Contents

The **Native American Graves Protection and Repatriation Act** is a Federal law passed in 1990. NAGPRA requires Federal agencies and institutions that receive Federal funds to return certain Native American cultural items to the tribes from which those items were taken.

Can we make a case for repatriating Sk'aliCh'elh-tenaut to Lummi?

1. Establish that Tokitae is "cultural patrimony" for Lummi and the individual Tribal members have "cultural affinity" for Sk'aliCh'elh-tenaut.
2. Establish that Miami Seaquarium fits NAGPRA's definition of "institution." The word most often used in NAGPRA documents is "museum," but if you read the Quick Guide to NAGPRA: "Institutions that receive Federal funds include, *but are not limited to*, museums, colleges and universities, state or local agencies and their subdivisions." MSQ is not just an amusement park, but is similar to a museum or institution of higher learning in its emphasis on research, field work, and education, as well as on display and exhibition:
    - MSQ is an acknowledged leader in manatee rescue and rehab, and is one of only three contracted and permitted manatee rehab facilities in Florida.
    - MSQ recently partnered with the University of Miami on a coral reef display.
    - MSQ website has a teacher's guide that conforms to Florida educational standards.
    - MSQ legal briefs often use the words "exhibit" and "display," which are museum-y words.
    - In government documents (pertaining to manatee rescue and rehab), MSQ is called an "oceanarium." Other oceanaria listed in the Federal Manatee Recovery Plan include Mote Marine Laboratory (institution of higher learning!) and the South Florida Museum.
    - Precedent: The Toledo Zoo and Aquarium aka The Toledo Zoological Society had to comply with NAGPRA.
    - Miami Dade County might also be eligible for NAGPRA. Miami Seaquarium leases their land from Parks and Rec, so Parks and Rec might be "in possession" of Tokitae. As of 2014, Marine Exhibition Corporation (dba Miami Seaquarium) was paying the county about 2.7 million annually for the lease; the County also got a one-time 8% cut of net profits from Wometco's sale of MEC shares.
3. Establish that Miami Seaquarium receives Federal funding.
    - The Small Business Administration loaned Marine Exhibition Corporation dba Miami Seaquarium $500,000 for disaster relief on March 11, 1993.
    - Between 2001-2016, Miami Seaquarium received over $3 million from the Florida Fish and Wildlife Research Institute (FWRI) for manatee rehabilitation. Federal funds flow into a Florida state pool for manatee work, FWRI then disburses money to MSQ.
    - MSQ has partnered on the coral reef exhibit with the Rosentiel School of Marine Science, which has received considerable funds from NOAA.

A. Federal Funds: MANATEES

The Fish and Wildlife Research Institute (FWRI) is part of the Florida Fish And Wildlife Conservation Commission (FWC). FWRI manages the Florida Manatee Rescue, Rehabilitation and Release Reimbursement Program for sick, injured and orphaned Florida manatees and adminsters funds for manatee protection. These funds come from a number of federal sources (Appendix A1: http://fwcresearch.com/budget/wildlife-research/), and are distributed to relevant partners (Appendix A2: http://fwcresearch.com/partners/), including Miami Seaquarium.

Between 2001-2016, Miami Seaquarium received $3,671,862 from FWRI for their manatee efforts. (Appendix A3: https://myfwc.com/media/18244/miami-seaquarium-17-18.pdf)

All of this manatee action is federally mandated in the 2001 Florida Manatee Recovery Plan (Appendix A4: https://www.fws.gov/northflorida/Manatee/Documents/Recovery%20Plan/MRP-start.pdf). The US Fish and Wildlife Services Implementation Schedule estimates reimbursement for "oceanaria," of which Miami Seaquarium is one of the designated recipients. (Appendix A5: https://www.fws.gov/northflorida/Manatee/Documents/Recovery%20Plan/MRP-Part%20III.pdf)

B. Federal Funds: DISASTER RELIEF

On March 11, 1993, Marine Exhibition Corporation received a disaster relief loan from the Small Business Administration in the amount of $500,000. Appendix B: Response Letter dated 11.16.18

C. Federal Funds: CORAL REEFS

Federal monies go to university which then partners with MSQ.

NOAA granted University of Miami's Rosentiel School of Marine Science $591,920 to do coral reef restoration (Appendix C1:https://news.miami.edu/rsmas/stories/2017/04/noaa-funds-um-coral-restoration-research.html)

Miami Seaquarium, in their own words, "In a joint effort to advance the conservation and restoration of reefs, Miami Seaquarium and University of Miami's RSMAS has added a new exhibit: 'Rescue a Reef'! Take a look at the 500- gallon jewel tank aquarium showcasing the university's coral reef restoration program." (Appendix C2: https://www.miamiseaquarium.com/things-to-do/experiences)

D. MUSEUM

There are museum-like words used by Miami SeaQ, and in government and legal docs pertaining to Miami SeaQ. There's a case to be made for them having "exhibits" that are intended for research/rehab and education, even though Miami SeaQ consistently and carefully refers to itself as a "world-class marine-life entertainment park" or similar.

1) "Oceanarium": Miami Seaquarium is refered to as an "oceanarium" in many government docs (see any of the manatee Appendices).
2) "Rescue and Rehab": Miami SeaQ heavily promotes all their rescue and rehab efforts, which would seem to take them out of theme park territory and into something else. (Appendix D1: https://www.miamiseaquarium.com/reefrangers) excerpt: "Miami Seaquarium® is committed to wildlife conservation and the rescue, rehabilitation and release of distressed marine mammals. This commitment began even before the park first opened its doors. In July of 1955, the park's conservation work began when Maime, a 3 week old, 47 pound manatee was rescued after being injured.Since that first rescue in 1955, Miami Seaquarium® has rescued, rehabilitated and released countless manatees, sea turtles, dolphins and whales. Since 2002, more than 80 manatees have been rescued and rehabilitated at Miami Seaquarium®."
3) museum-y words and phrases explicitly or implicitly referring to Miami SeaQ in legal documents. A cursory glance at one doc yields instant results, for instance, from the CORRECTED BRIEF OF APPELLEES MIAMI SEAQUARIUM AND FESTIVAL FUN PARKS, LLC, D/B/A PALACE ENTERTAINMENT (Appendix D2: https://finaldaysofwisdom.files.wordpress.com/2018/01/seaquarium-appellate-brief.pdf.):
    1) On pg17: The PWSDs are used as companion animals pursuant to rules adopted by APHIS for humane care of marine mammals **exhibited** in aquariums, which require a compatible companion from the "same or biologically related species."
    2) on pg 23: "The AWA "provides for the humane treatment of animals ... use[d] ... **for exhibition and research purposes**," *i.e.*, "unlike the ESA, it deals exclusively with captive animals, and specifically, animals that are **exhibited** in license facilities such as the Seaquarium."
4) "Exhibit" used directly by Miami SeaQ on their own website: Deep inside the Educational Outreach section of Miami SeaQ website, there's a Florida standards of education handout for teachers (Appendix D3: https://www.miamiseaquarium.com/sites/seaquarium.com/files/Miami%20Seaquarium%20-%20FL%20standards%20in%20the%20park_0.pdf). The word "exhibit" is used a lot, and the overall gist of the piece is that Miami SeaQ is an educational facility with educational exhibits.

5) Likewise, the "Teacher's Corner" section pushes Miami SeaQ's educational value, i.e. "Conservation Outpost - Our newest exhibit will take you through a timeline of our achievements in conservation over the past 60 years. Students will be able to learn about the threats facing manatees and sea turtles and what they can do to help." (Appendix D4: https://www.miamiseaquarium.com/plan-a-visit/education-and-outreach/teachers- corner)

5) Miami Seaquarium's own real name: Marine Exhibition Corporation.

E. CORPORATE

July 1, 2014 is when Miami Seaquarium started operating under Palace Entertainment, (Appendix E1: https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=4539463)

On May 6, 2014, The Miami-Dade County commissioners voted to approve the sale of Marine Exhibition Corporation dba Miami Seaquarium by Wometco and MVC Capital to Festival Fun Parks, dba Palace Entertainment, both of which are US-based companies headquartered in Newport Beach, CA. (Appendix E2: minutes of County Commissioners meeting where resolution approving sale of Miami SeaQ approved; Appendix E3: County Clerk's Memo, http://www.miamidade.gov/govaction/legistarfiles/MinMatters/Y2014/141011min.pdf).

Palace Entertainment is a subsidiary of Parques Reunidos, headquartered in Madrid, Spain. At time of the sale, Parque Reunidos was owned by Arle Capital Partners, a private equity firm in London, England.

F. NAGPRA

Quick Guide to NAGPRA: Appendix F1: https://www.nps.gov/history/tribes/documents/nagpra.pdf

Database of summaries submitted by NAGPRA compliant entities https://grantsdev.cr.nps.gov/Nagpra/CUI/Institutions_Report_Input.cfm. Examples of relevant NAGRA eligible entities (aquarium; Parks & Rec): Appendix F2: Toledo Zoological Society, aka Toledo Zoo & Aquarium; Appendix F3: Hamilton County Parks and Rec.

From the NAGPRA glossary, which is currently not viewable online due to government shutdown (https://www.nps.gov/nagpra/TRAINING/GLOSSARY.HTM):

Cultural Patrimony: An object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not

the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group. [25 USC 3001 (3)(D)]

Federal Funds, Receives: The receipt of funds by a museum after November 16, 1990, from a Federal agency through any grant, loan, contract (other than a procurement contract), or other arrangement by which a Federal agency makes or made available to a museum aid in the form of funds. Federal funds provided for any purpose that are received by a larger entity of which the museum is a part are considered Federal funds for the purposes of these regulations. [43 CFR 10.2 (a)(3)(iii)]

Museum: Any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency. [25 USC 3001 (8)] See also Federal Funds, Receives.

Possession: Having physical custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony with a sufficient legal interest to lawfully treat the objects as part of its collection for purposes of these regulations. Generally, a museum or Federal agency would not be considered to have possession of human remains, funerary objects, sacred objects, or objects of cultural patrimony on loan from another individual, museum, or Federal agency. [43 CFR 10.2 (a)(3)(i)] See also Control and Physical Custody.

Programs of the Fish and Wildlife Research Institute

Wildlife Research

http://fwcresearch.com/budget/wildlife-research/

Funding Sources
Archie Carr Center for Sea Turtle Research (University of Florida); Florida Department of Environmental Protection—Division of Recreation and Parks; Florida Department of Military Affairs; Fish and Wildlife Foundation of Florida; Florida Power and Light Company; Georgia Department of Natural Resources; John H. Prescott Marine Mammal Rescue Assistance; National Fish and Wildlife Foundation; National Marine Fisheries Service; National Oceanic and Atmospheric Administration; Raymond James Trust; Sea Turtle Conservancy; Shell Oil Company; Southwest Florida Water Management District; Tampa Electric Company; U.S. Fish and Wildlife Service; U.S. Forest Service; Wildlife Conservation Society

Program budget: $11,936,349
…….

Marine Mammal Research
Leslie Ward-Geiger, Leslie.Ward@MyFWC.com
Researchers focus on key topics, from population assessment to behavioral ecology, to inform and help guide manatee and right whale conservation and recovery planning.

Marine Mammal Research

Leslie Ward-Geiger, Leslie.Ward@MyFWC.com

Researchers focus on key topics, from population assessment to behavioral ecology, to inform and help guide manatee and right whale conservation and recovery planning.

Funding Source	#FTE	FTE Salaries	OPS Salaries	Expense	OPS Contract	Equipment	Special Categories	Program Operational Budget	Overhead Assessment	Total Program Budget
MRCTF	2.5	$180,302	$0	$0	$2,104,000	$35,112	$0	$2,319,414	$0	**$2,319,414**
MRCTF/ Grant	0.0	$0	$0	$0	$0	$0	$3,487	$3,487	$0	**$3,487**
STMTF	16.0	$1,070,276	$451,491	$311,843	$370,000	$11,625	$0	$2,215,235	$53,271	**$2,268,506**
GDTF	0.0	$0	$0	$0	$0	$0	$1,262,952	$1,262,952	$121,330	**$1,384,282**
FGTF	3.0	$171,795	$0	$0	$0	$0	$827,862	$999,657	$46,740	**$1,046,397**
Totals	**21.5**	**$1,422,373**	**$451,491**	**$311,843**	**$2,474,000**	**$46,737**	**$2,094,301**	**$6,800,745**	**$221,341**	**$7,022,086**

http://fwcresearch.com/partners/

Programs of the Fish and Wildlife Research Institute

PARTNERS

Academy of Sciences of the Czech Republic, Institute of Parasitology
Alabama Department of Conservation and Natural Resources
Alabama Department of Health
Alabama Marine Resources Division
Alachua Conservation Trust
Alligator Point Sea Turtle Patrol, Inc.
Amelia Island Sea Turtle Watch, Inc.
American Bird Conservancy
American Fisheries Society
Florida Chapter
Southern Division
American Museum of Natural History
American Turtle Observatory
Animal Specialty Hospital
Amphibian Foundation
Anna Maria Turtle Watch
Apalachicola National Estuarine Research Reserve
Archbold Biological Station
Atlantic Coastal Cooperative Statistics Program
Atlantic States Marine Fisheries Commission
Auburn University
Department of Fisheries and Allied Aquacultures
Avian Research and Conservation Institute
Avon Park Air Force Range
Bass Anglers Sportsman Society
Bat Conservation International
Bay County – Restore Act Coordinator
Beaches Sea Turtle Patrol, Inc.
Bermuda Aquarium, Museum and Zoo
Big Bend Coastal Conservancy
Bigelow Laboratory for Ocean Sciences
Boise State University
Bonefish and Tarpon Trust
Boston University
Brevard County Environmentally Endangered Lands Program
Brevard Zoo
Broward County

Busch Gardens
California State Polytechnic University, Pomona
Central Connecticut State University
Charlotte County
Natural Resources Division
Parks, Recreation and Cultural Resources
Charlotte County Health Department
Charlotte Harbor National Estuary Program
Choctawhatchee Basin Alliance
City of Clearwater
City of Coral Springs
City of Coral Springs, Coral Springs Improvement District
City of Jacksonville
City of Marathon
City of Marianna
City of Punta Gorda
City of St. Petersburg
Environmental Compliance Division
City of Winter Heaven
Clearwater Marine Aquarium
Clemson University
Clinic for the Rehabilitation of Wildlife
Coastal Marine Education and Research Academy
Coastal Plains Institute
Coastal Protection and Restoration Authority of Louisiana
Coastal Wildlife Club, Inc.
Collier County
Natural Resources Department
Pollution Control and Prevention Department
Collier County Health Department
Colorado State University – College of Veterinary Medicine
Conservancy of Southwest Florida
Conservation Biology Institute
Conservation Trust for Florida
Cornell University
Dauphin Island Sea Lab
DB Ecological Services
Defenders of Wildlife
Detroit Zoo
Disney Worldwide Conservation Fund
Disney's Animal Kingdom
Dog Island Conservation District
Don Pedro Turtle Patrol
Ducks Unlimited
Duke Energy Crystal River Mariculture Center
Durham University

Eastern Florida State College
Eastern Kentucky University
Eastman Environmental
Eckerd College
Eckerd College, Department of Environmental Studies
Ecological Associates Inc.
Eglin Air Force Base
Emerald Coast Wildlife Refuge
Environmental Protection Commission of Hillsborough County
Escambia County
Community and Environment Department
Marine Resources Division
Natural Resources Management Department
Fish and Wildlife Foundation of Florida
Fisheries Conservation Foundation – National Black Bass Initiative
Flagler College
Florida A&M University
School of Graduate Studies and Research
Florida Association of Benthologists
Florida Atlantic University
Harbor Branch Oceanographic Institute
Florida Bat Conservancy
Florida Climate Institute
Florida Department of Agriculture and Consumer Services
Division of Aquaculture
Florida Forest Service
Florida Department of Economic Opportunity
Florida Department of Environmental Protection
Apalachicola National Estuarine Research Reserve
Beaches and Coastal Systems
Big Bend Seagrasses Aquatic Preserve
Biscayne Bay Aquatic Preserves
Central Panhandle Aquatic Preserve
Coastal Management Program
Cross Florida Greenway State Recreation and Conservation Area
Division of Law Enforcement
Division of Recreation and Parks
Division of State Lands
Econfina River State Park
Ellie Schiller Homosassa Springs Wildlife State Park
Estero Bay Aquatic Preserve
Florida Coastal Office
Florida Geological Survey
Florida Outer Continental Shelf Program
Florida Park Service
Gasparilla Sound-Charlotte Harbor Aquatic Preserve

North West Regional Operation Center
Office of Emergency Response
Office of Greenways and Trails
Office of Technology and Information Services
Water Quality Assessment Program
Florida Department of Health
Division of Environmental Health
Florida Department of Military Affairs
Florida Department of State
Division of Historical Resources
Division of Library and Information Services
Florida Department of Transportation
Office of Environmental Management
Florida Division of Emergency Management
Florida Gulf Coast University
Florida Institute of Oceanography
Florida Institute of Technology
Florida International University
Florida Keys Community College
Florida National Guard
Florida Natural Areas Inventory
Century Commission for a Sustainable Florida – the Critical Lands and Waters Identification Project
Florida Ornithological Society
Florida Power and Light Company
Florida Sea Grant
Florida State University
FSU Coastal and Marine Laboratory
College of Arts & Sciences
Florida State Taxidermist Association
Florida Wildlife Federation
Florida Wildlife Rehabilitators Association
Flying Fish Fleet
Fort DeSoto County Park
Friends Seagrass Keepers
GeoAdaptive
GeoDesign
Geological Survey of Alabama
Geomar Environmental Consultants
George Mason University
Georgia Cooperative Fish and Wildlife Research Unit
Georgia Department of Natural Resources
Georgia Sea Turtle Center
Georgia Southern University
Governors South Atlantic Alliance
Greenville Zoo

Guana Tolomato Matanzas National Estuarine Research Reserve
Gulf and South Atlantic Fisheries Foundation
Gulf Coast State College
Gulf Coastal Plains and Ozarks Landscape Conservation Cooperative
Gulf County
Gulf of Mexico Alliance
Gulf of Mexico Coastal Ocean Observing System
Gulf of Mexico Fishery Management Council
Gulf of Mexico Research Initiative
Gulf Specimen Marine Lab
Gulf States Marine Fisheries Commission
Gulf World
Gulf/East Bay Sea Turtle Patrol
Gulfarium
Gumbo Limbo Nature Center
Hanna Park
Hernando County
Hillsborough County
Environmental Protection Commission Water Quality Monitoring Program Section
Hubbs-SeaWorld Research Institute
Huguenot Park
Illinois Natural History Survey
Indian Pass Sea Turtle Patrol
Indian River County
Conservation Lands
Indian River Lagoon National Estuary Program
Interagency Ocean Observation Committee
International Game Fish Association
Inwater Research Group
Jackson County
Jacksonville University
Jacksonville Zoo
Joseph W Jones Ecological Research Center
Key West Aquarium
Key West Naval Air Station
Key West Sea Turtle Club
Key West Wildlife Center
Lake County Water Authority
Lantana Marine Safety
Lee County
Lee County Environmental Laboratory
Lee Kong Chian Natural History Museum
Loggerhead Marinelife Center
Louisiana Department of Wildlife and Fisheries
Louisiana Oil Spill Coordinator's Office
Maine Department of Marine Resources

Manatee County Environmental Monitoring Laboratory
Manatee County Health Department
Manatee Rescue and Rehabilitation Partnership
Marine Discovery Center
Marine Resources Council
Marine Resources Development Foundation Marine Lab
Martin County
Massachusetts Institute of Technology
Massey University of New Zealand
McGill University
Medical University of South Carolina
Hollings Marine Lab
Melbourne-Tillman Water Control District
Miami Seaquarium
Miami-Dade County
Coastal and Wetlands Resources Section
Environmental Resources Management
Miami-Dade Environmentally Endangered Lands
Miami Dade Parks, Recreation & Open Spaces
Michigan State University
Mississippi Department of Marine Resources
Mississippi Department of Wildlife, Fisheries and Parks
Mississippi State University
Monroe County
Monterey Bay Aquarium Research Institute
Moss Landing Marine Laboratory
Mote Marine Laboratory
Mount Desert Island Biological Laboratory
Museu Nacional – Departamento de Invertebrados
Museum and Art Gallery of the Northern Territory, Australia
Nanyang Technological University
Earth Observatory of Singapore
Naples Zoo
National Aeronautics and Space Administration
Earth Science
Kennedy Space Center
Stennis Space Center
National Audubon Society
Audubon EagleWatch
Audubon of Florida
National Autonomous University of Mexico
National Fish and Wildlife Foundation
National Institute of Standards and Technology
National Museum of Natural History
National Oceanic and Atmospheric Administration
Florida Keys National Marine Sanctuary

Harmful Algal Blooms Observing System
National Centers for Environmental Information (NCEI)
National Environmental Satellite, Data, and Information Service
National Marine Fisheries Service
National Ocean Service
National Weather Service
Office for Coastal Management
Office of Oceanic and Atmospheric Research
Office of Response and Restoration
U.S. Integrated Ocean Observing System Program
Southeast Coastal Ocean Observing Regional Association
National Park Service
Big Cypress National Preserve
Biscayne National Park
Canaveral National Seashore
Dry Tortugas National Park
Everglades National Park
Fort Matanzas National Monument
Gulf Islands National Seashore
Timucuan Ecological and Historic Preserve
National Save the Sea Turtle Foundation
National Spatial Data Infrastructure
National University of Singapore
National Wildlife Federation
National Wildlife Refuge Association
Natural History Museum – Vienna, Austria
Natural History Museum of Los Angeles County
NatureServe
New England Aquarium
New Hampshire Department of Environmental Services
New Mexico State University – New Mexico Cooperative Fish and Wildlife Unit
North Carolina Wildlife Resources Commission
North Florida Land Trust
Northeastern University
Northwest Florida Water Management District
Nova Southeastern University
National Coral Reef Institute
Oceanographic Center
Ocean Conservancy
Ocean Tracking Network
Oklahoma State University
Oregon State University
Orianne Center for Indigo Conservation
Owls Nest Sanctuary for Wildlife
Palm Beach County
Palm Beach Zoo

Panama City Beach Turtle Watch
Pasco County Parks and Recreation
Paynes Prairie Preserve State Park
Peninsular Florida Landscape Conservation Cooperative
Penn State University
Pennsylvania Cooperative Fish and Wildlife Research Unit
Peregrine Fund
Pinellas County
Polk County
Ponte Vedra Turtle Patrol
Port Manatee
Princeton University
Raymond James Trust
Restore America's Estuaries
Rhode Island Department of Environmental Management
Rookery Bay National Estuarine Research Reserve
Sanibel Sea School
Sanibel-Captiva Conservation Foundation
Santa Fe College Teaching Zoo
Santa Rosa County Environmental Management Department
Sarasota Bay Estuary Program
Sarasota County
Water Services
Sarasota County Department of Health
Save-A-Turtle
Sea Turtle Adventures, Inc.
Sea Turtle Conservancy
Sea Turtle Conservation League of Singer Island
Sea Turtle Oversight Protection
Sea Turtle Preservation Society
Sea Turtle Program Volunteers of Highland Beach
Sea Turtle Trackers, Inc.
Seaside Seabird Sanctuary
SeaWorld Orlando
Smithsonian Institution
National Museum of Natural History
Smithsonian Tropical Research Institute
South Atlantic Fishery Management Council
South Atlantic Landscape Conservation Cooperative
South Carolina Department of Natural Resources
South Carolina Sea Grant Consortium
South Florida Ecosystem Restoration Task Force
South Florida Museum
South Walton Turtle Watch Group
South Florida Water Management District
Southeast Aquatic Resources Partnership

Southeast Florida Coral Reef Initiative
Southeast Ocean and Coastal Acidification Network
Southeast Partners in Amphibian and Reptile Conservation
Southeastern Bat Diversity Network
Southwest Florida Water Management District
St. Andrew Bay Resource Management Association
St. Augustine Beach Turtle Patrols
St. Cloud State University
St. Johns County
St. Johns River Water Management District
St. Johns Riverkeeper
St. Lucie County Environmental Resources Department
St Lucie County FPL
St. Petersburg College
State University of New York – College of Environmental Science and Forestry
Stetson University
Suwannee River Water Management District
Tall Timbers Research Station
Tampa Bay Estuary Program
Tampa Bay Watch
Tampa Electric Company
Tampa's Lowry Park Zoo
Texas A&M University
Harte Research Institute for Gulf of Mexico Studies
Texas Department of State Health Services
Texas State University
The Field Museum
The Florida Aquarium
The Marine Mammal Center
The Nature Conservancy
The Orianne Society
The PEW Charitable Trust
The Trust for Public Land
Tufts University
The Turtle Hospital
Town of Jupiter Island
Town of Palm Beach Shores
Turkey Creek Power Plant
Turtle Time, Inc.
U.S. Air Force
U.S. Army Corps of Engineers
U.S. Army Corps of Engineers JALBTCX
U.S. Army Engineer Research and Development Center
U.S. Coast Guard
District 7 MSU Charleston
District 7 MSU Savannah

District 7 Sector Jacksonville
District 7 Sector Key West
District 7 Sector Miami
District 7 Sector San Juan
District 7 Sector St Petersburg
District 8 Sector Mobile
U.S. Coast Guard Auxiliary District 7
U.S. Coral Reef Task Force
U.S. Department of Agriculture, Animal and Plant Health Inspection Service
Veterinary Services
Wildlife Services
U.S. Department of Defense
U.S. Department of the Interior
U.S. Environmental Protection Agency
Gulf Ecology Division Laboratory
Gulf of Mexico Program
U.S. Fish and Wildlife Service
Cedar Keys National Wildlife Refuge
Ecological Services Division
Endangered Species Program
Everglades Headwaters NWR
Fish and Wildlife Conservation
Gulf Restoration Program
Lake Whales Ridge NWR
Florida Peninsular Landscape Conservation Cooperative
National Conservation Training Center
National Wildlife Refuge System
U.S. Food and Drug Administration
U.S. Forest Service
Apalachicola National Forest
Ocala National Forest
U.S. Geological Survey
Caribbean Florida Water Science Center
Coastal and Marine Science Center
Cooperative Wildlife Research Units
Earth Resources Observation and Science Center
National Geospatial Program
National Wetlands Research Center
National Wildlife Health Center
Patuxent Wildlife Research Center
Southeast Amphibian Research and Monitoring Initiative
Wetland & Aquatic Research Center
Universidad Nacional Autónoma de México—Instituto de Ciencias del Mar y Limnología
University of Alabama
University of Arizona
University of California, Davis

University of California, Los Angeles
University of Central Florida
College of Education
University of Colorado Denver
University of Florida
Archie Carr Center for Sea Turtle Research
Center for Landscape Conservation Planning
Department of Biology
Florida Cooperative Fish and Wildlife Research Unit
Florida Museum of Natural History
H. T. Odum Center for Wetlands
Institute of Food and Agricultural Sciences
College of Agriculture and Life Sciences
College of Veterinary Medicine
Department of Wildlife Ecology and Conservation
Florida LakeWatch
Nature Coast Biological Station
School of Forest Resources and Conservation
Soil and Water Sciences Department
Tropical Aquaculture Laboratory
Wildlife Ecology and Conservation
Whitney Laboratory for Marine Bioscience
University of Georgia
Southeastern Cooperative Wildlife Disease Study
Savannah River Ecology Lab
University of Idaho
University of Louisiana at Lafayette
University of Maryland, Baltimore County
University of Massachusetts
University of Miami
Rosenstiel School of Marine and Atmospheric Science
University of North Carolina at Chapel Hill
University of North Carolina at Charlotte – Department of Bioinformatics and Genomics
University of North Carolina at Wilmington
University of North Florida
University of North Texas
University of Otago
University of Pisa
University of Rhode Island
University of South Florida
College of Marine Science
Department of Integrative Biology
Department of Radiology
Environmental Science and Policy Program
School of Geosciences Water Institute
University of South Florida Sarasota-Manatee

University of South Florida St. Petersburg
College of Business
Department of Biological Sciences
University of Southern California
University of Southern Mississippi
Gulf Coast Research Laboratory
University of Tampa
University of Tennessee
University of Texas
University of Texas at Austin
College of Natural Sciences, Department of Marine Sciences
University of Utah
University of Virginia
University of Washington
University of West Florida
University of Wisconsin
University Press of Florida
Vencore
Villanova University
Virginia Commonwealth University
Virginia Institute of Marine Sciences
Virginia Polytechnic Institute and State University
Volusia/Flagler Turtle Patrol
White Oak Conservation Center
Wildlife Conservation Society
Woods Hole Oceanographic Institution
YSI/Xylem Inc.
Zoo Miami

https://myfwc.com/media/18244/miami-seaquarium-17-18.pdf

Miami Seaquarium

Miami Seaquarium was the first manatee acute care facility in Florida. It first cared for an orphaned manatee in 1955 and has been participating in manatee rehabilitation in some form ever since.

Fiscal Year	Amount	Manatees Released
2017 - 2018	$204,392.65	9
2016 - 2017	$250,041.00	5
2015 - 2016	$266,756.77	5
2014 - 2015	$221,091.56	4
2013 - 2014	$129,044.24	4
2012 - 2013	$211,929.41	4
2011 - 2012	$206,995.13	10
2010 - 2011	$398,933.34	10
2009 - 2010	$237,697.34	4
2008 - 2009	$169,502.64	6
2007 - 2008	$276,706.90	3
2006 - 2007	$220,702.55	3
2005 - 2006	$269,589.41	3
2004 - 2005	$235,116.29	3
2003 - 2004	$139,639.99	1
2002 - 2003	$233,722.57	2

Florida Manatee Recovery Plan

(*Trichechus manatus latirostris*)
Third Revision

U.S. Fish and Wildlife Service
Southeast Region

FLORIDA MANATEE RECOVERY PLAN

(*Trichechus manatus latirostris*)

THIRD REVISION

Original Approval: April 15, 1980
First revision approved: July 24, 1989
Second revision approved: January 29, 1996

Southeast Region
U.S. Fish and Wildlife Service
Atlanta, Georgia

Approved: Sam D. Hamilton

Sam D. Hamilton, Regional Director, Southeast Region,
U.S. Fish and Wildlife Service

Date: 10/30/01

DISCLAIMER

Recovery plans delineate reasonable actions believed to be required to recover and/or protect listed species. Plans published by the U.S. Fish and Wildlife Service (FWS), are sometimes prepared with the assistance of recovery teams, contractors, state agencies, and other affected and interested parties. Recovery teams serve as independent advisors to FWS. Plans are reviewed by the public and submitted to additional peer review before they are adopted by FWS. Objectives of the plan will be attained and any necessary funds made available subject to budgetary and other constraints affecting the parties involved, as well as the need to address other priorities. Recovery plans do not obligate other parties to undertake specific tasks and may not represent the views nor the official positions or approval of any individuals or agencies involved in the plan formulation, other than FWS. They represent the official position of FWS only after they have been signed by the Regional Director as approved. Approved recovery plans are subject to modification as dictated by new findings, changes in species status, and the completion of recovery tasks.

By approving this document, the Regional Director will certify that the data used in its development represent the best scientific and commercial data available at the time it was written. Copies of all documents reviewed in development of the plan are available in the administrative record located at U.S. Fish and Wildlife Service, 6620 Southpoint Drive, South, Suite 310, Jacksonville, Florida 32216. (904) 232-2580.

LITERATURE CITATION SHOULD READ AS FOLLOWS:

U.S. Fish and Wildlife Service. 2001. Florida Manatee Recovery Plan, (*Trichechus manatus latirostris*), Third Revision. U.S. Fish and Wildlife Service. Atlanta, Georgia. 144 pp. + appendices.

ADDITIONAL COPIES MAY BE OBTAINED FROM:

Fish and Wildlife Reference Service
5430 Grosvenor Lane, Suite 110
Bethesda, Maryland 20814
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Fees for plans vary depending upon the number of pages.

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***Appointed Recovery Team members have an asterisk by their name.**

EXECUTIVE SUMMARY

CURRENT SPECIES STATUS

Endangered. The near and long term threats from human-related activities are the reasons for which the Florida manatee currently necessitates protection under the Endangered Species Act. The focus of recovery is not on how many manatees exist, but instead the focus is on implementing, monitoring and addressing the effectiveness of conservation measures to reduce or remove threats which will lead to a healthy and self-sustaining population. The Florida manatee could be considered for reclassification from endangered to threatened provided that threats can be reduced or removed, and that the population trend is stable or increasing for a sufficient time period.

HABITAT REQUIREMENTS AND LIMITING FACTORS

The Florida manatee lives in freshwater, brackish and marine habitats. Submerged, emergent, and floating vegetation are their preferred food. During the winter, cold temperatures keep the population concentrated in peninsular Florida and many manatees rely on the warm water from natural springs and power plant outfalls. During the summer they expand their range and on rare occasions are seen as far north as Rhode Island on the Atlantic coast and as far west as Texas on the Gulf coast.

The most significant problem presently faced by manatees in Florida is death or injury from boat strikes. The long-term availability of warm-water refuges for manatees is uncertain if minimum flows and levels are not established for the natural springs on which many manatees depend, and as deregulation of the power industry in Florida occurs. Their survival will depend on maintaining the integrity of ecosystems and habitat sufficient to support a viable manatee population.

RECOVERY GOAL

The goal of this revised recovery plan is to assure the long-term viability of the Florida manatee in the wild, allowing initially for reclassification to threatened status and, ultimately, removal from the List of Endangered and Threatened Wildlife.

RECOVERY CRITERIA

This plan sets forth criteria, which when met, will ensure a healthy, self-sustaining population of manatees in Florida by reducing or removing threats to the species' existence.

The following criteria must be met prior to **reclassification of the Florida manatee from endangered to threatened (downlisting)**:

1. Reduce threats to manatee habitat or range, as well as threats from natural and manmade factors by:
   - identifying minimum spring flows;
   - protecting selected warm-water refuge sites;
   - identifying for protection foraging habitat associated with the warm-water refuge sites;
   - identifying for protection other important manatee areas; and
   - reducing unauthorized human caused "take."

2. Achieve the following population benchmarks in each of the four regions over the most recent 10 year period of time:
   - statistical confidence that the average annual rate of adult survival is 90% or greater;
   - statistical confidence that the average annual percentage of adult female manatees accompanied by first or second year calves in winter is at least 40%; and
   - statistical confidence that the average annual rate of population growth is equal to or greater than zero.

The following criteria must be met prior to **removal of the Florida manatee from the List of Endangered and Threatened Wildlife (delisting)**:

1. Reduce or remove threats to manatee habitat or range, as well as threats from natural and manmade factors by enacting and implementing federal, state or local regulations that:
   - adopt and maintain minimum spring flows;
   - protect warm-water refuge sites;
   - protect foraging habitat associated with select warm-water refuge sites;
   - protect other important manatee areas; and
   - reduce or remove unauthorized human caused "take."

2. Achieve the following population benchmarks in each of the four regions for an additional 10 years after reclassification:
   - statistical confidence that the average annual rate of adult survival is 90% or greater;
   - statistical confidence that average annual percentage of adult female manatees accompanied by first or second year calves in winter is at least 40%; and
   - statistical confidence that average annual rate of population growth is equal to or greater than zero.

ACTIONS NEEDED

1. Minimize causes of manatee disturbance, harassment, injury and mortality.
2. Determine and monitor the status of the manatee population.
3. Protect, identify, evaluate, and monitor manatee habitats.
4. Facilitate manatee recovery through public awareness and education.

DATE OF RECOVERY

Currently, in some regions of the state, there are only reliable population data for the past 6 years. Therefore, full recovery may not be possible for at least another 14 years in order to meet the standard of assessing the population over the most recent 10 years of data for reclassification from endangered to threatened status and for an additional 10 years after reclassification for removal from the List of Endangered and Threatened Wildlife. Time is also needed to establish and implement management initiatives to reduce or remove the threats.

TOTAL ESTIMATED COST OF RECOVERY

Based on information provided by our recovery partners, current annual estimated budget expenditures for recovery approach $10,000,000.

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LIST OF ACRONYMS AND ABBREVIATIONS

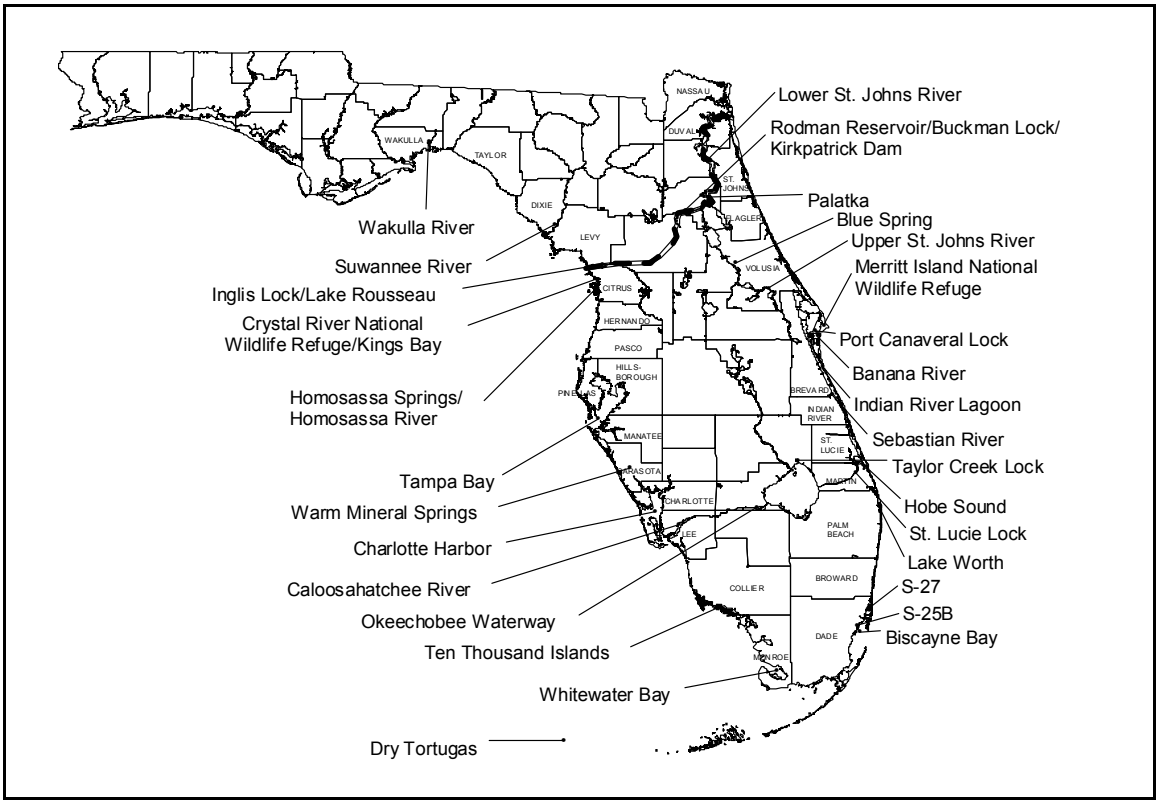
The following standard abbreviations for units of measurements and other scientific/technical acronyms and terms are found throughout this document:

BPSM	Florida Fish and Wildlife Conservation Commission, Bureau of Protected Species Management
CERP	Comprehensive Everglades Restoration Plan
CFR	Code of Federal Regulations
COE	U.S. Army Corps of Engineers
CZS	Chicago Zoological Society
DERM	Miami-Dade Department of Environmental Resources Management
EPA	U.S. Environmental Protection Agency
ESA	Endangered Species Act of 1973, as amended
FDEP	Florida Department of Environmental Protection
FDNR	Florida Department of Natural Resources
FIND	Florida Inland Navigation District
FMRI	Florida Fish and Wildlife Conservation Commission, Florida Marine Research Institute
FPL	Florida Power and Light Company
FR	Federal Register
FWC	Florida Fish and Wildlife Conservation Commission
FWC-DLE	Florida Fish and Wildlife Conservation Commission Division of Law Enforcement
FWS	U.S. Fish and Wildlife Service
GDNR	Georgia Department of Natural Resources
GIS	Geographic Information System
GPS	Global Positioning System
HBOI	Harbor Branch Oceanographic Institute
HWG	Habitat Working Group
IOWG	Interagency Oceanaria Working Group

LOA	Letter of Authorization
LE	Law Enforcement
MIPS	Manatee Individual Photo-Identification System
MML	Mote Marine Laboratory
MMPA	Marine Mammal Protection Act of 1972, as amended
MMPL	Marine Mammal Pathology Lab
MNPL	Maximum net productivity level
MPP	Manatee Protection Plan
MPS	Manatee protection system
MPSWG	Manatee Population Status Working Group
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
NPDES	National Pollution Discharge Elimination System
NPS	National Park Service
NSAV	Native submerged aquatic vegetation
NWR	National Wildlife Refuge
OC	The Ocean Conservancy (formerly the Center for Marine Conservation)
OSP	Optimum Sustainable Population
PIT	Passive Integrated Transponder
SAV	Submerged aquatic vegetation
SMC	Save the Manatee Club
USCG	U.S. Coast Guard
USGS-Sirenia	U.S. Geological Survey, Sirenia Project
USN	U.S. Navy
VHF	Very high frequency
WMD's	Water Management Districts
C Fish Industry	Commercial Fishing Industry
Local Gov'ts	Local Governments
M Industry	Marine Industries
Oceanaria	Cincinnati Zoo, Columbus Zoo, Homosassa Springs State Wildlife Park, Living Seas, Lowry Park Zoo, Miami Seaquarium, Mote Marine Laboratory, Sea World Florida and California, South Florida Museum
Photo-ID	Photo-identification
P Industry	Power Industries
R Fish Industry	Recreational Fishing Industry

C	Centigrade
cm	centimeters
ft	feet
hrs	hours
K	carrying capacity
kg	kilograms
km	kilometers
lbs	pounds
m	meters
mi	miles
min	minutes
ppm	parts per million
%	percent
≤	less than or equal to
°	degrees

Florida Coastal Counties and Other Sites Referenced in the Florida Manatee Recovery Plan



PREFACE

This Florida Manatee Recovery Plan revision adds new and refines existing recovery program activities for the next five years. The Recovery Plan is composed of four major sections:

1. Introduction: This section acquaints the reader with the Florida manatee, its status, the threats it faces, and past and ongoing conservation efforts. It also serves as a review of the biological literature for this subspecies.

2. Recovery: This section describes the goal of the plan; outlines an upcoming status review; presents reclassification and delisting criteria based upon the five listing/recovery factors and population benchmarks to assist in evaluating the status; objectives, strategy and actions or tasks needed to achieve recovery. These recovery tasks are presented in step-down outline format for quick reference and in a narrative outline, organized by four major objectives: (1) minimize causes of manatee disturbance, harassment, injury and mortality; (2) determine and monitor the status of the manatee population; (3) protect, identify, evaluate, and monitor manatee habitats; and (4) facilitate manatee recovery through public awareness and education.

3. Implementation Schedule: This section presents the recovery tasks from the step down outline in table format; assigns priorities to the tasks; estimates the time necessary to complete the tasks; identifies parties with authority, responsibility, or expressed interest in implementation of the tasks; and estimates the cost of the tasks and recovery program.

4. Appendices: This section presents additional information utilized by the FWS and Recovery Team to draft this revision.

PART III. IMPLEMENTATION SCHEDULE

The Implementation Schedule indicates task priorities, task numbers, task descriptions, duration of tasks, potential or participating parties, and lastly estimated costs (Table 6). These tasks, when accomplished, will bring about the recovery of the Florida manatee as discussed in Part II of this plan.

Parties with authority, responsibility, or expressed interest to implement a specific recovery task are identified in the Implementation Schedule. When more than one party has been identified the proposed lead party is indicated by an asterisk (*). The listing of a party in the Implementation Schedule does not imply a requirement or that prior approval has been given by that party to participate or expend funds. However, parties willing to participate will benefit by being able to show in their own budget submittals that their funding request is for a recovery task which has been identified in an approved recovery plan and is therefore part of the overall coordinated effort to recover the Florida manatee. Also, Section 7(a)(1) of the ESA directs all federal agencies to utilize their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of threatened and endangered species.

Following are definitions to column headings and keys to abbreviations and acronyms used in the Implementation Schedule:

PRIORITY NUMBER

Priority 1 - An action that must be taken to prevent extinction or to prevent the species from declining irreversibly in the foreseeable future.

Priority 2 - An action that must be taken to prevent a significant decline in species population/habitat quality or some other significant impact short of extinction.

Priority 3 - All other actions necessary to provide for full recovery of the species.

TASK NUMBER AND TASK Recovery tasks as numbered in the Narrative Outline.

RESPONSIBLE OR PARTICIPATING PARTY

C Fish Industry	Commercial Fishing Industry
COE	U.S. Army Corps of Engineers
CZS	Chicago Zoological Society
DERM	Miami-Dade Department of Environmental Resources Management
EPA	U.S. Environmental Protection Agency
Ecotour Ind	Ecotourism Industry
FDEP	Florida Department of Environmental Protection
FIND	Florida Inland Navigation District
FPL	Florida Power and Light Company
FWC	Florida Fish and Wildlife Conservation Commission Bureau of Protected Species Management Florida Marine Research Institute Division of Law Enforcement
FWS	U.S. Fish and Wildlife Service
GDNR	Georgia Department of Natural Resources
LE	Law Enforcement
Local Gov'ts	Local Governments
M Industry	Marine Industries
MML	Mote Marine Laboratory
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
NPS	National Park Service
OC	The Ocean Conservancy (formerly the Center for Marine Conservation)
Oceanaria	Cincinnati Zoo, Columbus Zoo, Homosassa Springs State Wildlife Park, Living Seas, Lowry Park Zoo, Miami Seaquarium, Mote Marine Laboratory, Sea World Florida and California, South Florida Museum
P Industry	Power Industries
Port Auth	Port Authorities
R Fish Industry	Recreational Fishing Industry
Sirenia	U.S. Geologic Survey - Sirenia Project
SMC	Save the Manatee Club
USCG	U.S. Coast Guard
USN	U.S. Navy
WMD's	Water Management Districts

ESTIMATED ANNUAL BUDGETS AND OTHER PROJECTIONS OF RECOVERY PARTNERS

Based upon recovery partners' current or proposed FY2001 budgets, it is estimated that close to $10 million is being spent annually on manatee recovery. This estimate does not include several significant recovery initiatives. Costs for USCG and FWC-DLE's manatee law enforcement efforts are not included in this total, nor are estimates included for COE, FDEP, and WMD regulatory programs which work regularly on manatee issues. Additionally, the COE's and the South Florida WMD's multi-million dollar project to retrofit navigational locks and water control structures with manatee protection technology in South Florida and FDEP's plan to retrofit structures at the Rodman Reservoir are not included in this total. It is possible that these programs may total an additional $4 to 5 million annually.

FWS FY 2001-2002 budget proposal for $1.36 million includes staff salary, recovery implementation projects, and a $1 million congressional add-on for: (1) manatee law enforcement; (2) a new manatee sanctuary and refuges initiative; and (3) a warm-water refuge initiative. In addition, regulatory consultations pertaining to manatee issues cost approximately $350 thousand annually in Florida. There is a need for two additional full time employees to handle the projected increase in consultations at a cost of $150 thousand.

COE, USCG, FDEP, and WMD's regulatory programs work regularly on manatee issues; however it was not possible to project the annual costs of these programs.

COE and South Florida WMD have partnered through the Central and Southern Florida Project, including matching funds, over $6.3 million has been budgeted to retrofit navigational locks and water control structures in South Florida with manatee protection technology during the next five years. In designing and constructing critical projects for the Everglades Restoration Project, water control structures are being designed to be manatee-safe, and cost estimates are not available for these projects.

USCG No estimate regarding the cost of USCG enforcement efforts has been provided. When on patrol, the USCG enforces all applicable federal laws and regulations. Costs of enforcing specific regulations, such as manatee speed zones, are not determinable. However, the USCG spends a significant amount of time patrolling navigable waterways that have speed zone regulations, and enforcement of speed zones is a high priority.

Sirenia FY 2001-2002 projected budget is $683 thousand.

FWC **BPSM** FY July 2000 - June 2001 budget of $1.566 million.

FMRI FY July 2000 - June 2001 budget of $3.325 million. This includes: (1) FMRI's research budget for $1.9 million; (2) $1.1 million administered by FMRI and earmarked for the critical care Oceanaria facilities and to the University of Florida Veterinary School; and (3) an additional $325 thousand in research contracts with MML that are administered by FMRI.

DLE No estimates were made regarding manatee law enforcement efforts, but the effort probably exceeds $1.0 million.

FDEP is budgeting to retrofit the Buchman Lock and Kirkpatrick Dam with manatee protection technology. Costs are anticipated to exceed $600 thousand over the next several years, however, this total is not included in the annual estimate.

GDNR FY 2001 budget of $19 thousand.

SMC FY 2001 proposed budget of $1.535 million.

MML FY 2001 manatee budget is $366 thousand. This includes $325 thousand in research contracts administered by FMRI and $41 thousand from MML and CZS.

Oceanaria estimated costs of $1.5 million for 50 manatees annually at $30 thousand per animal for basic maintenance of captive and rehabilitating animals. The critical care facilities receive $400 thousand from the Florida's Save the Manatee Trust Fund, and these funds are administered through the FWC-FMRI budget.

FPL projects FY 2001 budget that includes $110 thousand for studying warm-water refuge issues and for education.

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
2	1.1	Promulgate special regulations for incidental take under the MMPA for specific activities.	5 yrs	**FWS** COE	95	95	95	50	50	
2	1.2	Continue state and federal review of permitted activities to minimize impacts to manatees and their habitat.	Continuous	**FWS** **FWC** COE FDEP **GDNR** M Industry SMC USCG WMDs	500 278 4	500 278 4	500 278 4	500 278 4	500 278 4	
2	1.2.1	Continue to review coastal construction permits to minimize impacts.	Continuous	FWS FWC COE GDNR SMC WMDs						
2	1.2.2	Minimize the effect of organized marine events on manatees.	Continuous	FWS FWC GDNR M Industry SMC USCG						

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
2	1.2.3	Continue to review NPDES permits to minimize impacts.	Continuous	FWS FWC EPA FDEP GDNR P Industry SMC						
2	1.2.4	Pursue regulatory changes, if necessary, to address activities that are "exempt," generally authorized, or not covered by state or federal regulations.	2 yrs	FWS COE M Industry SMC						
1	1.3	Minimize collisions between manatees and watercraft.	Continuous	**FWS** **FWC** FIND GDNR Local Gov'ts Local LE M Industry OC SMC USCG	25 439	25 439	25 439	25 439	25 439	

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
1	1.3.1	Develop and refine state waterway speed and access rules.	5 yrs to Develop Continuous to Refine	FWS FWC Local Gov'ts M Industry OC SMC						
1	1.3.2	Develop and refine federal waterway speed and access rules.	3 yrs to Develop Continuous to Refine	FWS FWC COE Local Gov'ts M Industry NPS OC SMC						
1	1.3.3	Post and maintain regulatory signs.	Continuous	FWS FWC FIND Local Gov'ts NPS USCG						

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
1	1.4	Enforce manatee protection regulations.	Continuous	**FWS** **FWC** Local LE MML NPS USCG	6559	6559	6559	6559	6559	
2	1.4.1	Coordinate law enforcement efforts.	Continuous	FWS FWC Local LE NPS USCG						
2	1.4.2	Provide law enforcement officer training.	Continuous	FWS FWC Local LE NPS USCG						
2	1.4.3	Ensure judicial coordination.	Continuous	FWS						
2	1.4.4	Evaluate compliance with manatee protection regulations.	Periodic	FWS FWC MML SMC						

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
1	1.4.5	Educate boaters about manatees and boater responsibility.	Continuous	FWS FWC Local Gov'ts Local LE M Industry MML OC SMC USCG						
2	1.4.6	Evaluate effectiveness of enforcement initiatives.	Periodic	FWS FWC Local Gov'ts MML						
2	1.4.7	Provide updates of enforcement activities to managers.	Continuous	FWS Local LE USCG						
1	1.5	Assess and minimize mortality caused by large vessels.	1 yr to Assess Continuous to Reduce	**FWS** FWC COE Port Auth. USCG USN	5	5	5	5	5	
2	1.5.1	Determine means to minimize large vessel-related manatee deaths.	2 yrs	FWS						

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
1	1.52	Provide guidance to minimize large vessel-related manatee deaths.	Continuous	FWS FWC COE FDEP USCG						
1	1.6	Eliminate manatee deaths in water control structures, navigational locks, and drainage structures.	Continuous	FWS FWC **COE** DERM FDEP **WMDs**	10 10	10 10	10 10	10 10	10 10	
1	1.6.1	Install and maintain protection technology at water control structures where manatees are at risk and monitor success.	5 yrs to Install Continuous to Maintain & Monitor	FWS FWC COE FDEP WMDs						
1	1.6.2	Install and maintain protection technology at navigational locks where manatees are at risk and monitor success.	5 yrs to Install Continuous to Maintain & Monitor	FWS FWC COE FDEP WMDs						

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
1	1.6.3	Minimize injuries and deaths attributable to entrapment in drainage structures.	Install or Retrofit as Needed	FWS COE FDEP FWC Local Gov'ts WMDs						
1	1.6.4	Assess risk at existing and future water control structures and canals in South Florida.	2 yrs to Assess Continuous Monitoring	FWS COE FDEP FWC Local Gov'ts WMDs						
2	1.7	Minimize manatee injuries and deaths caused by fisheries and entanglement.	Continuous	**FWS** FWC GDNR SMC C Fish Indus R Fish Indus	10 10 1	10 10 1	10 10 1	10 10 1	10 10 1	
2	1.7.1	Minimize injuries and deaths attributed to crab pot fishery.	Continuous	FWS FWC C Fish Indus R Fish Indus						

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
2	1.7.2	Minimize injuries and deaths attributed to commercial and recreational fisheries, gear, and marine debris.	Continuous	FWS FWC Local Gov't C Fish Indus R Fish Indus OC SMC						
3	1.8	Investigate and prosecute all incidents of malicious vandalism and poaching.	As Needed	**FWS** **FWC** Local LE SMC USCG						
3	1.9	Update and implement catastrophic plan.	As Needed	**FWS** **FWC**	2	2	2	2	2	
2	1.10	Rescue and rehabilitate distressed manatees and release back into the wild.	Continuous	**FWS** Sirenia **FWC** GDNR MML **Oceanaria** SMC	50 1,130 1,000	50 1,130 1,000	50 1,130 1,000	50 1,130 1,000	50 1,130 1,000	
2	1.10.1	Maintain rescue network.	Continuous	FWS FWC MML						

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
2	1.10.2	Maintain rehabilitation capabilities.	Continuous	FWS Oceanaria						
2	1.10.3	Release captive manatees.	Continuous	FWS FWC Oceanaria						
3	1.10.4	Coordinate program activities.	Continuous	FWS						
3	1.10.5	Provide assistance to international Sirenian rehabilitators.	Continuous	FWS FWC Oceanaria SMC						
3	1.10.6	Provide rescue report.	Annually	FWS						
2	1.11	Implement strategies to eliminate or minimize harassment due to other human activities.	Continuous	**FWS** FWC Local Gov't OC SMC	5	5	5	5	5	
2	1.11.1	Enforce regulations prohibiting harassment.	Continuous	FWS FWC USCG						
2	1.11.2	Improve the definition of "harassment" within the regulations promulgated under the ESA and MMPA.	2 yrs	FWS						
		Totals for Objective 1.			4,238	4,238	4,238	4,193	4,193	$21,100

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
2	2.1	Continue the MPSWG.	Continuous	**FWS** **Sirenia** FWC	5 20 12	5 20 12	5 20 12	5 20 12	5 20 12	
2	2.2	Conduct status review.	1 yr	**FWS**			25			
2	2.3	Determine life history parameters, population structure, distribution patterns, and population trends.	Continuous	FWS **Sirenia** Academia **FWC** GDNR MML	110 342 360 3	110 383 360 3	110 415 360 3	110 430 360 3	110 445 360 3	
2	2.3.1	Continue and increase efforts to collect and analyze mark/recapture data to determine survivorship, population structure, reproduction, and distribution patterns.	Continuous	Sirenia FWC MML SMC						
2	2.3.2	Continue collection and analysis of genetic samples to determine population structure and pedigree.	Continuous	Sirenia FWC MML						
2	2.3.3	Continue carcass salvage data analysis to determine reproductive status and population structure.	Continuous	FWC						

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
2	2.3.4	Continue and improve aerial surveys and analyze data to evaluate fecundity data and to determine distribution patterns, population trends, and population size.	Continuous	FWS Sirenia FWC MML						
2	2.3.5	Continue collection and analysis of telemetry data to determine movements, distribution, habitat use patterns, and population structure.	Continuous	Sirenia FWC						
2	2.3.6	Continue to develop, evaluate, and improve population modeling efforts and parameter estimates and variances to determine population trend and link to habitat models and carrying capacity.	Continuous	Sirenia FWC						
2	2.3.7	Conduct a PVA to help assess population parameters as related to the ESA and MMPA	2yrs	FWS						
2	2.4	Evaluate and monitor causes of mortality and injury.	Continuous	**FWS** **Sirenia** **FWC** CZS GDNR MML	15 12 1,102 5	15 12 1,022 5	15 12 1,022 5	15 12 1,022 5	15 12 1,022 5	

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
2	2.4.1	Maintain and improve carcass detection, retrieval, and analysis.	Continuous	FWS FWC GDNR						
2	2.4.2	Improve evaluation and understanding of injuries and deaths caused by watercraft.	Continuous	FWS Sirenia FWC M Industry						
2	2.4.3	Improve the evaluation and understanding of injuries and deaths caused by other anthropogenic causes.	Continuous	FWS Sirenia FWC COE FDEP M Industry OC WMDs						
2	2.4.4	Improve the evaluation and understanding of naturally-caused mortality and unusual mortality events.	Continuous	FWS Sirenia Academia FWC MML						

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
2	2.5	Define factors that affect health, well-being, physiology, and ecology.	Continuous	FWS **Sirenia** Academia **FWC** MML Oceanaria	10 22 470	10 22 470	10 22 470	10 22 470	10 22 470	
2	2.5.1	Develop a better understanding of manatee anatomy, physiology, and health factors.	Continuous	Sirenia Academia FWC MML Oceanaria						
2	2.5.2	Develop a better understanding of thermoregulation.	Continuous	FWC Academia Oceanaria						
2	2.5.3	Develop a better understanding of sensory systems.	Continuous	FWS Sirenia Academia FWC MML Oceanaria						
2	2.5.4	Develop a better understanding of orientation and navigation.	Continuous	Sirenia Academia FWC Oceanaria						

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
2	2.5.5	Develop a better understanding of foraging behaviors during winter.	Continuous	Sirenia FWC Academia Oceanaria						
2	2.5.6	Develop baseline behavior information.	Continuous	FWC Academia Oceanaria						
2	2.5.7	Develop a better understanding of disturbance.	Continuous	FWS Academia CZS FWC MML Oceanaria						
2	2.5.7.1	Continue to investigate how a vessel's sound affects manatees.	Continuous	FWS Academia FWC M Industry MML Oceanaria						

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
2	2.5.7.2	Investigate, determine, monitor, and evaluate how vessel presence, activity, and traffic patterns affect manatee behavior and distribution.	Continuous	FWS Sirenia Academia FWC CZS M Industry MML Oceanaria						
2	2.5.7.3	Assess boating activity and boater compliance.	Periodic Assessment Continuous to Improve Compliance	FWS Sirenia FWC Local Gov'ts M Industry MML SMC						
2	2.5.7.4	Evaluate the impacts of human swimmers and effectiveness of sanctuaries.	2 yrs	FWS FWC						
2	2.5.7.5	Evaluate the impacts of viewing by the public.	2 yrs	FWS FWC						
2	2.5.7.6	Evaluate the impacts of provisioning.	2 yrs	FWS FWC						
		Totals for Objective 2.			2,488	2,449	2,506	2,496	2,511	$12,450

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
2	3.1	Convene a Habitat Working Group.	Continuous	**FWS** **Sirenia** **FWC** M Industry OC SMC	5 20 80	5 22 80	5 24 80	5 26 80	5 28 80	October 2002, HWG will make recommendations to refine and improve habitat criteria
1	3.2	Protect, identify, evaluate, and monitor existing natural and industrial warm-water refuges and investigate alternatives.	Continuous	**FWS** **Sirenia** **FWC** FPL MML P Industry SMC	10 120 50 80	10 126 50 20	10 132 50	10 160 50	10 160 50	
2	3.2.1	Continue the Warm- Water Task Force.	Continuous	FWS Sirenia FWC FPL P Industry SMC						
1	3.2.2	Develop and implement an industrial warm-water strategy.	2 yrs to Develop Continuous to Implement	FWS Sirenia FWC EPA FDEP P Industry						

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
1	3.2.2.1	Obtain information necessary to manage industrial warm-water refuges.	3 yrs	FWS FWC FPL P Industry						
2	3.2.2.2	Define manatee response to changes in industrial operations that affect warm-water discharges.	Continuous	FWS Sirenia FWC FPL						
1	3.2.3	Protect, enhance, and investigate other non-industrial warm-water refuges.	Continuous	FWS FWC FDEP SMC WMDs						
1	3.2.4	Protect and enhance natural warm-water refuges.	Continuous	FWS FWC FDEP SMC WMDs						
3	3.2.5	Assess changes in historical distribution due to habitat alteration.	1yr	FWS MMC Sirenia FWC						

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
2	3.2.4.1	Develop and maintain a database of warm-water refuge sites.	Continuous	FWS Sirenia FWC						
1	3.2.4.2	Develop comprehensive plans for the enhancement of natural warm-water sites.	Continuous	FWS FWC						
1	3.2.4.3	Establish and maintain minimum spring flows and levels at natural springs.	Continuous	FWS FWC EPA SMC WMDs						
1	3.3	Establish, acquire, manage, and monitor regional protected area networks and manatee habitat.	Continuous	**FWS** **Sirenia** **FWC** FDEP Local Gov'ts SMC WMDs	290 165 547	290 180 547	290 190 547	290 160 547	290 170 547	
1	3.3.1	Establish manatee sanctuaries, refuges, and protected areas.	2 yrs Periodic Update	FWS FWC						

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
	3.3.2	Identify and prioritize new land acquisition projects.	Annually	FWS Sirenia FWC FDEP FWC SMC WMDs						
2	3.3.3	Acquire land adjacent to important manatee habitats.	Continuous	FWS FDEP Land Trusts Local Gov'ts WMDs						
2	3.3.4	Establish and evaluate manatee management programs at protected areas.	Continuous	FWS FWC						
3	3.3.5	Support and pursue other habitat conservation options.	Continuous	FWS FWC SMC						
1	3.3.6	Assist local governments in development of county MPPs.	Continuous	FWS FWC Local Gov'ts M Industry R Fish Indus OC SMC						

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
1	3.3.7	Implement approved MPPs.	Continuous	FWS FWC Local Gov’ts						
2	3.3.8	Protect existing SAV and promote re-establishment of NSAV.	Continuous	FWS FWC FDEP FWC WMDs Local Gov’ts						
2	3.3.8.1	Develop and implement a NSAV protection strategy.	2 yrs to Develop Continuous to Implement	FWS Sirenia FWC FDEP FWC WMDs Local Gov’ts						
2	3.3.8.2	Develop and implement a state-wide seagrass monitoring program.	Continuous	FWS Sirenia FWC FWC NMFS WMDs Local Gov’ts						

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
21	3.3.8.3	Ensure aquatic plant control programs are properly designed and implemented.	Continuous	FWS Sirenia FWC COE FDEP FWC						
2	3.3.9	Conduct research to understand and define manatee ecology.	Continuous	Sirenia Academia FWC MML SMC						
2	3.3.9.1	Conduct research and improve databases on manatee habitat.	Continuous	Sirenia FWC						
2	3.3.9.2	Continue and improve telemetry and other instrumentation research and methods.	Continuous	Sirenia FWC						
2	3.3.9.3	Determine manatee time and depth pattern budgets.	Continuous	FWC MML						
2	3.3.10	Define the response to environmental change.	Continuous	FWS Sirenia FWC						

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
2	3.3.10.1	Define response to changes in fresh water flow patterns in south Florida as a consequence of the Everglades' Restoration.	Continuous	Sirenia Academia FWC						
2	3.3.10.2	Define response to degradation and rehabilitation of feeding areas.	Continuous	Sirenia FWC						
2	3.3.11	Maintain, improve, and develop tools to monitor and evaluate manatee habitat.	Continuous	FWS Sirenia FWC						
2	3.3.11.1	Maintain, improve, and develop tools to monitor and evaluate natural and human-related habitat influences on manatee ecology, abundance, and distributions.	Continuous	FWS Sirenia FWC						
1	3.3.11.2	Maintain, improve, and develop tools to evaluate the relationship between boating activities and watercraft-related mortality.	Continuous	FWS FWC M Industry MML						
3	3.3.11.3	Evaluate impact of changes in boat design and boater behavior.	Continuous	FWS M Industry MML						
2	3.3.11.4	Conduct a comprehensive risk assessment.	1 yr	FWS						

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
2	3.4	Ensure that minimum flows and levels are established for surface waters to protect resources of importance to manatees.	Continuous	**FWS** FWC SMC WMDs	3	3	3	3	3	
3	3.5	Assess the need to revise critical habitat.	1yr	**FWS**						
		Totals for Objective 3.			1,370	1,333	1,331	1,331	1,343	$6,708
3	4.1	Identify target audiences and key locations for outreach.	3 yrs Periodically Update	FWS FWC GDNR OC SMC	5 5 2	5 5 2	5 5 2	5 5 2	5 5 2	
2	4.2	Develop, evaluate, and update public education and outreach programs and materials.	3 yrs to Develop Periodically Update	FWS FWC FPL GDNR OC SMC	5 205 30 2	5 205 2	5 205 2	5 205 2	5 205 2	
1	4.2.1	Develop consistent and up-to-date manatee boater education courses/programs.	2 yrs to Develop Periodically Update	FWS FWC M Industry OC SMC USCG						

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
1	4.2.2	Publish and post manatee protection zone information.	Annually Publish Continuous	FWS FWC COE Local Gov'ts M Industry						
1	4.2.3	Update nautical charts and Coast Pilot to reflect current manatee protection zone information.	1 yr	FWS NOAA						
3	4.3	Coordinate development of manatee awareness programs and materials in order to support recovery.	Continuous	FWS FWC COE FDEP GDNR Local Gov'ts OC SMC USCG WMDs	5 14 2	5 14 2	5 14 2	5 14 2	5 14 2	
2	4.4	Develop consistent manatee viewing and approach guidelines.	2 yrs	**FWS** FWC OC SMC Ecotour Ind	3 1	3 1	3 1	3 1	3 1	

Implementation Schedule

Florida Manatee Recovery Plan **U.S. Fish and Wildlife Service**

Priority	Task Number	Task Description	Task Duration	Participants	Estimated Fiscal Year Costs ($1000s)					Comments
					FY1	FY2	FY3	FY4	FY5	
3	4.5	Develop and implement a coordinated media outreach program.	1 yr to Develop Continuous to Implement	FWS FWC Local Gov'ts OC Oceanaria SMC	5	5	5	5	5	
3	4.6	Utilize the rescue, rehabilitation, and release program to educate the public.	Continuous	**FWS** FWC Oceanaria	3 1	3 1	3 1	3 1	3 1	
3	4.7	Educate state and federal legislators about manatees and manatee issues.	Continuous	FWS FWC M Industry OC P Industry SMC						
		Totals for Objective 4.			288	258	258	258	258	$1,320
		Total for Recovery.			8,384	8,278	8,333	8,278	8,305	$41,578

U.S. SMALL BUSINESS ADMINISTRATION
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November 16, 2018

Julie Trimingham
julietrimingham@mac.com

Re: Freedom of Information Act Request dated November 5, 2018
SBA FOIA Tracking No: SBA-2019-000100

Dear Ms. Trimingham:

This responds to your Freedom of Information Act (FOIA) request received by this office on November 5, 2018. You requested SBA disaster loan approval information for Miami Seaquarium, Marine Exhibition Corporation, Palace Entertainment, and/or Festival Fun Parks. This office has determined that the information should be released in full.

The U.S. Small Business Administration, Office of Disaster Assistance, approved a disaster assistance loan for Marine Exhibit Corporation on March 11, 1993 in the amount of $500,000.

In accordance with 13 C.F.R. 102.6, no FOIA processing fees have been assessed. I trust this addresses your request and as such, I am closing your FOIA file with this office.

Sincerely,

Stacye Harness
Administrative Attorney
Extension 3606

2017 2016 2015 2014 NOAA Funds UM Coral Restoration Research

A nursery-raised staghorn coral outplanted onto a reef in Miami-Dade County by a citizen scientist. The two-year project will help the recovery of threatened coral species and enhance coastal resilience

MIAMI—The University of Miami's (UM) Rosenstiel School of Marine and Atmospheric Science announced today a two-year award from the National Oceanic and Atmospheric Administration (NOAA) to support cutting-edge research in coral conservation. The grant will support coral propagation and restoration efforts necessary to help with the recovery of threatened coral species and increased resilience of coastal communities in Florida's Miami- Dade County.

This project is a collaboration between UM coral biologists Diego Lirman (https://www.rsmas.miami.edu/people/faculty?p=diego-lirman) and Andrew Baker (https://www.rsmas.miami.edu/people/faculty?p=andrew-c-baker), NOAA's (http://www.habitat.noaa.gov/restoration/approaches/corals.html)Coastal Ecosystem Resiliency Program, Miami Science Barge (http://www.miamisciencebarge.org/), and the Phillip and Patricia Frost Museum of Science (https://www.frostscience.org/).

Healthy reefs shape coastlines and provide the first line of defense against weather hazards such as hurricanes. Coral reefs can reduce wave energy by up to 97 percent, thereby protecting low-lying coastlines from erosion and flooding, and by trapping sediments and limiting the need for costly beach renourishment projects.

"The need to enhance resilience through management action is crucial in urban-influenced ecosystems where human and natural stressors interact," said UM Rosenstiel School Associate Professor Diego Lirman (https://www.rsmas.miami.edu/people/faculty?p=diego-lirman), co-lead investigator of the project. "South Florida has been identified as a global hotspot for coastal urbanization, and the synergistic man-made stressors of habitat fragmentation, overfishing, and pollution, make it an ideal setting for this project."

Rebuilding healthy and physically complex coral reefs has been shown to be a cost-efficient, natural way to enhance fisheries habitat, promote recreational diving, and buffer the threats of coastal hazards. Coral reef restoration as a natural restoration solution is considered to be two to five times cheaper than using artificial structures.

"Restored reefs, unlike artificial structures, are self-building and self-repairing," said UM Associate Professor Andrew Baker, co-lead investigator of the project for UM. "They are able to continue to accrete and grow after deployment, catch up to projected sea-level rise, and build long-term resilience to storms."

During the project, the researchers will outplant nursery-raised staghorn corals onto nearshore reef habitats within Miami-Dade County, identify resilient coral genotypes able to survive the impacts of extreme temperature changes, and develop an outreach and education program to engage the public and coral reef conservation and restoration.

The research and restoration activities will be showcased through interactive public displays as part of the Frost Science Museum's Inventor-in-Residence program, where the Baker lab (https://www.facebook.com/cr2lab) will be running experiments in the museum's Knight Learning Center to increase coral thermal tolerance. The public can get directly involved in restoration through the UM Rescue a Reef (http://www.rsmas.miami.edu/news-events/press-releases/2017/noaa-funds-um-coral-restoration-research) program, where citizen scientists will be able to plant nursery-grown corals onto depleted reefs alongside scientists.

Funding for the project consists of a NOAA grant #NA17NMF4630010, totaling $591,920 and non-federal funds of $264,700. (https://news.miami.edu/research/index.html) Science and Technology (https://news.miami.edu/science-technology/index.html)

Experiences

Experience nature on a whole new level.

Fun Swimming with Dolphins in Miami, Florida

Whether swimming deep beneath the surface or leaping high above the water, the sealife of Miami Seaquarium® will delight and astound. Take a look at all we have to offer. There's an experience for every member of the family.

ANIMAL ENCOUNTERS SHOWS EXHIBITS ANIMAL INFO ALL

Touch Pools

Submerge your hands and touch

Dolphin Odyssey

Dolphin Encounter

bamboo sharks, cleaner fish and invertebrates in our NEW Touch Pools! This interactive exhibit will make you not want to leave, especially if you have a swarm of fish swimming up to you and giving you kisses.

Explore the ocean's most loved creatures during this deep-water experience. You'll have approximately 30 minutes to share all sorts of behaviors, including kisses, handshakes, rubs, training techniques and feeding your new friend. The experience is highlighted by an awesome dorsal pull.

This fun-filled, 30-minute program is a great way for young and old alike to have an unforgettable experience with a dolphin. During an Encounter, the dolphin swims to you while you stand in just a few feet of water. Do things like shake hands, share a friendly kiss and even try out some training signals.

Caribbean Flamingos

With our renovated entrance, you will now encounter over 30 beautiful flamingos, as soon as you enter the park. Our birds are surrounded by tropical landscape, allowing them to roam freely and enjoy the weather. Come meet these lovely birds and take picturesque photos!

Seal Swim

Our Seal Swim program is a unique deep and shallow water interaction with harbor seals. During your 15-20 minute interaction, you'll be swimming freely alongside our seals and then be introduced to your special seal friend to receive hugs, kisses, and take part in a fun training session.

Penguin Encounter

Learn about our African penguins at Penguin Isle and immerse yourself in their environment with our all-new penguin encounter! Enjoy a unique interaction with one of the world's most beloved birds in an intimate setting. You'll have the opportunity to meet and interact with a penguin one-on-one.

Sea Trek Reef Encounter

Marvel at an underwater walking journey through our 300,000-gallon tropical reef. With a state-of-the-art dive helmet that allows you to breathe freely, you'll feel right at home under the sea. During your 20-minute journey, you'll encounter tropical fish, sting rays and a variety of unique sea creatures.

VIP Tour

Our VIP Tour is an interactive 2 1/2-hour program where you may have the opportunity to get up-close and personal with some of our exotic animal friends. A personal tour guide will take you on a fascinating adventure.

Conservation Outpost

Learn about the challenges that manatees and endangered sea turtles face in the wild as well as the park's rescue and rehabilitation program. Enjoy a display of informative graphics and videos of our rescue team on a mission. You might even catch a glimpse of our Rescue truck on display!

Rescue a Reef

In a joint effort to advance the conservation and restoration of reefs, Miami Seaquarium and University of Miami's RSMAS has added a new exhibit: 'Rescue a Reef'! Take a look at the 500- gallon jewel tank aquarium showcasing the university's coral reef restoration program.

African Penguin

The African Penguin is the only species that breeds in Africa. You can't find them anywhere else! Their scientific name comes from the Greek work spen which means wedge and demersus which means plunging. This refers to their streamlined bodies which enable them to swim fast and travel long distances.

Penguin Isle

Meet the newest creatures to call Miami Seaquarium® their home – African Penguins living at the brand new Penguin Isle. As soon as guests walk up to Penguin Isle, they will be greeted over-sized, colorful graphics and educational displays about penguins and the challenges they face in the wild.

Top Deck Dolphin

Thrill to the high-flying antics of bottlenose dolphins as they perform breathtaking leaps and rolls. Guests thrill to the acrobatics of these agile marine mammals as they brave "rough waters" during the Rock n' Roll Cruise. The Top Deck dolphins can be viewed anytime throughout the day from above and below the water.

Tortuga Flats

Explore our sea turtle exhibit to learn more about the 5 endangered sea turtle species that live in Florida waters. The sea turtles featured are a part of the rescue and rehabilitation program at Miami Seaquarium®.

Sea Turtles

Sea turtles have inhabited the earth's waters for millions of years. Sea turtles live for long periods of time but scientists are not certain of their life spans as sea turtles can outlive the scientists. Currently, five of the eight recognized species of sea turtle can be found in the waters surrounding Florida.

Tropical Reef

The reef aquarium features a 750,000-gallon saltwater aquarium teeming with reef fishes of every size and color. During the Reef Presentation, a diver accompanied by a group of Sea Trekers work their way around the aquarium allowing visitors to watch as he/she hand-feeds tropical fish, large groupers, stingrays and moray eels.

Golden Dome Sea Lion

Enjoy the hilarious adventures of Salty the Sea Lion and his Reef Rangers. This comedic playlet allows the sea lion and seal stars to show off their athletic and comedic abilities as they explore the reef searching for a littering diver. You, too, can be a Reef Ranger by helping protect our waters from trash and recycling whenever possible.

Conservation for Kids

Welcome, Reef Rangers

Miami Seaquarium Reef Rangers are passionate about environmental protection, science, and conservation.

Visit Miami Seaquarium today to become an official Miami Seaquarium Reef Ranger and pledge to protect the Planet!

Reef Ranger Pledge:

1. To pick up at least 3 pieces of trash every time I go to the beach!
2. To treat the environment, animals, and the ocean with respect!
3. To try and reduce my use of single-use plastics and other unnecessary waste!
4. To have fun learning about the ocean and spreading the word about marine conservation!

Read all about some of the endangered animals you can find at Miami Seaquarium such as sea turtles, manatees, and penguins here! As Reef Rangers it's important to learn what you can do to help these animals. Also check out the "Rescue Rehabilitate and Release" tab to find out what Miami Seaquarium does for sea turtles and manatees!

ORCA WHALES

SEA TURTLES

MANATEES

AFRICAN PENGUINS

RESCUE REHAB & RELEASE

RESCUE REHAB & RELEASE

60 Years of Caring

Miami Seaquarium® is committed to wildlife conservation and the rescue, rehabilitation and release of distressed marine mammals. This commitment began even before the park first opened its doors. In July of 1955, the park's conservation work began when Maime, a 3 week old, 47 pound manatee was rescued after being injured.

Since that first rescue in 1955, Miami Seaquarium® has rescued, rehabilitated and released countless manatees, sea turtles, dolphins and whales. Since 2002, more than 80 manatees have been rescued and rehabilitated at Miami Seaquarium®.

Manatee Rescue & Rehabilitation

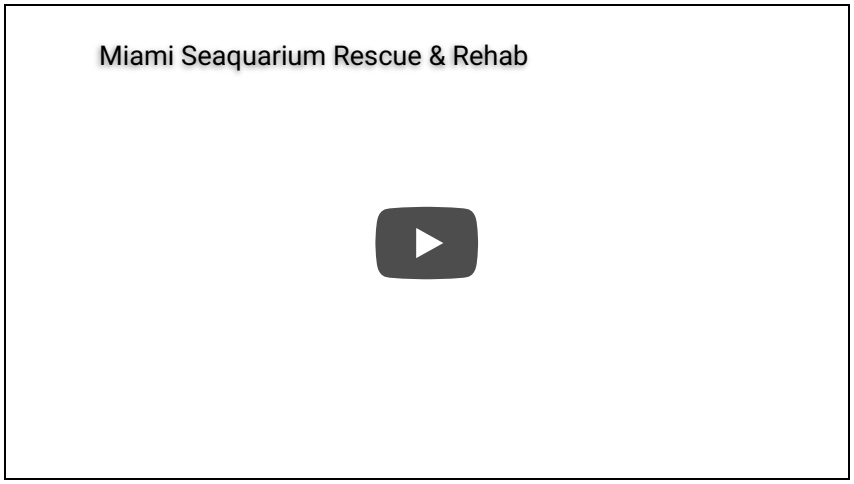
Miami Seaquarium® is one of only three facilities in the State of Florida with a letter of authorization from the US Fish and Wildlife Service as a Manatee Critical Care Facility. The park's highly trained animal rescue team includes divers, staff veterinarians and animal caretakers who are on call 24 hours a day, seven days a week.

As a part of its commitment to conservation, Miami Seaquarium® has documented many firsts in the area of manatee care in its 60-year history. These 'firsts' include:

- The first manatee to be conceived and born in the care of man.
- The first manatee rehabilitation facility to document "spontaneous lactation" among female manatees
- The first manatee to be diagnosed using an MRI test
- The first neurological surgery performed on an injured manatee using the same rod and pin system used to repair human spinal cord injuries
- The rehabilitation and release of the first manatee to survive a deadly condition called Pyothorax known to be fatal to all previous manatees
- The release of the smallest manatee to have ever been rescued, rehabilitated and released.

Today Miami Seaquarium® is at the forefront of manatee rescue and rehabilitation techniques and is recognized as having one of the leading marine mammal rescue and rehabilitation teams in the country.

Sea Turtle Rescue & Rehabilitation



COMMUNITY LEADERSHIP COURSE

Reef Rangers Gallery

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 16-14814

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC., ANIMAL LEGAL DEFENSE FUND, HOWARD GARRETT, and ORCA NETWORK,

Appellants,

v.

MIAMI SEAQUARIUM and FESTIVAL FUN PARKS, LLC, d/b/a PALACE ENTERTAINMENT,

Appellees.

CORRECTED BRIEF OF APPELLEES MIAMI SEAQUARIUM AND FESTIVAL FUN PARKS, LLC, D/B/A PALACE ENTERTAINMENT

ON APPEAL FROM THE UNITED DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

James Hardwick Lister (pro hac vice)
William A. Earnhart (pro hac vice)
Melinda L. Meade Meyers (pro hac vice)
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Counsel for Festival Fun Parks, LLC, d/b/a Miami Seaquarium and d/b/a Palace Entertainment

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC, ET AL. V. MIAMI SEAQUARIUM, ET AL.

CASE NO. 16-14814

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, the Defendants-Appellees submit this list, which includes all trial and magistrate judges, and all attorneys, persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of this case:

1. Animal Legal Defense Fund
2. Birch Horton Bittner and Cherot P.C.
3. Cech Samole, Brigid F.
4. Cobos, Evelyn A.
5. Coffey Burlington, P.L.
6. Earhart, William A.
7. Festival Fun Parks, LLC d/b/a Miami Seaquarium and d/b/a Palace Entertainment
8. Garrett, Howard
9. Goodman, Jared
10. Greenberg Traurig, P.A.
11. Hawks, Caitlin

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC, ET AL. V. MIAMI SEAQUARIUM, ET AL.

CASE NO. 16-14814

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (Continued)

12. Hiaasen, Scott A.
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PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC, ET AL. V. MIAMI SEAQUARIUM, ET AL.

CASE NO. 16-14814

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (Continued)

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, Defendant-Appellee, Festival Fun Parks, LLC, makes the following statements as to corporate ownership:

Festival Fun Parks, LLC's parent company is Palace Entertainment Holdings, LLC. No publicly-traded company owns more than 10% of the ownership interests in Festival Fun Parks, LLC.

/s/ Elliot H. Scherker
Elliot H. Scherker

STATEMENT REGARDING ORAL ARGUMENT

This appeal is taken from a summary judgment. The district court's extensive order sets forth both the pertinent facts and the legal basis for the court's ruling. The issues before this Court may readily be addressed on the record and briefs, without oral argument.

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STATEMENT OF JURISDICTION

I. STATUTORY JURISDICTION.

The district court had statutory jurisdiction. 28 U.S.C. § 1331; 16 U.S.C. § 1540. This Court has jurisdiction under 28 U.S.C. § 1291.

II. LACK OF STANDING.

Standing is raised before this Court because it goes to subject matter jurisdiction. *E.g., Fla. Wildlife Fed'n, Inc. v. S. Fla. Water Mgmt. Dist.*, 647 F.3d 1296, 1302 (11th Cir. 2011). Defendants-Appellees (collectively, Seaquarium) challenged the standing of Plaintiffs-Appellants (Plaintiffs) on summary judgment, and also sought summary judgment on the merits of Plaintiffs' claims. The district court ruled that Plaintiff People for the Ethical Treatment of Animals, Inc. (PETA) had standing to bring an action under the Endangered Species Act (ESA)—but granted summary judgment for Seaquarium on the merits. (R:203).

Plaintiffs appealed, and Seaquarium took a cross-appeal to raise lack of standing. After jurisdictional briefing, the Court dismissed the cross-appeal as unnecessary, ruling that Seaquarium may raise standing in this brief.

A. The District Court's Ruling.

Lolita (also referred to as Toki) is a legally captured Southern Resident Killer Whale (SRKW or orca), residing at Seaquarium. (R:203:2-3). Seaquarium is licensed by the Animal Planet Health Inspection Services (APHIS), an agency within the Department of Agriculture (USDA). (R:203:4). APHIS administers the Animal Welfare Act (AWA) and implementing regulations. (R:203:4). Following reviews in 2011-12, APHIS determined that Seaquarium's treatment of Lolita

complies with AWA requirements. (R:203:4-5). Plaintiffs sued Seaquarium, alleging a "take" of Lolita under the Endangered Species Act (ESA). (R:1).

1. The parties' submissions.

a. PETA's use of litigation.

PETA is a self-described "non-profit organization … dedicated to protecting animals from abuse, neglect, and cruelty." (R:133:2). A declaration by its general counsel states that "PETA uses public education, cruelty investigations, research, animal rescue, legislation, special events, celebrity involvement, protest campaigns, and administrative comments and complaints to educate the public and enforce laws enacted to protect animals." *Id.*

PETA also uses litigation as a tool (R:167:3)—and this case is the most recent chapter in PETA's orca litigation strategy:

- In 2011, PETA and other plaintiffs filed an action in the Southern District of California, as purported "next friends" of five orcas. *Tilikum ex. rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't, Inc.*, 842 F. Supp. 2d 1259, 1260 (S.D. Cal. 2012). PETA asserted standing under the Thirteenth Amendment (applied to animals), which the court rejected. *Id.* at 1263-65.
- Eight months after that ruling, PETA, together with other plaintiffs (some of whom are plaintiffs in this case) brought an action against the USDA under the Administrative Procedure Act (APA), in the Northern District of California, challenging USDA's renewal of Seaquarium's license, alleging that Lolita was being housed "under

conditions that violate the USDA's standards for issuance of a license with respect to" among other things, "minimum tank size." *Animal Legal Defense Fund v. U.S. Dep't of Agric.*, No. 13-20076, 2014 WL 11444100, at *1 (S.D. Fla. Mar. 25, 2014), *aff'd*, 789 F.3d 1206 (11th Cir. 2015). The case was transferred to the Southern District of Florida, which upheld the USDA. *Id*. at *7-8.

- This Court affirmed. *Animal Legal Defense Fund v. U.S. Dep't of Agric.*, 789 F.3d 1206, 1223-25 (11th Cir. 2015).
- PETA brought this action in July 2015. (R:1).

Jeffrey Kerr, PETA's general counsel, averred in the APA action that PETA employs "public education, cruelty investigations, research, animal rescue, legislation, special events, celebrity involvement, protest campaigns, *and lawsuits to enforce laws enacted to protect*[] *animals*." (R:167:Ex.A:1) (emphasis added). Kerr's declaration in this case, however, elides the word "lawsuits," replacing it with "administrative comments and complaints." (R:133-14:1-2).[1] That rewording cannot hide litigation as a key component of PETA's strategy—which deprives PETA of standing, as will be set forth below.

b. Standing.

PETA asserted that "[t]he Seaquarium's continuing 'take' of Lolita frustrates

[1] In a January 2016 complaint in Alabama federal court, PETA stated that it uses, among other things, "administrative petitions and comments, *and lawsuits to enforce laws enacted to protect animals*." Complaint at ¶ 10, *People for the Ethical Treatment of Animals, Inc. v. Mobile Zoo*, No. 16-00030, 2016 WL 286719 (S.D. Ala. Jan. 19, 2016) (emphasis added).

PETA's mission by requiring it to focus its resources on litigation to ensure compliance with established laws rather than on other educational and investigatory efforts, or on administrative comments and legislation." (R:131:5-6). PETA asserted that it "has had to divert substantial resources of money and staff time since at least 2011 to efforts to prevent the Seaquarium from continuing to harm and harass Lolita." (R:131:6). Among those alleged "efforts" are securing Lolita's status under the ESA—that is, adding an animal that the district court noted is "the only [SRKW] presently held in captivity" to protections afforded to SRKWs in the wild (R:203:3)—and "suing the USDA for renewing the Seaquarium's AWA license, and appealing dismissal of that suit." (R:131:6).

Seaquarium argued that, when PETA "sue[s] a defendant such as Miami Seaquarium," PETA is "engaging in [its] mission[], not filing a lawsuit to stop resources from being diverted away from use in [its] mission[]." (R:160:6). PETA's "self-chosen use of resources" does not establish injury. (R:160:8). Moreover, the alleged expenses had been "incurred in PETA's unsuccessful [AWA] litigation," which "concerned most of the same facts and legal standards" as this case. (R:160:10).

Finally, Seaquarium established that PETA had received almost $14,000 in donations all impelled by Lolita. (R:167:3-4). Although PETA claimed to have spent "at least $27,630.29 on … 'litigation and administrative efforts,'" those expenditures were for "counsel and related litigation costs" in the APA case. *Id.*

2. The summary judgment.

The district court addressed only PETA's standing, declining to decide

whether any other plaintiff has standing. (R:203:16-17).[2] The court ruled that "the asserted illegal act—the claimed unlawful 'take' of Lolita under ESA—is in direct conflict with PETA's mission of protecting animals." (R:203:10-11) (footnote omitted). Because PETA has "organized and promoted protests against Lolita's conditions," sued the USDA, sought to have Lolita protected under the ESA, and used social media to disseminate information about Lolita, PETA "demonstrate[d] that [its] diversion of resources to address Lolita's captivity, apart from this lawsuit, has impaired its mission of protecting animals from abuse." (R:203:11-12).

The court rejected Seaquarium's argument that "PETA's mission includes litigation," ruling that PETA's "litigation to accomplish its mission … is distinct from litigation itself being PETA's organizational goal." (R:203:13). Also, "[a]n organization's *voluntary* decision to divert resources to counteract the asserted illegal acts, unrelated to the legal challenge itself, qualifies as an injury," such that "PETA's choice to divert its resources … does not disqualify it from claiming injuries." (R:203:14) (original emphasis). "PETA has incurred a net economic loss" from "challeng[ing] the conditions of Lolita's captivity." (R:203:15).

The court further ruled that "[t]he diversion of resources and the conflict

[2] *See Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1195 (11th Cir. 2009) ("[b]ecause [individual plaintiff] has standing … we need not decide whether … organizational plaintiffs [have] … standing"). Plaintiffs cannot defend the district court's ruling by asking this Court to consider any other plaintiff's purported standing. *See, e.g., Norelus v. Denny's, Inc.*, 628 F.3d 1270, 1293 (11th Cir. 2010) ("appellate courts may not make fact findings").

with PETA's mission is directly traceable to the asserted unlawful 'take' … and would be redressed by enjoining Seaquarium from violating the ESA." (R:203:16). Although PETA was not likely to succeed in compelling Seaquarium to "forfeit possession" of Lolita, the court ruled that "redressability goes to PETA's diversion of resources," and enjoining Seaquarium to adhere to the ESA would reduce the likelihood of "divert[ing] [PETA's] resources to challenge the asserted illegal acts." *Id*.

B. PETA Lacks Standing.

1. The *Havens* doctrine.

The ESA's citizen-suit provision, under which "any person" may commence a civil action, 16 U.S.C. § 1540(g)(1), requires a plaintiff to satisfy "the irreducible constitutional minimum of standing": (i) a "concrete and particularized" injury in fact that is "actual or imminent," (ii) causation, and (iii) that actual threatened injury is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *accord Fla. Pub. Interest Research Grp. Citizen Lobby, Inc. v. E.P.A.*, 386 F.3d 1070, 1083 (11th Cir. 2004). An organization's abstract interest is thus insufficient to establish standing, "no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem." *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

Only when an organization's function has been "perceptibly impaired," is there a "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—[to] constitute[] far more than simply a setback to the organization's abstract social interests." *Havens Realty*

Corp. v. Coleman, 455 U.S. 363, 379 (1982). In *Havens*, a non-profit corporation, whose purpose was fostering "equal opportunity in housing" through a "housing counseling service," used "tester plaintiffs" to uncover discriminatory leasing practices. 455 U.S. at 368-69. The organization and individual plaintiffs sued the defendant leasing company under the Fair Housing Act, and the organizational plaintiff "asserted that the [defendant's] … practices … had frustrated the organization's counseling and referral services, with a consequent drain on resources." *Id.* The Supreme Court held that, if defendant's practices "have perceptibly impaired [the organizational plaintiff's] ability to provide counseling and referral services," it had "suffered injury in fact." *Id.* at 379.

This Court's leading *Havens* decision is *Florida State Conference of N.A.A.C.P. v Browning*, 522 F.3d 1153 (11th Cir. 2008), in which the NAACP and individual plaintiffs challenged a Florida law (referred to as "Subsection 6") that "impose[d] a new verification process as a pre-condition of voter registration for first-time registrants in Florida." *Id.* at 1156. The statutory process required the Florida Department of State to compare a registration application with information in state and federal databases; if the information fails to match, the applicant will not be registered to vote. *Id.* at 1156-57. The NAACP asserted that "Subsection 6 will hinder [plaintiffs'] ability to carry out their mission of registering eligible voters" because "they will have to divert scarce time and resources from registering additional voters to helping applicants correct the anticipated myriad of false mismatches due to errors." *Id.* at 1160 n.9, 1164-65. The defendant asserted that "this shift will be an entirely self-inflicted injury." *Id.* at 1165.

Because "[t]he Florida NAACP plan[ned] to register ten percent of the African-Americans eligible to vote in the upcoming election and personnel that would otherwise be part of this registration effort would have to be diverted to resolving mismatches under Subsection 6," the Court held that the NAACP had "averred that their actual ability to conduct specific projects during a specific period of time will be frustrated by Subsection 6's enforcement." *Id.* at 1166. The court recognized that "plaintiffs cannot bootstrap the cost of detecting and challenging illegal practices into injury for standing purposes," but held that "[c]osts unrelated to the legal challenge are different and do qualify as an injury, whether they are voluntarily incurred or not." *Id.*; *accord Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341-42 (11th Cir. 2014) (organizational plaintiffs engaged in "voter registration and education" had standing to challenge efforts to remove non-citizens from voter rolls because organizations would "expend[] resources to locate and assist [their] members to ensure that they were able to vote"); *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1349-51 (11th Cir. 2009) (plaintiff had standing to challenge voter-identification law "[b]ecause it will divert resources from its regular activities to … assist voters" in obtaining identification).[3]

This Court thus extends standing to organizational plaintiffs that divert resources from their ordinary advocacy activities to challenge a newly adopted law

[3] This Court has also applied *Havens* to grant organizational standing to plaintiffs challenging state laws affecting undocumented aliens, based on the same rationale. *Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1259-60 (11th Cir. 2012); *Hispanic Interest Coal. of Ala. v. Governor of Ala.*, 691 F.3d 1236, 1243-44 (11th Cir. 2012).

or regulation that, if allowed to stand, would deleteriously affect those activities. But this case presents a very different scenario: PETA's ordinary activities *include* litigation, if and when PETA perceives—rightly or wrongly—that animal abuse is taking place. Unlike the voting-rights organizations to which the Court has granted standing, PETA is bootstrapping its *litigation* strategy into standing to sue.

2. PETA has suffered no injury-in-fact.

Absent a direct effect—meaning "a concrete and demonstrable injury" to an organization's ordinary activities, an organization does not have standing. *People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087, 1094-95 (D.C. Cir. 2015). "[A]n organization's use of resources for litigation, investigation in anticipation of litigation, or advocacy is not sufficient to give rise to an Article III injury," and that an organization "suffer[s] an injury in fact where it 'expend[s] resources to educate its members and others,'" if "doing so subjects the organization to 'operational costs beyond those normally expended.'" *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919-20 (D.C. Cir. 2015) (second alteration in original; citations omitted). The Plaintiff in that case, who had sought to challenge USDA's food safety regulations, "alleged nothing more than an abstract injury to its interests that is insufficient to support standing." *Id*. at 921. As here, nothing in the challenged action limited the Plaintiff's "ability to seek redress for a violation of law" or to "restrict[] the flow of information that [the organization] uses to educate its members." *Id*. at 921. The court held that the plaintiff "has not alleged an injury to its interest" that would "give rise to organizational standing." *Id*.

When the D.C. Circuit accorded PETA standing to challenge the USDA's failure to adopt administrative regulations for birds, it did so—not because of allege "mistreatment of birds by third parties"—but because the failure to adopt regulations had damaged PETA's advocacy toolbox by preventing it from getting "redress for its complaints" and remedying "a lack of information for its membership." *USDA*, 797 F.3d at 1094-95. "PETA's alleged injuries—denial of access to bird-related AWA information including, in particular, investigatory information, and a means by which to seek redress for bird abuse—are 'concrete and specific to the work in which they are engaged,'" such that "PETA has alleged a cognizable injury sufficient to support standing." *Id*. at 1095. The agency inaction thus *directly* affected PETA's ability to perform its declared mission—as opposed to here, where PETA is challenging "mistreatment of [Lolita] by third parties," *i.e.* Seaquarium, which is firmly on the no-standing side of the Court's distinction.

Because "the only 'service' impaired is pure issue-advocacy—the very type of activity distinguished by *Havens*"—PETA cannot establish standing. *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1162 (D.C. Cir. 2005). That a plaintiff "cannot allocate issue advocacy expenses in any way it would prefer … is insufficient to establish standing." *Ams. for Safe Access v. D.E.A.*, 706 F.3d 438, 457-58 (D.C. Cir. 2013).

Indeed, "[t]he mere fact that an organization redirects some of its resources to litigation and legal counseling … is insufficient to impart standing." *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 358 (5th Cir. 1999) (citation

omitted) [hereinafter, *ACORN*]. "An organization cannot … manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit"—because, "[w]ere we to rule otherwise, any litigant that could create injury in fact by bringing a case." *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990); *accord N.A.A.C.P. v. City of Kyle, Tex.*, 626 F.3d 233, 238 (5th Cir. 2010). Although "an organization has standing to sue on its own behalf where it devotes resources to counteract a defendant's allegedly unlawful practices," *ACORN*, 178 F.3d at 360; *accord Scott v. Schedler*, 771 F.3d 831, 837 (5th Cir. 2014), "[n]ot every diversion of resources to counteract the defendant's conduct … establishes an injury in fact." *Kyle*, 626 F.3d at 238.

"An organization cannot obtain standing to sue in its own right as a result of self-inflicted injuries, i.e., those that are not 'fairly traceable to the actions of the defendant.'" *ACORN*, 178 F.3d at 358 (quoting *Bennett v. Spear,* 520 U.S. 154, 162 (1997)). "Expanding the definition of Article III injury to include an organization's litigation-related expenses implies that any sincere plaintiff could bootstrap standing by expending its resources in response to actions of another." *Id*. (citations and internal quotation marks omitted). The important distinction is whether the organization's resources have allegedly been diverted "to litigation or investigation in anticipation of litigation," which "does not constitute an injury in fact sufficient to support standing," or whether there has been "a diversion of resources to programs designed *to counteract the injury to its interest[s]*." *Equal Rights Ctr. v. Post Props, Inc.*, 633 F.3d 1136, 1140 (D.C. Cir. 2011) (emphasis added).

Where, as here, an organizational plaintiff is merely engaging in the same activities in which it would have engaged regardless of the litigation and cannot demonstrate that the purported diversion of resources "concretely and 'perceptibly impaired' the [organization's] ability to carry out its purpose," but rather was "simply a setback to the organization's abstract social interests" so "there is no injury in fact." *Kyle*, 626 F.3d at 238-39 (citations omitted); *accord Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 78 (3d Cir. 1998) (organizational plaintiff's supposed injury from being "forced to divert resources to investigation" did not establish injury-in-fact because acts "which comprised the 'investigation' went on as part of the [organization's] normal day-to-day operations"). PETA accordingly has failed to establish injury-in-fact.

C. Causation and Redressability.

1. Causation.

The district court's truncated consideration of causation is legally flawed, in the first instance, by its premise—that "PETA has suffered actual injuries." (R:203:16). The court's causation analysis is that "[t]he diversion of resources and the conflict with PETA's mission is directly traceable to the asserted unlawful 'take' in violation of the ESA." (R:203:16). With its premise having been debunked, the causation ruling also fails. Nor did PETA otherwise show causation.

Causation is "a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the

defendant." *Lujan*, 504 U.S. at 560 (citation and internal quotation marks omitted); *accord Kawa Orthodontics, LLP v. Sec'y, U.S. Dep't of Treasury*, 773 F.3d 243, 247-48 (11th Cir. 2014). PETA's failure to prove that its purported educational efforts were *required* to eliminate misimpressions as to Lolita's condition is fatal to its standing. *Am. Soc'y for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 27-28 (D.C. Cir. 2011). The most that Plaintiffs can say is that Seaquarium represents its care of Lolita as humane and lawful, exactly as APHIS found it to be, and that Plaintiffs simply disagree. That disagreement does not confer standing.

2. Redressabililty.

The district court seems to have accepted, albeit without expressly so ruling, that PETA cannot obtain a forfeiture of Lolita or an order compelling Seaquarium to capture another wild orca as a companion animal. (R:203:16 n.15). The entirety of PETA's argument on redressability, which the district court adopted (R:203:16) was that PETA is "being forced to divert resources to counteract [Seaquarium's] take of Lolita," and requiring Seaquarium to comply with the ESA "will provide" PETA "the remedy" that will "resolve [its] injury." (R:176:9).[4] Even taking that allegation at face value, PETA cannot satisfy the *Lujan* requirement that "it must be likely, as opposed to merely speculative, that the injury will be redressed by a

[4] The allegation is inconsistent with Kerr's declaration that PETA's injury could be alleviated only if "Lolita were provided better living conditions," including "an adequate amount of space, companions of her own species, and shelter from the sun." (R:133-14:3).

favorable decision." 504 U.S. at 247 (citation and internal quotation marks omitted).

"It is the plaintiff's burden to plead and prove … redressability." *Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.,* 641 F.3d 1259, 1266 (11th Cir. 2011) (citation omitted). Based on PETA's own assertions and public declarations, it cannot show that merely compelling ESA compliance—without moving Lolita to the requested "sea pen," shared with a (non-existent) companion orca—"would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." *Id*. (citation omitted). PETA certainly will not tell this Court that it will cease and desist from all actions against Seaquarium, whether in the public square or a courtroom, if it obtained that relatively minimal relief. PETA failed to demonstrate redressability.

STATEMENT OF THE ISSUE

Whether the district court correctly ruled that there has been no "take," in violation of Section 9(a)(1)(B) of the ESA, 16 U.S.C. § 1538(a)(1)(B).

STATEMENT OF THE CASE AND FACTS

I. INTRODUCTION.

This case addresses the welfare and treatment of Lolita, a captive SRKW at Seaquarium's facility in Miami-Dade County. Seaquarium is licensed by APHIS, which, after its reviews in 2011 and 2012, determined that Seaquarium complied with the AWA's requirements in its treatment of Lolita. (R:203:4-5).

SRKWs in the wild have been recognized as an endangered species since 2005. (R:203:3). In 2015, the National Marine Fisheries Service (NMFS) granted

PETA's petition requesting that Lolita, despite being in captivity, be recognized as a protected SRKW. *Id*. Once ESA protection was extended to captive SKRWs, Plaintiffs brought this action, alleging that the conditions under which Lolita is maintained constitute a "take." (R:1; R:203:3).

The district court granted summary judgment for Seaquarium on the merits, ruling that Seaquarium had not violated the AWA and that Plaintiffs' alleged "harm" does not constitute a take under the ESA. (R:203:17-39). On appeal, this Court is called upon to determine whether the district court correctly applied the ESA.

II. COURSE OF PROCEEDINGS.

Plaintiffs sued Seaquarium on July 20, 2015, seeking declaratory and injunctive relief. (R:1). Seaquarium filed a summary judgment motion on March 11, 2016, asserting: (i) Plaintiffs lack standing; and (ii) as a matter of law, Plaintiffs could not demonstrate that Seaquarium had committed a "take." (R:134; R:135). Plaintiffs filed a motion for partial summary judgment on standing. (R:131). The district court granted partial summary judgment to Plaintiffs, ruling that PETA had standing (R:203:10-16), and granted summary judgment for Seaquarium on the merits. (R:203:17-39) (the Order).[5] The district court entered final judgment on June 2, 2016, and Plaintiffs filed their notice of appeal on July 1, 2016. (R:205; R:206).

[5] See Statement of Jurisdiction, *supra*.

III. STATEMENT OF FACTS.

A. Lolita's Residence at Seaquarium.

The underlying facts are summarized in the Order:

> Lolita is a Southern Resident Killer Whale ("SRKW") that was legally captured off the coast of Washington State in 1970 when she was approximately 5 years old. Seaquarium purchased Lolita soon after her capture, and she has lived at the Seaquarium since September 24, 1970. She is now approximately 51 years of age. Her current age exceeds the median life expectancy of SRKWs.
>
> Lolita weighs about 8,000 pounds and is twenty-five feet long. For as long as she has been housed by the Seaquarium, she has lived in an oblong tank that, at its widest point, is eighty (80) feet across, and at its lowest point, is twenty (20) feet deep. Since the 1980s, the tank has been surrounded by stadium seating. For a time, Lolita shared her tank with Hugo, another SRKW. However, Hugo died in the 1980s. For the last twenty years, Lolita has shared her tank with [P]acific white-sided dolphins ("PWSDs"), who are of a biologically related species in that they are taxonomically members of the same family (i.e., the dolphin or "delphinidae" family).

(R:203:2-3) (internal citations and footnotes omitted).[6] With the exception of a SeaWorld orca, Lolita has survived longer than any orca under human care. (R:127:2; R:164:2).[7]

Lolita is healthy for an older orca. (R:203:4; R:22-7:3). Plaintiffs' veterinarian, Dr. Gallego, acknowledged that he saw no "signs of her being in bad physical condition" during a January 2016 discovery inspection. (R:127:2; R:164:2). As evidenced by a video recording, Lolita has appropriate muscle tone

[6] Lolita is actually 20 feet long. (R:173:2).

[7] Two years after Lolita was captured, Congress passed the Marine Mammal Protection Act (MMPA), which prohibits "take"—including capture—of marine mammals without a permit. 16 U.S.C. § 1372(a)(1). The MMPA has resulted in a practical moratorium on orca captures.

and unscarred skin, teeth, and eyes; she also was cooperative with trainers and veterinarians. (R:127:2-7; R:164; R:130-1).

Seaquarium's full-time veterinarian, Dr. Rodriguez, who has cared for Lolita since the late 1990s, provides a preventative medicine regime. (R:127:2; R:164). APHIS found that "[t]his whale receives excellent veterinary care." (R:22-7:3).[8]

The PWSDs are used as companion animals pursuant to rules adopted by APHIS for humane care of marine mammals exhibited in aquariums, which require a compatible companion from the "same or biologically related species." 7 U.S.C. § 2143; 9 C.F.R. § 3.101-110. Although Plaintiffs have argued that the PWSDs "rake" (scratch) Lolita with their teeth (*e.g.*, Plaintiffs' Brief at 5, 12), it is undisputed that cetaceans, including orcas and dolphins, naturally rake each other, both in the wild and in captivity. (R:203:17). APHIS found the rakes to be the "superficial" result of "normal behavior and activities," which "are promptly identified and treated." (R:203:4; R:22:3). Dr. Gallego placed Lolita as a three on a 1-10 scale for rakes. (R:203:17).

Plaintiffs have asserted that Lolita's pool is too small (Plaintiffs' Brief at 10-11), but APHIS found that the pool satisfies the AWA's orca pool-size requirements. (R:203:4-5; R:22-3; R:22-4).[9] APHIS also found that "shade and

[8] The parties agree Lolita has had pterygium, an irreversible eye condition, since the 1980s (approximately 30 years before the "take" prohibition was applied to Lolita in 2015). (R:127:9; R:164; R:203:18-19).

[9] Plaintiffs have demanded Lolita be "forfeited" to them for transfer to a "sea pen." (R:127; R:164). Plaintiffs propose to ship Lolita, who has been in human care for 46 years, roughly 3,000 miles to an unbuilt and unfunded "sea pen," in which Plaintiffs have no plans to provide a companion animal. *Id.* The proposed "sea (continued . . .)

protection from weather is provided by the stadium seating around Lolita's pool, and … Lolita has none of the skin and eye lesions associated with inadequate shade." (R:203:5; R:22-7:3). The pool is also sufficiently deep "to provide [sun] protection by submerging," and "[t]here was no evidence of solar damage to the skin." (R:22-5:2). Dr. Gallego also found no evidence of sunburn during the discovery inspection, and Plaintiffs otherwise presented none. (R:127:8-9; R:164).

B. The Summary Judgment Order.

1. The district court's statutory construction analysis.

The district court ruled that, because the ESA does not specifically address treatment of captive animals—while the AWA comprehensively does so—and Congress has left that relationship between the two acts in place for 40 years, "the plain terms of the ESA, its legislative history, and its coexistence with the AWA and the MMPA," mean that an AWA-licensed exhibitor "'take[s]' a captive animal … only when its conduct gravely threatens or has the potential to gravely threaten the animal's survival." (R:203:38) (original alteration). The court reached that construction after an exhaustive review of: the ESA's statutory text; legislative history; agency interpretations; and the relationship between the AWA and the ESA. (R:203:19-37).

(. . . continued)
pen" (which does not meet the 100-mile-by-100-mile dimensions required by Plaintiffs' non-veterinary expert) is the first step of a plan that ends with Lolita being released to the wild. (R:127; R:164; R:203:6). Doing so would violate a rule providing that marine mammals who have been in captivity for two years or more are presumptively non-releasable. 50 C.F.R § 216.27(a)(1)(iii).

a. The ESA's text.

The statutory definition of "take," as used in ESA Section (9)(a)(1), 16 U.S.C. § 1538(a)(1)(B), lists 10 prohibited acts: "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The district court noted that "the proscribed conduct overlaps in some respects," *e.g.*, "there is only a pedantic distinction between 'wound' and 'harm,' the former and more narrow term involving the piercing or laceration of skin and the latter, broader term involving a physical injury of some kind." (R:203:21-22) (citations and footnotes omitted). The district court accordingly applied *noscitur a sociis*, looking to the "common denominators among the terms," *i.e.*, conduct that: "constitutes seizure ('trap,' 'capture,' 'collect'); … or, has the potential to seize or gravely threaten the life of ('pursue,' 'hunt,' 'wound') a member of a listed species." (R:203:23).

The terms at issue on Plaintiffs' claims are "harm" and "harass," which the district court construed as having "the same essential character as the eight associated terms" and therefore "should be interpreted with the same level of 'impact' to the listed species as the other eight terms denote." (R:203:23).[10] The court accordingly construed "harm" and "harass" as "human conduct that amounts to a seizure or is gravely threatening, or has the potential to seize or gravely threaten the life of a member of a protected species." (R:203:25).

[10] Alternatively, the district court applied the *ejusdem generis* canon, which yields the same result, because "the more general word 'harm' appears in relation to specific terms which denote grave harm." (R:203:23).

b. Legislative history.

The district court also reviewed the ESA's legislative history, which "provides strong evidence that use of the terms 'harm' and 'harass' to describe a 'take' were intended to encompass only conduct amounting to a seizure, that is gravely threatening, or has the potential to seize or gravely threaten the life of an endangered species." (R:203:25). The 1973 Senate Report on the ESA "highlighted two causes of extinction the ESA was designed to reverse": "'hunting' and 'destruction of natural habitat.'" *Id.* The court also noted the statement of the House floor manager that the "principal threat to animals stems from *destruction of their habitat*" and "from those who would *capture or kill them for pleasure or profit*." (R:203:25-26) (citations omitted; emphasis by the court).

The court also relied on the ESA's "cornerstone," which "prescribes the actual designation of a species as endangered," and found that "[t]hese two causes of species extinction—habitat destruction and predation—are also reflected" in the ESA's provisions, as well as in implementing regulations, pursuant to which "a species is threatened or endangered based on any one or a combination of … [statutory] factors," including destruction of habitat, "disease or predation," and "other natural or manmade factors" that affect the species' existence. (R:203:26) (footnote omitted; quoting 16 U.S.C. § 1533(a)(1)). "[A]nalyzing the plain meaning of 'take' and its attendant verbs—harm, harass, hunt, shoot, kill, wound, capture, trap, pursue, collect—relative to the ESA's purpose in the two causes of species extinction Congress sought to counteract, it is clear that in formulating the ESA, 'harm' and 'harass' … were intended to proscribe acts … gravely

threatening, constitute the seizure of, or have the potential [to] seize or gravely threaten a member of a listed species." *Id.*

c. Agency interpretation.

Noting that "[d]eference to agency interpretation is … appropriate, as is the case here, where the subject being regulated is complex and requires an expertise exceeding the 'normal province of Congress,'" the district court cited a 1994 "joint policy" issued by the NMFS and Fish and Wildlife Service (FWS), which states that, "to the extent known at the time a species is listed as endangered, the agencies would address specific activities that will not be considered likely to result in a 'take.'" (R:203:27-28). The court gave particular attention to the NMFS' 2015 "comments regarding the permissible captive care activities for Lolita," particularly that, "depending on the circumstances, it would not likely find continued possession, care, and maintenance of a captive animal to be a violation of ESA section 9." (R:203:28-29). Also, "in responding to concerns regarding Lolita's care … the NMFS stated that Lolita's 'captive care requirements' are regulated by APHIS … and thus, are not within the [NMFS's] jurisdiction." (R:203:29).

"Finally, and relevant to Plaintiffs' proposed remedy in this case, the NMFS, in responding to many comments supporting Lolita's relocation to a sea pen or release into the wild, further interpreted section 9(a)(1) by stating that release of a captive animal into the wild could itself constitute a 'take.'" *Id.* Looking next to the FWS's interpretations of "'take' under the ESA in relation to the captive status of a listed species," the court noted the FWS's definition of "harass" as having "a

different character when applied to an animal in captivity than when applied to animal[s] in the wild." *Id*. (citation omitted).

"This interpretation was informed … by the purpose of the ESA as being 'best served by conserving species in the wild along with their ecosystems'—captive animals, the FWS stated, are 'removed from their natural ecosystems and have a role in survival of the species only to the extent that they maintain genetic integrity.'" *Id*. (citation omitted). "Consistent with this view, the FWS promulgated a definition of 'harass' as: 'an intentional or negligent act or omission which creates the likelihood of injury to *wildlife* by annoying it to such an extent as to significantly disrupt normal behavioral patterns … and excluded from the definition, when applied to 'captive wildlife[,] … generally accepted [a]nimal husbandry practices that meet or exceed the minimum standards for facilities and care" under the AWA. (R:203:30) (quoting 50 C.F.R. § 17.3; emphasis by the court). The court accorded deference to NMFS's statements made in the course of including Lolita in the ESA listing, and to the FWS statement in promulgation of a rule governing captive wildlife, "given the autonomy and interpretive power granted to them in implementing the ESA, the text and design of the ESA, and the validity of the statements in light of the policy objectives of the ESA." (R:203:30-31).

The agencies' interpretations "further confirm the ambit of the ESA," and "[t]hat the types of harm … the ESA was designed to safeguard against are, on the whole, distinct from concerns regarding the humane treatment and welfare of an animal in captivity." (R:203:31). Rather, "the humane treatment and welfare

standards governing Lolita's captivity are provided for in a different federal law," the AWA, to which the court turned in its final analytical step. *Id*.

d. The ESA and the AWA.

The court addressed "the relationship between the ESA and the AWA insofar as they both apply to animals held in captivity, particularly those trained and used for entertainment purposes." *Id*. The AWA "provides for the humane treatment of animals … use[d] … for exhibition and research purposes," *i.e.*, "unlike the ESA, it deals exclusively with captive animals, and specifically, animals that are exhibited in license facilities such as the Seaquarium." (R:203:32). The AWA is implemented by regulations and administrative enforcement—"in contrast to the ESA," because "the AWA's goals are not advanced through private causes of action." *Id*.

"In implementing the policy considerations enacted in the AWA, APHIS first established detailed regulations for the humane handling, care, treatment and transportation of marine mammals used for exhibition purposes in 1979," which standards "govern Lolita's captive care requirements at the Seaquarium." (R:203:32-33). Those regulations "address many of the types of injuries identified by Plaintiffs," including "protection from the weather *or from direct sunlight*," UV exposure, adequate enclosures, veterinary care, and companion animals. (R:203:33-34) (citations omitted; emphasis by the court). "Thus, from a wide angle, the AWA deals with a subject similar to that addressed by the ESA," but the AWA "is sharply focused on the 'humane treatment' of captive animals used for exhibition and research," which is "the overriding concern reflected in the

implementing regulations." (R:203:34). "By contrast, the ESA promotes a different congressional objective—the protection of endangered species from habitat destruction and predation." *Id*.

"[I]n the forty-plus years since their respective enactments, Congress has not disturbed this balance." *Id*. The ESA was amended numerous times, but never with any reference to "the humane treatment of captive animals," as Congress "elected not to prescribe captive care requirements in the ESA, or expand the definition of 'take' to include the humane treatment of endangered species in captivity." (R:203:36). "Instead, it left such responsibility with … APHIS." *Id*.

The court concluded that Plaintiffs' position, "if adopted … would bring the ESA into conflict with the AWA, by "displac[ing] a long established regulatory framework providing for licensing and oversight of exhibitors and researchers by APHIS," and by "expos[ing] licensed exhibitors and researchers to liability to special interest groups despite their compliance with APHIS' captive care standards." (R:203:37). It would also "substitute the judgment of a federal trial court judge for the technical expertise of the responsible agency." *Id*.

2. The district court's ruling on Plaintiffs' claims.

Based on this analysis, the district court ruled that a licensed exhibitor, such as Seaquarium, can be deemed to have committed a "take" of a captive animal "only when its conduct gravely threatens or has the potential to gravely threaten the animal's survival." (R:203:38). Applying that standard, the court relied on APHIS's findings that Seaquarium's care for Lolita complies with AWA humane-care rules, albeit Seaquarium "largely does not dispute that Lolita has medical

issues for which she receives treatment." (R:203:4-5, 19 & n.19).[11]

The court addressed "the conditions and consequent injuries identified by Plaintiffs":

> They fall into three categories: (a) physical and psychological injuries due to inadequate pool size and design; (b) physical and psychological injuries due to aggressive and inappropriate behavior by the PWSDs; and (c) inappropriate veterinary care. There is simply no evidence from the experts or otherwise that these conditions and concomitant injuries, individually or collectively, greatly threaten Lolita's existence. Thus, while in a literal sense the conditions and injuries of which Plaintiffs complain are within the ambit of the ordinary meaning of "harm" and "harass," it cannot be said that they rise to the level of grave harm that is required to constitute a "take" by a licensed exhibitor under the ESA.

(R:203:38) (footnote omitted). Rather, "[t]he conditions … and the injuries the Plaintiffs … presented to the Court, are largely addressed under a different federal law," the AWA. (R:203:39). Plaintiffs' remedy "is not under the ESA, but rather with Congress, where their efforts to improve Lolita's less than ideal conditions can be addressed through legislation." *Id*.

IV. STANDARD OF REVIEW.

This Court reviews a summary judgment *de novo*, with the evidence viewed in a light most favorable to the nonmoving party. *Likes v. DHL Express (USA), Inc*., 787 F.3d 1096, 1098 (11th Cir. 2015). The *de novo* standard also applies to statutory interpretation. *Carver Middle Sch. Gay-Straight All. v. Sch. Bd. of Lake*

[11] The district court did not address the admissibility of Plaintiffs' proffered expert opinion evidence of alleged injuries, because that evidence, even if admissible and accepted as true, would not support a viable claim of a "take." (R:203:18 n.18).

Cty., Fla., 842 F.3d 1324, 1328 (11th Cir. 2016).

SUMMARY OF ARGUMENT

The central question in this case is whether an AWA-licensed exhibitor of captive animals, whose care and treatment of the animal has been determined by APHIS—the agency charged with enforcement of the AWA—to be both compliant with the AWA and humane, may nonetheless be deemed to have committed a forbidden "take" of an endangered or threatened species under the ESA, absent a showing that the animal is gravely threatened by the exhibitor's care and treatment. The district court, faithfully applying statutory construction principles and deferring to the intent underlying both the AWA and the ESA, which have operated in harmony for more than 40 years, correctly declined both radically to reinvent the ESA's "take" prohibition or to step into the shoes of the responsible agency and independently review Seaquarium's care and treatment of Lolita.

Plaintiffs would have the courts construe two of the 10 terms used by the Congress to define a "take" under the ESA—"harm" and "harass"—to include virtually *any* perceived deficiency in an exhibitor's care and treatment of a captive animal, an APHIS determination that the care and treatment is AWA-compliant notwithstanding. Applying fundamental statutory construction canons, the district court correctly construed "harm" and "harass" consistently with the other eight terms that define a "take," all of which entail acts that either gravely threaten an animal's life or have the potential to do so. Because "harm" and "harass" must be construed as having the same essential character as the eight associated terms, the statutory text does not admit of the construction urged by Plaintiffs.

Moreover, if either term is legitimately subject to differing interpretations, adverting to the usual extrinsic sources—legislative history, agency construction, and the ESA's interrelationship with the AWA—yields the same result. As NMFS stated in the order that expanded SKRW-protected status to captive orcas in 2015 (which provided the jumping-off point for this action), the AWA, *not* the ESA, specifies care standards for Lolita, and "the mere continuing to hold and day-to-day care of a captive animal" is not considered a take under the ESA. As the district court correctly noted, accepting Plaintiffs' construction would make continued possession of captive endangered or threatened species members by AWA-compliant exhibitors completely untenable.

The protections accorded by the ESA should properly be invoked *only* when an exhibitor's alleged improper care or treatment rises to the level of gravely threatening (or potentially threatening) an animal's life. Because, even giving Plaintiffs' allegations full credence, the alleged injuries do not rise to that level, the district court correctly granted summary judgment for Seaquarium.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONSTRUED THE ESA's DEFINITION OF "TAKE."

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *TVA v. Hill*, 437 U.S. 153, 180 (1978). It has a twofold purpose: (i) "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and (ii) "to provide a program for the conservation of such … species." 16 U.S.C.

§ 1531(b). To achieve those purposes, the ESA includes "a variety of protections designed to save from extinction species that … [are] designate[d] as endangered or threatened." *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 690 (1995) [hereinafter *Sweet Home*].

A. The District Court Correctly Interpreted the Statutory Text.

Section 9(a)(1) of the ESA prohibits a "take" of a member of a listed species, 16 U.S.C. § 1538(a)(1)(B)-(C), defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). None of those terms are further defined.

The well-established meaning of "take," when Congress statutorily defined the term in enacting the ESA, was "to get possession (as fish and game) by killing or capturing"—actions that necessarily end or severely affect the life of the animal. Webster's Third New Int'l Dictionary (1961). In listing the 10 actions that can constitute a "take" under the new statutory definition, Congress intended to outlaw "every conceivable *way*" one might "take" an animal. S. Rep. No. 93-307 (1973), *as reprinted in* U.S.C.C.A.N. 2989, 2995 (emphasis added). That stated intent demonstrates that Congress was fully aware of what a "take" is, and accordingly focused the statutory definition on plugging potential loopholes by prohibiting all means of committing a "take," rather than prohibiting actions that do not *substantially impact* wildlife. *Sweet Home*, 515 U.S. at 696-99, 726 (citing Senate Report).

1. Interpreting the language.

The two terms at issue here are "harm" and "harass," which Plaintiffs argue

should be read in the "broadest possible terms." *E.g.*, Plaintiffs' Brief at 22-23. But, as the district court recognized, "[w]hile the ESA's purpose is 'broad,' construing statutory language is not merely an exercise in ascertaining 'the outer limits of [a word's] definitional possibilities.'" (R:203:22) (original alteration; internal citation omitted) (citing *Dolan v. Postal Serv.*, 546 U.S. 481, 486 (2006)). Rather, because "this is a statutory interpretation case," an "[a]nalysis of the statutory text, aided by established principles of interpretation, controls." *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014).

The district court correctly invoked the principle that a court should not "interpret the relevant words … in a vacuum, but with reference to the statutory context, structure, history, and purpose." (R:203:21) (internal quotation marks omitted) (quoting *Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014)). Looking first to "statutory context," the Supreme Court has recognized that there is considerable overlap among the 10 definitions of "take," which "reflects the [ESA's] broad purpose." *Sweet Home*, 515 U.S. at 698 n.11; *accord Endangered & Threatened Wildlife & Plants; Final Redefinition of "Harm,"* 46 Fed. Reg. 54748 (Nov. 4, 1981) (because "[i]t is obvious that there is considerable overlap in many of these terms … it would be a fruitless and impractical exercise to attempt to define any one of these terms to the exclusion of the others so as to have no overlap of prohibited actions").[12] The district court took note: "[f]or example, there is no meaningful difference between the terms 'trap' and 'capture'; and, there

[12] For an analysis of administrative interpretations, see Point II.B.2, *infra*.

is only a pedantic distinction between 'wound' and 'harm,' the former and narrow term involving the piercing or laceration of skin, and the latter, broader term involving a physical injury of some kind." (R:203:22) (footnotes and citations omitted). That being so, the district court correctly invoked *noscitur a sociis* to construe "harm" and "harass." (R:203:22-23).

2. *Noscitur a sociis.*

Noscitur a sociis is "the commonsense principle that statutory terms, ambiguous when considered alone, should be given related meaning when grouped together." *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1247 (11th Cir. 2008). Stated otherwise, "a word is known by the company it keeps." *McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016) (citation omitted). It is "often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Id*. (citation omitted).

The district court construed "harm" and "harass" in context:

> Here, the common denominators among the terms are conduct that: constitutes seizure ("trap," "capture," "collect"); is gravely threatening ("kill," "shoot"); or, has the potential to seize or gravely threaten the life of ("pursue," "hunt," "wound") a member of a listed species. The remaining terms "harm" and "harass" should, therefore, have the same essential character as the eight associated terms. Or put another way, as Seaquarium argues, "harm" and "harass" should be interpreted with the same level of "impact" to the listed species as the other eight terms denote.

(R:203:23).[13] The district court's construction of "harm" and "harass" is consistent

[13] The district court noted that *ejusdem generis* "yields the same result," because "the more general word 'harm' appears in relation to specific terms which denote *grave* harm: 'cause the death of a (person, animal, or other living thing)' ('kill'); (continued . . .)

with the only Court of Appeals decision to have construed either term in an analysis of a "take" prohibition. *United States v. Hayashi*, 22 F.3d 859, 864 (9th Cir. 1993).

In *Hayashi*, upon which the district court relied (R:203:24), the court read "harass," as used in the definition of "take" in the MMPA, to require *significant* adverse impact—indeed, a "direct intrusion" on wildlife, because the other components of the MMPA "take" definition ("hunt, capture, or kill") certainly did so. 22 F.3d at 864 (citing 16 U.S.C. § 1362 (1992)).[14] The court accordingly held that firing a gun near—but not at—a dolphin, to discourage it from eating fish hooked on fishermen's lines, was not "harass[ment]" as a matter of law, and therefore was not a "take." *Id*.[15]

The Supreme Court's recent *McDonnell* decision validates the court's

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(. . . continued)
'pursue an animal in order to kill or for sport' ('hunt'); 'kill or wound (a person or animal) with a bullet…' ('shoot'); and, 'to follow someone or something in order to catch or attack them' ('pursue')." (R:203:23-24) (internal citations omitted). "[G]eneral words or principles, when appearing in conjunction with particular classes of things, will not be considered broadly, but rather will be limited to the meaning of the more particular and specific words." *Doe v. Naval Air Station, Pensacola, Fla.*, 768 F.2d 1229, 1232 (11th Cir. 1985).

[14] When *Hayashi* was decided, the MMPA (like the ESA) "fail[ed] to define 'harass'" in the definition of "take." *Hayashi,* 22 F.3d at 861. Congress amended the MMPA specifically to define "harass," 16 U.S.C. § 1362 (2003), such that "harass" under the ESA is now more narrow than "harass" under the MMPA. *Special Rule for the Polar Bear*, 73 Fed. Reg. 76249, 76251 (Dec. 16, 2008).

[15] As Plaintiffs note (Plaintiffs' Brief at 31-32), *Sweet Home* distinguished *Hayashi* in addressing indirect and direct harm, but *Hayashi* is persuasive insofar as it correctly analyzes the degree of impact that must be shown to constitute harassment (and by logical extension, harm). 515 U.S. at 702 n.16.

analysis. The defendant was charged with honest-services fraud for accepting benefits, while serving as Virginia's governor, in exchange for an "official acts," *i.e.*, "arranging meetings" for a constituent, "'hosting' events," and "contacting other government officials." 136 S. Ct. at 2361. The bribery statute required the government to identify a "question, matter, cause, suit, proceeding or controversy" that "may at any time be pending" or "may by law be brought" before a public official, as the first element of an "official act." 18 U.S.C. § 201(a)(3).

Addressing "whether a typical meeting, call, or event is itself a 'question, matter, cause, suit, proceeding or controversy,'" the Supreme Court rejected the government's position that "nearly any activity by a public official qualifies as a question or matter—from workaday functions, such as the typical call, meeting, or event, to the broadest issues the government confronts, such as fostering economic development," ruling that the statutory language "do[es] not sweep so broadly." *McDonnell*, 136 S. Ct. at 2368. Instead, the Court looked to "[t]he last four words in that list—'cause,' 'suit,' 'proceeding,' and 'controversy'—[which] connote a formal exercise of governmental power, such as a lawsuit, hearing, or administrative determination." *Id*. "Although it may be difficult to define the precise reach of those terms, it seems clear that a typical meeting, telephone call, or event arranged by a public official does not qualify as a 'cause, suit, proceeding or controversy.'" *Id*. But "'question' could also mean any 'subject or aspect that is in dispute, open for discussion, or to be inquired into,' and a 'matter' any 'subject' of 'interest or relevance.'" *Id*. (citing Webster's Third New Int'l Dictionary (1961)). Those meanings would turn "a typical meeting, call, or event" into a "question" or

"matter" under the statute. *Id*.

Both terms can also be read "more narrowly," such that "question" would mean "a subject or point of debate or a proposition being or to be voted on in a meeting," and "matter" would mean "a topic under active and usually serious or practical consideration." *Id*. (citing Webster's). "To choose between those competing definitions," the Court "look[ed] to the context in which the words appear," to "conclude that a 'question' or 'matter' must be *similar in nature* to a 'cause, suit, proceeding or controversy.'" *Id*. at 2369 (emphasis added). "Because a typical meeting, call, or event arranged by a public official is not of the same stripe as a lawsuit before a court, a determination before an agency, or a hearing before a committee, it does not qualify as a 'question' or 'matter' under § 201(a)(3)." *Id*.

Similarly, in *Yates v. United States*, 135 S. Ct. 1074 (2015), the Supreme Court held that a "tangible object" as used in the Sarbanes-Oxley Act, does not include a fish, even though a fish is—literally—a tangible object, because that term is used in association with "document" and "record," and thus refers to storage media, e.g., a hard drive. 135 S. Ct. at 1081, 1085-87. The Court emphasized that, while dictionary definitions "bear consideration, they are not dispositive" when context counsels a narrow reading. *Id*. at 1082-83.

McDonnell and *Yates* are controlling: "harm" and "harass," even if open to other meanings, must be construed consistently with "pursue, hunt, shoot, wound, kill, trap, capture or collect"—precisely as the district court construed them. (R:203:22-23). Just as "question" or "matter" could not be broadly construed, so

as to have their colloquial or quotidian sense, "harm" and "harass" cannot be so construed. *McDonnell* establishes that the district court got it exactly right.[16]

3. *Sweet Home.*

Plaintiffs' primary argument is that the district court's interpretation is nonetheless foreclosed by the *Sweet Home* decision—and, indeed, they go so far as to accuse the district court of "join[ing] the *Sweet Home* dissent in its 'selective foray' through the ESA's legislative history, redefining 'harm' and 'harass' to require a 'grave threat' or 'seizure' of an animal." Plaintiffs' Brief at 22-25 (citations and emphasis omitted). The district court did nothing of the kind. The irony here is that *Sweet Home* fully *supports* the district court's analysis.

In *Sweet Home*, the plaintiffs sought a declaratory judgment to overturn an Interior Department regulation that defined "harm" under the ESA as "an act which actually kills or injures wildlife," including "significant habitat modification or degradation [that] actually kills or injures wildlife by significantly impairing essential behavioral patterns." 515 U.S. at 691 (quoting 50 C.F.R. § 17.3). The plaintiffs asserted that the regulation should have been "limited … to direct applications of force against protected species," *i.e.*, to "direct or willful action that

[16] And, as the district court correctly stated, the *noscitur a sociis* canon "becomes even more pertinent when the proscribed conduct, like the term 'take' in the ESA section 9(a)(1), is defined with a list of overlapping words." (R:203:22-23) (citing *United States v. Costello*, 666 F.3d 1040, 1046 (7th Cir. 2012) ("[w]hen a statute is broadly worded in order to prevent loopholes from being drilled in it by ingenious lawyers, there is a danger of its being applied to situations absurdly remote from the concern of the statute's framers" (citations omitted))). Plaintiffs mistake Congress' intent to outlaw all ways by which one might *commit* a "take" as intended to outlaw any human-caused *impact* on any protected animal.

leads to injury." *Id*. at 697-98.

The Supreme Court rejected that challenge, relying on a dictionary definition of "harm"—"to cause hurt or damage"—which, "[in] *the context of the ESA*, … naturally encompasses habitat modification that results in *actual injury or death* to members of an endangered or threatened species." *Id*. at 697 (emphasis added). The Court noted that "the dictionary definition does not include the word 'directly' or suggest in any way that only direct or willful action that leads to injury constitutes 'harm.'" *Id*. "Moreover, unless the statutory term 'harm' encompasses indirect as well as direct injuries, the word has no meaning that does not duplicate the meaning of other words that § 3 uses to define 'take.'" *Id*. at 697-98. The Court reversed the Court of Appeals' application of *noscitur a sociis* "to give 'harm' essentially the same function as other words in the definition, thereby denying it independent meaning." *Id*. at 701-02.

But the Court was careful to uphold a construction of "harm" that is entirely *consistent* with other definitions of "take." First, the Court noted that "[s]everal of the words that accompany 'harm' in the § 3 definition of 'take,' especially 'harass,' 'pursue,' 'wound,' and 'kill,' refer to actions that do not require direct applications of force." *Id*. at 701. And the Court reaffirmed the proper role for *noscitur a sociis* to play in analyzing Section 3—which speaks directly to the district court's analysis in this case.

The Court reiterated that "[t]he canon … counsels that a word gathers meaning from the words around it." *Id*. at 702 (citation and internal quotation marks omitted). The Court applied the canon to hold that indirect harm is

included:

> The statutory context of "harm" suggests that Congress meant that term to serve a particular function in the ESA, *consistent with*, but distinct from, the functions of the other verbs used to define "take." The Secretary's interpretation of "harm" to include indirectly injuring endangered animals through habitat modification permissibly interprets "harm" to have "a character of its own not to be submerged by its association."

Id. at 702 (emphasis added; citation omitted).

Because, as noted earlier, *Sweet Home* involved a direct *facial* challenge to a regulation, the ultimate question was merely whether the Secretary had acted reasonably in promulgating the regulation, a question that was addressed with deference to agency's expertise. *Id*. at 703-04 ("[t]he latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation"). The Supreme Court noted that the plaintiffs in that case had "advance[d] strong arguments that activities that cause minimal or unforeseeable harm will not violate the [ESA] as construed" in the Interior Department's "'harm' regulation." *Id* at 699. The breadth of the challenge, however, foreclosed any need for the Court to address the regulation's proper *scope*— because the plaintiffs' "facial challenge to the regulation" sought to "invalidate the Secretary's understanding of 'harm' in every circumstance, even when an actor knows that an activity, such as draining a pond, would actually result in the extinction of a listed species by destroying its habitat." *Id*. at 699-700. Holding only that, "[g]iven Congress' clear expression of the ESA's broad purpose

to protect endangered and threatened wildlife, the Secretary's definition of 'harm' is reasonable," *id*. at 700, the Court had no occasion to address whether regulations defining "harm" could lawfully be construed to include "minimal or unforeseeable harm" being deemed a "take."

Here, the district court was called upon to construe a regulation that, as urged by Plaintiffs, would treat any alleged lapse in the ordinary care and treatment of a captive animal by an AWA-licensed exhibitor whose care and treatment has been approved by APHIS as a take. The Court accordingly reached the question left open in *Sweet Home*. But, because the Court held that "harm" in the definition of "take" should be construed to avoid immunizing the "grave result" of man-made "detrimental[] chang[e] [of] natural habitat," resulting in "members of those species [being] killed or injured," *id*. at 696, the district court's construction is entirely consistent with *Sweet Home*. By requiring a "grave[]" threat to the animal's survival for there to be a "take" of an exhibited animal receiving humane AWA-compliant care (R:203:38), the district court reached the unforeseeable-harm issue left open in *Sweet Home*, heeding the Court's acknowledgement that there are "strong arguments" why "minimal or unforeseeable harm" cannot be deemed a "take," *id*. at 699-700, and correctly interpreting "harm" and "harass" in context.

B. The District Court's Construction Is Consistent with ESA's Legislative History and Administrative Interpretations of "Take."

1. Legislative history supports the court's interpretation of "harm" and "harass."

After reviewing the ESA's legislative history, the district court concluded that, "analyzing the plain meaning of 'take' and its attendant verbs—harm, harass,

hunt, shoot, kill, wound, capture, trap, pursue, collect—relative to the ESA's purpose and the two causes of species extinction Congress sought to counteract, it is clear that in formulating the ESA, 'harm' and 'harass' … were intended to proscribe acts gravely threatening, constitute the seizure of, or have the potential [to] seize or gravely threaten a member of a listed species." (R:203:25-26). If there is any ambiguity as to whether the common meaning of "harm" and "harass"—as opposed to the district court's contextual reading—should be applied, the legislative history requires the contextual approach.

It is a familiar principle that, "[w]hen ambiguity in a statute renders congressional intent unclear," such that a court is unable to discern such intent from the plain meaning of other statutory text, "it is appropriate to resort to extrinsic aids such as legislative history." *Lowery v. Ala. Power Co.,* 483 F.3d 1184, 1205 (11th Cir. 2007); *accord U.S. Steel Mining Co. v. Dir., OWCP*, 719 F.3d 1275, 1283 (11th Cir. 2013). The history is pellucid.

The 1973 Senate Report on the ESA stresses that the act was designed to reverse two "causes of *extinction*"—"hunting and destruction of natural habitat." S. Rep. No. 93-307, 2990 (emphasis added). The Supreme Court, in analyzing the ESA in *Sweet Home*, noted the comments of Senator Tunney, who stressed that "most endangered species are threatened primarily by the destruction of their natural habitats." 515 U.S. at 706 n.19 (quoting 119 Cong. Rec. 25669 (1973)). The Supreme Court also cited the remarks of the House floor manager, to the effect that the "principal threat to animals stems from destruction of their habitat" and "from those who would capture or kill them for pleasure or profit," as to which the

floor manager added: "we certainly can make it less profitable for them to do so." *Id*. (quoting same source).

The district court then turned to the ESA's "cornerstone":

> These two causes of species extinction—habitat destruction and predation—are also reflected in the cornerstone of the Act, section 4, which prescribes the actual designation of a species as endangered. 16 U.S.C. § 1533(a)(1). Pursuant to the ESA and its implementing regulations, a species is threatened or endangered based on any one or a combination of the following section 4(a)(1) factors: "the present or threatened destruction, modification, or curtailment of its habitat or range; overutilization for commercial, recreational, scientific or educational purposes; disease or predation; … inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting [the species'] existence."

(R:203:26) (original alteration). The district court correctly ruled that "the legislative history accompanying the ESA provides strong evidence that use of the terms 'harm' and 'harass' to describe a 'take' were intended to encompass only conduct amounting to a seizure, that is gravely threatening, or has the potential to seize or gravely threaten the life of an endangered species." (R:203:25-26).

2. The district court correctly relied on agency interpretations.

When "statutory language is ambiguous," the courts will "defer to [an agency's] consistent and well-reasoned interpretation" of the language. *Serrano v. U.S. Attorney Gen.*, 655 F.3d 1260, 1266 (11th Cir. 2011). Contrary to Plaintiffs' assertions (Plaintiffs' Brief at 32-40), agency decisions construing the "take" prohibition and its relationship to AWA standards defining humane care of captive animals support the district court's determination that an exhibitor's provision of AWA-compliant (and thus "humane") care is not a "take." (R:203:27-37).

First, the NMFS—which, as a division of the National Oceanic and Atmospheric Administration, is charged with implementing regulations to protect threatened or endangered marine species under the ESA, 50 C.F.R. § 222.101(a)—has defined "harm" as " an act which *actually kills or injures* fish or wildlife." 50 C.F.R. § 222.102 (emphasis added). In giving exemplars, NMFS returned to that core definition: "[s]uch an act may include significant habitat modification or degradation *which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns*, including, breeding, spawning, rearing, migrating, feeding or sheltering." *Id*. (emphasis added).

NMFS adhered to this definition in promulgating the very rule requested by PETA to include Lolita under the ESA and implementing regulations. *Amendment to the Endangered Species Act Listing of the Southern Resident Killer Whale Distinct Population Segment*, 80 Fed. Reg. 7380 (Feb. 10, 2015) [hereinafter *Final Rule*]. NMFS stated that what constitutes a "take" should be decided on an individual basis, because "depending on the circumstances, we would *not* likely find continued possession, care, and maintenance of a captive animal to be a violation of section 9." *Id*. at 7389 (emphasis added). As NMFS officials explained in announcing the rule:

> If Miami Seaquarium was looking to move [Lolita], transfer her, or certainly if there were any interest in…release that would certainly have to be looked at and looked at in terms of a take issue. *But the mere continuing to hold and day-to-day care of a captive animal is not considered a take under the Endangered Species Act.*

(R:130-1:Ex.10 Timestamp 25:30) (emphasis added).

NMFS's statements are entirely consistent with formal precedent of the FWS, an agency within the Interior Department that is responsible for implementing the ESA for land-based species and some aquatic species, 50 C.F.R. § 17.1(a), and thus for the vast majority of ESA-protected species exhibited in zoos and aquariums. *Captive-bred Wildlife Reg.,* 63 Fed. Reg. 48634, 48636 (Sept. 11, 1998). The FWS defines "harm" under the ESA identically with the NMFS's definition. 50 C.F.R. § 17.3 ("an act which actually kills or injures wildlife … by significantly impairing essential behavioral patterns").

The FWS has also promulgated a definition of "harass" under the ESA: "an intentional or negligent act or omission which creates the *likelihood of injury to wildlife by annoying it* to such an extent as to significantly disrupt normal behavioral patterns." 50 C.F.R. § 17.3 (emphasis added).[17] NMFS has not defined "harass," but paralleled FWS's approach in discussing what could constitute "take" of Lolita in *Final Rule*, and has cited the FWS definition as persuasive. *See Strahan v. Roughead*, 910 F. Supp. 2d 358, 366 (D. Mass. 2012).[18]

FWS has also rejected Plaintiffs' contention (Plaintiffs' Brief at 33) that the "take" prohibition must be implemented identically for both wild and captive animals and that *any* disruption of wild behaviors from captivity is a "take":

---

[17] FWS subsequently ruled that "likelihood of injury" requires more than a "potential" for injury. *Special Rule for Polar Bear*, 73 Fed. Reg. 76249, 76251 (Dec. 16, 2008); *see In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, 818 F. Supp. 2d 214, 223-28 (D.D.C. 2011) (upholding quoted ruling).

[18] Plaintiffs agree that "NMFS has favorably cited FWS' definition of 'harass,'" in a ruling that is cited in the *Strahan* order. Plaintiffs' Brief at 9.

> [T]he definition of 'take' in the Act clearly applies to individual specimens or groups of specimens, and the captive or non-captive status of a particular specimen is a significant factor in determining whether particular actions would "harass" that specimen … .
>
> To decide otherwise would place those persons holding captive specimens of a listed species in an untenable position. If providing for the maintenance and veterinary care of a live animal were considered to be "harassment," those persons holding such specimens in captivity would be forced to obtain a permit or give up possession since *any failure to provide proper maintenance and care would be an unlawful "taking*." Since Congress chose not to prohibit the mere possession of lawfully-taken listed species in Section 9(a)(1) of the Act, [FWS] believes that congressional intent supports the proposition that measures necessary for the proper care and maintenance of listed wildlife in captivity do not constitute "harassment" or "taking."

Captive-bred Wildlife, 63 Fed. Reg. at 48636 (emphasis added).

The district court correctly treated NMFS's *Final Rule* and FWS's *Captive-bred Wildlife* rule as persuasive and entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (agency interpretations and opinions "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"). (R:203:30-31). "The weight of deference afforded to agency interpretations under *Skidmore* depends upon 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'" *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013) (quoting *Skidmore,* 323 U.S. at 140); *accord EEOC v. Catastrophe Mgmt. Sols.*, No. 14-13482, 2016 WL 7210059, at *10 (11th Cir. Dec. 13, 2016). NMFS and FWS rulings and interpretations of the ESA have the requisite "power to persuade," and serve only further to buttress the district court's construction.

The district court's construction of "harm" and "harass" is completely consistent with definitions promulgated—and used on a regular basis—by NMFS and FWS. The court appropriately relied on the agencies' "consistent and well-reasoned interpretation[s]" of the two terms, *Serrano*, 655 F.3d at 1266, further to support its correct textual analysis.

II. THE DISTRICT COURT CORRECTLY HARMONIZED THE ESA AND AWA IN GRANTING SUMMARY JUDGMENT.

A. Overview.

Once "harm" and "harass" are given their proper due, the only remaining question is whether the district court correctly applied the standard to the facts presented by the parties on summary judgment. But that ruling must first be seen in its proper light.

Plaintiffs assert that "disputed facts remain with respect to … the conditions under which Lolita is maintained, including their compliance with the AWA, and … the existence and severity of Lolita's physical injuries," and also "as to remedy." Plaintiffs' Brief at 51. But the district court did *not* resolve the question whether such factual disputes existed, much less did it attempt to harmonize disputed facts. Rather, the court *assumed* the accuracy of Plaintiffs' proffered injuries—its doubts about the expert testimony offered in support notwithstanding (R:203:17-19 & n.18, 38 n.27)—and applied its construction of "take" under the ESA "to the *injuries identified by PETA*." (R:203:19) (emphasis added).

Following the lengthy legal analysis (as discussed in Point I, *supra*), the court stated that it had "thoroughly considered the conditions and consequent

injuries identified by Plaintiffs" and—based on APHIS's findings that Seaquarium is providing Lolita with humane care (R:203:4-5, 38)—concluded:

> There is simply no evidence from the experts or otherwise that these conditions and concomitant injuries, individually or collectively gravely threaten Lolita's existence. Thus, while in a literal sense the conditions and injuries of which Plaintiffs complain are within the ambit of the ordinary meaning of 'harm' and 'harass,' it cannot be said that they rise to the level of grave harm that is required to constitute a 'take' by a licensed exhibitor under the ESA.

(R:203:38). Because a contrary construction of "take" "would displace a long established regulatory framework providing for licensing and oversight of exhibitors and researchers by APHIS, it would expose licensed exhibitors and researchers to liability to special interest groups despite their compliance with APHIS' captive care standards, and would substitute the judgment of a federal trial court judge for the technical expertise of the responsible agency." (R:203:37).

The only remaining questions for this Court are: (i) whether the district court correctly ruled that "humane" treatment of a captive animal by an AWA-licensed exhibitor is not, as a matter of law, a "take" under the ESA, absent a grave threat to the animal's existence (which likely would be inhumane treatment); and (ii) if so, then whether APHIS's findings should control on whether a captive animal is receiving "humane" treatment.

B. The District Court Correctly Harmonized the ESA and AWA.

The "gravely threatens" standard articulated by the district court avoids conflict between the ESA and AWA on animal-care issues by providing an objective safety valve that is triggered when medical evidence establishes a grave

threat to the animal. (R:203:38). For example, Plaintiffs' non-veterinarian expert, Dr. Visser, testified that a proper orca pool must be 100 *miles* wide, by 100 *miles* long, by 300 meters deep. (R:168:Ex.D:44-46).[19] APHIS, however, found that Lolita's pool complies with AWA's pool-size standard. (R:203:5). There would be no end to zoo-related litigation if ideological "take" arguments—like Dr. Visser's—were enough to hold AWA-compliant licensee in violation of the ESA. See Amicus Sea Shepard Brief at 25 ("[c]aptivity is immoral in all circumstances").

Contrary to Plaintiffs' assertions, neither the FWS and NMFS rulings, nor the Order, offer protection to a zoo or aquarium whose care APHIS has found to be seriously non-compliant with AWA standards, and thus *not* "humane." 7 U.S.C. § 2143. The AWA standards define "humane" care, and FWS has ruled that inhumane care is likely a "take." *Captive-bred Wildlife*, 63 Fed. Reg. at 48638. Thus, the "gravely threatened" test for a "take" is premised on AWA compliance. (R:203:38). As the district court noted, the "overriding concern" of the AWA and the AWA care standards, 7 U.S.C. §§ 2131, 2143, is to ensure exhibitors provide *humane* care. (R:203:34).

That ruling is supported by FWS's close linking of the ESA "take" prohibition to the AWA standards defining "humane" care for captive wildlife exhibited to the public, *i.e.*, the ESA continues to afford protection to species that

[19] That would be a 10,000 square mile "pool"—approximately the size of Vermont. Enchanted Learning, *U.S. States (plus Washington D.C.): Area & Ranking*, www.enchantedlearning.com/usa/states/area.shtml (last visited Feb. 9, 2017).

"are not being treated in a *humane* manner." *Captive-bred Wildlife*, 63 Fed. Reg. at 48638 (emphasis added).[20] FWS declined to perform a species-by-species determination of what is humane animal husbandry, rather than "take" by "harass[ment]," explaining that APHIS had already adopted species-by-species animal husbandry standards under the AWA. *Id*. Instead, FWS adopted a rule defining "harass" in "take" to generally *exclude* AWA-compliant care of "captive wildlife," using "[a]nimal husbandry practices that meet or exceed the minimum standards for facilities and care under the [AWA]." 50 C.F.R. § 17.3. FWS also required a "likelihood of injury" for there to be a "take." *Id*. Similarly, FWS, in *Captive-bred Wildlife*, found that proper care and maintenance measures are not "'harassment' *or* '*taking*.'" 63 Fed. Reg. at 48636 (emphasis added).

Plaintiffs assert that the district court "adopted its novel 'grave threat' standard due, in part, to a perceived need to reconcile the protections of the ESA with those of the AWA." Plaintiffs' Brief at 41-51. But that argument ignores Congressional directives for coordination of the ESA and the AWA. The ESA provides that:

> Nothing in this chapter … shall be construed as superseding or limiting in any manner the functions of the Secretary of Agriculture under any other law relating to prohibited or restricted importations *or possession* of animals … and no proceeding or determination under this chapter shall preclude any proceeding or be considered

[20] In announcing the previously cited rule that applies the ESA to Lolita, NMFS officials stated that the AWA governs "pool-size" and other "basic care elements" for "captive holding." (R:130-1:Ex.10 Timestamp 26:30). "[T]he [AWA] is what specifies the [care] standards for captive animals. The [ESA] does not do that." (R:130-1:Ex.10 Timestamp 29:30).

> determinative of any issue of fact or law in any proceeding under any Act administered by the Secretary of Agriculture.

16 U.S.C. § 1540(h) (emphasis added). Because ESA proceedings cannot "limit[]" USDA "functions" regarding "possession" of animals and shall not "be considered determinative of any issue of fact or law" in any subsequent USDA proceeding, Section 1540(h) gives the AWA precedence.

It thus makes particular sense for FWS to construe the ESA "take" standard as adhering to the AWA "humane" care standard. Indeed, Section 1540(h)'s legislative history shows that Congress, in enacting the ESA, sought "coordination" between FWS/NMFS and USDA as to several areas of joint concern, as well as "*other possibly overlapping areas*," which would include care for captive members of endangered species exhibited pursuant to the AWA. S. Rep. No. 93-307, 2999 (emphasis added).[21]

The AWA also requires coordination of overlapping statutes, including the ESA, in directing USDA to "consult … with other Federal departments …

[21] Plaintiffs rely on *Endangered & Threatened Wildlife & Plants; Revision of the Section 4(d) Rule for the African Elephant (Loxodonta africana)*, 81 Fed. Reg. 36388, 36388 (June 16, 2016) (final rule), to argue that FWS now construes "take" *without* reference to AWA standards. Plaintiffs' Brief at 38-39. Although FWS imposed a "take" prohibition in that decision, to ensure that the captive elephants "received an appropriate standard of care," FWS also referred to an earlier proposed rule for the governing AWA standard. *Endangered & Threatened Wildlife & Plants; Revision of the Section 4(d) Rule for the African Elephant (Loxodonta africana)*, 80 Fed. Reg. 45154, 45161 (July 29, 2015) (proposed rule; rule adopted "to ensure that elephants held in captivity receive an appropriate standard of care"; "[a]ny activities that qualify as take, including those *beyond* the standard veterinary care, breeding procedures, and AWA care standards described in the definition of harass" would be prohibited without permit).

concerned with the welfare of animals used for … exhibition … when establishing [AWA animal care] standards." 7 U.S.C. § 2145(a). Accordingly, in adopting the AWA standards governing orca exhibits, including pool size, companionship, and shading, USDA considered the comments of the NMFS, FWS, and the Marine Mammal Commission (MMC). *Marine Mammals; Humane Handling, Care, Treatment, and Transportation*, 44 Fed. Reg. 36868, 36868 (June 22, 1979). Further, USDA worked closely with NMFS, FWS, and MMC in developing marine mammal care standards, and its publication of those standards (which USDA adopted in 1979) "marked the culmination of 5 years of cooperative work by the [FWS], the NMFS, the APHIS, and [MMC]." 1977-1978 FWS MMPA Ann. Rep. at 4-5.

This close relationship—of more than 40 years standing—between the ESA and the AWA cannot be undone by application of the Supreme Court's *Pom Wonderful* decision, as Plaintiffs would have the Court do. Plaintiffs' Brief at 44-50. That case addressed whether the Food, Drug, and Cosmetic Act (FDCA) precludes a Lanham Act claim challenging a misleading food label, and Plaintiffs mistakenly attempt to analogize the Court's holding to the interaction between the ESA and the AWA. Plaintiffs' Brief at 45.

Plaintiffs are incorrect. First, the Supreme Court emphasized in *Pom Wonderful* that there is *no* relationship between the FDCA and the Lanham Act, the former having been enacted to protect consumer "health and safety," and the latter to allow private parties to bring for unfair-competition-claims. 134 S. Ct. at 2241. Second, Coca-Cola argued that the FDCA regulations "preclude[d] POM's

Lanham Act claim." *Id.* at 2239. Here, the district court merely utilized the APHIS findings to support its rulings that Seaquarium was not committing a "take," and thus, followed the agencies' policies in coordinating the ESA and AWA. (R:203:38).

Third, *Pom Wonderful* directly invoked the Lanham Act's core purpose (preventing unfair competition from deceptively labeled products), and at most tangentially impacted the FDCA's consumer "health and safety" interests. 134 S. Ct. at 2233-34, 2241. By contrast, the ESA's purpose—to prevent species extinction by habitat destruction and predation—is, at most, tangentially implicated by a case involving care of a captive animal under 16 U.S.C. § 1531. (R:203:34-36). And the AWA is "sharply focused" on care for captive exhibited animals, which is the core issue in this case. (R:203:34). Plaintiffs' invocation of *Pom Wonderful* provides no support for their argument, and the district court's careful harmonization of the ESA and AWA should be upheld.

C. The District Court Correctly Relied on APHIS's Findings.

Seaquarium has kept Lolita alive for 46 years and, at 51, Lolita has outlived the median wild orca lifespan. (R:203:2). As the district court noted, "Seaquarium largely does not dispute that Lolita has medical issues for which she receives treatment." (R:203:19). Although Plaintiffs "proffered evidence, through purported expert testimony," of 13 alleged injuries (R:203:17-18), and argue additional alleged injuries to this Court (Plaintiffs' Brief at 52-55), the fundamental question remaining is whether, as a matter of law, treatment of a captive animal that APHIS has approved as humane and AWA-compliant can *ever* constitute a

"take" under the ESA.[22] The district court answered that question with its construction of "harm" and "harass," as has been set forth, and then declined to second-guess APHIS's expertise. (R:203-37).

Plaintiffs nonetheless contend that Lolita has "frequent infections, likely ulcers, possible lung disease, anemia and kidney disease," and openly question the accuracy of APHIS's finding that Seaquarium's care of Lolita is AWA-complaint. Plaintiffs' Brief at 52, 55-57. The district court correctly refused to go behind APHIS's findings.

APHIS's permitting decisions are subject to review only under 5 U.S.C. § 706(2), the APA's narrow judicial-review provision, *e.g., Ctr. for Biological Diversity v. APHIS*, No. 10-14175, 2011 WL 4737405, at *2 (S.D. Fla. Oct. 6, 2011), which requires reviewing courts to afford great deference to administrative decisions. *E.g., Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1360 (11th Cir. 2008) ("standard is exceedingly deferential" (citation omitted)). Plaintiffs cannot be granted more sweeping review of an agency's decision by ignoring the APA and

[22] In acknowledging that there might be exceptional situations where an AWA-licensed exhibitor providing humane care might nevertheless be committing an ESA-prohibited "take" when engaging in conduct that "gravely threatens" an animal (R:203:26, 38), the district court both cabined its ruling and safeguarded the coordination between the ESA and the AWA. *See Kuehl v. Sellner*, 161 F. Supp. 3d 678, 709-19 (N.D. Iowa 2016), *appeal pending* (8th Cir. No. 16-1624) (cited in Plaintiffs' Brief at 28) (APHIS repeatedly cited zoo for serious AWA violations; court relied on APHIS findings to determine "take" had occurred). *See also* Order at 4-5, *Graham v. San Antonio Zoological Society,* No. 5:15-cv-1054-XR (W.D. Tex. Jan. 27, 2016), ECF No. 16 (whether ESA "take" claim regarding zoo elephant could go forward depends on AWA compliance).

attempting to open the decision to *de novo* review.[23]

Nor, for that matter can Plaintiffs ask this Court to step into the district court's shoes and determine, in the first instance, whether there are factual disputes under their version of the ESA "take" standard—which the district court expressly rejected—and then to overturn the summary judgment. Indeed, as the district court noted, Seaquarium had challenged the admissibility of Plaintiffs' proffered expert opinions under Federal Rule of Evidence 702, and the district court, having ruled "as a matter of law that the injuries Plaintiffs have proffered do not constitute a 'take,'" did not reach the opinions' admissibility. (R:203:18 n.18).[24] This Court cannot do so.

Whether expert opinion is admissible under Rule 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589-92 (1993) is, of course, initially for the district court, subject to review only for abuse of discretion. *E.g., Am. Gen. Life Ins. v. Schoenthal Family, LLC*, 555 F.3d 1331, 1338 (11th Cir. 2009) ("district court must determine that proffered expert testimony is both reliable and relevant" to consider testimony on summary judgment). Because "appellate courts may not make fact findings," *Norelus*, 628 F.3d at 1293, this Court cannot accept Plaintiffs' invitation to consider their expert testimony. *McKissick v. Busby*, 936

[23] As noted in the Statement of Jurisdiction, *supra*, PETA and other plaintiffs challenged the Seaquarium's license in an APA proceeding—and lost. *Animal Legal Defense Fund*, 789 F.3d at 1223-25. They cannot renew the APA battle in the guise of an ESA action.

[24] The court did, however, note that "all or most" of the reports did not appear to be based upon "reliable methodologies," and were "speculative and unreliable." (R:203:18 n.18, 38 n.27).

F.2d 520, 522 (11th Cir. 1991) ("[a]s a general rule," appellate courts "will not consider issues which the district court did not decide").

If the Court were to find *any* merit to Plaintiffs' challenge to the district court's standard, the only relief to which Plaintiffs could be entitled would be a remand for the court to rule on Seaquarium's *Daubert* challenges and to consider anew whether to grant summary judgment. *E.g., Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 8 F.3d 760, 769 (11th Cir. 1993). But no such relief can, or should, be afforded to Plaintiffs: the district court correctly construed the ESA's "take" prohibition and deferred to APHIS's findings—and correctly granted summary judgment.

CONCLUSION

Based on the foregoing, Seaquarium requests the Court to affirm the final judgment in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this corrected brief has been e-filed and that a copy has been served via the CM/ECF system on April 3, 2017 upon:

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 13,858 words, excluding the parts of the brief exempted by 11th Cir. R. 32-4.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word 2010 in Times New Roman, 14-point font.

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FL Standards

Field trips

Miami Seaquarium is a great field trip option that will teach students about wildlife conservation and life sciences. Through our park signage and marine mammal shows, we offer educational and fun experiences that will cover FL standards of education just by visiting the park. Here is a list of science standards that will be covered just by visiting our park.

Kinder

SC.K.L.14.2

Recognize that some books and other media portray animals and plants with characteristics and behaviors they do not have in real life.

Example: In the sea lion show Salty is thought to be giving CPR to a scuba diver. When in reality, sea lions cannot give CPR.

SC.K.L.14.3

Observe plants and animals, describe how they are alike and how they are different in the way they look and in the things they do.

Example: Observe seals and sea lions. Ask students to describe some similarities between these marine mammals and some differences about them.

SC.K.N.1.2

Make observations of the natural world and know that they are descriptors collected using the five senses.

Example: Touch the sting rays: Ask students to observe using their 5 senses. How does the sting ray feel? What does the stung ray look like? Can you eat a sting ray? Can you smell the sting rays? If you participate in a sting ray feeding: What does the sting ray food feel and smell like?

SC.K.N.1.4

Observe and create a visual representation of an object which includes its major features.

Example: Observe the dolphins. Ask the students to describe what some major features of the animal are.

SC.K.N.1.5

Recognize that learning can come from careful observation.

Example: Observe the penguins: what can you learn about the penguins from watching them interact with each other? What can you learn about the penguins from observing their environment?

1st

SC.1.E.6.2

FL Standards

Field trips

Describe the need for water and how to be safe around water.

Example: Which animals in the park need water to survive? Do they hold their breath for a long time? How long can you hold your breath?

SC.1.L.14.1

Make observations of living things and their environment using the five senses.

Example: Touch the sting rays: Ask students to observe using their 5 senses. How does the sting ray feel? What does the stung ray look like? Can you eat a sting ray? Can you smell the sting rays? If you participate in a sting ray feeding: What does the sting ray food feel and smell like?

SC.1.L.14.3

Differentiate between living and nonliving things.

Example: Observe the aquariums in dolphin lobby. Ask the students to point out living creatures (fish, sea urchins, sting rays) and to point out nonliving things (rocks, sand). Take them to the Rescue a Reef coral exhibit, ask them is the corals are living or nonliving. Explain that corals are living things even though they look to be nonliving.

SC.1.L.16.1

Make observations that plants and animals closely resemble their parents, but variations exist among individuals within a population.

Example: Visit our top deck dolphin exhibit. Here you will see a mother and her baby. Talk about similarities between the students and their parents. Explain that it is the same with animals.

SC.1.L.17.1

Through observation, recognize that all plants and animals, including humans, need the basic necessities of air, water, food, and space.

Example: Observe our manatees during the Manatee Presentation (check your show schedule). Watch the manatees eat their food. Have the children list the necessities that are available in the exhibit that they observe the manatees using. Air – see the manatees take a breath. Water – see the fresh water hose running. Food – see the manatees eating. Space – see the exhibit where they live.

SC.1.N.1.2

Using the five senses as tools, make careful observations, describe objects in terms of number, shape, texture, size, weight, color, and motion, and compare their observations with others.

Example: Visit the red footed tortoises at Tropical Wings. In groups have the children describe what the tortoises look like, feel like, how much they think they weigh, how they move and how many there are.

SC.1.N.1.4

Ask "how do you know?" in appropriate situations.

Example: Ask “how do you know” for any one of the previous examples.

2nd

SC.2.L.17.1

Compare and contrast the basic needs that all living things, including humans, have for survival.

Example: Observe our manatees during the Manatee Presentation (check your show schedule). Watch the manatees eat their food. Have the children list the necessities that are available in the exhibit that they observe the manatees using. Air – see the manatees take a breath. Water – see the fresh water hose running. Food – see the manatees eating. Space – see the exhibit where they live. Ask the students to describe how they receive these basic necessities in their own lives.

SC.2.L.17.2

Recognize and explain that living things are found all over Earth, but each is only able to live in habitats that meet its basic needs.

Example: Visit the penguin exhibit: explain that these penguins are found and are adapted to a climate that is different than that of south Florida. Their enclosure is temperature controlled.

SC.2.N.1.3

Ask "how do you know?" in appropriate situations and attempt reasonable answers when asked the same question by others.

Example: Ask the students if penguins are birds. When they respond, prompt them with “how do you know” Talk about what characteristics make penguins birds.

3rd

SC.3.E.6.1

Demonstrate that radiant energy from the Sun can heat objects and when the Sun is not present, heat may be lost.

Example: Visit the aquariums in dolphin lobby – Observe the lighting in each. These animals need like from the “sun” in order to keep the water temperature adequate for each species. Without these lights, heat would be lost.

SC.3.L.15.1

Classify animals into major groups (mammals, birds, reptiles, amphibians, fish, arthropods, vertebrates and invertebrates, those having live births and those which lay eggs) according to their physical characteristics and behaviors.

Example: Visit multiple exhibits in the park and ask the students what kind of animal is in each exhibit. Ask them to explain their answer. What characteristics do these animals have that make them a mammal, reptile, fish etc?

SC.3.N.1.6

Infer based on observation

Example: Infer what kind of animal dolphins are based on observing them.

4th

SC.4.L.16.2

Explain that although characteristics of plants and animals are inherited, some characteristics can be affected by the environment.

Example: Observe the killer whale and pacific white sided dolphins. In the wild, these animals would not necessarily spend time together. Here at MSQ, they are members of the same pod and play together. Observe the manatees. Juliet the manatee is over 60 years old. Manatees in the wild rarely reach this age. She does not have any environmental stressors or threats that would cause her to die at a young age.

SC.4.L.16.3

Recognize that animal behaviors may be shaped by heredity and learning.

Example: Observe the dolphins or sea lions during a show. Speak to the students about how they know how to do the behaviors in the show. Who teaches them?

SC.4.L.17.2

Explain that animals, including humans, cannot make their own food and that when animals eat plants or other animals, the energy stored in the food source is passed to them.

Example: Observe the manatees – What do they eat? Where does that food come from in the wild? Observe the dolphins – What do they eat? Where does that food come from in the wild? Explain that these animals cannot produce their own food, like plants.

SC.4.L.17.4

Recognize ways plants and animals, including humans, can impact the environment.

Example: Walk through conservation outpost: Have the students list the ways that humans are effecting the environment of sea turtles and manatees.

FL Standards

Field trips

5th

SC.5.L.15.1

Describe how, when the environment changes, differences between individuals allow some plants and animals to survive and reproduce while others die or move to new locations.

Example: Visit the Rescue a Reef coral exhibit in dolphin lobby. Explain that when the temperature changed (gets too hot) corals can bleach and eventually die. Visit the manatee exhibit – explain that when the water gets too cold for manatees, they can experience something called cold stress. This is why they migrate to warm waters.

SC.5.L.17.1

Compare and contrast adaptations displayed by animals and plants that enable them to survive in different environments such as life cycles variations, animal behaviors and physical characteristics.

Example: Observe the seals and sea lions – Ask the students to list adaptations that these animals have and how the specific adaptation would aid them to survive in the wild. Observe the African penguins – Ask the students to list adaptations that these animals have and how the specific adaptation would aid them to survive in the wild. Compare the adaptations of the penguins to the adaptations of the seals and sea lions. How do they differ? How are they the same? How does their environment effect their adaptations?

SC.5.N.1.6

Recognize and explain the difference between personal opinion/interpretation and verified observation.

Example: Observe the sea turtles – Ask the students why they think sea turtles are important to the ecosystem? Listen to their answers, prompt them with “how do you know” when appropriate. Have them differentiate between their opinions and their observations.

Want more?

Each of the field trip add-on educational presentations at Miami Seaquarium are aligned to science, math, art and language arts standards. We provide post-visit educational materials to extend student’s in-park experiences to the classroom.

Teacher's Corner

FIELD TRIPS

School Field Trips filled with Edu-Tainment!

Miami Seaquarium is a great field trip option that will teach students about wildlife conservation and life sciences. We offer educational and fun experiences that will cover FL standards of education just by visiting the park! Our park signage, marine mammal shows & presentations, and our Reef Ranger Research Report will give your students a day filled with EDU-tainment! Download our **FL Standards Info Sheet** that will be covered just by visiting our park.

We have facilities that cater to all ages (K-12) as well as online scavenger hunts and field study guides for teachers to utilize on their trip. Take the plunge and immerse your students in the underwater world during a field trip to Miami Seaquarium!

What's New!

Penguin Isle - Explore the world of the endangered African Penguin, the newest residents at Miami Seaquarium.

Conservation Outpost - Our newest exhibit will take you through a timeline of our achievements in conservation over the past 60 years. Students will be able to learn about the threats facing manatees and sea turtles and what they can do to help.

Reef Rangers Program - Come to our conservation outpost for some EDU-tainment where one of our education instructors will have a fun hands on activity that will help kids learn about ocean conservation. Finish our Reef Ranger Scavenger Hunt and become a Reef Ranger with a free Reef Ranger pin!

Educational Orca Whale Presentation - Learn all about Killer Whale conservation efforts right here in South Florida!

Field Trip Upgrades!

School Group Lunch
$ 5.00 per person

One (1) Hamburger or one (1) hot dog, a bag of chips and one small juice
Lunch orders must be received no later than 7 business days before your scheduled field trip. Once your lunch order is received you will receive an updated field trip confirmation/invoice. Subject to availability.
Download Lunch Form

Sharky's SkyTrail Adventure
$ 5.00 per person
(Cash payment collected at exhibit)
Students must have a sign waiver in order to participate. **Download Waiver**

How to Book!

For Miami-Dade County Public Schools, Broward County Public Schools & School District of Palm Beach County

- **2017-2018 Field Trip Request Form**
- **2018 Summer Camp Field Trip Request Form**

You may also book your group by calling, (305) 365-2507
Fax Request Forms to (305) 365-2504
Email Request Forms: reservations@msq.cc

Special rates available for all other groups!

For reservations and rates speak with a Sales Representative by calling (305) 365-2518
Group Request Form

SCAVENGER HUNTS

Scavenger Hunts/Classroom Info

Want a great way to make your students' next field trip to the park more educational? Simply print off one of our age appropriate park-wide scavenger hunts. It's a great way to fill your students with fun facts about our exotic and aquatic animal friends!

Print these exciting scavenger hunts - with activities for kindergarten through high school students

Kindergarden & 1st Grade	Visual	
Second & Third Grade	Questions	Answers
Fourth & Fifth Grade	Questions	Answers
Sixth through Eighth Grade	Questions	Answers
High School	Questions	Answers

FIELD TRIP PRESENTATIONS

Florida Standards of Education Presentations

Want to bring what you're teaching in class to Miami Seaquarium? Miami Seaquarium offers presentations that are based directly of the Florida Standards of Education. Teachers have the opportunity to work directly with our education department and create a curriculum correlating to what they are teaching in class.

With a variety of guided presentation programs, the Education Department at Miami Seaquarium® offers students and youth groups the opportunity to take a closer look at our many animals and natural creatures. Choose from a host of themes for this unique experience. And, for an additional fee, bring your students up-close to a Green Sea Turtle, learn about the Threatened Manatees, or pet a 500 lb. Sea Lion!

Cost: $3 - $4 Per Participant (in addition to admission cost)
Minimum 10 Participants

Select ONE of these exciting themes for your presentation:

*Please book presentations 2 weeks in advance

NEW! Rescuing Reefs –Join us for an educational presentation on coral reefs and why they are important to our local ecosystem. Students will get a first-hand look at the threatened Staghorn coral and learn about ways they can help the species. All groups will be visited by a University of Miami's Rescue a Reef scientist and will take a look at our new Rescue a Reef exhibit here a Miami Seaquarium! This program is appropriate for students in grades K-12.

Cost: $3.00 per participant Duration: 45 minutes Class size: 25 students

NEW! Birds of a Feather – African penguins have made Miami Seaquarium their new home! Come learn about the endangered species and what human related threats are harming them. Find out more about the Macaws and other parrots that live at the park too! The animal interaction is holding one of our birds. This program is appropriate for students in grades K-12.

Cost: $4.00 per participant Duration: 45 minutes Class size: 10-100 students

Sea Turtle Alert – Get up-close and comfortable with sea turtles found in South Florida. Learn how you can help save these endangered reptiles as we discuss the myths and mysteries of our ancient aquatic ancestors. Your animal interaction is a sea turtle feeding session. This program is appropriate for students grades K – 12.

Cost: $3.00 per participant Duration: 45 minutes Class size: 10-60 students

Fishtacular Fish – Come learn about all kinds of fish under the sea! From freaky and funky deep sea fish to those mysterious and cartilaginous sharks and stingrays, we got it all. Students will have the opportunity to discuss the differences between all kinds of fish and much more. The animal interaction will be feeding the sting rays. This program is appropriate for students in grades K – 12.

Cost: $4.00 per participant Duration: 45 minutes Class size: 10-60 students

Seal Studies – Seals, sea lions and walruses, oh my! Join in the fun as we explore more about the dogs of the sea and their amazing underwater adaptations. For your animal interaction, you will meet one of our seals or sea lions. This program is appropriate for students in grades K – 12.

Cost: $4.00 per participant Duration: 45 minutes Class size: 10-40 students (for a seal/sea lion feed or touch) 10 – 80 students (to see one of our seals or sea lions up close and talk to one of our trainers)

Techniques in Training – Ever wonder what it takes to become a marine mammal trainer? Be introduced to a day in the life of our stars as we discuss the differences in show, play, train and husbandry sessions. Learn how trainers use natural behavior and positive reinforcements to share the behaviors you see in our shows. This program includes a "meet and greet" with one of our marine mammal trainers. This program is appropriate for students in grades 6-12.

Cost: $3.00 per participant Duration: 45 minutes Class size: 10-100 students

Manatee Expedition – Bring your students face-to-face with rescued and rehabilitating manatees as we discuss reasons for their endangerment, basic anatomy, evolution and preservation of the species. This program includes a "meet and greet" with one of our animal keepers. This program is appropriate for students in grades K-12..

Cost: $3.00 per participant Duration: 45 minutes Class size: 10-50 students

For more information about our educational programs and reservations, please call the Education Department at (305) 361- 5705 ext. 207 or email us at **education@msq.cc**

SCHOOL OUTREACH

Bring Miami Seaquarium® right to your classroom with our Marine Science/Conservation Outreach Program.

Choose from a host of themes or let us design a program specific to your needs.

Classroom Presentation, up to 50 students
1st program $100 Per Presentation
2nd program on same day $50

Assembly, up to 150 students
1st program $200
2nd program on same day $100

$25 additional travel fee for schools located further than 15 miles from our park grounds on Key Biscayne.

Length: 45 Minutes, includes presentation and question-and-answer session.

Program may include:

- Visit from Our Educational Specialists
- Slide Show
- Animal Artifacts

For more information about these and other educational programs and resources, please call the Education Department at (305) 361-5705 ext. 207

TEACHER WORKSHOPS

Take valuable lessons to your classroom!

Teachers get to visit Miami Seaquarium throughout the school year for special workshops. Learn about specific topics, participate in animal interactions and take new exciting topics to your students.

Dates and Topics:

October 27, 2018 - Biodiversity of South Florida

November 10th, 2018 - Manatee Conservation Efforts

December 1st, 2018 - Endangered Species in South Florida

January, 19th, 2019 - Conservation Efforts

February 23rd, 2019 - Sea Turtle Conservation Efforts

March 23rd, 2019 - Urban Sharks

April 27th, 2019 - Marine Debris

TICKETS & PROGRAMS

Annual Pass
Tickets & Programs
Groups
Passholder Perks
Discounts

THINGS TO DO

Experiences
Events
Birthday Parties
Dining
Shopping & Photos
Special Occasions
Education & Outreach

PLAN A VISIT

Calendar & Hours
Directions
FAQs
Hotels & Packages
Transportation
My Photos

PARK INFO

About Miami Seaquarium
Park Map
Jobs & Internships
Contact Us
Sponsors & Alliances
In the News
Community
Webisodes
Accreditations

 Privacy Policy Terms of Use

Hotels, Restaurants and Leisure
Company Overview of Marine Exhibition Corporation

October 31, 2018 11:19 AM ET

Snapshot **People**

Company Overview

Marine Exhibition Corporation, doing business as Miami Seaquarium, owns and operates a marine-life entertainment park in South Florida. It offers marine animal shows and presentations; fun-filled mix of exhibits, shows, attractions, food, and shopping opportunities; and shows that feature a range of athletic behaviors, including leaps, spins, tail walks, and flips. The company also provides teacher workshops, educational classroom posters, online state mandated curriculum materials, children's educational videos, and curriculum units to private and public school teachers. In addition, it offers facilities for group programs, birthday parties, weddings, picnics, receptions, corporate events, ...

Detailed Description

4400 Rickenbacker Causeway
Miami, FL 33149

United States

Phone: 305-361-5705
Fax: 305-361-6077
www.miamiseaquarium.com

Founded in **1955**

Key Executives For Marine Exhibition Corporation

Mr. Eric A. Eimstad
Vice President of Sales & Marketing

Compensation as of Fiscal Year 2018.

Similar Private Companies By Industry

Company Name	Region
Ellenton Ice & Sports Complex, LLC	United States
OHCAL Foods, LLC	United States
1 Hotel South Beach, Inc.	United States
100 Sardines Management LLC	United States
1000 Acres Ranch Resort, Inc.	United States

Recent Private Companies Transactions

Type Date	Target
No transactions available in the past 12 months.	

Request Profile Update

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MEMORANDUM

Agenda Item No. 8(H)(1)

TO:	Honorable Chairwoman Rebeca Sosa and Members, Board of County Commissioners	**DATE:**	May 6, 2014
FROM:	R. A. Cuevas, Jr. County Attorney	**SUBJECT:**	Resolution authorizing and approving sale of stock of Marine Exhibition Corporation to Festival Fun Parks, LLC Resolution No. R-421-14

The accompanying resolution was prepared by the Parks, Recreation and Open Spaces Department and placed on the agenda at the request of Prime Sponsor Commissioner Xavier L. Suarez.

R. A. Cuevas, Jr.
County Attorney

RAC/jls

Memorandum

MIAMI-DADE COUNTY

Date: May 6, 2014

To: Honorable Chairwoman Rebeca Sosa
and Members, Board of County Commissioners

From: Carlos A. Gimenez
Mayor

Subject: Resolution Authorizing and Approving Sale of Stock of Marine Exhibition Corporation to Festival Fun Parks, LLC, the Merger of Marine Exhibition Corporation into Festival Fun Parks or an Affiliate of Festival Fun Parks and Authorizing the County Mayor or Mayor's Designee to accept stock sale participation payment

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Recommendation

It is recommended that the Board of County Commissioners (Board) approve (1) the attached resolution authorizing and approving the sale of 100% of the stock of Marine Exhibition Corporation (MEC), operator of the Seaquarium marine exhibition facility on Virginia Key, to Festival Fun Parks, LLC (Festival), a Delaware limited liability company; (2) the subsequent merger of MEC into Festival or an affiliate of Festival; and (3) authorize the County Mayor or Mayor's designee to accept up to $1,500,000 as per the stock sale participation payment required under the lease.

Scope

The Seaquarium is located on Virginia Key within Commission District 7, Commissioner Xavier L. Suarez. The impact of this agenda item is countywide, as the Seaquarium is a regional asset and a tourist attraction for residents and visitors throughout Miami-Dade County. In calendar year 2013, some 598,000 persons visited the Seaquarium.

Fiscal Impact/Funding Source

The County will receive a one-time payment of eight percent (8%) of the net book profit realized by MEC's parent company, Wometco Enterprises, Inc. ("Wometco"), from the sale of MEC's stock, not to exceed $1.5 million, from MEC pursuant to MEC's lease agreement with the County. These funds are to be deposited in the Coastal Park and Marina Trust Fund to be used as matching funds for capital improvement grants. MEC has represented to the County (Exhibit B) that the County will be receiving no less than $1,000,000 associated with the sale of its stock.

Track Record/Monitor

There are no known performance issues with MEC. The lease will continue to be managed by the Parks, Recreation and Open Spaces Department's Contract Manager, Jon Seaman.

Background

The original lease between the County and MEC for the construction and operation of the Seaquarium is dated March 9, 1954. The lease documents have been amended and restated, and approved by the Board a number of times since it originated, most recently on July 25, 2000. MEC's corporate office is in Coral Gables. The current lease term is set to expire on October 21, 2031, although the lease contains additional extension provisions if certain conditions are met.

MEC is by far the largest tenant within the Parks, Recreation and Open Spaces Department, with rent payments to the County totaling nearly $2.7 million annually. MEC stock is owned by Wometco Enterprises, Inc. and MVC Capital, Inc. The lease permits the MEC to assign the lease or sell its rights under the lease upon giving notice to the County and affording the County an opportunity to object if the transaction is contrary to the best interests of the County. The sale of stock to Festival is in the best interest of the County, as Festival is a large, well established company that is able to make improvements to the Seaquarium. (The principals of Festival are listed as Exhibit A of the attached resolution.) The Seaquarium has pledged not to add terrestrial animals to its collection in calendar years 2014 and 2015.

Festival Fun Parks, LLC is a subsidiary of Palace Entertainment Holdings, LLC which hosts over 13 million visitors annually at 37 locations across the U.S., including three in Florida. It operates seven theme parks, 10 water parks and 20 family entertainment centers, making it the nation's largest operator of such facilities. Both Festival and Palace are U.S. based companies with headquarters in Newport Beach, California. Palace Entertainment is a subsidiary of international park operator Parques Reunidos, headquartered in Madrid, Spain. Parques Reunidos is owned by Arle Capital Partners, a private equity firm based in London, England.

Attachments

Michael Spring, Senior Advisor
Office of the Mayor

MEMORANDUM

(Revised)

TO: Honorable Chairwoman Rebeca Sosa
and Members, Board of County Commissioners

DATE: May 6, 2014

FROM: R. A. Cuevas, Jr.
County Attorney

SUBJECT: Agenda Item No. 8(H)(1)

Please note any items checked.

_____	**"3-Day Rule" for committees applicable if raised**
_____	**6 weeks required between first reading and public hearing**
_____	**4 weeks notification to municipal officials required prior to public hearing**
_____	**Decreases revenues or increases expenditures without balancing budget**
_____	**Budget required**
_____	**Statement of fiscal impact required**
_____	**Ordinance creating a new board requires detailed County Mayor's report for public hearing**
✓	**No committee review**
_____	**Applicable legislation requires more than a majority vote (i.e., 2/3's ____, 3/5's ____, unanimous _____) to approve**
_____	**Current information regarding funding source, index code and available balance, and available capacity (if debt is contemplated) required**

Approved _____ Mayor
Veto _____
Override _____

Agenda Item No. 8(H)(1)
5-6-14

RESOLUTION NO. R-421-14

RESOLUTION AUTHORIZING AND APPROVING SALE OF STOCK OF MARINE EXHIBITION CORPORATION (MEC) TO FESTIVAL FUN PARKS, LLC; AUTHORIZING AND APPROVING SUBSEQUENT MERGER BETWEEN MEC AND FESTIVAL FUN PARKS, LLC OR AN AFFILIATE OF FESTIVAL FUN PARKS, LLC; AND AUTHORIZING THE COUNTY MAYOR OR THE COUNTY MAYOR'S DESIGNEE TO EXECUTE ANY AND ALL DOCUMENTS REQUIRED IN CONNECTION THEREWITH, TO ACCEPT A PAYMENT FROM MEC IN AN AMOUNT NOT TO EXCEED $1,500,000, AND TO UNDERTAKE ANY NECESSARY AUDIT AND DUE DILIGENCE TO CONFIRM AMOUNT DUE TO THE COUNTY

WHEREAS, the County as Lessor and Marine Exhibition Corporation d/b/a The Miami Seaquarium as Lessee ("MEC") entered into an Amended and Restated Lease on July 25, 2000, as subsequently amended, for the lease of certain parcels of land along the Rickenbacker Causeway across Biscayne Bay on Virginia Key for the continued operation of the Miami Seaquarium ("Lease"); and

WHEREAS, the Lease permits MEC to assign the Lease or sell its rights under the Lease upon giving notice to the County and affording the County an opportunity to object if the transaction is contrary to the best interests of the County; and

WHEREAS, the stockholders of MEC are contemplating a sale of all of their stock in MEC to Festival Fun Parks, LLC and Festival Fun Parks, LLC is contemplating the merger of MEC into Festival Fun Parks, LLC or with another related, affiliate entity that has the same principals as Festival Fun Parks, LLC; and

WHEREAS, MEC has provided disclosure of the names and business addresses of all proposed transferees of MEC's interests as set forth in the accompanying

memorandum and in accordance with Section 2-8.1(d)(1) of the Code of Miami-Dade County, Florida; and

WHEREAS, the Lease provides that in the event MEC sells or assigns its rights pursuant to the Lease and/or if MEC's stock is sold, assigned or transferred by its parent corporation, Wometco Enterprises, Inc. ("Wometco") (other than for an initial public offering or for the purpose of reductions in debt or construction of capital improvements), then MEC must pay the County 8% of any net book profit realized by Wometco, which amount shall not exceed $1,500,000; and

WHEREAS, MEC has represented to the County that it shall pay the County no less than $1,000,000 associated with this transaction at the time of the closing of the sale of all of the stock in MEC owned by Wometco ; and

WHEREAS, further, MEC has represented to the County that it will hold another $500,000 in escrow with its attorney pending the final determination of the net book profit realized by Wometco and shall pay the County any such additional amounts owed to the County, up to $500,000, within 90 days following the closing of the sale of all of the stock in MEC owned by Wometco; and

WHEREAS, this Board desires to accomplish the purpose outlined in the accompanying memorandum, a copy of which is incorporated herein by reference,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MIAMI-DADE COUNTY, FLORIDA, that this Board:

1. Authorizes and approves the sale of all of the stock of MEC owned by Wometco and MVC Capital, Inc. to Festival Fun Parks, LLC.

2. Authorizes and approves the subsequent merger of MEC with and into Festival Fun Parks, LLC or an affiliate of Festival Fun Parks, LLC, provided said affiliate has the same principals as those disclosed in accordance with Section 2-8.1(d)(1) of the Code of Miami-Dade County. Further, this Board finds that Exhibit "A" attached hereto satisfies the disclosure requirements of Section 2-8.1(d)(1) of the Code of Miami-Dade County and hereby authorizes and approves said Exhibit.

3. Authorizes the County Mayor or Mayor's designee to accept a payment due to the County from MEC as a result of the sale and merger in an amount not to exceed a total of $1,500,000 as satisfaction of all amounts due to the County by MEC pursuant to Section 23 of the Lease which provides that MEC shall pay the County eight percent (8%) of any net book profit realized by Wometco not to exceed $1,500,000. The initial $1,000,000 shall be paid to the County at the time of the closing of the sale of all of the stock in MEC owned by Wometco, with the total payment due to the County to be delivered by MEC within 90 days following the closing.

4. Finds that the proposed sale of stock and subsequent merger will not be contrary to the best interests of the County and that Festival Fun Parks, LLC, is a competent, experienced operator comparable to MEC.

5. Authorizes the Mayor or Mayor's designee to execute any and all documents that may be required in connection with the transactions authorized and approved by this Resolution and to undertake any necessary audit and due diligence to confirm amount due to the County.

The foregoing resolution was offered by Commissioner **Xavier L. Suarez**, who moved its adoption. The motion was seconded by Commissioner **Dennis C. Moss** and upon being put to a vote, the vote was as follows:

Rebeca Sosa, Chairwoman	**aye**		
Lynda Bell, Vice Chair	**aye**		
Bruno A. Barreiro	**aye**	Esteban L. Bovo, Jr.	**aye**
Jose "Pepe" Diaz	**aye**	Audrey M. Edmonson	**aye**
Sally A. Heyman	**aye**	Barbara J. Jordan	**aye**
Jean Monestime	**aye**	Dennis C. Moss	**aye**
Sen. Javier D. Souto	**aye**	Xavier L. Suarez	**aye**
Juan C. Zapata	**absent**		

The Chairperson thereupon declared the resolution duly passed and adopted this 6th day of May, 2014. This resolution shall become effective ten (10) days after the date of its adoption unless vetoed by the Mayor, and if vetoed, shall become effective only upon an override by this Board.

MIAMI-DADE COUNTY, FLORIDA
BY ITS BOARD OF COUNTY COMMISSIONERS

HARVEY RUVIN, CLERK

By: **Christopher Agrippa**
Deputy Clerk

Approved by County Attorney as to form and legal sufficiency.

Monica Rizo

EXHIBIT "A"

Disclosure of Interests Pursuant to Section 2-8.1(d)(1)

Festival Fun Parks, LLC (a Delaware entity)
Festival is 100% owned by Palace Entertainment Holdings, LLC (also a Delaware entity).

Festival Fun Parks, LLC and Palace Entertainment Holdings, LLC have the same officers and managers, as follows:

Officers:
-Fernando Eiroa – President & CEO
-Russell D. Owens – CFO
-Michael L. Baroni – General Counsel & Secretary
-Rolf Paegert - COO
-Gregg Borman – SVP, Family Entertainment Centers
-Bill Lentz - VP, Water Parks
-James Judy - VP, Water Parks
-Albert Cabuco – VP, Food & Beverage
-Michele Wischmeyer – VP, Marketing

Managers:
Board of Managers:
-Francisco Javier Abad Marturet
-Fernando Eiroa

The business address for all persons and entities disclosed herein is:

4590 MacArthur Blvd., Suite 400
Newport Beach, CA 92660

EXHIBIT B

MIAMI SEAQUARIUM®

April 25, 2014

Jack Kardys
Director
Parks, Recreation and Open Space
Miami-Dade County
275 N.W. 2nd Street
Miami, FL 33128

Re: MEC Lease - Payment Due the County

Dear Jack:

This is to confirm, as we previously advised Assistant County Attorneys Monica Rizo and Miguel Gonzalez, (a) the minimum payment due to the County under the MEC Lease as a result of Wometco's sale of its MEC common stock to Festival Fun Parks, LLC and the contemplated merger of MEC into Festival Fun Parks, LLC or another related, Festival Fun Parks, LLC affiliate entity, will be $1 million, which sum would be paid to the County at the time of the Closing, and (b) an additional $500,000 will be deposited in escrow with Holland & Knight at the Closing, subject to the determination of Wometco's Net Book Profit from the sale of the stock by Wometco's auditors.

Very truly yours,

Wometco Enterprises, Inc.

By: _____
Michael S. Brown
Chief Operating Officer

cc: Monica Rizo, Esq.
Miguel Gonzalez, Esq.
Eileen Mehta, Esq.
Bruce Jay Colan, Esq.

EXHIBIT C

MIAMI SEAQUARIUM®

Wednesday, April 02, 2014

Jack Kardys
Miami-Dade County Parks, Recreation and Open Spaces

Dear Jack,

Miami Seaquarium traditionally has not incorporated marquee terrestrial animals as part of its animal collection. Out of respect for the Miami-Dade County Parks, Recreation and Open Spaces (PROS) Department's desire to include language in our lease defining which marquee terrestrial animals it wishes to be prohibited from our collection, we pledge not to add any new terrestrial animals during calendar years 2014 and 2015, on the condition that the acquisition of Miami Seaquarium by Palace Entertainment is approved and consummated.

Miami Seaquarium will continue to have the ability to add marine mammals/animals to its park facility during this 2014 and 2015 period. Also, during this 2014 and 2015 period, we will work with the PROS Department to open negotiations of the Miami Seaquarium lease with respect to this issue, as well as other matters of concern to Miami Seaquarium.

Sincerely,

Andrew Hertz,
President
General Manager

Accepted and Agreed:

_____ _____

Jack Kardys Date

4400 Rickenbacker Causeway Miami, Florida 33149-1095
305-361-5705 Fax 305-361-6077
www.miamiseaquarium.com

RESOLUTION AUTHORIZING AND APPROVING SALE OF STOCK OF MARINE EXHIBITION CORPORATION (MEC) TO FESTIVAL FUN PARKS, LLC; AUTHORIZING AND APPROVING SUBSEQUENT MERGER BETWEEN MEC AND FESTIVAL FUN PARKS, LLC OR AN AFFILIATE OF FESTIVAL FUN PARKS, LLC; AND AUTHORIZING THE COUNTY MAYOR OR THE COUNTY MAYOR'S DESIGNEE TO EXECUTE ANY AND ALL DOCUMENTS REQUIRED IN CONNECTION THEREWITH, TO ACCEPT A PAYMENT FROM MEC IN AN AMOUNT NOT TO EXCEED $1,500,000, AND TO UNDERTAKE ANY NECESSARY AUDIT AND DUE DILIGENCE TO CONFIRM AMOUNT DUE TO THE COUNTY(Parks, Recreation and Open Spaces)

Adopted
Resolution R-421-14
Mover: Xavier L. Suarez
Seconder: Dennis C. Moss
Vo te: 12 - 0
Absent: Zapata

REPORT: In response to Commissioner Moss' inquiry regarding the future vision for the Seaquarium if the proposed resolution was approved, Department Director Jack Kardys, Miami-Dade Parks, Recreation and Open Spaces (Parks & Recreation), asked Mr. Andrew Hertz to respond.

Mr. Andrew Hertz advised his employment with the Seaquarium would continue after the completion of the sale; but unfortunately, his vision for the Seaquarium would no longer be upheld. He stated that he guaranteed that the County's commitment to entertainment, education, community involvement, and wildlife conservation would continue unabated. He noted Parks & Recreation would continue to receive rental income and children educational programs would be continued.

Mr. Hertz advised it would take approximately a year for Palace to review the existing facility to evaluate and determine if any improvements and/or changes should be made and how the facility should be improved. He noted he had already shared with them his recommendations, but it would be Palace's vision and not his coming forth.

In response to Commissioner Moss' question regarding the future vision for the Seaquarium, Department Director Kardys clarified that the existing lease agreement would remain in force for the remaining of its term, which was 25 or 30 years; and the contract extensions would also remain in force. He noted Parks & Recreation would remain as the contract manager and would participate in the process of infrastructure improvements and/or changes to the structure because any proposed improvement plans required his department review and approval. He advised that other Miami-Dade County departments would also be included in the review process of proposed improvement plans if any significant improvements required building permits.

Department Director Kardys noted the department had done their due diligence regarding Palace and their international presence. He advised the research indicated

the firm was a very, very stable organization around the world; and it owned 37 different parks in the United States, 29 in Europe, and 1 in Argentina. He stated Palace also owned zoos, aquariums, and a variety of other family entertainment centers. He stated that he felt very comfortable in proceeding with this program and moving forward with this resolution. He advised that he also felt very confident because Mr. Hertz would continue to work with them, especially during the transition period, since all the terms remained the same; and Mr. Hertz was well informed on the County's intention due to his long tenure. He noted Mr. Hertz had already discussed with Palace's representatives future plans for the facility; and the approval of the sale was the first step.
He stated regular meetings would be
held during the course of the next year to discuss how the facility should be improved.

Commissioner Jordan advised she supported the item, and she asked about the future plans for Lolita based on a letter distributed at the meeting.

Mr. Hertz advised that the plan for "Lolita" remained the same as in past years.

Commissioner Jordan requested Lolita's status be given consideration in the sale of the facility due to her age and long tenure with the Seaquarium, and it had come to her attention the National Marine Fisheries Service was reviewing her eligibility for protection as an endangered species under the Endangered Species Act (ESA).

Mr. Hertz advised Lolita's status had already been discussed with the federal government, and none of the plans violated any federal regulations. He also advised that Lolita's ESA status was under review by a Peer Review Committee at the federal government level; but it had already been determined that the routine performances and level of care provided to her was not in violation of ESA regulations, even if she was placed in the endangered species classification.

Discussion ensued between Commissioner Jordan and Mr. Hertz regarding providing Lolita with a certain level of consideration due to her old age

and the condition of her good health.

In response to Commissioner Bovo's inquiry regarding the lack of timely notice for this item, First Assistant County Attorney Abigail Price-Williams advised the proposed resolution was properly noticed.

In response to Commissioner Suarez' inquiry regarding whether an alternative solution was available to provide Lolita with more humane treatment, Mr. Hertz explained how well she was treated and fed at the Seaquarium including the quality of her life.

Discussion ensued between Commissioner Suarez and Mr. Hertz regarding the life expectancy of killer whales in captivity.

Pursuant to Commissioner Suarez' question regarding the degree of discretion the Board exercised over the approval or disapproval of the proposed resolution, Assistant County Attorney Monica Maldonado advised that the lease specific grounds on which the Board could disapprove the sale of stock was to make a finding that it would not be in the best interest of the County to approve this sale of stock.

Pursuant to Commissioner Suarez' question regarding what was previously said regarding the Board's ability to revisit the performance of the new administration within twelve (12) months, Assistant County Attorney Maldonado clarified that her understanding of what Mr. Hertz had previously said was that the purchaser of the stock would be evaluating the facility within the next 12 months to determine their plans for the facility. She noted that, if necessary, the purchaser would come back before the Board for approval if the plans were inconsistent with the lease agreement; but if the plans were consistent, the purchaser did not have to come back before the Board for approval.

Mr. Hertz advised Mr. Kardys had asked the Seaquarium's administration not to introduce into the Seaquarium animals in direct competition with Zoo Miami (the Zoo) to ensure the Zoo and the Seaquarium were complimentary to each other instead of in direct competition. He stated that the language of the lease agreement would be modified to include language to that effect as well as other issues under review, which needed to be modernized in the lease agreement.

Commissioner Suarez noted he had the same concerns previously expressed regarding Lolita.

Chairwoman Sosa asked whether the purchaser would improve the facilities and would be required to abide by the same contract terms requiring that the animals be provided with quality care because their life span seemed to be based on the quality of the care.

Department Director Kardys advised he expected the level of animal care would remain at the same level or better than the current level. He noted that the research findings on Palace's performance with their zoos and aquariums around the world indicated

everything was moving in the direct direction.

There being no further comments or objections, the Board proceeded to take a vote on the foregoing proposed resolution as presented.

NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT - Final Rule 43 CFR 10

Dated October 1, 2003

[Code of Federal Regulations] [Title 43, Volume 1] [Revised as of October 1, 2003]
From the U.S. Government Printing Office via GPO Access [CITE: 43CFR10] [Page 213-239]

TITLE 43--PUBLIC LANDS: INTERIOR
PART 10--NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REGULATIONS

Authority: 25 U.S.C. 3001 et seq.
Source: 60 FR 62158, Dec. 4, 1995, unless otherwise noted.

Subpart A--Introduction

Sec. 10.1 Purpose and applicability.

(a) **Purpose**. These regulations carry out provisions of the Native American Graves Protection and Repatriation Act of 1990 (Pub.L. 101-601; 25 U.S.C. 3001-3013;104 Stat. 3048-3058). These regulations develop a systematic process for determining the rights of lineal descendants and Indian tribes and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony with which they are affiliated.

(b) **Applicability**. (1) These regulations pertain to the identification and appropriate disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony that are:
(i) In Federal possession or control; or
(ii) In the possession or control of any institution or State or local government receiving Federal funds; or
(iii) Excavated intentionally or discovered inadvertently on Federal or tribal lands.
(2) These regulations apply to human remains, funerary objects, sacred objects, or objects of cultural patrimony which are indigenous to Alaska, Hawaii, and the continental United States, but not to territories of the United States.
(3) Throughout these regulations are decision points which determine their applicability in particular circumstances, e.g., a decision as to whether a museum ``controls'' human remains and cultural objects within the meaning of the regulations, or, a decision as to whether an object is a ``human remain,'' ``funerary object,'' ``sacred object,'' or ``object of cultural patrimony'' within the meaning of the regulations. Any final determination making the Act or these regulations inapplicable is subject to review pursuant to section 15 of the Act.
[60 FR 62158, Dec. 4, 1995, as amended at 62 FR 41293, Aug. 1, 1997]

Sec. 10.2 Definitions.

In addition to the term Act, which means the Native American Graves Protection and Repatriation Act as described above, definitions used in these regulations are grouped in seven classes: Parties required to comply with these regulations; Parties with standing to make claims under these regulations; Parties responsible for implementing these regulations; Objects covered by these regulations; Cultural affiliation; Types of land covered by these regulations; and Procedures required by these regulations.

(a) **Who must comply with these regulations**?
(1) Federal agency means any department, agency, or instrumentality of the United States. Such term does not include the Smithsonian Institution as specified in section 2 (4) of the Act.
(2) Federal agency official means any individual authorized by delegation of authority within a Federal agency to perform the duties relating to these regulations.
(3) Museum means any institution or State or local government agency (including any institution of higher learning) that has possession of, or control over, human remains, funerary objects, sacred objects, or objects of cultural patrimony and receives Federal funds.
(i) The term ``possession'' means having physical custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony with a sufficient legal interest to lawfully treat the

objects as part of its collection for purposes of these regulations. Generally, a museum or Federal agency would not be considered to have possession of human remains, funerary objects, sacred objects, or objects of cultural patrimony on loan from another individual, museum, or Federal agency.
(ii) The term ``control'' means having a legal interest in human remains, funerary objects, sacred objects, or objects of cultural patrimony sufficient to lawfully permit the museum or Federal agency to treat the objects as part of its collection for purposes of these regulations whether or not the human remains, funerary objects, sacred objects or objects of cultural patrimony are in the physical custody of the museum or Federal agency. Generally, a museum or Federal agency that has loaned human remains, funerary objects, sacred objects, or objects of cultural patrimony to another individual, museum, or Federal agency is considered to retain control of those human remains, funerary objects, sacred objects, or objects of cultural patrimony for purposes of these regulations.
(iii) The phrase ``receives Federal funds'' means the receipt of funds by a museum after November 16, 1990, from a Federal agency through any grant, loan, contract (other than a procurement contract), or other arrangement by which a Federal agency makes or made available to a museum aid in the form of funds. Federal funds provided for any purpose that are received by a larger entity of which the museum is a part are considered Federal funds for the purposes of these regulations. For example, if a museum is a part of a State or local government or a private university and the State or local government or private university receives Federal funds for any purpose, the museum is considered to receive Federal funds for the purpose of these regulations.
(4) Museum official means the individual within a museum designated as being responsible for matters relating to these regulations.
(5) Person means an individual, partnership, corporation, trust, institution, association, or any other private entity, or, any official, employee, agent, department, or instrumentality of the United States, or of any Indian tribe or Native Hawaiian organization, or of any State or political subdivision thereof that discovers or discovered human remains, funerary objects, sacred objects or objects of cultural patrimony on Federal or tribal lands after November 16, 1990.

(b) **Who has standing to make a claim under these regulations?**
(1) Lineal descendant means an individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe or Native Hawaiian organization or by the common law system of descendance to a known Native American individual whose remains, funerary objects, or sacred objects are being claimed under these regulations.
(2) Indian tribe means any tribe, band, nation, or other organized Indian group or community of Indians, including any Alaska Native village or corporation as defined in or established by the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. The Secretary will distribute a list of Indian tribes for the purposes of carrying out this statute through the Departmental Consulting Archeologist.
(3)(i) Native Hawaiian organization means any organization that:
(A) Serves and represents the interests of Native Hawaiians;
(B) Has as a primary and stated purpose the provision of services to Native Hawaiians; and
(C) Has expertise in Native Hawaiian affairs.
(ii) The term Native Hawaiian means any individual who is a descendant of the aboriginal people

who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii. Such organizations must include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna 'O Hawai'i Nei.
(4) Indian tribe official means the principal leader of an Indian tribe or Native Hawaiian organization or the individual officially designated by the governing body of an Indian tribe or Native Hawaiian organization or as otherwise provided by tribal code, policy, or established procedure as responsible for matters relating to these regulations.

(c) **Who is responsible for carrying out these regulations?**
(1) Secretary means the Secretary of the Interior.
(2) Review Committee means the advisory committee established pursuant to section 8 of the Act.
(3) Departmental Consulting Archeologist means the official of the Department of the Interior designated by the Secretary as responsible for the administration of matters relating to these regulations.
Communications to the Departmental Consulting Archeologist should be addressed to: Departmental Consulting Archeologist National Park Service, PO Box 37127, Washington, DC 20013-7127.

(d) **What objects are covered by these regulations?** The Act covers four types of Native American objects. The term Native American means of, or relating to, a tribe, people, or culture indigenous to the United States, including Alaska and Hawaii.
(1) Human remains means the physical remains of the body of a person of Native American ancestry. The term does not include remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained, such as hair made into ropes or nets. For the purposes of determining cultural affiliation, human remains incorporated into a funerary object, sacred object, or object of cultural patrimony, as defined below, must be considered as part of that item.
(2) Funerary objects means items that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed intentionally at the time of death or later with or near individual human remains. Funerary objects must be identified by a preponderance of the evidence as having been removed from a specific burial site of an individual affiliated with a particular Indian tribe or Native Hawaiian organization or as being related to specific individuals or families or to known human remains. The term burial site means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which, as part of the death rite or ceremony of a culture, individual human remains were deposited, and includes rock cairns or pyres which do not fall within the ordinary definition of gravesite. For purposes of completing the summary requirements in Sec. 10.8 and the inventory requirements of Sec. 10.9:
(i) Associated funerary objects means those funerary objects for which the human remains with which they were placed intentionally are also in the possession or control of a museum or Federal agency.
Associated funerary objects also means those funerary objects that were made exclusively for burial purposes or to contain human remains.
(ii) Unassociated funerary objects means those funerary objects for which the human remains with which they were placed intentionally are not in the possession or control of a museum or Federal agency. Objects that were displayed with individual human remains as part of a death rite or ceremony of a culture and subsequently returned or distributed according to traditional custom to

living descendants or other individuals are not considered unassociated funerary objects.
(3) Sacred objects means items that are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. While many items, from ancient pottery sherds to arrowheads, might be imbued with sacredness in the eyes of an individual, these regulations are specifically limited to objects that were devoted to a traditional Native American religious ceremony or ritual and which have religious significance or function in the continued observance or renewal of such ceremony. The term traditional religious leader means a person who is recognized by members of an Indian tribe or Native Hawaiian organization as:
(i) Being responsible for performing cultural duties relating to the ceremonial or religious traditions of that Indian tribe or Native Hawaiian organization, or
(ii) Exercising a leadership role in an Indian tribe or Native Hawaiian organization based on the tribe or organization's cultural, ceremonial, or religious practices.
(4) Objects of cultural patrimony means items having ongoing historical, traditional, or cultural importance central to the Indian tribe or Native Hawaiian organization itself, rather than property owned by an individual tribal or organization member. These objects are of such central importance that they may not be alienated, appropriated, or conveyed by any individual tribal or organization member. Such objects must have been considered inalienable by the culturally affiliated Indian tribe or Native Hawaiian organization at the time the object was separated from the group. Objects of cultural patrimony include items such as Zuni War Gods, the Confederacy Wampum Belts of the Iroquois, and other objects of similar character and significance to the Indian tribe or Native Hawaiian organization as a whole.

(e) **What is cultural affiliation?** Cultural affiliation means that there is a relationship of shared group identity which can reasonably be traced historically or prehistorically between members of a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group. Cultural affiliation is established when the preponderance of the evidence -- based on geographical, kinship, biological, archeological, linguistic, folklore, oral tradition, historical evidence, or other information or expert opinion -- reasonably leads to such a conclusion.

(f) **What types of lands do the excavation and discovery provisions of these regulations apply to?** (1) Federal lands means any land other than tribal lands that are controlled or owned by the United States Government, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.). United States ``control,'' as used in this definition, refers to those lands not owned by the United States but in which the United States has a legal interest sufficient to permit it to apply these regulations without abrogating the otherwise existing legal rights of a person.
(2) Tribal lands means all lands which:
(i) Are within the exterior boundaries of any Indian reservation including, but not limited to, allotments held in trust or subject to a restriction on alienation by the United States; or
(ii) Comprise dependent Indian communities as recognized pursuant to 18 U.S.C. 1151; or
(iii) Are administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act of 1920 and section 4 of the Hawaiian Statehood Admission Act (Pub.L. 86-3; 73 Stat. 6).
(iv) Actions authorized or required under these regulations will not apply to tribal lands to the extent that any action would result in a taking of property without compensation within the

meaning of the Fifth Amendment of the United States Constitution.

(g) **What procedures are required by these regulations?**
(1) Summary means the written description of collections that may contain unassociated funerary objects, sacred objects, and objects of cultural patrimony required by Sec. 10.8 of these regulations.
(2) Inventory means the item-by-item description of human remains and associated funerary objects.
(3) Intentional excavation means the planned archeological removal of human remains, funerary objects, sacred objects, or objects of cultural patrimony found under or on the surface of Federal or tribal lands pursuant to section 3 (c) of the Act.
(4) Inadvertent discovery means the unanticipated encounter or detection of human remains, funerary objects, sacred objects, or objects of cultural patrimony found under or on the surface of Federal or tribal lands pursuant to section 3 (d) of the Act.
[60 FR 62158, Dec. 4, 1995, as amended at 62 FR 41293, Aug. 1, 1997]

Subpart B--Human Remains, Funerary Objects, Sacred Objects, or Objects of Cultural Patrimony From Federal or Tribal Lands

Sec. 10.3 Intentional archaeological excavations.

(a) **General.** This section carries out section 3 (c) of the Act regarding the custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony that are excavated intentionally from Federal or tribal lands after November 16, 1990.

(b) **Specific Requirements.** These regulations permit the intentional excavation of human remains, funerary objects, sacred objects, or objects of cultural patrimony from Federal or tribal lands only if:
(1) The objects are excavated or removed following the requirements of the Archaeological Resources Protection Act (ARPA) (16 U.S.C. 470aa et seq.) and its implementing regulations. Regarding private lands within the exterior boundaries of any Indian reservation, the Bureau of Indian Affairs (BIA) will serve as the issuing agency for any permits required under the Act. For BIA procedures for obtaining such permits, see 25 CFR part 262 or contact the Deputy Commissioner of Indian Affairs, Department of the Interior, Washington, DC 20240. Regarding lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Pub. L. 86-3, the Department of Hawaiian Home Lands will serve as the issuing agency for any permits required under the Act, with the Hawaii State Historic Preservation Division of the Department of Land and Natural Resources acting in an advisory capacity for such issuance. Procedures and requirements for issuing permits will be consistent with those required by the ARPA and its implementing regulations;
(2) The objects are excavated after consultation with or, in the case of tribal lands, consent of, the appropriate Indian tribe or Native Hawaiian organization pursuant to Sec. 10.5;
(3) The disposition of the objects is consistent with their custody as described in Sec. 10.6; and
(4) Proof of the consultation or consent is shown to the Federal agency official or other agency official responsible for the issuance of the required permit.

(c) **Procedures.** (1) The Federal agency official must take reasonable steps to determine whether a planned activity may result in the excavation of human remains, funerary objects, sacred objects, or objects of cultural patrimony from Federal lands. Prior to issuing any approvals or permits for activities, the Federal agency official must notify in writing the Indian tribes or Native Hawaiian organizations that are likely to be culturally affiliated with any human remains, funerary objects, sacred objects, or objects of cultural patrimony that may be excavated. The Federal agency official must also notify any present-day Indian tribe which aboriginally occupied the area of the planned activity and any other Indian tribes or Native Hawaiian organizations that the Federal agency official reasonably believes are likely to have a cultural relationship to the human remains, funerary objects, sacred objects, or objects of cultural patrimony that are expected to be found. The notice must be in writing and describe the planned activity, its general location, the basis upon which it was determined that human remains, funerary objects, sacred objects, or objects of cultural patrimony may be excavated, and, the basis for determining likely custody pursuant to Sec. 10.6. The notice must also propose a time and place for meetings or consultations to further consider the activity, the Federal agency's proposed treatment of any human remains, funerary objects, sacred objects, or objects of cultural patrimony that may be excavated, and the proposed disposition of any excavated human remains, funerary objects, sacred objects, or objects of cultural patrimony. Written notification should be followed up by telephone contact if there is no response in 15 days. Consultation must be conducted pursuant to Sec. 10.5.
(2) Following consultation, the Federal agency official must complete a written plan of action (described in Sec. 10.5(e)) and execute the actions called for in it.
(3) If the planned activity is also subject to review under section 106 of the National Historic Preservation Act (16 U.S.C. 470 et seq.), the Federal agency official should coordinate consultation and any subsequent agreement for compliance conducted under that Act with the requirements of Sec. 10.3
(c)(2) and Sec. 10.5. Compliance with these regulations does not relieve Federal agency officials of requirements to comply with section 106 of the National Historic Preservation Act (16 U.S.C. 470 et seq.).
(4) If an Indian tribe or Native Hawaiian organization receives notice of a planned activity or otherwise becomes aware of a planned activity that may result in the excavation of human remains, funerary
objects, sacred objects, or objects of cultural patrimony on tribal lands, the Indian tribe or Native Hawaiian organization may take appropriate steps to:
(i) Ensure that the human remains, funerary objects, sacred objects, or objects of cultural patrimony are excavated or removed following Sec. 10.3 (b), and
(ii) Make certain that the disposition of any human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently as a result of the planned activity are carried out following Sec. 10.6.

Sec. 10.4 Inadvertent discoveries.

(a) **General.** This section carries out section 3 (d) of the Act regarding the custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony that are discovered inadvertently on Federal or tribal lands after November 16, 1990.

(b) **Discovery.** Any person who knows or has reason to know that he or she has discovered

inadvertently human remains, funerary objects, sacred objects, or objects of cultural patrimony on Federal or tribal lands after November 16, 1990, must provide immediate telephone notification of the inadvertent discovery, with written confirmation, to the responsible Federal agency official with respect to Federal lands, and, with respect to tribal lands, to the responsible Indian tribe official. The requirements of these regulations regarding inadvertent discoveries apply whether or not an inadvertent discovery is duly reported. If written confirmation is provided by certified mail, the return receipt constitutes evidence of the receipt of the written notification by the Federal agency official or Indian tribe official.

(c) **Ceasing activity.** If the inadvertent discovery occurred in connection with an on-going activity on Federal or tribal lands, the person, in addition to providing the notice described above, must stop the activity in the area of the inadvertent discovery and make a reasonable effort to protect the human remains, funerary objects, sacred objects, or objects of cultural patrimony discovered inadvertently.

(d) **Federal lands.** (1) As soon as possible, but no later than three (3) working days after receipt of the written confirmation of notification with respect to Federal lands described in Sec. 10.4 (b), the responsible Federal agency official must:
(i) Certify receipt of the notification;
(ii) Take immediate steps, if necessary, to further secure and protect inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony, including, as appropriate,
stabilization or covering;
(iii) Notify by telephone, with written confirmation, the Indian tribes or Native Hawaiian organizations likely to be culturally affiliated with the inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony, the Indian tribe or Native Hawaiian organization which aboriginally occupied the area, and any other Indian tribe or Native Hawaiian organization that is reasonably known to have a cultural relationship to the human remains, funerary objects, sacred objects, or objects of cultural patrimony. This notification must include pertinent information as to kinds of human remains, funerary objects, sacred objects, or objects of cultural patrimony discovered inadvertently, their condition, and the circumstances of their inadvertent discovery;
(iv) Initiate consultation on the inadvertent discovery pursuant to Sec. 10.5;
(v) If the human remains, funerary objects, sacred objects, or objects of cultural patrimony must be excavated or removed, follow the requirements and procedures in Sec. 10.3 (b) of these regulations; and
(vi) Ensure that disposition of all inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony is carried out following Sec. 10.6.
(2) Resumption of activity. The activity that resulted in the inadvertent discovery may resume thirty (30) days after certification by the notified Federal agency of receipt of the written confirmation of notification of inadvertent discovery if the resumption of the activity is otherwise lawful. The activity may also resume, if otherwise lawful, at any time that a written, binding agreement is executed between the Federal agency and the affiliated Indian tribes or Native Hawaiian organizations that adopt a recovery plan for the excavation or removal of the human remains, funerary objects, sacred objects, or objects of cultural patrimony following Sec. 10.3 (b)(1) of these regulations. The disposition of all human remains, funerary objects, sacred objects,

or objects of cultural patrimony must be carried out following Sec. 10.6.

(e) **Tribal lands.** (1) As soon as possible, but no later than three (3) working days after receipt of the written confirmation of notification with respect to Tribal lands described in Sec. 10.4 (b), the responsible Indian tribe official may:
(i) Certify receipt of the notification;
(ii) Take immediate steps, if necessary, to further secure and protect inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony, including, as appropriate, stabilization or covering;
(iii) If the human remains, funerary objects, sacred objects, or objects of cultural patrimony must be excavated or removed, follow the requirements and procedures in Sec. 10.3 (b) of these regulations; and
(iv) Ensure that disposition of all inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony is carried out following Sec. 10.6.
(2) Resumption of Activity. The activity that resulted in the inadvertent discovery may resume if otherwise lawful after thirty (30) days of the certification of the receipt of notification by the Indian tribe or Native Hawaiian organization.

(f) **Federal agency officials.** Federal agency officials should coordinate their responsibilities under this section with their emergency discovery responsibilities under section 106 of the National Historical Preservation Act (16 U.S.C. 470 (f) et seq.), 36 CFR 800.11 or section 3 (a) of the Archeological and Historic Preservation Act (16 U.S.C. 469 (a-c)). Compliance with these regulations does not relieve Federal agency officials of the requirement to comply with section 106 of the National Historical Preservation Act (16 U.S.C. 470 (f) et seq.), 36 CFR 800.11 or section 3 (a) of the Archeological and Historic Preservation Act (16 U.S.C. 469 (a-c)).

(g) **Notification requirement in authorizations.** All Federal authorizations to carry out land use activities on Federal lands or tribal lands, including all leases and permits, must include a requirement for the holder of the authorization to notify the appropriate Federal or tribal official immediately upon the discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony pursuant to Sec. 10.4 (b) of these regulations.
[60 FR 62158, Dec. 4, 1995, as amended at 62 FR 41293, Aug. 1, 1997]

Sec. 10.5 Consultation.
Consultation as part of the intentional excavation or inadvertent discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony on Federal lands must be conducted in accordance with the following requirements.

(a) **Consulting parties.** Federal agency officials must consult with known lineal descendants and Indian tribe officials:
(1) From Indian tribes on whose aboriginal lands the planned activity will occur or where the inadvertent discovery has been made; and
(2) From Indian tribes and Native Hawaiian organizations that are, or are likely to be, culturally affiliated with the human remains, funerary objects, sacred objects, or objects of cultural patrimony; and
(3) From Indian tribes and Native Hawaiian organizations that have a demonstrated cultural

relationship with the human remains, funerary objects, sacred objects, or objects of cultural patrimony.

(b) **Initiation of consultation.** (1) Upon receiving notice of, or otherwise becoming aware of, an inadvertent discovery or planned activity that has resulted or may result in the intentional excavation or inadvertent discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony on Federal lands, the responsible Federal agency official must, as part of the procedures described in Sec. Sec. 10.3 and 10.4, take appropriate steps to identify the lineal descendant, Indian tribe, or Native Hawaiian organization entitled to custody of the human remains, funerary objects, sacred objects, or objects of cultural patrimony pursuant to Sec. 10.6 and Sec. 10.14. The Federal agency official shall notify in writing:
(i) Any known lineal descendants of the individual whose remains, funerary objects, sacred objects, or objects of cultural patrimony have been or are likely to be excavated intentionally or discovered inadvertently; and
(ii) The Indian tribes or Native Hawaiian organizations that are likely to be culturally affiliated with the human remains, funerary objects, sacred objects, or objects of cultural patrimony that have been or are likely to be excavated intentionally or discovered inadvertently; and
(iii) The Indian tribes which aboriginally occupied the area in which the human remains, funerary objects, sacred objects, or objects of cultural patrimony have been or are likely to be excavated intentionally or discovered inadvertently; and
(iv) The Indian tribes or Native Hawaiian organizations that have a demonstrated cultural relationship with the human remains, funerary objects, sacred objects, or objects of cultural patrimony that have been or are likely to be excavated intentionally or discovered inadvertently.
(2) The notice must propose a time and place for meetings or consultation to further consider the intentional excavation or inadvertent discovery, the Federal agency's proposed treatment of the human remains, funerary objects, sacred objects, or objects of cultural patrimony that may be excavated, and the proposed disposition of any intentionally excavated or inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony.
(3) The consultation must seek to identify traditional religious leaders who should also be consulted and seek to identify, where applicable, lineal descendants and Indian tribes or Native Hawaiian organizations affiliated with the human remains, funerary objects, sacred objects, or objects of cultural patrimony.

(c) **Provision of information.** During the consultation process, as appropriate, the Federal agency official must provide the following information in writing to the lineal descendants and the officials of Indian tribes or Native Hawaiian organizations that are or are likely to be affiliated with the human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently on Federal lands:
(1) A list of all lineal descendants and Indian tribes or Native Hawaiian organizations that are being, or have been, consulted regarding the particular human remains, funerary objects, sacred objects, or objects of cultural patrimony;
(2) An indication that additional documentation used to identify affiliation will be supplied upon request.

(d) **Requests for information.** During the consultation process, Federal agency officials must request, as appropriate, the following information from Indian tribes or Native Hawaiian

organizations that are, or are likely to be, affiliated pursuant to Sec. 10.6 (a) with intentionally excavated or inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony:
(1) Name and address of the Indian tribe official to act as representative in consultations related to particular human remains, funerary objects, sacred objects, or objects of cultural patrimony;
(2) Names and appropriate methods to contact lineal descendants who should be contacted to participate in the consultation process;
(3) Recommendations on how the consultation process should be conducted; and
(4) Kinds of cultural items that the Indian tribe or Native Hawaiian organization considers likely to be unassociated funerary objects, sacred objects, or objects of cultural patrimony.

(e) **Written plan of action.** Following consultation, the Federal agency official must prepare, approve, and sign a written plan of action. A copy of this plan of action must be provided to the lineal descendants, Indian tribes and Native Hawaiian organizations involved. Lineal descendants and Indian tribe official(s) may sign the written plan of action as appropriate. At a minimum, the plan of action must comply with Sec. 10.3 (b)(1) and document the following:
(1) The kinds of objects to be considered as cultural items as defined in Sec. 10.2 (b);
(2) The specific information used to determine custody pursuant to Sec. 10.6;
(3) The planned treatment, care, and handling of human remains, funerary objects, sacred objects, or objects of cultural patrimony recovered;
(4) The planned archeological recording of the human remains, funerary objects, sacred objects, or objects of cultural patrimony recovered;
(5) The kinds of analysis planned for each kind of object;
(6) Any steps to be followed to contact Indian tribe officials at the time of intentional excavation or inadvertent discovery of specific human remains, funerary objects, sacred objects, or objects of cultural
patrimony;
(7) The kind of traditional treatment, if any, to be afforded the human remains, funerary objects, sacred objects, or objects of cultural patrimony by members of the Indian tribe or Native Hawaiian organization;
(8) The nature of reports to be prepared; and
(9) The planned disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony following Sec. 10.6.

(f) **Comprehensive agreements.** Whenever possible, Federal Agencies should enter into comprehensive agreements with Indian tribes or Native Hawaiian organizations that are affiliated with human remains, funerary objects, sacred objects, or objects of cultural patrimony and have claimed, or are likely to claim, those human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently on Federal lands. These agreements should address all Federal agency land management activities that could result in the intentional excavation or inadvertent discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony.
Consultation should lead to the establishment of a process for effectively carrying out the requirements of these regulations regarding standard consultation procedures, the determination of custody consistent with procedures in this section and Sec. 10.6, and the treatment and disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony. The signed

agreements, or the correspondence related to the effort to reach agreements, must constitute proof of consultation as required by these regulations.

(g) **Traditional religious leaders.** The Federal agency official must be cognizant that Indian tribe officials may need to confer with traditional religious leaders prior to making recommendations. Indian tribe officials are under no obligation to reveal the identity of traditional religious leaders. [60 FR 62158, Dec. 4, 1995, as amended at 62 FR 41293, Aug. 1, 1997]

Sec. 10.6 Custody.

(a) **Priority of custody.** This section carries out section 3 (a) of the Act, subject to the limitations of Sec. 10.15, regarding the custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently in Federal or tribal lands after November 16, 1990. For the purposes of this section, custody means ownership or control of human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently in Federal or tribal lands after November 16, 1990. Custody of these human remains, funerary objects, sacred objects, or objects of cultural patrimony is, with priority given in the order listed:
(1) In the case of human remains and associated funerary objects, in the lineal descendant of the deceased individual as determined pursuant to Sec. 10.14 (b);
(2) In cases where a lineal descendant cannot be ascertained or no claim is made, and with respect to unassociated funerary objects, sacred objects, and objects of cultural patrimony:
(i) In the Indian tribe on whose tribal land the human remains, funerary objects, sacred objects, or objects of cultural patrimony were excavated intentionally or discovered inadvertently;
(ii) In the Indian tribe or Native Hawaiian organization that has the closest cultural affiliation with the human remains, funerary objects, sacred objects, or objects of cultural patrimony as determined pursuant to Sec. 10.14 (c); or
(iii) In circumstances in which the cultural affiliation of the human remains, funerary objects, sacred objects, or objects of cultural patrimony cannot be ascertained and the objects were excavated intentionally or discovered inadvertently on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of an Indian tribe:
(A) In the Indian tribe aboriginally occupying the Federal land on which the human remains, funerary objects, sacred objects, or objects of cultural patrimony were excavated intentionally or discovered
inadvertently, or
(B) If it can be shown by a preponderance of the evidence that a different Indian tribe or Native Hawaiian organization has a stronger cultural relationship with the human remains, funerary objects, sacred objects, or objects of cultural patrimony, in the Indian tribe or Native Hawaiian organization that has the strongest demonstrated relationship with the objects.

(b) **Custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony and other provisions of the Act apply to all intentional excavations and inadvertent discoveries made after November 16, 1990, including those made before the effective date of these regulations.**

(c) **Final notice, claims and disposition with respect to Federal lands.** Upon determination of the lineal descendant, Indian tribe, or Native Hawaiian organization that under these regulations appears to be entitled to custody of particular human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated intentionally or discovered inadvertently on Federal lands, the responsible Federal agency official must, subject to the notice required herein and the limitations of Sec. 10.15, transfer custody of the objects to the lineal descendant, Indian tribe, or Native Hawaiian organization following appropriate procedures, which must respect traditional customs and practices of the affiliated Indian tribes or Native Hawaiian organizations in each instance. Prior to any such disposition by a Federal agency official, the Federal agency official must publish general notices of the proposed disposition in a newspaper of general circulation in the area in which the human remains, funerary objects, sacred objects, or objects of cultural patrimony were excavated intentionally or discovered inadvertently and, if applicable, in a newspaper of general circulation in the area(s) in which affiliated Indian tribes or Native Hawaiian organizations members now reside. The notice must provide information as to the nature and affiliation of the human remains, funerary objects, sacred objects, or objects of cultural patrimony and solicit further claims to custody. The notice must be published at least two (2) times at least a week apart, and the transfer must not take place until at least thirty (30) days after the publication of the second notice to allow time for any additional claimants to come forward. If additional claimants do come forward and the Federal agency official cannot clearly determine which claimant is entitled to custody, the Federal agency must not transfer custody of the objects until such time as the proper recipient is determined pursuant to these regulations. The Federal agency official must send a copy of the notice and information on when and in what newspaper(s) the notice was published to the Departmental Consulting Archeologist.
[60 FR 62158, Dec. 4, 1995, as amended at 62 FR 41293, Aug. 1, 1997]

Sec. 10.7 Disposition of unclaimed human remains, funerary objects, sacred objects, or objects of cultural patrimony. [Reserved]

Subpart C--Human Remains, Funerary Objects, Sacred Objects, or Objects of Cultural Patrimony in Museums and Federal Collections

Sec. 10.8 Summaries.

(a) **General.** This section carries out section 6 of the Act. Under section 6 of the Act, each museum or Federal agency that has possession or control over collections which may contain unassociated funerary objects, sacred objects, or objects of cultural patrimony must complete a summary of these collections based upon available information held by the museum or Federal agency. The purpose of the summary is to provide information about the collections to lineal descendants and culturally affiliated Indian tribes or Native Hawaiian organizations that may wish to request repatriation of such objects. The summary serves in lieu of an object-by-object inventory of these collections, although, if an inventory is available, it may be substituted. Federal agencies are responsible for ensuring that these requirements are met for all collections from their lands or generated by their actions whether the collections are held by the Federal agency or by a non-Federal institution.

(b) **Contents of summaries.** For each collection or portion of a collection, the summary must

include: an estimate of the number of objects in the collection or portion of the collection; a description of
the kinds of objects included; reference to the means, date(s), and location(s) in which the collection or portion of the collection was acquired, where readily ascertainable; and information relevant to identifying lineal descendants, if available, and cultural affiliation.

(c) **Completion.** Summaries must be completed not later than November 16, 1993.

(d) **Consultation.** (1) Consulting parties. Museum and Federal agency officials must consult with Indian tribe officials and traditional religious leaders:
(i) From whose tribal lands unassociated funerary objects, sacred objects, or objects of cultural patrimony originated;
(ii) That are, or are likely to be, culturally affiliated with unassociated funerary objects, sacred objects, or objects of cultural patrimony; and
(iii) From whose aboriginal lands unassociated funerary objects, sacred objects, or objects of cultural patrimony originated.
(2) Initiation of consultation. Museum and Federal agency officials must begin summary consultation no later than the completion of the summary process. Consultation may be initiated with a letter, but should be followed up by telephone or face-to-face dialogue with the appropriate Indian tribe official.
(3) Provision of information. During summary consultation, museum and Federal agency officials must provide copies of the summary to lineal descendants, when known, and to officials and traditional religious leaders representing Indian tribes or Native Hawaiian organizations that are, or are likely to be, culturally affiliated with the cultural items. A copy of the summary must also be provided to the Departmental Consulting Archeologist. Upon request by lineal descendants or Indian tribe officials, museum and Federal agency officials must provide lineal descendants, Indian tribe officials and traditional religious leaders with access to records, catalogues, relevant studies, or other
pertinent data for the limited purposes of determining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession of objects covered by the summary. Access to this information may be requested at any time and must be provided in a reasonable manner to be agreed upon by all parties. The Review committee also must be provided access to such materials.
(4) Requests for information. During the summary consultation, museum and Federal agency officials must request, as appropriate, the following information from Indian tribes and Native Hawaiian organizations that are, or are likely to be, culturally affiliated with their collections:
(i) Name and address of the Indian tribe official to act as representative in consultations related to particular objects;
(ii) Recommendations on how the consultation process should be conducted, including:
(A) Names and appropriate methods to contact any lineal descendants, if known, of individuals whose unassociated funerary objects or sacred objects are included in the summary;
(B) Names and appropriate methods to contact any traditional religious leaders that the Indian tribe or Native Hawaiian organization thinks should be consulted regarding the collections; and
(iii) Kinds of cultural items that the Indian tribe or Native Hawaiian organization considers to be funerary objects, sacred objects, or objects of cultural patrimony.

(e) **Museum and Federal agency officials** must document the following information regarding unassociated funerary objects, sacred objects, and objects of cultural patrimony in their collections and must use this documentation in determining the individuals, Indian tribes, and Native Hawaiian organizations with which they are affiliated:
(1) Accession and catalogue entries;
(2) Information related to the acquisition of unassociated funerary object, sacred object, or object of cultural patrimony, including:
(i) The name of the person or organization from whom the object was obtained, if known;
(ii) The date of acquisition;
(iii) The place each object was acquired, i.e., name or number of site, county, State, and Federal agency administrative unit, if applicable; and
(iv) The means of acquisition, i.e., gift, purchase, or excavation;
(3) A description of each unassociated funerary object, sacred object, or object of cultural patrimony, including dimensions, materials, and photographic documentation, if appropriate, and the antiquity of such objects, if known;
(4) A summary of the evidence used to determine the cultural affiliation of the unassociated funerary objects, sacred objects, or objects of cultural patrimony pursuant to Sec. 10.14 of these regulations.

(f) **Notification.** Repatriation of unassociated funerary objects, sacred objects, or objects of cultural patrimony to lineal descendants, culturally affiliated Indian tribes, or Native Hawaiian organizations as determined pursuant to Sec. 10.10 (a), must not proceed prior to submission of a notice of intent to repatriate to the Departmental Consulting Archeologist, and publication of the notice of intent to repatriate in the Federal Register. The notice of intent to repatriate must describe the unassociated funerary objects, sacred objects, or objects of cultural patrimony being claimed in sufficient detail so as to enable other individuals, Indian tribes or Native Hawaiian organizations to determine their interest in the claimed objects. It must include information that identifies each claimed unassociated funerary object, sacred object, or object of cultural patrimony and the circumstances surrounding its acquisition, and describes the objects that are clearly identifiable as to cultural affiliation. It must also describe the objects that are not clearly identifiable as being culturally affiliated with a particular Indian tribe or Native Hawaiian organization, but which, given the totality of circumstances surrounding acquisition of the objects, are likely to be culturally affiliated with a particular Indian tribe or Native Hawaiian organization. The Departmental Consulting Archeologist must publish the notice of intent to repatriate in the Federal Register. Repatriation may not occur until at least thirty (30) days after publication of the notice of intent to repatriate in the Federal Register.
[60 FR 62158, Dec. 4, 1995, as amended at 62 FR 41293, Aug. 1, 1997]

Sec. 10.9 Inventories.

(a) **General.** This section carries out section 5 of the Act. Under section 5 of the Act, each museum or Federal agency that has possession or control over holdings or collections of human remains and associated funerary objects must compile an inventory of such objects, and, to the fullest extent possible based on information possessed by the museum or Federal agency, must identify the geographical and cultural affiliation of each item. The purpose of the inventory is to

facilitate repatriation by providing clear descriptions of human remains and associated funerary objects and establishing the cultural affiliation between these objects and present-day Indian tribes and Native Hawaiian organizations. Museums and Federal agencies are encouraged to produce inventories first on those portions of their collections for which information is readily available or about which Indian tribes or Native Hawaiian organizations have expressed special interest. Early focus on these parts of collections will result in determinations that may serve as models for other inventories. Federal agencies must ensure that these requirements are met for all collections from their lands or generated by their actions whether the collections are held by the Federal agency or by a non-Federal institution.

(b) **Consultation**--(1) Consulting parties. Museum and Federal agency officials must consult with:
(i) Lineal descendants of individuals whose remains and associated funerary objects are likely to be subject to the inventory provisions of these regulations; and
(ii) Indian tribe officials and traditional religious leaders:
(A) From whose tribal lands the human remains and associated funerary objects originated;
(B) That are, or are likely to be, culturally affiliated with human remains and associated funerary objects; and
(C) From whose aboriginal lands the human remains and associated funerary objects originated.
(2) Initiation of consultation. Museum and Federal agency officials must begin inventory consultation as early as possible, no later in the inventory process than the time at which investigation into the cultural affiliation of human remains and associated funerary objects is being conducted. Consultation may be initiated with a letter, but should be followed up by telephone or face-to-face dialogue.
(3) Provision of information. During inventory consultation, museums and Federal agency officials must provide the following information in writing to lineal descendants, when known, and to officials and traditional religious leaders representing Indian tribes or Native Hawaiian organizations that are, or are likely to be, culturally affiliated with the human remains and associated funerary objects.
(i) A list of all Indian tribes and Native Hawaiian organizations that are, or have been, consulted regarding the particular human remains and associated funerary objects;
(ii) A general description of the conduct of the inventory;
(iii) The projected time frame for conducting the inventory; and
(iv) An indication that additional documentation used to identify cultural affiliation will be supplied upon request.
(4) Requests for information. During the inventory consultation, museum and Federal agency officials must request, as appropriate, the following information from Indian tribes and Native Hawaiian organizations that are, or are likely to be, culturally affiliated with their collections:
(i) Name and address of the Indian tribe official to act as representative in consultations related to particular human remains and associated funerary objects;
(ii) Recommendations on how the consultation process should be conducted, including:
(A) Names and appropriate methods to contact any lineal descendants of individuals whose remains and associated funerary objects are or are likely to be included in the inventory; and
(B) Names and appropriate methods to contact traditional religious leaders who should be consulted regarding the human remains and associated funerary objects.
(iii) Kinds of objects that the Indian tribe or Native Hawaiian organization reasonably believes to have been made exclusively for burial purposes or to contain human remains of their ancestors.

(c) **Required information.** The following documentation must be included, if available, for all inventories completed by museum or Federal agency officials:
(1) Accession and catalogue entries, including the accession/catalogue entries of human remains with which funerary objects were associated;
(2) Information related to the acquisition of each object, including:
(i) The name of the person or organization from whom the object was obtained, if known;
(ii) The date of acquisition,
(iii) The place each object was acquired, i.e., name or number of site, county, State, and Federal agency administrative unit, if applicable; and
(iv) The means of acquisition, i.e., gift, purchase, or excavation;
(3) A description of each set of human remains or associated funerary object, including dimensions, materials, and, if appropriate, photographic documentation, and the antiquity of such human remains or associated funerary objects, if known;
(4) A summary of the evidence, including the results of consultation, used to determine the cultural affiliation of the human remains and associated funerary objects pursuant to Sec. 10.14 of these regulations.

(d) **Documents.** Two separate documents comprise the inventory:
(1) A listing of all human remains and associated funerary objects that are identified as being culturally affiliated with one or more present-day Indian tribes or Native Hawaiian organizations. The list must indicate for each item or set of items whether cultural affiliation is clearly determined or likely based upon the preponderance of the evidence; and
(2) A listing of all culturally unidentifiable human remains and associated funerary objects for which no culturally affiliated present-day Indian tribe or Native Hawaiian organization can be determined.

(e) **Notification.** (1) If the inventory results in the identification or likely identification of the cultural affiliation of any particular human remains or associated funerary objects with one or more Indian tribes or Native Hawaiian organizations, the museum or Federal agency, not later than six (6) months after completion of the inventory, must send such Indian tribes or Native Hawaiian organizations the inventory of culturally affiliated human remains and associated funerary objects, including all information required under Sec. 10.9 (c), and a notice of inventory completion that summarizes the results of the inventory.
(2) The notice of inventory completion must summarize the contents of the inventory in sufficient detail so as to enable the recipients to determine their interest in claiming the inventoried items. It must identify each particular set of human remains or each associated funerary object and the circumstances surrounding its acquisition, describe the human remains or associated funerary objects that are clearly identifiable as to cultural affiliation, and describe the human remains and associated funerary objects that are not clearly identifiable as being culturally affiliated with an Indian tribe or Native Hawaiian organization, but which, given the totality of circumstances surrounding acquisition of the human remains or associated objects, are identified as likely to be culturally affiliated with a particular Indian tribe or Native Hawaiian organization.
(3) If the inventory results in a determination that the human remains are of an identifiable individual, the museum or Federal agency official must convey this information to the lineal descendant of the deceased individual, if known, and to the Indian tribe or Native Hawaiian

organization of which the deceased individual was culturally affiliated.
(4) The notice of inventory completion and a copy of the inventory must also be sent to the Departmental Consulting Archeologist. These submissions should be sent in both printed hard copy and electronic formats. Information on the proper format for electronic submission and suggested alternatives for museums and Federal agencies unable to meet these requirements are available from the Departmental Consulting Archeologist.
(5) Upon request by an Indian tribe or Native Hawaiian organization that has received or should have received a notice of inventory completion and a copy of the inventory as described above, a museum or Federal agency must supply additional available documentation to supplement the information provided with the notice. For these purposes, the term documentation means a summary of existing museum or Federal agency records including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding the acquisition and accession of human remains and associated funerary objects.
(6) If the museum or Federal agency official determines that the museum or Federal agency has possession of or control over human remains that cannot be identified as affiliated with a particular individual, Indian tribes or Native Hawaiian organizations, the museum or Federal agency must provide the Department Consulting Archeologist notice of this result and a copy of the list of culturally unidentifiable human remains and associated funerary objects. The Departmental Consulting Archeologist must make this information available to members of the Review Committee. Section 10.11 of these regulations will set forth procedures for disposition of culturally unidentifiable human remains of Native American origin. Museums or Federal agencies must retain possession of such human remains pending promulgation of Sec. 10.11 unless legally required to do otherwise, or recommended to do otherwise by the Secretary. Recommendations regarding the disposition of culturally unidentifiable human remains may be requested prior to final promulgation of Sec. 10.11.
(7) The Departmental Consulting Archeologist must publish notices of inventory completion received from museums and Federal agencies in the Federal Register.

(f) **Completion.** Inventories must be completed not later than November 16, 1995. Any museum that has made a good faith effort to complete its inventory, but which will be unable to complete the process by this deadline, may request an extension of the time requirements from the Secretary. An indication of good faith efforts must include, but not necessarily be limited to, the initiation of active consultation and documentation regarding the collections and the development of a written plan to carry out the inventory process. Minimum components of an inventory plan are: a definition of the steps required; the position titles of the persons responsible for each step; a schedule for carrying out the plan; and a proposal to obtain the requisite funding.
[60 FR 62158, Dec. 4, 1995, as amended at 62 FR 41293, Aug. 1, 1997]

Sec. 10.10 Repatriation.

(a) **Unassociated funerary objects, sacred objects, and objects of cultural patrimony**--(1) Criteria. Upon the request of a lineal descendant, Indian tribe, or Native Hawaiian organization, a museum or Federal agency must expeditiously repatriate unassociated funerary objects, sacred objects, or objects of cultural patrimony if all the following criteria are met:
(i) The object meets the definitions established in Sec. 10.2 (d)(2)(ii), (d)(3), or (d)(4); and

(ii) The cultural affiliation of the object is established:
(A) Through the summary, consultation, and notification procedures in Sec. 10.14 of these regulations; or
(B) By presentation of a preponderance of the evidence by a requesting Indian tribe or Native Hawaiian organization pursuant to section 7(c) of the Act; and
(iii) The known lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the museum or Federal agency does not have a right of possession to the objects as defined in Sec. 10.10 (a)(2); and
(iv) The agency or museum is unable to present evidence to the contrary proving that it does have a right of possession as defined below; and
(v) None of the specific exceptions listed in Sec. 10.10 (c) apply.
(2) Right of possession. For purposes of this section, ``right of possession'' means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object, or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession to that object.
(3) Notification. Repatriation must take place within ninety (90) days of receipt of a written request for repatriation that satisfies the requirements of paragraph (a)(1) of this section from a lineal descendent or culturally affiliated Indian tribe or Native Hawaiian organization, provided that the repatriation may not occur until at least thirty (30) days after publication of the notice of intent to repatriate in the Federal Register as described in Sec. 10.8.

(b) **Human remains and associated funerary objects**--(1) Criteria. Upon the request of a lineal descendant, Indian tribe, or Native Hawaiian organization, a museum and Federal agency must expeditiously repatriate human remains and associated funerary objects if all of the following criteria are met:
(i) The human remains or associated funerary object meets the definitions established in Sec. 10.2 (d)(1) or (d)(2)(i); and
(ii) The affiliation of the deceased individual to known lineal descendant, present day Indian tribe, or Native Hawaiian organization:
(A) Has been reasonably traced through the procedures outlined in Sec. 10.9 and Sec. 10.14 of these regulations; or
(B) Has been shown by a preponderance of the evidence presented by a requesting Indian tribe or Native Hawaiian organization pursuant to section 7(c) of the Act; and
(iii) None of the specific exceptions listed in Sec. 10.10 (c) apply.
(2) Notification. Repatriation must take place within ninety (90) days of receipt of a written request for repatriation that satisfies the requirements of Sec. 10.10 (b)(1) from the culturally affiliated Indian tribe or Native Hawaiian organization, provided that the repatriation may not occur until at least thirty (30) days after publication of the notice of inventory completion in the Federal Register as described in Sec. 10.9.

(c) **Exceptions.** These requirements for repatriation do not apply to:
(1) Circumstances where human remains, funerary objects, sacred objects, or objects of cultural patrimony are indispensable to the completion of a specific scientific study, the outcome of which

is of major benefit to the United States. Human remains, funerary objects, sacred objects, or objects of cultural patrimony in such circumstances must be returned no later than ninety (90) days after completion of the study; or
(2) Circumstances where there are multiple requests for repatriation of human remains, funerary objects, sacred objects, or objects of cultural patrimony and the museum or Federal agency, after complying with these regulations, cannot determine by a preponderance of the evidence which requesting party is the most appropriate claimant. In such circumstances, the museum or Federal agency may retain the human remains, funerary objects, sacred objects, or objects of cultural patrimony until such time as the requesting parties mutually agree upon the appropriate recipient or the dispute is otherwise resolved pursuant to these regulations or as ordered by a court of competent jurisdiction; or
(3) Circumstances where a court of competent jurisdiction has determined that the repatriation of the human remains, funerary objects, sacred objects, or objects of cultural patrimony in the possession or control of a museum would result in a taking of property without just compensation within the meaning of the Fifth Amendment of the United States Constitution, in which event the custody of the objects must be as provided under otherwise applicable law. Nothing in these regulations must prevent a museum or Federal agency, where otherwise so authorized, or a lineal descendant, Indian tribe, or Native Hawaiian organization, from expressly relinquishing title to, right of possession of, or control over any human remains, funerary objects, sacred objects, or objects of cultural patrimony.
(4) Circumstances where the repatriation is not consistent with other repatriation limitations identified in Sec. 10.15 of these regulations.

(d) **Place and manner of repatriation.** The repatriation of human remains, funerary objects, sacred objects, or objects of cultural patrimony must be accomplished by the museum or Federal agency in consultation with the requesting lineal descendants, or culturally affiliated Indian tribe or Native Hawaiian organization, as appropriate, to determine the place and manner of the repatriation.

(e) **The museum official or Federal agency official** must inform the recipients of repatriations of any presently known treatment of the human remains, funerary objects, sacred objects, or objects of cultural patrimony with pesticides, preservatives, or other substances that represent a potential hazard to the objects or to persons handling the objects.

(f) **Record of repatriation.** (1) Museums and Federal agencies must adopt internal procedures adequate to permanently document the content and recipients of all repatriations.
(2) The museum official or Federal agency official, at the request of the Indian tribe official, may take such steps as are considered necessary pursuant to otherwise applicable law, to ensure that information of a particularly sensitive nature is not made available to the general public.

(g) **Culturally unidentifiable human remains.** If the cultural affiliation of human remains cannot be established pursuant to these regulations, the human remains must be considered culturally unidentifiable. Museum and Federal agency officials must report the inventory information regarding such human remains in their holdings to the Departmental Consulting Archeologist who will transmit this information to the Review Committee. The Review Committee is responsible for compiling an inventory of culturally unidentifiable human remains in the possession or control of

each museum and Federal agency, and, for recommending to the Secretary specific actions for disposition of such human remains. [60 FR 62158, Dec. 4, 1995, as amended at 62 FR 41294, Aug. 1, 1997]

Sec. 10.11 Disposition of culturally unidentifiable human remains. [Reserved]

Sec. 10.12 Civil penalties.

(a) **The Secretary's Authority to Assess Civil Penalties.** The Secretary is authorized by section 9 of the Act to assess civil penalties on any museum that fails to comply with the requirements of the Act. As used in this Paragraph, ``failure to comply with requirements of the Act'' also means failure to comply with applicable
portions of the regulations set forth in this Part. As used in this Paragraph ``you'' refers to the museum or the museum official designated responsible for matters related to implementation of the Act.

(b) **Definition of ``failure to comply.''** (1) Your museum has failed to comply with the requirements of the Act if it:
(i) After November 16, 1990, sells or otherwise transfers human remains, funerary objects, sacred objects, or objects of cultural patrimony contrary to provisions of the Act, including, but not limited to, an unlawful sale or transfer to any individual or institution that is not required to comply with the Act; or
(ii) After November 16, 1993, has not completed summaries as required by the Act; or
(iii) After November 16, 1995, or the date specified in an extension issued by the Secretary, whichever is later, has not completed inventories as required by the Act; or
(iv) After May 16, 1996, or 6 months after completion of an inventory under an extension issued by the Secretary, whichever is later, has not notified culturally affiliated Indian tribes and Native Hawaiian organizations; or
(v) Refuses, absent any of the exemptions specified in Sec. 10.10(c) of this part, to repatriate human remains, funerary object, sacred object, or object of cultural patrimony to a lineal descendant or culturally affiliated Indian tribe or Native Hawaiian; or
(vi) Repatriates a human remains, funerary object, sacred object, or object of cultural patrimony before publishing the required notice in the Federal Register;
(vii) Does not consult with lineal descendants, Indian tribe officials, and traditional religious leaders as required; or
(viii) Does not inform the recipients of repatriations of any presently known treatment of the human remains, funerary objects, sacred objects, or objects of cultural patrimony with pesticides, preservatives, or other substances that represent a potential hazard to the objects or to persons handling the objects.
(2) Each instance of failure to comply will constitute a separate violation.

(c) **How to Notify the Secretary of a Failure to Comply.** Any person may bring an allegation of failure to comply to the attention of the Secretary. Allegations must be in writing, and should include documentation identifying the provision of the Act with which there has been a failure to comply and supporting facts of the alleged failure to comply. Documentation should include evidence that the museum has possession or control of Native American cultural items, receives

Federal funds, and has failed to comply with specific provisions of the Act. Written allegations should be sent to the attention of the Director, National Park Service, 1849 C Street, NW, Washington, D.C. 20240.

(d) **Steps the Secretary may take upon receiving such an allegation.**
(1) The Secretary must acknowledge receipt of the allegation in writing.
(2) The Secretary also may:
(i) Compile and review information relevant to the alleged failure to comply. The Secretary may request additional information, such as declarations and relevant papers, books, and documents, from the person making the allegation, the museum, and other parties;
(ii) Identify the specific provisions of the Act with which you have allegedly failed to comply; and
(iii) Determine if the institution of a civil penalty action is an appropriate remedy.
(3) The Secretary must provide written notification to the person making the allegation and the museum if the review of the evidence does not show a failure comply.

(e) **How the Secretary notifies you of a failure to comply.** (1) If the allegations are verified, the Secretary must serve you with a written notice of failure to comply either by personal delivery or by registered or certified mail (return receipt requested). The notice of failure to comply must include:
(i) A concise statement of the facts believed to show a failure to comply;
(ii) A specific reference to the provisions of the Act and/or these regulations with which you allegedly have not complied; and
(iii) Notification of the right to request an informal discussion with the Secretary or a designee, to request a hearing, as provided below, or to await the Secretary's notice of assessment. The notice of failure to comply also must inform you of your right to seek judicial review of any final administrative decision assessing a civil penalty.
(2) With your consent, the Secretary may combine the notice of failure to comply with the notice of assessment described in paragraph (h) of this section.
(3) The Secretary also must send a copy of the notice of failure to comply to:
(i) Any lineal descendant of a known Native American individual whose human remains, funerary objects, or sacred objects are in question; and
(ii) Any Indian tribes or Native Hawaiian organizations that are, or are likely to be, culturally affiliated with the human remains, funerary objects, sacred objects, or objects of cultural patrimony in question.

(f) **Actions you may take upon receipt of a notice of failure to comply.** If you are served with a notice of failure to comply, you may:
(1) Seek informal discussions with the Secretary;
(2) Request a hearing. Figure 1 outlines the civil penalty hearing and appeal process. Where the Secretary has issued a combined notice of failure to comply and notice of assessment, the hearing and appeal processes will also be combined.
(3) Take no action and await the Secretary's notice of assessment.

(g) **How the Secretary determines the penalty amount.**
(1) The penalty amount must be determined on the record;
(2) The penalty amount must be .25 percent of your museum's annual budget, or $5,000,

whichever is less, and such additional sum as the Secretary may determine is appropriate after taking into account:
(i) The archeological, historical, or commercial value of the human remains, funerary object, sacred object, or object of cultural patrimony involved; and
(ii) The damages suffered, both economic and non-economic, by the aggrieved party or parties including, but not limited to, expenditures by the aggrieved party to compel the museum to comply with the Act; and
(iii) The number of violations that have occurred at your museum.
(3) An additional penalty of up to $1,000 per day after the date that the final administrative decision takes effect may be assessed if your museum continues to violate the Act.
(4) The Secretary may reduce the penalty amount if there is:
(i) A determination that you did not willfully fail to comply; or
(ii) An agreement by you to mitigate the violation, including, but not limited to, payment of restitution to the aggrieved party or parties; or
(iii) A determination that you are unable to pay, provided that this factor may not apply if you have been previously found to have failed to comply with these regulations; or,
(iv) A determination that the penalty constitutes excessive punishment under the circumstances.

(h) **How the Secretary assesses the penalty.** (1) The Secretary considers all available information, including information provided during the process of assessing civil penalties or furnished upon further request by the Secretary.
(2) The Secretary may assess the civil penalty upon completing informal discussions or when the period for requesting a hearing expires, whichever is later.
(3) The Secretary notifies you in writing of the penalty amount assessed by serving a written notice of assessment, either in person or by registered or certified mail (return receipt requested). The notice
of assessment includes:
(i) The basis for determining the penalty amount assessed and/or any offer to mitigate or remit the penalty; and
(ii) Notification of the right to request a hearing, including the procedures to follow, and to seek judicial review of any final administrative decision that assesses a civil penalty.

(i) **Actions that you may take upon receipt of a notice of assessment.** If you are served with a notice of assessment, you may do one of the following:
(1) Accept in writing or by payment of the proposed penalty, or any mitigation or remission offered in the notice of assessment. If you accept the proposed penalty, mitigation, or remission, you waive the
right to request a hearing.
(2) Seek informal discussions with the Secretary.
(3) File a petition for relief. You may file a petition for relief with the Secretary within 45 calendar days of receiving the notice of assessment. Your petition for relief may request the Secretary to assess no penalty or to reduce the amount. Your petition must be in writing and signed by an official authorized to sign such documents. Your petition must set forth in full the legal or factual basis for the requested relief.
(4) Request a hearing. Figure 1 outlines the civil penalty hearing and appeal process.
(i) In addition to the documentation required in paragraph (g) of this section, your request must

include a copy of the notice of assessment and must identify the basis for challenging the assessment.
(ii) In this hearing, the amount of the civil penalty assessed must be determined in accordance with paragraph (h) of this section, and will not be limited to the amount assessed by the Secretary or any offer of mitigation or remission made by the Secretary.

(j) **How you request a hearing.** (1) You may file a written, dated request for a hearing on a notice of failure to comply or notice of assessment with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203-1923. You must enclose a copy of the notice of failure to comply or the notice of assessment. Your request must state the relief sought, the basis for challenging the facts used as the basis for determining the failure to comply or fixing the assessment, and your preference of the place and date for a hearing. You must serve a copy of
the request on the Solicitor of the Department of the Interior personally or by registered or certified mail (return receipt requested) at the address specified in the notice of failure to comply or notice of assessment. Hearings must take place following procedures set forth in 43 CFR part 4, subparts A and B.
(2) Your failure to file a written request for a hearing within 45 days of the date of service of a notice of failure to comply or notice of assessment waives your right to a hearing.
(3) Upon receiving a request for a hearing, the Hearings Division assigns an administrative law judge to the case, gives notice of assignment promptly to the parties, and files all pleadings, papers, and other documents in the proceeding directly with the administrative law judge, with copies served on the opposing party.
(4) Subject to the provisions of 43 CFR 1.3, you may appear by representative or by counsel, and may participate fully in the proceedings. If you fail to appear and the administrative law judge determines that this failure is without good cause, the administrative law judge may, in his/her discretion, determine that this failure waives your right to a hearing and consent to the making of a decision on the record.
(5) Departmental counsel, designated by the Solicitor of the Department of the Interior, represents the Secretary in the proceedings. Upon notice to the Secretary of the assignment of an administrative law judge to the case, this counsel must enter his/her appearance on behalf of the Secretary and must file all petitions and correspondence exchanges by the Secretary and the respondent that become part of the hearing record. Thereafter, you must serve all documents for the Secretary on his/her counsel.
(6) Hearing administration. (i) The administrative law judge has all powers accorded by law and necessary to preside over the parties and the proceedings and to make decisions under 5 U.S.C. 554-557.
(ii) The transcript of testimony; the exhibits; and all papers, documents, and requests filed in the proceedings constitute the record for decision. The administrative law judge renders a written decision upon the record, which sets forth his/her findings of fact and conclusions of law, and the reasons and basis for them.
(iii) Unless you file a notice of appeal described in these regulations, the administrative law judge's decision constitutes the final administrative determination of the Secretary in the matter and takes effect 30 calendar days from this decision.

(k) **How you appeal a decision.** (1) Either you or the Secretary may appeal the decision of an

administrative law judge by filing a ``Notice of Appeal'' with the Interior Board of Indian Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203-1954, within 30 calendar days of the date of the administrative law judge's decision. This notice must be accompanied by proof of service on the administrative law judge and the opposing party.
(2) To the extent they are not inconsistent with these regulations, the provisions of the Department of the Interior Hearings and Appeals Procedures in 43 CFR part 4, subpart D, apply to such appeal proceedings. The appeal board's decision on the appeal must be in writing and takes effect as the final administrative determination of the Secretary on the date that the decision is rendered, unless otherwise specified in the decision.
(3) You may obtain copies of decisions in civil penalty proceedings instituted under the Act by sending a request to the Interior Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203-1954. Fees for this service are established by the director of that office.

(l) **The final administrative decision.** (1) When you have been served with a notice of assessment and have accepted the penalty as provided in these regulations, the notice constitutes the final administrative
decision.
(2) When you have been served with a notice of assessment and have not filed a timely request for a hearing as provided in these regulations, the notice of assessment constitutes the final administrative decision.
(3) When you have been served with a notice of assessment and have filed a timely request for a hearing as provided in these regulations, the decision resulting from the hearing or any applicable administrative appeal from it constitutes the final administrative decision.

(m) **How you pay the penalty.** (1) If you are assessed a civil penalty, you have 45 calendar days from the date of issuance of the final administrative decision to make full payment of the penalty assessed to the Secretary, unless you have filed a timely request for appeal with a court of competent jurisdiction.
(2) If you fail to pay the penalty, the Secretary may request the Attorney General of the United States to collect the penalty by instituting a civil action in the U.S. District Court for the district in which your museum is located. In these actions, the validity and amount of the penalty is not subject to review by the court.
(3) Assessing a penalty under this section is not a waiver by the Secretary of the right to pursue other available legal or administrative remedies. [68 FR 16360, Apr. 3, 2003]

Sec. 10.13 Future applicability. [Reserved]

Subpart D--General

Sec. 10.14 Lineal descent and cultural affiliation.

(a) **General.** This section identifies procedures for determining lineal descent and cultural affiliation between present-day individuals and Indian tribes or Native Hawaiian organizations and human remains, funerary objects, sacred objects, or objects of cultural patrimony in museum or Federal agency collections or excavated intentionally or discovered inadvertently from Federal

lands. They may also be used by Indian tribes and Native Hawaiian organizations with respect to tribal lands.

(b) **Criteria for determining lineal descent.** A lineal descendant is an individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe or Native Hawaiian organization or by the common law system of descendence to a known Native American individual whose remains, funerary objects, or sacred objects are being requested under these regulations. This standard requires that the earlier person be identified as an individual whose descendants can be traced.

(c) **Criteria for determining cultural affiliation.** Cultural affiliation means a relationship of shared group identity that may be reasonably traced historically or prehistorically between a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group. All of the following requirements must be met to determine cultural affiliation between a present-day Indian tribe or Native Hawaiian organization and the human remains, funerary objects, sacred objects, or objects of cultural patrimony of an earlier group:
(1) Existence of an identifiable present-day Indian tribe or Native Hawaiian organization with standing under these regulations and the Act; and
(2) Evidence of the existence of an identifiable earlier group. Support for this requirement may include, but is not necessarily limited to evidence sufficient to:
(i) Establish the identity and cultural characteristics of the earlier group,
(ii) Document distinct patterns of material culture manufacture and distribution methods for the earlier group, or
(iii) Establish the existence of the earlier group as a biologically distinct population; and
(3) Evidence of the existence of a shared group identity that can be reasonably traced between the present-day Indian tribe or Native Hawaiian organization and the earlier group. Evidence to support this requirement must establish that a present-day Indian tribe or Native Hawaiian organization has been identified from prehistoric or historic times to the present as descending from the earlier group.

(d) **A finding of cultural affiliation should** be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record.

(e) **Evidence.** Evidence of a kin or cultural affiliation between a present-day individual, Indian tribe, or Native Hawaiian organization and human remains, funerary objects, sacred objects, or objects of cultural patrimony must be established by using the following types of evidence: Geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion.

(f) **Standard of proof.** Lineal descent of a present-day individual from an earlier individual and cultural affiliation of a present-day Indian tribe or Native Hawaiian organization to human remains, funerary objects, sacred objects, or objects of cultural patrimony must be established by a preponderance of the evidence. Claimants do not have to establish cultural affiliation with scientific certainty.

Sec. 10.15 Limitations and remedies.

(a) **Failure to claim prior to repatriation.** (1) Any person who fails to make a timely claim prior to the repatriation or disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony is deemed to have irrevocably waived any right to claim such items pursuant to these regulations or the Act. For these purposes, a ``timely claim'' means the filing of a written claim with a responsible museum or Federal agency official prior to the time the particular human remains, funerary objects, sacred objects, or objects of cultural patrimony at issue are duly repatriated or disposed of to a claimant by a museum or Federal agency pursuant to these regulations.
(2) If there is more than one (1) claimant, the human remains, funerary object, sacred object, or objects of cultural patrimony may be held by the responsible museum or Federal agency or person in possession
thereof pending resolution of the claim. Any person who is in custody of such human remains, funerary objects, sacred objects, or objects of cultural patrimony and does not claim entitlement to them must place the objects in the possession of the responsible museum or Federal agency for retention until the question of custody is resolved.

(b) **Failure to claim where no repatriation or disposition has occurred.** [Reserved]

(c) **Exhaustion of remedies.** No person is considered to have exhausted his or her administrative remedies with respect to the repatriation or disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony subject to subpart B of these regulations, or, with respect to Federal lands, subpart C of these regulations, until such time as the person has filed a written claim for repatriation or disposition of the objects with the responsible museum or Federal agency and the claim has been duly denied following these regulations.

(d) **Savings provisions.** Nothing in these regulations can be construed to:
(1) Limit the authority of any museum or Federal agency to:
(i) Return or repatriate human remains, funerary objects, sacred objects, or objects of cultural patrimony to Indian tribes, Native Hawaiian organizations, or individuals; and
(ii) Enter into any other agreement with the consent of the culturally affiliated Indian tribe or Native Hawaiian organization as to the disposition of, or control over, human remains, funerary objects, sacred objects, or objects of cultural patrimony.
(2) Delay actions on repatriation requests that were pending on November 16, 1990;
(3) Deny or otherwise affect access to court;
(4) Limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations; or
(5) Limit the application of any State or Federal law pertaining to theft of stolen property.
[60 FR 62158, Dec. 4, 1995, as amended at 62 FR 41294, Aug. 1, 1997]

Sec. 10.16 Review committee.

(a) **General.** The Review Committee will advise Congress and the Secretary on matters relating to these regulations and the Act, including, but not limited to, monitoring the performance of museums and Federal agencies in carrying out their responsibilities, facilitating and making

recommendations on the resolution of disputes as described further in Sec. 10.17, and compiling a record of culturally unidentifiable human remains that are in the possession or control of museums and Federal agencies and recommending actions for their disposition.

(b) **Recommendations.** Any recommendation, finding, report, or other action of the Review Committee is advisory only and not binding on any person. Any records and findings made by the Review Committee may be admissible as evidence in actions brought by persons alleging a violation of the Act.

Sec. 10.17 Dispute resolution.

(a) **Formal and informal resolutions.** Any person who wishes to contest actions taken by museums, Federal agencies, Indian tribes, or Native Hawaiian organizations with respect to the repatriation and disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony is encouraged to do so through informal negotiations to achieve a fair resolution of the matter. The Review Committee may aid in this regard as described below. In addition, the United States District Courts have jurisdiction over any action brought that alleges a violation of the Act.

(b) **Review Committee Role.** The Review Committee may facilitate the informal resolution of disputes relating to these regulations among interested parties that are not resolved by good faith negotiations. Review Committee actions may include convening meetings between parties to disputes, making advisory findings as to contested facts, and making recommendations to the disputing parties or to the Secretary as to the proper resolution of disputes consistent with these regulations and the Act.

Appendix A to Part 10--Sample Summary

The following is a generic sample and should be used as a guideline for preparation of summaries tailoring the information to the specific circumstances of each case.

Before November 17, 1993
Chairman or Other Authorized Official Indian tribe or Native Hawaiian organization
Street
State
Dear Sir/Madame Chair:

I write to inform you of collections held by our museum which may contain unassociated funerary objects, sacred objects, or objects of cultural patrimony that are, or are likely to be, culturally affiliated with your Indian tribe or Native Hawaiian organization. This notification is required by section 6 of the Native American Graves Protection and Repatriation Act. Our ethnographic collection includes approximately 200 items specifically identified as being manufactured or used by members of your Indian tribe or Native Hawaiian organization. These items represent various categories of material culture, including sea and land hunting, fishing, tools, household equipment, clothing, travel and transportation, personal adornment, smoking, toys, and figurines. The collection includes thirteen objects identified in our records as ``medicine bags.'' Approximately half of these items were collected by John Doe during his expedition to your reservation in 1903 and accessioned by the museum that same year (see Major Museum Publication, no. 65 (1965).

Another 50 of these items were collected by Jane Roe during her expeditions to your reservation between 1950-1960 and accessioned by the museum in 1970 (see Major Museum: no. 75 (1975). Accession information indicates that several of these items were collected from members of the Able and Baker families. For the remaining approximately 50 items, which were obtained from various collectors between 1930 and 1980, additional collection information is not readily available.

In addition to the above mentioned items, the museum has approximately 50 ethnographic items obtained from the estate of a private collector and identified as being collected from the ``northwest portion of the State.'' Our archeological collection includes approximately 1,500 items recovered from ten archeological sites on your reservation and another 5,000 items from fifteen sites within the area recognized by the Indian Claims Commission as being part of your Indian tribe's aboriginal territory.

Please feel free to contact Fred Poe at (012) 345-6789 regarding the identification and potential repatriation of unassociated funerary objects, sacred objects, or objects of cultural patrimony in this collection that are, or are likely to be, culturally affiliated with your Indian tribe or Native Hawaiian organization. You are invited to review our records, catalogues, relevant studies or other pertinent data
for the purpose of determining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession of these items. We look forward to working together with you.

Sincerely,
Museum Official
Major Museum

Appendix B to Part 10--Sample Notice of Inventory Completion

The following is an example of a Notice of Inventory Completion published in the Federal Register.

National Park Service
Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects from Hancock County, ME, in the Control of the National Park Service.
AGENCY: National Park Service, Interior.
ACTION: Notice.

Notice is hereby given following provisions of the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003(d), of completion of the inventory of human remains and associated funerary objects from a site in Hancock County, ME, that are presently in the control of the National Park Service.

A detailed inventory and assessment of these human remains has been made by National Park Service curatorial staff, contracted specialists in physical anthropology and prehistoric archeology, and representatives of the Penobscot Nation, Aroostook Band of Micmac, Houlton Band of Maliseet, and the Passamaquoddy Nation, identified collectively hereafter as the Wabanaki Tribes

Maliseet, and the Passamaquoddy Nation, identified collectively hereafter as the Wabanaki Tribes of Maine.

The partial remains of at least seven individuals (including five adults, one subadult, and one child) were recovered in 1977 from a single grave at the Fernald Point Site (ME Site 43-24), a prehistoric shell midden on Mount Desert Island, within the boundary of Acadia National Park. A bone harpoon head, a modified beaver tooth, and several animal and fish bone fragments were found associated with the eight individuals. Radiocarbon assays indicate the burial site dates between 1035-1155 AD. The human remains and associated funerary objects have been catalogued as ACAD-5747, 5749, 5750, 5751, 5752, 5783, 5784. The partial remains of an eighth individual (an elderly male) was also recovered in 1977 from a second grave at the Fernald Point Site. No associated funerary objects were recovered with this individual. Radiocarbon assays indicate the second burial site dates between 480-680 AD. The human remains have been catalogued as ACAD-5748. The human remains and associated funerary objects of all nine individuals are currently in the possession of the University of Maine, Orono, ME. Inventory of the human remains and associated funerary objects and review of the accompanying documentation indicates that no known individuals were identifiable. A representative of the Wabanaki Tribes of Maine has identified the Acadia National Park area as a historic gathering place for his people and stated his belief that there exists a relationship of shared group identity between these individuals and the Wabanaki Tribes of Maine. The Prehistoric Subcommittee of the Maine State Historic Preservation Office's Archaeological Advisory Committee has found it reasonable to trace a shared group identity from the Late Prehistoric Period (1000-1500 AD) inhabitants of Maine as an undivided whole to the four modern Indian tribes known collectively as the Wabanaki Tribes of Maine on the basis of geographic proximity; survivals of stone, ceramic and perishable material culture skills; and probable linguistic continuity across the Late Prehistoric/Contact Period boundary. In a 1979 article, Dr. David Sanger, the archeologist who conducted the 1977 excavations at the Fernald Point Site and uncovered the abovementioned burials, recognizes a relationship between Maine sites dating to the Ceramic Period (2,000 B.P.-1600 A.D.) and present-day Algonkian speakers generally known as Abenakis, including the Micmac, Maliseet, Passamaquoddy, Penboscot, Kennebec, and Pennacook groups.

Based on the above mentioned information, officials of the National Park Service have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity which can be reasonably traced between these human remains and associated funerary objects and the Wabanaki Tribes of Maine.

This notice has been sent to officials of the Wabanaki Tribes of Maine. Representatives of any other Indian tribe which believes itself to be culturally affiliated with these human remains and associated funerary objects should contact Len Bobinchock, Acting Superintendent, Acadia National Park, P.O. Box 177, Bar Harbor, ME 04609, telephone: (207) 288-0374, before August 31, 1994. Repatriation of these human remains and associated funerary objects to the Wabanaki Tribes of Maine may begin after that date if no additional claimants come forward.
Dated: July 21, 1994
Francis P. McManamon, Departmental Consulting Archeologist, Chief, Archeological Assistance Division.
[Published: August 1, 1994]

Native American Graves Protection and Repatriation Act (NAGPRA)

A Quick Guide for Preserving Native American Cultural Resources

What is NAGPRA?

The Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001-3013, 43 CFR Part 10 was passed on November 16, 1990, to resolve the disposition of Native American cultural items and human remains under the control of Federal agencies and institutions that receive Federal funding ("museums"), as well as the ownership or control of cultural items and human remains discovered on Federal or tribal lands after November 16, 1990. The statute and regulations outline the rights and responsibilities of lineal descendants, Indian tribes (to include Alaska Native villages), Native Hawaiian organizations, Federal agencies, and museums under the Act, and provide procedures for complying with NAGPRA. Depending on the category of cultural item in question and its cultural affiliation, NAGPRA provides lineal descendants (regardless of whether or not they are Native American), Indian tribes, and Native Hawaiian organizations (NHOs) a process for transfer to them of cultural items.

What is meant by the terms Native American, tribal land, and aboriginal land?

As defined in NAGPRA, "Native American" means of, or relating to, a tribe, people, or culture that is indigenous to the United States. "Tribal land" means all lands within the exterior boundaries of any Indian reservation, all dependent Indian communities, or any lands administered for the benefit of Native Hawaiians. "Aboriginal land" means Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of an Indian tribe.

Who must comply with NAGPRA?

Those entities having control of NAGPRA cultural items:
Federal agencies (excluding the Smithsonian Institution, which operates under a parallel law)
Institutions that receive Federal funds (including, but not limited to, museums, colleges and universities, state or local agencies and their subdivisions)

What are cultural items?

As defined in NAGPRA *[25 USC 3001 (3)]*, cultural items are:
Human remains: physical remains of a Native American
Funerary objects: placed near individual human remains as part of a death rite or ceremony
Sacred objects: needed for the modern-day practice of traditional Native American religions
Cultural patrimony: group-owned objects having ongoing importance to the group

What is cultural affiliation?

Cultural affiliation, as defined in NAGPRA *[25 USC 3001 (2)]*, is a relationship of shared group identity that may be reasonably traced historically or prehistorically between a present-day Indian tribe or NHO and an identifiable earlier group.

When is cultural affiliation determined to exist?

When, after following the requirements of NAGPRA, including consultation with Indian tribes and NHOs, there is a reasonable belief that the totality of information shared permits a relationship of shared group identity to be traced between a present-day Indian tribe or NHO and an earlier group, based on biological, archeological or anthropological information, geographical location, kinship ties, linguistic connection, folkloric references, oral traditions, historical data, other relevant information or expert opinion.

When are human remains determined to be culturally unidentifiable (CUI)?

When, after following the requirements of the NAGPRA, including consultation with Indian tribes and NHOs, the totality of information shared does not reasonably permit a relationship of shared group identity to be traced.

There is a mandatory process in NAGPRA for resolution of the disposition of human remains of a culturally unidentifiable Native American individual with either a "tribal land" provenience, an "aboriginal land" provenience. In addition, NAGPRA provides a discretionary process for the disposition of CUI without a "tribal land" or "aboriginal land" provenience.

Who owns/controls NAGPRA cultural items discovered on tribal or Federal lands after November 16, 1990?

On tribal land, human remains and associated funerary objects belong to the lineal descendant(s) of the deceased Native American. If no lineal descendant can be ascertained, the human remains and associated funerary objects belong to the "tribal land" Indian tribe or NHO. Unassociated funerary objects, sacred objects, and objects of cultural patrimony belong to the "tribal land" Indian tribe or NHO.

On Federal land, human remains and associated funerary objects belong to the lineal descendant(s) of the deceased Native American. If no lineal descendant can be ascertained, control is with the closest culturally affiliated Indian tribe or NHO that states a claim. In the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony, control is with the closest culturally affiliated Indian tribe or NHO that states a claim. If cultural affiliation cannot be determined, control of a NAGPRA cultural item is with the Indian tribe that is recognized as the "aboriginal land" tribe and states a claim, unless the claim is preempted by the claim of an Indian tribe or whose cultural relationship to the item is stronger than that of the "aboriginal land" tribe.

What is the process for resolution of ownership of NAGPRA cultural items discovered on tribal or Federal lands after November 16, 1990?

Intentional Excavation= Discovery with a Plan:

1. Prior to any discovery, and through consultation, develop a **Plan of Action** or an agreement for disposition upon discovery and removal.
2. If cultural items are discovered, immediately put the plan or agreement into action**.**

Inadvertent Discovery= Discovery without a Plan:

1. Discovery of cultural items without a plan for disposition**.**
2. Stop work for 30 days, protect site, consult, and develop a plan.

3. Publish any Notice of Intended Disposition (NID) in newspaper twice, as required.
4. Transfer control of cultural items after 30 days.
5. Send copy of NID to National NAGPRA.

What are NAGPRA Collections?

Cultural items that are in the possession of or under the control of a museum or Federal agency. These organizations are required to compile a summary or inventory of the cultural items in their collections and consult with Indian tribes and NHOs to identify the geographical and cultural affiliation of the items.

What are the NAGPRA Collections summary and inventory processes?

Summaries for unassociated funerary objects, sacred objects & objects of cultural patrimony:

1. **Institution or Federal agency** produces a summary description of objects in its collection that fit, or might fit, one of the categories of cultural item (**NAGPRA Summary**) and distributes it to all potential culturally affiliated Indian tribes or NHOs.
2. **Institution or Federal agency** consults with Indian tribes or NHOs, upon request, to identify NAGPRA cultural items.
3. **Indian Tribe or NHO** submits a written request, and if the request satisfies the required criteria, the **institution or Federal agency** publishes a Notice of Intent to Repatriate in the Federal Register.

Inventories for human remains and associated funerary objects:

1. **Institution or Federal agency** consults with Indian tribes or NHOs to determine if human remains and associated funerary objects in its collection are culturally affiliated or culturally unidentifiable.
2. Based on the totality of the information in its possession, **institution or Federal agency** creates an item-by-item Culturally Affiliated Inventory or Culturally Unidentifiable Inventory.
3. Within 6 months of completing either type of inventory, **institution or Federal agency** sends copies to appropriate Indian tribe(s) or NHO(s) and publishes a Notice of Inventory Completion in the Federal Register. Notices are not claim dependent.

4. **Institution or Federal agency** waits 30 days following publication of a Federal Register notice before transferring control of cultural items, human remains, or associated funerary objects, in case there are competing claims that satisfy the required criteria. During the 30 days, there can be consultation on transfer of possession.
5. **Institution or Federal agency** must transfer *control* of item(s) to **Indian tribe(s) or NHO(s) within 90 days of receipt of a claim that satisfies the required criteria** if no exceptions apply (such as to resolve competing claims), and transfers *possession* of item(s) based on mutual agreement of all parties.

What funding is available to help with the NAGPRA process?

Section 10 of NAGPRA authorizes competitively selected grants to museums, Indian tribes, and Native Hawaiian organizations to assist in consultation, documentation, and repatriation of Native American human remains and cultural items. The National Park Service's National NAGPRA Program administers the grants. There are two types of NAGPRA grants available: Consultation/ Documentation Grants and Repatriation Grants (see *Quick Guide – NPS Grants*).

What does the National NAGPRA Program do?

Supports the Review Committee established to monitor NAGPRA compliance, makes findings of fact, facilitates the resolution of disputes, consults on regulations, and reports to Congress
Drafts regulations to implement NAGPRA, in consultation with the Review Committee
Publishes notices in the Federal Register
Maintains databases for NAGPRA inventories and summaries, and to identify consulting parties
Administers grants to Indian tribes, Native Hawaiian organizations, and museums
Provides training and outreach programs to tribes, institutions, Federal agencies, and the public
Staffs the Secretary of the Interior on civil penalties imposed on institutions that fail to comply with NAGPRA

More information

For more information about the statute and regulations, visit the National NAGPRA Program on the National Park Service website at: http://www.nps.gov/nagpra/

For more information about the NAGPRA Grants go to: www.nps.gov/history/nagpra/grants

Cultural Patrimony: An object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group. [25 USC 3001 (3)(D)]

Federal Funds, Receives: The receipt of funds by a museum after November 16, 1990, from a Federal agency through any grant, loan, contract (other than a procurement contract), or other arrangement by which a Federal agency makes or made available to a museum aid in the form of funds. Federal funds provided for any purpose that are received by a larger entity of which the museum is a part are considered Federal funds for the purposes of these regulations. [43 CFR 10.2 (a)(3)(iii)]

Museum: Any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency. [25 USC 3001 (8)] See also Federal Funds, Receives.

Possession: Having physical custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony with a sufficient legal interest to lawfully treat the objects as part of its collection for purposes of these regulations. Generally, a museum or Federal agency would not be considered to have possession of human remains, funerary objects, sacred objects, or objects of cultural patrimony on loan from another individual, museum, or Federal agency. [43 CFR 10.2 (a)(3)(i)] See also Control and Physical Custody.

Department of Defense Must Comply with National Historic Preservation Act

Okinawa Dugong v. Rumsfeld, 2005 U.S. Dist. LEXIS 3123 (N.D. Cal. March 1, 2005).

Danny Davis, 2L, University of Mississippi School of Law

Okinawa dugongs, relatives of the manatee, may be considered cultural property under the National Historic Preservation Act (NHPA), according to a federal district judge for the Northern District of California. Judge Patel, in denying a motion to dismiss brought by the Department of Defense (DOD), held that the dugongs were entitled to protection under the NHPA because the dugongs are listed as a "natural monument" under Japan's Law for the Protection of Cultural Properties.

Background

In 1995, the U.S. and Japanese governments formed a commission for the purpose of finding ways to reduce the burden of the U.S. military presence on Okinawans. The commission recommended that the Marine Corps Air Station Futenma be replaced by a sea-based facility. In 1997, the DOD released a document which outlined the requirements and concepts of operation of the new facility, which contained a recommendation that the facility be located in Henoko Bay. Japanese government officials, including the governor of Okinawa, accepted Henoko Bay as the relocation site. In 2000, the Consultative Body of Futenma Relocation was formed. The Consultative Body, composed exclusively of local and national officials from Japan, produced the "2002 Basic Plan." The Basic Plan identified location, size, construction method, and runway orientation of the 1.5 mile long sea-based facility.

Henoko Bay is rich with coral reefs and sea grass beds that are feeding grounds for the Okinawa dugongs. The Okinawa dugong population has decreased to about 50. Dugongs are currently listed as endangered under the U.S. Endangered Species Act. They are also listed as a protected "natural monument" under Japan's Law for the Protection of Cultural Properties due to the central role they play in the creation mythology, folklore and rituals of traditional Okinawan culture. According to a 2002 United Nations Environmental Programme report, construction of the sea-base facility in Henoko Bay would have serious repercussions for the dugongs because it would destroy some of the last remaining dugong habitat in Japan.

Conservation groups in the U.S. and Japan joined in bringing a lawsuit against the DOD alleging that the DOD failed to comply with the requirements of the NHPA. The DOD filed a motion for summary judgment for failure to state a claim and for lack of subject matter jurisdiction.

National Historic Preservation Act

The purpose of the NHPA is to preserve the "historical and cultural foundations of the Nation . . . in order to give a sense of orientation to the American People."1 The Act establishes a policy of the U.S. federal government to be a leader in the "preservation of the prehistoric and historic resources of the United States and of the international community of nations."2 Under the NHPA, the Secretary of the Interior is to maintain a National Register of Historic Places which includes districts, sites, buildings, structures and objects that are significant in American history, architecture, archeology, engineering, and culture.

Section 470a-2 requires the head of a federal agency involved in an "undertaking" outside of the U.S. to take into account the effect on property listed on the World Heritage List or on the applicable country's equivalent of the National Register.

The Issues

The DOD argued that § 470a-2 of the NHPA did not apply to their actions in Okinawa for several reasons. First, it claimed the dugongs' listing on Japan's Law for the Protection of Cultural Properties is not equivalent to being listed on the National Register because the dugong cannot constitute "property" under the Act. Second, the DOD has not taken any action that would be considered a federal "undertaking" under the NHPA because the base relocation was being done by the Japanese government. Third, since the relocation project is an action taken by the Japanese government the court lacked jurisdiction over the matter.

The DOD argued that "equivalent" in § 470a-2 meant equal to the U.S. National Register. According to the DOD, Japan's Law for the Protection of Cultural Properties allows both inanimate and animate objects to be listed whereas the NHPA only allows inanimate objects and does not include animals. However, the court was not convinced by this interpretation. The court stated that if equivalent was to be read as "equal to," it would defy the basic proposition that cultures vary and, furthermore, no foreign nation's list would meet this standard.

To determine the proper meaning of equivalent, the court consulted Webster's Third New International Dictionary which defines equivalent as "corresponding or virtually identical in effect or function." Using this definition, the court interpreted the section to require the list be equivalent in effect or function.3 The court concluded that Japan's list was equivalent with the U.S. National Register because both lists "reflect similar motives, share similar goals, and generally pertain to similar types of property."4 Also, since § 470a-2 is concerned with property that is listed on a foreign government's list, it only

makes sense that “property” should be defined according to that government’s standards and not the U.S. domestic standard. So, if Japan considers the dugongs cultural “property” then any U.S. federal undertaking affecting the dugongs falls under § 470a-2 of the Act.

The court also rejected the DOD’s argument that the replacement facility was not a federal undertaking. Section 470a-2 defines an “undertaking” as: “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency.”5 This includes projects that are carried out on behalf of or for the agency, carried out with Federal financial assistance, or require agency approval. Since there are no cases that interpret the meaning of “undertaking” in § 470a-2, the court looked to cases interpreting the domestic application of the NHPA for guidance. Courts have broadly defined “undertaking” to include a wide range of direct or indirect federal support, such as financing, licensing, construction, land grants, and project supervision.6 The court concluded that it would amount to a legal absurdity for it to dismiss the case based on the replacement facility not being a federal undertaking when the facility is being built for the U.S. military according to the DOD’s specifications.

Finally, the court rejected the DOD’s argument that the court lacks jurisdiction because of the “act of state doctrine.” The doctrine bars judicial review if the action being challenged involves an official act of a foreign government within its own territory and court action would result in the invalidation of that official act. The court concluded the evidence before the court did not indicate the construction of the replacement facility was truly an official act of Japan within its own territory. Rather it appears that it is an action intertwined with DOD decision-making. For the doctrine to apply, the DOD would have to show that it has untangled itself from the project.

Conclusion

The denial of the motion to dismiss brought by the DOD does not in itself stop the replacement facility from being built. However, the court’s decision does require the DOD to argue more than simply “don’t blame us, blame the Japanese - they’re the ones building it.”

Endnotes

1. 16 U.S.C. §470(b)(2) (2004).
2. *Id*. § 470-1(2).
3. *Okinawa Dugong v. Rumsfeld*, 2005 U.S. Dist. LEXIS 3123 at *22 (N.D. Cal. March 1, 2005).
4. *Id*. at *20.
5. 16 U.S.C. §470a-2.
6. Dugong, 2005 U.S. Dist. LEXIS 3123 at *43.

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Animals and the United States National Register of Historic Places

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Animals and the National Register

Introduction

In two recent instances, questions have come to my attention about the relevance of animals to the U.S. National Register of Historic Places, and vice-versa. I think this issue – which I confess I had not realized *was* an issue until it came up in these cases – merits some discussion, particularly among cultural anthropologists who may apply their skills to evaluating the National Register eligibility of places valued by living communities.

One of the cases involves a river in which salmon swim. Salmon are tremendously important to the cultures and economies of the Indian tribes that live along the river, and are deeply wrapped up in their spiritual lives – as are other fish and wildlife in and around the river, and indeed the river itself. In the opinion of the tribes (and their cultural resource consultant), the river is eligible for the National Register as a traditional cultural property under National Register Criterion "A[1]." We have identified the fish, other wildlife, and plants native to the river, and particularly the salmon, as "contributing elements," – that is, elements that contribute to the river's significance – because without them, the river's cultural integrity would be compromised[2]. Rather missing the point, the proponent of a project that affects the river asserted that its effects on the river's fish need not be reviewed under Section 106 of the National Historic Preservation Act (NHPA), because "animals are not eligible for the National Register."

The other case involves application of Section 402 of NHPA, which requires federal agencies to consider the effects of their actions on properties listed in a host country's "equivalent" of the National Register[3]. A U.S. agency failed to consider the effects of a project in which it is involved on a population of marine mammals that is listed on a host nation's "cultural heritage registry." At issue, of course, was the equivalence of this registry to the National Register[4]. Supporters of the marine mammals (and their cultural resource consultant) said the two lists are equivalent – that both were designed to identify aspects of the human environment to which their respective societies attach historical and cultural significance, but achieved this purpose in slightly different ways. We argued that to demand that every nation's register be a mirror image of the National Register would make Section 402 meaningless. We suggested that, were the marine mammals in the United States, the National Register might very well recognize their cultural significance by listing the bay within which they make their home. The agency argued that it the registers are not equivalent, because "animals are not eligible for the National Register."

I do not want to dwell on the particulars of these cases. Instead, I would like to work through the question of whether and how animals – living animals, that is, not animal remains in archaeological sites or animals represented in art and architecture – can in any sense be eligible for the National Register.

A Cow For the Keeper

Let us begin by accepting the obvious fact that the National Register is, by name, a register of "places." A "place," in National Register parlance, can be a "district," a "site," a "building," a "structure," or an "object." We can engage in clever arguments about whether an animal might fit into one or more of these categories. Surely an animal is a "structure" made up of bone, flesh, sinew and skin; surely a whole herd of them comprises a "district." But, we can counter-argue, they are not made by human beings. But, we can counter-counter argue, neither are many landscapes, but natural landscapes can still be eligible for the Register because of the historical events with which they are associated, the cultural freight they carry[5]. But…..

Let's skip all that. Let's accept as given that if I were to nominate a cow, the Keeper of the National Register would not accept it – even if it were the first artificially cloned five-legged cow, carried the reincarnated soul of Teddy Roosevelt, was over fifty years old, and had single-hoofedly apprehended Usama bin Laden. For good or ill, and unlike people in some other countries, we do not nominate animals to the National Register.

What we *do,* I believe – though we do not usually give it much thought – is regard animals as elements that contribute to those historic properties with which they're associated, and hence as aspects of such properties that should be considered in planning.

"Contributing Elements" and Their Kin

What is a "contributing element?" Although the term is widely used in an informal sort of way[6], I can find no published National Register definition. The Register does define a "contributing resource" – specifically with reference to historic districts – as "a building, site, structure, or object adding to the historic significance of a property[7]." If we let it, following this definition would take us back into debating whether a cow is a structure, or perhaps an object. But to generalize, it appears that a "contributing resource" in a historic district is an element of the district that helps make it the historical, architectural, or cultural entity it is. Various National Register bulletins provide direction that is generally consistent with this interpretation.

National Register 15, *How to Apply the National Register Criteria for Evaluation,* refers repeatedly to "important features" in discussing property integrity; this seems to mean the same thing as "contributing resource," but is applied to a broader range of property types. Feature types alluded to in the bulletin include topographic features, vegetation, and specific elements of a building's exterior or interior[8].

National Register Bulletin 16A, *How to Complete the National Register Nomination Form,* directs nominators to list the "specific features" of a building, giving as examples porches, verandas, porticos, stoops, windows, doors, chimneys, and dormers. It also draws attention to "important decorative elements" like finials, pilasters, bargeboards, brackets, halftimbering, sculptural relief, balustrades, corbelling, cartouches, and murals or mosaics, and to "significant interior features," such as floor plans, stairways, functions of rooms, spatial relationships, wainscoting, flooring, paneling, beams, vaulting, architraves, moldings, and chimneypieces. With respect to historic districts, it directs the

nominator to count contributing buildings, sites, structures, and objects. Something that contributes to a district "adds to the historic associations, historic architectural qualities, or archeological values for which a property is significant" either because it is eligible for the Register in its own right or because "it was present during the period of significance, relates to the documented significance of the property, and possesses historic integrity or is capable of yielding important information about the period[9]."

National Register Bulletin 40, *Guidelines for Identifying, Evaluating, and Registering Battlefields,* says that "contributing resources may include all buildings extant at the time of the battle (including buildings that served as headquarters, hospitals, or defensive positions); structures such as the original road network on the battlefield; stone walls or earthworks used as defensive positions, or bridges over important waterways, sites such as burial sites, or objects such as statues and markers[10]."

National Register Bulletin 30, *Guidelines for Evaluating and Documenting Rural Historic Landscapes,* discusses how a landscape displays "characteristics" that define its significance. Some of these characteristics are general influences on the landscape, such as "response to the natural environment" and "cultural traditions," but others are more specific "components," such as circulation networks, boundary demarcations, buildings, structures, and objects whether isolated or in clusters, archeological sites, and small-scale elements like footbridges and signs. Most relevant to the question of animals is this bulletin's treatment of "vegetation related to land use," also listed as a "component" that may help define a landscape's character:

> *Various types of vegetation bear a direct relationship to long-established patterns of land use. Vegetation includes not only crops, trees, or shrubs planted for agricultural and ornamental purposes, but also trees that have grown up incidentally along fence lines, beside roads, or in abandoned fields. Vegetation may include indigenous, naturalized, and introduced species.*
>
> *While many features change over time, vegetation is, perhaps, the most dynamic. It grows and changes with time, whether or not people care for it. Certain functional or ornamental plantings, such as wheat or peonies, may be evident only during selected seasons. Each species has a unique pattern of growth and life span, making the presence of historic specimens questionable or unlikely in many cases. Current vegetation may differ from historic vegetation, suggesting past uses of the land [11].*

So in the case of a landscape, at least, living things can clearly be components that contribute to a property's character.

The relative importance of a property's different parts is often an issue in building maintenance and rehabilitation. Part II of the form used to apply for certification of a rehabilitation project for federal income tax credits requires that individual elements of a building to be rehabilitated be identified and described, including information about their relationship to the building[12]; the applicant goes on to describe whether and how each

such element will be modified by the rehabilitation work. The reason for this detailed treatment is not made very obvious by the instructions for completing the application form, but Preservation Brief 32, *Making Historic Properties Accessible* indicates that the rationale is to preserve that which contributes to the building's character. In this bulletin, Thomas Jester and Sharon Park emphasize the need to "identify which *character defining features and spaces* must be protected whenever any changes are anticipated[13]."

As examples of typical "character defining features," Jester and Park mention "construction materials, the form and style of the property, the principal elevations, the major architectural or landscape features, and the principal public spaces."

Charles Birnbaum and Christine Capella Peters, in the *Secretary of the Interior's Guidelines for the Treatment of Cultural Landscapes,* also refer to "character-defining features," defining such a feature as any "prominent or distinctive aspect, quality, or characteristic of a cultural landscape that contributes significantly to its physical character." Although the examples they go on to provide are all relatively static, and in some cases non-living – "land use patterns, vegetation, furnishings, decorative details and materials" – they define the term "cultural landscape" itself as:

> *A geographic area (including both cultural and natural resources and the wildlife or domestic animals therein) associated with a historic event, activity, or person or exhibiting other cultural or aesthetic values[14].*

In summary, then, whether the term used is "contributing element," "contributing resource," "character-defining feature," "important feature," or just "component," it is widely recognized that some elements of a property help to define its significance, character, and integrity while others do not.

Examining my own use of the term "contributing element," and the use of the same and similar terms by others, I think we're all talking about the same thing. Those aspects of a district, site, building, structure or object that help define its character contribute to its significance and integrity, and hence to its eligibility for the National Register. Those that do not help define the property's character do not contribute to its significance, integrity, and eligibility. We regularly discuss – occasionally in nominations but more often in eligibility documentation and still more frequently in rehabilitation plans and in arguments about what does and does not have to be attended to during Section 106 review – whether a given piece of a building, part of a site, or segment of a landscape contributes to the property's eligibility. Does the elevator lobby help define the character of the courthouse? Does the disturbed 19th century component contribute to the archaeological site's research value? Does the southeast slope of the valley contribute to the character of the landscape? "Contributing element" is not always the phrase we use in identifying important parts of a property, but it is a widely used term and is as good a term as any.

Can a Cow Contribute?

So, can an animal – or a herd, pride, pod, covey, or other group of animals – contribute to the eligibility of a property? Can it help define such a property's character?

The answer, I think, is obviously "yes." Consider a historic zoo – say, the National Zoo in Washington D.C. If you took away the animals, would the National Zoo lose an important aspect of its character? Certainly. Would it become ineligible for the National Register? Probably not; it would still have historical associations and architectural qualities that would make it eligible. But would it have lost an important degree of integrity? Certainly; the animals are an important – indeed, central – feature defining the zoo's character.

The same is obviously true of a landscape in which buffalo roam or deer and antelope play. This is why the *Secretary of the Interior's Guidelines for Treatment of Cultural Landscapes* defines the term "cultural landscape" to include "wildlife or domestic animals"

As an example, consider a bay in which a community has traditionally maintained a fishery. There are many specific features around the bay that are associated with the community's fishing practices – docks, wharfs, piers, boats, a cannery, a fish hatchery. Some of these might be eligible for the Register in their own rights, but collectively they are the elements that contribute to – the properties that define the character of – the bay as a National Register eligible historic district. But there is another element that is crucial to the character of the district: fish. If the fish go away, fishing will cease and the district will lose a key aspect of its character. It will become a sort of ghost town, a museum display. It may regain vitality with the rehabilitation of its cannery as a shopping mall and the conversion of its piers into a theme park, but its character will be fundamentally changed from what it was as the living core of a fishing community. The fish are fundamental to the bay's significance[15].

This is not to say that the bay will be ineligible for the National Register if the fish all go belly-up. There are many former fishing communities that are on the National Register for their association with fishing, even though fishing is no longer very important to their existence. Cannery Row in Monterey, California is an obvious example. A place like Cannery Row can be eligible for the Register because it evokes a past condition, but the character of such a place is very different from that of a place in which the past condition has continued into the present. Cannery Row and a living fishing community may both be eligible for the National Register, but the things we want to try to keep in one case are beyond being of concern in the other. In the case of Cannery Row we may not be much troubled by changes in the local sardine population – the fish no longer contribute much to the Row's character. In the case of the living community, on the other hand, change in the fish population on which the community depends is a matter of serious concern to anyone who values the community's historic and cultural character.

So, I think it is entirely appropriate to identify animals – as well as plants, of course – as contributing elements, or character-defining features, of a historic property, provided they actually do contribute to that property's historic or cultural character.

This conclusion may seem self-evident; indeed, it did to me until I had to think it through in connection with the cases alluded to at the beginning of this paper. This is why National Register Bulletin 38, *Guidelines for Identification and Documentation of Traditional Cultural Properties*[16] – the only bulletin with my name on it – does not discuss animals, or even contributing elements. It seemed self-evident that animals -- just like plants, rocks, the water in a spring – could contribute to the eligibility of a traditional cultural property, provided they have something to do with that property's character.

It is true that "the National Register doesn't list animals," but this is a truth without meaning. The National Register doesn't list cornices, either, or staircases, or fenestration, or stratigraphic levels in an archeological site, but all these features may contribute to the character, the significance, the integrity, and hence the eligibility of a place. So may animals, and it is as contributing elements or character-defining features that animals are appropriately included in the National Register.

But Why Bother?

In discussing this issue with colleagues, I've been asked whether I didn't have something better to do with my time. After all, there are lots of laws protecting animals as animals, and their habitats as habitats; what good does it do to think of them in National Register terms? I think there are three reasons to do so.

First, the fact that one law applies to something doesn't make another law inapplicable. The fact that we review project impacts under the National Environmental Policy Act (NEPA), for example, does not excuse us from considering them under NHPA as well. An animal may be a member of an endangered species and therefore have to be considered under the Endangered Species Act (ESA), but this doesn't excuse us from considering it under NHPA if it has something to do with an eligible property.

Second, while the consideration afforded endangered species under ESA, NEPA, and some other statutes is substantial, that afforded species that *aren't* particularly endangered is pretty paltry, but such plain old garden-variety species can often be of considerable cultural importance. Beef cattle aren't endangered, but they're pretty central to the cultural character of a cattle ranch.

Third, the interests we're likely to be concerned about with an animal under NHPA may be quite different from those that underlie biological protection laws like the ESA. They may even be contrary to the interests of the mainstream natural resource conservation community. The cultural significance of an animal may lie in its being hunted, for example, while biological interests or public sympathy for cuddly critters may discourage hunting. Remember the Makah Tribe's taking of whales[17], for example, and the Hopi use of baby eagles for ritual purposes[18]. Tribes are not the only ones whose cultural interests in animals may not be entirely in synch with those of biologists and animal welfare aficionados; it is easy to imagine a case in which the continuing existence of a sport hunting club, intimately and historically associated with a tract of animal-rich land, might

conflict with conservationists' desires to end hunting on the same tract. Or consider the conflict between environmentalists who want to return grazing land to natural conditions and multi-generational ranchers who want to continue grazing. However one feels about the relative merits of whale hunting versus whale conservation, eaglet gathering versus eagle conservation, recreational hunting versus letting the animals live, and grazing versus natural area restoration, desires to hunt, gather, and graze do have cultural dimensions that are often not very thoroughly considered when we look at animals only through the lens of laws like NEPA and the ESA.

Conclusion

While it is true that "the National Register does not list animals," this does not mean that animals, and impacts on animals and their habitats, are not considered or should not be considered under NHPA. Animal populations may be culturally important elements or features of a historic property, and their presence may – by itself or in combination with other features – make a property eligible for the National Register. Cultural interests in the management of animals that contribute to a historic property's character may coincide or conflict with those of environmentalists and other segments of the population. Particularly when dealing with rural landscapes and traditional cultural properties, where animals are likely to be involved in human use or perception of the land, the relevance of animals to National Register eligibility should be explicitly considered. Where animals are relevant to a place's cultural significance and a federal decision may affect them, such effects need to be addressed under Section 106 of NHPA.

Endnotes

[1] 36 CFR 60.4(a)

[2] The river in this case is the Klamath, and our arguments for eligibility are set forth in my report to the Klamath River Intertribal Fish and Water Commission (King, Thomas F., *First Salmon: The Klamath Cultural Riverscape and the Klamath River Hydroelectric Project.* Report to the Klamath River Intertribal Fish and Water Commission, Hoopa, CA, 2004).

[3] 16 U.S.C. 470a-2. Rather confusingly, the statute includes another Section 402, codified at 16 U.S.C. 470x, comprising definitions pertaining to Title IV, which created the National Center for Preservation Technology and Training.

[4] The case is *Dugong v. Rumsfeld,* or more formally OKINAWA DUGONG (*Dugong Dugon*); CENTER FOR BIOLOGICAL DIVERSITY; TURTLE ISLAND RESTORATION NETWORK; JAPAN ENVIRONMENTAL LAWYERS FEDERATION; SAVE THE DUGONG FOUNDATION; DUGONG NETWORK OKINAWA; COMMITTEE AGAINST HELIPORT CONSTRUCTION, SAVE LIFE SOCIETY; ANNA KOSHIISHI; TAKUMA HIGASHIONNA; and YOSHIKAZU MAKISHI v DONALD H. RUMSFELD, in his official capacity as the Secretary of Defense; and U.S. Department of Defense; Civil Action No. C-03-4350 (MHP). For information on the case and its (at least temporary) resolution in favor of the plaintiffs, the dugongs and the equivalence of the Japanese and U.S. registers, see http://www.commondreams.org/news2005/0302-08.htm, accessed 4-18-2006.

[5] The court in *Dugong v. Rumsfeld* in fact concluded that in its view, an animals could meet the National Register definition of an "object." The court pointed out that at least one tree had been regarded as eligible for the National Register, and suggested that what goes for a plant could go for an animal.

[6] A search of the internet on September 15, 2004 using the Google search engine for the terms "contributing element" and "National Register" yielded 608 combinations of the terms, in most cases

involving sites and structures thought to contribute to National Register-eligible districts in the course of Section 106 review, tax act certification, or actions by local historic district commissions.

[7] National Register Bulletin 16A, Appendix IV; see http://www.cr.nps.gov/nr/publications/bulletins/nrb16a/nrb16a_appendix_IV.htm , accessed 9/14/04

[8] See http://www.cr.nps.gov/nr/publications/bulletins/nrb15/nrb15_8.htm#defining, accessed 9/14/04

[9] See http://www.cr.nps.gov/nr/publications/bulletins/nrb16a/ , accessed 9/14/04

[10] See http://www.cr.nps.gov/nr/publications/bulletins/nrb40/nrb40_5.htm, accessed 9/14/04

[11] See http://www.cr.nps.gov/nr/publications/bulletins/nrb16a/nrb16a_III.htm#description, accessed 9/14/04

[12] See http://www2.cr.nps.gov/tps/tax/download/hpca-instructions.pdf, accessed 9/14/04

[13] See http://www2.cr.nps.gov/tps/briefs/brief32.htm , accessed 9/14/04, emphasis added.

[14] Birnbaum and Peters, *Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for the Treatment of Cultural Landscapes*, Washington D.C., National Park Service, 1996, p. 4, emphasis added.

[15] So are the fishermen, of course, but that is another topic.

[16] See http://www.cr.nps.gov/nr/publications/bulletins/nrb38/ , accessed 9/14/04

[17] For one interestingly balanced student view of this controversy, see "My Moral Dillemas over the Makah Whale Hunt," by Daniel Solomon, in the *Loblolly Environmentalist* at http://faculty.salisbury.edu/~jdhatley/loblolly.htm, accessed 9/14/04

[18] For a generally balanced if badly titled précis of this controversy, see Andrew Revkin, "U.S. Plan Would Sacrifice Baby Eagles to Hopi Ritual," *New York Times* 10/29/2000, http://www.stpt.usf.edu/~jsokolov/divhopi.htm , accessed 9/14/04

Peru has a new love affair with its hairless dogs
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Reporter Annie Murphy

Each day, Munay and Kuny wander through the Huaca Pucllana ruins in Lima. They act like a lot of dogs.

They roll in the dirt. They walk wherever they want, even through an excavation. They pee on stuff. Then around noon, they head over to the fancy on-site restaurant, where the cooks have set aside food for them. Usually, it's chicken, lightly seasoned and sautéed.

Munay and Kuny are Peruvian hairless dogs; the breed has been declared part of Peru's cultural patrimony. That's why these dogs live here and get treated so well.

These hairless dogs have been in Peru for thousands of years. But just a few decades ago, they were in danger of dying out. Then a local breeder launched a campaign that made them popular again.

Munay and Kuny aren't exactly noble-looking representatives of this breed. Today, they're covered in dirt; and they have almost no hair, other than the scraggly Mohawks that make them look like aging punk rockers.

A Dutch tourist named Stefan, who is touring the site with his girlfriend, doesn't seem too impressed with the dogs. "[They're] pretty ugly and naked," he says. "We're used to dogs with a lot more hair."

A few decades ago, that's what a lot of Peruvians thought, too. The fact that the dogs are popular now is largely because of dog expert named Ermanno Maniero. He spent years working to get them recognized as a breed. Maniero, who was born in Italy, says he first saw the hairless dogs as a kid, during road trips around Peru with his parents.

"We could see that these dogs were really looked down on. They were always wandering around the town squares, and we thought they were sick. But we asked around and learned that they were just hairless dogs. And one day, someone told me that they were an ancient breed." Maniero visited a Peruvian museum where he saw the dogs depicted on ceramics and realized that they'd been around for centuries.

It wasn't just depictions on pots. Sonia Guillen, a bioarchaeologist, has found pre-Colombian remains of Peruvian hairless dogs.

"The dogs were buried in their own space. They were wrapped in textiles and they had a bit of fish put on top of the snout, as a way to send them to the other life with covering and food."

Guillen says that the dogs have been a part of life in Peru since before even the Inca Empire.

Today, many Peruvians believe that hairless dogs have magical properties; that hugging or tucking in with them at night can relieve asthma and assorted pains. Even Maniero says it's a good idea to snuggle up with one if you're sick.

"Instead of using a hot water bottle, what could be better than using a living creature to raise your temperature?"

It's just one of the many "benefits" that Alfredo Janneau, who breeds the hairless dogs, plays up when showing me the dogs at his kennel.

My favorite is a three-month old puppy about the size of a housecat, with coppery skin, pinkish-white spots, and fine golden hair on its face. The puppy's skin does feel sort of like a hot water bottle, one that's covered in thin velvet.

Then, Janneau makes me an offer: for you, he says, $900. Just think of the benefits, he adds. "They don't get fleas, they don't have allergy issues, and above all, they don't bark – at least not the ones that I sell."

These dogs can cost much more abroad.

The thing is, though, I already have one, named Piji. He's charcoal-colored and built like a greyhound, with huge floppy ears. My boyfriend got him as a puppy, for free, from some friends. But these dogs don't like extremes. We're already wondering how he'll deal with New England winters when we go back to the US.

No problem, says Janneau. "There are a ton of these dogs in Russia and other cold places," he says. "People really love them there. They just bundle them up."

But first we'll have to see if we can even get the dog on a plane again. The last time we traveled with Piji, customs officials threatened to fine us for taking "cultural patrimony" out of Peru.