HONORABLE DISCHARGE: *PAWS v. DEPARTMENT OF THE NAVY*

BY
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This article explores the implications of Progressive Animal Welfare Society v. Dep't of Navy and presents one possible vision of the National Environmental Protection Act (NEPA) in the area of animal protection. The author begins by examining NEPA and the Progressive case, and what the case may mean for marine mammals. Next, the author considers the possible applications of the Progressive holding to the protection of other animals. Finally, the author concludes that NEPA, through reverse impact studies, remains the best hope for preserving this country's wildlife.

True human goodness, in all its purity and freedom, can come to the fore only when its recipient has no power. Mankind's true moral test, its fundamental test (which lies deeply buried from view), consists of its attitude towards those who are at its mercy: animals. And in this respect, mankind has suffered a fundamental debacle, a debacle so fundamental that all others stem from it.[1]

I. INTRODUCTION

The role of the National Environmental Protection Act (NEPA), as applied by the courts, has diverged greatly from the lofty substantive hopes of its legislative creators. It has become a mere procedural "hoop" for those who decimate animal populations and injure the environment in general, whether unthinkingly or otherwise. However, if the holding of *Progressive* were adopted by other courts, NEPA might regain some of its hoped-for substantive muscle in practical effect, if not in form.

In the *Progressive Animal Welfare Society v. Dep't of Navy*,[2] *Progressive* case, the U.S. District Court for the Western District of Washington grappled with competing interests of undeniable importance: the interests of military security and environmental policy. The cen-

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1 MILAN KUNDERA, THE UNBEARABLE LIGHTNESS OF BEING 289 (Michael Heim trans., Perennial Library ed., Harper & Row 1987).

2 725 F. Supp. 474 (W.D. Wash. 1989).

tral question presented by the case was whether the National Environmental Policy Act of 1969 (NEPA)[3] required the Navy to prepare an environmental impact statement (EIS) before "deploying" Atlantic bottle-nosed dolphins at the Trident nuclear submarine base on Puget Sound in Bangor, Washington.[4] The court decided that the dolphin project qualified as a "major federal action" under NEPA, and that a "reverse impact" study of the effect of the environment on the dolphins was necessary.[5] The study was necessary because the Navy's proposal was "controversial" and dolphins are an integral part of the environment.[6]

The case was correctly decided, but should not be confined in its application to the use of marine mammals. Marine mammals are afforded protection under statutory,[7] regulatory,[8] and case law,[9] and they have achieved a special status in both public and judicial opinions. However, "reverse impact" studies should be required when any government agency proposes to harass, kill, capture, or use any indigenous animal populations.

II. NEPA: THE GREEN ARM OF THE LAW?

A. *Great Expectations*

NEPA was introduced by the late Senator Henry M. Jackson (D-Washington) and signed into law by Richard Nixon as his first official act in 1970.[10] Even then, NEPA's proponents recognized the importance of environmental issues, and how crucial they would be in the future. Senator Jackson strongly believed that

> [t]he needs and aspirations of future generations make it our duty to build a sound and operable foundation of national objectives for the management of our resources and our environment. We hold those resources in trust for our children and their children. The future of succeeding generations in this country will be shaped by the choices we make. We must choose well, for they cannot escape the consequences of our choices.[11]

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[3] 42 U.S.C. §§ 4321, 4331-35, 4341-47 (1988).

[4] *Progressive*, 725 F. Supp. at 477.

[5] *Id.* at 478.

[6] *Id.*

[7] *See, e.g.*, Marine Mammal Protection Act, Pub. L. No. 92-522, 86 Stat. 1027 (1972) (codified as amended in scattered sections of 16 U.S.C.).

[8] *See, e.g.*, 9 C.F.R. §§ 3.100-.118 (1993).

[9] *See, e.g., Progressive*, 725 F. Supp. at 474; Jones v. Gordon, 792 F.2d 821 (9th Cir. 1986); Greenpeace v. Evans, 688 F. Supp. 579 (W.D. Wash. 1987).

[10] Henry M. Jackson, *Foreword: Environmental Quality, the Courts, and the Congress*, 68 MICH. L. REV. 1073, 1079 (1970). For an extensive legislative history of NEPA, *see generally* 2 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW, § 9.01 at 9-28 through 9-45 (1989 ed.).

[11] Jackson, *supra* note 10, at 1081-82.

In addition, NEPA's declaration of purpose sounds like an overture to a symphonic new harmony between people and their environment.[12]

NEPA required the establishment of the Council on Environmental Quality (CEQ)[13] in the executive branch of the government. The CEQ's duties include gathering information, overseeing the impact of federal projects, and serving in an advisory role to the President.[14] NEPA keeps the legislative branch involved by requiring an annual Environmental Quality Report from the President to the Congress, which would include recommendations for further legislation needed to remedy "the deficiencies of existing programs and activities."[15] In addition, NEPA's reach extends to all agencies of the federal government. All agencies were required to: 1) review their regulations and policies; 2) find any inconsistencies between then existing regulations and policies and NEPA; and 3) submit suggested resolutions for conforming to NEPA to the President by July 1, 1971.[16]

Senator Jackson recognized that the most important feature of NEPA is its requirement that all agencies of the federal government comply with it.[17] He hoped that the Act would "establish checks and balances in order to ensure that potential environmental problems will be identified and considered early in the decision-making process and not after irrevocable commitments have been made."[18] Senator Jackson's "checks and balances" can be achieved through NEPA's requirement that an EIS be prepared whenever "major federal action" in the form of a project or legislation is proposed.[19]

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12 The purposes of NEPA are:

> To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 U.S.C. § 4321 (1988).

13 *Id.* § 4342.

14 *Id.* § 4344.

15 *Id.* § 4341.

16 *Id.* § 4333.

17 Jackson, *supra* note 10, at 1079.

18 *Id.*

19 In § 102 of NEPA

> [t]he Congress authorizes and directs that, to the fullest extent possible:
> (2) all agencies of the Federal Government shall . . .
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . .
> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action . . . .

42 U.S.C. § 332 (1988).

In addition to legislative and executive support for the EIS as an environmental protection tool, the Supreme Court has recognized that the EIS "is the outward sign that environmental values and consequences have been considered during the planning stage of agency actions. If environmental concerns are not interwoven into the fabric of agency planning, the 'action-forcing' characteristics of § 102(2)(C) would be lost."[20]

B. Mixed Results

Ironically, despite this evidence of support from the Supreme Court, it has been the judicial branch that has stripped NEPA of much of its potential muscle. In interpreting NEPA, the courts have chipped away at the statute in both predictable and sometimes unpredictable ways.

Shortly after NEPA was signed into law, the federal district courts were called upon to decide just how the brand new statute should be applied.[21] Almost immediately, courts applied NEPA prospectively rather than forcing compliance upon agency projects that were beyond the planning stage when NEPA took effect.[22]

In addition, the district courts struggled with the issue of standing. Predictably, conservation and environmental groups jumped at the chance to bring suit, but courts did not universally welcome them into the courtroom.[23]

Once the Supreme Court got into the act, NEPA's reach was further curtailed. In a series of cases known as "the Dirty Dozen,"[24] the Court adopted a narrow reading of NEPA, declaring it procedural rather than substantive.[25] In addition, the Court declared that NEPA

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[20] Andrus v. Sierra Club, 442 U.S. 347, 350-51 (1979) (footnotes omitted).

[21] *See generally* Donald N. Zillman & Peggy Gentles, *NEPA's Evolution: The Decline of Substantive Review*, 20 ENVTL. L. 505 (1990) (discussing the judicial history of NEPA).

[22] *See, e.g.*, Pennsylvania Envtl. Council v. Bartlett, 315 F. Supp. 238, 247-48 (1982).

[23] *See, e.g.*, Brooks v. Volpe, 329 F. Supp. 118 (W.D. Wash. 1971). *But see* Cape May County Chapter v. Macchia, 329 F. Supp. 504 (D.N.J. 1971).

[24] Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989); Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989); Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87 (1983); Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983); Weinberger v. Catholic Action of Haw., 454 U.S. 139 (1981); Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978) (consolidating two cases); Kleppe v. Sierra Club, 427 U.S. 390 (1976); Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776 (1976); Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289 (1975); United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973).

[25] *See, e.g.*, Kleppe v. Sierra Club, 427 U.S. 390 (1976). For criticism of the Court's interpretation of NEPA as procedural, *see generally* Nicholas C. Yost, *NEPA's Promise—Partially Fulfilled*, 20 ENVTL. L. 533 (1990).

must defer to other federal statutes in cases of conflict.[26] This approach pervades most aspects of NEPA compliance and lawsuits, and arguably flouts the great expectations and the intent of its drafters.

III. THE EIS: THE GREAT GREEN HOPE (OR HOOP)?

Although NEPA requires all agencies to complete an EIS for all "major federal actions,"[27] this requirement is often little more than a paper promise. In deciding what constitutes a satisfactory EIS, courts have assembled a perplexing mishmash of deference to agency actions and requirements for strict compliance.

A. The Process

Under the "procedural, not substantive" approach to NEPA, a court may review whether an agency has complied with all procedural requirements of the EIS process, but not whether the action proposed by the agency harms the environment to an excessive degree. Nonetheless, all agencies must follow the procedures to the letter, or risk an injunction until they comply.[28]

First, agencies must prepare an environmental assessment (EA) for projects that may fall under the requirements of NEPA. The purpose of an EA is to determine whether a full-blown EIS will be necessary.[29] An EIS will not be necessary if the project will have "no significant impact."[30] If the agency decides that an EIS is necessary, notice of intent to prepare an EIS must be published in the Federal Register.[31] Once a draft EIS has been prepared, the preparing agency must make the draft available to the Council on Environmental Quality (CEQ) and the public for comment.[32]

Once the agency has allowed for and received comments, it must file its final EIS discussing: 1) the impact of the project; 2) any and all reasonable alternatives to the proposed action; 3) possible mitigation measures; and 4) its final decision concerning the action to be taken.[33]

B. The Reward

As interpreted by the courts, however arduous the process may seem, a proper EIS becomes tantamount to a blank check to damage the environment. A court may not evaluate the substantive impact of an agency's decision, but merely the agency's compliance (or lack

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26 *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973).

27 *See supra* note 19.

28 *See generally* Leslie A. Herrmann, *Injunctions for NEPA Violations: Balancing the Equities*, 59 U. CHI. L. REV. 1263 (1992).

29 40 C.F.R. § 1508.9 (1993).

30 *Id.*

31 40 C.F.R. § 1501.7 (1993).

32 42 U.S.C. § 4332(2)(C) (1988); 40 C.F.R. §§ 1502.9, 1506.10 (1993).

33 40 C.F.R. §§ 1502.9, 1502.19, 1503.1 (1993).

thereof) with the procedural requirements.[34] Although an EIS must list alternatives and mitigating measures, a more damaging action may proceed even if there are less damaging alternatives and measures.[35] Under this judicial scheme, a plaintiff challenging an agency decision under NEPA must show that the agency's action was "arbitrary and capricious."[36] This is due, in part, to the Supreme Court's ruling that NEPA evaluation is limited by the Administrative Procedure Act (APA).[37] This standard turns a NEPA suit into a substantial uphill climb for plaintiffs, as any decision for action based on a procedurally adequate EIS is presumed reasonable, unless shown to be otherwise under the difficult "arbitrary and capricious" test.

In addition, the Supreme Court has ruled that some federal actions fall outside the scope of NEPA altogether. Specifically, in *Weinberger v. Catholic Action of Haw.*,[38] the Court ruled that the Navy acted properly in not publishing an EIS before constructing storage facilities that the Navy would neither admit nor deny were designed to house nuclear weapons. The Court's decision rested on the grounds that since documents generally are made public under NEPA via the Freedom of Information Act (FOIA), and since classified material is exempt from FOIA for national security reasons, the Navy was justified in keeping the information regarding any future or potential storage of nuclear weapons from the public.[39] The court ruled that an EIS needed to be prepared. However, the EIS did not ever have to leave the confines of internal Navy decision making channels.[40] This ruling effectively undercuts even the purely procedural protections of NEPA in the military context.[41]

It is against this backdrop that the *Progressive* case took shape.

IV. THE *PROGRESSIVE* CASE

A. *Factual Background*

1. *The Permits*

Under normal circumstances, permits for the taking of dolphins and other marine mammals are issued by the Department of Commerce (DOC), as delegated to the National Oceanic and Atmospheric Administration (NOAA) and, in turn, to the National Marine Fisheries Service (NMFS), under the Marine Mammal Protection Act of 1972

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[34] *See, e.g.*, Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989).

[35] Kleppe v. Sierra Club, 427 U.S. 390, 401-402 (1976).

[36] *See, e.g.*, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).

[37] *Id.* at 548.

[38] 454 U.S. 139 (1981).

[39] *Id.* at 144-46.

[40] *Id.* at 146.

[41] *See generally* Note, *Beyond Judicial Scrutiny: Military Compliance with NEPA*, 18 GA. L. REV. 639 (1984).

(MMPA).[42] However, the armed forces receive a special statutory exemption from the MMPA.[43] Under this exemption, the Navy could bypass many of the MMPA's procedures and safeguards, so long as the Navy obtained a "letter of concurrence" from the DOC[44] and complied with federal regulations for the capture, care, and handling of the dolphins.[45]

2. The Project

In 1988, the DOC issued a letter of concurrence allowing the Navy to take up to twenty-five marine mammals per year from 1988 through 1992.[46] The Navy decided to use any dolphins taken pursuant to the permits for use at the Trident nuclear submarine base at Bangor.[47] The dolphins would be captured in the Gulf of Mexico and eventually moved thousands of miles to the Pacific Ocean environment of Puget Sound.

Although exact details of the project itself remain sketchy (much of the information is still classified), the dolphins were to be trained ostensibly as "security guards" for the base.[48] The dolphins would be used to detect and prevent enemy swimmers and craft from tampering with the submarines.[49] In addition, information was circulated that the dolphins were slated for a bizarre "swimmer nullification program," for which they would be trained to fire bullets into enemy divers by ramming them with spring-loaded nose canisters.[50] However,

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42 16 U.S.C. §§ 1373-74 (1988).

43 The statute reads as follows:

(a) Authority. —Subject to subsection (c), the Secretary of Defense may authorize the taking of not more than 25 marine mammals each year for national defense purposes. Any such authorization may be made only with the concurrence of the Secretary of Commerce and after consultation with the Marine Mammal Commission established by section 201 of the Marine Mammal Protection Act of 1972 (16 U.S.C. § 1401).

(b) Humane treatment required. —A mammal taken under this section shall be captured, supervised, cared for, transported, and deployed in a humane manner consistent with conditions established by the Secretary of Commerce.

(c) Protection for endangered species. —A mammal may not be taken under this section if the mammal is determined to be a member of an endangered or threatened species under section 4 of the Endangered Species Act of 1973 (16 U.S.C. § 1533).

(d) Application of other act. —This section applies without regard to the provisions of the Marine Mammal Protection Act of 1972 (16 U.S.C. § 1361 et seq.).

10 U.S.C. § 7524 (1988).

44 *Id.*

45 Specifications for the Humane Handling, Care, Treatment, and Transportation of Marine Mammals, 9 C.F.R. Ch. 1, Subpart E (1993).

46 *Progressive*, 725 F. Supp. at 476.

47 *Id.*

48 *Animal Rights Groups Sue Navy Bar Use of Dolphins*, UPI, Apr. 3, 1989, *available in* LEXIS, Nexis Library, UPI File.

49 *Id.*

50 Andrea Stone, *Navy's Dolphin Project Assailed; Animal Advocates: Don't Make Them Killers*, USA TODAY, May 3, 1990, at A3.

Representative Norm Dicks (D-Washington) stated in a television interview that the reported "nose guns" did not exist.[51]

As to the conditions under which the dolphins were to be trained, allegations of starvation, corporal punishment, and solitary confinement in individual pens were leveled at the Navy by Rick Trout, a former trainer for the Navy.[52] The Navy refused to comment.

3. The Plaintiffs

The Progressive Animal Welfare Society (PAWS), an animal rights organization based in Lynnwood, Washington, brought this action along with fourteen other animal rights and environmental groups.[53] PAWS was informed of the Navy's top-secret plans to use the warm-water dolphins at the Trident submarine base in the frigid waters of Puget Sound.[54] After PAWS Issues Director Mitchell Fox learned of the plan, he contacted Rick Trout, who strongly opposed the project on both moral and practical grounds. Trout and PAWS were concerned that the Puget Sound environment would be traumatic for these warm-water mammals, and objected from a philosophical standpoint to the use of wild animals for military purposes. The group's concern for the animals was not unfounded; records showed that at least forty-four dolphins had already died in the Navy program.[55] In addition, the plaintiffs were concerned about the psychological effects of keeping the highly social dolphins in solitary holding pens.[56]

4. The Defendants

The Navy and the other defendants[57] contended that the plaintiffs' concerns were unfounded, and that Navy studies showed that the dolphins would adapt to the colder waters without difficulty.[58] They

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[51] *Activists Charge Dolphins Are Armed and Dangerous*, UPI, May 2, 1990, *available in* LEXIS, Nexis Library, UPI File.

[52] Rick Trout, *One Trainer Talks*, DOLPHINS IN PERIL, Summer 1990, at 65.

[53] These groups included the American Society for the Protection and Care of Animals, the Animal Legal Defense Fund, the Animal Protection Institute, the Association of Veterinarians for Animal Rights, the Dolphin Project, Inc., Earth Island Institute, Inc., the Humane Society of the United States, In Defense of Animals, the International Wildlife Coalition, the International Society for Animal Rights, Inc., the New England Anti-Vivisection Society, the Michigan Humane Society, People for the Ethical Treatment of Animals, and United Animal Nations. Complaint for Declaratory and Injunctive Relief and Petition for Permit Review, #C89-498C [hereinafter Complaint for Declaratory and Injunctive Relief].

[54] *Animal Groups File Suit Over Navy Guard Dolphins at Bangor*, PAWS NEWS RELEASE (Progressive Animal Welfare Soc'y, Lynnwood, Wash.), Apr. 3, 1989.

[55] *Id.*

[56] *Progressive*, 725 F. Supp. at 477.

[57] In addition to the Navy, the plaintiffs named DOC, Secretary of Commerce Robert Mosbacher, Administrator of NOAA William Evans, and Assistant Administrator for Fisheries of NMFS James Brennan. *Id.* at 476.

[58] *New Study of Navy's Guard Dolphin Plan Urged*, UPI, Dec. 4, 1989, *available in* LEXIS, Nexis Library, UPI File [hereinafter *New Study*].

argued that the dolphins' insulating fat layer would protect them from the cold.[59] In addition, the Navy stated that the dolphins' pens would be opened nightly so the animals could have social contact with each other.[60]

The Navy also contested PAWS' assertions concerning the number of animals that had died during the project. The Navy pointed to records indicating that thirteen dolphins had died between 1986 and 1988.[61] However, these records also showed that nearly half of the dead dolphins had suffered from starvation or stomach ulcers before death, indicating that the animals had felt the effects of stress from relocation and rigorous training.[62]

B. The Lawsuit

The complaint filed by PAWS and the other plaintiffs on April 3, 1989 included sixteen causes of action.[63] PAWS asserted that the Navy's proposed use of the dolphins would violate federal regulations for the care and handling of marine mammals.[64] Central to PAWS' arguments, however, were the Navy's failure to prepare an EIS on the impact of the environment on the dolphins themselves and the DOC's issuance of a permit for dolphin capture in the absence of such an EIS.[65]

The Navy argued that NEPA's purpose was confined solely to addressing the effects of a project on the environment.[66] It contended that NEPA did not require a study of the impacts of the surrounding environment on the dolphins.[67] According to the Navy, such a "reverse impacts" study was not mandated by the statute.[68]

The plaintiffs requested a preliminary injunction to prevent the Navy from deploying the dolphins at Bangor until the EIS could be prepared.[69] The defendants moved to dismiss the action for failure to state a claim because the EIS was not necessary under NEPA.[70] The court decided in favor of the plaintiffs.[71]

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59 Karen Kucher, *Dolphins' Use in Navy Games Fought*, SAN DIEGO UNION-TRIBUNE, Aug. 24, 1993, at B1.

60 Tom LaPuzza, spokesman for the Naval Ocean Systems Center in San Diego, where many Navy dolphins were trained, also stated that: "We buy these animals at great cost. We spend years and years training them, lots of man hours, lots and lots of fish down the stomach, so it would be silly for us [to put them in jeopardy]." *Id.*

61 *New Study, supra* note 58.

62 *Id.*

63 Complaint for Declaratory and Injunctive Relief, *supra* note 53.

64 9 C.F.R. §§ 3.100-.118 (1993).

65 Complaint for Declaratory and Injunctive Relief, *supra* note 53, at 11-15.

66 *Progressive*, 725 F. Supp. at 477.

67 *Id.*

68 *Id.*

69 *Id.* at 476.

70 *Id.* at 477.

71 *Id.* at 479.

1. The Defendants' Position: No "Reverse Impacts"

In support of its position, the Navy relied on *Clinton Community Hospital Corp. v. Southern Maryland Medical Center*,[72] a case in which a joint-venture private hospital was to be built near Andrews Air Force base in Maryland.[73] In that case the plaintiff, a corporation that owned another hospital in the area, argued that the defendant could not build the new hospital until it had prepared an EIS studying the impact "of the already existing environment on the hospital when constructed."[74] The plaintiff contended that the noise from the air base would negatively impact the patients and staff at the new facility.[75] The court rejected the plaintiff's argument, stating that "the project is *the proposed competitive hospital,* and in the [c]ourt's view, under NEPA the involved agencies must consider the effect of the hospital building on the surrounding environment, *not* the effect of the environment on the hospital."[76] On appeal, the Fourth Circuit affirmed the district court's ruling, stating that "[s]uch a claim turns the statutory scheme 180 degrees around."[77]

The Eighth Circuit also decided against the need for a reverse impacts study in *Monarch Chemical Works v. Thone*.[78] In that case, an oil reprocessing company appealed the district court's decision not to permanently enjoin the construction of a prison facility in East Omaha, Nebraska.[79] The plaintiff argued that the City of Omaha had prepared an inadequate EIS because it "failed to address the impact of the surrounding environment on the inmates to be housed in the medium-minimum security facility"[80] that was to be located in a heavily industrialized area near an air field. The court, while admitting that whether NEPA requires reverse impact consideration "is a subject of some debate,"[81] granted substantial deference to the project's proponents, stating that they must have been aware of the problems when the project was originally assessed.[82] The plaintiff's arguments were rejected, and the project was allowed to go forward without further study or an additional EIS.

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[72] 374 F. Supp. 450 (D. Md.1974), *aff'd per curiam*, 510 F.2d 1037 (4th Cir. 1975).

[73] *Id.* at 451.

[74] *Id.* at 453.

[75] In support of its argument, the plaintiff eloquently asserted that the EIS that had been prepared, studying only the effect of the new building on the surrounding environment, was akin "to an examination of the impact of planting a pansy bed in an artillery shell testing field and limiting the inquiry as to what adverse effect the pansy bed will have on the surrounding grass." *Id.*

[76] *Id.* at 457.

[77] Clinton Community Hosp. Corp. v. Southern Maryland Medical Ctr., 510 F.2d 1037, 1038 (4th Cir. 1975).

[78] 604 F.2d 1083 (8th Cir. 1979).

[79] Monarch Chemical Works v. Exxon, 466 F. Supp. 639, 644 (D. Neb. 1979).

[80] Monarch Chemical Works v. Thone, 604 F.2d 1083, 1087 (8th Cir. 1979).

[81] *Id.* at 1089.

[82] *Id.*

These cases and others[83] demonstrate courts' general hostility to the reverse impacts argument in the few instances in which it has arisen.

2. *The Plaintiffs' Position: Dolphins are Different*

Despite the cases in which reverse impact studies were found to be unnecessary, PAWS argued that "dolphins, unlike buildings, are an integral part of the environment itself."[84] The plaintiffs cited *Jones v. Gordon*,[85] a case in which NMFS issued a permit to Sea World for the capture of orcas "for purposes of scientific research and public display."[86] Under this permit, Sea World proposed to capture up to one hundred orcas, up to ten of which would be kept in permanent captivity. The other ninety would be subjected to a battery of tests.[87] The plaintiff argued that the capture permit was void because NMFS failed to prepare an EIS.[88] Although Sea World argued that the statute of limitations ran under the MMPA permit process,[89] the court relied upon NEPA's language that the statute's requirements apply "to the fullest extent possible,"[90] and held that an EIS was required.[91]

Similarly, a permit was invalidated in *Greenpeace U.S.A. v. Evans*,[92] where a graduate student had been given permission to collect skin and blubber samples from native orca populations in Puget Sound by firing specially-designed long-bow arrows at them from a motorboat.[93] The court granted Greenpeace's motion for summary judgment, ruling that the NMFS allowed "controversial invasive methods of collecting data" while wrongfully neglecting to prepare an EA or an EIS.[94]

In both *Jones* and *Greenpeace*, the proposed uses of marine mammals were for scientific purposes. Scientific research normally qualifies for a "categorical exclusion" from the EIS requirement under NEPA.[95] In *Greenpeace*, however, the court pointed out that even when a categorical exclusion would normally apply, an agency may still be required to prepare an EA or an EIS in "extraordinary circum-

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83 *See, e.g.*, Olmstead Citizens for a Better Community v. United States, 793 F.2d 201 (8th Cir. 1986).

84 *Progressive*, 725 F. Supp. at 477.

85 792 F.2d 821 (9th Cir. 1986).

86 *Id.* at 823.

87 "The numerous scientific tests proposed included liver biopsies, gastric lavages, hearing and respiratory tests, tooth extractions, and blood tests. Sea World also proposed to tag, mark, and attach radio transmitters to killer whales held temporarily." *Id.*

88 *Id.* at 822-23.

89 16 U.S.C. §1374(d)(6) (1988).

90 Jones v. Gordon, 792 F.2d 821, 826 (9th Cir. 1986) (quoting 42 U.S.C. § 4332 (1988)).

91 *Id.*

92 688 F. Supp. 579 (W.D. Wash. 1987).

93 *Id.* at 580.

94 *Id.* at 586.

95 40 C.F.R. §§ 1501.4(a)(2), 1508.4 (1993).

stances."[96] One of the factors used to determine if an EIS is necessary is whether the proposed action is "highly controversial."[97] The court ruled that this project was definitely "controversial."[98]

The Navy responded to these arguments by asserting that these cases did not involve reverse impact studies, since NMFS was required to study the impact of the projects on the native orca populations, and not the impacts on individual subjects themselves.[99] All of these arguments were considered by the *Progressive* court in reaching a decision.

3. *The Ruling: An EIS is Needed*

The court denied the Navy's motion to dismiss. It granted the plaintiff's motion for preliminary injunction on the basis that a reverse impacts study was required.[100] Judge Coughenour agreed with PAWS that the decision to take wild dolphins from the Gulf of Mexico, train them, and move them to Puget Sound was a "major federal action" requiring an EIS under NEPA.[101] The court noted that the defendants had not "provide(d) for NEPA review at any point in the process," yet they had made the "controversial decision" to move forward with the project.[102] The court found this unacceptable.

Regarding the Navy's specific arguments, the court noted that *Jones* called for a reverse impacts study, as the court ordered NMFS to "consider the short life span of whales in captivity," and "the effect of removal on the whales' reproduction and social structure."[103] Judge Coughenour asserted that this would be a study of the impact on the whales themselves, not on the surrounding environment. In addition, the judge rejected the argument that the armed forces exemption to the MMPA[104] did not trigger NEPA.[105] The DOC's letter of concurrence, a requirement for the project to go forward, was enough agency action to trigger NEPA and require an EIS.[106]

In light of NEPA's checkered history in the courts and the deference given to NEPA defendants generally and to the military specifically, *Progressive* has important implications for NEPA plaintiffs.

V. WHAT *PROGRESSIVE* MAY MEAN

Despite the obstacles courts have erected for NEPA plaintiffs, particularly in the military context, PAWS was successful in stopping the Navy's plans, or at least delaying these plans until an EIS was pre-

96 *Greenpeace,* 688 F. Supp. at 581-82 (quoting 40 C.F.R. § 1508.4).
97 *Id.* at 582 (quoting 40 C.F.R. § 1508.27(4)).
98 The meaning of "controversy" in this context will be explored presently.
99 *Progressive,* 725 F. Supp. at 478.
100 *Id.* at 479.
101 *Id.*
102 *Id.*
103 *Id.* at 478.
104 *Progressive,* 725 F. Supp. at 479.
105 *Id.*
106 *Id.*

pared. Of particular note are 1) the "controversy" factor relied upon by the court to arrive at its decision, and 2) the overall policy ramifications of the ruling in the face of previous rulings in arguably similar circumstances.

A. The "Controversy" Factor

The *Progressive* court held that reverse impacts should be studied under NEPA "where they are highly controversial."[107] *Jones*[108] and *Greenpeace*[109] relied on this factor as well, with similar results. These rulings suggest that courts may be developing a less tolerant attitude toward harassment and use of wild animal populations, particularly marine mammals.

In this context, "controversial" means "'[the existence of a] substantial dispute . . . as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use.'"[110] In these three cases involving marine mammals, the courts pointed to disputes among experts and the scientific community as to the impact the proposed projects would have on the animals. However, it did not seem to hurt PAWS' case that there was also a substantial public outcry over the Navy's plans to use the dolphins.[111]

In other cases, courts have reached mixed results when examining the question of whether sufficient controversy existed to mandate an EIS. In *Don't Ruin Our Park v. Stone*,[112] plaintiff citizen groups objected to the relocation of an Army National Guard aviation base near Phillipsburg, Pennsylvania.[113] The proposed site was "bounded on all sides by Pennsylvania state forest and game commission lands."[114] Common sense dictates that the construction, traffic, and noise generated by the base would affect the sensitive wetlands and forests in the area. However, the assessment performed by the Department of Military Affairs set forth a "finding of no significant impact" (or "FONSI") as allowed under NEPA.[115] The plaintiffs objected to this finding in

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107 *Id.* at 478.

108 *Jones*, 792 F.2d at 828-29.

109 *Greenpeace*, 688 F. Supp. at 586.

110 *Id.* at 582 (citing Foundation for North American Wild Sheep v. United States Dep't of Agric., 681 F.2d 1172, 1178 (9th Cir. 1982) (quoting Rucker v. Willis, 484 F.2d 158, 162 (4th Cir. 1973)) (emphasis omitted).

111 After the court's ruling came down, a public hearing was held as part of the EIS process. About 100 people came to the hearing, and testified passionately against the dolphin project. Rev. Gretchen Woods testified, "I believe we are polluting the moral environment by creating a situation in which we dehumanize ourselves by engaging in a process which seems . . . guaranteed ultimately to turn an intelligent species of God's creation into an enemy of humanity." Vince Stricherz, *Don't Put Dolphins on Guard Duty, Critics Tell Navy*, SEATTLE TIMES, Sept. 6, 1990, at D1.

112 802 F. Supp. 1239 (M.D. Pa. 1992).

113 *Id.* at 1242.

114 *Id.*

115 *Id.* at 1243.

part because the proposed action was the subject of substantial public outcry, and therefore it was controversial.[116]

In response, the court reiterated that "controversy" means scientific dispute over the impact of a project, and not merely public opposition to the project.[117] The court rejected the plaintiff's argument, stating that if an EIS were required for every unpopular project, "[t]he outcome would be determined by a 'heckler's veto.'"[118]

In *Sierra Club v. Watkins*,[119] the controversy factor came into play again. Here, the Sierra Club sought to enjoin the Department of Energy from importing used nuclear fuel rods from Taiwan for storage and disposal in the United States until an EIS could be done.[120] Unlike *Don't Ruin Our Park*, the plaintiff in *Sierra Club* emphasized "uncertainty in the scientific community" about the effects of radiation from fuel rods and the safety and durability of the containers used to transport them.[121]

The court did not reject the plaintiff's argument summarily. Rather, the opinion points out that there is "little authority concerning how great the difference of opinion must be in the scientific community" in order to constitute a controversy requiring an EIS.[122] After considering the body of scientific data on both sides of the issue, the court deferred to the federal agency, stating that the agency "must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."[123] The court ruled that the agency did not need to prepare an EIS in this case because the agency's scientific data and conclusions appeared to represent the scientific majority view.[124]

The *Don't Ruin Our Park* and *Sierra Club* cases demonstrate that the controversy factor has not been of great assistance to NEPA plaintiffs objecting to federal projects. Public opposition alone is not enough to sway judicial opinion, and even relatively substantial scientific debate over an environmental issue may not suffice to override a court's deference to the federal agency in question. Even in a case involving nuclear waste, arguably one of the most controversial issues of our time, the courts generally remain cautious, deferential, conservative, and reluctant to rule in favor of environmental groups. In light of this, the marine mammal cases seem somewhat anomalous.

Arguably, *Jones*, *Greenpeace*, and *Progressive* indicate a trend in environmental law. This trend, if it is a trend, seems to show that har-

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116 *Id.* at 1257.

117 *Id.*

118 *Id.* (quoting North Carolina v. F.A.A., 957 F.2d 1125, 1133-34 (4th Cir. 1992)).

119 808 F. Supp. 852 (D.D.C. 1991).

120 *Id.* at 860.

121 *Id.*

122 *Id.*

123 *Id.* at 862 (quoting Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989)).

124 *Id.*

assment, capture, and use of marine mammals is virtually controversial per se, and will be granted less deference under NEPA than other kinds of federal action. If NEPA plaintiffs rally public support and support from the scientific community,[125] it seems hopeful that they may argue persuasively that a project should be delayed until NEPA requirements have been satisfied.

B. Policy Ramifications

As mentioned previously, a number of factors weighed against PAWS' case: 1) the armed forces exemption to the MMPA; 2) the concerns of national security and the classified nature of the project, and; 3) the general judicial skepticism as to the necessity of reverse impacts studies created substantial barriers for the *Progressive* plaintiffs. Despite these barriers, the court ruled that NEPA compliance was necessary in the form of a reverse impacts study. This may have important ramifications for future NEPA plaintiffs.

As applied to animals and animal populations, reverse impact studies may give conservationists another available tool when bringing NEPA suits. If a NEPA plaintiff can invoke the controversy factor under federal CEQ regulations, it does not seem out of the realm of possibility that a court would rule in the plaintiff's favor.

Although NEPA remains procedural, not substantive, the reverse impacts study is a way to slow the progressing decimation of wild animal populations.[126] The *Progressive* holding, although made in a district court, gives hope that increased protection of animals may survive judicial scrutiny where a plaintiff successfully portrays the proposed project as scientifically controversial. The more hoops an agency must pass through, the more likely it is that a project may not move forward at all due to difficulty and expense. In this way, it may be possible for NEPA to regain some of its desired substance, at least in practical effect if not in actual policy. It remains to be seen, however, whether such a strategy will be successful in a case not involving marine mammals.

VI. Possible Application

Although encouraging, the *Progressive* holding may merely demonstrate judicial support for the protection of marine mammals. Marine mammals have fared far better than other animals under

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125 In the *Greenpeace* case, the court noted that "(a)mong those criticizing the proposed research were knowledgeable scientists with years of experience studying killer whales who raised objections about the potential adverse effects of harrassing the whales." Greenpeace U.S.A. v. Evans, 688 F. Supp. 579, 582 (W.D. Wash. 1987).

126 In this case, the Navy actually cancelled the project altogether for a time, citing military budget cuts and a "changing world situation" as the reason. Evelyn Iritani, *Dolphins Relieved of Duty*, Seattle Post-Intelligencer, Jan. 17, 1991.

NEPA.[127] This consideration should be extended to situations where any indigenous animal populations are involved.

One example of where an EIS, including a study of reverse impacts, could have forestalled the destruction of indigenous wildlife is the Alaskan wolf hunt debacle. In two cases,[128] federal courts ruled that aerial wolf hunting did not involve sufficient federal action to trigger NEPA.

A. The Facts

The Alaska Department of Fish and Game (ADFG) announced its plans to kill approximately sixty percent of Alaska's wolf population in the state's vast interior.[129] The wolves were to be shot from aircraft in an effort to increase shrinking caribou and moose herds.[130] Defenders of Wildlife and other conservation groups objected to the wolf-kill and brought suit in both the 9th and D.C. Circuits to stop the hunt.

The suits were brought under NEPA because "[m]any, perhaps most, of the wolves were to be killed on federal lands for which the Department of the Interior is responsible."[131] The plaintiffs asserted that the Secretary of the Interior was obligated under NEPA to prepare an EIS before making a decision whether or not to prevent the wolf-kill.[132]

B. The Rulings

In both cases, the courts ruled that the Secretary of the Interior's failure to act did not constitute "major federal action" requiring compliance with NEPA procedures.[133] One court did note, however, that "[n]one of this is to say that agencies may, by manipulating the time at which they actually develop recommendations or reports on proposals, seek to avoid or perniciously to delay preparing an impact statement. It is simply to confirm that Congress did not expect agencies to prepare statements if there is to be no action."[134] Therefore, it would appear that the line between intentional avoidance of NEPA requirements and genuine inaction is a fine one.

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127 *See, e.g.*, Robertson v. Methow Valley Citizens' Council, 109 S. Ct. 1835 (1989) (construction of a ski resort was allowed to go forward unimpeded, despite the fact that an entire population of mule deer could be lost).

128 *See* Alaska v. Andrus, 591 F.2d 537 (9th Cir. 1979); Defenders of Wildlife v. Andrus, 627 F.2d 1238 (D.C. Cir. 1980).

129 *Defenders of Wildlife*, 627 F.2d at 1240.

130 In addition, the state planned to curtail caribou hunting on the part of native Alaskans. The state contended that caribou herds had dwindled from over 240,000 to approximately 60,000 from 1970 to 1976. *Alaska*, 591 F.2d at 539.

131 *Defenders of Wildlife*, 627 F.2d at 1240.

132 *Id.*; *Alaska*, 591 F.2d at 539.

133 *Alaska*, 591 F.2d at 540; *Defenders of Wildlife*, 627 F.2d at 1243.

134 *Defenders of Wildlife*, 627 F.2d at 1244.

C. *The Reasons*

In addition to the ruling that federal agency inaction fails to trigger the EIS requirement, one court noted that the State of Alaska had the support of many other agencies.[135] No mention was made of scientific or other support for the plaintiff's position. Perhaps with such scientific support, the plaintiff could have gone further to fulfill the requirement of "controversy," even in the face of federal inaction.

However, the stark reality may be that wolves, unlike marine mammals, are simply not yet worthy of public or judicial support.[136] Whatever the reason, the wolf hunt deserved scrutiny under NEPA.

D. *The Reverse Impacts*

If an EIS had been ordered in the wolf hunt cases, a reverse impacts study would have been appropriate. The primary impact of the hunt was obviously the increase of the caribou and moose herds for which the hunt was designed. This is the impact of the "project" on the surrounding environment in the traditional EIS context.

However, the reverse impacts in the case are just as important and worthy of consideration. The impact on the wolf population was the reverse impact, as the wolves were the objects of the project in the same way that the dolphins were the objects in *Progressive*. Since the aerial hunting technique precludes choosing target wolves on the basis of age, sex, and health, the hunt could conceivably eliminate most of the healthy females in their reproductive years. In this way, the long-term impact on the "project" could be far more devastating than the decrease in caribou and moose herds the hunt was designed to curtail. By forcing the Secretary of the Interior to prepare an EIS studying these effects, it seems possible that a less destructive method of wolf population control could be explored.

VII. Conclusion

NEPA still holds some strong possibilities for groups and individuals who wish to preserve this country's wildlife. By considering both primary and reverse impacts of a proposed project, a plaintiff may offer a court more angles from which to consider the adequacy of an existing EIS, or the wisdom of not preparing one at all. By securing as much scientific data as possible and rallying public support, plaintiffs may also increase the chances that the project will be viewed as "controversial" under the CEQ regulations. It may still be hoped that all animals,

135 "In this stand the state is joined by amici curiae: officials of 11 states and the International Association of Fish and Wildlife Agencies." *Alaska*, 591 F.2d at 539.

136 Wolves have traditionally been feared, hated, and hunted to near-extinction, rather than loved as marine mammals currently are. One need look no further than the story of Little Red Riding Hood for the traditionally evil nature that continues to be attributed to wolves.

and not just marine mammals, will be seen as worthy of consideration under NEPA before they are disrupted or eliminated.

From the idealistic mandate of its drafters to its "procedural, not substantive" application in the hands of the courts, NEPA remains the last, best hope for animals and the environment at large. If rulings like *Progressive* were to become the norm instead of the exception, perhaps our long and embarrassing history of using other living creatures for whatever purpose we wish would end, and the human race could pass the true test of its mercy after all.

VIII. AFTERMATH

As a result of the court's opinion in *Progressive*, the parties entered into a stipulated agreement under which the Navy agreed not to deploy any dolphins in western Washington until an EIS was prepared.[137] In exchange, PAWS agreed not to pursue further litigation.[138] The Navy subsequently violated this agreement by making plans to bring dolphins to the Pacific Northwest for a one-week training exercise known as "Forward Sentinel 93."[139]

The Navy argued that the language in the agreement, specifically that the Navy would "not deploy dolphins for operational purposes,"[140] meant that PAWS sought to enjoin only "the long term, or permanent stationing of dolphins at Submarine Base Bangor for the operational purpose of protecting the submarines based there."[141] Since the training exercise was short-term, the Navy contended that the dolphins were not "deployed" or "operational" within the meaning of the agreement. On the other hand, PAWS argued that the Navy's interpretation was "pedantic"[142] and that the Navy's plan involved the kind of activity that PAWS has sought to stop.

The judge agreed with PAWS, stating that he was "baffled" by the Navy's arguments.[143] The judge granted the plaintiffs' motion for a preliminary injunction. He expressed irritation that the Navy would attempt to avoid the previous agreement, and that it would do so without informing the court or the plaintiffs of its plans, allowing them to learn of the plan through "rumors that the Navy then confirmed."[144]

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137 Stipulation of the Parties Regarding the Partial Resolution of This Litigation, #C89-498C, entered May 3, 1990.

138 *Id.*

139 Response of the U.S. Navy to the Plaintiffs' Motion to Reopen, Vacate Stay of Proceedings, and for Preliminary injuction, #C89-498C, Aug. 23, 1993 [hereinafter Response of the U.S. Navy]. The exercise was to take place from September 2 through September 8, 1993.

140 Stipulation of the Parties Regarding the Partial Resolution of This Litigation, #C89-498C, entered May 3, 1990.

141 Response of the U.S. Navy, *supra* note 139.

142 Plaintiff's Reply to Navy's Response Re: Plaintiffs' Motion to Reopen, Vacate Stay, & for Injunction, #C89-498C, entered Aug. 24, 1993.

143 Ed Offley, *Dolphin Ban Navy Can't Use Them in War Games*, Seattle Post-Intelligencer, Aug. 25, 1993, at A1, A6.

144 *Id.*

Once again, this demonstrates that the courts are very serious when ruling that NEPA's procedural hoops must be jumped through, even though they be merely hoops.