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The Fox Guarding the Henhouse: Conflicting Duties Under the Marine Mammal Protection Act

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I. INTRODUCTION

Each year, thousands of dolphin, or porpoises,\(^1\) are indiscriminately slaughtered in tuna nets. As well as being graceful and beautiful, these mammals are highly gregarious.\(^2\) Evidence also suggests that man and Cetaceans have evolved in a similar manner.\(^3\) In comparing their intelligence to that of humans, remarkable similarities have been found between the cerebral cortex of man and of these mammals.\(^4\) Additionally, these mammals are capable of complex intra- and inter-species communication,\(^5\) and recent studies indicate that these creatures have "[s]elf-consciousness and the ability to reason and to express creative thoughts."\(^6\) It is therefore not difficult to see why a large number of people have come to view this senseless killing as a great loss.

The mechanics of the food chain necessitate the killing of one species by a dominant species. Humans, as the most dominant species, are able to kill any other animal in their search for food. The question is, do they have the right? Thousands

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1. *Cetacea* are marine mammals which include whales as well as dolphin and porpoises. Although dolphin and porpoises both belong to the order of *Cetacea*, they are not the same animal. Dolphin are of the family *delphinidae*, while porpoises are of the family *phocoenidae*. Although dolphin and porpoises belong to two different species, they are so physiologically, behaviorally, and morphologically similar that the names have come to be used interchangeably. Levin, *Towards Effective Cetacean Protection*, 12 NAT. RESOURCES LAW., 549, 555 (1979).

2. *Id.* at 556.

3. *Id.* at 552.

4. A high degree of cerebral cortex convolution indicates a high degree of intelligence. "It is within the cerebral cortex that those functions of the brain associated with so-called intelligence are controlled . . . . The cerebral cortex is also most likely responsible for thinking, memory, and language." *Id.* at 557. The human brain is the most highly convoluted of all land mammals, and yet the Cetacean's brain is more convoluted than the human's. *Id.*

5. *Id.* at 558.

of dolphin are killed each year in commercial fishing operations. Mounting concern for these sea creatures has resulted in various attempts at protecting the animals and ensuring their continued existence.

In response to the growing concerns expressed about the incidental taking of porpoises by tuna fishermen and the effect on the marine environment, Congress enacted the Marine Mammal Protection Act (MMPA).\textsuperscript{7} The MMPA was designed to regulate the taking of marine mammals by imposing a moratorium on intentional takings. Congress placed the MMPA under the direction of the Department of Commerce.\textsuperscript{8} Various subcommittees were formed in order to assist the Secretary of Commerce in establishing and implementing guidelines and standards for the regulation of commercial fishing.\textsuperscript{9}

Notwithstanding the positive implications of such a measure, a conflict has arisen. The Secretary of Commerce\textsuperscript{10} (Secretary) heads the National Oceanic and Atmospheric Administration (NOAA), the subcommittee responsible for administering the MMPA. The National Marine Fisheries Service (NMFS)\textsuperscript{11} shares authority with the NOAA\textsuperscript{12} and the Marine Mammal Commission (MMC),\textsuperscript{13} a so-called "check" on the MMPA. Thus, the Secretary is responsible for carrying out the policies of the MMPA and protecting the marine mammals. The Secretary is likewise responsible for promoting and protecting the interests of the commercial fishing industry, an industry with a significant impact on this nation's economy. It is highly unlikely that Congress intended to require the Secretary to balance these competing interests. The question is raised as to which interests prevail. According to the MMPA, protection of marine mammals is the primary consideration.\textsuperscript{14}

\begin{itemize}
\item \textsuperscript{8} \textit{Id.} § 1362.
\item \textsuperscript{9} \textit{See} Kokechik Fishermen's Ass'n v. Secretary of Commerce, 839 F.2d 795, 804 (D.C. Cir. 1988).
\item \textsuperscript{10} \textit{See} 16 U.S.C. § 1361 (1988).
\item \textsuperscript{11} \textit{Id.} §§ 1373-1374. The NMFS is the delegate of the Secretary with authority to grant permits under the MMPA. \textit{See} Federation of Japan Salmon Fisheries v. Baldrige, 679 F. Supp. 37 (D.D.C. 1987).
\item \textsuperscript{13} 16 U.S.C. § 1401 (1988).
\item \textsuperscript{14} "The court found that the overriding purpose of the Marine Mammal
Legislative history of the MMPA indicates a congressional intent to subordinate the interests of the fishing industry to the welfare of these sea creatures. As a further complication, the Secretary is also one of the two officers jointly responsible for determining which species will be included in the endangered species list under the Endangered Species Act (ESA).

This comment sets forth the duties established under the various organizations created to further the welfare of marine mammals. Also presented is the conflict between the interests of those involved in preserving and protecting these creatures and the competing interests of fishermen, who depend on these creatures yet indiscriminately slaughter thousands every year in the course of fishing operations. Ultimately, this conflict of interest must be resolved. A profound sense of unfairness results from a person acting in a dual capacity, like that of the Secretary, representing both interests. The nature of this conflict is such that no group will benefit.

II. BACKGROUND

A. Commercial Fishing Operations

In the early 1960's, a new method of fishing for yellowfin tuna was developed. It is highly efficient and economical and replaces fishing for tuna with poles and live bait. The new method is known as "purse seine fishing." It is based on the observation that in the eastern tropical Pacific, one of the most productive tuna fishing areas in the world, tuna habitually associate with certain species of dolphin. Dolphin are larger and more visible than tuna, are oxygen-breathing, and must exist near the surface. Therefore, fishermen can locate the accompanying tuna by searching for dolphin. When dolphin are spotted, fishermen use speedboats to herd them into mile-long nets. Both the dolphin and the tuna swimming be-
neath the dolphin are trapped when the net is closed or "pursed" around them. Some of the dolphin escape by swimming through an open hole at the top of the net, however, many panic and dive to the bottom where their snouts get caught in the net's webbing. Because the dolphin are unable to get to the surface to breath, they drown. Dolphin are very social and loyal, refusing to abandon fellow porpoises which are entangled or injured.\(^9\) This instinct results in further deaths. Still others drown merely as a result of shock or other physical injury.\(^{20}\)

While the "purse seine" method is the most commonly used method for catching tuna, there are three other procedures to detect the presence of tuna schools.\(^{21}\) The first method detects schools by locating large areas of surface turbulence which are generated by the feeding schools. Fishermen spot these areas of the ocean that look like the water is boiling (hence, the name "boiler" or "breezer") and set their nets on the schools they have located.\(^{22}\) The other two methods are based on the idea that tuna are known to congregate under floating objects. The first of these two methods does not involve dolphin, but instead uses tree trunks, branches or other large floating objects (hence, the name "log sets").\(^{23}\) Finally, the most common method is "dolphin sets," which involves spotting a herd of dolphin believed to be associated with tuna. It is this method with which we are most concerned.

Studies show that the catches resulting from the three different modes of fishing are generally quite different in both species composition and size of the fish caught. "Dolphin sets" yield the largest tunas caught in purse seine fishing. They are "mostly greater than 80-90 [centimeters], but frequently over 100-110 [centimeters], and almost all of them yellowfin."\(^{24}\)

\(^{19}\) Levin, supra note 1, at 563-64.
\(^{20}\) Levin, supra note 1, at 564.
\(^{22}\) Id.
\(^{23}\) Id.
\(^{24}\) Inter-American Tropical Tuna Commission, Incidental Mortality of Dolphins in the Eastern Tropical Pacific Tuna Fishery, 1979-1988: A Decade of the
Canneries pay the most for large yellowfin because they produce greater yields with less labor. Although the average number of porpoises killed each time nets are “set” has decreased, the effectiveness of this method has led to striking increases in its use, particularly by the U.S. tuna fishing fleet. In fact, American tuna fishermen are responsible for “approximately 80 percent of the worldwide slaughter of dolphin and porpoises.”

In light of the indiscriminate slaughter of thousands of dolphin, several methods have been developed to reduce mortality. One of the two key developments is the “backdown maneuver.” In this procedure, the vessel is put in reverse after the dolphin are encircled and most of the net has been retrieved. This maneuver forms the net into a long channel, and the corkline at the far end sinks, allowing the dolphin to escape. The second key development is the “Medina Panel,” which is essentially a safety panel of very fine mesh along the outer edge of the net. These help prevent entanglement of the porpoises in the larger mesh of the regular net. The Medina Panel and other methods have considerably decreased the mortality of dolphin. Nonetheless, many dolphin are killed “incidental” to tuna fishing.
B. Historical Background

The problem is international, and the United States cannot regulate the actions of other countries in waters outside of its jurisdiction. However, because the United States is responsible for a large percentage of the incidental killing, Congress felt that by regulating the American fleet, the United States could ultimately impress upon other countries the actions and standards imposed upon the American fleet. Thus, the MMPA was devised to protect species taken incidental to commercial fishing operations within U.S. jurisdiction, without forcing American tuna fishermen to cease operations.

Congress saw two possible alternative approaches for protection when implementing the necessary regulations. The first was a total prohibition against the taking or importation of marine mammals. The second was a more flexible approach. Scientific management would be used to protect each species in light of its individual environmental circumstances. Congress elected to compromise in creating the MMPA. Thus, the MMPA established a moratorium on the taking and importation of marine mammals which can be modified by regula-

30. International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952, United States-Canada-Japan, 4 U.S.T. 380, T.I.A.S. No. 2786 [hereinafter INPFC] was signed by Canada, Japan, and the United States in part to minimize the interception of North American origin salmon by Japan in the North Pacific and Bering Sea. In 1976, the Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1801 (1976), established a 200-mile fishery conservation zone surrounding the coast of the United States. Pursuant to this Act, no foreign vessel may fish within this zone for fish stocks that are fully utilized by United States fishermen. The Act called for some specific renegotiation of the INPFC, which resulted in moving the abstention line. Furthermore, "section 1371 of the MMPA imposes a moratorium on the 'take' of all marine mammals in water subject to the jurisdiction of the U.S., including the Bering Sea and North Pacific Ocean." Federation of Japan Salmon Fisheries v. Baldridge, 679 F. Supp. 37, 40 (D.D.C. 1987).

31. 16 U.S.C. § 1372(c) (1988) is an enforcement provision of foreign imports under the MMPA which provides for a ban on the importation of fish caught in a manner which does not meet United States standards.


33. "The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards." 16 U.S.C. § 1371(a)(2) (1988).
tions and permits issued by the Secretary, consistent with the goal of protecting marine mammals.\textsuperscript{34}

Congressional research found that "certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities . . . [T]hey should not be permitted to diminish below their optimum sustainable population."\textsuperscript{35} The term "optimum sustainable population" is defined as "a population size which falls within a range from the population level of a given species or stock which is the largest supportable within the ecosystem to the population level that results in maximum net productivity."\textsuperscript{36} Mammals such as the dolphin have been described as "[i]nterest bearing resources . . . which are instrumental in changing energy . . . into energy available for consumption . . . and which are such that their capacity to supply energy for future consumption is not decreased by utilization of some of the energy they supply."\textsuperscript{37} Utilitarian theory forbids destructive utilization and mandates maximum sustainable yield.\textsuperscript{38} Applying this to fish set for harvest, or in this case used to harvest other fish, the amount that we can harvest at a given population size without driving the population size down is determined by the rate at which the population can replace the harvested organisms, i.e., the growth rate.\textsuperscript{39} The two terms, "optimum sustainable population" and "maximum sustainable yield" are based on a very similar idea. The expression "optimum sustainable population" is used in the definition of "depleted" as follows:

\begin{quote}
[A]ny case in which (A) the Secretary . . . determines that a species or population stock is below its optimum sustainable population; (B) a State . . . determines that such species or stock is below its optimum sustainable population; or (C) a species or population stock is listed as an endangered species or a threatened species under the Endan-
\end{quote}

\textsuperscript{34} Id. § 1371.
\textsuperscript{35} Id. § 1361(1)-(2).
\textsuperscript{38} Id. at 169.
\textsuperscript{39} Id. at 178-80.
gered Species Act of 1973.\textsuperscript{40}

The MMPA thereby established a moratorium on taking and importing marine mammals and marine mammal products.\textsuperscript{41} However, exceptions remain available at the discretion of the Secretary. The first exception involves the issuance of permits. Congress realized that not all marine mammals are in danger or depleted, and incidental takings might be allowed in specific cases.\textsuperscript{42} However, the unnecessary killing warrants regulation of some kind. Therefore, the Secretary was given the authority to issue permits for the taking of porpoises, incidental to commercial fishing, if the fishermen comply with provisions of the MMPA.

The second exception is broader.\textsuperscript{43} Some incidental, but not intentional, taking of marine mammals by commercial fishermen is allowed under this exception, notwithstanding the definitive goal of the MMPA to minimize or abolish the incidental kill.\textsuperscript{44} Thus, under the first exception, permits can be issued for intentional incidental takings of marine mammals which are not endangered, and under the second exception, certain unintentional incidental takings will be allowed.

C. Authority Under the MMPA

The MMPA is administered under the Department of Commerce. Primary authority rests with the Secretary. The Secretary is aided by the NOAA, the NMFS,\textsuperscript{45} and the MMC.\textsuperscript{46} These organizations have been delegated significant authority under the MMPA.\textsuperscript{47}

\begin{enumerate}
\item[41.] Id. § 1371(a).
\item[42.] Id. § 1371(a)(1).
\item[43.] Id. § 1371(a)(2).
\item[44.] Id. § 1371.
\item[45.] The NMFS is the division of the NOAA responsible for carrying out the functions prescribed by sections 1371 and 1373 of the MMPA. See infra text accompanying notes 53-56.
\item[46.] 16 U.S.C. § 1401 (1988). The MMC is a separate advisory body whose members are appointed by the President pursuant to section 1401 of the MMPA. It is essentially a mechanism for gathering the information which the NMFS is required to publish under section 1371 of the MMPA. See infra text accompanying notes 56-60.
\item[47.] These agencies each have specific responsibilities, designated under the MMPA in sections 1371, 1373, 1374, and 1401.
\end{enumerate}
The NOAA is charged with administering the MMPA.\textsuperscript{48} This agency is responsible for fashioning "a workable permit system on a species by species basis."\textsuperscript{49} The NOAA collects data from various sources to make regulatory proposals from which they promulgate regulations regarding the incidental taking of porpoises by purse seine tuna fishermen under section 1374 of the MMPA. The NOAA has responsibility for overseeing the permit system.\textsuperscript{50} Section 1371(a)(2) also makes reference to two other sections of the MMPA. These sections, 1373 and 1374, also make reference to the NOAA's duty to develop regulations and issue permits in accordance with statutory guidelines.\textsuperscript{51} The overriding concern of the permits issued by the NOAA is the marine mammals and that the takings "not be to the disadvantage of those species."\textsuperscript{52} After the Secretary, the NOAA has the primary licensing responsibility under the MMPA. However, this authority is shared with the NMFS.\textsuperscript{53}

Like the NOAA, the NMFS is a delegate of the Secretary with the authority to grant permits under the MMPA.\textsuperscript{54} The NMFS is a division of the NOAA, held to a statutory requirement to:

[P]ublish and make available to the public, prior to or concurrent with publication of notice of its intent to prescribe regulations under section 1373 of the MMPA, reasonable estimates of (1) the existing population level of each species of porpoise affected by the proposed regulations, (2) the optimum sustainable population of each of these species, and (3) the expected impact of those regulations on the effort, mandated by the Act, to achieve an optimum sustainable population level for each species.\textsuperscript{55}

The NMFS, together with the NOAA, is charged with publishing these findings as well as scheduling formal rulemaking.

\textsuperscript{48} Kokechik Fishermen's Ass'n v. Secretary of Commerce, 839 F.2d 795, 803 (D.C. Cir. 1988).
\textsuperscript{49} Id. at 806.
\textsuperscript{51} Kokechik, 839 F.2d at 804.
\textsuperscript{55} Richardson, 414 F. Supp. at 312.
hearings. Like the NOAA, the NMFS gets much of its information and data from outside sources such as the MMC.\textsuperscript{56}

The MMC is a separate advisory body, appointed by the President to ensure that individuals will exercise their independent judgment and give environmental concerns priority.\textsuperscript{57} It constitutes an independent commission of individuals knowledgeable in the fields of marine ecology and resource management and plays a significant advisory role under the MMPA.\textsuperscript{58} Its duties include studying and making recommendations to federal agencies for the protection and conservation of marine mammals.\textsuperscript{59} The MMC is responsible for reviewing the entire MMPA program and suggesting areas of improvement.\textsuperscript{60} Since the MMPA was enacted in 1972, the Secretary, who is responsible for the ultimate control of the MMPA, has been faced with balancing the interests of the fishing industry against those of the marine mammals which he is charged with protecting.

D. The Endangered Species Act

The conflict over killing dolphin is further complicated by the fact that the duties of the Secretary of Commerce in administering the MMPA are also related to the Endangered Species Act of 1972 (ESA).\textsuperscript{61} The policy of the ESA is for all "[f]ederal departments and agencies [to] seek to conserve endangered species and threatened species and . . . utilize their authorities in furtherance of the purposes of this Act."\textsuperscript{62} Here, too, the Secretary of Commerce plays a major role in the protection of marine mammals. Under this act, the Secretary of Commerce is charged with the determination and preservation of endangered and threatened species, a responsibility shared with the Secretary of the Interior.\textsuperscript{63}

The Secretary of Commerce is vested with responsibility for specific species, pursuant to the Reorganization Plan No. 4 of 1970\textsuperscript{64} which established the NOAA. Under this plan, all

\begin{itemize}
\item \textsuperscript{56} The MMC was created by 16 U.S.C. § 1401 (1988).
\item \textsuperscript{57} Kokechik Fishermen's Ass'n v. Secretary of Commerce, 839 F.2d 795, 808 (D.C. Cir. 1988).
\item \textsuperscript{58} Id.
\item \textsuperscript{59} 16 U.S.C. § 1402(a)(4) (1988).
\item \textsuperscript{60} Id. §§ 1402(a)(1)-(4).
\item \textsuperscript{61} Id. §§ 1531-1543.
\item \textsuperscript{62} Id. § 1531(c)(1).
\item \textsuperscript{63} Id. § 1532.
\item \textsuperscript{64} 5 U.S.C. § 903 (1988).
\end{itemize}
responsibility, authority and duties with respect to dolphin are delegated to the Secretary of Commerce.\textsuperscript{65} Determination of endangered and threatened species is one of the duties that falls under the ESA. The Secretary of the Interior is responsible for determining and listing endangered species, except for "any species over which program responsibilities have been vested in the Secretary of Commerce."\textsuperscript{66} If the Secretary feels that any species for which he is primarily responsible should be listed as endangered or threatened, or have its status changed from threatened to endangered, he need only inform the Secretary of the Interior, "who shall list such species in accordance with the section."\textsuperscript{67} Furthermore, the Secretary of the Interior "may not list or remove from any list any such species, and may not change the status of any such species which are listed without a prior favorable determination made pursuant to this section by the Secretary of Commerce."\textsuperscript{68} Thus, the Secretary also plays a substantial role in the protection of marine mammals as endangered species.

E. The Energy Reorganization Act: Another Model for Administrative Control

At present, the Secretary is responsible for considering the interests of both marine mammals and commercial fishermen. There are, however, other methods of organizing administrative control over areas of divergent interests. The Energy Reorganization Act (ERA)\textsuperscript{69} provides an example of an alternative system where separate agencies are charged with the responsibility for opposing interests in order to alleviate the conflict of interest which might otherwise exist.

The ERA was created out of Congress' concern that "the AEC [Atomic Energy Commission] could not perform the function of promoter of the nuclear industry and at the same time protect public health and safety."\textsuperscript{70} The Atomic Energy Act of 1946\textsuperscript{71} was the first legislation to address nuclear activity. It established a design of federal control and created the

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\textsuperscript{65} Id.
\textsuperscript{67} Id. § 1533(a)(2)(A).
\textsuperscript{68} Id. § 1533(a)(2)(C).
\textsuperscript{71} 42 U.S.C. §§ 1801-1819 (1946).
Atomic Energy Commission (AEC). About eight years later a plan was devised to transform nuclear power into a source of energy for the country, and consequently Congress passed the Atomic Energy Act of 1954 (AEA). This Act was passed with the intention of encouraging the use and development of atomic energy. As the nuclear industry grew, Congress recognized the need for state participation in the development of nuclear power and amended the AEA in 1959 to clarify the respective state and federal roles in the field. One goal of the amendments was to organize regulatory parameters while concurrently recognizing state and federal interests. To accomplish this, "the AEC was given the power to promote the research and development of nuclear energy and to consider public health and safety in the exercise of its regulatory responsibility." Thus arose the conflict of interest which resulted in the creation of the ERA.

The ERA, which recognized the dual nature of the AEC in promoting the nuclear industry while protecting the public, abolished the AEC, and divided its responsibilities between the Energy Research and Development Agency (ERDA) and the Nuclear Regulatory Commission (NRC). The ERDA was responsible for encouraging and conducting research and development in the field of nuclear energy. The NRC was primarily responsible for licensing and regulatory matters previously performed by the AEC. Ultimately, the Department of Energy Organization Act (DEOA) was adopted. This act abolished the ERDA and gave all of its functions to the Department of Energy (DOE), as well as all nuclear waste management.

Like the MMPA, the AEC was designed to carry out conflicting duties. However, the ERA was created with the recognition that the AEC could not effectively perform as both promoter of and protector against nuclear energy. The current system, which divides the conflicting responsibilities between two administrative agencies, is a significant improvement over the old AEC system.

73. Id.
75. Klausner, supra note 70, at 36.
F. Background of Case Law Regarding the MMPA

1. American Tunaboat Ass’n v. Baldridge

    American Tunaboat Ass’n v. Baldridge\(^7\) set forth the promulgated regulations and the other factors upon which the Secretary bases his decisions. In American Tunaboat, the American Tunaboat Association (ATA) had applied for a general permit. A hearing was assigned to an administrative law judge according to statutory requirements. At the hearing, the ATA and NOAA differed vastly in their population estimates for the dolphin under consideration. The administrative law judge disagreed with the NOAA’s method of collecting data. He recommended a different method which would classify the porpoise species under consideration not depleted. The NOAA adopted the Administrative Law Judge’s suggestion that the dolphin was not depleted. However, the agency disagreed with his recommendation concerning population collecting techniques.

    Ultimately, the NOAA disregarded valid information designed to fairly assess the situation at hand. The discretion given to the Secretary is thus extended to his delegates. This case exemplifies one of the major concerns with the current system: Where more than one agency is asked to bring its knowledge to bear, the Secretary should not be allowed to choose which information he will use. Instead, the Secretary should be required to rely on all valid information without the option of disregarding some of the information.

2. Kokechik Fishermen’s Ass’n. v. Secretary of Commerce

    Another case, Kokechik Fishermen’s Ass’n. v. Secretary of Commerce,\(^8\) represents the theory that the Secretary, by basing his decisions on a lack of information, justifies issuing permits to commercial fishermen. In Kokechik, the Federation of Japan Salmon Fisheries Cooperative Association applied to the NMFS for a permit for incidental takes.\(^9\) NMFS/NOAA, as required by the MMPA, published a notice of the necessary statutory information. Included were statements concerning the status of each marine mammal stock affected and the ef-

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\(^7\) 738 F.2d 1013 (1984).
\(^8\) 839 F.2d 795 (D.C. Cir. 1988).
\(^9\) Id. at 797.
ffects of any permitted taking on its optimum sustainable population. The proposed regulation considered only the taking of Dall’s porpoise. Formal rulemaking hearings were held before a Department of Commerce administrative law judge, who recommended issuing of a five-year permit allowing incidental taking of a specified number of Dall’s porpoise. The permit included no other marine mammals, but it was foreseeable that other marine mammals such as northern fur seals, northern sea lions, harbor porpoises, Pacific white-sided dolphin and killer whales would be taken. The permit application did not request permission for those incidental takes because they were prohibited by the MMPA. Thus, the legitimacy of the permit in this case came under scrutiny. This case shows that it is possible for the Secretary to manipulate the “lack of information” in a permit application to shield himself from responsibility for the incidental taking of otherwise prohibited marine mammals, notwithstanding the foreseeability of those takings.

3. Committee for Humane Legislation v. Richardson

Another highly controversial case demonstrates how the Secretary can properly follow statutory procedure, yet circumvent the system devised under the MMPA by still issuing permits. In Committee for Humane Legislation v. Richardson, the American Tuna Association (ATA), applied for permits for purse-seine tuna fishing where there would be incidental takes of various kinds of marine mammals, primarily two species of porpoises. The Secretary, together with his delegate agencies, issued a permit to the ATA in 1975 which allowed them to take, subject to certain restrictions, an unlimited number of marine mammals during the year. As a result of information obtained during public hearings on the matter, certain changes were made in the requirements of the tuna fishing permits, but the incidental takings were still allowed.

When the ATA reapplied for a permit the following year, the Secretary again allowed substantial takings in the course of

80. Id. at 798.
81. Id. at 800.
83. Id. at 304.
84. Kenneth Norris, testifying on behalf of the MMC, stated: “[E]ven the most conservative estimate of porpoise mortality in the Eastern Tropical Pacific Tuna Fishery... represents an unacceptably high level of mortality.” Id.
tuna fishing.\textsuperscript{85} The MMC, in a letter to the NMFS, stated: "[T]he Commission finds no basis for confidence that any number above zero would provide the basis for 'assurance' that the principal stocks of porpoise will increase in size."\textsuperscript{86} Nonetheless, the agency again announced that it would not initially impose a quota for the year, but would do so if the total number of porpoise deaths looked as if it would exceed a certain percentage of the previous year's takings.\textsuperscript{87} Contrary to the express purpose of the MMPA, the Secretary and his agencies allowed intentional takings in an effort to avoid crippling the commercial fishing industry.

\section*{III. Analysis}

The statistics relating to the slaughter of dolphin demonstrate the need for regulating the incidental taking of marine mammals by the tuna industry. The MMPA was created with this in mind, and the protection of the marine mammals is its primary purpose.\textsuperscript{88} The Secretary, as head of the MMPA, is given both broad authority and relatively discretionary regulatory control. Although the Secretary is necessarily interested in protecting the marine mammals, he is also responsible for promoting an industry which indiscriminately slaughters many thousands of these animals each year. The balancing act which results was not intended by Congress when it created the MMPA. This balancing act is not beneficial to either the endangered marine mammals or the fishermen fearful of what a suspension of the tuna fishing industry would create in terms of economic losses.

The Secretary has faced this balancing of interests on many occasions since Congress enacted the MMPA in 1972. Commercial fishing does not permit discrimination between which species of fish and mammals will be caught and which will not. Thus, marine mammals protected by the MMPA are unintentionally caught, a result "prohibited by the MMPA unless, pursuant to the requirements of the Act, the Secretary of Commerce specifically grants permission for the taking of

\begin{itemize}
  \item \textsuperscript{85} Proposed regulations for the 1976 fishing season indicated a quota somewhere in the range of 50,000 to 110,000 animals. \textit{Id.} at 305.
  \item \textsuperscript{86} \textit{Id.} (citing letter from Robert Eisenbud, General Counsel for the MMC, to Robert Schoning, Director of the NMFS).
  \item \textsuperscript{87} \textit{Id.} at 304.
  \item \textsuperscript{88} "The primary purpose of the MMPA is to protect marine mammals . . . ." \textit{Id.} at 306.
\end{itemize}
marine mammals incidental to commercial fishing."\(^8\) This is where the Secretary's duty becomes discretionary.

A permit might be granted if the Secretary and related agencies feel that certain marine mammals are not in significant danger of depletion.\(^9\) Therefore, minor incidental takings do not disadvantage these species.

The MMPA has consistently rejected a "means oriented approach."\(^8\) Accordingly, the MMPA:

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\text{[I]s not primarily a directive as to how marine mammals may be taken; rather, it is result-oriented: it directs that an estimated impact of any proposed taking be made and provides that such taking may not be authorized if the impact is to the disadvantage of the mammals involved.\(^9\)}
\]

The Secretary is therefore granted inordinate discretionary power to decide whether a disadvantage to the animal is substantial enough to overcome competing interests. The duty of determining which species of marine mammals are "disadvantaged" or "depleted" within the meaning of the MMPA is delegated to the NOAA.\(^9\)

"The basic approach of the statute and regulations has been to impose yearly quotas on the taking of abundant por-
poise species by tuna fishermen, and to prohibit the taking of any species deemed depleted."94 This ultimately allows the NOAA to determine which species are to be regulated by the Secretary under the MMPA. The basis upon which the Secretary decides which takings will be granted permits is unclear. When the Secretary determines than an animal is "not disadvantaged," part of his rationalization may stem from the fact that he is charged with regulating the incidental slaughter of these marine mammals, while at the same time, facing the responsibility of looking out for the interests of the commercial fishing industry.

The Secretary protects the interests of the fishermen, and therefore has a strong incentive for allowing the incidental taking of marine mammals. "It is clear that Congress did not intend that the Marine Mammals Protection Act would force American tuna fishermen to cease operations; the Act does not prohibit purse-seine fishing on porpoise."95 Congress was aware that invalidating commercial fishing permits would be disastrous to the commercial fishermen operating under those permits. For this reason the Secretary is authorized to waive the moratorium provided that several statutory criteria are met.

Section 1373 of the MMPA determines the criteria which the Secretary may consider when prescribing regulations under the MMPA. The statute includes a wide range of factors such as "the effect of limitations on present and future animal populations, U.S. treaty requirements, ecological and environmental considerations, the conservation and development of fishery resources and economic and technical feasibility."96 For example, in the regulatory process, the Secretary must consider the technical capability of fishermen to avoid injury to porpoises. "It is not the intention of the Committee to shut down or significantly to curtail the activities of the tuna fleet so long as the Secretary is satisfied that the tuna fishermen are using economically and technologically practicable measures to assure minimal hazards to marine mammal populations."97 Inevitably, the Secretary will also consider the interests of the commercial fishing industry when promulgating regulations and permitting incidental takings.

94. Id. at 1015.
95. Richardson, 540 F.2d 1141, 1149 (D.C. Cir. 1976).
96. Id. at 1148 (citing Marine Mammal Protection Act of 1972, Senate Commerce Committee, S. Rep. No. 92-863, 92d Cong., 2d Sess. 16 (1972)).
97. Id. at 1148.
Regardless of the fact that strict statutory criteria must be satisfied before the Secretary is allowed to waive the moratorium, the Secretary and his delegates may circumvent these requirements in numerous ways. The statute requires the Secretary to justify his decisions based on the welfare of the marine mammals. Before permissible takings can occur under the exception to the moratorium, two statutory requirements must be met. The first is that the taking must be authorized by regulations promulgated through formal rulemaking proceedings and a permit issued by the Secretary. The second is that the taking must meet the requirements of the MMPA and be consistent with its primary goal.

The procedural requirements with which the Secretary must comply in promulgating regulations are set forth in section 1373(d) of the MMPA, which reads:

The Secretary shall publish and make available to the public either before or concurrent with the publication of notice in the Federal Register of his intention to prescribe regulations under this section—
(1) a statement of the estimated existing levels of the species . . . ;
(2) a statement of the expected impact of the proposed regulations on the optimum sustainable population . . . ;
(3) a statement describing the evidence before the Secretary upon which he proposes to base such regulations; and
(4) any studies made by or for the Secretary or any recommendations made.

Clearly defined procedural requirements are prescribed for the rulemaking process. However, these statutory requirements leave several questions unanswered. The first question is: Upon what information does the Secretary base his decisions? According to the statute, he must promulgate rules based on data and recommendations provided by agencies such as the MMC and the NOAA. However, it not necessary to comply with this regulation. The question then becomes whether the Secretary

99. Id.; see also 50 C.F.R. § 216 (1990).
100. "[O]ur inquiry must focus on whether the Secretary's interpretation . . . is reasonable and consistent with the statutory language, legislative history, and purpose of the MMPA . . . ." Federation of Japan Salmon Fisheries v. Baldrige, 679 F. Supp. 37, 45 (D.D.C. 1987).
Section 1373(a) of the MMPA provides that "[t]he Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, shall prescribe such regulations." In American Tunaboat, the NOAA's final decision rejected the recommendations of the administrative law judge and approved the NOAA collection techniques. The court held that "[i]n light of the comprehensive and reliable nature of the data collected by the federal observers, it was arbitrary for the agency to have simply disregarded it. Without offering any reason, the agency refused to consider the post-1977 data." However, the discretion given to the Secretary and his delegate authorities is clear. Ultimately, the agency may select the information it will utilize. Likewise, the Secretary may use his own delegates and agencies to provide that information, thus obtaining statistics and deriving the reasoning necessary to justify the particular situation at hand in the light most favorable to his needs.

Similarly, by basing his decisions to issue permits on a lack of information, the Secretary may justify his exceptions to the moratorium. In several cases, the Secretary has issued permits where estimates of existing population levels of the species involved and other statutorily required information was unavailable. In Kokechik, the question was "whether the Secretary of Commerce may legally issue a permit allowing incidental taking of one protected marine mammal species knowing that other protected marine mammal species will be taken as well." Despite the Secretary's inability to determine to what extent these other marine mammals would be disadvantaged, he issued a permit from the position that "as long as it did not specifically authorize the taking of northern fur seals [and other protected marine mammals] he had complied with the MMPA. The result was, in effect, that the permit allowed the Federation to take protected marine mammals for a price—the civil penalties imposed for such takings."

In another case, permits were issued and quotas estab-
lished on the basis that the allowable kills would enable the particular stocks of animals to increase. However, in the very same notices, the agency had given estimates for existing population levels and stated that "[o]ptimum sustainable population levels have not been determined; therefore, no statement can be made as to the effect of the proposed action on optimum sustainable populations." The permits were approved in clear violation of the rules for their issuance under the MMPA, which state that the Secretary must publish and make this information available. The notice then went on to state, "[a]t these levels of incidental fishing mortality, the present population stocks are either stable or increasing or decreasing slightly." Such a statement is both ambiguous and contrary to the intention of the MMPA; by requiring the Secretary to issue such notices, Congress was trying to avoid the arbitrary creation of rules or issuing of permits.

Even though Congress created an additional "check" in the decisionmaking process of the NOAA's permit decisions (by requiring the NOAA to consult with the MMC before prescribing regulations governing takings) there are ways of circumventing these "checks." In Kokechik, as previously noted, the NOAA consulted with the MMC and "accepted the MMC's recommendation not to issue a permit for the taking of fur seals over the contrary recommendation of the administrative law judge." The Secretary's decision considered the MMC's recommendations as required, and followed the statutory rules for promulgating regulations. Nonetheless, incidental takings, necessary to the Federation's fishing operations and contrary to the MMPA, were foreseeable. By not allowing the takings in permit regulations, the Secretary was, in a sense, saying that he did not condone the actions of the commercial fishermen, while simultaneously taking no action to directly prevent them. Essentially, the "check" provided by the MMC is controlled by the Secretary, which completely undermines the significance of this limitation.

Other evasions of the MMPA rules also occur. For example, the Secretary acts in accordance with the MMPA by accepting recommendations and submitted information. However, he can then disregard the information and issue a permit,

540 F.2d 1141 (D.C. Cir. 1976).
107. Id. at 305 (citing 40 Fed. Reg. 41536 (1975)).
108. Id.
by using some other justification not based on a lack of information. In *Richardson*, the agency justified its decision to allow substantial takings for the second year in a row by saying that it:

[R]epresents, at this time, the most reasonable way that it can meet its responsibility to reduce porpoise mortality incidental to yellowfin tuna fishing and its responsibility not to shut down or significantly curtail the activities of the tuna fleet as set forth in the Marine Mammal Protection Act and its legislative history.\(^{110}\)

This returns us to the primary purpose of the MMPA. Courts have repeatedly held that the primary purpose for enacting the MMPA was "to provide marine mammals, especially porpoise[s], with necessary and extensive protection against man's activities."\(^{111}\) There are several ways to analyze the congressional intent in enacting the MMPA.

In *Richardson*, the defendants—the Secretary, the Administrator of the NOAA, and the Director of the NMFS—took the position that the MMPA resulted from Congress' dual concern "for the well being of the porpoise and of the tuna industry, and that this dual concern was intended to be expressed in action taken at the agency level."\(^{112}\) The plaintiffs in this case asserted that the primary purpose of the MMPA was to protect marine mammals, and that "other interests, such as those of the tuna industry, should be served only if they are compatible with this primary goal."\(^{113}\)

The defendants, in their brief in support of their cross-motion for summary judgment, contended: "The mandate of Congress is that the [federal agency] should try to reduce porpoise mortality rates but in a way that will maintain a healthy United States tuna industry."\(^{114}\) The defendants essentially took the position that the MMPA mandates a "balancing act" between the interests of the mammals and those of the tuna industry. However, the Court ruled that "the primary purpose of the MMPA is to protect marine mammals; the Act was not intended as a 'balancing act' between the interests of the fishing industry and the animals."\(^{115}\) Furthermore, the

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111. *Id.* at 306.
112. *Id.*
113. *Id.*
114. *Id.* at 306 n.21 (citing brief for defendants-intervenors at 2).
115. *Id.* at 306.
court stated that "[t]he interests of the marine mammals come first under the statutory scheme, and the interests of the industry, important as they are, must be served only after protection of the animals is assured."

Clearly, actions of the Secretary which balance the interests, or worse, disadvantage the protected marine mammals, are contrary to the intention of the MMPA. "The statutory duty of the Secretary is thus mandatory, not discretionary."

The purpose of the MMPA is "to restore, maintain, and protect the integrity of the marine mammal populations." Competing interests are involved regarding the Secretary's duty to consider the interests of the commercial fishing industry as well as those of the marine mammals. For these reasons, there must be an alternative system of regulation under the MMPA.

Congress can resolve the problems created by the conflicting interests by dividing the duties designated to the Secretary under the MMPA. As an alternative to the present system of regulation under the MMPA, Congress should adopt a plan where the interests of the marine mammals and those of the fishermen are promoted separately, under different authorities. The ERA serves as a model for this concept and demonstrates that such a system would be plausible. As the ERA demonstrates, a need exists for separate agencies to perform very different functions.

A conflict of interest arose under the AEC when the agency was charged with performing conflicting duties. The dual-nature of the present system under which the Secretary, who is charged with carrying out the intentions of the MMPA as well as promoting and looking out for the interests of commercial fishermen, is very similar. As with the AEC, a system of centralized responsibility has a tendency to hamper the concerns of both interests involved. Just as Congress promulgated the ERA to differentiate the conflicting interests in the field of nuclear energy, separate bodies of regulation should be established for the opposing interests of the MMPA and the fishing industry.

116. Id. at 309.
118. Id. at 49.
IV. PROPOSAL

Under the present system, the Secretary regulates the competing interests of prey and predator. This system must be restructured to prevent any abuse of power on the part of an individual or single agency. An alternative approach must be offered. In order to demonstrate the feasibility of such a system, the Energy Reorganization Act will be used as a model.

The opposing interests in this field should be separated, as occurred with the ERA. One agency could be established to promote and recognize the interests of the fishing industry, while another agency could be created to regulate and identify the concerns about the marine mammal populations. Presumably, as the DEOA demonstrates, this agency could be expanded to include the appointed data collection agencies, as well as other animal protection agencies.

Undoubtedly, conflicts between the two interests would arise and would ultimately have to be resolved. However, rather than one administrative agency being pulled in two directions, each opposing side would be responsible for its own interests. It is sufficiently clear that the tuna fleet would be seriously harmed should the general permit for purse seine fishing be withdrawn. However, the arguments "properly should be addressed to Congress rather than to the courts. Balancing of interests between the commercial fishing fleet and the porpoise is entirely a legislative decision, dictated at present by the terms of the Act."119

Under the proposed structure there would be no need to change the regulations presently in effect under the MMPA. The current regulatory system tends toward leniency and inaction. By removing the Secretary's conflict as well as the discretionary power given to a single agency, there is less likelihood of violations such as those which occurred in the past when the Secretary was faced with two sides of a situation that were diametrically opposed. By taking the decisionmaking away from a single agency and placing it with an impartial judge, much of the inherent unfairness which results from the fox guarding the henhouse will be eliminated.

V. CONCLUSION

By abolishing the dual nature of the Secretary's position, the MMPA would be more efficiently administered, and therefore more likely to uphold the true intent of the Act. "[T]he Act was to be administered for the benefit of the protected species rather than for the benefit of commercial exploitation."120 By providing separate agencies to promote the interests of both sides and employing an impartial decision-making body, any conflicts would be more equitably resolved. This is particularly true insofar as the interests of the marine mammals are concerned. Their interests should receive top priority in an attempt to abolish the unnecessary slaughter that results from commercial fishing methods. By implementing a system which recognizes the conflict which arises when a single officer or agency performs the function of both promoter and protector of an interest, the Secretary would be relieved of the burden placed on him by the dual nature of his position.

The shortcomings of the present approach are painfully clear. It is up to Congress to alleviate the burden placed on the Secretary by forcing him to regulate conflicting interests under one Act. By providing representative agencies for both interests, both will ultimately benefit. By delegating to one agency the duty to collect data and make recommendations when questions or problems arise, the decision-making body will not be presented with information contrived by different methods and divergent standards. By eliminating the conflict of interest, Congress will ensure that both interests will be properly served and conflicts between these interests will be equitably resolved.

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120. Id. at 1148.