

1993

## The Marine Mammal Protection Act: Maintaining the Commitment to Marine Mammal Conservation

LaVonne R. Dye

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### Recommended Citation

LaVonne R. Dye, *The Marine Mammal Protection Act: Maintaining the Commitment to Marine Mammal Conservation*, 43 Case W. Rsrv. L. Rev. 1411 (1993)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol43/iss4/44>

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THE MARINE MAMMAL PROTECTION ACT:  
MAINTAINING THE COMMITMENT TO MARINE MAMMAL  
CONSERVATION

Are you terminally ill? Do you have AIDS, ALS, brain cancer, or syphilis? Don't go out with a whimper; go out with a bang! Undertake an eco-kamikaze mission. Yes, terminally ill earth defenders can perform the ultimate act of ecodefense while cheating the Grim Reaper of all the wasting and suffering that precedes these hideous, industrial age deaths

The possibilities for the terminally ill warriors are limitless. Dams from the Columbia and the Colorado to the Connecticut are crying to be blown to smithereens, as are industrial polluters, the headquarters of oil spilling corporations, fur warehouses, paper mills. No doubt you already have a favorite target in your own watershed.

Here's how it works: Your doctor tells you have [sic] 6-18 months to live. Your condition will steadily worsen. You decide that, rather than endure all that suffering, you'll go out in a flash — taking out, say, the Southeast power grid.

To those of you feeling suicidal: this may be the answer to your dreams. If you are determined to end it all, don't slink off to some garage and intensify acid rain and the greenhouse effect by CO poisoning. Don't jump off a bridge — blow up the bridge! Who says you can't take it with you?

One final thought: from those of you impatient with this admittedly slow pace of ecodefense, contributions are

urgently solicited for scientific research on a species specific virus that will eliminate *Homo shiticus* from the planet. Only an absolutely species specific virus should be set loose. Otherwise, it will be just another technological fix. Remember, Equal Rights for All Other Species!<sup>1</sup>

This alarming insight into the mindset of environmental terrorists is frightening to marine life parks across the country. Espousing the slogan that marine mammals are better off dead than in captivity, environmental terrorists have threatened to destroy oceanariums which maintain marine mammals in a controlled environment.<sup>2</sup> Using less radical tactics, other animal rights groups have attempted to accomplish their goals through legal means.<sup>3</sup> One technique employed by animal rights groups to prevent the captivity of marine mammals is to protest the granting of permits which allow marine life facilities to capture or to import marine

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1. *Eco-Kamikazes Wanted*, EARTH FIRST! J., Sept. 22, 1989, at 21.

2. Fear of environmental terrorism has prompted marine life parks like Sea World to station guards with their whales twenty-four hours a day. Personal interview with Allen Kelley, Supervisor of Animal Training for Sea World of Ohio, Inc., in Aurora, Ohio (Mar. 8, 1992). Also, in the winter of 1989-1990, a marine mammal collected by the National Aquarium in Baltimore became the target of activity by animal rights extremists. Telephone Interview with Amy Woodworth, Public Relations Coordinator for the National Aquarium in Baltimore (June 9, 1992). The National Aquarium in Baltimore collected and transported a dolphin from Tampa Bay to Hawks Cay, Florida, where it was maintained in an enclosed area of the ocean while it awaited transport to the aquarium. In an attempt to get media attention for their viewpoint, animal rights extremists cut open the underwater fence that was maintaining this dolphin and two others in the enclosed area. Although none of the animals were injured by the clipped fence and none of them swam away from the enclosed area, this incident was an illustration of the dangerous lengths to which animal rights extremists will go in order to attain their goals and to publicize their objectives. *Id.*

Medical labs conducting research on animals are also victimized by the fear of environmental terrorism. In 1986, environmental terrorists removed 150 captive animals and destroyed labs at the University of Oregon. *Extremist Indictments*, ANIMAL RTS. REP. BULL. (Perceptions Press, Washington D.C.), Oct. 27, 1990. One of the convicted extremists argued "that the 'lesser evil' of aiding in the raid was justified in order to stop the 'greater evil,' continued abuse of the lab animals." *Id.* In addition, it is believed that animal rights extremists were responsible for the destruction, by fire, of a University of California at Davis veterinary medicine facility in 1987. This arson attack resulted in approximately four million dollars in damage. *Id.* Both of these incidents have shed light on "the role of terrorism as a tool of animal rights activism." *Id.*

3. It should be noted that the term "animal rights groups" is not intended to be synonymous with the term "environmental terrorists." In this note, the term "animal rights groups" is intended to denote those groups which use passive tactics, i.e. protesting, lobbying, etc. to communicate their viewpoints and to achieve their goals. The term "environmental terrorists" refers to those groups and individuals who use violence, threats, and other terrorist tactics to accomplish their objectives.

mammals for the purposes of research or public display.<sup>4</sup> In their attempts to block the capture or importation of marine mammals, animal rights groups have instituted law suits as interested parties against marine life facilities which seek the mammals.<sup>5</sup>

This note focuses upon *Animal Protection Institute of America v. Mosbacher*,<sup>6</sup> a suit filed by animal rights groups seeking to invalidate an importation permit issued to the John G. Shedd Aquarium in Chicago by the Secretary of Commerce. This permit authorizes Shedd Aquarium to import six pseudorcas (also known as false killer whales) from Japan for the purpose of public display.<sup>7</sup> Although these whales were beached deliberately by Japanese fishermen due to their interference with fishing operations, animal rights groups oppose their importation because the issued permit allegedly violates the Marine Mammal Protection Act ("MMPA").<sup>8</sup> The MMPA requires the Secretary of Commerce, prior to the granting of a permit for the importation of a marine mammal, to verify that the country of origin has established a conservation program that is consistent with the purposes and policies of the MMPA.<sup>9</sup> Because Japan has not implemented any program designed to preserve marine mammal populations, the animal rights groups argued that the permit should be invalidated.<sup>10</sup>

Part I of this note will examine the Marine Mammal Protection Act of 1972, focusing on the sections which allow marine life facilities to apply for permits to collect, import, and maintain marine mammals in captivity for public display and research purposes.

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4. To date, animal rights groups have been successful in persuading the courts to invalidate collection permits in two separate cases. See *Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986) (enjoining Sea World from collecting killer whales under a permit that had been issued without the preparation of an environmental impact statement); *Greenpeace U.S.A. v. Evans*, 688 F. Supp. 579 (W.D. Wash. 1987) (holding a permit granted for scientific research invalid because an environmental impact statement was not prepared prior to its issuance).

5. See *supra* note 4.

6. 799 F. Supp. 173 (D.D.C. 1992).

7. *Id.*; Telephone Interview with Ken Ramirez, Assistant Curator of Marine Mammals and Supervisor of Animal Training for the John G. Shedd Aquarium (Mar. 8, 1992).

8. 16 U.S.C. §§ 1361-1407 (1988).

9. 16 U.S.C. § 1371(a)(3)(A). The MMPA states that the term "conservation" means "the collection and application of biological information for the purposes of increasing and maintaining the number of animals within species and populations of marine mammals at their optimum sustainable population." 16 U.S.C. § 1362(2).

10. See *Mosbacher*, 799 F. Supp. at 179 ("[P]etitioners assert that § 1371(a)(3)(A) prohibits the Secretary from issuing permits for the importation of the . . . false killer whales without first certifying that the capturing country's program for 'taking' marine mammals is consistent with . . . the MMPA.").

In Part II, the analysis will address the aforementioned MMPA issue raised by animal rights groups in the *Mosbacher* case. The policies underlying the specific MMPA provision at issue and Japan's historic non-compliance with international conservation efforts will be examined. In addition, this section will address the propriety of the MMPA permit provisions to determine whether marine life parks should ever be allowed to import and to hold marine mammals in captivity. This analysis concludes that the MMPA's permit program should be continued because it is consistent with the policies and goals of the MMPA. Ultimately, this section proposes that the MMPA should be amended to accommodate situations like those presented in *Mosbacher*. This amendment would authorize the Secretary of Commerce to set aside the conservation program requirement in 16 U.S.C. § 1371(a)(3)(A) in cases where the animals to be imported by certified marine life facilities are prospective victims of "nuisance" killings or incidental takings by the fishing industry. This amendment seeks to remedy a situation in which compliance with the MMPA importation restrictions not only is counterproductive to the conservation of marine mammal populations, but may also achieve the same result as environmental terrorism: death of the marine mammals at issue.

## I. BACKGROUND

### A. The MMPA Permit Program

In 1972, Congress created the Marine Mammal Protection Act as a reaction to the public's concern that human activities were threatening to extinguish certain species of marine mammals.<sup>11</sup>

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11. The legislative history of the MMPA states:

Recent history indicates that man's impact upon marine mammals has ranged from what might be termed malign neglect to virtual genocide. These animals, including whales, porpoises, seals, sea otters, polar bears, manatees and others, have only rarely benefitted from our interest: they have been shot, blown up, clubbed to death, run down by boats, poisoned, and exposed to a multitude of other indignities, all in the interests of profit or recreation, with little or no consideration of the potential impact of these activities on the animal populations involved.

H.R. REP. NO. 707, 92d Cong., 2d Sess. 11-12 (1972), reprinted in 1972 U.S.C.C.A.N. 4144, 4144-45.

Several environmental concerns provided the impetus necessary to motivate Congress to create the MMPA. First, the public was outraged by the brutal slaughter of harp seal pups in Canada. See Ken Schoolcraft, Jr., *Recent Development, Congress Amends the Marine Mammal Protection Act*, 62 OR. L. REV. 257, 258 (1983) (supporting congressional amendments to the MMPA and identifying, without resolving, some remaining prob-

Specifically, Congress enacted the MMPA "to prohibit the harassing, catching and killing of marine mammals by U.S. citizens or within the jurisdiction of the United States . . . ."12 Congress has justified this prohibition by announcing that "decent treatment for [marine mammals] . . . may well . . . be in the long-term best interests of man."13 The goal of this act is to protect marine mammals so as to maintain their "optimum sustainable populations."14 To achieve this goal, the MMPA further prohibits the "taking and importation of marine mammals and marine mammal products . . . ."15 Several exceptions to this general rule have been created.16 One such exception is the provision of the MMPA which allows marine life parks and other zoological institutions to apply for permits to collect and to import marine mammals for the "purposes of scientific research, public display, or enhancing the survival or recovery of a species or stock . . . ."17

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lems in the act). Second, fear that certain whale species would become extinct due to human activities was another influential factor in the creation and enactment of the MMPA. See George C. Coggins, *Legal Protection for Marine Mammals: An Overview of Innovative Resource Conservation Legislation*, 6 ENVTL. L. 1, 14 (1975) (reviewing the MMPA's novel protective devices and criticizing its vagueness and enforceability problems). Further, the incidental killing of dolphins and porpoises by the United States tuna purse seine ships had become another major congressional concern. See H.R. REP. NO. 707, *supra*, at 15, reprinted in 1972 U.S.C.C.A.N. at 4148.

12. H.R. REP. NO. 707, *supra* note 11, at 11, reprinted in 1972 U.S.C.C.A.N. at 4144.

13. H.R. REP. NO. 707, *supra* note 11, at 12, reprinted in 1972 U.S.C.C.A.N. at 4145. Humanity's interest in protecting marine mammal populations may best be summarized by the following MMPA policy declaration: "[M]arine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management." 16 U.S.C. § 1361(6).

14. 16 U.S.C. § 1361(2). "Optimum sustainable population" denotes the number of animals needed to procreate and to sustain the greatest population that is supportable by the ecosystem. See 16 U.S.C. § 1362(8).

15. 16 U.S.C. § 1371(a).

16. For example, the MMPA permits the "incidental taking" of marine mammals in the course of commercial fishing operations. 16 U.S.C. § 1371(a)(2). Also, Alaskan natives are permitted to collect marine mammals for subsistence purposes or for the creation and sale of genuine native crafts and clothing. 16 U.S.C. §§ 1371(b)(1)-(2).

17. 16 U.S.C. § 1371(a)(1). The agencies charged with the responsibility of issuing permits for the taking and importation of marine mammals acknowledge the important role that the public display of marine mammals can play in fulfilling the objectives and policies of the MMPA. See *Permits for Taking Marine Mammals for Public Display*, 54 Fed. Reg. 22001 (1989). In particular, these agencies note that "the education and conservation components of public display programs can enhance widespread appreciation for and understanding of all marine mammals and their role in the marine ecosystem." *Id.* The 1988 amendments to the MMPA modified this provision to require that a collection permit or an importation permit for the public display of marine mammals could be issued only to:

The MMPA divides the power to issue these permits between the Department of Commerce and the Department of Interior.<sup>18</sup> On behalf of the Secretary of Commerce and the National Oceanic and Atmospheric Administration, the National Marine Fisheries Service implements the permit program for the importation of cetaceans (i.e. whales and dolphins) and all pinnipeds (i.e. seals and sea lions), except walruses.<sup>19</sup> The Secretary of Interior is vested with the power to enforce the permit policies with respect to all other marine mammals.<sup>20</sup> In addition, any permit issued by either of the Secretaries must state the number and species of animals that can be taken or imported, the location and manner in which they may be taken or imported, and the time period covered by the permit.<sup>21</sup> Moreover, the permit must articulate the "methods of capture, supervision, care, and transportation" that must be followed before and after the taking or importation.<sup>22</sup>

The specific requirements for the issuance of a permit differ depending on the intended use of the mammal.<sup>23</sup> If the purpose of the permit is public display, the Secretary must verify that the applicant offers an educational or conservational program and is open to the public on a regular basis.<sup>24</sup> If the purpose of the per-

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an applicant which offers a program for education or conservation purposes that, based on professionally recognized standards of the public display community, is acceptable to the Secretary and which submits with the permit application information indicating that the applicant's facilities are open to the public on a regularly scheduled basis and that access to the facilities is not limited or restricted other than by the charging of an admission fee.

16 U.S.C. § 1374(c)(2). This modification was made due to the congressional acknowledgment that "[a]n informed public is more likely to support research, conservation, and protection efforts directed at marine mammal populations in the United States and worldwide." 54 Fed. Reg. 22001.

18. See 16 U.S.C. § 1362(11).

19. See 16 U.S.C. § 1362(11)(A).

20. 16 U.S.C. § 1362(11)(B).

21. 16 U.S.C. §§ 1374(b)(A)-(C). The act also authorizes the imposition of other conditions deemed appropriate by the Secretary. 16 U.S.C. § 1374(b)(D).

22. 16 U.S.C. § 1374(c)(1).

23. Although the requirements for the issuance of the permit differ depending on whether the collection or importation is for the purpose of research, public display, or aiding the survival of the species, the applicant for the permit will always bear the burden of showing that the taking or importation is allowed under one of these exceptions and is in accord with the development of sound principles of marine life conservation. See H. REP. NO. 707, *supra* note 11, at 18, reprinted in 1972 U.S.C.C.A.N. at 4151.

24. 16 U.S.C. § 1374(c)(2). Although the MMPA does not define specifically what constitutes an "education program," it does say that the program must be "based on professionally recognized standards of the public display community" and must be "acceptable to the Secretary." 16 U.S.C. § 1374(c)(2). While the education or conservation component

mit is scientific research, the Secretary of the appropriate department must determine that "the taking is required to further a bona fide scientific purpose and does not involve unnecessary duplication of research."<sup>25</sup> More stringent requirements, however, must be satisfied before the Secretaries can issue a permit for scientific research which results in the killing of a marine mammal.<sup>26</sup> The Secretaries of the Departments of Commerce and Interior may not issue a permit for the killing of a marine mammal until they have verified the following:

(1) a non-lethal method of conducting the research is not available; and

(2) if the marine mammal is a member of a depleted species, the research findings will directly help the species or the research is extremely important.<sup>27</sup>

If the purpose of the permit is to aid the survival of a species or stock, the Secretaries first must consult with the Marine Mammal Commission and hold a public hearing in order to determine whether the taking or importation would aid significantly the maintenance and increasing distribution that is needed to facilitate the survival or recovery of the species.<sup>28</sup> The Secretaries must also verify that any taking or importation is consistent with an established conservation plan or with the Secretary's determination of what is needed to ensure the survival or recovery of a species or stock.<sup>29</sup> Furthermore, a permit for the captive holding of a marine mammal that belongs to a depleted species or stock cannot be issued until all of the following conditions are met:

(1) the Secretary determines that the "captive maintenance is likely to contribute to the survival or recovery of the species or stock by maintaining a viable gene pool, increasing productivity, providing biological information, or establishing animal reserves;"<sup>30</sup>

(2) the Secretary verifies that "the expected benefit to the af-

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does not need to be the main objective of the applicant's public display program, the Senate Committee acknowledged the value of requiring display facilities to educate the public about the marine mammals being exhibited. See S. REP. NO. 592, 100th Cong., 2d Sess. 28-29 (1988).

25. 16 U.S.C. § 1374(c)(3).

26. See *id.*

27. *Id.*

28. 16 U.S.C. § 1374(4)(A)(i).

29. 16 U.S.C. § 1374(4)(A)(ii).

30. 16 U.S.C. § 1374(c)(4)(B)(i).



affected species or stock outweighs the expected benefit of alternatives which do not require removal of animals from the wild,"<sup>31</sup> and

(3) the Secretary "requires that the marine mammal or its progeny be returned to the natural habitat of the species or stock as soon as feasible, consistent with the objectives of any applicable conservation plan or recovery plan . . . ."<sup>32</sup>

The MMPA sets out other requirements that also govern the taking and importation of marine mammals. The MMPA authorizes the issuance of permits for the incidental taking of marine mammals in the course of commercial fishing operations; however, it also mandates that it shall be "the immediate goal" of U.S. fisheries to reduce incidental marine mammal fatalities and injuries to "insignificant levels approaching a zero mortality and serious injury rate . . . ."<sup>33</sup>

The Secretary is given the discretion to waive many of these requirements when determining whether to issue a permit for the taking or importation of any marine mammal or marine mammal product.<sup>34</sup> However, before any of these requirements can be waived, the Secretary must make two determinations:

(1) that the taking or importation of the marine mammal is consistent with MMPA conservation goals; and

(2) that the country of origin has implemented a conservation program for the taking of marine mammals that is "consistent with the purposes and policies of" the MMPA.<sup>35</sup>

Thus, the MMPA imposes numerous impediments to the importation of marine mammals which are designed to further the goals of the statute. The recent decision in *Animal Protection Institute of America v. Mosbacher*<sup>36</sup> provides a mechanism for determining whether the importation restriction imposed by section 1371(a)(3)(A) is consistent with the MMPA policy of conserving marine mammal populations.

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31. 16 U.S.C. § 1374(c)(4)(B)(ii).

32. 16 U.S.C. § 1374(c)(4)(B)(iii).

33. 16 U.S.C. § 1371(a)(2). This same provision orders the Secretary of the Treasury to "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." *Id.*

34. 16 U.S.C. § 1371(a)(3)(A).

35. *Id.*

36. 799 F. Supp. 173 (D.D.C. 1992).

## II. ANIMAL PROTECTION INSTITUTE, INC. V. MOSBACHER

The dispute in *Mosbacher* arose on March 10, 1988, when the John G. Shedd Aquarium in Chicago submitted an application to the National Marine Fisheries Service requesting a permit to import six pseudorca whales from Japan for public display purposes.<sup>37</sup> After requesting and receiving additional information on the proposed application and reviewing the comments submitted by eight animal rights organizations that opposed the issuance of the permit,<sup>38</sup> on April 29, 1989 the National Marine Fisheries Service issued a permit authorizing the importation.<sup>39</sup> On June 12, 1989, the Sierra Legal Defense Club, on behalf of several animal rights groups,<sup>40</sup> filed suit in the United States District Court for the District of Columbia as an interested party against the Secretary of Commerce and the administrator of the National Marine Fisheries Service, seeking to invalidate the permit on the grounds that it violated the MMPA.<sup>41</sup> On July 31, 1992, the federal district court

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37. See 53 Fed. Reg. 11,692 (1988) (notice that application for permit was received).

38. See Petition for Review, Animal Protection Institute of America, Inc. v. Mosbacher, No. 89-1696 at 6, para. 15 (D.D.C. filed June 12, 1989) [hereinafter Complaint].

39. 54 Fed. Reg. 19,934 (1989). It should be noted that two permits were granted to Shedd Aquarium at the outset of this controversy. Telephone interview with Ken Ramirez, Assistant Curator of Marine Mammals and Supervisor of Animal Training for the John G. Shedd Aquarium (Mar. 5, 1993). One permit authorized Shedd Aquarium to collect pseudoras from the Japanese shore drive fisheries. *Id.* The second permit authorized Shedd Aquarium to import pseudoreas from an existing marine life facility in Japan. *Id.* Although the location of the whales is different under these two permits, their source is the same. These whales were the victims of an annual shore drive conducted by Japanese fisheries. *Id.* The purpose of a shore drive is to beach the whales which interfere with the activities of Japanese fisheries by competing for the fish. *Id.*

Shedd Aquarium withdrew the permit authorizing it to collect pseudorcas directly from the shore drive fisheries due to accusations by animals rights groups that they were supporting the shore drive by purchasing the whales directly from the fisheries. *Id.* Thus, the only permit at issue in this case is the one authorizing Shedd Aquarium to import whales from a Japanese marine life facility. Since these marine life facilities collected their pseudorcas from the shore drive fisheries, the issue still remains as to whether the permit authorizing the importation of these beached whales violates the MMPA.

40. The named plaintiffs in the suit are the Animal Protection Institute of America, Inc., the International Wildlife Coalition, the Midwest U.S.A. Whale Protection Federation, the Humane Society of the United States, Greenpeace U.S.A., the Cetacean Society International, the Sea Shepherd Conservation Society, and the American Humane Association. See Complaint, *supra* note 38, at 1. Committed to the conservation and preservation of marine mammals, all of these organizations either oppose the capturing of marine mammals from the wild or oppose the holding of marine mammals in captivity for any reason. See *id.* at 2-5, para. 4-11.

41. *Id.* at 1-2, para. 1. 16 U.S.C. § 1374(d)(6) provides that "[a]ny 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 . . . or of his refusal to issue such a

granted summary judgment on behalf of the defendants,' holding that the Secretary of Commerce had not abused his discretion in granting the permit. The court upheld the Secretary's issuance of the permit pursuant to the Secretary's authority under 16 U.S.C. 1371(a)(1).<sup>42</sup> The court further held that the Secretary's actions were not in violation of the Administrative Procedure Act in that they did not violate the law and were not "arbitrary and capricious [as] measured against the underlying purpose of the MMPA . . . ."<sup>43</sup> Since the court found that 16 U.S.C. 1371(a)(1) gave the Secretary the requisite authority to approve the permit at issue, the court deemed it unnecessary to address the § 1371(a)(3)(A) issue that is being examined in this note. Yet application of the section in cases such as *Mosbacher*, where the animals at issue are prospective victims of "nuisance" killings and incidental takings, may result in decisions inconsistent with the purposes of the MMPA.

The animal rights groups challenged the validity of the permit on several grounds. Many of their challenges alleged procedural deficiencies in the permit granting process.<sup>44</sup> If these allegations

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permit." This provision requires an interested party who is seeking judicial review to file a petition for review in the District Court where the party resides, or has his/her main place of business, or in the District of Columbia, within sixty days after the issuance or denial of the permit. *Id.* The only guidance given on the permissible scope of review under this section is that such review shall comply with the Administrative Procedure Act. *Id.*

It should be noted that the courts have refused to grant standing to plaintiffs who fail to establish an individualized interest in the environmental issue at hand. *See Sierra Club v. Morton*, 405 U.S. 727, 741 (1972) (Court denied the Sierra Club standing to contest the approval of the construction of a ski resort because the Club's assertion that the project would adversely affect the area's aesthetics and ecology was insufficient to establish individualized harm). In addition, courts have refused to grant standing unless the injury to the plaintiff is imminent and redressable. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992) (where plaintiffs brought action challenging a regulation of the Secretary of Interior under the Endangered Species Act and alleged standing on grounds that they had vague intentions of observing endangered species in future, court denied standing because injury to plaintiffs was not imminent or redressable.) Applying the *Lujan* Court's test for standing in *Mosbacher*, the court granted standing because plaintiffs presented specific plans to observe whales in the wild and found the injury to be redressable because the whales would not be captured if the permit were revoked. *Mosbacher*, 799 F. Supp. at 177.

42. *Mosbacher*, 799 F. Supp. at 178.

43. *Id.*

44. Several of the alleged violations of the MMPA are as follows: defendants failed to verify that the granting of the permit would be consistent with the policies and purposes of the MMPA as required by § 1361 and § 1371(a)(3)(A); defendants failed to certify that the granting of the permit would not cause the population of the pseudorcas to drop

are correct, then the plaintiffs' motion to invalidate the importation permit should have been granted. However, these procedural deficiencies in the permit-granting process were not likely to be permanent obstacles to the Secretary's granting of this permit because they seemed to be "technicalities" which could be easily remedied. One basis of the plaintiffs' complaint, however, should not have been so easily dismissed. Section 1371(a)(3)(A) of the MMPA requires the Secretary of Commerce, before the issuance of a permit for the importation of a marine mammal, to certify that the country from which the animals are being imported has established a marine mammal conservation and preservation program that is consistent with the policies of the MMPA.<sup>45</sup> Subsequently, this provision appears to prohibit absolutely the importation of marine mammals or marine mammal products from any nation that does not have this type of conservation program.<sup>46</sup> According to the plaintiffs in *Mosbacher*, the defendants failed to satisfy the requirements of section 1371(a)(3)(A) because Japan does not have a conservation program that is consistent with the policies and purposes of the MMPA; therefore, the permit should be invalidated.<sup>47</sup>

A. Applicability of Section 1371(a)(3)(A) to *Animal Protection Institute of America v. Mosbacher*

The first issue raised by the plaintiffs' allegations is whether section 1371(a)(3)(A) applies to the decision of the Secretary of Commerce to issue a permit to the Shedd Aquarium for the importation of the pseudorcas for purpose of public display. The language of section 1371(a)(3)(A) is ambiguous:

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below their optimum sustainable population as required by §§ 1361(2), (6), and § 1362(2); defendants failed to ensure that attempts would be made to protect mating grounds and other significant areas for the whales as required by § 1362(2); as required by § 1373(a) and § 1371(a)(3)(A), defendants failed to ensure that the issuance of the permit would not be harmful to the whale species or to the affected populations; defendants failed to publish the regulations set forth in § 1373(a) and § 1373(a)(3)(A) which control the taking of pseudorcas; as required by § 1374(c) and 50 C.F.R. 216.31, defendants failed to specify the age, sex, and size of marine mammals that can be imported, the dates, location, method of capture, or the status of whales to which the permit pertains; and that the permit was issued without the assurance that Shedd Aquarium would comply with the regulations set forth in §§ 1372(b)(1), (2), and (4) which prohibit the importation of marine mammals that were pregnant, nursing, or under eight months old at the time of taking, or that were collected in an inhumane manner.

45. 16 U.S.C. § 1371(a)(3)(A).

46. *Id.*

47. Complaint, *supra* note 38, at 7, para. 21. See also *Mosbacher*, 799 F. Supp. at 179.

The Secretary . . . is authorized and directed, . . . having due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals, to determine when, to what extent, if at all, and by what means, it is compatible with this chapter to waive the requirements of this section so as to allow taking, or importing of any marine mammal, or any marine mammal product. . . . Provided, *however*, That the Secretary, in making such determinations, must be assured that the taking of such marine mammal is in accord with sound principles of resource protection and conservation as provided in the purposes and policies of this chapter: *Provided further, however, That no marine mammal or no marine mammal product may be imported into the United States unless the Secretary certifies that the program for taking marine mammals in the country of origin is consistent with the provisions and policies of this chapter.* Products of nations not so certified may not be imported into the United States for any purpose, including processing for exportation.<sup>48</sup>

The National Oceanic and Atmospheric Administration ["NOAA"] has interpreted this provision to mean that the Secretary needs to certify that the originating country has a conservation program consistent with the MMPA only when the Secretary exercises his/her discretion to waive one of the other requirements of section 1371.<sup>49</sup> Therefore, NOAA does not consider the requirements of section 1371(a)(3)(A) to be legally binding when making a decision as to whether to grant permits for the importation of marine mammals for public display. In fact, NOAA considers importation permits for public display purposes to be "an independently created exception to the moratorium rather than a waiver."<sup>50</sup> The agencies

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48. 16 U.S.C. § 1371(a)(3)(A) (emphasis added).

49. U.S. DEP'T OF COMMERCE, PERMIT POLICIES AND PROCEDURES FOR SCIENTIFIC RESEARCH AND PUBLIC DISPLAY UNDER THE MARINE MAMMAL PROTECTION ACT AND THE ENDANGERED SPECIES ACT 43 (1989) [hereinafter U.S. DEP'T OF COMMERCE, POLICIES AND PROCEDURES]. Some of the waivable requirements of § 1371 include prohibiting the taking or importation of a marine mammal unless for the purposes of research, display, or aiding the survival of a marine mammal species, and barring the importation of commercial fish and fish products that were caught with technology that results in the excessive killing of marine mammals. 16 U.S.C. § 1371(a).

50. U.S. DEP'T OF COMMERCE, POLICIES AND PROCEDURES, *supra* note 49, at 43.

charged with the duty of issuing permits for the taking and importation of marine mammals have acknowledged that providing a forum in which marine mammals can be viewed and appreciated may encourage the public to work toward the conservation of the marine environment and those animals that live within it.<sup>51</sup> Thus, since the public display of marine mammals is consistent with the MMPA policy of protecting marine mammal populations,<sup>52</sup> NOAA's interpretation of section 1371(a)(3)(A) is plausible.

Animal rights groups, on the other hand, interpret section 1371(a)(3)(A) as applicable to and binding on the issuance of all importation permits, not just those which involve the Secretary's exercise of a waiver.<sup>53</sup> This interpretation appears to be consistent with the MMPA policy of promoting the international conservation of marine mammals,<sup>54</sup> as shown by the legislative history behind the act. According to the legislative history, "the Committee [on Merchant Marine and Fisheries] felt it to be of vital significance to include strong language exhorting the Department of State to develop more effective international treaties for the protection of these animals, which today have little or no protection."<sup>55</sup>

Thus, since both interpretations of section 1371(a)(3)(A) are consistent with different MMPA policies, a serious question exists as to whether the requirements of section 1371(a)(3)(A) apply to the issuance of all importation permits.<sup>56</sup> If the drafters of the MMPA did not intend for this provision to apply to all importation permits, then the language in this section needs to be corrected in order to clarify that point. However, if section 1371(a)(3)(A) is binding on the issuance of all permits for the importation of marine mammals for public display, then the plaintiffs' argument that

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51. See *supra* note 17; *infra* notes 185-86 and accompanying text (discussing the importance of public display in educating people about marine mammals).

52. See 16 U.S.C. § 1361.

53. As stated previously, animal rights groups have asserted that one of the reasons that Shedd Aquarium's permit is invalid is because Japan does not have a conservation program consistent with the MMPA. See Complaint, *supra* note 38, at 7, para. 21; *Animal Protection Institute of America v. Mosbacher*, 799 F. Supp. 173, 175, 179 (D.D.C. 1992).

54. 16 U.S.C. § 1361(4) ("negotiations should be undertaken immediately to encourage the development of international arrangements for research on, and conservation of, all marine mammals").

55. H.R. REP. NO. 707, *supra* note 11, at 14, reprinted in 1972 U.S.C.C.A.N. at 4147.

56. In its resolution of *American Protection Institute of America v. Mosbacher*, the court conceded that the ambiguous statutory language of § 1371(a)(3)(A) did not provide a definitive answer to this question. *Mosbacher*, 799 F. Supp. at 178.

the issued permit is invalid amounts to much more than a procedural glitch that can be easily dismissed.

### B. Absence of a Conservation Program in Japan

Significant evidence exists to support the plaintiffs' contention that the Japanese government has not enacted a conservation program that is consistent with the policies of the MMPA. For example, the Japanese government has not mandated that "the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate" as is required of United States fisheries under the MMPA.<sup>57</sup> In fact, the number of nuisance killings permitted by the Japanese fisheries illustrates that they are not required to limit the number of marine mammals that are killed in the course of commercial fishing operations. According to the fisheries, the pseudorcas have interfered with the long-line fisheries for tuna and billfish in the Indian and Pacific Oceans.<sup>58</sup> Sometimes, the local laws prohibit Japanese fishermen from hunting tuna with any equipment other than hooks and lines, thereby preventing them from competing with the large commercial net fisheries.<sup>59</sup> Consequently, in order to end the interference of pseudorcas and other small cetaceans with their activities, the Japanese fishermen deliberately beach these animals and kill them.<sup>60</sup> Between 1976 and 1982, the natives of the Japanese island of Iki slaughtered approximately 4,147 bottlenose dolphins, 953 pseudorcas, 525 Risso's dolphins, and 466 Pacific white-sided dolphins.<sup>61</sup> Vowing to exterminate the marine mammals which interfere with their fishing operations, these fisheries claim that the animals' interference with their activities costs them in excess of \$2.5 million per year.<sup>62</sup> Despite the conclusions of scientists that pollution and over-fishing rather than cetacean interference are

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57. 16 U.S.C. § 1371(a)(2).

58. James E. Scarff, *The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment*, 6 *ECOLOGY L.Q.* 323, 415 (1977) (citing Yamaguchi, *On the Predation of Tunal Longline Catches by the Smaller Toothed Whales*, 27 *MAGURO GYOGYO* 59-73 (1964)).

59. *MARINE MAMMALS AND FISHERIES* 2 (J.R. Beddington et al. eds., 1985).

60. *See id.* As stated previously, the pseudorcas at issue in the *Mosbacher* case are being beached intentionally by the Japanese due to their interference with the operations of the Japanese fisheries. *See supra* note 39 and accompanying text.

61. *MARINE MAMMALS AND FISHERIES*, *supra* note 59, at 2.

62. *Battle Resumes Over Dolphin Kill*, *CHI. TRIB.*, Mar. 2, 1980, § 1, at 2.

responsible for the decrease in catch,<sup>63</sup> the exorbitant number of intentional nuisance killings has not waned.<sup>64</sup> In fact, in 1983 the number of nuisance killings was reported to be 30,000 to 40,000 mammals annually in the Japanese and Goto Islands.<sup>65</sup>

A lack of a conservation program is also evidenced by Japan's traditional non-compliance with international legislation designed to limit the killing of marine mammals. For example, in 1946, the International Convention for the Regulation of Whaling ("ICRW"), composed of fifteen nations including the United States and Japan, designed a schedule to regulate harvesting practices and to impose harvesting limits for certain species of whales.<sup>66</sup> The ICRW also

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63. 3 JOHN W. KINDT, *MARINE POLLUTION AND THE LAW OF THE SEA* 1333 (1986) (citing Frizell, *Saving Dolphins, Saving Face*, OCEANS, Jan.-Feb. 1983, at 65, 65).

64. See *Briefing*, The Dallas Morning News, Nov. 3, 1992, available in LEXIS, Nexis Library, Currnt File (1,758 whales and dolphins killed by just ten percent of Japan's drift-net fleet in 1990); *Our Love of Dolphins has Turned into a Questionable Affair*, Smithsonian, January, 1993, available in LEXIS, Nexis Library, Currnt File (more than 25,000 dolphins killed in 1991 by tuna fisherman).

65. Kindt, *supra* note 63, at 1333 (citing Frizell, *supra* note 63, at 66). It should be noted that the number of marine mammal slaughters resulting from interference with fisheries should be distinguished from the number of marine mammals that are killed because they are the direct target of the fishing operations. See Scarff, *supra* note 58, at 378 ("[F]isheries are of two main types: direct fisheries where small cetaceans are the target species and fisheries where cetaceans are taken 'incidentally' to the capture of a different target species, usually fish."). It is the incidental capture of dolphins and other small cetaceans by tuna fishermen that has generated a great deal of controversy regarding the use of purse seines. See *id.* (stating that fishermen deliberately seek out cetaceans, setting their purse seine nets around porpoise schools in order to trap the tuna underneath); *Porpoises and Purse Seines*, OCEANS, May-June 1974, at 6, 7 (discussing the legislative and conservationists' reactions to the problem). See H.R. REP. NO. 707, *supra* note 11, at 15, reprinted in 1972 U.S.C.C.A.N. at 4148 (legislative history of the MMPA acknowledged that annually, hundreds of thousands of marine mammals were being killed inadvertently in the purse seines used by the United States tuna fleet). Due to the fact that yellowfin tuna and dolphins are usually found together, use of the purse seines by tuna fishermen results in the deaths of a large number of marine mammals. Margaret P. Gordon, Comment, *International Aspects of the Tuna-Porpoise Association Phenomenon: How Much Protection for Poseidon's Sacred Messengers?*, 7 CAL. W. INT'L. L.J. 639, 643-45 (1977). Because purse seining is the only practical method of catching tuna, a ban on purse seining would be impossible to enforce due to the impractical expense. Therefore, procedures have been developed to allow the release of small cetaceans trapped in the net without risking the loss of the tuna. See David M. Levin, *Toward Effective Cetacean Protection*, 12 NAT. RESOURCES LAW. 549, 564 (1979). This development is beneficial to the small cetaceans that were being killed by the use of purse seines and to the fishermen themselves because the depletion of the dolphin population was making it more difficult to find tuna. *Id.*

66. International Convention for the Regulation of Whaling, Dec. 2, 1946, art. I, 62 Stat. 1716, 1723-27 [hereinafter ICRW].



established the International Whaling Commission ("IWC")<sup>67</sup> and authorized it to amend harvest quotas based on its evaluation of scientific data on the populations of whale species and the effects on the whaling nations.<sup>68</sup> However, member nations have been able to circumvent compliance with these quotas in two ways. First, the IWC lacks power to sanction whaling nations for violation of the harvest quotas.<sup>69</sup> Consequently, member nations are able to violate the quotas set by the IWC with no fear of economic sanctions or other punishment. Second, a major loophole in the IWC excuses a member nation from complying with any proposed amendment of a whaling quota, provided that the nation files a timely objection to the amendment.<sup>70</sup> The Japanese government has used this loophole to its advantage.<sup>71</sup> In 1981, the IWC established an international moratorium which proscribed the harvesting of sperm whales.<sup>72</sup> As allowed by Article Five of the ICRW, the Japanese government filed a timely objection to this zero quota as well as to the moratorium on commercial whaling that was passed in 1982.<sup>73</sup> Consequently, according to the IWC loophole provision, Japan was excused from complying with both restrictions.<sup>74</sup>

The decision of the United States Supreme Court in *Japan Whaling Association v. American Cetacean Society*,<sup>75</sup> significantly reduced the likelihood that Japanese fisheries would suffer U.S.-imposed economic sanctions<sup>76</sup> for their violation of the interna-

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67. *Id.* art. III, para. 1, 62 Stat. at 1717.

68. *Id.* art. IV, para. 1, 62 Stat. at 1718.

69. *Id.* art. IX, 62 Stat. at 1720.

70. *Id.* art. V, para. 3(c), 62 Stat. at 1719 (this article of the ICRW mandates that "the amendment shall become effective with respect to all Contracting Governments which have not presented objection but shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn").

71. See *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986) (discussing Japan's use of the "timely objection" to avoid IWC quotas); see also Susan Geha, *International Regulation of Whaling: The United States Compromise*, 27 NAT. RESOURCES J. 931, 935 (1987) (discussing the Japanese government's use of ICRW loopholes and explaining the background facts of Japan Whaling).

72. ICRW, *supra* note 66, art. IV, para. 1, 62 Stat. at 1718.

73. Geha, *supra* note 71, at 935

74. *Japan Whaling*, 478 U.S. at 231-34.

75. *Id.* at 221.

76. Congress passed the Pelly Amendment of 1954 and Packwood-Magnuson Amendment of 1976 in response to the IWC's inability to enforce its whaling quota. The amendments were aimed at encouraging compliance with international conservation projects such as the IWC. Both amendments require the Secretary of Commerce to certify to the President if "nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an in-

tional moratorium on sperm whale hunting.<sup>77</sup> Consequently, the Court's holding decreased the possibility that Japan would ever be given an economic incentive to implement a marine resource conservation program. The legislation which gave rise to this suit, the Pelly and Packwood-Magnuson Amendments,<sup>78</sup> was enacted to facilitate compliance with international conservation programs like the IWC. Both amendments require a certification by the Secretary of Commerce to the President in the event that other nations conduct their fishing operations in a manner which decreases the effectiveness of an international fishery conservation program.<sup>79</sup> These amendments can be distinguished: the Pelly Amendment granted the President discretionary power to impose economic sanctions on non-complying nations,<sup>80</sup> while the Packwood-Magnuson Amendment mandated that the executive branch impose sanctions on these nations.<sup>81</sup>

In *Japan Whaling*, the American Cetacean Society argued that after Japan harvested two sperm whales in violation of the 1981 moratorium set by the IWC, the Secretary of Commerce had a non-discretionary duty to certify Japan to the President as a nation that was "in violation of the [IWC's] zero sperm whale quota for the 1984-85 season."<sup>82</sup> They also argued that once any nation

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ternational fishery conservation program . . . ." 16 U.S.C. § 1821 (1988) (Packwood-Magnuson); 22 U.S.C. § 1978(a)(1) (1988) (Pelly). While the Pelly Amendment authorized the President to use his discretion regarding the imposition of sanctions on an offending nation, 22 U.S.C. § 1978(a)(3), the Packwood-Magnuson Amendment required the executive branch to impose economic sanctions on the offending nations. 16 U.S.C. § 1821(e)(2).

77. In *Japan Whaling*, the Court held that the Secretary of Commerce has the discretion to determine whether a foreign nation's violation of whaling quotas diminishes the effectiveness of IWC. See Geha, *supra* note 71, at 932 (Court's holding "effectively strips the Pelly and Packwood-Magnuson Amendments of their enforcement power.").

78. Packwood-Magnuson Amendment of 1976, 16 U.S.C. § 1821 (1988); Pelly Amendment of 1954, 22 U.S.C. § 1978 (1988).

79. 16 U.S.C. § 1821(e)(2)(A)(i) ("The term 'certification' means a certification made by the Secretary that nationals of a foreign country . . . are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling."); 22 U.S.C. § 1978(a)(1) (certification required "[w]hen the Secretary . . . determines that nationals of a foreign country . . . are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program . . . .").

80. 22 U.S.C. § 1978(a)(3).

81. 16 U.S.C. § 1821(e)(2). The passage of the Packwood-Magnuson Amendment illustrated the legislative branch's frustration with the President's refusal to impose sanctions on quota violators. Geha, *supra* note 71, at 932.

82. *American Cetacean Soc'y v. Baldrige*, 604 F. Supp. 1398, 1401 (D.D.C. 1985), *aff'd*, 768 F.2d 426 (D.C. Cir. 1985), *rev'd sub nom.*, *Japan Whaling Ass'n v. American*

violated a whaling quota set by the IWC, the Secretary was automatically required to find that the offending nation was "necessarily . . . diminish[ing] the effectiveness of the [ICRW]."<sup>83</sup> Under the Packwood-Magnuson Amendment, once the Secretary of Commerce had certified a violating nation to the President, the Secretary of State would then be obliged to impose sanctions accordingly.<sup>84</sup> Reversing the holdings of the lower courts, the Supreme Court of the United States rejected the argument of the American Cetacean Society and held that the amendments and their respective legislative histories did not support a finding that the Secretary of Commerce was required to certify Japan to the President as an offending nation for its violation of the IWC whaling quotas.<sup>85</sup> Essentially, the Court found that the Secretary had discretionary power to determine whether Japan's refusal to comply with IWC quotas should be considered an activity which "'diminish[ed] the effectiveness' of the ICRW."<sup>86</sup> Due to the United States' need to maintain a working relationship with Japan, the Court's decision greatly reduced the possibility that Japan would ever be given economic incentive to comply with international marine mammal conservation efforts.<sup>87</sup>

Although the Secretary of Commerce did not certify Japan to the President for its 1984-85 violations of the international whaling quotas, he did do so when Japan did not end its commercial whaling practices in 1988 as it had promised to do.<sup>88</sup> Pursuant to this promise, Nippon Kyodou Hoge Company, the last remaining Japanese whaling company, was dissolved on November 27, 1987.<sup>89</sup> However, the Japanese government has permitted scientific researchers to hunt and kill approximately 400 whales annually.<sup>90</sup>

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Cetacean Soc'y, 478 U.S. 221 (1986).

83. *Baldrige*, 604 F. Supp. at 1401.

84. *See* 16 U.S.C. §§ 1821(e)(2)(B)-(D).

85. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 231-32 (1986).

86. *Id.* at 232 (quoting 16 U.S.C. § 1821(e)(2)(A)(i)).

87. *See* Geha, *supra* note 71, at 932 ("[T]he recent Supreme Court decision of *Japan Whaling Association v. American Cetacean Society* . . . effectively strips the Pelly and Packwood-Magnuson Amendments of their enforcement power.").

88. Due to strong diplomatic pressure from the U.S., the Japanese government made a promise to end its commercial whaling activities by 1988 when it accepted the international moratorium on whaling in 1984. Kazuo Sumi, *The Whale War Between Japan and the United States: Problems and Prospects*, 17 DENVER J. INT'L L. & POL'Y. 317, 365 (1989).

89. *Id.* at 320.

90. *Id.* at 317.

While the Japanese government maintains that the scientific research is being conducted by the Institute of Cetacean Research, a non-profit organization designed to study marine mammals,<sup>91</sup> critics contend that the Japanese government is using this "scientific research" as a ruse for continuing its commercial whaling practices.<sup>92</sup> Therefore, in order to deter Japan's "scientific" whaling activities, President Reagan imposed sanctions on Japan in 1988 denying Japan fishing rights within a two hundred mile zone in U.S. waters.<sup>93</sup> However, the impact of this sanction was more political than economic in that the U.S. allocation of fish in that zone to Japanese fisheries was zero in that particular year. Therefore, "the decision had no significant impact on the Japanese fishing industry."<sup>94</sup> Hence, this sanction has not provided Japan with any real incentive to institute a conservation program comparable to the MMPA.

Fear of destroying a working relationship with Japan prevents the United States from imposing economic sanctions, rather than mere symbolic sanctions, on Japan for its refusal to abide by whaling quotas.<sup>95</sup> This same fear is likely to prevent the United States from taking action to motivate Japan to enact a conservation program comparable to the MMPA that would limit the number of nuisance killings by Japanese fisheries.<sup>96</sup> In granting the permit to Shedd Aquarium to import the beached pseudorcas despite the fact that Japan lacks a conservation program comparable to the MMPA, the National Marine Fisheries Service may have conceded to this reality.

Japan's historic non-compliance with international efforts to conserve marine mammal resources may be due to "differences in [Japan's] dietary customs, religious beliefs, cultural backgrounds, and emotional sensibilities . . . ."<sup>97</sup> Professor Sumi notes:

Whales have been of benefit to the Japanese since the

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91. *Id.* at 320.

92. *Id.* at 317.

93. *Id.* at 318. This sanction was imposed under the Packwood-Magnuson Amendment, but not under the Pelly Amendment. *Id.*

94. *Id.*

95. Obviously, the President's decision not to impose a sanction having a negative economic impact is more conducive to a positive relationship with Japan. *Id.* at 365.

96. Further, the MMPA does not authorize the imposition of sanctions on non-complying nations beyond banning the importation of commercial fish and fish products from countries which do not adopt commercial fishing policies commensurate with U.S. standards. 16 U.S.C. § 1371(a)(2).

97. Sumi, *supra* note 88, at 318.

stone age . . . . Owing to land-poor and mountainous geographical conditions that are not favorable to the development of livestock farming and to religious constraints that forbade the eating of the meat of four-legged animals, the Japanese have, from ancient times, made use of whales, together with fish and shellfish, as a source of animal protein. For that reason, the Japanese have traditionally treated the whale not as a marine mammal, but as a kind of fish . . . .<sup>98</sup>

In fact, whale meat was the primary source of protein for the Japanese people until the mid-1960's.<sup>99</sup>

Regardless of the reason for Japan's historic non-compliance with the international whaling moratorium, their scientific whaling activities and the exorbitant number of nuisance killings committed by the Japanese fisheries illustrate that Japan has failed to institute a conservation program commensurate with the policies of the MMPA. Therefore, if the certification requirement of section 1371(a)(3)(A) does apply to the importation of marine mammals for public display, then the permit granted to Shedd Aquarium should have been invalidated. However, the fact that the plaintiffs should have prevailed on this argument illustrates the inconsistency of section 1371(a)(3)(A) with the policies of the MMPA. If the requirements of section 1371(a)(3)(A) work to invalidate permits to import marine mammals which are the prospective victims of nuisance killings by foreign fisheries, then this provision clashes with the underlying policy of the MMPA to promote the preservation and conservation of marine mammals.<sup>100</sup>

### C. Section 1371(a)(3)(A) Is Inconsistent With MMPA Conservation Policy

The section 1371(a)(3)(A) prohibition on the importation of marine mammals from a country which does not have a comparable conservation program appears to be consistent with the express MMPA policy that the federal government should work toward fostering international support for the conservation of marine mammals.<sup>101</sup> The MMPA offers two reasons in support of the policy

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98. *Id.* at 348.

99. *Id.* at 351.

100. 16 U.S.C. § 1361(6) (1988).

101. 16 U.S.C. § 1361(4). Also, 16 U.S.C. § 1378 requires the Secretary of Commerce and the Secretary of the Interior, through the Secretary of State, to initiate international

that the international preservation of marine mammals should be encouraged. First, "the protection and conservation of marine mammals is . . . necessary to insure the continuing availability of [marine mammal] products which move in interstate commerce . . ." <sup>102</sup> Second,

marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic [value] and . . . they should be protected . . . to the greatest extent feasible . . . and . . . the primary objective of their management should be to maintain the health and stability of the marine ecosystem. <sup>103</sup>

Thus, the policies underlying section 1371(a)(3)(A) are both economic and aesthetic in nature.

Plaintiff-animal rights groups contend that prohibiting the importation of the pseudorcas at issue from a country that has not established a certified conservation program forces the federal government to impose a limited economic sanction on a country whose policies toward marine mammal conservation are antithetical to its own. <sup>104</sup> The argument to block importation of marine mammals from countries has moral tones as well. The animal rights groups who brought this suit seem to be concerned that if the Secretary of Commerce authorizes the importation permit at issue, the United States will be sending a message that it condones and even supports the nuisance slaughters by Japanese fisheries. <sup>105</sup>

While the economic and moral concerns behind encouraging international preservation of marine mammals are understandable, they have slight practical application to the case at hand. In the present case, the pseudorcas at issue are being run ashore deliberately and left to die by Japanese fisheries who found them to be a nuisance during their fishing operations. <sup>106</sup> The Japanese had no intention of selling these particular animals to marine life facilities

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negotiations for the purpose of convincing other nations to commit themselves to the conservation and preservation of marine mammals.

102. 16 U.S.C. § 1361(5).

103. 16 U.S.C. § 1361(6).

104. Linda Carlisle, *A Whale of a Controversy: The Oceanarium at the Shedd Aquarium*, WILD ONION, Mar. 1991 at 4.

105. *Id.*

106. Telephone Interview with Ken Ramirez, Assistant Curator of Marine Mammals and Supervisor of Animal Training for the John G. Shedd Aquarium (Mar. 8, 1992).

in foreign nations.<sup>107</sup> While they occasionally remove the tails for the meat, the fishermen generally do not use or sell the meat from these animals.<sup>108</sup> Since the Japanese had no intention of benefiting financially from the killing of these animals, prohibiting the importation of these whales provides no economic incentive for the Japanese to comply with international conservation efforts. Furthermore, prohibiting the importation of the whales due to Japan's failure to enact a certified conservation program would not send the message that the United States opposes the activities of the Japanese fisheries. In fact, blocking the importation might send the opposite message. In this case, the United States has an opportunity to allow one of its state-of-the-art oceanariums to save the lives of six whales that the Japanese intend to kill. By authorizing the importation permit, the federal government would be sending the message that it is committed to the conservation of these marine mammals. Thus, if section 1371(a)(3)(A) works to deny marine life facilities the opportunity to save the lives of a few whales that are the prospective victims of nuisance beachings, the provision runs counter to the MMPA policy of marine mammal conservation.

D. The Underlying Issue: Is the Maintenance of Marine Mammals in Captivity Justifiable?

As illustrated by the previous discussion, the requirements of section 1371(a)(3)(A) are inconsistent with the MMPA conservation objective when they are applied to the importation of whales that are the prospective victims of nuisance killings by foreign fisheries. The shortcomings of section 1371(a)(3)(A) are illustrated further by examining how this provision creates a vehicle through which animal rights groups can pursue their political agenda in the judicial system. In bringing this suit, animal rights groups were not concerned solely about preventing the subsidization of marine mammal slaughtering by foreign fisheries. According to the Assistant Curator of Marine Mammals and Animal Training Supervisor for Shedd Aquarium, Ken Ramirez, the primary motivation of the animal rights groups that initiated this suit is to prevent marine life facilities from acquiring additional animals for their captive environments.<sup>109</sup> Because these groups object to the holding of marine

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107. *Id.*

108. See Carlisle, *supra* note 104.

109. Telephone Interview with Ken Ramirez, Assistant Curator of Marine Mammals and Supervisor of Animal Training for the John G. Shedd Aquarium (Mar. 8, 1992).

mammals in captivity for any reason whatsoever, they strongly oppose the MMPA provision which allows marine mammals to be collected and imported for the purpose of public display.<sup>110</sup> Consequently, these animal rights groups are seeking a judicial interpretation of the MMPA that will reflect their moral concerns about marine mammals being kept in a captive environment.

The concerns of animal rights activists raise the issue of whether the holding of marine mammals in captivity for public display purposes is justifiable. This section will examine the arguments proffered by animal rights groups on this issue, as well as the counter-arguments of marine life facilities. The intent of this analysis is two-fold: (1) to determine whether the MMPA section authorizing the issuance of marine mammal collection and importation permits for the purpose of public display is consistent with the MMPA conservation objective; and (2) to determine whether invalidating the permit and guaranteeing the certain death of the whales at issue is a more rational policy of marine resource management than allowing the animals to be imported and cared for in the controlled environment of a marine life facility.

## 1. Does Captivity Shorten the Life Span of Marine Mammals?

### a. Argument

Much of the debate over whether marine life facilities should be barred from maintaining public displays of marine mammals focuses on empirical data which attempts to measure the effects of captivity on the longevity of the animals being kept therein. One of the most prominent criticisms from animal rights groups is that the life span of marine mammals is shorter in captivity than it is in the wild.<sup>111</sup> This concern has been heightened due to the recent deaths of two killer whales in Sea World parks.<sup>112</sup> For example, animal rights activists rely on a 1981 study which concluded that while the approximate longevity of adult male and female killer whales was 48 and 80 years respectively, these animals only survive, on the average, approximately 2.8 years in captivity.<sup>113</sup> A

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110. *Id.* See 16 U.S.C. § 1371(a) (MMPA provision authorizing collection and importation of marine mammals for the purpose of public display).

111. See *Dolphins*, NEWS PRESS, Jan. 19, 1991, at 1D (Flipper's ex-trainer, Rick O'Barry, asserts that in the wild, a dolphin's life span is approximately thirty years, while in captivity, a dolphin's life expectancy is only seven years).

112. Ken Miller, *Sea World Feeling Heat After Killer Whale Deaths*, GANNETT NEWS SERVICE, Aug. 29, 1991, available in LEXIS, Nexis Library, GNS File.

113. See Mary A. Winters, Comment, *Cetacean Rights Under Human Laws*, 21 SAN



different study concluded that the average longevity of an orca in captivity is 7.2 years as compared to forty-eight years in the wild.<sup>114</sup> Similarly, according to Chicago Earth First, Trans-Species Unlimited, Chicago, and the Whale Protection Federation, the average longevity of beluga whales is thirty-five years in the wild, but only five years in captivity.<sup>115</sup> Due to this alleged shortening of life span for captive marine mammals, animal rights groups contend that the issuance of public display permits is inconsistent with the conservation policies of the MMPA.

#### b. Counter-argument

Spokespeople for marine life parks assert that critics are misinformed about the life expectancy of marine mammals in the wild.<sup>116</sup> According to Sea World, Inc., the approximate longevity of a killer whale in the wild is 25-35 years, not 48 or 80 years as argued by animal rights groups.<sup>117</sup> In addition, Sea World maintains that the first year survival rate of the dolphins born within its breeding program is higher than the first year survival rate of dolphins born in the wild.<sup>118</sup> Similarly, a study on the longevity of Beluga Whales in Western Hudson Bay concluded that the average lifespan of a beluga whale is ten to twelve years, not thirty-five or fifty years as claimed by animal rights extremists.<sup>119</sup>

Marine life facilities criticize the methods used in studies conducted by animal rights activists to determine the average lifespan of marine mammals in the wild and in captivity.<sup>120</sup> For example,

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DIEGO L. REV. 911, 920 n.67 (1984) (citing *Hearings Before National Marine Fisheries Service* (NOAA), Seattle Public Hearings 35, 43 (Aug. 1983) (conducted through the Canadian Department of Fisheries and Oceans, this study examined the life span of 61 killer whales that were collected between 1963 and 1983)).

114. *Id.* at 920. See also *Jones v. Gordon*, 792 F.2d 821, 821 (9th Cir. 1986) (shorter life span of captive mammals was one of the arguments used to obtain an injunction against Sea World's acquisition of these killer whales under a permit that was granted by the National Marine Fisheries Service without the preparation of an environmental impact statement).

115. *Target: Dolphin Captivity Part II*, THE ANIMAL RIGHTS REPORTER, Jan. 1, 1991, at 6-7.

116. See *id.* at 7; Ken Miller, *supra* note 112; Internal Memorandum from the Shedd Aquarium, *Beluga Whale Acquisition: Animal Rights Activists Claims and Shedd Aquarium Responses*, 4-5 (1991).

117. See Ken Miller, *supra* note 112.

118. Louise Sweeney, *Animal Rights Groups Attack Petting Pools*, UNDERWATER U.S.A., Dec. 1990, at 8.

119. See Internal Memorandum from the Shedd Aquarium, *supra* note 116, at 4-5.

120. See *id.* at 5.

a 1986 study conducted by Douglas DeMaster and Jeannie Drevak concluded that the average length of stay of a beluga whale in an aquarium was 5.54 years.<sup>121</sup> Even though this 5.54 year figure only represents a beluga whale's length of stay in an oceanarium, animal rights extremists wrongly tell the public that this figure represents the mortality of beluga whales in captivity.<sup>122</sup> The inaccuracy of this characterization of the study's results is illustrated as follows:

A reasonable comparison would be to a family composed only of a mother and father, both of whom are 25 years old. The average age (or "length of stay") for this family is 25 years. A baby is added and immediately the average age drops to 16.6 years. If, one year later, another child is born, the average drops to 13.25 years.<sup>123</sup>

As in this example, each time a marine life facility acquires a new whale, the statistic for the average length of stay decreases significantly because a length of stay of zero is averaged into the calculation.<sup>124</sup>

The argument of marine life parks is bolstered further by a 1988 study which concluded that no significant difference exists between the survivorship rates of bottlenose dolphins, beluga whales, and killer whales in captivity and the survivorship rates of those mammals in the wild.<sup>125</sup> The results are even more persuasive when it is noted that the scientist who conducted this study was commissioned by animal rights groups, not by marine life facilities.<sup>126</sup> The results provide support for the proposition that the death of an animal in captivity is not necessarily the result of the animal being kept in a captive environment. Instead, the death is simply a natural part of the animal's life.

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121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. KAREN L. STEUER, CENTER FOR COASTAL STUDIES, A COMPARATIVE INSTITUTIONAL SURVEY OF FACTORS INFLUENCING MORTALITY OF CETACEANS IN U.S. ZOOS AND AQUARIA 35 (1989).

126. The study was funded by the Animal Protection Institute of America, the International Wildlife Coalition, and the Humane Society of the United States. *Id.* at title page. These three organizations are strongly opposed to marine mammals being kept in captivity.

## 2. Do Captive Marine Mammals Receive Adequate Treatment?

### a. Argument

Animal rights groups contend that captive marine mammals are kept in unsatisfactory environments and receive inadequate treatment.<sup>127</sup> This accusation is directed commonly at marine life parks and aquariums which house dolphins in petting pools.<sup>128</sup> Critics argue that high chlorine levels, concrete walls, crowded conditions, and the lack of rules governing public interaction with the animals in these facilities creates a harmful and abusive environment for the animals.<sup>129</sup> The concern that captivity provides a stressful environment is directed further at marine life parks that train their animals to perform shows, maintain petting pools, or transport their animals between parks on a seasonal basis.<sup>130</sup> In addition, many animal rights advocates believe that marine mammals in captivity are trained to perform "tricks" by having their food withheld until they cooperate.<sup>131</sup>

### b. Counter-argument

Marine life facilities vehemently deny that captive marine mammals are kept in unsatisfactory environments or receive inadequate treatment.<sup>132</sup> Spokespeople for large oceanariums main-

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127. See *Dolphins*, *supra* note 111 (animal rights activists argue that putting a marine mammal in any captive environment, regardless of the size, is inadequate).

128. See Marty Snyderman, *San Diego Sea World Petting Pool Raises Flak*, UNDERWATER U.S.A., Feb., 1990, at 19 (critics speculate that the chlorine levels need to be high in these pools due to the large number of animals being maintained there and due to the germs being introduced by the public); Sweeney, *supra* note 118, at 8 (The animal rights group, Sea Shephard, claims that petting pool dolphins "become aggressive and injure each other because conditions are too crowded; their eyes are damaged by high chlorine levels, brightly painted pool bottoms and lack of shade; and their sonar is damaged by the concrete walls around them.").

129. See Snyderman, *supra* note 128, at 19.

130. See Dwight Silverman, *Aging Whale Uncorks Wave of Debate: Retraining, Return to Ocean "Pod" After 21 Years of Captivity Sought*, HOUSTON CHRONICLE, Sept. 15, 1991, at B2. *An Objective Analysis of the Animal Rights Movement*, THE ANIMAL RIGHTS REPORTER, Dec. 1, 1990, at 4 (Flipper's ex-trainer argues that dolphins in petting pools are subjected to a very stressful environment).

131. See Fox Butterfield, *Claiming Harassment, Aquarium Sues 3 Animal Rights Groups*, N.Y. TIMES, Oct. 1, 1991, at 18 (describing animal rights groups' fund-raising letter which alleged that the New England Aquarium trained dolphins through the withholding of food).

132. See, e.g., Internal Memorandum from the Shedd Aquarium, *supra* note 116, at 4 (rejecting claims of harsh treatment and asserting that aquarium's technology and objectives parallel the best interests of the animals).

tain that the animals under their care enjoy a healthy life with clean food, veterinary care, and freedom from predators and diseases caused by pollution.<sup>133</sup> These facilities often exceed the pool size requirements mandated by the federal government and utilize modern filtration systems to maintain excellent water quality.<sup>134</sup> Furthermore, proponents assert that chlorine levels in petting pools are safe for the animals and have not caused a deterioration in their eyesight.<sup>135</sup>

Most oceanariums flatly deny that marine mammals are trained to perform through the withholding of their food.<sup>136</sup> These institutions maintain that their animals are trained to perform show behaviors through a series of positive reinforcements, never through the withholding of food or other forms of punishment.<sup>137</sup> These training techniques are also used to teach the animals to cooperate with regular veterinarian check-ups.<sup>138</sup> For example, the animals are trained to present their tail flukes for blood samples and to lie on the side of the pool to receive medical care.<sup>139</sup> By using these training techniques, oceanariums can ensure that the animals live in a healthy environment and experience interaction that is stimulating both physically and mentally.<sup>140</sup>

### 3. Does the Capture of Marine Mammals Harm the Remaining Population?

#### a. Argument

Animal rights activists also assert that the process of capturing marine mammals is not only dangerous to the animals being

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133. *Id.*

134. *Id.*

135. See Marty Snyderman, *supra* note 128, at 19.

136. See Fox Butterfield, *supra* note 131. The more reputable marine life parks, i.e. Shedd Aquarium and Sea World, claim to use only positive reinforcement techniques, never food deprivation to train their animals. Telephone Interview with Ken Ramirez, Assistant Curator of Marine Mammals and Supervisor of Animal Training at the John G. Shedd Aquarium (Mar. 8, 1992); Personal Interview with Allen Kelley, Supervisor of Animal Training at Sea World of Ohio, Inc. (Mar. 8, 1992). *But see* Hanauer, *supra* note 100, at 24 (arguing that, "[o]riginating at Marineland of Florida in 1938, the practice of withholding food . . . has spread to most sea parks.")

137. Telephone Interview with Ken Ramirez, Assistant Curator of Marine Mammals and Supervisor of Training at Shedd Aquarium (Mar. 8, 1992); Personal Interview with Allen Kelley, Supervisor of Animal Training at Sea World of Ohio, Inc. (Mar. 8, 1992).

138. See Carlisle, *supra* note 104.

139. Training captive mammals to perform these husbandry behaviors is critical to early detection of diseases or illnesses. In the past, animal illnesses would become very serious before they were detected. *Id.*

140. See Internal Memorandum from the Shedd Aquarium, *supra* note 116, at 4.

caught,<sup>141</sup> but also to the species' population sizes and their remaining social structure.<sup>142</sup> Critics accuse collection teams of capturing the strongest and healthiest members of a marine mammal population and leaving the weaker ones behind to fend for themselves.<sup>143</sup> The latter argument was advanced by animal rights activists in order to obtain an injunction against Sea World's collection of killer whales under a permit that was issued by the National Marine Fisheries Service without the preparation of an environmental impact statement.<sup>144</sup> This argument is also being raised in response to Shedd Aquarium's application for a permit to collect four additional beluga whales from Western Hudson Bay in Canada.<sup>145</sup> Arguing that this area is a breeding and calving ground for beluga whales, critics contend that the capturing process has and will endanger the well-being of mothers and calves in that area.<sup>146</sup>

#### b. Counter-argument

Marine life parks maintain that the capturing process is not harmful to the animals being caught or to the species' population sizes.<sup>147</sup> Marine life parks are required to follow the methods of capture prescribed by the federal government and to prepare a report describing all of the activities engaged in pursuant to the permit.<sup>148</sup>

#### c. MMPA Restrictions on Importation

In order to protect the remaining marine mammal populations,

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141. Activists argue that the capturing process is cruel and inhumane. *See Hearings Before National Marine Fisheries Service* (NOAA), Seattle Public Hearings, at 4, 17, 192 (Aug. 1983) (alleging that Sea World used inhumane methods to capture killer whales); *see also* Greenpeace U.S.A. v. Evans, 688 F. Supp. 579, 584 (1987) (even though the MMPA excuses the preparation of an environmental impact statement [hereinafter EIS] when the marine mammals are being used for scientific activities, the court held that the controversial activity of using a dart gun to obtain samples of whale tissue warranted the preparation of an EIS before the permit was issued for the research); Internal Memorandum from the Shedd Aquarium, *supra* note 116, at 1-2.

142. *See* Jones v. Gordon, 792 F.2d at 829 (arguing that capture of killer whales by Sea World may have devastating impact on population size and may disrupt group's social structure).

143. *See* Internal Memorandum from the Shedd Aquarium, *supra* note 116, at 2.

144. *Id.*

145. *See id.* at 1-2.

146. *See id.* at 1. Shedd Aquarium argues that the area is not officially recognized as a breeding or calving area. *Id.*

147. *Id.* at 1-2.

148. 16 U.S.C. § 1374 (specifying the conditions under which a permit for the taking or importation of a marine mammal may be granted).

Congress imposed several restrictions on the types of marine mammals which may be imported into the United States:

[I]t is unlawful to import into the United States any marine mammal if such mammal was:

- (1) pregnant at the time of taking;
- (2) nursing at the time of taking, or less than eight months old, whichever occurs later;
- (3) taken from a species or population stock . . . designated as a depleted species or stock; or
- (4) taken in a manner deemed inhumane by the Secretary.<sup>149</sup>

In addition, the Secretary is vested with the responsibility to set regulations which will ensure that any taking or importation of marine mammals pursuant to the MMPA will not harm the populations of the species and stocks involved.<sup>150</sup> These regulations were designed to ensure that any capture authorized pursuant to the MMPA would be humane and would be consistent with the goal of maintaining the optimum sustainable population of each marine mammal species.<sup>151</sup>

#### 4. Is it Possible That Captive Environments Are Healthier than the Ocean Environment?

When the MMPA was enacted, Congress acknowledged that "the most pervasive and threatening [hazard facing marine mammals was] . . . the degradation of the environment upon which they depend."<sup>152</sup> Due to exorbitant ocean pollution and the increasing number of marine mammal deaths resulting therefrom, representatives of marine life parks argue that marine mammals are often better off in captivity than in the wild.<sup>153</sup> The ocean envi-

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149. 16 U.S.C. § 1372(b). According to 16 U.S.C. § 1362(1), a "depleted population" is one that "is below its optimum sustainable population" or one that has been named an endangered or threatened species. Additionally, an "inhumane" manner of collecting a marine mammal would be one that involves more than "the least possible degree of pain and suffering practicable to the mammal involved." See 16 U.S.C. § 1362(4).

150. 16 U.S.C. § 1373(a). These restrictions may include the number, age, size, and sex of animals which may be taken or imported, the period of time, manner and locations in which the animals may be taken or imported, and fishing techniques which cause unnecessary deaths to a marine mammal species. 16 U.S.C. § 1373(c).

151. 16 U.S.C. § 1373(a).

152. H.R. REP. NO. 92-707, *supra* note 11, at 14, *reprinted in* 1972 U.S.C.C.A.N. at 4147.

153. See Sweeney, *supra* note 118, at 8 (quoting Patricia St. John, a dolphin research

ronment is inundated with many forms of pollution, some of which are marine debris (i.e. plastic, metal, glass, lumber, and medical wastes),<sup>154</sup> hydrocarbons (i.e. biodegradable crude oil, nonbiodegradable waste oil, and natural gas),<sup>155</sup> and ocean dumping (i.e. "(1) dredge spoils, (2) industrial wastes, (3) sewage sludge, (4) construction and demolition debris, (5) solid waste, (6) explosives and chemical munitions, and (7) radioactive waste").<sup>156</sup> Currently, the primary non-biodegradable threat to the ocean environment is plastic debris.<sup>157</sup> Ocean-based sources of plastic debris<sup>158</sup> alone create in excess of 6.4 million metric tons of waste annually.<sup>159</sup> This figure does not include the volume of plastic debris created by land-based sources.<sup>160</sup> When marine mammals become entangled in plastic debris such as six pack plastic rings and driftnets which have panels made of plastic webbing, they suffer wounds and infections, experience feeding and swallowing problems, and often drown.<sup>161</sup> Although the total number of marine mammal deaths resulting from plastic debris is unknown, the estimates are high.<sup>162</sup> Additionally, it is speculated that the Japanese salmon driftnet fishery industry is responsible for the deaths of approximately 2,335 Dall's porpoises each year.<sup>163</sup>

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specialist, who asserts that "[w]ith ocean pollution, dolphinariums may be the only place we're going to get stock back into the ocean. Captivity when done right can be a better life for the dolphin . . .").

154. See B. HENEMAN AND CENTER FOR ENVIRONMENTAL EDUCATION, PERSISTENT MARINE DEBRIS IN THE NORTH SEA, NORTHWEST ATLANTIC OCEAN, WIDER CARIBBEAN AREA, AND THE WEST COAST OF BAJA CALIFORNIA, A REPORT TO THE MARINE MAMMAL COMMISSION AND THE NATIONAL OCEAN POLLUTION PROGRAM OFFICE I-2 (1980) (reporting various forms of "persistent marine debris").

155. See KINDT, *supra* note 63, at 1323-24 (discussing environmental concerns raised by proposed sales of leases for oil wells on the outer-continental shelf of the United States); *Id.* at 2178-79 (explaining dangers of waste oil pollution to marine life).

156. *Id.* at 2211.

157. Coleman & Wehle, *Plastic Pollution: A Worldwide Oceanic Problem*, PARKS, Apr.-June 1984, at 9.

158. Ocean-based sources of plastic debris include offshore oil activities and vessels for commercial fishing, merchant shipping, military, recreational, and sport-fishing uses. CENTER FOR ENVIRONMENTAL EDUCATION, PLASTICS IN THE OCEAN: MORE THAN A LITTER PROBLEM 19-29 (1987).

159. S. REP. NO. 270, 100th Cong., 1st Sess. 2 (1987).

160. Plastic manufacturers and processors, solid waste disposal locations, sewer systems, litter, and illegal dumping are examples of land-based sources of plastic debris. INTERAGENCY TASK FORCE ON PERSISTENT MARINE DEBRIS, REPORT OF THE INTERAGENCY TASK FORCE ON PERSISTENT MARINE DEBRIS 43, 51 (1988).

161. *Id.*

162. See Charles W. Fowler, *Marine Debris and Northern Fur Seals: Case Study*, 18 MARINE POLLUTION BULL. 326 (1987).

163. See MARINE MAMMAL COMMISSION, 1988 ANNUAL REPORT OF THE MARINE

Crude oil spills within the last decade have heightened public awareness of the environmental dangers of hydrocarbon pollution.

With regard to whales, an oil spill could cause: (1) starvation due to the contamination of food supplies and the fouling of the sensitive feeding organs of baleen whales; (2) pneumonia from the penetration of their lungs by oil; and (3) suffocation from the clogging of their blowholes.<sup>164</sup>

Since crude oil spills are biodegradable, the impact of nonbiodegradable waste oil is considered an even more dangerous environmental problem.<sup>165</sup> However, the ultimate effect of waste oil on the digestion and physical health of marine mammals is still unknown.<sup>166</sup>

Pollution from ocean dumping represents ten percent of all ocean contaminants.<sup>167</sup> Since the waste sites remain far away from population centers and the activity is inexpensive and efficient, ocean dumping is an attractive waste disposal option.<sup>168</sup> Consequently, marine mammals suffer physical harm when toxic pollutants from industrial wastes, sewer sludge, metals, poisons, and radioactive wastes are ingested through their diet and become concentrated in their bodily tissues.<sup>169</sup> Since organic wastes require oxygen to decompose, ocean dumping upsets the balance of the marine ecosystem even further by depleting oxygen levels to a point that kills marine organisms.<sup>170</sup> Millions of marine organisms have died after becoming trapped in these "dead zones," areas of anoxic water which span hundreds of miles.<sup>171</sup>

The large number of marine mammal deaths resulting from ocean pollutants is one of several signals that the ocean does not

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MAMMAL COMMISSION 159 (1989).

164. KINDT, *supra* note 63, at 1324.

165. *Id.* at 2178-79. Even though waste oil is generated from land-based sources, it has many routes to the ocean via urban and river run-off and wastes from industrial, municipal, offshore development, and oil refinery activities. *Id.* at 2178 (citing LOS Convention, Dec. 10, 1982, art. 208, 21 I.L.M. 1261, U.N. Doc. A./CONF. 62/122 (1982) (report from the LOS Convention)).

166. *Id.* at 2178 (citing STAFF OF SENATE COMM. ON COM., 94TH CONG., 1ST SESS., EFFECTS OF MAN'S ACTIVITIES ON THE MARINE ENVIRONMENT 14 (Comm. Print 1975)).

167. *Id.* at 2211.

168. *Id.* at 2210-11.

169. Joseph A. Lumsdaine, *Ocean Dumping Regulation: An Overview*, 5 ECOLOGY L.Q. 753, 755-56 (1976).

170. *Id.*

171. Anastasia Toufexis, *The Dirty Seas*, TIME, Aug. 1, 1988, at 46.



have the ability to assimilate these wastes any longer. Ecologists warn that "environmental systems do not deteriorate gradually, but, rather, are able to maintain the basic integrity of their character virtually until the point of collapse . . . at which point the processes of decay [can] no longer be feasibly arrested."<sup>172</sup> However, as indicated by past experience with massive oil spills, warnings of pending environmental catastrophes tend to go unnoticed until an actual disaster demands prompt action.<sup>173</sup> Due to the combined effects of pollution, over-fishing, and destruction of marine habitats, the marine ecosystem has experienced approximately a forty percent decline in marine life over the past few decades.<sup>174</sup> The reality of ocean pollution supports the contention that the physical welfare of marine mammals may be better protected in a controlled environment that is free from the contaminants which are destroying the marine ecosystem.

## 5. Is it Moral to Hold Marine Mammals in Captivity?

### a. Argument

The most difficult issue raised by animal rights groups is whether it is ethical or moral to hold marine mammals in captivity. Animal rights activists maintain that instead of teaching conservation and preservation, marine life parks and aquariums only send the message that animals are here on Earth for humanity's entertainment, exploitation, and capitalistic ventures.<sup>175</sup> Animal rights advocates also argue that marine life parks do not present to the public an accurate representation of the behavior of marine mammals in the wild.<sup>176</sup> Instead, the animals are "trained to perform 'degrading' tricks which wound their dignity."<sup>177</sup> Relying on these arguments, many animal rights groups declare that it is unethical and immoral to hold marine mammals in captivity for any reason.<sup>178</sup>

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172. KINDT, *supra* note 63, at 4-5 (citing Falk, *Toward a World Order Respectful of the Global Ecosystem*, 1 ENVTL. AFF. 251, 252 (1971)).

173. See J. Kodwo Bentil, *Environmental Quality Measures—Prevention is Better Than Cure*, 1980 J. PLAN. & ENVTL. L., at 638.

174. Levin, *supra* note 65, at 550.

175. See Carlisle, *supra* note 104.

176. *Id.*

177. *Id.*

178. *Id.*

b. Counter-argument

Marine life facilities deny that it is unethical and immoral to keep marine mammals in captivity, maintaining adamantly that these exhibits are needed to promote conservation and preservation through public education.<sup>179</sup> Marine life facilities criticize some animal rights groups' premise that "all capitalist ventures are intrinsically evil or anti-environmental."<sup>180</sup> Marine life facilities argue that "[i]f environmentalists as a group could learn to accept the profit motive, perhaps it could be used as a tool to encourage sound environmental practices designed to be profitable."<sup>181</sup> Furthermore, maintaining marine mammals in captivity allows researchers to study the intelligence and physiology of these animals more closely than is possible in their natural habitat.<sup>182</sup> Indeed, "scientific knowledge gained about pregnancy and offspring of [these animals] will contribute to conservation management programs in the wild."<sup>183</sup> In 1990, over 100 million people attended marine life facilities in order to see marine mammals.<sup>184</sup> Undoubtedly, these facilities provide a forum for people to see animals that they would probably never have the opportunity to see otherwise.<sup>185</sup> As more marine habitats are destroyed and more species are becoming endangered, marine life facilities argue that today more than ever, the public needs the opportunity to see and to appreciate the beauty of aquatic life.<sup>186</sup>

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179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* Most of the information known by scientists about Atlantic bottlenose dolphins is the result of research conducted on these animals in captivity. Similarly, the majority of information available to scientists on blood chemistry and metabolic baselines of pilot whales and smaller cetaceans is the product of studying these animals in captivity during their recuperation from beaching. See *Target: Dolphin Captivity Part III*, *supra* note 115, at 6.

183. *Id.*

184. See Fox Butterfield, *supra* note 131.

185. Sweeney, *supra* note 118, at 8 (Sea World plays a significant role in bringing people closer to animals that they would never have the opportunity to see otherwise); Cf. Michael Robinson & Ross B. Simons, *Resist the Anti-Zoo Zealots*, N.Y. TIMES, May 26, 1991, § 4, at 11 ("[Z]oos play a critical role in educating the populace to the current environmental crisis. Zoos help make people who normally have little or no access to the wild aware of the natural beauty and wealth of the biological world . . . Perhaps it will be the role of our zoos, by making urban people aware of the vast riches that are being lost to economic growth, overpopulation and deforestation to preserve our natural heritage for the next generation.").

186. See Internal Memorandum from the Shedd Aquarium, *supra* note 116, at 4 (noting

Thus, while some of the criticisms against the importation and captive-maintenance of marine mammals may be valid, a closer look shows that the goals of the MMPA are furthered by allowing marine life facilities to import marine mammals for the purpose of public display. Congress' decision to create an exception which permits the taking and importation of marine mammals for public display,<sup>187</sup> subject to certain conditions, strikes a reasonable balance between the concerns of animal rights groups and the goals of marine life facilities. Since this exception furthers the MMPA goals of protecting and conserving marine mammal populations in a manner which promotes the "health and stability of the marine ecosystem,"<sup>188</sup> the provision allowing the importation of marine mammals for public display should be retained. Furthermore, since the public display of marine mammals can be beneficial to the animals and to the public, the issuance of a permit to Shedd Aquarium for the importation and display of the whales at issue is a more rational policy of marine resource management than is invalidating the permit and assuring their certain death.

#### E. Proposal To Amend Section 1371(a)(3)(A)

The fact that section 1371(a)(3)(A) enables the plaintiffs in *Animal Protection Institute v. Mosbacher* to use the MMPA as a tool to prevent marine life facilities from acquiring additional animals for public display provides further support for the argument that this provision runs counter to the conservation policies of the MMPA. Enforcing the importation restriction of section 1371(a)(3)(A) in *Mosbacher* and in other similar cases works contrary to the policy of promoting marine resource conservation and protection<sup>189</sup> by guaranteeing the certain death of whales that are the prospective victims of nuisance killings. By denying these whales the opportunity for life in a respectable marine life facility, the effect of 1371(a)(3)(A) is counterproductive at best.

Thus, if section 1371(a)(3)(A) was not intended to apply to the issuance of the importation permit, the language of this provision needs to be amended in order to make its applicability clear. How-

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that as more marine habitats are destroyed and more species become endangered, marine life institutions are needed more than ever before to "inspire visitors to take action toward conserving these magnificent animals and their natural environments").

187. 16 U.S.C. § 1371(a)(1) (1988).

188. 16 U.S.C. § 1361(6) (1988).

189. 16 U.S.C. § 1361(6); 16 U.S.C. § 1371(a)(3)(A).

ever, if section 1371(a)(3)(A) does, in fact, apply to the issuance of all importation permits, then the MMPA should be amended to allow the Secretary of Commerce or Interior to authorize permits for the importation of marine mammals that are the prospective victims of nuisance beachings or incidental takings by foreign fisheries, regardless of whether the country of origin has a conservation program that is consistent with MMPA policies. This amendment would further MMPA conservation policies and would prevent animal rights activists from using section 1371(a)(3)(A) as a mechanism through which to satisfy their political agenda which was considered and rejected by the drafters of the MMPA,<sup>190</sup> i.e., the policy that marine life facilities should not be permitted to hold marine mammals in captivity for any reason.

It should be noted that the proposed amendment is not to extend to the importation of marine mammal products, even if they were created from marine mammals that were the victims of nuisance killings or incidental takings. Authorizing the importation of marine mammal products from countries which lack a certified conservation program would be tantamount to supporting economically and morally the insensitive destruction of these animals solely for the profit of the country of origin. Therefore, the proposed amendment is intended to extend only to the importation of living marine mammals by marine life facilities when the mammals in question are the prospective victims of nuisance beachings or incidental takings. In accordance with other legislative provisions, the permits would be granted only to marine life facilities which satisfy the federal housing regulations for marine mammals.<sup>191</sup>

This proposed amendment is consistent with the views of ethologists who have studied the ethical considerations underlying the

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190. Obviously, by enacting 16 U.S.C. § 1371(a) which allows the taking or importation of marine mammals for public display, Congress rejected the proposal of animal rights groups that marine life facilities should be barred from holding marine mammals in captivity. The legislative history of the MMPA indicates that although Congress rejected the argument that "the principal significance of these animals lies in their usefulness to men and, by inference, that any use by man is therefore justifiable," it also rejected the argument at "the other end of the spectrum—that animals must be left alone altogether." H.R. REP. NO. 92-707, *supra* note 11, at 12, *reprinted in* 1972 U.S.C.C.A.N. Congress acknowledged that "[b]oth [arguments] fail to recognize that man's thumb is already on the balance of Nature, and that solicitous and decent treatment for the animals may well also be in the long-term best interests of man." *Id.* See also *supra* note 17.

191. In determining whether to grant a permit for the public display of marine mammals, the Secretary must assess "the applicant's qualifications for the proper care and maintenance of the marine mammal . . ." 50 C.F.R. § 216.31(c) (1992).

use of animals for laboratory research. For example, the proponents of the humane treatment view espouse the principle that humans should try to console and to relieve the suffering of animals under their care.<sup>192</sup> Additionally, in his argument in favor of recognizing animal rights, Tom Regan defines death as the most egregious harm that can be inflicted on an animal because it destroys the animal's ability to satisfy its own preferences of treatment.<sup>193</sup> Although laboratory research on animals and the importation of marine mammals for public display purposes raise very different ethical issues, the proposed amendment is consistent with the ethical considerations discussed herein because it recognizes that death is the ultimate harm that can come to these whales. Although importation of these animals would not change the fact that they are being deprived of their ability to choose their own environment, importation would save them from the ultimate deprivation: death. Furthermore, importation of the whales would allow the animal behaviorists and veterinarians at Shedd Aquarium and other similar facilities to care for the animals and to treat the injuries that they may have suffered when they were run ashore by the fisheries. In this sense, it seems much more ethical and compassionate to give these animals an opportunity to live in an oceanarium where they will receive daily care than to let them die at the hands of the Japanese fishermen.

In addition to passing ethical scrutiny, the proposed amendment comports with the policies underlying the MMPA, i.e. to facilitate the development of sound resource management policies that will protect the marine ecosystem and maintain optimum sustainable populations of marine mammal species.<sup>194</sup> The amendment furthers this policy of preserving and protecting marine mammals while also providing the public with a forum in which to learn about and to appreciate marine mammals. As illustrated by the passage of the MMPA, heightened public awareness can provide the impetus necessary to compel the executive branch to impose "real" economic sanctions on countries which fail to enact conser-

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192. Rebecca Dresser, *Assessing Harm and Justification in Animal Research: Federal Policy Opens the Laboratory Door*, 40 RUTGERS L. REV. 723, 738-39 (1988) (discussing ethical considerations underlying the federal policy and its capacity for changing the use of animals in biomedical science).

193. Rebecca Dresser, *Respecting and Protecting Non-Human Animals: Regan's The Case for Animal Rights*, 1984 AM. B. FOUND. RES. J. 831, 836 (discussing Regan's theory that animals and humans share comparable welfare-interests).

194. 16 U.S.C. § 1361(6).

vation programs designed to limit the unnecessary killing of these animals.

In addition, the proposed amendment would give marine mammals the opportunity to reproduce in a controlled environment. Since it is very difficult to study these animals in their natural environment, providing scientists with an opportunity to study the reproduction of marine mammals in captivity could contribute to the maintenance of an optimum sustainable population of pseudorcas in the wild. The scientific data obtained as a result of these studies can help scientists to improve present conservation programs in ways that will protect the pseudorca population.

### III. CONCLUSION

Congress' decision to create a public display exception to the moratorium on the taking and importation of marine mammals furthers the MMPA conservation objectives by striking a reasonable balance between the concerns of animal rights groups and the goals of marine life facilities. However, since Congress has adopted a position on this issue that is antithetical to the position advocated by animal rights groups, these groups have been seeking a judicial interpretation of the MMPA that will satisfy their political agenda.<sup>195</sup> Yet even if section 1371(a)(3)(A) provides a back door through which plaintiffs like the animal rights groups in *Mosbacher* can effectuate their preferred policy, this indirect route was probably unintended by the drafters of the MMPA. In addition, due to Japan's historic non-compliance with international conservation efforts, the plaintiffs' interpretation of section 1371(a)(3)(A) is unlikely to advance the MMPA goal of fostering international cooperation with the protection of marine mammal populations. Furthermore, the position advocated by animal rights activists, at least with respect to the importation of marine mammals that are the prospective victims of nuisance killings, is counterproductive to the MMPA policy of protecting and conserving marine mammal populations. Therefore, if the plaintiffs are correct that the restrictions imposed by 1371(a)(3)(A) apply to the issuance of all importation permits, then this provision should be amended to allow the Secretary of Commerce or Interior to authorize permits for the

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195. *Animal Protection Institute of America v. Mosbacher*, 799 F. Supp. 173 (D.D.C. 1992) provides an example of one of the most recent efforts by animal rights groups of obtaining such a judicial interpretation.

importation of marine mammals that are the prospective victims of nuisance killings or incidental takings by foreign fisheries, regardless of whether the country of origin has implemented a conservation program that is comparable to the MMPA. This amendment would close the back door created by 1371(a)(3)(A), thereby properly forcing animal rights activists to pursue their political objectives in the legislative, rather than judicial, forum. Furthermore, this amendment is more likely to further the MMPA objective of protecting and conserving marine mammal populations than is the present policy which advocates standing by while thousands of whales continue to be slaughtered.

LAVONNE R. DYE