

CETACEAN RIGHTS UNDER HUMAN LAWS

Pursuant to the Marine Mammal Protection Act of 1972, a permit, which has sparked great public interest and debate, was issued to Sea World Inc. allowing them to scientifically study ninety orca whales and capture ten whales for public display. This Comment will analyze the standards a court would use to review the controversial permit, and will discuss the proposed legal actions and options of those opposed to the permit. The Comment will then change its perspective and advocate protecting the animals by granting cetaceans themselves legal rights, and will examine the justifications and advantages of this new approach.

INTRODUCTION

We need another, a wiser and perhaps a more mystical concept of animals. Remote from universal nature, and living by complicated artifice, man in civilization surveys the creature through the glass of his knowledge and sees thereby a feather magnified and the whole image in distortion. We patronize them for our incompleteness, for their tragic fate of having taken form so far below ourselves. And therein we err, we greatly err. For the animal shall not be measured by man. In a world older and more complete than ours, they move more finished and complete. They are gifted with extensions of senses we have lost or never attained, living by voices we shall never hear. They are not brethren, they are not underlings; they are other nations, caught with ourselves in the net of life and time, fellow prisoners of the splendor and travail of the earth.¹

In the last two decades, cetaceans (whales, dolphins and porpoises) have captured the attention and concern of a large number of people. Although previously the interest in these animals was limited to their economic or scientific value, an increasing national concern with man's impact on cetaceans has expressed itself in domestic legislation. This Comment will analyze whether the permit procedure of the Marine Mammal Protection Act of 1972² (MMPA or Act) can adequately accomplish the Act's purported goal of cetacean protection. In the Comment's first section, the arguments for and against a permit recently issued to Sea World, Inc. to capture killer whales (*Orcinus orcas*) for public display and scientific research will be discussed to exemplify the current—and often conflict-

1. H. BETSON, *THE DUTERMOST HOUSE* (1928), quoted in H. ELLIS, *THE BOOK OF WHALES* 14 (1980).

2. 16 U.S.C. §§ 1361-1407 (1982).

ing—attitudes towards protecting and understanding cetaceans. The Sea World permit will also provide a case study for analyzing the scope of judicial review of permits provided for in the Act. In the second section, the Comment will look beyond judicial review of a specific permit issuance, and will suggest a new legal approach to protecting cetaceans as holders of legal rights enforceable in court. This section will examine the issue of standing, and will include the ethical and scientific justifications for recognizing standing for cetaceans in their own right.

I

PERMITS AND PROTECTION

The Marine Mammal Protection Act

In the early 1970s, Congress realized man's activities were seriously endangering certain species of marine mammals.³ As a 1972 House Report acknowledged, the American public was increasingly alarmed at the predictions of extinction for species of whales, at the documentary television reports on the uncontrolled killing of baby harp seals, and at the increased drownings of porpoises in the U.S. tuna fleet's nets in the eastern tropical Pacific Ocean.⁴ With a national election imminent, a growing influence of environmental groups, and amidst an unprecedented passage of environmental legislation, the 92nd Congress considered protective legislation.⁵

The consensual goal was to conserve and protect marine mammals, but the legislative history reveals considerable conflict over the best method.⁶ Two views sparked heated debate: the "protectionists" advocated a complete ban on all killing; the "managers" wanted an extensive program of resource management calculated to provide an "optimum sustainable yield."⁷ Congress chose a compromise. Never-

3. See H. R. REP. NO. 92-707, 92nd Cong., 2d Sess., reprinted in U.S. CODE CONG. & AD. NEWS 4144 (hereinafter cited as HOUSE REPORT).

4. *Id.* at 4145, 4148-49.

5. See Coggins, *Legal Protection for Marine Mammals: An Overview of Innovative Resource Conservation Legislation*, 6 ENVTL. L. 1, 11, 14 (1975).

6. See HOUSE REPORT, *supra* note 3, at 4152.

7. Protectionists (or preservationists) argued the only effective way to protect the animals is a complete ban on all killing of marine mammals and the importation of any product made thereof. See generally Herrington & Regenstein, *The Plight of Ocean Mammals*, 1 ENVTL. AFFAIRS 792 (1972) (article discusses the "ban" approach to animal preservation).

Resource oriented biologists, various federal agencies, and representatives of entities with an economic interest in marine mammals called for the traditional management approach. That approach was based on the concept of maximum sustainable yield. See Coggins, *supra* note 5, at 16. This approach aims to regulate species harvesting so that it is near the point of greatest return without causing the population size to decrease. The maximum sustainable yield concept has been widely criticized because it fails to consider variables such as age, sex, cyclical or unpredictable changes in stocks unrelated to man's

theless, the Act demonstrates the compromise was balanced towards a protectionist position.⁸

In the Act's definitional section, the terms conservation and management are used interchangeably.⁹ The Act's goal is to regulate the taking of marine mammals, and by using biological information, the Act aims to maintain populations at their "optimum sustainable populations" (a scientific term meaning the range between the number of animals which will maximize species productivity, at the same time maintaining the largest population the ecosystem can support).¹⁰ Congress rejected the idea that these animals are best left alone; the Act reflects the position that when man interferes with the ecosystem, an obligation arises not only to protect, but to affirmatively act to preserve it.¹¹

Substance of the Act

The Act places a moratorium on the taking and importing of marine mammals and marine mammal products.¹² "Taking" is broadly defined to mean harass, hunt, kill, or attempt to harass, hunt, or kill.¹³ The principal responsibility to administer the Act is divided between the Department of Commerce and the Department of the Interior. The National Oceanic and Atmospheric Administration, through the National Marine Fisheries Service (Fisheries Service), administers the Secretary of Commerce's program for cetaceans and pinnipeds (other than walruses).¹⁴

impact, and predatory and competitive interaction between species. See Nafzinger, *The Management of Marine Mammals After the Fisheries Conservation and Management Act*, 14 WILLAMETTE L. J. 153, 172-73 n. 83 (1978).

8. See Coggins, *supra* note 5, at 17.

9. The terms "conservation" and "management" are defined by the act as meaning collection and application of biological information for the purposes of increasing and maintaining the number of animals within species and marine mammal populations at their optimum sustainable population. 16 U.S.C. § 1362(2) (1976), amended by Act of Oct. 9, 1981, Pub. L. N. 97-58, 95 Stat. 979 (1981).

10. In the original act, populations were to be maintained at their "optimum carrying capacity." 16 U.S.C. § 1362(2)(1976). The 1981 amendments substituted the terms "carrying capacity" or "maximum sustainable population," in order to clarify the population range in question, and to make the standard more understandable to the scientific community and administrative agencies implementing the Act. See 16 U.S.C. § 1362 (B) & (D)(1982). For an extensive discussion of these Amendments, see Note, *Congress Amends the Marine Mammal Protection Act*, 62 OR. L. REV. 257, 267-71 (1983).

11. See Coggins, *supra* note 5, at 18.

12. 16 U.S.C. § 1371(a) (1982).

13. *Id.* at § 1362(12).

14. *Id.* at § 1362(11)(A); 50 C.F.R. § 216.8 (1983). The Secretary of the Interior, through the Fish and Wildlife Service, has responsibility for walruses, polar bears, sea

The moratorium on the taking of marine mammals is not a complete ban, and the Act specifies certain exemptions. Certain Alaskan natives may take marine mammals for subsistence and production of handicrafts.¹⁵ Under a permit system, marine mammals may be taken for public display or scientific research,¹⁶ and incidental to commercial fishing.¹⁷ The 1981 Amendments allow persons other than commercial and noncommercial fishers to take limited numbers of marine mammals without following the Act's normal regulation and permit requirements.¹⁸

The Act makes management of marine mammals a federal responsibility; however, it allows management to be returned to the states under a specified procedure.¹⁹ It provides for civil penalties up to \$10,000 and criminal fines up to \$20,000 or one year in jail, or both, for violation of its provisions, permits, or regulations.²⁰ Seizure and forfeiture sanctions are available to enforcing agencies.²¹ It further provides for the establishment of an internationally-directed program through the Secretary of State,²² for research, grant, and equipment development programs,²³ and has reporting²⁴ and appropriations provisions.²⁵ A three-member Marine Mammal Commission is established by the Act to make recommendations to the Secretary of Commerce (in the case of cetaceans) in connection with the management and protection of the animals.²⁶

Jurisdiction

The Act's scope includes persons or vessels on the high seas subject to United States jurisdiction, or on land or water within U.S.

otters, marine otters, manatees, and dugongs. *Id.* at § 1362(11)(B).

15. *Id.* § 1371(b).

16. *Id.* § 1371(a).

17. *Id.* § 1371(a)(2).

18. *Id.* § 1371(a)(4)(5) (1982). This provision is intended to apply to offshore oil and gas developers. *See* H.R. REP. NO. 97-228, 97th Cong., 1st Sess., *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 1458, 1469-70 (1981). Oil and gas development and exploration have direct and indirect impacts on marine mammals and the ecosystem. *See* 1981 ANN. REP. MARINE MAMMAL COMM. 73 (1982).

19. 16 U.S.C. § 1379 (1982).

20. *Id.* § 1375.

21. *Id.* § 1376.

22. *Id.* § 1378.

23. *Id.* §§ 1380-1381.

24. The Act requires the appropriate Secretary to publish annual reports regarding the status of marine mammal species and populations, and to publish reports on agency decisions including the issuance of permits. *Id.* § 1373(f).

25. For example, the Department of Commerce was issued \$7,223,000 for fiscal year 1982, \$8,000,000 for fiscal year 1983, and \$8,800,000 for fiscal year 1984. 16 U.S.C. § 1384 (1982).

26. *Id.* §§ 1401-1407. The Commission must submit an annual report to Congress. *Id.* § 1404.

jurisdiction.²⁷ A presumption against extraterritorial extension of U.S. statutes was applied to the MMPA in *United States v. Mitchell*.²⁸ In that case, the court of appeals reversed the conviction of an American citizen who had captured twenty-one dolphins within the three-mile territorial limit of the Commonwealth of the Bahamas.²⁹ The court reasoned that when Congress considers environmental legislation, it presumably recognizes the authority of other sovereign states to preserve or exploit the natural resources within their own territory.³⁰ The court emphasized that to apply the Act extraterritorially, clear congressional intent to extend the application of the statute to foreign sovereign territories must be shown.³¹

When the MMPA was enacted, the Act applied up to the edge of the twelve-mile fishery zone.³² The Fishery Conservation and Management Act of 1976³³ unilaterally extended both the United States fisheries jurisdiction and the jurisdiction of the MMPA to cover a 200-nautical-mile zone from the shore baseline.³⁴ General permits to fish in the U.S. fishery conservation zone are issued to foreign fishing associations whose nations have a Governing International Agreement with the United States.³⁵

27. *Id.* § 1372(a)(1)(2).

28. 553 F.2d 996 (5th Cir. 1977).

29. *Id.* at 997.

30. *Id.* at 1002.

31. *Id.* at 1002, 1004. Although the court's holding is technically correct, because neither the Act nor the legislative history reveal an intent to apply the Act to foreign territories, the decision may result in the Act being circumvented by American citizens. A black market for the sale of dolphins may have arisen since the MMPA's passage. Dolphins have become an increasingly popular tourist attraction, and apparently there are few proficient dolphin catchers outside the United States. As a result, European markets will reportedly pay between \$5,000 and \$10,000 for a healthy specimen. According to a Fisheries Service special agent, since the *U.S. v. Mitchell* decision, the Service has shut down the foreign intelligence network. *The Trouble with Dolphins*, 155 NAT'L GEOGRAPHIC 506, 521, 528 (April, 1979). Apparently oceanariums are replacing their killer whales with whales caught by Icelandic fishermen, who seek out buyers. Although the details are shrouded in secrecy, at the orca symposium in Seattle, in October, 1980, the rumored price for one of these whales was \$150,000. See ELLIS, WHALES AND DOLPHINS 188 (1982).

32. Pub. L. No. 92-522 § 3(15), 86 Stat. 1027, 1029 (1972) (amended 1981). For a description of the "fisheries zone" limit, see Act of October 14, 1966, Pub. L. No. 89-658, 80 Stat. 408 (1966).

33. Pub. L. No. 94-265 § 2-406, 90 Stat. 331 (1976).

34. Pub. L. No. 94-265 § 101, 90 Stat. 404 (1976).

35. 1982-83 ANN. REP. DEP'T COM. MARINE MAMMAL PROTECTION ACT 1972 4 (1983) (hereinafter cited as DEP'T COM. 82/83 REP.). Thus for example, a three year permit for the incidental taking of 5,975 porpoises was issued to the Japan Fisheries Agency. Of these, 5,500 are Dall's porpoises that die in drift gillnets used in Japan's high seas salmon fishery in the North Pacific Ocean. *Id.* In an action brought by an environ-

Permits

The Fisheries Service publishes rules and regulations in order to implement the Act, and is responsible for making decisions to waive the moratorium by issuing or denying permits. Three steps must be taken before a permit can be granted. Upon receipt and initial review by the Service, notice of the application and an invitation to submit written data or views must be published in the Federal Register.³⁶ The Fisheries Service may then afford interested parties an opportunity for a public hearing.³⁷ The hearing is discretionary with the agency. However, the Act's legislative history reveals an intent to encourage and allow public participation.³⁸

The type of hearing the Act contemplates is important because the type of hearing determines the standard of judicial review (to be discussed later in the Comment).³⁹ The Act allows a public hearing, and the federal agency regulations state a summary record is to be kept.⁴⁰ The judicial review provision does not require a determination on the record; an adversary hearing, with evidence subject to cross-examination, is unnecessary.⁴¹ The hearing is an informal proceeding at which written and oral arguments are presented at a public hearing before the governing agency.⁴² After considering the comments, the Service approves or denies the application.⁴³

The Sea World Controversy

Notice was published in the Federal Register that an application had been filed by Sea World Inc. of San Diego for a permit to take killer whales for scientific research and public display.⁴⁴ Sea World

mental group, the District Court in *Friends of Animals, Inc. v. Baldrige*, No. 81 Civ. 1547 (D.D.C. 1982), upheld the agency's issuance of the permit. *Case discussed in* DEP'T COM. 82/83 REP. at 18-19.

36. 16 U.S.C. § 1374(d)(2) (1982).

37. *Id.* § 1374(d)(4). Any interested party may appear in person or through representatives at the hearing and may submit any relevant material, view, comments, arguments, or exhibits. 50 C.F.R. § 216.33(b) (1983).

38. The Secretary is authorized to grant public hearings upon request of any interested party, and is instructed to act in an expeditious fashion and to make full public disclosure of his action in issuing or denying a requested permit. HOUSE REPORT, *supra* note 3, at 4158. *See also* 117 CONG. REC. 34, 44951 (1971), where Congressman Dingell said that although public hearings are discretionary, the house committee is "strongly of the opinion that this discretion should continue to be exercised in the direction of full disclosure and open hearings in controversial cases."

39. *See infra* note 91 and accompanying text.

40. 50 C.F.R. § 216.33(b) (1983).

41. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 12.10 at 448-49 (2d ed. 1979).

42. For a discussion of the appropriateness of this type of informal hearing, *see* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 13.12 at 241-42 (2d ed. Supp. 1982).

43. 50 C.F.R. § 216.33(c) (1983).

44. Notice of Application for Sea World Inc. to Take and Display Killer Whales, 48 Fed. Reg. 53, 11310 (1983).

requested up to ten animals for public display and captive breeding. Up to ninety were requested for scientific research: to be studied, sampled, and marked. The research animals were to be captured, some for up to three weeks, and then released. The activities were to be conducted in the waters off Alaska and California.⁴⁵

After reviewing more than two-thousand public comments and holding a two-day public hearing in Seattle on August 16 and 17, 1983, the federal agency granted the permit on November 1, 1983.⁴⁶ The permit will allow Sea World to capture ten killer whales for captivity. Because a requirement limits the number of animals that can be taken for display or breeding during any one year to an average of one percent of the minimum estimated population,⁴⁷ Sea World will probably be permitted to catch only two whales a year for display and breeding.⁴⁸ The permit prohibits the taking of any pregnant, nursing, or unweaned animals, and if any whale dies during capture it will be counted against the ten. All further testing and capture will be suspended until the death-causing incident is thoroughly studied.⁴⁹

The Fisheries Service permit restricts the scope of Sea World's research to taking blood samples and measuring, tagging, and marking the animals. The agency refused the request to hold some orca whales for up to three weeks, stating the aquarium must submit for approval a research plan showing the animals held for extended time would rejoin an orca whale group when released. A limit of thirty whales per year can be temporarily captured, and they must be returned to the water as soon as testing is completed, usually within a matter of hours.⁵⁰ The Service further stated that until assured that the whales will not be subject to undue stress, no tooth extraction, liver biopsies, or stomach sampling can be performed. Permission to perform these tests had been requested by Sea World last February.⁵¹

No animals can be taken from California waters until authorized

45. National Oceanic and Atmospheric Administration (NOAA), Press Release No. 83-61 (Nov. 1, 1983) (hereinafter cited as *Commerce Press Release*).

46. United States Dept. of Commerce, NOAA, National Marine Fisheries Service (NMFS), *Notice of Issuance of Permit 3510-22* (1983).

47. United States Dept. of Commerce, NOAA, NMFS, *Permit to Take Marine Mammals*, Permit No. 439 (hereinafter cited as *Permit*).

48. *Commerce Press Release*, *supra* note 45, at 1-2.

49. *Permit*, *supra* note 47, at 3.

50. *Commerce Press Release*, *supra* note 45, at 1-2.

51. *Id.* at 1.

by the Assistant Administrator for Fisheries.⁵² However, the permit provides that after at least one year's activities in Alaska, and after submitting additional information on the animals' populations and a detailed report on the numbers of animals proposed for California, Sea World can seek authorization to conduct capture activities in California.⁵³ Thus, under the existing permit, taking whales off California waters has not been prohibited indefinitely. The marine park stated plans, at the time the permit was issued, to begin the five-year, 1.5 million dollar program in the summer of 1984.⁵⁴

Arguments on Each Side

Many believe that Sea World, an accredited zoological institution, successfully combines entertainment with education, and has contributed to shaping positive public opinion about whales.⁵⁵ Since the first park opened in 1964, over 75 million people have seen killer whales at Sea World of San Diego, and its two sister facilities, near Cleveland, Ohio, and Orlando, Florida. Last year more than 6.6 million people visited these three parks, and the overwhelming majority of them would never had had a chance to see similar animals in the wild.⁵⁶ Supporters of the permit argue that only an elitest approach would suggest that if people cannot afford to travel to see killer whales in the wild, they should remain at home and merely watch them on television. Marine Parks, they assert, allow the public to learn about the whales in person.⁵⁷

At the public hearing in Seattle, Sea World argued that an informed and educated public⁵⁸ constitutes the best possible protection for marine resources; and its current project is aimed at instigating a captive propagation program to insure the continued availability of killer whales for educational and public display. Sea World supported its captive breeding program with the successful births of

52. *Permit*, *supra* note 47, at 2.

53. *Id.*

54. Los Angeles Times (San Diego ed.), Nov. 2, 1983, pt. II, at 1, col. 5.

55. See Will, *The Orcas of Sea World*, NEWSWEEK 72 (Aug. 29, 1983); see also, *Hearings Before National Marine Fisheries Service* (NOAA), Seattle Public Hearings, 35-43 (Aug. 1983) (testimony of Dr. L. Cornell, Senior Vice-Pres. and Zoological Dir. of Sea World) [hereinafter cited as *Public Hearings*].

56. *Public Hearings*, *id.* at 31 (testimony of R. Hillebrecht, Executive Vice-Pres. of Harcourt Brace Jovanovich, Inc. and Chief Exec. Off. of Sea World).

57. *Id.* at 116-17 (testimony of W. Braker, Director of the John G. Shedd Aquarium in Chicago).

58. Opponents to the permit argue the actual educational value of whales in captivity is negligible. Marine park shows, where the animals jump through hoops or give trainers rides, do not portray the animals as accurately as, for example, a film of a whale with her newborn calf. It is misleading, opponents assert, for the whale capture industry to claim credit for the current public sympathy for whales. *Id.* at 77-81 (testimony of V. Boe, Project Coordinator for Greenpeace International).

twenty-seven bottle-nosed dolphins in the last five years.⁵⁹ One supporter of the permit hypothesized that a denial could jeopardize all captive breeding programs, programs that presently are the only way to ensure many threatened or endangered species' survival.⁶⁰ Although the latter argument is currently irrelevant (killer whales are not an endangered species),⁶¹ if Sea World can successfully breed the animals the park will not need to take others from the wild in the future.

The science and research will be carried out by Hubbs-Sea World Research Inst., a non-profit, private-operating foundation. Testifying at the public hearing, a spokesperson for Hubbs said the ability to detect current and future environmental problems (such as pollution) is directly related to knowledge about natural populations.⁶² The spokesperson argued, the physiological effects of manmade sounds (boats or seismic noise) on these animals and their behavioral responses, which may someday be crucial to the survival of the species, can only be obtained from studying captive animals.⁶³ Hubbs argued that the present state of diminished government and private research funding threatens a standstill in most cetacean research. Therefore, the coordinated research program on killer whales, which Sea World will support, is an important scientific opportunity.⁶⁴

Despite such supporting arguments, the majority of those testifying at the public hearing spoke against the permit. While commending Sea World's record of spending its own funds on animal rescue and rehabilitation work,⁶⁵ and although not opposed, in principle, to animals being kept in captivity,⁶⁶ opponents were concerned with effects of captivity on orcas. A primary concern was that while a conservative estimate of an orca whale's life span in the wild is 48 years,

59. *Id.* at 40 (testimony of Dr. Cornell).

60. *Id.* at 119-20 (testimony of W. Braker).

61. *Id.* at 12 (testimony of Congressman D. Bonker, D-Wash.).

62. *Id.* at 130-31 (testimony of Steve Leatherwood, Hubbs-Sea World Research Inst. biologist).

63. *Id.* at 184, 185 (testimony of Prof. Awbrey, Senior Research Fellow at Hubbs-Sea World Research Inst.).

64. *Id.* at 131 (testimony of S. Leatherwood).

65. Sea World, at its three installations, rescues and treats approximately 400 animals each year at an average cost of approximately \$1,000 per animal. Like almost every coastal aquarium and oceanarium, Sea World is on call to pick up and accept sick, injured, orphaned, or stranded animals. *Id.*, *supra* note 57, at 118 (testimony of W. Braker).

66. *Id.* at 47 (testimony of A. Reichman, Wildlife Coord. for Greenpeace Northwest).

the average life span of whales in captivity is 7.2 years.⁶⁷ Since a replication of an orca's habitat cannot be presently reproduced, opponents characterized confining the whales in relatively small tanks as "cruel and inhumane" treatment.⁶⁸

In Washington state, where Sea World attempted to capture orcas at Budd Inlet in 1976, strong local opposition to the permit existed. Opponents claimed that by using seal bombs, high-speed boats, and seaplanes,⁶⁹ Sea World engaged in inhumane treatment and violated several provisions of their permit.⁷⁰ Further, the Washington Attorney General commenced an action against Sea World and numerous state and federal agencies.⁷¹ The complaint was dismissed after Sea World agreed to release the whales it had in its possession and to never again capture orcas in Washington state waters.⁷² Because it was the same applicant applying for the permit, and because Sea World's application was vague regarding the methods which would be used to capture the whales, a fear of duplicate capture techniques was expressed.⁷³

Orca whales have never been bred successfully in captivity despite

67. *Id.* at 49. In a 1981 study, Dr. M. Briggs of the Canadian Dept. of Fisheries and Oceans, determined that orca adult males lived to be 48 years while adult females may live as long as 80 to 100 years. *Id.* One study of 61 killer whales captured in the last 20 years, concluded they live an average of only 2.8 years in captivity. *Id.* at 45 (testimony of Congressman N. Dicks, R-Wash.). Sea World claims a 1979 scientific census put the average at 10 years or more. *Id.* at 42 (testimony of Dr. L. Cornell).

68. *Id.* at 85 (testimony of W. Oliver). These powerful mammals are thought to have an average 100 miles-a-day range traveling in their ocean environment. 129 CONG. REC. H10148 (daily ed. Nov. 17, 1983)(statement of Rep. Chandler). Another opponent argued that before the whales die in captivity, they suffer what researchers are beginning to identify as a type of insanity. Erratic, uncooperative, and sometimes downright dangerous behavior has been reported in the news concerning whales at Sea World in San Diego. *Public Hearings*, *supra* note 55, at 219 (testimony of K. Sinats, Dir. for Greenpeace Foundation of Canada). See e.g., San Diego Union, Feb. 24, 1984, at B-3, col. 4 (killer whale seized trainer in its mouth during a show).

69. *Public Hearings*, *supra* note 55, at 192 (testimony of Tammie Bison, citizen of Seattle).

70. *Id.* at 17 (testimony of R. Munro, Secretary of State for Wash. State); *Id.* at 4 (statement of U.S. Senator Slade Gorton).

71. *Id.* at 16-17 (testimony of R. Munro); *Id.* at 3-4 (statement of Senator Gorton).

72. *Id.* Washington state has since approved a resolution, expressing the will of the legislature, that orca whales may not be captured or harassed within the state's three-mile jurisdiction. Although the resolution may not be enforceable in court (the MMPA might preempt such state legislation because of the doctrine of federal supremacy), it is highly unlikely that Sea World would again risk bad publicity and seek a permit to capture orcas in Washington state waters.

73. *Id.* at 22-23 (testimony of R. Munro). Sea World was also accused of another incident of cruel capture techniques. In 1970, in Pen Cove on Whidby Island, citizens reported that more than 80 whales were driven into the cove and netted. Between three and six allegedly died. It was alleged the dead animals then had their bellies slit open, were weighed down (purportedly by chains, rocks, or concrete), and were then taken out to sea and sunk. These actions were an apparent attempt to keep the public from learning of the animal's deaths as a result of the capture technique. *Id.* at 22.

repeated attempts; therefore, opponents to the permit argued it is unrealistic to expect that Sea World can do so by using ten more whales.⁷⁴ A spokesperson for the Fund for Animals argued that because no provision exists in the MMPA to capture orca whales for the purpose of husbandry, and because it is not within the spirit of the statute to encourage domestic breeding of marine mammals, the captive breeding program has no legal basis.⁷⁵

Politically, several Washington Congressmen feared the permit would undermine the consistently held United States position against commercial whaling at the International Whaling Commission, and would create a dangerous precedent for our own marine mammal policy.⁷⁶ One Congressman stated that the U.S. has a national policy against the capture of these animals for commercial gain.⁷⁷ Another Congressman, believing that the Act contemplated only serious scientific research as a valid reason for a permit issuance, asserted "exploitation in the name of research is still exploitation."⁷⁸

As a summation, the testimony of a retired biologist for the U.S. Bureau of Commercial Fisheries is helpful to understand the opponent's position.⁷⁹ He said, viewed strictly as a scientific experiment,

74. *Id.* at 14 (testimony of Congressman Bonkers). Some scientists were concerned because Sea World has stated no hypothesis regarding how they plan to successfully breed orcas in the present when they have been unsuccessful in the past. Although Sea World cites their success with dolphin breeding, they don't provide any facts learned from the dolphin breeding process which might be applied to orcas. *See, e.g.,* at 94-5, *id.* (testimony of Dr. M. Spencer, Scientist and Physiologist).

75. *Id.* at 205 (testimony of P. Watson, Field Agent for Fund for Animals).

76. *Id.* at 12, 15 (testimony of Congressman Bonker). The Congressman testified that the Reagan Administration strongly supports a moratorium on all commercial world-wide whaling. Therefore he stated, it is incongruous for the United States to support termination of commercial whaling, and yet still allow some form of domestic whaling activity. *Id.* at 12.

77. *Id.* at 10 (testimony of Congressman Chandler); *Id.* at 4, (statement of Senator Gorton); *Id.* at 19 (testimony of R. Munro). Despite testimony to the contrary, it is not entirely accurate that the U.S. has a national policy against the taking of whales for commercial gain. Rather, the U.S. has a national policy against commercial whaling. The MMPA does authorize the taking of non-depleted species for public display and scientific research. *Id.* at 6 (statement of J. Johnson, Chairman for the Nat'l. Marine Fisheries Service). More accurately, the issue is whether the Act embodies a national policy opposed to taking marine mammals for public display used primarily for commercial gain, and additionally whether Sea World's proposal is a form of commercial whaling activity contrary to the U.S. policy against commercial whaling.

78. *Id.* at 46 (testimony of Congressman N. Dicks). Management administrators testified they are concerned because very little sound scientific understanding exists on the size of orca pods (family groups), their geographic range, or their habits. Therefore, scientists are in a poor position to predict the effect of capture on whale populations. *Id.* at 26-27 (testimony of Comm'r B. Boyle, Comm'r of Public Lands).

79. *Id.* at 132-3 (testimony of V. Scheffer, biologist retired from the U.S. Bureau

the proposal would enrich the aquarium industry and the wider scientific community, and would be interesting to thousands of people. The question becomes—is the price too high? New organizations devoted expressly to the welfare of cetaceans, and the observation that whales have become for millions a symbol of wild free nature, suggest that decisions affecting cetacean captivity can no longer be guided by a consciousness that bases its decisions solely on increases in scientific knowledge. This argument asserts that when the social and moral costs of harassing 100 orca whales are considered, Sea World's proposal is too expensive.⁸⁰

Judicial Review

The Marine Mammal Protection Act states, "Any applicant for a permit, or any party opposed to such permit, may obtain judicial review of the terms and conditions of any permit issued by the Secretary under this section or of his refusal to issue such a permit."⁸¹ The Act, however, does not enlighten the applicant or an opponent as to the permissible scope of review. Two questions arise: 1) Who qualifies as a "party opposed", and 2) What standards will be applied by courts in reviewing agency decisions?

The answer to the first question is relatively simple. Courts have consistently held that environmental groups who participated in the permit proceedings are parties opposed and have standing.⁸² As to the second question, Congress provided for review pursuant to the Administrative Procedure Act (APA).⁸³ Congress also intended to make judicial review available under general federal jurisdiction statutes.⁸⁴

of Commercial Fisheries).

80. *See id.*

81. 16 U.S.C. § 1374(d)(6) (1976). Notice is to be initiated by filing an application for review in the federal district court in the area of the applicant's residence or principle place of business, or in the U.S. District Court for the District of Columbia, within sixty days from the date that the permit was issued or denied. *Id.*

82. "There can be no doubt that appellants—eight environmental groups which participated fully in the administrative proceedings and vigorously opposed grant of the permit to [the applicant]—qualify as 'parties opposed'." *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002, 1006 (D.C. Cir. 1977); *See also*, *Committee for Humane Legislation v. Richardson*, 414 F. Supp. 297 (D.D.C. 1976), *aff'd*, 540 F.2d 1141 (D.C. Cir. 1976) (Plaintiffs and plaintiff interveners, fourteen organizations whose common purpose is to protect the natural environment, had standing under the MMPA).

83. "Such review shall be pursuant to Chapter 7 of Title 5", 16 U.S.C. § 1374(d)(6) (1982).

84. *See* S. REP. NO. 863, 92d Cong., 2d Sess. 7-8 (1972); H.R. CONF. REP. NO. 1488, 92d Cong., 2d Sess. 22-23, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4144, 4187. The relevant general federal jurisdiction statute sections are 28 U.S.C. §§ 1331 and 1337 ((1976) & Supp. V 1981).

Questions of Fact

In reviewing factual decisions by the Fisheries Service, the courts have used the APA "substantial evidence" test.⁸⁵ Under this test, the court decides questions of law but limits itself to the test of reasonableness in reviewing findings of fact.⁸⁶ Agency decisions based on scientific and technical matters, within that agency's expertise, are given particular deference.⁸⁷ The Supreme Court mandates that findings of fact supported by substantial evidence in the record are conclusive.⁸⁸

*Friends of Animals v. Baldrige*⁸⁹ is illustrative. In this case, the court said, in an area where complex scientific judgments must be made on limited evidence, the court will not substitute its judgment for that of the agency. The court further said this deference will be especially appropriate when the weight of expert opinion supports a permit issuance. Most importantly, although the court was concerned about the data's accuracy, it held that the decision to issue the permit was based on substantial evidence, and must be upheld even if the court would not have reached the agency's result had the issue been before the court for determination.⁹⁰ Similarly, in another case arising under the MMPA, the court in *Animal Welfare v. Kreps*⁹¹ said its role in reviewing findings of fact is limited, and it

85. 5 U.S.C. § 706 (2)(E) (1982).

86. K. DAVIS, ADMINISTRATIVE LAW TREATISE, 520 (Supp. 1982).

87. See, e.g., *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 36-38 (D.C. Cir. 1976), cert. denied, 426 U.S. 941 (1976).

88. See *E. I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 54 (1977); *N.L.R.B. v. Brown*, 380 U.S. 278, 291 (1965).

89. *Friends of Animals v. Baldrige*, discussed in DEPT. OF COM. 82/83 REP., *supra* note 35, at 18-19.

90. *Id.* at 19; see also, *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) where the court used similar instructions under the substantial evidence test, "[A] court may [not] displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo."

91. 561 F.2d 1002 (D.C. Cir. 1977) (the agency made a determination of fact on the administrative record, so it must be supported by substantial evidence of the record as a whole). Technically, the "arbitrary and capricious test" should be the applicable standard. The Administrative Procedure Act (APA) provides that the substantial evidence test be used for questions of fact which have been the subject of a proceeding "on the record" (a hearing with a transcript of evidence). The hearing provided for in the MMPA is an informal procedure, and not an adversarial hearing, (see *supra*, note 41 and accompanying text). Questions not subject to the substantial evidence test are subject to the arbitrary and capricious test. 5 U.S.C. § 706(2)(a) (1982). However, in cases arising under the MMPA, because an administrative record is kept, courts frequently use the term "on the record" and have consistently applied the substantial evidence test for questions of fact.

can reject the Service's decision only if unsupported by substantial evidence.⁹²

After reviewing the public record and all the comments, the agency found a substantial public benefit would be gained from the contemplated public display, and that the anticipated manner of display outweighed any adverse effect on orca whale stocks.⁹³ While conflicting views on the public benefit of orca whale display were presented, this determination was not unreasonable looking at the record as a whole. The evidence on the scientific implications of orca whale capture was also conflicting; nevertheless, there was expert testimony which supported the permit. The agency decision will be given deference, and under a substantial evidence test a reviewing court would uphold the agency's findings of fact.

Questions of Policy

The substantial evidence test may apply to review of policy decisions,⁹⁴ although precedent also supports the seemingly narrower "arbitrary and capricious" test.⁹⁵ Under this test, a reviewing court would determine whether the Fisheries Service's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."⁹⁶ Many reviewing courts have mixed the two standards together.⁹⁷

92. *Animal Welfare Inst. v. Kreps*, 561 F.2d at 1013.

93. These are the criteria set forth in the agency rules. 50 C.F.R. § 216.31(c) (1983).

94. The requirement of substantial evidence "applies to both factual determinations and policy determinations by [the agency] even though application to the latter is more difficult." *Texas Independent Ginners Ass'n v. Marshall*, 630 F.2d 398, 404 (5th Cir. 1980).

95. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414-415 (1971), construed in *F.C.C. v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 803 (1978). In the *Overton Park* case, the Supreme Court held review under the substantial evidence test is authorized only when an agency action is taken pursuant to a rule-making provision of the APA itself, or when the agency action is based on a public adjudicatory hearing. If the hearing is not designed to produce a record that is the basis of the agency decision, it is quasi-legislative in nature, and the basic requirement for substantial evidence review is not met. *Id.* at 414. See also *Nat'l Ethyl Corp. v. E.P.A.*, 541 F.2d 1, 33-37 (D.C. Cir.), cert denied, 426 U.S. 941 (1976) (In the area of rule-making the agency can exercise its policy judgement as it sees fit, so long as its judgement is not arbitrary and capricious).

Note however, that *Citizens to Preserve Overton Park* has been widely criticized for its ambiguous language, and the decision has resulted in confusion as to the test's exact meaning and application. See, e.g., DAVIS, *supra* note 86, at 518-533.

96. Administrative Procedure Act, 5 U.S.C. § 706 (2)(A) (1982).

97. See, e.g., *American Petroleum Inst. v. E.P.A.*, 540 F.2d 1023, 1028 (10th Cir. 1976), cert denied, 430 U.S. 922 (1977); *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 705 (2d Cir. 1975) (Lumbard, J., concurring). The reality may be that the distinction between the two tests in reviewing policy decisions is largely semantic, and that the two criteria tend to converge. See *Pacific Legal Foundation v. Department of Transp.*, 593 F.2d 1338, 1343 n. 35 (D.C. Cir. 1979), cert denied, 444 U.S. 830 (1979); DAVIS, *supra* note 86, at 522-23.

It is arguable that the agency decision to issue the Sea World permit does not effectuate the purposes of the MMPA.⁹⁸ In every case arising under the Act, a heavy burden is placed on the permit applicant to show the taking will not work to the species' disadvantage, and to show the populations are managed with the animals' interests as the prime consideration.⁹⁹ The legislative history reveals an intent that if this burden is not met, the permit must be denied.¹⁰⁰

The record demonstrates that to some extent, orca whales put in captivity are harmed. The question becomes whether Congress intended that the Act encompass a policy in which a permit issuance cannot harm a marine species as a whole, or whether individual animals cannot be harmed.¹⁰¹ If it is the former, although scientists were concerned about inadequate population data on orcas,¹⁰² it was not demonstrated that capturing ten whales over five years would harm population levels, and the agency's decision should be upheld.

If the Act established a policy against harming individual animals however, a better argument can be made that the agency decision is contrary to the Act's policies and purposes.¹⁰³ Most of the evidence against the permit focussed on the adverse effects of captivity on whales, while the majority of evidence supporting the permit stressed the marine park's educational and scientific value. It can be argued that the accusations that the animals living conditions are confining and inhumane, and that the animals die more quickly in captivity, were never satisfactorily answered. Under a substantial evidence test, the record does not show that individual whales will not be harmed. Under a strict arbitrary and capricious test, it is less clear that the agency decision could be overturned as an abuse of discre-

98. The federal agency can issue a permit only if it is demonstrated that the taking will be consistent with the purposes and policies of the Act. 16 U.S.C. §1374(d)(3) (1982).

99. HOUSE REPORT, *supra* note 3, at 4151.

100. *Id.* at 4151, 4158.

101. The legislative history shows Congress's belief that a management program is best way to benefit the animals. One goal of such management is to prevent the animal populations from exceeding the environment's carrying capacity and thus harming themselves. *Id.* at 4152.

102. *Public hearing, supra* note 55, at 141 (testimony of R. Osborne, Research Director for Moclips Cetological Society).

103. For example, in overturning the Government's technical formula used to determine the waiver of restrictions on baby sealskin importations, the court focused on the individual animals themselves, and noted that the particular provision's statutory purpose was based entirely on emotional concerns (Congress responding to public indignation over the killing of baby nursing seals, perceived to be vulnerable and helpless) and not on the resource management standards adopted by the Government. *Animal Welfare v. Kreps, supra* note 82, at 1012.

tion. While realistically the court might well ask itself whether the decision was reasonable,¹⁰⁴ because the Act expressly gives the Fisheries Service the discretion to issue public display permits, and because the Act does not clearly mandate a policy against harming individual animals, it is likely that a reviewing court would defer to the agency's policy determinations.

Questions of Law

A reviewing court may substitute its judgement for that of an agency on a question of statutory interpretation or law, even if the agency's interpretation is peculiarly within its area of specialization.¹⁰⁵ The custom, however, has been to give great weight or deference to the agency's view.¹⁰⁶ The Supreme Court has reversed some appellate courts for substituting their judgement for the agency's and thereby exceeding their appellate review authority.¹⁰⁷ For example, in a 1981 case,¹⁰⁸ the Supreme Court said that since the Immigration Act confers on the Attorney General the power to decide what constitutes "extreme hardship", his construction of the standard should not "be overturned by a reviewing court simply because it may prefer another interpretation of the statute."¹⁰⁹ Nevertheless, if there are "compelling indications that [the agency] is wrong"¹¹⁰ the reviewing court may overrule the agency's judgement; deference to the agency does not mean automatic affirmation.

Opponents to the permit argued that the MMPA prohibits the issuance of permits for commercial exploitation. While the Act does not stipulate for what purposes a public display permit can be issued to marine parks, the Act provides "the primary objective of [resource] management should be to maintain the health and stability of the marine ecosystem."¹¹¹ In explaining this provision, the House Report stated that this objective "indicates that the animals must be managed for their benefit and not for the benefit of commercial ex-

104. In MMPA cases, courts are reviewing agency decisions in which complex facts and policies are intertwined, and the traditional tests cannot easily dictate the scope of judicial review. Perhaps a more flexible approach requiring that the agency decision be reasonable and that the administrator explain how the decision effectuates the purposes of the law, would be a better standard for reviewing agency policy decisions. *See* DAVIS, *supra* note 86, at § 29.00-5, 552-55.

105. *Id.* at § 29.00-6, 558.

106. *Id.*

107. *See* E. I. du Pont de Nemours & Co. v. Collins, 432 U.S. 46, 57 (1977).

108. Immigration and Naturalization Service v. Jong Ha Wang, 450 U.S. 139 (1981).

109. *Id.* at 144-45.

110. Columbia Broadcasting System, Inc., v. Democratic National Committee, 412 U.S. 94, 121 (1973). *See also* Watt v. Alaska, 451 U.S. 259 (1981) (the Supreme Court interpreted the legislative history and statutory construction differently than did the agency).

111. 16 U.S.C. § 1361(6) (1982).

ploitation."¹¹² While the legislative history reveals no specific discussion on the kinds of public display permissible under the Act,¹¹³ it can be argued that the Act should not have been interpreted to allow a permit to marine parks operated primarily for profit to capture orca whales.¹¹⁴ Additionally, it can be argued that Sea World's stated goal of initiating a successful captive breeding program is not a permissible reason to issue a public display permit; thus, the agency incorrectly interpreted the act to allow permits for animal husbandry.

For the reasons discussed in the previous section, a reviewing court would be reluctant to substitute its judgement for that of the agency. An argument can be made that such reluctance is misplaced, since it is the court's role to interpret statutes. However, to overrule the agency two major hurdles would have to be gotten over: first, the court would have to agree that the statute was interpreted incorrectly, and second, the court would have determine that revoking the permit is a proper remedy. Especially because the Act is largely silent on the issue, it would take an unusually activist court to overturn the agency's statutory interpretation.

112. HOUSE REPORT, *supra* note 3, at 4154. In *Committee for Humane Legislation v. Richardson*, 540 F.2d at 1148 n. 27, the court stated that the Act is to be administered for the benefit of the protected species rather than for the benefit of commercial exploitation. See also *Balelo v. Baldrige*, 724 F.2d 753, 760 (9th Cir. 1984) (the court cited *Committee for Humane Legislation* in reiterating that the Act is not to be administered for commercial exploitation).

113. See HOUSE REPORT, *supra* note 3, at 4158 (Secretary authorized to grant public display permits upon a showing that the taking is consistent with the purposes of the Act). A more recent indication of some members of Congress's attitude towards orca whales in captivity is seen after the 1976 Budd Inlet incident (see notes 69-73 and accompanying text). At the public hearing, Congressman Bonkers cited a 1976 Senate Commerce Committee Report which supported a bill to prohibit the taking of killer whales "until we are absolutely convinced that the removal of these creatures from their natural environment will not . . . harm the indigineous population. Specifically, there should be no taking of the animal except for bona fide scientific purposes"; the legislation was believed to be held pending until Sea World agreed not to capture whales off the Washington coast. *Public Hearing*, *supra* note 55, at 14-15. Washington state Congressmen Chandler and Norm Dicks, major instigators behind the MMPA's passage in 1972, contend that Congress never intended to allow this type of orca whale capture, and that there is not enough scientific use of the animals by Sea World to justify public display. Telephone interview with John Geise, Administrative Assistant to Congressman Chandler, Washington, D.C. (March 22, 1984).

114. For example, less exploitative conditions could include public display which is purely educational, or in which the animals are kept in a large bay under the conditions more closely resembling orca's natural habitat.

Opposition Through Legislative Channels

In addition to seeking judicial review, those opposed to the Sea World permit can attempt to change the act's provisions through legislative channels. Six congressmen from Washington State have sponsored legislation that would prohibit Sea World, or anyone else, from capturing orca whales for public display.¹¹⁵ The bill, introduced by Representative Rod Chandler on November 17, 1983, would amend the Act to ban permits for public display of orca whales; it does not prohibit capturing whales for scientific research.¹¹⁶ Hearings were held on the bill on March 15, 1984 in the House Subcommittee on Fisheries and Wildlife Conservation and the Environment (a subcommittee of the Merchant Marine and Fisheries Committee). The bill has 65 individual cosponsors from 25 states.¹¹⁷

The Sea World controversy has also caused widespread public concern in Alaska,¹¹⁸ and legislative action has been under-

115. 129 CONG. REC. H10147-48 (daily ed. Nov. 17, 1983)(statement of Rep. Chandler). Support for approval of the permit already exists in Washington. One Congressman cited Sea World's educational and research record, and argued, "they have proven themselves to be a true and reliable friend to marine mammals," as he cautioned against overturning the Fisheries Service's decision should the matter ever come before the House. H.R. REP. No. 160, 92nd Cong., 1st Sess. 10149 (1983). (statement of Rep. D. Hunter).

Protectionist interests acknowledge there is another argument against amending the Act. The 1981 amendments to the Act excused oil and gas companies from the lengthy and costly process of obtaining a regular permit. Also, the American Tuna Association's lobbying resulted in the clarification of provisions and amendments which allow 20,500 Dall's porpoises to be killed annually through 1986. The political reality appears to be that an attempt to amend the Act's public display provisions will also open the Act to persons with nonprotective interests in marine mammals. The result may be contrary to the very interests environmental groups are trying to protect. Interview with Dr. William Evans, Director of Hubbs-Sea World Research Institute, San Diego (Nov. 8, 1983).

116. The bill is cosponsored by Washington State Reps. Thomas Foley, Al Swift, Norm Dicks, Mike Lowry and Sid Morrison. News release from Congressman Rod Chandler (Nov. 17, 1983).

117. Because it is controversial, it is possible that supporters of the bipartisan bill will not lobby strongly for the amendment when the MMPA is up for reauthorization this year. It would then be reintroduced in 1985. Telephone Interview with John Enright, Press Secretary for Congressman R. Chandler, Washington D.C. (March 26, 1984). Some environmental groups, which oppose the permit, have decided to lobby in support of the proposed bill in lieu of seeking judicial review of the permit at this time. Telephone Interview with Alan Reichman, Wildlife coordinator for Greenpeace, Washington D.C. (Feb. 9, 1984).

118. Letters to Alaska's Governor Bill Sheffield's office regarding the killer whale controversy have been running ten to one in opposition to Sea World; most of the writers expressing anger that federal officials conducted no public hearings in Alaska before issuing the permit. Los Angeles Times (San Diego ed.), May 13, 1984, at 1, col.2. Despite the fact that last April Sea World urged support for the permit in every major newspaper in Alaska, Paddy McGuire of the Alaska Fish and Game Commission classifies the furor against the permit as "unprecedented" in the recent history of wildlife issues. San Diego Union, June 7, 1984, at B1, col. 1. Another group dedicated to preserving orca whales has joined the opposition to the permit and for unusual reasons. The Tlingits, a tribe of 480 members living on Admiralty Island, believe they can communicate with the orca whale, and revere the animal as part of their mythology. To them, the orca whales, as do

taken.¹¹⁹ On January 9, 1984 Sea World applied to the Alaska Department of Fish and Games for a state permit¹²⁰ to capture the whales whose capture had been authorized by the federal permit. Although under the MMPA Sea World does not need Alaska's permission to capture the whales, Sea World officials have assured the Alaskan government that no captures will be attempted unless they receive Alaska's approval.¹²¹ In May 1984, Alaskan Governor Sheffield announced the state's opposition to the capture. Sea World declared, in July, it would capture no whales in Alaskan waters in 1984 but not whether it would proceed in the future despite state disapproval.¹²²

A Suit Under NEPA

In Alaska, another approach has been taken to block Sea World's orca capture. On May 1, 1984, the Sierra Defense Club, Inc. on behalf of a coalition of individuals and charter businesses in Alaska, filed suit in the U.S. district court of Alaska.¹²³ The plaintiff's alleged that the Fisheries Service actions violated the National Environmental Policy Act (NEPA),¹²⁴ which is a general overlay environmental statute. The plaintiffs argue that the NEPA requires that before the federal agency could permissibly have taken a final action, which arguably will have an adverse impact on the environment, they should have prepared an Environmental Impact Statement (EIS). In the absence of an EIS, the permit, plaintiffs contend, would be invalid and void.¹²⁵ They support this argument with the

people, have a right to live freely. Los Angeles Times (San Diego ed.), May 13, 1984, part 1, at 1, col. 3.

119. The Alaskan Legislature has drafted a non-binding resolution demanding a halt to the capture until the issue can be further studied. Joint Resolution 31 has passed the state senate, but is now being held up in a House subcommittee by the Republican majority. Telephone interview with Paula Turrell, Office of Representative Szymanski, Juneau, Alaska (June 18, 1984).

120. Sea World applied for a permit pursuant to Alaska statute § 16.05.930.

121. Los Angeles Times (San Diego ed.), May 13, 1984, part 1, at 3, col. 4-5.

122. Anchorage Daily News, July 11 1984, at A-1, col. 5 and A-16, col. 1. Sheffield also asked Commerce Sec. Baldrige to revoke the permit. Baldrige refused, saying it provided adequate safeguards for the animals. *Id.* at A-16. While the collection program is on temporary hold, Sea World will continue gathering data on the animals. *Id.* at A-16, col. 3.

123. Jones v. Gordon J., 84-01 (D. Alaska filed May 1, 1984).

124. 42 U.S.C. §4321 et seq. (1969).

125. Complaint for the Plaintiff, Jones v. Gordon J., 84-01 (D. Alaska filed May 1, 1984), at 2, 27 [hereinafter cited as Complaint]. The plaintiffs further argued that under NEPA all federal actions are subject to an environmental assessment to determine whether a full EIS is warranted. If the agency believes an EIS is unnecessary, it must

contention that the authorized "takings" may significantly disrupt life cycles of small killer whale pods inhabiting Alaskan waters.¹²⁶

Apparently, without public participation under NEPA,¹²⁷ the Fisheries Service concluded the taking of 100 whales in Alaska does not require an EIS under NEPA.¹²⁸ Whether or not the plaintiffs are correct in asserting an EIS was required in these particular circumstances will be determined by future court decisions. The attempt represents, nevertheless, yet another potential route for environmental interests to move, procedurally and doctrinally, to protect cetacean rights.¹²⁹

II

AN ARGUMENT FOR STANDING

The issue of standing has a particular significance in the Sea World controversy. The Act's judicial review provision is fundamentally limiting since an action can only be brought within 60 days of the permit issuance.¹³⁰ The Act allows the Fisheries Service to modify, suspend, or revoke the permit for either a violation of its terms, or to make the permit consistent with Fisheries regulations made after the date of the permit's issuance.¹³¹ The permittee is then enti-

issue a "Finding of No Significant Impact." The Fisheries Service did not comply with these procedures. *Id.* at 24-25. The plaintiffs seek judicial review under the Administrative Procedure Act 5 U.S.C. § 706(2)(D) which mandates that a court shall set aside any agency action taken without observation of the procedure required by law, and Administrative Procedure Act 5 U.S.C. § 706(2) which mandates that a court shall set aside any agency action which is in excess of statutory authority, arbitrary, and capricious. Complaint, *supra* note 125, at 26.

126. Complaint, *supra* note 125, at 3. The Fisheries Service admits that "currently little is known concerning the size, composition, structure, and productivity of the killer whale population(s) in Alaska." See Memorandum from R.B. Brumstead to William G. Gordon, Report on the Application of Sea World, Inc. for a Public Display/Scientific Research Permit Under the Provisions of Sec. 101(a)(1) of the Marine Mammal Protection Act of 1972 (October 27, 1983) at 23 (hereinafter cited as *Decision Memorandum*).

127. One of NEPA's major purposes is to encourage and facilitate public involvement in federal decisions which may affect the quality of the human environment. See 50 C.F.R. § 1500.2(d) (1983).

128. It seems the decision was based on the Fisheries Service's past permitting practices. Since 1974, over 400 permits have been issued and none have required an EIS. *Decision Memorandum*, *supra* note 126, at 20. However, the plaintiffs argue that because the size of the "take" is unprecedented, and the potential adverse impacts to the environment from the action unusually great, preparation of an EIS is required. Complaint, *supra* note 125, at 23-24. They note that one issue raised by the Washington State lawsuit (discussed *infra* notes 71-72 and accompanying text) was the NMFS' failure to prepare an EIS under NEPA prior to issuing the live capture permit. Complaint at 23.

129. The full, detailed, consideration of the potential ramifications of this new procedural and doctrinal attempt to protect cetacean rights is beyond the scope of this Comment. The author invites future additional comment concerning this innovative approach.

130. 16 U.S.C. § 1374(d)(6) (1982).

131. *Id.* § 1374(e).

tled to a hearing and the Director may allow public participation at his discretion.¹³² A summary record of the hearing must be kept,¹³³ and judicial review is possible, on the same basis as for the action on the original permit.¹³⁴

Environmental groups could participate in an agency action initiated by the Fisheries Service. Subsequent to a Fisheries Service decision, either environmental groups or permittees such as Sea World could obtain judicial review of that decision. However, the Act gives environmental groups no procedure to force the agency to act, if, for example, the capture of orca whales is done in an inhumane manner, or if captivity is having a demonstrably adverse effect on the animals. While it is hoped the Service will enforce the provisions of the MMPA, as it is required to do, it is troublesome there is no procedure to force the agency to enforce the Act's provisions after the permit has been granted.

The permit issued to Sea World states "Any display program in which any of the marine mammals taken or imported hereunder are to participate shall be designed so as not to fatigue or overwork the mammals. A duly licensed veterinarian shall (so) certify to the Assistant Administrator."¹³⁵ The permit also provides for inspection of the Holder's records and facilities insofar as they pertain to activities authorized by the permit, relate to species covered by the permit, or pertain to the Assistant Administrator's responsibilities under the Act.¹³⁶ If citizens had standing, citizens could, at least, challenge the acceptability of the animal's living conditions. Items such as the size of the tanks or the sunlight and fresh air that the animals get could come under scrutiny. Perhaps this strategy would be more in the animal's immediate interest than a challenge to the idea of orca whales on public display—an idea which may be with us for a long time.

Citizen Suits

While Congress cannot authorize the exercise of judicial power in the absence of a case or controversy, Congress may enact "statutes creating legal rights, the invasion of which creates standing," even

132. 50 C.F.R. § 18.33(d)(3) (1983); 16 U.S.C. § 1374(e)(2) (1982).

133. 50 C.F.R. § 18.33(d)(3) (1983).

134. 16 U.S.C. 1374(e)(2) (1982).

135. *Permit*, *supra* note 47, General Conditions para. 6b. The permit does not stipulate whether Dr. Cornell (Sea World's current veterinarian) will suffice, or whether a disinterested veterinarian shall so certify.

136. *Id.* General Conditions para. 8.

though no legally recognizable injury would exist without the statute.¹³⁷ Since the early 1970's, several major environmental statutes have provided for citizen suits and broad judicial review.¹³⁸ The Endangered Species Act of 1973,¹³⁹ for example, expressly authorizes private citizens to sue in their own name to seek protection for an endangered species.¹⁴⁰ *Barcelow v. Brown*¹⁴¹ held that the MMPA has no citizen standing provision. The reasons why a citizen suit provision would be desirable are similar to those which will be discussed in the subsequent section on standing.

Standing and the MMPA

The Administrative Procedure Act, in section 702, provides "Any person suffering legal wrong because of an agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."¹⁴² Although curiously courts have tended to ignore this provision's test for standing,¹⁴³ they have reached the conclusion that "adversely affected in fact" or "injury in fact" is a test for standing.¹⁴⁴ Courts have added to the injury in fact requirement, and although the predominantly common law of standing is a confused area of law, three tests have emerged.¹⁴⁵

137. *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

138. *See, e.g.*, Clear Air Act Amendments, 42 U.S.C. § 1857h-5 (1976); Federal Water Pollution Control Amendments, 33 U.S.C. § 1365(a) (1976). *See also*, Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1415(g) (1976); Safe Drinking Water Act, 42 U.S.C. § 300(j-8) (1976); Toxic Substances Control Act, 15 U.S.C. § 2618(a) (1982); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(a) (Supp. V 1981) (statutes which have citizen suit standing provisions).

139. 16 U.S.C. §§ 1531-1543 (1982). The Act authorizes the Secretary of the Interior to list species that are threatened with worldwide extinction. After the Secretary has compiled the list of endangered or threatened species, published it in the Federal Register, and exhausted the proscribed hearing process, the Act makes it unlawful for any person subject to the jurisdiction of the United States to take, import, or sell any such species. *Id.* at § 1533. By 1978, the Secretary of the Interior had listed the Blue Whale, Bowhead Whale, Finback Whale, Gray Whale, Humpback Whale, Right Whale, Sei Whale, and Sperm Whale as endangered species. 43 Fed. Reg. 58, 036 (1978).

140. *See, e.g.*, *Palila v. Hawaii Dept. of Land and Natural Resources*, 471 F. Supp. 985 (D. Hawaii 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981) (Plaintiffs had standing to sue in their own names as "next-friends" on behalf of palila finches).

141. 478 F. Supp. 646, 691 (D.P.R. 1979) (The plaintiff alleged that the U.S. Navy was taking marine mammals in the course of its activities. The court held that as a private citizen, the plaintiff had no standing to enforce the provisions of the MMPA).

142. 5 U.S.C. § 702 (1982).

143. *See generally* DAVIS, ADMINISTRATIVE LAW TREATISE 214-19 (2d ed. 1983)(discussion of court cases in the area of APA § 702).

144. *See Id.* at 215-18.

145. *Id.* at 212.

The Three Tests for Standing

Injury in Fact

The first and most basic standing requirement is that the party must suffer injury in fact.¹⁴⁶ In a leading case which defines legally protected interests, the Supreme Court stated "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society."¹⁴⁷ Associational parties may allege injury to the recreational, aesthetic, scientific, and educational interests of their members.¹⁴⁸ The magnitude of the injury is of no consequence, relative to standing, if injury can be shown.¹⁴⁹

An organization may have standing as the representative of its members, based on injury to its members generally or even to a single member.¹⁵⁰ An environmental group cannot be denied standing solely because its members cannot be distinguished from other concerned citizens.¹⁵¹ Environmental organizations could allege injury in seeing the whales in captivity, in seeing inhumane treatment, and that they have a personal stake in the maintenance of a safe and healthful habitat for the animals.¹⁵² These organizations could also allege the federal agency's decision impairs their ability to see and enjoy whales in their natural habitat under non-exploitive conditions.¹⁵³

Causation

A second prerequisite to standing is a showing of a sufficient causal relationship between the challenged act and the alleged injury.¹⁵⁴ There must be a "substantial probability" that, if the court

146. See, e.g., *Association of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150 (1970).

147. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

148. See, e.g., *Animal Welfare Inst. v. Kreps*, 561 F.2d, at 1007.

149. For example, the Supreme Court has allowed important interests to be vindicated with no more at stake than a fraction of a vote, a \$5.00 fine and costs, and a \$1.50 poll tax. *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n. 14 (1973).

150. See, e.g., *Warth v. Seldin*, 422 U.S. at 511; *NAACP v. Button*, 371 U.S. 415, 428 (1963).

151. Cf., *U.S. v. SCRAP*, 412 U.S. 669, at 686-87.

152. For similar allegations, see *Animal Welfare Inst. v. Kreps*, 561 F.2d, at 1007.

153. *Id.*

154. See, e.g., *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); Note, *The Causal Nexus: What Must Be Shown for Standing to Sue in Federal Courts*, 29 U. FLA. L. REV. 250 (1977).

affords the relief requested, the party's injury will be removed.¹⁵⁵ Environmental groups would have to allege that marine parks' treatment of the animals is inconsistent with the terms of the permit or the policies of the MMPA.¹⁵⁶ If the court were convinced that the causal connection is not purely speculative, this test would be met.¹⁵⁷

Zone of Interest

A third test for standing, which some courts require, is that "the interest sought to be protected is arguably within the zone of interest to be regulated by the statute."¹⁵⁸ Congress intended to protect marine mammals and encourage their development to the greatest extent feasible.¹⁵⁹ Assuming public display of orca whales is consistent with the Act's purposes, it is still arguable that inhumane capture techniques or captivity conditions violates Congress' intent to protect the animals. Therefore, ensuring that conditions in marine parks are in the whales' best interest appears within the zone of interest regulated by the MMPA, and environmental groups should be able to assert the animals' interests in court.

*Animal Welfare Inst. v. Kreps*¹⁶⁰ used these three guidelines in analyzing the standing issue in a MMPA suit brought by environmental groups. The *Animal Welfare* court held that, notwithstanding the absence of a special provision for judicially reviewing agency regulations, Congress implicitly conferred standing (to challenge waiver regulations) on the same categories of persons to whom it gave standing to challenge permits.¹⁶¹ Continuing its analysis, and expressing a broad view of the law of standing, the court additionally held "even if the statute did not provide the answer, appellants also satisfy the three prerequisites for standing in the absence of a statutory grant."¹⁶²

The problem with conferring standing on environmental groups under three-test analysis is that it would only be effective when the Fisheries Service had issued a permit or drafted a regulation. Only under those circumstances could environmental groups allege that new evidence shows that the animals should not be put in captiv-

155. *Warth v. Seldin*, 422 U.S. at 504.

156. *Cf.*, *Animal Welfare Inst. v. Kreps*, 561 F.2d, at 1009-10 (for similar pleadings).

157. *See* *Simon v. Eastern Ky. Welfare Rights Org.*, *supra* note 154, at 42.

158. *Association of Data Processing Organization, Inc. v. Comptroller of the Currency*, 397 U.S. 150, 153 (1969).

159. 16 U.S.C. § 1361(6) (1982). *See also* *Balelo v. Baldrige*, *supra* note 112 at 756. In *Balelo* the court stated, "Congress's overriding purpose in enacting the MMPA was the protection of marine mammals."

160. 561 F.2d 1002.

161. *Id.* at 1006.

162. *Id.*

ity,¹⁶³ or that permit terms have been violated. Only selective judicial scrutiny would be available because no case or controversy exists unless a permit was previously issued. Therefore, the conditions of other cetaceans in captivity would remain unchallenged under the MMPA.¹⁶⁴

A New Approach

Perhaps the most important criticism of litigating under traditional standing concepts is that such suits perpetuate the legal fiction that human interests are being violated and that animals' interests are only protected indirectly. *Cetaceans themselves should have standing.* Two questions are raised by an argument for standing for cetaceans in their own right: 1) Are there legal justifications for giving animals legal rights; and 2) Are cetaceans creatures who warrant special law?

A Philosophical Argument

According to many philosophers, animals do not have rights simply because animals are not the kind of beings who can have rights.¹⁶⁵ Kant and the Utilitarians believed only rational beings, meaning man alone, have rights and all the lower animals are viewed as mere machines towards which man has no ethical responsibility.¹⁶⁶ Descartes insisted that respect for human dignity does not require respect for animals.¹⁶⁷ The Judeo-Christian belief that man was granted dominion over animals,¹⁶⁸ has been historically interpreted by the Western world to mean that because of man's immortal soul, humans are superior to animals.¹⁶⁹ In contrast, John Locke

163. Although testimony was presented at the hearings concerning the detrimental effects of captivity on the animals, apparently the Fisheries Service was not sufficiently convinced of such effects to deny the permit. New evidence would have to more conclusively demonstrate detrimental effects before a reviewing court would be apt to revoke the permit.

164. The conditions of other animals in marine parks, such as that of dolphins in small feeder-pools, would continue to be outside the Act's protection.

165. See, e.g., I. KANT, *THE METAPHYSICAL PRINCIPLES OF VIRTUE* 106 (1964).

166. See Brumbaugh, *Of Man, Animals, and Morals: A Brief History*, in *ON THE FIFTH DAY* 18-19 (1978); Note, *Using Metaright Theory to Ascribe Kantian Rights to Animals Within Nozick's Minimal State*, 19 ARIZ. L. REV. 242, 247-251 (1979).

167. Brumbaugh, *supra* note 166, at 14.

168. "God created man in his own image . . . [granting man] dominion over the fish of the sea, and over the birds of the air, and over cattle, and over all the earth, and over every creeping thing . . . upon the earth." GENESIS 1:26-27 (Revised Standard Version).

169. See, e.g., Comment, *Rights for Nonhuman Animals: A Guardianship Model*

believed man and animal share the same natural rights—life, liberty, prosperity, and the right not to suffer at the hands of others.¹⁷⁰ Albert Schweitzer espoused a humane philosophy and conduct emphasizing reverence for all life.¹⁷¹

A legal right can be defined as a claim against others for their acts or omissions on one's behalf which can be asserted before the state for enforcement.¹⁷² Arguments have been made for creating "animal rights", in the legal sense, with the animals represented by human beings.¹⁷³ The concept that a person may represent another person's interest is not new in the law; a trustee, guardian, or lawyer is often such a representative. The law does not disqualify infants, the insane, the senile, or the feeble-minded from exercising legal rights simply because they cannot act to enforce or comprehend their rights themselves.¹⁷⁴ Similarly, animals are beings who could have recognized rights, and humans, as guardians, can enforce those rights on the animals behalf.¹⁷⁵

for Dogs and Cats, 14 SAN DIEGO L. REV. 484, 494 (1977).

170. Fox, *What Future For Man and Earth? Toward a Biospiritual Ethic*, in *ON THE FIFTH DAY* 229 (1978).

171. "The universal ethic of reverence for life shows sympathy with animals, which is so often viewed as sentimentality, to be a duty which no thinking man can escape." A. SCHWEITZER, ALBERT SCHWEITZER, *AN ANTHOLOGY* (1947).

172. Feinberg, *Human Duties and Animal Rights*, in *ON THE FIFTH DAY* 47 (1978).

173. To illustrate the arguments: Although Congress regulates the care, handling, and treatment of animal's awaiting use in medical research, Congress has refused to interfere with the actual experimentation process. Abuses such as the needless suffering of research animals or using the animals to prove scientific points already well-established, could be eliminated by expanding the notion of guardianship so that research animals would have someone to allege ill-treatment for them. See Note, *Use of Animals in Medical Research: The Need for Governmental Regulation*, 24 WAYNE L. REV. 1733, 1738-1751 (1978).

Animal welfare groups have recently confronted the "factory farming" issue, characterized by overcrowding, restricted movement, and unaesthetized surgical procedures. General federal and state anti-cruelty statutes are the only source of farm animal protection. Enforcement through public (local police departments or special administrative agencies) or private (local humane societies granted police power) enforcement agencies is often ineffective. When concerned citizens cannot force these institutions to act, those citizens, on behalf of the animals themselves, should have standing to bring civil actions. See generally, J. Frank, *Factory Farming: An Imminent Clash Between Animal Rights Activists and Agribusiness*, 7 B. C. ENVTL AFF. L. REV. 423 (1979).

174. A person need have no clear awareness of his predicament to be represented. Mere possession of the interest is sufficient. For example, given a contract between a policy holder and an insurance company to pay a sum to the holder's children upon his death, the children have a right, which through their representative can be enforced in a court of law. This is true even though they have no knowledge or understanding of the contract which created the claim. Feinberg, *supra* note 172, at 54-57.

175. A similar argument can be made for the environment itself. For an excellent discussion of the environment's rights, see C.D. STONE, *SHOULD TREES HAVE STANDING?* (1974).

Cetacean Intelligence

The extent of cetacean intelligence is an extremely complicated question. Science is unsure what intelligence is (in humans, dolphins, or whales) or how to classify it.¹⁷⁶ Even though definitions of intelligence vary,¹⁷⁷ scientists generally assume that brain size is a factor.¹⁷⁸ The sperm whale has the largest brain of any creature known to have lived on earth, followed in order by the larger baleen whales, elephants, the large delphinids (orca and pilot whales), bottle-nosed dolphins and then human beings.¹⁷⁹ A strict linear progression must be corrected for body size in proportion to brain size.¹⁸⁰ The ratio of the body's surface area to the volume of the brain has been called the "cephalization" of the animals.¹⁸¹ Whales and dolphins stand close to humans in terms of cephalization coefficients.¹⁸²

Because cerebral cortex development is generally regarded as the morphological feature most clearly related to man's extensive behavioral repertoire and intelligence, the cerebral cortex's structure has been implicated in the arguments relating intelligence to cetaceans. The most striking feature of whale and dolphin brains is the extent of cerebral cortex fissuration.¹⁸³ The new-cortex, or "new brain", which is the wrinkled and convoluted gray area thinly covering the surface of the cerebral hemispheres, has been shown to be complex in cetaceans—especially dolphins (the most extensively studied ceta-

176. R. ELLIS, *DOLPHINS AND PORPOISES* 18 (1982).

177. Dictionary definitions of intelligence include "the ability to learn or understand from experience" and the "faculty of thought and reason". See, e.g., WEBSTERS NEW WORLD DICTIONARY 732 (2d college ed. 1972).

178. ELLIS, *supra* note 176, at 20.

179. *Id.*

180. *Id.*

181. The size of the brain is a measure of the total information processing capacity. Taking the ratio of the brain size to body surface, then adjusting for the amount required to handle ordinary body functions for average animals, there is created a useful definition of intelligence from a neurobiological perspective. Jerison, essay on Cetacean Behavior, Intelligence, and the Ethics of Killing Cetaceans, presented at the 1980 IWC Conference, reprinted in ELLIS, *supra* note 176.

182. Morgane, *The Whale Brain: The Anatomical Basis of Intelligence*, in MIND IN THE WATERS 92 (1974). However, it must be emphasized that no serious worker in the brain sciences is attempting to presuppose a correlation between intelligence and any simple measure such as brain weight alone. The quality factor, as well as the quantity factor, is critical. *Id.* Additionally, brain/body ratios in cetaceans differ. This suggests they are varied in intelligence or that these ratios are poor correlates of animal intelligence. This latter interpretation is the most widely accepted at the present time. Kruger, *Specialized Features of the Cetacean Brain*, in WHALES, PORPOISES AND DOLPHINS 250 (K. Norris ed. 1966).

183. Kruger, *supra* note 182, at 134.

cean).¹⁸⁴ The neo-cortex is believed to form perception, memory, thought, and to be an index of the relative efficiency of the brain's behavior regulation.¹⁸⁵

The meaning of the intricate fissuration of the whale's cortex is not yet known. The neurobiological evidence does not conclusively link the whale brain with intelligence, and scientists differ on the implications drawn from what is known.¹⁸⁶ Furthermore, cetaceans could represent an evolutionary path where the large brain and effective transmission and reception of information has evolved for a completely different reason than our own. Whales' brains may have evolved to a high sophistication as a result of their almost perfect adaptation to a completely aquatic existence.¹⁸⁷

It is well-established that cetaceans are extremely capable animals with a highly developed communications system. Whales navigate by employing a sonar-like process—echolocation—whereby they emit high frequency clicks and whistles, transmitting the sounds through a "lens" of fat in the forehead.¹⁸⁸ For years the United States Navy has been conducting research and experimentation on dolphins. The Navy has been attempting to emulate dolphins' natural sonar capabilities with electronic and computer equipment.¹⁸⁹

184. See Morgane, *supra* note 182, at 86.

185. See Bunnell, *The Evolution of the Cetacean Intelligence*, in *MIND IN THE WATERS* 56, 57 (1974); see also, MORGANE, *supra* note 182, at 85-88 (for discussion and photographs of dolphin's cortex).

186. To illustrate a few areas of debate: Some researchers have reported that the laminar differentiation (layering of the cortex) is poor in dolphins and most similar to that of a rabbit. On the other hand, the enormous surface area of the dolphin cortex and its highly convoluted appearance may be used as an argument for the superiority of cetaceans. Kruger, *supra* note 182, at 237. The cortex of whales is relatively thinner than comparable regions of other large brains, including human, but the total surface area is far greater due to the tremendous infolding. Morgane, *supra* note 182, at 88.

The controversial cetologist John C. Lilly has done extensive studies on dolphins with the concept of interspecies communications. Such communications presumably would serve as a manifestation of dolphin intelligence. See generally, LILLY, *MAN AND DOLPHIN* (1961). Dr. Lilly's work has been both criticized by scientists as being without any scientific basis and commended by others as valuable and visionary.

187. ELLIS, *supra* note 176, at 21-22. In an unusual explanation for the complex development of the cetacean brain, two Dutch biologists theorized that, because the dolphin has not developed writing and therefore "culture," its communication capabilities have had to develop in a compensatory fashion. Whereas humans can store their collective information in books and computers, dolphins, lacking the hands to build these artifacts, have had to store all the knowledge in dolphin history. FICHTELIUS AND SJO-LANDER, *SMARTER THAN MAN?* (1972).

188. *C.f.*, 155 NATIONAL GEOGRAPHIC 506, 515 (April 1979). There is a theory that toothed whales can "ensonify" their prey, by projecting what in essence is a miniature sonic boom, loud enough to kill or stun the prey. It is unclear how this works, but is currently being studied. See ELLIS, *supra* note 176, at 17-18.

189. As yet the Navy has met with only limited success. Although they are often secretive about their uses of dolphins and about the discoveries which they will disclose, the Navy has reported that bionic sonar may bring them closer to duplicating dolphin's sonar equipment. National Geographic, *supra* note 188, at 518-19.

Scientific studies demonstrate that cetaceans are special and mysterious creatures with remarkably developed brains. Additionally, an often overlooked but important aspect of the information about these animals comes from people who have simply observed—for example, those who watch the gray whales annual migration past West Coast shores—or by people who have come in contact with the wild, living animals. A recurrent observation is that cetaceans are aware of, and often intensely conscious of, their human observers.¹⁹⁰ Whether this unscientific feeling is an indication of a high intelligence, rather than just something humans want to believe, remains to be seen.

A Recognition of Cetacean Rights

The concept that the law can, and maybe should, develop new dimensions in the particular area of cetacean rights, is recognized in *Animal Welfare v. Kreps*:

We cannot ignore the fact that the MMPA is an unusual statute: its sole purpose is to promote protection of animals. Where an Act is expressly motivated by considerations of humaneness toward animals, who are uniquely incapable of defending their own in court, it strikes us as eminently logical to allow groups specifically concerned with animal welfare to involve the aid of courts in enforcing the statute.¹⁹¹

Although the court said the appellants satisfied the traditional tests for standing, the court, in essence, acknowledged the theme of this comment—affording cetaceans rights with humans acting as their legal guardians. Acknowledging this concept would not automatically mean that all public display of cetaceans would be forbidden. Claims would still be brought under the MMPS, which is, as previously discussed, a management as well as a protectionist statute. But a forthright approach has the advantage of being a more logical and honest way to solve an unusual and sensitive legal issue.

III

CONCLUSION

It is a strange phenomena of human nature that mankind often does not protect a species until the animal is in danger of extinction; then humans frantically tries to repair the damage done. Meaningful international protection of whales has come long after the need was known. Although U.S. conservationist ideology is reflected in law,

190. See generally McIntyre, *On Awareness*, in MIND IN THE WATERS 69-70 (1978) (cetacean intelligence more accurately described as cetacean awareness).

191. *Animal Welfare v. Kreps*, 561 F.2d 1002, 1007 (1977).

the political war between special interest groups and protectionists rages on, and the mentality that the natural world is a vast resource for humans to exploit is still held by many.

Perhaps protection for whales from exploitation in the name of public display and scientific research will come if humans are someday able to communicate with these animals. Perhaps freedom from being viewed as animals to be captured and trained for human amusement will come if cetacean intelligence is scientifically established (at least by a human definition of intelligence). But perhaps the real issue is human willingness to change our thinking; thus, inspiring laws that focus on the animals themselves and their rights rather than on how they can be optimally sustained, ultimately for human utilization.

As the legal system progresses, new human ideas and human awarenesses are translated into law. Affording and upholding human rights has been a major achievement of the legal system. Similarly, the legal arena is the place where the battle for cetacean's rights has begun. Legally enforceable rights for whales and dolphins is an unusual, and perhaps even to some, a threatening idea. Yet it is not such a radical concept when one realizes the goal is to preserve and protect creatures we have only recently begun to understand and appreciate. By giving cetaceans rights and allowing human individuals or groups to sue on their behalf, or otherwise represent them in court, the goal of effective protection will be more readily achieved.

MARY A. WINTERS