary’s position. Indeed, it is difficult to
24 understand how the Report’s finding, noted above, that “the [growth study] results are not
25 consistent with recovery from depletion from either stock” is affirmative evidence that the
26 fishery is not causing harm. Rather, the Report’s findings unequivocally demonstrate that
27 either (1) the depleted stocks will never recover or (2) if they do it will not be for
28 extremely lengthy periods that far exceed the expected normal recovery by decades – even
 assuming a *zero* observed mortality rate. AR 861 (FSR) at 5601, 5514.

1 As noted above, the ODP specifically calls for a yes or no answer to the growth
2 question and provides that a “no” answer would warrant a finding of significant adverse
3 impact. Having reviewed the record, it is clear that the best available scientific
4 evidence indicates that the recovery of the depleted dolphins stocks is being “risky or
5 appreciably delayed” despite the very low reported mortality, and that the answer to the
6 growth question is therefore squarely “no.” Indeed, it is a telling omission that the
7 Secretary discusses – but never answers – this question in his final finding. *See* AR 939 at
8 6037-38; *see also* Oral Arg. Tr. at 45 (conceding that the Secretary did not definitively
9 answer the question).

10
11 (2) The Ecosystem and Indirect Effects Questions

12 As noted above, NOAA concluded in its discussion of the growth rate issue that the
13 growth rates are so low that there is likely “some process. . . acting to suppress population
14 growth.” AR 861 (FSR) at 5512. Specifically, NOAA found that there “are three general
15 explanations (hypotheses) for the lack of recovery”: (1) The environment has changed
16 such that the current populations of the Northeastern offshore spotted dolphins and the
17 Eastern Spinner dolphins are already at or near their carrying capacities, (2) there is a lag
18 period before recovery begins, once mortality levels fall, and (3) the purse seine fishery
19 has effects on the dolphin populations beyond the reported mortality. *Id.* at 5515, 5536-
20 37.

21 Given the dearth of any data regarding the lag period hypothesis, NOAA focused its
22 inquiry on whether (1) changes in the ecosystem, or (2) effects of the fishery beyond
23 immediate observed mortality, could explain the failure of the dolphins to recover. Each
24 issue is discussed in turn.

1 a. *The Ecosystem Question*

2 To address this question, NOAA examined whether the ETP environment has
3 changed since the late 1950s in such a way that it “would no longer support the same
4 numbers of these dolphins as it did before.” *Id.* at 5515.

5 According to the Final Science Report, the possibility that there has been “some
6 degree of reduction” in the carrying capacity of the ETP “cannot be rejected because
7 relevant data are sparse, and the complicated relationships among species and their
8 environment are so poorly understood.” *Id.* It unequivocally concludes, however, that it is
9 unlikely that there have been changes of sufficient magnitude to explain the depleted
10 dolphins’ lack of recovery. “[The] physical and biological data do not support such a large-
11 scale environmental change in the ETP.” *Id.* The Report further explains:

12 *[A] three- to five-fold decline in carrying capacity of the ecosystem would*
13 *be required to explain the low growth rates currently estimated for the*
14 *depleted dolphin stocks. If such a dramatic change in the ecosystem*
15 *occurred, it is unlikely that the only animals affected would be dolphins. It*
16 *is conceivable that the small physical changes observed have had some*
effects on carrying capacity of the ecosystem for these dolphins, but the
paucity of directly relevant data precludes a determination of either the
direction of such an effect or its magnitude. However, it appears unlikely
that carrying capacity of the ETP has declined by three- to five-fold.

17 *Id.* at 5510 (emphasis added), 5567-68 (in order to explain low growth rates, the carrying
18 capacity for the ecosystem would have to have been effectively reduced by about 80% for
19 Northeastern offshore spotted dolphins and by about 65 % for Eastern Spinner dolphins).

20 In short, while a dramatic decrease in the ETP ecosystem sufficient to explain the
21 dolphins’ lack of recovery could not be categorically ruled out, the scientific evidence
22 indicated that this explanation was “unlikely.” *Id.* at 5567-68; AR 923 at 6001 (scientific
23 briefing for Secretary concluding that “Ecosystem change of a magnitude to explain lack
24 of recovery is unlikely”); AR 889 at 5752 (stating view of the MMC that “the data
25 collected and examined do not support a conclusion that environmental/ ecosystem
26 changes have prevented dolphin stocks from recovering”).

27 The members of the Ecosystems Panel also acknowledged the complexities of the
28 ETP environment, and several expressed the view that there may have been changes in the

1 ecosystem that could account for “at least part” of the dolphins’ slow recovery or may
2 have “affected” their recovery. Consistent with the Final Science Report, however, none
3 concluded that there has been dramatic large-scale environmental change sufficient to
4 fully explain the very low growth rates. *See* AR 844 at 5443 (Landry Report) (“ecological
5 changes. . . provide a credible explanation for at least part of the observed slow recovery
6 of dolphin stocks from the tuna fishery’s impact”); AR 850 at 5470 (Read Report) (“it is
7 unlikely that the ecological structure of the ETP has changed substantially in a way that
8 could significantly impede or promote the population growth of depleted dolphin
9 stocks”); AR 853 at 5482 (Barber Report) (Possible decline in ETP carrying capacity may
10 have affected recovery of the population).

11 In his final finding, the Secretary highlights the comments of panel members that
12 discuss the possibility that ecosystem changes have reduced to some extent the carrying
13 capacity of the ETP. AR 939 at 6035. Taking the Final Science Report and all of the
14 comments of the Ecosystem panelists together, however, there can be little genuine
15 dispute, that the best available science shows that whatever changes have occurred in the
16 ETP, they are not likely to explain the extremely low growth rates and the dolphin’s failure
17 to recover as expected.

18
19 b. *The Indirect Effects Question*

20 The focus of this question is whether the “chase and encirclement of dolphins
21 during fishing operations might affect dolphins, but not necessarily result in their
22 immediate, and observable, death in the nets.” AR 861 (FSR) at 5510. To this end NOAA
23 undertook a stress literature review, reviewed the results from the necropsy and CHES
24 studies, and reviewed historical data. Key lines of investigation included (1) the
25 separation of mothers from calves, and (2) the physiological effects of chase and
26 encirclement that may affect subsequent survival and reproduction. *Id.*

27 The Final Science Report also states that there are indirect effects that were not
28 studied but may be significant. First, it notes that “it is likely that there is increased

1 predation on dolphins that have experienced chase and encirclement, due to injuries,
2 weakness or separation from the school. . .” but that it was not feasible to collect data on
3 this point. *Id.* at 5537. Second, it points out that there are several reasons to think that the
4 actual bycatch is likely to be larger than the reported bycatch because of either intentional
5 and/or unintentional under reporting of dolphin deaths. *Id.* The Court examines these
6 issues in turn.

7 (i) Stress effects and cow-calf separation

8 Based on its literature review, the Final Science Report found that “[t]he operations
9 involved in catching tuna associated with dolphins are well-recognized stressors in other
10 mammals, particularly wild animals . . . ” *Id.* at 5573. Some of these effects include
11 muscle damage, an effect that can be exacerbated by release of hormones associated with
12 fear. *Id.* “The resulting syndrome, commonly referred to as *capture myopathy*, can be
13 manifested within hours or days, and can cause symptoms ranging from minor temporary
14 effects. . . to massive muscle damage and death . . .” *Id.* (emphasis in original). The
15 literature also identifies “psychosocial stressors” that may be encountered during fishing
16 operations, such as “disruption of foraging and social activity, fragmentation of social
17 bonds,” and so forth which can influence “metabolism, growth, reproduction, and immune
18 status, and therefore can significantly alter the survival and reproductive success of an
19 individual.” *Id.* Given the literature on stress, the Report concludes that it is “plausible that
20 stress resulting from chase and capture could compromise the health of at least some of
21 the dolphins involved.” *Id.* at 5510, 5573.

22 With respect to the 90 % incomplete necropsy study⁸, and the limited CHES
23 study, the Report found “some evidence for potential stress-related injury or unobserved
24 mortality of dolphins involved in purse seine fishing operations.” *Id.* at 5580. This is
25 based on the combined documentation of:

- 26 (a) moderately elevated stress hormones (catecholamines) and enzymes
27 indicative of muscle damage observed in live fishery-involved dolphins; (b)

28 ⁸ As discussed in Part IV.A(1), Defendants obtained less than 10 percent of the
minimum number of necropsies required for this study.

1 evidence of past (healed) muscle and heart damage in dolphins killed during
2 fishing operations; and (c) fatal heart damage in virtually all fishery-killed
dolphins, which most probably was related to elevated catecholamines.

3
4 *Id.* The Report concluded, that while the data samples were too small to “estimate
5 potential population-level impacts or to determine whether population recovery . . . may
6 be delayed . . . ” in “the aggregate, the findings support the possibility that purse seine
7 fishing involving dolphins may have a negative impact on the health of some individuals.”

8 *Id.* at 5511. The Report further found that “[s]everal lines of research suggested potential
9 physiological mechanisms of stress effects, but larger sample sizes...are needed to fully
10 interpret the findings.” *Id.*; *see also id.* at 5530 (“the data support the idea that tuna purse-
11 seining activities might cause the unobserved injury or death of individual dolphins,” but
12 “[w]ithout larger sample sizes, the results cannot be evaluated in terms of impact on
13 population recovery”).

14 With respect to the separation of calves from mother dolphins, the Final Science
15 Report was able to quantify the number of mortalities resulting from separation of calves
16 from mothers that occur during the latter part of the chase and capture process based on
17 the number of lactating mother dolphins that are observed dead in the nets. Based on this
18 data, the Final Science Report estimated that reported mortality figures underreport calf
19 deaths by 10-15 percent for Northeastern offshore spotted dolphins and 6-10% for
20 Eastern Spinner dolphins, “with the caveat that actual mortality is likely to be larger by an
21 unknown amount.” *Id.* at 5511, 5529-30, 5575, AR 223 at 839; AR 967. As the Report
22 notes, it could not and did not quantify the effect of mother-calf separations that may
23 occur earlier in the chase portion of the fishing operation, but concludes that this
24 “unobserved calf mortality potential could be large.” AR 861 (FSR) at 5529. The Indirect
25 Experts Panel also unanimously found that cow-calf separation could be a significant
26 cause of unobserved mortality. *See* AR 841 at 5421-22, 5423-24 (Wartzok Report); AR
27 847 at 5448, 5451 (Johnson Report); AR 851 at 5474 (Hofman Report); AR 843 at 5436-
28 37 (Sweeney report); AR 848 at 5457-59 (Lockyer Report); *see also* AR 223 at 839; AR

1 967. Thus, the record strongly supports the conclusion that cow-calf separation causes
2 mortalities significantly beyond the 10-15 percent that scientists were able to quantify.

3 The Report also emphasizes that it is “important to consider” the frequency with
4 which dolphins interact with the purse seine nets, individually and by population. AR 861
5 (FSR) at 5511.⁹ Given “the intensity of the fishery,” the Report concludes, if an average
6 of only 2-5 dolphins died unobserved per set due to indirect effects of the fishery, this
7 would explain the failure of the dolphins to recover as expected:

8 [A] relatively small number of animals effects per interaction (2-5 per set or
9 2-5 per thousand chased) would be sufficient to explain the low growth rates
and long recovery times.

10 *Id.* at 5530-31; *see also id.* at 5516 (if “the sum of the fishery effects were a few dolphins
11 per set or a few dolphins per 1000 dolphins chased, it would be sufficient to account for
12 the lack of recovery”); *Id.* at 5537, 5581-82.

13 Overall, the Report concludes that it is *probable* that the effects discussed above
14 are operating to some degree but a lack of data makes it impossible to quantify the effect
15 or reach population level conclusions. Nonetheless, it is a plausible explanation for the
16 lack of recovery by the depleted dolphin stocks:

17 [T]here are numerous plausible effects of the fishery on the dolphin
18 populations beyond the reported kill. Is the sum of all of these fishery
19 effects sufficient to account for the lack of recovery? Unfortunately, the
20 answer to this central question is not clear. For some effects, such as cow-
21 calf separation, we have estimates of the minimum size of the effect. For
22 others, such as stress effects and unreported mortality, we have indications
23 that effects may exist but do not have any quantitative estimates of their size.
24 It is *probable* that all of these effects are operating to some degree, and it is
*plausible that in sum they could account for the observed lack of growth
of the dolphin populations.* If the sum of the fishery effects were a few
dolphins per set or a few dolphins per 1000 dolphin chased, it would be
sufficient to account for the lack of recovery. However, without
comprehensive quantitative estimates for any of these effects, it is not
possible to reach *more definitive* conclusions.

25 *Id.* at 5537 (emphasis added).

26 _____
27 ⁹ For example, the Final Science Report estimates that 6.8 million Northeastern
28 offshore spotted dolphins are chased per year and 2.0 million are captured (encircled in
the nets), which results in each dolphin being chased 10.6 times per year and captured
3.2 times per year, on average. *Id.* at 5511.

1 Notably, the five members of the Indirect Effects Experts Panel further
2 corroborated the conclusions of the Final Science Report. While the opinions all
3 acknowledged the uncertainties in the data, and varied in their particulars, internal NMFS
4 summaries state that “All five panelists agree that indirect fishery effects, especially cow-
5 calf separation and increased likelihood of predation, account for the lack of recovery.”
6 March 10, 2003 Hogarth Decl., Ex. A at 12; AR 915 at 5929 (same); AR 939a at 2; *See*
7 *also* AR 847 at 5451 (Johnson report) (“it is extremely likely that unreported mortalities
8 and indirect effects are of a magnitude and degree (2-3 animals per set) to risk recovery of
9 the [depleted] dolphin stocks”); AR 843 at 5435-38 (Sweeney report) (unreported
10 mortalities are occurring due to cow-calf separation, aborted fetuses from stress, and
11 disorientation leading to predation, although without further data degree of impact is
12 unknown); AR 851 at 5474 (Hofman report) (evidence suggests that it is “likely
13 possibility” that 2-4 additional dolphins die during purse seine sets from indirect effects);
14 AR 841 at 5424 (Wartok report) (given various avenues for indirect effect to occur, it is
15 “easy” to attribute the lack of growth of depleted stocks to indirect fisheries effects); AR
16 848 at (Lockyer report) (The loss of even a few animals to capture myopathy could
17 “represent risk to recovery of populations”; calf loss is likely a significant problem and
18 evidence of lowered fecundity is “also a big concern”).

19 Notwithstanding all of the above, Defendants argue that the specific results of the
20 incomplete necropsy and limited CHESS studies provide affirmative evidence that the
21 fishery is not having a significant adverse impact. Notably, this is the first time the
22 Secretary proffers this rationale. In his final finding, the Secretary does not invoke these
23 studies as affirmative support; rather, he relies only on the lack of conclusive population-
24 level data regarding indirect effects, and the need for more research and data, to draw his
25 conclusion that the indirect effects caused by purse-seine fishing are not impacting
26 dolphins to a degree that would risk or appreciably delay recovery to optimum population
27 levels. 939 AR, 68 Fed. Reg. at 2015-16. Indeed, he points to the uncertainty in the
28

1 evidence and the need for more information no less than eight times in this section of this
2 final finding. *Id.*

3 At oral argument, Defendants' counsel argued that "if the [agency's] articulated
4 reasons. . . are not clear or require further explanation," then the Court can look beyond
5 the agency's stated rationale and to the entire administrative record to explain the agency's
6 decision. Oral Arg. Tr. at 51. The agency's articulated reasons in this case, however, are
7 neither cryptic nor unclear; on the contrary, the Secretary provided an extensive and
8 detailed discussion of his action in the Federal Register. In such circumstances, it is plain
9 that counsel can not provide *post hoc* rationalizations for the agency's action that the
10 agency did not itself articulate. *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm*
11 *Mutual Automobile Ins. Co.*, 463 U.S. 29, 43, 50 (1983) ("It is well established that an
12 agency's action must be upheld, if at all, on the basis articulated by the agency itself" and
13 not "counsel's *post hoc* rationalizations"). Accordingly, counsel can not now proffer
14 different grounds for the Secretary's final finding.

15 Even assuming *arguendo*, however, that Defendants' newly offered rationale was
16 properly before the Court, it is not supported by the record. With respect to the necropsy
17 study, Defendants argue that no delayed mortality was proven, and that lesions found
18 during the necropsy study could have been produced by non-fishery related stress in the
19 normal environment. Accordingly, Defendants now argue, the necropsy study supports the
20 final finding because "stress effects were not seen in individual dolphins sampled" and
21 additional sampling might not have allowed for population level inferences in any event.
22 Defs.' Opp'n at 7; *see also* Defs.' Mot. at 20.

23 As the Final Science Report summarizes, the necropsies showed lesions in the
24 heart, lungs, and kidney that most likely result from an overwhelming alarm reaction,
25 which presumably led to death by cardiac arrest. AR 861 (FSR) at 5574. There was also
26 evidence of previous tissue damage that had healed which was consistent with those
27 produced by excess secretion of stress hormones (catecholamines), although it was not
28 possible to determine whether they were caused by prior interaction with nets or some

1 other stressor. The findings are indicative, however, “of a degree of capture myopathy that
2 could lead to unobserved mortality in some cases.” *Id.*

3 Defendants are correct that the incomplete necropsy study did not show mortal
4 lesions or prove that the fishery is having population level adverse impacts. However,
5 Defendants’ argument that the study provides affirmative evidence of the contrary – that
6 the fishery is *not* having a significant adverse impact – stretches the record. For example,
7 while no delayed mortality was proven, the study concluded that it “seems plausible that in
8 some cases these types of injuries [lesions of the heart and small vessels] will cause
9 delayed mortality,” although more studies would be required to provide a definitive
10 answer. *See also* AR 861 (FSR) at 5574 (“The findings are indicative of a degree of
11 capture myopathy that could lead to unobserved mortality in some cases”).

12 Most importantly, the study emphasizes that delayed mortality from the stress
13 effects would be an infrequent event and thus would likely not reveal itself given the very
14 small number of necropsies actually obtained. *Id.* at 8203-04 (“Again, however, it must be
15 emphasized that the over-all sample size is too small to reveal conditions of low
16 frequency, as defined aboveFurther study using a much larger sample size is required
17 to discover low frequency conditions”). Moreover, such low frequency conditions are
18 potentially of great importance since a rare occurrence of such effects could significantly
19 impact population growth. As NOAA explained:

20 It is clear that harmful stress effects cannot be happening to most individual
21 [] [dolphins] in the population, or the population would be declining
22 dramatically. *However, a rare occurrence of such effects, in less than one
1 [sic] of 100 dolphins . . . could significantly decrease population
growth.*

23 AR 939A at 4 (emphasis added). Thus, Defendants’ position – that the necropsy study
24 constitutes affirmative evidence that the fishery is *not* having a significant adverse impact
25 – because it did not identify a delayed mortality from stress effects – lacks persuasive
26 force given that the necropsy study was grossly incomplete – with a sample size less than
27 ten percent of the minimum required – and thus was far too small to yield “*meaningful
28 and reliable scientific insights.*” March 10, 2003 Hogarth Decl. ¶ 18(c) (emphasis

1 added); AR 861 (FSR) at 5573. Indeed, this argument appears to resurrect the Secretary's
2 previous, discredited approach of dragging his feet on mandated research and then invoking
3 the incomplete results to support his finding.

4 Defendants similarly argue that the results of the CHESS experiment support the
5 Secretary's final finding because "the individual recaptured dolphins did not show signs of
6 stress response consistent with delayed mortality." Defs.' Mot. at 21. Specifically,
7 Defendants quote the Final Science Report as stating that the "observed changes [from
8 recaptured dolphins] fell well short of those noted in life-threatening capture myopathy."
9 *Id.* See AR 861 (FSR) at 5577. Again, Defendants do not fairly read the record. First,
10 they omit the remainder of the sentence which states "however, some individuals . . .
11 showed more dramatic elevations in hormones, enzymes, and other metabolic indicators,
12 suggesting that a subset of the population may be more susceptible to developing serious
13 forms of capture myopathy." AR 861 (FSR) at 5577-78.

14 More fundamentally, Defendants essentially ignore the study's overall findings
15 which (1) confirmed a stress response, (2) confirmed that chases of even short durations
16 produced mild muscle damage, consistent with lesions described in the necropsy study,
17 (3) revealed changes in blood hormones that provided a possible explanation for lesions in
18 heart muscle and which suggest some form of capture myopathy in the fishery-killed
19 animals, and (4) that larger sample sizes would be required to determine whether
20 intermediate levels of muscle damage could lead to unobserved death within hours or days.
21 *Id.* at 5579. Indeed, it was emphasized that selected individual dolphins may be
22 particularly sensitive to the stresses associated with chase and encirclement, but that, as
23 with the necropsy study, this type of relatively rare event would require much larger
24 sample sizes to be assessed. *Id.* at 5580; *see also* Indirect Effects Panel reports, AR 841
25 at 5420, 5422-23 (Wartzok report) (stress-related effects found in individual dolphins
26
27
28

1 from CHES and necropsy studies could cause delayed mortality); AR 851 at 5474-75
2 (Hofman report); AR 848 at 5456, 5458 (Lockyer report); AR 847 at 5449.¹⁰

3 In sum, it is true that the barely begun necropsy study and the limited CHES study
4 do not conclusively prove that stress effects from purse seine fishing operations are
5 having a significant adverse effect on dolphins in the ETP. The limited results, however,
6 fairly read, point in this direction. Moreover, it is the Secretary's failure to complete the
7 necropsy study that has likely created such inconclusive results. *See, e.g.*, AR
8 851(Hoffman report) ("the likelihood of determining the significance of possible stress-
9 related heart and muscle damage would be increased substantially if all of the 300 target
10 samples of animals [per stock]...were necropsied"). Under these circumstances, the
11 Defendants' attempt to transform the lack of conclusive evidence from the incomplete
12 necropsy and limited CHES studies into affirmative evidence demonstrating that the
13 fishery is *not* having a significant adverse impact is simply not persuasive.

14
15 (ii) Undercounting of mortality or sets on dolphins

16 As noted above, the Final Science Report also emphasized that the actual bycatch of
17 dolphins during purse seine operations is likely to be larger than the reported bycatch
18 because (1) some dolphin deaths are not observed, (2) dolphin sets made by boats smaller
19 than Class 6 are not observed,¹¹ and (3) observers may not report all dolphin deaths. *Id.* at
20 5515, 5537. This point is significant because the data relating to the number of dolphin
21 deaths and number of sets on dolphins is used to analyze the effects of the fishery. *See* AR
22 861 (FSR) at 5511 ("[i]n addition to reported mortality. . .it is important to consider how
23 many times the fishery interacts with dolphins individually and with the populations as a

24
25 ¹⁰ As in the case of the necropsy study, the fact that effects may be rare does not
26 render them insignificant. As one of the expert panelists explained "if only one tenth of
27 one percent of the dolphins captured each year had their immune systems affected,
making them more vulnerable to disease, approximately 2,000 north[eastern] offshore
spotted dolphins and 300 Eastern Spinner dolphins would be affected each year." AR
851 at 5475 (Hofman report).

28 ¹¹ Such vessels are not permitted to set on dolphins and thus do not carry
observers.

1 whole each year”); *id.* at 5530-31 (using data regarding number of sets to conclude that
2 “because of the intensity of the fishery, a relatively small number of animals affected per
3 interaction (2-5 per set or 2-5 per thousand chased) would be sufficient to explain the low
4 growth rates and long recovery times”); AR 968 at 6293 (“[i]n order to fulfill [the
5 Secretary’s] mandate and evaluate the effect of the fishery, it is essential to estimate how
6 often purse seine operations take place on each dolphin stock”).

7 There is significant evidence in the record to support the Final Science Report’s
8 conclusion that the data used to analyze the effects of the fishery likely undercounts the
9 number of dolphins deaths and sets. For example, annual reports from the International
10 Review Panel (“IRP”), which is charged with enforcing the IDCP state that, between 1993-
11 2001, there were 3,193 reported uses of illegal explosives, 484 reports of night sets, and
12 94 reports of interference of observers. Suppl. AR 6 at 647-49; Suppl. AR 9 at 904-06;
13 Suppl. AR 11 at 1132-34; Suppl. AR 14 at 1178-80; Suppl. AR 19 at 1425-27; Suppl. AR
14 77 2416-24; AR 697 at 3876, 3916, 3944.¹² Given that these figures only represent
15 reported instances, it is likely that the actual number of such incidents is higher.

16 Internal briefing memoranda to the Secretary also highlight the concern that
17 unreliable mortality data is a significant issue affecting dolphin recovery. For example a
18 set of “General Talking Points” prepared for the Secretary in December 2002 states “We
19 are particularly concerned about mortality that stems from non-compliance with the
20 International Agreement, such as discrepancies in reporting by the national observer
21 programs and the illegal setting on dolphins by small [under class 6] vessels.” DP 321 at 2;
22 *see also* DP 321 at 1 (Outline for Talking Points which identified vessels under size Class
23 6 and unreliable mortality data from national observer programs as some of the causes of
24 the dolphins’ failure to recover).

25 A document inadvertently discovered by Plaintiffs and ordered included in the
26 Administrative Record by Court order on April 15, 2004, also highlighted the issue of

27
28 ¹² Suppl. AR refers to supplements to the Administrative Record that Defendants
produced pursuant to discovery proceedings.

1 undercounting as early as 1999. It consists of a November 24, 1999 e-mail from a senior
2 scientist, Bob Pitman, who raised serious concerns regarding the undercounting of sets by
3 Mexican national observers. Specifically, he wrote as follows:

4 I'm writing [about] a conversation we had in Costa Rica with a purse seine
5 fisherman that came onboard [our ship] and talked to us for a couple of
6 [hours] while we were in port there. He was an older guy from San Diego I
7 believe and was the deck boss off a seiner tied up next to us. He had just
8 finished a long trip where they had set on and released what he said was
9 several hundred thousand dolphins without a single mortality. He was quite
10 candid with us on a number of issues and I don't have any doubts about the
11 veracity of his statements.

12 What was troubling was that he said he had worked on a number of Mexican
13 purse seiners, and although they always had observers on board it was
14 common knowledge throughout the fleet that the observers were regularly
15 paid off to misreport what happened during the cruise. What was most
16 interesting was that the observers weren't being paid to ignore dolphin
17 mortalities (because apparently they have relatively few), they were instead
18 being paid substantial sums of money to report their dolphin-caught tuna as
19 'dolphin safe' when they were actually being caught [using purse seine nets]
20 on dolphins. . .

21 He said he had personally been onboard when the Mexican observers were
22 handed \$10,000 to report all the catch as 'dolphin safe.' He said that is a
23 small sum compared to what the boats can make by mis-reporting their
24 catch. The implications for our efforts is that there has probably been a lot
25 more pressure on dolphin stocks in the ETP than we are aware of, which
26 could actually be a factor in the apparent non-recovery of ETP dolphin
27 stocks.

28 Suppl. AR 66. The e-mail was forwarded to Michael Tillman, Director of the Southwest
Region of NOAA, NMFS, who stated that Mr. Pittman's e-mail "substantiates
allegations/concerns which have emerged during past meetings of the IRP." *Id.* As
discussed in Part IV(B)(2)(b)(ii), accurately determining the number of sets on dolphins,
and thus the intensity of the fishery, is an important step in properly analyzing the indirect
effects of the fishery. *See also* AR 861 (FSR) at 5530-31.

Notwithstanding all of the above, the Secretary did not take into consideration the
fact that the data he relied upon may well under-count mortalities and the number of sets
on dolphins. On the contrary, the final finding emphasizes that NOAA has a "high degree
of confidence" in its mortality statistics because they are based on 100% observer

1 coverage. AR 861 (FSR) at 2015.¹³ The Secretary argues that the evidence indicating that
2 the data may well under-count mortalities and sets could not be considered because it was
3 not “quantifiable,” *See* Defs.’ Opp’n to Pls.’ March 22, 2004 Mot. to Supplement Record
4 at 3; Oral Arg. Tr. at 50-51. The fact that certain relevant information is not readily
5 quantifiable, however, does not justify its exclusion from consideration. Indeed, many
6 points discussed in the Final Science Report were not “quantifiable.” Nor does the IDCPA
7 direct the Secretary to only consider “quantifiable” information. As such, the Secretary’s
8 failure to consider this category of information further undermines the basis for his
9 finding.

10
11 (3) The Direct Mortality Question

12 The ODP also directs NOAA to answer the following question: “For any depleted
13 stock, does the estimate of the total fishery-attributed dolphin mortality, obtained by
14 adding together estimates of direct mortality and, where appropriate, quantifiable levels of
15 indirect mortality, exceed the mortality standard considered appropriate by the Secretary?”
16 67 Fed. Reg. at 54642. If the Secretary answered “yes” to this question, the Secretary was
17 to conclude that the fishery is having a significant adverse impact. *Id.* at 54641.

18 The only indirect mortality that NOAA was able to quantify was data regarding cow-
19 calf separation, which, as discussed above, indicated that reported mortality figures
20 underreport calf deaths by 10-15 percent for Northeastern offshore spotted dolphins and
21 6-10 percent for Eastern Spinner dolphins, “with the caveat that actual mortality is likely
22 to be larger by a unknown amount” since it was not possible to quantify the effect of calf
23 separations that occur earlier in the chase portion of the set. AR 861(FSR) at 5511, 5529-
24 30, 5575, AR 223 at 839; AR 967.

25
26
27 ¹³ The Court notes that, in order to provide data covering 100% of all sets, the
28 IATTC must rely on national observer programs, including Mexico’s national observer
program. *See* Ex. 1 to Def.’s May 14, 2004 letter (explaining that the IATTC observer
scheme involves alternating IATTC and national program observers on trips).

1 Taking into account the limited cow-calf separation data available, the Final Science
2 Report concludes that direct mortality falls well below the Potential Biological Removal
3 (“PBR”) levels¹⁴ for each stock – the mortality standard considered appropriate by the
4 Secretary. AR 939 at 6036.

5 If the direct mortality figures (combined with any quantifiable indirect mortality)
6 *were* exceeding the PBR levels, this fact alone would, under the ODP, have required the
7 Secretary to find a significant adverse impact. The fact that they are not exceeding the
8 PBR levels, however, does not, under the ODP, affirmatively establish the contrary – that
9 the fishery is not having a significant adverse impact. Notably, the ODP only provides that
10 a “yes” answer requires a finding of significant adverse impact but does not provide for the
11 converse. 67 Fed. Reg. at 54641.

12 This is because the IDCPA essentially assumes that direct observed mortality is not
13 having a significant adverse impact on the depleted dolphin stocks – given the very low
14 reported mortality rates– and instead focuses on whether *indirect unobserved* effects are
15 causing the dolphins’ failure to recover as expected. Thus, while the Final Science Report
16 does confirm that direct observed mortality is not the cause of the dolphins’ failure to
17 recover, this finding does not, by itself, support a conclusion that the fishery is not having
18 a significant adverse impact. As the Final Science Report concludes, the final finding
19 should be made “in consideration of evidence for adverse fishery effects *beyond* reported
20 mortality. . .” AR 861 (FSR) at 5537 (emphasis added).

21 The Secretary argues, however, that NOAA’s analysis on this issue does provide
22 substantial affirmative support for his finding because NOAA was also able to include in
23 its direct mortality analysis quantifiable indirect effects. As noted above, however, the
24 only quantifiable indirect effect that NOAA was able to include was data regarding one
25 aspect of one indirect effect (cow-calf separation during the latter part of the set). NOAA
26

27
28 ¹⁴ PBR is “the maximum number of animals, not including natural mortalities,
that may be removed from a marine mammal stock while still allowing that stock to
reach or maintain its optimum sustainable population size.” AR 939 at 6036.

1 was not able to quantify other potential indirect effects because of incomplete data. As
2 such, this argument carries little weight.

3 As discussed above, the Secretary also ignores the evidence in the record that the
4 direct mortality data likely understates actual direct mortality due to inadvertent and
5 intentional under-reporting by observers and the setting on dolphins by boats smaller than
6 Class 6. *See* Part IV(B)(2)b(ii). The Secretary’s failure to consider likely flaws in the
7 mortality data further detracts from his conclusion that the reported mortality data
8 constitutes significant affirmative evidence that the fishery is not having a significant
9 adverse impact on depleted dolphins.

10
11 (4) Conclusion

12 In sum, the best available scientific evidence clearly shows that the Northeastern
13 offshore spotted dolphins and the Eastern Spinner dolphins remain severely depleted, and
14 that while reported direct mortality is very low – and not a threat to the dolphins’ recovery
15 – the dolphins are still not recovering at expected rates and may never fully recover.
16 Rather, the very low growth rates indicate that the dolphin populations are being
17 significantly adversely impacted by something – i.e. that “some process is acting to
18 suppress population growth.” AR 861 (FSR) at 5512.

19 As to the cause of the suppression, scientists examined two potential explanations:
20 (1) changes to the ecosystem and (2) indirect effects from the fishery. With the respect
21 to the former, the available scientific evidence indicates that while the ecosystem may
22 have changed to some degree it is not the likely explanation for the dolphins’ failure to
23 recover. With respect to the latter, scientists identified potential indirect effects of the
24 fishery, including cow-calf separation, delayed stress effects, and under-reporting of
25 mortality. While inconclusive, the best available scientific evidence all suggests that these
26 combined effects can explain the dolphins’ failure to recover, particularly given the
27 intensity of the fishery. As such, the Final Science Report concludes that “[t]he final
28 determination of whether or not the purse seine fishery is having a significant adverse

1 impact . . . should be made in consideration of the evidence for adverse fishery effects
2 *beyond reported mortality and the lack of evidence for substantial ecosystem change.*”
3 *Id.* at 5537 (emphasis added). Indeed, it appears clear that, as with the case of the initial
4 finding, virtually all of the best scientific evidence that *is* available points in favor of
5 finding that the fishery is having a significant adverse impact on the depleted dolphin
6 stocks.

7 Significantly, internal documents prepared in early December 2002, shortly before
8 the final finding, are fully consistent with this conclusion. Although Defendants have
9 never identified the author(s) of the documents, they concede that “NOAA staff properly
10 prepared the document[s] for use by Dr. Hogarth, the decision maker, as a tool in making a
11 fully informed decision.” Defs.’ Opp’n at 4. The first, an “Outline with Talking Points for
12 Tuna/Dolphin Briefing, December 11, 2002” summarizes the research that was done and
13 identifies the following “Conclusions”:

- 14 • Depleted dolphins stocks are not recovering as expected, and there seems to
15 be 10,000-20,000 ‘missing’ dolphins that would account for this lack of
recovery
- 16 • Fishery effects, particularly cow-calf separation, vessels under size Class 6,
17 and unreliable mortality data from national observer programs are the *most*
likely causes.

18 DP 321 at 1 (emphasis added). The second, titled “General Talking Points,” includes
19 similar points and concludes that the science does *not* support a finding of “no significant
20 adverse impact”:

- 21 • Dolphin stocks are not growing as they should, may be declining, and it’s
22 *probably not* the environment causing the delay in recovery.
- 23 • Although there is uncertainty, *most of the data we have point to the fishery*
as the cause
- 24 • A determination of “no significant adverse impact” *is not supported by the*
science . . .

25 DP 321 at 2 (emphasis added).¹⁵

26 _____
27 ¹⁵ Defendants attempt to dismiss the importance of the last talking point quoted
28 above by referring to it as “half a sentence.” Defs.’ Opp’n at 4. As Defendants are
aware, the only reason the remainder of the sentence is not included here is because the
Court allowed Defendants to redact the final portion of the sentence – which only

1 As noted above, the Secretary, in explaining his final finding, repeatedly focuses on
2 the fact that the evidence concerning indirect effects is inconclusive and that additional
3 data is needed. Thus, while he concedes that “[i]n the aggregate, available data suggest the
4 possibility that purse seining activities result in indirect effects that negatively impact
5 dolphins,” he concludes that because the available data is insufficient to draw population-
6 level inferences, and “[a]dditional research is necessary,” that the indirect effects are “not
7 impacting dolphins to a degree that would risk or appreciably delay recovery.” AR 939 at
8 6036-37. As discussed above, however, findings in the area of marine science must often
9 be based on incomplete information, and doubts should be resolved in favor of the
10 depleted species. *Brower II*, 257 F.3d at 1070. As such, the Secretary can not rely on
11 “insufficient evidence” to default to a finding of no significant adverse impact –
12 particularly where, as here, the Secretary continued to drag his feet on critical research. *Id.*
13 at 1066-67, 1070-71. Indeed, the Secretary’s heavy reliance on the fact that the indirect
14 effects evidence is not definitive is completely unavailing. Finally, as discussed above,
15 Defendants’ efforts to demonstrate that the record contains significant affirmative
16 evidence supporting a finding that the fishery is not having a significant adverse impact is
17 based either on a misreading of the record or improper *post-hoc* justifications, which in
18 any event do not hold up under scrutiny.

19
20 C. Integrity of the Decision-Making Process

21 In seeking to uphold his initial finding, the Secretary expressly argued that
22 “international concerns and competing policies for protecting dolphins” should be taken
23 into account. *Brower II*, 257 F.3d at 1065-66. As both this Court and the Ninth Circuit

24 _____
25 further underscored the first part of the sentence. Defendants also argue that this
26 document can not be viewed as an admission by NOAA because the document can not be
27 said to reflect the decision maker’s rationale and does not reflect NOAA’s final
28 position, which is set forth in the Federal Register. Defs.’ Opp’n at 4. This argument
misses the point. The point is not that this document reflects the reasoning of the
decision-maker – clearly it does not; rather, it is compelling evidence that the decision-
maker *rejected* the conclusions of the agency’s own scientists, and thus the best
available scientific evidence.

1 have plainly held, however, Defendants were required to make the final finding based
2 solely on the best available scientific data, and without deference to trade politics or
3 competing policy viewpoints. *Brower I*, 93 F. Supp. 2d at 1087, 1089-90, *aff'd*, 257 F.3d
4 at 370; *EII*, 256 F. Supp. 2d at 1066, 1069-71. Indeed, the prior decisions in this matter
5 made it patently clear that “international concerns” and “competing policies” regarding the
6 best approach to dolphin conservation had no place in the Secretary’s decision-making
7 because such factors had already been weighed by Congress – and resulted in the specific
8 and mandatory requirements of the IDCPA. “Such [policy] decisions are within Congress’
9 bailiwick, and both the Secretary and this court *must defer to congressional intent as*
10 *reflected in the IDCPA.”* *Brower II*, 257 F.3d at 1066 (emphasis added). Indeed,
11 Defendants agreed at oral argument that the Congressional compromise was to leave the
12 decision to NOAA’s scientific expertise. Oral Arg. Tr. at 54.

13 Despite these explicit warnings and admissions, the record is replete with evidence
14 that the Secretary was influenced by policy concerns unrelated to the best available
15 scientific evidence. In fact, while Defendants maintain that Plaintiffs’ claim of political
16 influence is only “mere . . . conjecture,” Defs.’ Opp’n at 20, this Court has never, in its 24
17 years, reviewed a record of agency action that contained such a compelling portrait of
18 political meddling. This portrait is chronicled in documents which show that both Mexico
19 and the United States Department of State (“DOS”) engaged in a persistent effort to
20 influence both the process and the ultimate finding, and that high ranking-officials in the
21 Department of Commerce were willing to heed these influences notwithstanding the
22 scientific evidence to the contrary. Aiding this process was the fact that the Department
23 of Commerce’s own trade policy objectives in this area were consistent with the interests
24 of Mexico and the DOS.

25 First, as the record makes plain, Defendants were well aware that both the DOS and
26 Mexico (the United States’ second largest trading partner, *see* RD 9 at 43¹⁶), were strongly

27 _____
28 ¹⁶ The term “RD” refers to “released documents” for which asserted privileges
have been withdrawn.

1 pushing for a finding of No Significant Adverse Impact (“NSAI”). A briefing packet
2 prepared in September 2001 for the Secretary of Commerce is one of numerous examples
3 in the record that makes this point abundantly clear:

4 The final finding is very important to the Government of Mexico, as the
5 Mexican tuna industry is eager to receive the dolphin-safe label for much of
6 their tuna that is imported into the United States . . . A finding of ‘no
7 significant adverse impact’ would allow this to happen. By contrast, a final
8 finding of ‘significant adverse impact’ will prevent Mexican tuna from being
9 labeled as dolphin-safe, and in Mexico’s view, effectively continue to block
10 the importation of Mexican caught tuna into the United States.

11 DP 113. Mexico also threatened to withdraw from the IDCP if the dolphin label was not
12 changed, and both the DOS and the Department of Commerce strongly favored keeping
13 this agreement intact. *See, e.g.*, DP 113 (summarizing September 2000 consultations with
14 Mexico during which Mexico threatened to withdraw from the IDCP or take action
15 through the World Trade Organization if the label standard was not changed); AR 106 at
16 447 (DOS e-mail noting Mexico’s threat to abandon the IDCP and stating that “Our goal
17 continues to be to keep this program intact.”); AR 896 at 5817 (“Both NOAA Fisheries
18 [Department of Commerce] and the Department of State want the [IDCP] program to
19 succeed and recognize the potential impact of either finding on the program”); DP 329
20 (internal talking points identifying Department of Commerce’s basic goals with respect to
21 tuna/dolphin issues as *inter alia* “continued international cooperation” and “getting better
22 compliance with the [IDCP Agreement]”); RD 8 at 35, 38.

23 In February, 2002, the United States Ambassador to Mexico met with the Mexican
24 Secretary for Agriculture and Fisheries and senior Mexican trade and foreign affairs
25 officials. A summary of this meeting, provided to the Department of Commerce, stated
26 that the Mexican officials made a detailed presentation of Mexico’s concerns about the
27 continued effective closure of the United States market to Mexican tuna. The Mexican
28 officials urged the United States to “seize the moment and expend the necessary political
capital to resolve this issue.” DP 180 (Attached Mem. at 1). While the Ambassador
responded that Mexican officials should submit their views on the proposed Organized
Decision Process during the 60-day public comment period through the appropriate

1 channels, *id.* (Attached Mem. at 2), the record reflects that, at least since 2000, Mexico
2 had been afforded numerous opportunities to press its case at the highest levels outside
3 any formal comment periods provided for by the Federal Register. *See, e.g.*, DP 3 (May
4 2000 briefing memorandum for meeting between former Commerce Secretary William
5 Daley and Mexican officials regarding tuna-dolphin issues in Secretary’s office); DP 85
6 (July 31, 2001 Talking points for Secretary Evans for meeting with Mexico on
7 Tuna/Dolphin issues); DP 148 (describing December 2001 consultations with Mexico on
8 tuna-dolphin issues attended by, among others, Commerce Deputy Under Secretary Scott
9 Gudes and Senior Policy Advisor Sloan Rappoport, and led by Department of State); RD 9
10 at 43 (referring to 2002 meetings between Secretary Evans and Mexican Economy
11 Secretary Derbez concerning the court decision that is “precluding Mexico’s tuna exports
12 from being labeled ‘dolphin-safe.’”); DP 178, 180 (e-mail from DOS to NOAA re
13 February 2002 meeting between the Mexican Secretary of Agriculture and Fisheries, U.S.
14 Ambassador, Under Secretary Hakim and others “to discuss the tuna-dolphin question”);
15 DP 191 (Talking points re April 2002 “U.S.-Mexico Meeting on Tuna-Dolphin Issues”).

16 Aside from the issue of access, the record indicates that the influence of the DOS
17 and Mexico were felt early on in the process leading up to the final finding. First, Former
18 Commerce Secretary William Daley “committed” as early as 1999, “at the request of
19 Mexico,” to “an accelerated target date of September 2002” for issuing the final finding.
20 DP 1 (Attached Mem. at 1). Then, on December 4, 2001, current Under Secretary Scott
21 Gudes reconfirmed to Mexican officials a commitment to an early September 2002 final
22 finding in a meeting led by the DOS. DP 148. On July 31, 2002, Secretary Evans also
23 reiterated to Mexican Economy Secretary Derbez that he was amenable to an early final
24 finding and a “time line of events leading to the [early] final finding and reflecting this
25 possibility [was] transmitted to Secretary Derbez’s office.” DP 113. *See also* RD 8 at 38
26 (“Given the importance of this issue to Mexico and the other ETP fishing nations, the
27 Secretary is committed to making the final finding as early as September 2002”). While
28 the Secretary did not ultimately expedite the final finding, the fact that he had agreed to do

1 so at Mexico's behest – at the same time that Mexico was failing to fully cooperate in
2 essential necropsy research efforts – suggests not only significant influence, but a
3 Secretary who was more concerned with diplomatic relations than obtaining the necessary
4 scientific research.¹⁷

5 Second, Mexico had criticized the decision-making framework used for the initial
6 finding for, *inter alia*, not being flexible enough. DP 203 at 2. The DOS also objected to
7 the NMFS' proposed process for making the final decision, originally termed the
8 "Decision Analysis Framework" or "DAF." And as the record clearly reflects, the DOS
9 successfully intervened to obtain a more flexible decision making framework. On
10 September 1, 2001, NOAA staff member, Nicole Le Boeuf, explained that she would be
11 updating her colleagues "on a recent conversation I had with individuals from the DOS, in
12 which I gave them the [decision] framework diagrams for their review." DP 112. She
13 added that "I will provide you with more details of this conversation (i.e. how it came
14 about, etc...) and some of their recommended changes in the draft framework for your
15 consideration." *Id.* By September 7, 2001, Rebecca Lent of NOAA wrote Ms. Le Boeuf
16 that "the message [she] was getting from Bill GF [at the Department of State] was one of
17 considerable concern about the [Decision Analysis Framework] - seriously," and noted
18 that the "SML [stock mortality limit] issue is going to be tough." DP 118. By September
19 13, 2001, Ms. Leboeuf was informed that "DOS [Department of State] had requested a
20 political-level meeting," DP 121, leading Ms. Le Boeuf to respond: "Is this the beginning
21 of the decision framework showdown [with DOS]???" *Id.* Senior Policy Advisor
22 Rappoport responded "yes, this is likely the beginning of the showdown on the DAF. I'll
23 see if they want you in on the meeting, but Hogarth was inclined to keep it small." *Id.* He
24 promised, however, not to "give away the farm." *Id.* By October 30, 2001, the DAF had

25
26 ¹⁷ It appears that Mexico withdrew its request for an early finding. *See* DP 225
27 (June 2002 internal NOAA e-mail stating that "the Mexicans are now reconsidering the
28 accelerated finding and may instead prefer a consultation on the research report with the
two commissions"); RD 8 at 38 (August 2002 memorandum noting that NMFS officials
"have already been approached [by Mexico] regarding the possible retraction of this
request [for an early final finding] and have asked [Mexico] for formal notification").

1 “morphed [from the Decision Analysis Framework] into an organized decision process
2 [ODP] such that the Secretary has more flexibility.” DP 137. A summary of changes to
3 the DAF states, *inter alia*, that the new ODP “addresses the concern that a more rigid
4 decision framework might reduce the Secretary’s flexibility to make a sound policy
5 decision. To support this all references to a formal decision framework have been
6 replaced with language in support of an organized decision process.” DP 149 at 2. *See*
7 *also* DP 125 (after input from NOAA, DOC, and DOS, new version leaves “more
8 discretion” to the Secretary and eliminates use of SMLs.); DP 260 (Attached Mem. at 2)
9 (“The ODP is far less quantitative and restrictive than the previously used DAF”).

10 During the month of December 2002, on the eve of the final finding, the political
11 pressures intensified. On December 2, 2002, Commerce Under Secretary for the
12 International Trade Administration, Grant Aldonas, met with the Mexican tuna industry.
13 DP 300; AR 911. In response to complaints that they were “unhappy[] with the NMFS
14 approach,” and that NMFS’ study was biased and non-transparent, Aldonas assured them
15 that “*Secretary Evans*, and *not* NMFS, will make the determination.” AR 911 (emphasis
16 added) . He further asked them to “identify specific problems in the NMFS study so they
17 can be addressed in the decision paper for Secretary Evans.” *Id.* Aldonas also stated that
18 “he promised Secretary Derbez that he would look into” seeking a change of venue in the
19 event the final finding was challenged. *Id.* On December 3, 2002, the DOS, NOAA, and the
20 U.S. Trade representative met with officials from the governments of Mexico, Colombia,
21 Costa Rica, and Venezuela. The meeting was held at the joint request of the four foreign
22 governments “in order to express their concerns over the Secretary of Commerce’s
23 pending final finding regarding the dolphin-safe labeling standard.” DP 316 at 1.

24 On December 3, 2002, Secretary of State Colin L. Powell also personally wrote
25 Secretary Evans that “[t]he Department of State has an ongoing interest in this matter
26 because this finding will profoundly affect our role as the lead USG [United States
27 Government] representative to the IDCP [International Dolphin Conservation Program].”
28 AR 904 at 5878. The Secretary further argued the importance of the IDCP, emphasizing

1 that the DOS, “[w]orking in close cooperation with your staff at NOAA . . . [has]
2 successfully developed the IDCP from its origins in 1992 as an informal arrangement to a
3 binding international agreement . . .” *Id.* Finally, Secretary Powell argued that the
4 evidence was not sufficient to find a significant adverse impact and requested that
5 Secretary Evans “carefully consider the sufficiency of the evidence in reaching [his]
6 decision.” AR 904 at 5878.

7 In mid-December, Trade Undersecretary Aldonas, subsequent to his meeting with
8 the Mexican tuna industry, began challenging NMFS’ scientific conclusions, leading Dr.
9 Hogarth to send out an “urgent request” for help from agency scientists to help him
10 respond. DP 340. On December 23, 2002, the Mexican Ambassador also personally
11 wrote Secretary Evans:

12 I know [Mexican] Secretary Derbez has been in touch with you regarding the
13 tuna-dolphin issue. Nevertheless, I would like to underline the importance
14 that this longstanding issue has for Mexico’s economy, Mexico’s public
15 opinion and sustainable development . . .

14 I am sure that within the sphere of your mandate, your sympathy towards
15 Mexico and the strength of our bilateral relationship, you will find the best
16 formula to solve this issue in a favorable way.

16 AR 925 at 6004.

17 During this same period, the record shows that, within the Department of
18 Commerce, the decision-making process was shifting away from the science and toward
19 the larger policy issues. As discussed earlier, a “General Talking Points,” prepared by
20 NOAA staff around December 11, 2002 for the decision-maker, focused on NMFS’
21 scientific conclusions as reflected in the Final Science Report and the opinions from the
22 expert panels, and included the following points: (1) “Although there is uncertainty, *most*
23 *of the data we have point to the fishery as the cause* [of the depleted stocks’ failure to
24 recover as expected],” and (2) “A determination of ‘no significant adverse impact’ *is not*
25 *supported by the science.*” DP 321 at 2 (emphasis added). By December 16, 2002, a
26 revised set of Talking Points prepared in anticipation of the final finding had a
27 considerably different approach. Instead of focusing on the science, it emphasized the
28 larger policy considerations:

- 1 • We've all seen the science. We know that dolphin stocks aren't recovering.
- 2 • Now, let's take a step back and look at the bigger picture
- 3 • We also know that, given the information in-hand, we can't *prove* that either
4 the fishery is or is not having a significant adverse impact on the dolphins. . .
- 5 • So, we've identified what our overarching goals are and would like to take
6 the road that best gets us to these goals.
- 7 • Our basic goals are: dolphin recovery, continued international cooperation,
8 getting better compliance with the [IDCP] Agreement, and maintaining a
9 sustainable fishery. . .
- 10 • We think we can package either decision to demonstrate that we are
11 conservation minded, pro-active, and are dedicated to recovering dolphins as
12 well as cooperating with our international partners.

13 DP 329 (emphasis added). On December 31, 2002, the Secretary issued his final finding
14 that the fishery is not having a significant adverse impact on depleted dolphin stocks in the
15 ETP, thus triggering a weakening of the dolphin-safe standard.

16 To be sure, there is no “smoking gun” document that explicitly admits that the final
17 finding was motivated by larger policy considerations that Congress did not intend the
18 Secretary to consider. The Court would not, however, expect such a document to exist.
19 The plentiful circumstantial evidence, however, readily leads the Court to this conclusion.
20 Indeed, it appears that while the scientists at NMFS undertook their research mission
21 extremely seriously, at the end of the day, the intense pressures to secure larger policy
22 objectives led to a decision driven more by politics than science. Indeed, the record
23 reflects an agency that gave short shrift to the conclusions of its own scientists, dragged
24 its feet on crucial research, and essentially ignored the explicit warning of the appellate
25 court not to invoke “insufficient evidence” as a justification for its finding. *See* Part
26 IV(B)(4).

27 While Defendants vigorously deny that international trade and policy
28 considerations influenced the Secretary's final finding, their arguments lack force. For
29 example, Defendants argue that the record only “confirms that NOAA was willing to meet
30 with any and all interested parties, including Plaintiffs, and hear their varied concerns.”
31 Defs.' Opp'n at 20. Defendants further point to eight items in the Administrative Record
32 to demonstrate that Plaintiffs were equally able to press their views upon the Secretary. *Id.*

1 A review of the eight items, however, only serves to highlight the limited influence and
2 access that Plaintiffs enjoyed relative to the DOS, the Government of Mexico and the
3 Mexican tuna industry.¹⁸ Defendants also repeatedly emphasize that Dr. Hogarth states
4 that he “did not give any weight to the materials regarding discussions with the Mexican
5 Government on their trade concerns.” *Id.* (quoting Nov. 12, 2003 Hogarth Supplemental
6 Decl. ¶ 5). Notably, Dr. Hogarth does not state that he did not give any weight to the views
7 of the DOS, the Mexican tuna industry, or the Commerce Under Secretary of Trade.

8 As this Court has previously held, the Secretary must be held to the Congressional
9 compromise that resulted in the IDCPA. *Brower I*, 93 F. Supp. 2d at 1089. Under this
10 compromise, the dolphin-safe standard would *not* be changed in order to support the IDCP
11 or otherwise promote the international trade policies and objectives sought by the
12 Executive Branch either in 1997 or today. Rather, the compromise required that the fate
13 of the dolphin-safe standard would turn solely on the *scientific* evidence of the impact of
14 the fishery on depleted dolphin stocks. Indeed, Defendants conceded this point at oral
15 argument. *See* Oral Arg. Tr. at 54 (“[T]here had been international obligations to look into
16 the change of this label with our own Congress, but our Congress made a different
17 decision in terms of leaving it within NOAA’s expertise . . . to review the science”).

18 Given all of the above, this Court is convinced that the Secretary’s decision-making
19 process was infected by the very policy considerations that Congress had directed should

21 ¹⁸ *See* AR 303 (May 2001 brief cover letter to Secretary on behalf of the Dolphin
22 Safe/Fair Trade Campaign attaching a scientific report); AR 354 (July 2001 public
23 comments for the record regarding a permit application for the taking of ETP Dolphins
24 in connection with the CHESS study); AR 467 (September 2001 letter requesting that
25 representatives of the environmental community be allowed to attend a scheduled
26 September 11, 2001 “dispute resolution” meeting between DOC, DOS, and Mexican
27 tuna industry officials); AR 697 (April 16, 2002 Comments submitted on the Proposed
28 Organized Decision Process); AR 783 (June 2002 letter responding to Federal Register
notice soliciting nominations for expert panelists); AR 803 (follow up letter regarding
nominations); AR 826 (e-mail regarding Earth Island’s request that a video showing a
Columbian vessel setting on dolphins in violation of IDCP (because of small size)
resulting in over 50 plus unreported dolphin deaths be made part of the record and
provided to Indirect Effect Experts Panel); AR 890 (October 2002 letter to Secretary
requesting that NMFS draft report be made public given that the draft report had been
made available to the IATTC).

1 not be considered. Accordingly, the Court has no choice but to conclude that the final
2 finding was based on “factors which Congress has not intended [the agency] to consider.”
3 *Brower II*, 257 F.3d at 1065; *Midwater Trawlers Coop. v. Dep’t. of Commerce*, 282 F.3d
4 710, 720 (9th Cir. 2002); *New York v. Gorsuch*, 554 F. Supp. 1060, 1065-66 (S.D.N.Y.
5 1983) (agency can not fail to comply with statutory mandate based on competing
6 concerns).

8 V. CONCLUSION

9 As Defendants emphasize, the final finding is the culmination of an entirely distinct
10 proceeding from the initial finding. This is certainly correct in that the agency amassed a
11 much larger body of information during the intervening years, developed a new decision
12 process, and made the final finding with the benefit of the Ninth Circuit’s decision in
13 *Brower II*, 257 F.3d 1058. As the above discussion reveals, however, Defendants failed to
14 heed the fundamental teachings of *Brower II*. As a result, the Secretary’s final finding is
15 little more than a reprisal of the agency’s past errors.

16 First, *Brower II* expressly warned the agency that it could not – as in the case of the
17 initial finding – drag its feet on Congressionally mandated research, and then invoke a lack
18 of evidence on the very subject of the research to justify removing a form of protection
19 for a depleted species, Defendants have repeated this same error. As detailed above in
20 Part IV(A), the agency, without compelling justification, again failed to come even close
21 to completing the necropsy study, despite the fact that it was a key stress study mandated
22 by Congress – and despite the agency’s concession in 1999 that critical data on stress
23 would need to await completion of the necropsy sampling program. Indeed, Defendants
24 admit that their failure to obtain even 10 percent of the minimum required necropsy
25 samples precluded “meaningful and reliable scientific insights” from this critical study.

26 And while Defendants vigorously dispute that the Secretary “defaulted” to a finding
27 of no significant adverse impact based on insufficient evidence, the final finding speaks
28 for itself. As discussed in Part IV(B)(3) and (4), the Secretary’s discussion in the final

1 finding of the indirect stress effects of the fishery not only repeatedly emphasizes the
2 insufficiency of the evidence, and the need for additional research in order to more
3 conclusively evaluate the indirect effects of the fishery, but it also relies exclusively on
4 these points to conclude that the indirect effects are not sufficient to cause a significant
5 adverse impact.

6 Second, *Brower II* expressly held that the applicable standard – the best *available*
7 scientific evidence – does not demand conclusive evidence and is intended to give “the
8 benefit of the doubt to the species.” *Brower II*, 257 F.3d at 1070. Thus, findings in the
9 marine mammal conservation area must often be made based on incomplete data. *Id.* After
10 applying this standard in *Brower II*, the court concluded that the Secretary had abused his
11 discretion because all of the best scientific evidence that was available, while not
12 conclusive, indicated that dolphins were adversely impacted by the fishery. *Id.* at 1071.

13 Here again, the best available scientific evidence, while not conclusive, is all
14 suggestive that the fishery is having a significant adverse impact. As discussed in Part
15 IV(B), the evidence indicates that (1) the dolphin stocks are still severely depleted and are
16 not recovering despite extremely low reported mortality rates, (2) that their recovery is
17 being risked or appreciably delayed, (3) that changes to the ecosystem are unlikely to
18 explain this phenomena, and (4) that indirect effects from the fishery can plausibly
19 account for the lack of recovery. In short, virtually all of the best available evidence again
20 points toward the fishery as the cause of the dolphin’s failure to recover – a conclusion
21 shared by NMFS scientists in an internal briefing prepared for the Secretary in December
22 2002. Yet Defendants again dismiss much of this evidence because it is not “conclusive”
23 despite the teachings of *Brower II*.

24 Finally, as detailed in Part IV(C), *Brower II* explicitly held that the Secretary could
25 not base his finding on larger policy objectives but instead must heed Congress’ directive
26 to yield to the science. Yet the record convincingly demonstrates that the Secretary
27 nonetheless proceeded to sacrifice the integrity of the decision-making process by
28

1 disregarding the best available scientific evidence in favor of political and diplomatic
2 considerations.

3 Given all of the above, the Court finds that Plaintiffs have amply met their burden
4 of demonstrating that (1) the Secretary's offered explanation for its decision runs counter
5 to the evidence before the agency and (2) the agency relied on facts which Congress did
6 not intend it to consider. *Brower II*, 257 F.3d at 1065. Accordingly, the Court finds that
7 the Secretary's final finding is "arbitrary, capricious, an abuse of discretion, or otherwise
8 not in accordance with the law." 5 U.S.C. § 706(2)(A).

9 The Secretary argues that, in the event the Court sets aside his final finding, that the
10 matter should be remanded to him for further proceedings. Plaintiffs, on the other hand,
11 contend that the Court should remand with specific directions. While the more typical
12 course would be a remand for further proceedings, the Court agrees with Plaintiffs that
13 this is not a typical case. Rather, the fact that Defendants have repeatedly failed to heed
14 both Congress' intent and the teachings of the appellate court leads this Court to conclude
15 that a remand for further proceedings would be futile in this case. Further, the deadline for
16 making the final finding has passed, and the record as of December 31, 2002 is complete.
17 While Congress could in the future direct the agency to undertake and consider specific
18 additional research after the December 31, 2002 deadline, the IDCPA does not make any
19 such provisions. Accordingly, the Court concludes that this is one of the rare cases in
20 which a remand with specific directions is appropriate. *See generally Sierra Club v.*
21 *United States Env'tl Protection Agency*, 346 F.3d 955, 963 (9th Cir. 2003) (remanding
22 with instructions when court failed to see how further administrative proceedings would
23 serve a useful purpose, record was fully developed, and conclusions that must follow from
24 it were clear).

25 Accordingly, and good cause appearing, it is HEREBY ORDERED that:

26
27 (1) Defendants' Motion for Summary Judgment is DENIED.
28

1 (2) Plaintiffs' Motion for Summary Judgment is GRANTED.

2

3 (3) The December 31, 2002 final finding of the Secretary that the "intentional
4 deployment on or encirclement of dolphins with purse seine nets is not having a
5 significant adverse effect on any depleted dolphin stock in the [Eastern Tropical Pacific
6 ocean]," set forth in 68 Fed. Reg. 2010, 2011 (Jan. 15, 2003) pursuant to the Dolphin
7 Protection Consumer Information Act, 16 U.S.C. § 1385(g)(2) is declared arbitrary,
8 capricious, an abuse of discretion and contrary to law pursuant to the Administrative
9 Procedures Act, 5 U.S.C. § 706(2). Accordingly, "dolphin safe" shall continue to mean
10 that "no tuna were caught on the trip in which such tuna were harvested using a purse seine
11 net intentionally deployed on or to encircle dolphins, and that no dolphins were killed or
12 seriously injured during the sets in which the tuna were caught," as defined in 16 U.S.C. §
13 1385(h)(2).

14

15 IT IS FURTHER ORDERED that Defendants Donald Evans, Secretary of
16 Commerce, and William T. Hogarth, Assistant Administrator of Fisheries, National
17 Marine Fisheries Services, and their agents, servants, employees, successors, and those in
18 active concert or participation with them, shall not allow any tuna product sold in the
19 United States to be labeled as "dolphin safe" that does not meet the aforesaid statutory
20 definition. Defendants shall immediately notify all appropriate government personnel and
21 enforcement agencies, including but not limited to, the United States Customs Service, the
22 Federal Trade Commission, and the United States Department of State.

23

24 **IT IS SO ORDERED.**

25

26 Dated: August 9, 2004

27

/s/

THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

28