

William & Mary Environmental Law and Policy Review

Volume 46 (2021-2022)
Issue 1

Article 6

10-1-2021

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Dana Mirsky

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Dana Mirsky, "*Very Complex Questions*": Zoos, Animals, and the Law, 46 Wm. & Mary Env't L. & Pol'y Rev. 217 (2021), <https://scholarship.law.wm.edu/wmelpr/vol46/iss1/6>

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“VERY COMPLEX QUESTIONS”: ZOOS, ANIMALS, AND THE LAW

DANA MIRSKY*

INTRODUCTION

In Sulawesi, Indonesia—forty-five thousand years ago, an artist painted what is now the world’s oldest known cave painting—a life-size image of a wild pig.¹ Forty thousand years later, the elite of Hierakonpolis, Egypt, housed elephants, hippos, and baboons in the world’s oldest known zoo.² Today, individuals keep exotic fish, reptiles, and birds as pets while zoos and aquariums display some of the largest and rarest animals on the planet.³ The human fascination with wild animals is clearly not a new phenomenon, but how and why we keep wild animals have evolved over time.⁴ Zoos in particular have changed dramatically just over the past few decades. Once filled with bare, concrete cages and focusing exclusively on human entertainment, the American zoological industry now

* JD Candidate, William & Mary Law School, 2022; MSc Animal Welfare Science, Ethics & Law, University of Glasgow, 2018; BA Biological Sciences, Mount Holyoke College, 2012. The author would like to thank her family, friends of all species, and the *ELPR* staff for their support and assistance during this process. In particular, she would like to thank Kristin Cruise for the extensive and extended use of her bookshelf. She would also like to acknowledge the tireless efforts of trainers and zookeepers everywhere and hopes that they will continue to advocate not only for their animals but also for themselves.

¹ Agence France-Presse, *World’s ‘Oldest Known Cave Painting’ Found in Indonesia*, GUARDIAN (Jan. 13, 2021, 3:11 PM), <https://www.theguardian.com/science/2021/jan/13/worlds-oldest-known-cave-painting-found-in-indonesia> [https://perma.cc/5VH8-TMGS].

² Roger Atwood et al., *Top 10 Discoveries of 2009*, 63 *ARCHAEOLOGY* 20, 25 (2010).

³ See *Pets and Other Animals*, CDC, <https://www.cdc.gov/healthypets/pets/index.html> [https://perma.cc/MJ44-NTJJ]; see, e.g., *Ocean Voyager Built by the Home Depot*, GA. AQUARIUM, <https://www.georgiaaquarium.org/gallery/ocean-voyager/> [https://perma.cc/VVP3-TB95] (last visited Nov. 3, 2021) (describing the aquarium’s Ocean Voyager exhibit as “one of the largest single aquatic exhibits in the world” and “specially designed to house whale sharks, the largest fish species in the world”); *Help Center*, SAN DIEGO ZOO, <https://zoo.sandiegozoo.org/help-center> [https://perma.cc/WUY7-SEVS] (last visited Nov. 3, 2021) (describing the zoo as having 100 acres with over 3,000 animals, including the only platypuses currently outside of Australia).

⁴ See Eugene Hargrove, *The Role of Zoos in the Twenty-First Century*, in *ETHICS ON THE ARK: ZOOS, ANIMAL WELFARE, AND WILDLIFE CONSERVATION* 13, 13 (Bryan G. Norton et al. eds., 1995).

prides itself on prioritizing animal welfare.⁵ Many zoos now house animals in naturalistic habitats and work hard to educate the public about conservation and wildlife issues in addition to contributing directly to global efforts to preserve endangered species and their environments.⁶

Although zoos and aquariums remain popular destinations,⁷ public backlash in response to the perceived welfare issues associated with keeping larger and more intelligent species in human care has escalated in recent years.⁸ In addition to boycotts, social media campaigns, and sensationalized documentaries,⁹ zoo and aquarium facilities

⁵ See, e.g., *About Us*, ASS'N OF ZOOS & AQUARIUMS, <https://www.aza.org/about-us> [<https://perma.cc/Q38S-LRJJ>] (last visited Nov. 3, 2021) (zoo accrediting organization touting “the highest standards for animal care and welfare” in its facilities); *Virginia Zoo in Norfolk*, VA. ZOO, <https://zootix.norfolk.gov/> [<https://perma.cc/8SEL-A4TP>] (last visited Nov. 3, 2021) (listing “leadership in . . . animal welfare” as part of its mission).

⁶ See Keri Phillips, *The Ethical Evolution of Zoos*, REAR VISION (Oct. 21, 2015, 12:14 PM), <https://www.abc.net.au/radionational/programs/rearvision/the-ethical-history-of-zoos/6869776> [<https://perma.cc/M6XZ-HQNM>]; Zoo, NAT'L GEOGRAPHIC, <https://www.nationalgeographic.org/encyclopedia/zoo/> [<https://perma.cc/D266-CD3Y>] (last visited Nov. 3, 2021); ASS'N OF ZOOS & AQUARIUMS, *supra* note 5; Maynard et al., *Mission Impossible or Mission Accomplished: Do Zoo Organizational Missions Influence Conservation Practices?*, 39 ZOO BIOLOGY 304, 304–05 (2020).

⁷ The Association of Zoos and Aquariums reports more than “183 million annual visitors in the US and over 200 million worldwide.” *Visitor Demographics*, ASS'N OF ZOOS & AQUARIUMS, <https://www.aza.org/partnerships-visitor-demographics> [<https://perma.cc/PP3M-SZLJ>] (last visited Nov. 3, 2021).

⁸ J. Weston Phippen, *Do We Need Zoos?*, ATL. (June 2, 2016), <https://www.theatlantic.com/news/archive/2016/06/harambe-zoo/485084/> [<https://perma.cc/YM5V-3KST>].

⁹ See, e.g., Brian Clark Howard, *Schoolchildren and Musicians Boycott SeaWorld in “Blackfish” Flap*, NAT'L GEOGRAPHIC (Dec. 21, 2013), <https://www.nationalgeographic.com/news/2013/12/131220-seaworld-blackfish-boycott-field-trip-musicians-animals/> [<https://perma.cc/73M3-4QN4>] (discussing SeaWorld boycotts in response to the “Blackfish” film); *Freedom for Animals*, FACEBOOK, <https://www.facebook.com/freedomforanimals/> [<https://perma.cc/P43M-7CVL>] (last visited Nov. 3, 2021) (Facebook page for an organization “campaigning against the use of animals in entertainment”). The three most famous documentary-style productions within the last fifteen years are most likely: *THE COVE* (Participant Media 2009) (a documentary about modern dolphin hunts in Japan); *BLACKFISH* (Manny O. Prods. 2013) (a film purporting to depict the problem of keeping orcas in human care); and, most recently, *TIGER KING* (Netflix 2020) (a documentary series focused on self-proclaimed “Tiger King” Joe Exotic, his large cat collection, and conflicts with other “big cat” owners). All of these movies have been subject to criticism, some directly from the zoological community. Critics of *THE COVE* denounced the film’s implication that most zoological facilities continue to collect animals from the wild and are therefore partially responsible for the Japanese dolphin hunts, even though the United States banned the collection of marine mammals from the wild in 1972 with the passage of the Marine Mammal Protection Act. See, e.g., Roger Moore, *SeaWorld Rejects Condemnation by ‘The Cove’*, ORLANDO SENTINEL (Aug. 5, 2007, 3:00 AM), <https://www.orlandosentinel.com/entert>

also face a variety of legal challenges. This includes both legislation¹⁰ and litigation; animal rights¹¹ groups regularly bring zoos and aquariums to court, often seeking to, *inter alia*, expand the legal scope of animal rights or prove animal mistreatment in a particular facility.¹²

Several federal statutes confer a variety of protections on animals both in and out of zoos.¹³ However, the structure and nature of these statutory schemes make lawsuits concerning alleged animal mistreatment

ainment/orl-story-the-cove-condemns-marine-parks-story.html [https://perma.cc/564Q-U9TA]; Katharine Mieszkowski, *Dolphins Are Dying to Amuse Us*, SALON (Aug. 7, 2009, 7:16 AM), http://web.archive.org/web/20110127093300/https://www.salon.com/news/environment/feature/2009/08/07/the_cove_dolphins [https://perma.cc/Y3AC-LU6M]; 16 U.S.C. § 1362(13); see discussion *infra* Part I. As part of litigation related to BLACKFISH, SeaWorld prepared a document of more than thirty pages explaining the film’s misleading and inaccurate messaging, and several former SeaWorld trainers interviewed for the film have since spoken out against it. See Defendants’ Motion in Limine at 32:7–9, *Baker v. SeaWorld Ent., Inc.*, 423 F. Supp. 3d 878 (S.D. Cal. 2019) (referring to *Blackfish Analysis: Misleading and/or Inaccurate Content*, SEAWORLD, http://da15bdaf715461308003-0c725c907c2d637068751776aeee5fbf.r7.cf1.rackcdn.com/adf36e5c35b842f5ae4e2322841e8933_4-4-14-updated-final-of-blacklist-list-of-inaccuracies-and-misleading-points.pdf [https://perma.cc/3RPB-KT98] (last visited Nov. 3, 2021)); see also Eric Davis, *Blackfish Exposed by Former SeaWorld Trainer*, MICECHAT (Jan. 9, 2014), <https://www.micechat.com/53915-blackfish-exposed/> [https://perma.cc/N4YV-PB6J]; Eric Davis, *More Blackfish Backlash—Tilikum’s Trainer Dives In*, MICECHAT (Jan. 13, 2014), <https://www.micechat.com/54370-blackfish-backlash/> [https://perma.cc/ER3X-5PYC]. TIGER KING received criticism not only for not focusing more on the plight of the animals at Joe Exotic’s facility or the problems associated with private ownership of large exotic animals, but also for the ways it generalized zoos and sanctuaries. Rachel Nuwer, *Why ‘Tiger King’ Is Not ‘Blackfish’ for Big Cats*, N.Y. TIMES (July 15, 2021), <https://www.nytimes.com/2020/04/09/science/tiger-king-joe-exotic-conservation.html> [https://perma.cc/WN5B-CGKQ]; Rachael Bale, *Key Facts That ‘Tiger King’ Missed About Captive Tigers*, NAT’L GEOGRAPHIC (Apr. 1, 2020), <https://www.nationalgeographic.com/animals/2020/03/captive-tigers-joe-exotic-tiger-king/> [https://perma.cc/PPR9-VQN5]; Stephanie Schuttler, *Review of the Tiger King Zoo: Joe Exotic Didn’t Love His Animals*, DR. STEPHANIE SCHUTTLE (Oct. 8, 2020), <https://stephanieschuttler.com/dont-let-joe-exotic-fool-you-he-didnt-love-his-animals/> [https://perma.cc/CX4T-BPCP]; see discussion *infra* Part I regarding the issue of zoos versus sanctuaries.

¹⁰ See, e.g., CAL. FISH & GAME CODE § 4502.5 (West 2016) (California ban on display, import, or breeding of orcas); Rachel Garner, *Nosey’s Law Makes Way More Than Circuses Illegal in New Jersey*, WHY ANIMALS DO THE THING (Jan. 10, 2018), <https://blog.whyanimalsdothething.com/post/169541780402/noseys-law-makes-way-more-than-circuses-illegal> [https://perma.cc/9SGU-HNYZ] (explaining how a New Jersey ban on circuses also affects zoos); Rachel Garner, *Legislation Breakdown: H.R. 1380 “The Big Cat Public Safety Act”*, WHY ANIMALS DO THE THING (Sept. 19, 2020), <https://www.whyanimalsdothething.com/hr-1380-the-big-cat-public-safety-act> [https://perma.cc/CNG3-Z592] (discussing the effects a bill concerning big cat protections would have on zoos).

¹¹ Animal rights is a concept distinct from animal welfare. See explanation *infra* note 104.

¹² See discussions *infra* Parts II, III.

¹³ See discussion *infra* Part I.

challenging for courts as well as attorneys. In addition, animal facilities—such as zoos, aquariums, and sanctuaries—do not regulate or even define themselves or each other consistently. Misleading or inaccurate—but popular—ideas about the best so-called solutions for animals in zoos only add to the confusion. This Note uses both court cases and the example of the real-life “Free Willy”¹⁴ to explore this unique intersection of the legal system and the zoological industry, looking in particular at what courts and zoos can do if a facility does not adequately care for its animals.

Plaintiffs in these animal mistreatment cases generally ask the court to order the transfer of the animals in question—often specifically to a sanctuary rather than a zoo; typically, plaintiffs also alternatively request that the court at least order the defendant facility to somehow remedy its treatment of the animals.¹⁵ On a few occasions, courts have granted such relief, requiring a facility to either surrender the animals or make specific animal husbandry changes.¹⁶ One particular request—for the transfer of one or more killer whales, or orcas¹⁷ to a “sea pen”—has *not* yet been granted.¹⁸ A sea pen is an offshore area—often a bay or partially enclosed area on a coastline—separated from the rest of the ocean by nets stretching from the sea floor to the ocean’s surface.¹⁹ Sea pens are often suggested as a potential “happy ending” for orcas in human care.²⁰

This Note examines the advantages and disadvantages of these three options—transferring animals to a different facility (the “transfer option”), ordering a defendant facility to change its treatment of the animals (the “treatment option”), or moving orcas or dolphins²¹ to a sea pen (the “sea pen option”). Part I provides background on the oversight,

¹⁴ The failed attempt to release Keiko, the killer whale star of *FREE WILLY*, resulted in Keiko’s death in 2003. MARK. A. SIMMONS, *KILLING KEIKO* 27–29, 381 (2014) [hereinafter *KILLING KEIKO*]. See also *infra* note 197; discussion *infra* Part III.

¹⁵ See discussion *infra* Part II.

¹⁶ See discussion *infra* Part II.

¹⁷ Orcas are also known as killer whales—this Note will use both terms interchangeably. *Killer Whale*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/species/killer-whale> [<https://perma.cc/6SNF-S5KT>] (last visited Nov. 3, 2021).

¹⁸ See discussion *infra* Part III.

¹⁹ *KILLING KEIKO*, *supra* note 14, at 125, 187.

²⁰ See, e.g., Hugo Martín, *Are SeaWorld’s Whales Better Off Staying in Their Glass-and-Concrete Enclosures?*, L.A. TIMES (Jan. 3, 2016, 3:00 AM), <https://www.latimes.com/business/la-fi-seaworld-whales-20160103-story.html> [<https://perma.cc/6U93-M6ZH>].

²¹ Taxonomically, killer whales are considered the largest member of the dolphin family; “dolphins” throughout this Note refers to *other* species of dolphins kept in aquariums, most of which are bottlenose dolphins. See *Killer Whale*, *supra* note 17; TERRY S. SAMANSKY, *STARTING YOUR CAREER AS A MARINE MAMMAL TRAINER* 20 (2001).

regulation, and definition of animal facilities. Part II explores the transfer and treatment options, while Part III evaluates the sea pen option. The conclusion considers wider lessons to be learned from these case studies.

I. REGULATING, DEFINING, AND SUING ZOOLOGICAL FACILITIES

To appreciate the dilemma courts find themselves in, it is necessary to understand both the relevant regulatory schemes as well as several key aspects of the zoological world. Multiple federal statutes protect zoo animals; however, these statutes each have their own goals and means of implementation. Neither the law nor the animal management industry itself clearly or formally distinguishes “zoos” from “sanctuaries.” Finally, animal facilities of either type *may* choose to accept additional regulation by participating in one or more voluntary accreditation programs.

A. *Federal Legal Protections for Animals*

Zoos cannot necessarily treat animals however they please or keep any animal from any source for any reason. A handful of federal statutes dictates not only if a person or organization may collect animals from the wild, but also when and how facilities may display, transport, and care for certain animals. This includes—but is not limited to—the Animal Welfare Act (“AWA”), the Endangered Species Act (“ESA”), and the Marine Mammal Protection Act (“MMPA”).²²

1. The Animal Welfare Act

The AWA sets “basic standards for care and treatment” for animals in zoological facilities.²³ It covers most “warm-blooded” animals,

²² There are numerous other statutes in place to protect wildlife. *See, e.g.*, Migratory Bird Treaty Act, 16 U.S.C. §§ 703–12; Bald and Golden Eagle Protection Act, 16 U.S.C. § 668; *see also About the U.S. Fish and Wildlife Service*, U.S. FISH & WILDLIFE SERV. (Feb. 12, 2021), https://www.fws.gov/help/about_us.html [<https://perma.cc/4XTW-8HVX>] (describing the Service’s role in implementing various conservation statutes); *Laws and Policies: More Laws*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/topic/laws-policies#more-laws> [<https://perma.cc/XNW9-VYTY>] (last visited Nov. 3, 2021) (listing statutes falling under the NOAA Fisheries’ purview).

²³ ANIMAL & PLANT HEALTH INSPECTION SERV., USDA, *The Animal Welfare Act: Animal Care Factsheet*, in DOG BREEDER RESOURCE GUIDE 5 (2019) [hereinafter *AWA Factsheet*], https://www.aphis.usda.gov/animal_welfare/downloads/breeders/dogs/Dog-Breeder-Resource-Guide.pdf [<https://perma.cc/9UB6-C8G8>].

with exemptions for animals used for various agricultural purposes (such as food or fiber) as well as “cold-blooded” animals.²⁴ The U.S. Department of Agriculture (“USDA”) administers the AWA through its Animal and Plant Health Inspection Service (“APHIS”) and requires regulated facilities to obtain licenses and undergo periodic inspections.²⁵ Regulated entities include anyone trading in, exhibiting, transporting, or researching animals protected by the AWA.²⁶

Whether public or private, “[a]nimal exhibits open to the public must be licensed” as exhibitors.²⁷ AWA regulations define an “exhibitor” as “any person . . . exhibiting any animals . . . to the public for compensation . . . whether operated for profit or not.”²⁸ “Exhibitor” is interpreted broadly; it has been applied even to the exhibition of a single animal and is satisfied “simply by making [animals] available to the public.”²⁹ A recent ruling suggests that the utilization of virtual platforms such as Cameo and OnlyFans³⁰ also constitutes exhibition for AWA purposes.³¹

²⁴ *Id.*; 7 U.S.C. § 2132(g). Though generally regarded as an oversimplification by scientists, “warm-blooded” typically refers to animals that can regulate their internal body temperature, e.g., mammals and birds, while “cold-blooded” animals, e.g., fish and reptiles, cannot—instead, their internal body temperature is largely dictated by their environment. Howard Bennett, *Ever Wondered About Warm-Blooded and Cold-Blooded Animals?*, WASH. POST (Nov. 29, 2015), https://www.washingtonpost.com/lifestyle/kidspost/ever-wondered-about-warm-blooded-and-cold-blooded-animals/2015/11/27/575d30ca-6c57-11e5-aa5b-f78a98956699_story.html [<https://perma.cc/WP7E-H7KJ>].

²⁵ *AWA Factsheet*, *supra* note 23, at 5–6.

²⁶ ANIMAL & PLANT HEALTH INSPECTION SERV., USDA, PROGRAM AID NO. 1117, LICENSING & REGISTRATION UNDER THE ANIMAL WELFARE ACT: GUIDELINES FOR DEALERS, EXHIBITORS, TRANSPORTERS, AND RESEARCHERS 7 (2019) [hereinafter AWA LICENSING], https://www.aphis.usda.gov/animal_welfare/downloads/aw/awlicreg_gray-book.pdf [<https://perma.cc/RT6H-78CH>]. See also 7 U.S.C. § 2132 (defining dealers, exhibitors, research facilities, and carriers).

²⁷ AWA LICENSING, *supra* note 26, at 14; 7 U.S.C. §§ 2132(h), 2133 (2018).

²⁸ 7 U.S.C. § 2132(h) (2018).

²⁹ *In re Good*, Jr., 49 Agric. Dec. 156, 164, 174 (U.S.D.A. 1990). In 2018, Animal and Plant Health Inspection Service (“APHIS”) amended the AWA to expand a *de minimis* rule exempting from licensing persons exhibiting small numbers of animals—fewer than four or eight animals, depending on the type of activity involved, i.e., breeding or exhibition. 83 F.R. 25549.

³⁰ Cameo is a “[c]elebrity shout-out service” connecting celebrities of all kinds “with fans for whom they offer customized video messages” for a price. Jay Barmann, *How Creators Make Money on Subscription Platforms and Services*, INFLUENCE: NOFILTER (May 28, 2020), <https://influence.co/nofilter/make-money-patreon-substack-onlyfans-twitch> [<https://perma.cc/KS7U-JARD>]. OnlyFans is a subscription site frequently used for “adult content.” *Id.*

³¹ *United States v. Lowe*, No. 20-cv-0423-JFH, 2021 WL 149838, at *12 (E.D. Okla. Jan. 15, 2021).

Regulations promulgated pursuant to the AWA set minimum standards for housing and sanitation, personnel, transport, food and water, and veterinary care.³² Intended to ensure “humane handling, care, or treatment, and transportation of animals,”³³ these regulations include specific subparts covering dogs and cats, guinea pigs and hamsters, rabbits, non-human primates, marine mammals, and other warm-blooded animals.³⁴ Regulations for specific types of animals include requirements tailored to those animals’ needs; for example, nonhuman primate regulations include particular standards for enrichment³⁵ while marine mammal regulations include requirements for water quality as well as interaction or “swim-with-the-dolphin” programs.³⁶ Failure to comply with AWA regulations may result in license suspension or revocation, civil penalties, or criminal prosecution;³⁷ however, the AWA does not contain a citizen suit provision, leaving enforcement up to APHIS.³⁸

2. The Endangered Species Act

The ESA protects all species officially listed as endangered.³⁹ Many zoos contribute directly or indirectly to the conservation of endangered species and habitats by displaying and breeding representatives of such species in their collections.⁴⁰ These zoos must therefore comply with the

³² AWA Factsheet, *supra* note 23, at 5.

³³ 7 U.S.C. § 2143(a)(1) (2018).

³⁴ See 9 C.F.R. §§ 3.1, 3.25–3.26, 3.50–3.51, 3.66, 3.75, 3.100 (2021).

³⁵ 9 C.F.R. § 3.81 (2021). Enrichment refers to the ways animal keepers introduce novelty into an animal’s environment, providing mental stimulation and eliciting natural behaviors and thereby improving animal welfare. See Robert John Young et al., *Environmental Enrichment: The Creation of Opportunities for Informal Learning*, in ZOO ANIMAL LEARNING AND TRAINING 101, 101–02 (Vicky A. Melfi et al., eds., 2020).

³⁶ 9 C.F.R. §§ 3.106, 3.111 (2021).

³⁷ 7 U.S.C. § 2149 (2018).

³⁸ See *In Def. of Animals v. Cleveland Metroparks Zoo*, 785 F. Supp. 100, 103 (1991); AWA Factsheet, *supra* note 23, at 5–6.

³⁹ The list of endangered species includes both animals and plants. *Summary of the Endangered Species Act*, EPA, <https://www.epa.gov/laws-regulations/summary-endangered-species-act> [<https://perma.cc/29RN-SGCW>] (last visited Nov. 3, 2021). Listed species may be found at *Species Search*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/endangered/species/index.html> [<https://perma.cc/W8RM-N7T8>] (last visited Nov. 3, 2021).

⁴⁰ See Judy P. Che-Castaldo et al., *Evaluating the Contribution of North American Zoos and Aquariums to Endangered Species Recovery*, 8 SCI. REPS. 1, 1 (2018) (evaluating “the means and extent to which North American zoos and aquariums contribute to the recovery of species listed under the [ESA]”).

ESA with respect to any listed species they hold. The U.S. Fish and Wildlife Service (“FWS”) implements the ESA for terrestrial and freshwater species, while the National Marine Fisheries Service (“NMFS” or “NOAA Fisheries”)⁴¹ administers the ESA for marine species.⁴² In addition to enforcement by these agencies, the ESA also includes a citizen suit provision.⁴³ The ESA provides endangered species with various habitat protections and restricts not only the transport and sale of these species, but also the “taking” of any such species within the United States.⁴⁴

The ESA defines “taking” or to “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.”⁴⁵ FWS regulations further define both “harass” and “harm,”⁴⁶ and plaintiffs can prove ESA violations using either definition.⁴⁷ The definition of “harass” specifies that “when applied to captive wildlife, [this definition] does not include generally accepted: (1) Animal Husbandry practices that meet or exceed the minimum standards for facilities and care under the [AWA].”⁴⁸ However, a record of AWA compliance does not necessarily preclude ESA liability, and multiple courts, in the course of ESA suits, have “examine[d] the evidence surrounding an exhibitor’s animal husbandry practices” and required plaintiffs to “show that [a facility’s] treatment of [its animals] does not amount to generally accepted, AWA-compliant animal husbandry practices.”⁴⁹

3. The Marine Mammal Protection Act

The MMPA protects all marine mammals, defining marine mammals as “any mammal which . . . is morphologically adapted to the marine

⁴¹ NMFS is part of the National Oceanic and Atmospheric Administration, or NOAA, and is also called “NOAA Fisheries.” *About Us*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/about-us> [<https://perma.cc/3FKK-4Q3X>] (last visited Nov. 3, 2021).

⁴² *What is the Endangered Species Act?*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/node/1221> [<https://perma.cc/C877-63NH>] (last visited Nov. 3, 2021).

⁴³ 16 U.S.C. § 1540(g) (2018).

⁴⁴ *Summary of the Endangered Species Act*, *supra* note 39. See also Endangered Species Act, 16 U.S.C. §§ 1531–44 (2018).

⁴⁵ 16 U.S.C. § 1532(19) (2018).

⁴⁶ 50 C.F.R. § 17.3 (2021). NMFS regulations define “harm”—similarly to the FWS regulations—but not “harass.” See 50 C.F.R. 222.102 (2021).

⁴⁷ *Graham v. San Antonio Zoological Soc’y*, 261 F. Supp. 3d 711, 748 (W.D. Tex. 2017).

⁴⁸ 50 C.F.R. § 17.3 (2021).

⁴⁹ *Graham*, 261 F. Supp. 3d at 744, 748.

environment . . . or . . . primarily inhabits the marine environment.”⁵⁰ It therefore covers not only whales, dolphins, seals, and sea lions, but also manatees, sea otters, and polar bears.⁵¹ Just as the ESA protects endangered species and their habitats, the MMPA focuses on the protection of wild marine mammals and their habitats; the care of marine mammals at zoos and aquaria therefore falls under the jurisdiction of APHIS and the AWA.⁵² Like the ESA, multiple agencies implement the MMPA.⁵³ NMFS protects “whales, dolphins, porpoises, seals, and sea lions” while FWS protects “walrus, manatees, sea otters, and polar bears.”⁵⁴ Unlike the ESA, however, the MMPA does *not* contain a citizen suit provision.⁵⁵

The MMPA prohibits the “take” of any marine mammal, defining take as “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill”⁵⁶ and “harassment” as “any act of pursuit, torment, or annoyance which . . . has the potential to injure a marine mammal” or “has the potential to disturb a marine mammal . . . by causing disruption of behavior patterns.”⁵⁷ Because the MMPA prohibits the capture of marine mammals as a take, a facility can only collect or import a wild-caught marine mammal if issued a permit by NMFS; however, while the MMPA sets requirements for facilities displaying marine mammals, it does *not* require such facilities to obtain a permit for this activity.⁵⁸ To display marine mammals, the MMPA requires facilities to provide educational or conservation programming meeting industry standards, hold a license or registration as required by APHIS under the AWA, and be “open to the public on a regularly scheduled basis.”⁵⁹ Any facility that a marine mammal is exported to must also meet these requirements.⁶⁰

⁵⁰ 16 U.S.C. § 1362(6) (2018).

⁵¹ *Id.* See also *Law & Policies: Marine Mammal Protection Act*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/topic/laws-policies#marine-mammal-protection-act> [<https://perma.cc/CDG8-5YYB>] (last visited Nov. 3, 2021).

⁵² 16 U.S.C. § 1361 (2018); *Law & Policies: Marine Mammal Protection Act*, *supra* note 51.

⁵³ *Law & Policies: Marine Mammal Protection Act*, *supra* note 51.

⁵⁴ *Id.*

⁵⁵ See 16 U.S.C. §§ 1361–1423h (2018).

⁵⁶ 16 U.S.C. § 1362(13) (2018). Note that the MMPA’s definition of “take” varies slightly from the ESA’s, which is “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” 16 U.S.C. § 1532(19) (2018).

⁵⁷ 16 U.S.C. § 1362(18)(A) (2018).

⁵⁸ *Public Display of Marine Mammals*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/public-display-marine-mammals> [<https://perma.cc/R79U-NAMZ>] (last visited Nov. 3, 2021).

⁵⁹ 16 U.S.C. §§ 1374(c)(2)(A)(i)–(iii) (2018).

⁶⁰ 16 U.S.C. §§ 1374(c)(2)(B), (C) (2018).

The MMPA also establishes the Marine Mammal Health and Stranding Response Program.⁶¹ The MMPA mandates the development of “objective criteria . . . to provide guidance for determining at what point a rehabilitated marine mammal is releasable to the wild.”⁶² NMFS regulations require the release of rehabilitated marine mammals within six months of rescue unless the veterinarian believes that:

- (i) The marine mammal might adversely affect marine mammals in the wild;
- (ii) Release of the marine mammal to the wild will not likely be successful given the physical condition and behavior of the marine mammal; or
- (iii) More time is needed to determine whether the release of the marine mammal to the wild will likely be successful.⁶³

Those responsible for the animal must provide a recommendation of release, non-releasability, or postponement to NMFS, which in turn, decides whether to require release, continued rehabilitation, or “other disposition.”⁶⁴ If NMFS determines that the animal is non-releasable, the animal may be transferred to a facility for public display *if* the recipient facility complies with the MMPA’s public display requirements⁶⁵ and the recipient “agrees to hold the marine mammal in conformance with all applicable requirements and standards.”⁶⁶ The NMFS Office of Protected Resources determines placement based on factors including the species and unique needs of the animal.⁶⁷

⁶¹ 16 U.S.C. § 1421 (2018). “Stranding” occurs when a marine mammal “is on the shore and unable to return to the water under its own power,” is on the shore and requires medical attention, or cannot otherwise “return to its natural habitat without assistance.” *West Coast Marine Mammal Stranding Network*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/west-coast/marine-mammal-protection/west-coast-marine-mammal-stranding-network> [<https://perma.cc/W7RF-8R4N>] (last visited Nov. 3, 2021).

⁶² 16 U.S.C. § 1421a(a) (2018).

⁶³ 50 C.F.R. §§ 216.27(a)(1)(i)–(iii) (2021).

⁶⁴ 50 C.F.R. §§ 216.27(a)(2), (3) (2021).

⁶⁵ 16 U.S.C. §§ 1374(c)(2)(A)(i)–(iii) (2018).

⁶⁶ 50 C.F.R. §§ 216.27(c)(3)(i)–(ii) (2021).

⁶⁷ *Non-Releasable Marine Mammals*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/non-releasable-marine-mammals> [<https://perma.cc/JCD7-HFYM>] (last visited Nov. 3, 2021). This process is described in greater detail in a procedural directive issued by NMFS. NAT’L MARINE FISHERIES SERV., NAT’L OCEANIC &

B. Zoos vs. Sanctuaries

Petitions, news articles, and court filings often call for the transfer of animals from a zoo to a sanctuary, suggesting or implying that sanctuaries are inherently superior to zoos.⁶⁸ However, this assumption is at best, unsubstantiated and at worst, harmful to the animals themselves—the structure of the AWA and its regulations means that in many cases, sanctuaries receive less regulation and oversight than zoos.

Zoos and sanctuaries are not explicitly or formally distinguished either legally or within the animal management industry; however, they are nevertheless arguably “distinct business types” that are regulated differently.⁶⁹ A zoo may be described as “[a] business that maintains a stationary collection of exotic animals for the primary purpose of public exhibition,” and a sanctuary as “[a] non-profit business that maintains a stationary collection of rescue animals for the primary purpose of providing them a permanent home.”⁷⁰ Many zoos breed as part of conservation programs, train animals for health and programming purposes, and provide educational presentations or interpreters.⁷¹ Sanctuaries generally *only* house “rescue[d]” animals and do not trade or breed those animals.⁷²

Most zoos, as exhibitors, must have a license under the AWA. The AWA’s definition of exhibitor specifies that “such term includes . . . zoos exhibiting such animals whether operated for profit or not.”⁷³ AWA regulations specifically define “zoo” as “any park, building, cage, enclosure, or other structure or premises in which a live animal or animals are kept for public exhibition or viewing, regardless of compensation.”⁷⁴

Neither the AWA nor its regulations refer to or discuss sanctuaries;⁷⁵ however, the Captive Wildlife Safety Act (“CWSA”), which made the

ATMOSPHERIC ADMIN., NMFS PLACEMENT PROCESS FOR NON-RELEASABLE MARINE MAMMALS 02-308-02 (2012), <https://media.fisheries.noaa.gov/dam-migration/02-308-02.pdf> [<https://perma.cc/5SNU-W339>].

⁶⁸ See, e.g., *Animal Activists Commission Billboard in Fight Over Billy the Elephant*, NBC LA (Nov. 13, 2017, 5:10 PM), <https://www.nbclosangeles.com/news/billy-elephant-la-zoo-billboard/27306/> [<https://perma.cc/R7Z2-J3E2>] (detailing activist efforts to move an elephant from the Los Angeles Zoo to a sanctuary). See also discussion *infra* Part II.

⁶⁹ Rachel Garner, *The Difference Between a Zoological Facility and a Sanctuary*, WHY ANIMALS DO THE THING (Oct. 3, 2017), <https://www.whyanimalsdothething.com/the-difference-between-zoos-sanctuaries> [<https://perma.cc/SDF3-K4YS>].

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ 7 U.S.C. § 2132(h) (2018).

⁷⁴ 9 C.F.R. § 1.1 (2021).

⁷⁵ See AWA LICENSING, *supra* note 26, at 14–16.

trade of “big cats” (e.g., lions, tigers, and the like) illegal,⁷⁶ provides an exemption for “accredited wildlife sanctuar[ies].”⁷⁷ To qualify as “accredited” under the CWSA,⁷⁸ the sanctuary must:

- (1) be a registered non-profit under 501(c)(3);
- (2) “not commercially trade in” prohibited wildlife species;
- (3) “not propagate” any such species; and
- (4) “not allow direct contact between the public and animals.”⁷⁹

If a facility billing itself as a sanctuary exhibits animals to the public, it is subject to USDA regulation as an exhibitor; however, facilities *not* exhibiting animals to the public do not fall under the “exhibitor” definition or any other regulated term in the AWA, and therefore do not fall under AWA/USDA jurisdiction.⁸⁰ In addition, any facility exhibiting animals excluded from the definition of “animal” in the AWA is similarly not regulated as an exhibitor.⁸¹ A sanctuary closed to the public, or open to the public but only housing unregulated animals is therefore *not* required to conform to AWA requirements or even possess a USDA license.

C. Accreditation

The USDA encourages regulated facilities to implement standards beyond the basic requirements of the AWA.⁸² Many facilities—zoos as well as sanctuaries—choose to do so by participating in one or more of the voluntary accreditation schemes available to animal facilities. Accreditation can signal a facility’s commitment to animal welfare—these schemes

⁷⁶ U.S. FISH & WILDLIFE SERV., DEPT OF THE INTERIOR, CAPTIVE WILDLIFE SAFETY ACT: WHAT BIG CAT OWNERS NEED TO KNOW (2007), <https://www.fws.gov/le/pdf/CaptiveWildlifeSafetyActFactsheet.pdf> [<https://perma.cc/6YFD-MHCS>]. Also exempt are “[p]ersons, facilities, or other entities licensed by [APHIS] under the [AWA] to possess big cats,” such as zoos. *Id.* The CWSA amended the Lacey Act, which does not address animal treatment but rather prohibits the trade of wildlife, fish, or plants “taken, possessed, transported, or sold” illegally. *See id.*; 16 U.S.C. § 3372.

⁷⁷ 16 U.S.C. § 3372(e)(2)(C) (2018).

⁷⁸ Note that “accredited” here refers specifically to qualifying for the sanctuary exemption under the CWSA—it is *not* related to any of the voluntary accreditation schemes discussed *infra* Section I.C. *See* Regulations to Implement the Captive Wildlife Safety Act, 72 Fed. Reg. 45,938, 45,941 (Aug. 16, 2007) (codified at 50 C.F.R. pt. 14).

⁷⁹ 16 U.S.C. §§ 3372(e)(2)(C)(i)–(iv) (2018).

⁸⁰ *See* 7 U.S.C. § 2132 (2018).

⁸¹ *See* 7 U.S.C. §§ 2132(g), (h) (2018).

⁸² AWA Factsheet, *supra* note 23, at 5.

generally impose stricter requirements than the USDA, and successful accreditation may therefore serve as additional validation of the facility’s quality, both within the zoological industry and for the public.⁸³

Facilities may choose one or more of several accreditation schemes; zoo-oriented organizations offering accreditation include the Association of Zoos & Aquariums (“AZA”), the Zoological Association of America, and the Alliance of Marine Mammal Parks & Aquariums (“AMMPA”).⁸⁴ Accreditation organizations for sanctuaries include the Global Federation of Wildlife Sanctuaries (“GFAS”) and the American Sanctuary Association (“ASA”).⁸⁵ Schemes for zoos versus sanctuaries are not necessarily mutually exclusive; however, sanctuary criteria may include bans on breeding, commercial activity, and using animals for “entertainment,” which may not fit with a zoo’s mission.⁸⁶

AZA also offers a “certification” program with similar requirements to accreditation but for “related facilities.”⁸⁷ At the time of this writing, at least two of the AZA certified facilities were also accredited by a sanctuary organization.⁸⁸ In addition to certification from industry

⁸³ See, e.g., Bale, *supra* note 9 (explaining accreditation as a way to identify “good” sanctuaries or zoos); *Standards & Guidelines*, ALL. OF MARINE MAMMAL PARKS & AQUARIUMS, <https://www.ammpa.org/membership/standards-guidelines> [https://perma.cc/C7G6-YVRT] (last visited Nov. 3, 2021) (describing general requirements and benefits of AMMPA accreditation).

⁸⁴ *Accreditation*, ASS’N OF ZOOS & AQUARIUMS, <https://www.aza.org/accreditation> [https://perma.cc/CK5T-EE6Q] (last visited Nov. 3, 2021); *Accreditation*, ZOOLOGICAL ASS’N OF AM., <https://zaa.org/accreditation> [https://perma.cc/45WV-BUK2] (last visited Nov. 3, 2021); *Join the Alliance*, ALL. OF MARINE MAMMAL PARKS & AQUARIUMS, <https://www.ammpa.org/membership/join-alliance> [https://perma.cc/2KRS-S9PH] (last visited Nov. 3, 2021).

⁸⁵ *Accreditation*, GLOB. FED’N OF ANIMAL SANCTUARIES, <https://www.sanctuaryfederation.org/accreditation/> [https://perma.cc/AB6X-6EK8] (last visited Nov. 3, 2021); *American Sanctuary Association*, AM. SANCTUARY ASS’N, <https://www.americansanctuaries.org/> [https://perma.cc/DKF7-AXUA] (last visited Nov. 3, 2021).

⁸⁶ *Who Can Apply*, GLOB. FED’N OF ANIMAL SANCTUARIES, <https://www.sanctuaryfederation.org/accreditation/definitions/> [https://perma.cc/9QA6-N5T6] (last visited Nov. 3, 2021); *Accreditation Criteria*, AM. SANCTUARY ASS’N, <https://www.americansanctuaries.org/accreditation-criteria> [https://perma.cc/QNH3-EU6S] (last visited Nov. 3, 2021); see *supra* Section I.B (comparing zoos versus sanctuaries).

⁸⁷ *Accreditation vs. Certification*, ASS’N OF ZOOS & AQUARIUMS, <https://www.aza.org/accreditation-vs-certification> [https://perma.cc/2XAC-ZJD7] (last visited Nov. 3, 2021).

⁸⁸ See *Currently Certified Related Facilities*, ASS’N OF ZOOS & AQUARIUMS, <https://www.aza.org/current-cert> [https://perma.cc/2CZ2-PYGC] (last visited Nov. 3, 2021). The Elephant Sanctuary in Tennessee is accredited by GFAS. THE ELEPHANT SANCTUARY IN TENN., <https://www.elephants.com/> [https://perma.cc/R2B2-BWRN] (last visited Nov. 3, 2021). The Wild Animal Sanctuary Texas is accredited by the ASA. THE WILD ANIMAL SANCTUARY TEX., <https://www.wildanimalsanctuarytexas.org/> [https://perma.cc/45ZL-PFYV] (last visited Nov. 3, 2021).

organizations, facilities may also receive animal welfare certification⁸⁹ from American Humane, a humane organization focused on animal welfare and safety that is probably best known for its “No Animals Were Harmed®” logo frequently seen in film credits.⁹⁰

In addition to signaling a facility’s dedication to animal welfare, accreditation also provides numerous professional benefits for facilities. Not only do zoos preferentially hire personnel with experience at a similarly accredited facility,⁹¹ but zoos within the same accreditation scheme may also have access to and share additional resources—not only information and resources from the accrediting organization itself, but also animals.⁹² Animals move between zoos for numerous reasons, such as breeding programs,⁹³ social grouping or health needs,⁹⁴ or exhibit renovations.⁹⁵ A

⁸⁹ See generally AM. HUMANE, AMERICAN HUMANE CERTIFIED (2016), <https://www.americanhumane.org/app/uploads/2016/08/Humane-Conservation-Intro-6-6-16-5page-REV-6.pdf> [<https://perma.cc/53JG-L8TU>].

⁹⁰ *About Us*, AM. HUMANE, <https://www.americanhumane.org/about-us/> [<https://perma.cc/9MDW-DYGS>] (last visited Nov. 3, 2021). Note that American Humane is not the same as the Humane Society of the United States (“HSUS”), which is an animal rights group that despite its name, is not affiliated with local “humane societ[ies].” The Center for Consumer Freedom Team, *7 Things You Didn’t Know About HSUS*, CTR. FOR CONSUMER FREEDOM (Apr. 20, 2010), <https://www.consumerfreedom.com/articles/184-7-things-you-didnt-know-about-hsus/> [<https://perma.cc/5FZ4-2B9Y>].

⁹¹ See, e.g., *Jobs*, ASS’N OF ZOOS & AQUARIUMS, <https://www.aza.org/jobs?job=22856> [<https://perma.cc/T3UH-Q3N5>] (last visited Nov. 3, 2021) (“Staff biologist” job posting from AZA-accredited facility seeking applicants with experience “preferably in an AZA accredited facility”) (PDF on file with author).

⁹² See, e.g., *Benefits of Accreditation*, ASS’N OF ZOOS & AQUARIUMS, <https://www.aza.org/benefits-of-accreditation?locale=en> [<https://perma.cc/9V47-T5KN>] (last visited Nov. 3, 2021).

⁹³ Many zoos are involved with one or more Species Survival Plan (“SSP”) Programs, which manage the captive breeding and husbandry of endangered species “to maintain a healthy, genetically diverse and demographically stable population for the long-term future.” *Species Survival Plan Programs*, ASS’N OF ZOOS & AQUARIUMS, <https://www.aza.org/species-survival-plan-programs?locale=en> [<https://perma.cc/7WZJ-NX6T>] (last visited Nov. 3, 2021). Species Survival Plan Programs “recommend breeding pairs and transfers” within and between facilities in order to promote and maintain this genetic diversity. *Id.* SSP programs, in fact, “must include at least three participating AZA member facilities.” ASS’N OF ZOOS & AQUARIUMS, SPECIES SURVIVAL PLAN HANDBOOK 25 (2021), https://assets.speakcdn.com/assets/2332/aza_species-survival-plan-program-handbook.pdf [<https://perma.cc/V4UM-FUEZ>].

⁹⁴ See, e.g., Press Release, Maryland Zoo in Baltimore, The Maryland Zoo in Baltimore Provides New Home for Infant Chimpanzee (Oct. 13, 2020), <https://www.marylandzoo.org/wp-content/uploads/2020/10/Maryland-Zoo-welcomes-baby-chimp-to-troop-FINAL.pdf> [<https://perma.cc/CPH8-VGZM>] (announcing the arrival from the Oklahoma City Zoo of an infant chimpanzee whose mother “was unable to care for her properly”).

⁹⁵ See, e.g., Annie Blanks, *Four Harbor Seals Traveling to Gulfarium for Two-Month Stay*, NWF DAILY NEWS (Mar. 27, 2018, 6:25 AM), <https://www.nwfdailynews.com/news/20180327>

facility is more likely to transfer to or accept animals from another facility involved in the same or equivalent accreditation programs because the accreditation indicates that the other facility provides a similar standard of care.⁹⁶ In addition, NMFS specifically distributes its questionnaire for non-releasable whales and dolphins to members of specific organizations, although non-members may also request notification regarding available animals.⁹⁷

There are various reasons why a facility might choose one accreditation program over another—or even, despite the benefits, no accreditation at all. The Pittsburgh Zoo chose to part ways with AZA after twenty-nine years of AZA accreditation after AZA updated its requirements to prohibit unprotected or “free” contact with elephants.⁹⁸ Mill Mountain Zoo in Roanoke, Virginia, lost its AZA accreditation due to its financial situation.⁹⁹ Both zoos, however, currently possess ZAA accreditation.¹⁰⁰ A few zoos are accredited by multiple zoological accrediting organizations.¹⁰¹ Some facilities may simply find certain aspects of accreditation

/four-harbor-seals-traveling-to-gulfarium-for-two-month-stay [https://perma.cc/47KR-S247] (discussing the temporary transfer of seals between Alliance of Marine Mammal Parks and Aquariums-accredited facilities during exhibit renovations).

⁹⁶ See *id.*; *Benefits of Accreditation*, *supra* note 92.

⁹⁷ *Non-Releasable Marine Mammals*, *supra* note 67.

⁹⁸ Don Hopey, *Pittsburgh Zoo Drops Accreditation Due to Disagreement Over Elephant Handling*, PITTSBURGH POST-GAZETTE (Aug. 18, 2015, 12:35 AM), <https://www.post-gazette.com/local/city/2015/08/17/Pittsburgh-Zoo-PPG-Aquarium-will-drop-membership-in-Association-of-Zoos-Aquariums-over-elephant-handling-policy/stories/201508170157> [https://perma.cc/NZ6K-U2NS]. “Free contact” refers to the practice of trainers sharing the same space as the animals, in contrast to “protected contact,” where trainers always keep a protective barrier between themselves and the animals. See Greg A. Vicino, *Elephant Training in Zoos*, in ZOO ANIMAL LEARNING AND TRAINING 183, 184 (Vicky A. Melfi et al., eds., 2020). Where and how zoo animal training occurs remains “[o]ne of the most hotly debated topics in the training field.” Tim Sullivan, *Last But in Fact Most Importantly . . . Health and Safety*, in ZOO ANIMAL LEARNING AND TRAINING 309, 323 (Vicky A. Melfi et al., eds., 2020).

⁹⁹ Ralph Berrier, *Mill Mountain Zoo Earns Accreditation from National Zoo Association*, ROANOKE TIMES (Mar. 14, 2019), https://roanoke.com/news/local/mill-mountain-zoo-earns-accreditation-from-national-zoo-association/article_8c20c6c3-3e41-59d8-8b8c-43dbdbcfde42.html [https://perma.cc/Y3XK-D3XG].

¹⁰⁰ MILL MOUNTAIN ZOO, <http://www.mmzoo.org/> [https://perma.cc/F8P3-NXH2] (last visited Nov. 3, 2021); PITTSBURGH ZOO & PPG AQUARIUM, <https://www.pittsburghzoo.org/> [https://perma.cc/DS94-WT9S] (last visited Nov. 3, 2021) (showing also its accreditation by AMMPA and certification by American Humane).

¹⁰¹ These include the Fort Worth Zoo, Fossil Rim Wildlife Center, Turtle Back Zoo, and others. See *Accredited Facilities*, ZOOLOGICAL ASS’N OF AM., <https://zaa.org/accredited-facilities> [https://perma.cc/D45V-7GEG] (last visited Nov. 3, 2021); *Currently Accredited*

beyond their means or abilities. The filing fee alone to *apply* for AZA accreditation may cost a facility well over \$3,000.¹⁰² Some standards may present practical difficulties, such as the requirement for food and beverage services¹⁰³—smaller or seasonal facilities may not be able to offer food and beverages cost-effectively. Lack of accreditation may therefore represent a philosophical, financial, or pragmatic choice, rather than a lack of interest in higher animal welfare standards.

D. *Lawsuits*

When suing zoological facilities, animal rights¹⁰⁴ organizations—often either People for the Ethical Treatment of Animals (“PETA”), the Animal Legal Defense Fund (“ALDF”), or the Nonhuman Rights Project (“NHRP”)—typically sue either in their own capacity or in support of one or more individual citizens.¹⁰⁵ Such organizations typically make use of the ESA’s citizen suit provision to allege that a zoo or aquarium’s treatment of its ESA-protected animals amounts to a take and therefore an ESA violation.¹⁰⁶ In other situations, however, they have attempted to use state law,¹⁰⁷

Zoos and Aquariums, ASS’N OF ZOOS & AQUARIUMS (Apr. 2021), <https://www.aza.org/current-accreditation-list?locale=en> [https://perma.cc/2T48-JWL7].

¹⁰² See ASS’N OF ZOOS & AQUARIUMS, THE GUIDE TO ACCREDITATION OF ZOOLOGICAL PARKS AND AQUARIUMS 20–21 (2021), https://assets.speakcdn.com/assets/2332/guide_to_accreditation.pdf [https://perma.cc/4TLB-V5SG].

¹⁰³ See, e.g., ASS’N OF ZOOS & AQUARIUMS, THE ACCREDITATION STANDARDS & RELATED POLICIES 41 (2021) [hereinafter AZA ACCREDITATION STANDARDS], <https://assets.speakcdn.com/assets/2332/aza-accreditation-standards.pdf> [https://perma.cc/66XF-5Q2L] (AZA-accredited facilities “must have certain basic facilities to accommodate guests, including restrooms, food and beverage services, and rest areas.”).

¹⁰⁴ Animal *rights* are different than animal *welfare*. Animal welfare focuses on treating animals humanely, while animal rights typically emphasize a belief that animals deserve rights equal to human rights, and therefore that humans “should not use or own animals in any way.” Ralph A. DeMeo, *Defining Animal Rights and Animal Welfare: A Lawyer’s Guide*, 91 FLA. B.J. 42, 42 (2017); AKC Government Relations, *Understanding the Difference Between Animal Rights and Animal Welfare*, AM. KENNEL CLUB (Mar. 6, 2017), <https://www.akc.org/expert-advice/news/difference-between-animal-rights-animal-welfare/> [https://perma.cc/7GT8-L2FG].

¹⁰⁵ See, e.g., *PETA v. Tri-State Zoological Park of W. Md.*, 397 F. Supp. 3d 768 (D. Md. 2019) (PETA suing a facility directly); *Graham v. San Antonio Zoological Soc’y*, 261 F. Supp. 3d 711 (W.D. Tex. 2017) (zoo visitors suing the San Antonio Zoo with support from the ALDF); *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, 231 A.3d 1171 (Conn. App. Ct. 2020) (NHRP suing a facility directly).

¹⁰⁶ See, e.g., *PETA v. Tri-State*, 397 F. Supp. 3d 768; *Graham*, 261 F. Supp. 3d at 711.

¹⁰⁷ See, e.g., *Collins v. Tri-State Zoological Park of W. Md.*, 514 F. Supp. 3d 773 (D. Md. 2021) (alleging violations of Maryland code); *Culp v. City of Los Angeles*, No. B208520, 2009 WL 3021762 (Cal. Ct. App. Sept. 23, 2009) (alleging violations of California code).

the Constitution,¹⁰⁸ or even petitions for writs of habeas corpus to make their cases.¹⁰⁹

If a lawsuit successfully proves that a facility mistreats its animals, releasing zoo animals to the wild is generally not a feasible remedy. Most zoo animals—in particular protected animals such as primates, big cats, and marine mammals—are too habituated to humans and lack the skills needed to survive in the wild.¹¹⁰ NMFS has even suggested that in certain cases, “releasing a captive animal into the wild” could constitute a take in violation of the ESA.¹¹¹ With release off the table, only a few other remedies remain—the transfer option, the treatment option, or the sea pen option.

II. THE TRANSFER AND TREATMENT OPTIONS

The transfer and treatment options are both viable choices—each has strengths and weaknesses. For terrestrial¹¹² animals, a multitude of possible transfer locations, e.g., other zoos and sanctuaries, already exist.¹¹³

¹⁰⁸ See *Tilikum ex rel. PETA v. Sea World Parks & Ent., Inc.*, 842 F. Supp. 2d 1259, 1259–60 (S.D. Cal. 2012) (alleging that SeaWorld’s holding of five killer whales violated the Thirteenth Amendment).

¹⁰⁹ See *Commerford*, 231 A.3d at 1171; *Nonhuman Rights Project, Inc. v. Breheny*, 134 N.Y.S.3d 188, 189 (N.Y. App. Div. 2020) (filing writs of habeas corpus on behalf of individual elephants).

¹¹⁰ See Zoe Cormier, *Can Captive Animals Ever Truly Return to the Wild?*, BBC EARTH: CONSERVATION, <https://www.bbcearth.com/blog/?article=can-captive-animals-ever-truly-return-to-the-wild> [<https://perma.cc/85SG-C7GL>] (last visited Nov. 3, 2021); James Owen, *Most Captive-Born Predators Die If Released*, NAT’L GEOGRAPHIC (Jan. 23, 2008), <https://www.nationalgeographic.com/animals/2008/01/predators-captivity-habitat-animals/> [<https://perma.cc/T695-4BLP>].

¹¹¹ 80 Fed. Reg. 7380, 7386 (response to comment 14). The failed attempt to release Keiko, the killer whale star of the film *Free Willy* starkly demonstrates this point—after several months on his own, Keiko died from a combination of chronic negative stress and malnutrition in what has been referred to as “the most famous case of animal abuse the world doesn’t know about.” Pixels at the Parks, *Mark Simmons Talking About Killing Keiko at Shark Con*, YOUTUBE (July 16, 2015) [hereinafter *Shark Con*], <https://www.youtube.com/watch?v=JdnwQaGerBU> [<https://perma.cc/7GGH-HBJE>]. See also *infra* note 197; *infra* Part III.

¹¹² As discussed *infra* Part III, there are fewer transfer options available for aquatic animals such as whales and dolphins.

¹¹³ A 2017 survey found that there were likely approximately 500 zoological facilities in the United States at that time. Rachel Garner, *How Many Zoos Are There in the United States?*, WHY ANIMALS DO THE THING (Nov. 24, 2017), <https://www.whyanimalsdothething.com/how-many-zoos> [<https://perma.cc/Q4PK-AQUP>]. GFAS estimates that there are more than 150 GFAS accredited and verified sanctuaries worldwide. GLOB. FED’N OF

However, moving animals to a new facility presents risks—both in and after transport—and the selection of a recipient facility can present real challenges. Alternatively, a court can require a facility alter its treatment of the animals, e.g., to make specific changes to the facility's husbandry practices and/or the animals' environments. Staying in a familiar location can benefit an animal and removes the risks of transfer; however, in some scenarios making the necessary changes could require a significant investment of time and resources from both the facility *and* the court. Neither option is inherently superior, and, while the selection of one of these remedies over the other should depend on the specifics of a particular situation, there is essentially no formal guidance on *how* to make this determination.

A. *The Transfer Option*

Moving an animal from one facility to another is rarely an easy or straightforward task. Challenges include the actual transport of animals between facilities (which presents a variety of logistical hurdles¹¹⁴),

ANIMAL SANCTUARIES, <https://www.sanctuaryfederation.org/> [https://perma.cc/S7RF-UDV4] (last visited Nov. 3, 2021). In April 2021, there were 241 AZA-accredited zoos and aquariums. *See Currently Accredited Zoos and Aquariums*, *supra* note 101.

¹¹⁴ The practical realities of moving exotic animals can pose real challenges. Such transports require careful planning, as well as significant investments of time and money. Carriers and handlers of transported animals must comply with a host of AWA requirements. 7 U.S.C. § 2143 (2018). The animal may pose a safety risk—an accidental release could harm people or other animals. *See, e.g.*, Associated Press, *Jaguar Kills Eight Other Animals After Escaping from Zoo Enclosure*, GUARDIAN (July 15, 2018, 8:32 PM), <https://www.theguardian.com/world/2018/jul/16/jaguar-kills-eight-other-animals-after-escaping-from-zoo-enclosure> [https://perma.cc/QNM8-PPFK]; Associated Press, *Tiger Escapes Enclosure at San Francisco Zoo, Killing 1*, WMC5 (Dec. 26, 2007, 11:18 PM), <https://www.wmc5.com/actionnews5.com/story/7542759/tiger-escapes-enclosure-at-san-francisco-zoo-killing-1/> [https://perma.cc/PY8T-ZZGW]. Depending on animal size, mode of transport, and other requirements, “transport of live animals requires constant planning that can take up to a year or more and cost hundreds of thousands of dollars.” Brian Straight, *From A to Z: How Animals Get to Aquariums and Zoos, and Everywhere in Between*, AM. SHIPPER (Aug. 20, 2019), <https://www.freightwaves.com/news/from-a-to-z-how-animals-get-to-aquariums-and-zoos-and-everywhere-in-between> [https://perma.cc/K8QN-9SGU]; *see also* Julia Lyon, *2000 Miles with a Giant Rhino*, CNN BUS. (July 1, 2014, 7:05 AM), <https://money.cnn.com/2014/07/01/smallbusiness/zoo-animals-mover/index.html> [https://perma.cc/CK5E-KEQM] (discussing additional factors, such as weather, that must be considered).

However, zoos regularly move animals for a variety of reasons, *see supra* notes 94–96 and accompanying text, and have successfully transported animals as large as elephants and whale sharks over significant distances. *See, e.g.*, *Zoo Miami Welcomes New Endangered Asian Elephant from Australia*, CBS MIAMI (May 9, 2018, 11:30 PM), <https://miami.cbs>

finding a willing facility,¹¹⁵ and, potentially the most difficult of all—*selecting* a facility. Both in and out of court, many people are quick to push for animals to be moved from a zoo to a sanctuary, under the assumption that sanctuaries are inherently better than zoos.¹¹⁶ In some cases, plaintiffs name particular sanctuaries.¹¹⁷ In others, plaintiffs are less specific, asking that the animals move to a “reputable facility,”¹¹⁸ for the court to appoint a *guardian ad litem* to find an appropriate location,¹¹⁹ or for the surrender of the animals to the federal government or an “accredited wildlife sanctuary.”¹²⁰ However, selecting an appropriate facility is not as

local.com/2018/05/09/zoo-miami-new-elephant-ongard/ [https://perma.cc/EGP5-EVE9] (describing the transfer of an elephant from the Melbourne Zoo in Australia to the Miami Zoo in Florida); Howard Krum, *When Whale Sharks Fly*, in *THE RHINO WITH GLUE-ON SHOES* 77, 77–87 (Lucy H. Spelman & Ted Y. Mashima, eds., 2008) (describing the author’s experience helping to fly whale sharks from Taiwan to the Georgia Aquarium). This aspect of the issue should be taken into account, but it is unlikely to be a deciding factor unless an animal is not considered a good candidate for travel. *See, e.g.*, Associated Press, *San Antonio Zoo Won’t Relocate Aging Elephant*, NBCDFW (Sept. 14, 2014, 11:54 AM) [hereinafter *San Antonio Zoo Won’t Relocate Aging Elephant*], https://www.nbcdfw.com/news/local/san-antonio-zoo-wont-relocate-aging-elephant/1989348/ [https://perma.cc/2P94-FMHN] (“[M]oving the 54-year-old elephant might kill her”); Chabeli Herrera, *Lolita May Never Go Free. And That Could Be What’s Best for Her, Scientists Say*, MIAMI HERALD (Nov. 29, 2017, 10:46 AM), https://www.miamiherald.com/news/business/article185517463.html [https://perma.cc/Z5E9-28P2] (discussing concerns associated with moving an orca over 50 years old).

¹¹⁵ There are myriad reasons why a facility might turn such an opportunity down. In addition to obvious concerns regarding cost and available space, a facility may be reluctant to accept an animal if there are health concerns. *See* Sandi Doughton, *Zoos Clash with Sanctuaries Over Treatment of Elephant Tuberculosis*, SEATTLE TIMES (Mar. 30, 2015, 6:22 PM), https://www.seattletimes.com/seattle-news/zoos-resist-guidelines-that-limit-elephant-tuberculosis/ [https://perma.cc/HZU6-QHZJ]. Furthermore, altering animal social groups can be tricky—even when standard precautions are taken, animal introductions are a risk. *See* Yonette Joseph, *A First Date for Two Rare Tigers Ends in Death at London Zoo*, N.Y. TIMES (Feb. 9, 2019), https://www.nytimes.com/2019/02/09/world/europe/london-zoo-tiger.html [https://perma.cc/V7GV-4JE3].

¹¹⁶ *See* discussion *supra* Section I.B.

¹¹⁷ *See, e.g.*, Verified Petition for a Common Law Writ of Habeas Corpus at 66, Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc., No. LLI-CV-18-5010773S, 2019 WL 1399499, *aff’d*, 231 A.3d 1171 (Conn. App. Ct. 2020) (naming the Performing Animal Welfare Society); Rowley v. City of New Bedford, 413 F. Supp. 3d 53, 62 (D. Mass. 2019) (naming The Elephant Sanctuary).

¹¹⁸ Plaintiffs’ Trial Brief at *9, Kuehl v. Sellner, 161 F. Supp. 3d 678 (N.D. Iowa 2016).

¹¹⁹ Complaint for Declaratory & Injunctive Relief at *38, PETA, Inc. v. Tri-State Zoological Park of W. Md., 397 F. Supp. 3d 768 (D. Md. 2019) (No. 1:17-cv-02148-PX); Complaint for Declaratory & Injunctive Relief at *29, Collins v. Tri-State Zoological Park of W. Md., No. 1:20-cv-01225-PX, 2021 WL 211301 (D. Md. Jan. 21, 2021).

¹²⁰ Hill v. Coggins, 423 F. Supp. 3d 209, 218 (W.D.N.C. 2019).

easy as simply picking a sanctuary. Courts must accept or select a facility capable of providing what they believe to be an acceptable level of care to the animals, armed only with scant guidance from the law, the record in front of them, and their own powers of equitable discretion.

1. *Kuehl v. Sellner*: Tigers

In *Kuehl v. Sellner*, plaintiffs brought an ESA suit against Cricket Hollow Zoo (“CHZ”) in Manchester, Iowa, and successfully demonstrated that CHZ’s treatment of its lemurs and tigers—both endangered species¹²¹—amounted to harm and harassment, and therefore a taking in violation of the ESA.¹²² The trial court ordered the transfer of the lemurs and tigers “to an appropriate facility which is licensed by the USDA and is capable of meeting the needs of the endangered species.”¹²³ Lacking specific guidance from either the AWA or the ESA, the trial court apparently relied on its “broad grant of equitable power” in making its placement decision.¹²⁴

Plaintiffs suggested that the tigers move to The Wild Animal Sanctuary (“TWAS”) in Keenesburg, Colorado; CHZ proposed the Exotic Feline Rescue Center (“EFRC”) in Center Point, Indiana.¹²⁵ Both are USDA-licensed; the court noted that TWAS had over 400 animals in treeless enclosures, approximately 50 employees (including a veterinarian), and over 200,000 visitors a year paying a thirty-dollar admission fee.¹²⁶ EFRC, in contrast, housed about 200 animals in shaded enclosures, engaged less than ten employees, and asked for a ten-dollar minimal donation.¹²⁷ The court chose EFRC:

Would the EFRC be my first choice for placement of [CHZ’s] tigers? Maybe not. But that is not the question which the Court is required to answer. Instead, the Court must determine whether the EFRC—which is Defendants’

¹²¹ *Lemurs*, ECOS ENV’T CONSERVATION ONLINE SYS., <https://ecos.fws.gov/ecp/species/3240> [<https://perma.cc/6L5U-RDSH>] (last visited Nov. 3, 2021); *Tiger*, ECOS ENV’T CONSERVATION ONLINE SYS., <https://ecos.fws.gov/ecp/species/1765> [<https://perma.cc/T7U8-PHGM>] (last visited Nov. 3, 2021).

¹²² *Kuehl v. Sellner*, 161 F. Supp. 3d 678, 718 (N.D. Iowa 2016).

¹²³ *Id.* at 719.

¹²⁴ *Kuehl v. Sellner*, 887 F.3d 845, 854 (8th Cir. 2018).

¹²⁵ *Id.*

¹²⁶ Ruling Regarding Placement & Transp. of Endangered Animals at 9–10, *Kuehl v. Sellner*, 161 F. Supp. 3d 678 (N.D. Iowa 2016).

¹²⁷ *Id.*

choice—is “capable of meeting the needs” of the tigers. The Court finds that the answer to that question is yes.¹²⁸

Because both facilities possessed USDA licenses, the court only felt obligated to consider whether the facilities could meet the animals’ needs. It is not clear, however—other than, perhaps, the fact that it was CHZ’s choice—why the court ultimately went with EFRC over TWAS, given its hint of reluctance.

Nothing in the record then or since this disposition suggests that the court chose wrongly. The Eighth Circuit determined that “the district court did not clearly err” and affirmed that court’s decision.¹²⁹ Both facilities remain licensed and operational; TWAS is GFAS- and ASA-accredited, while EFRC does not appear to have any accreditations.¹³⁰ In short, other than the comparative accreditation status—which was not mentioned—the most accessible bases for comparison are the factors discussed by the court in the CHZ case—essentially, the basic operations and resources of each facility.

¹²⁸ *Id.* at 10.

¹²⁹ *Kuehl*, 887 F.3d at 855. At least two other courts have also found TWAS acceptable—the District Court of Maryland in 2019 accepted a proposal to transfer animals at the Tri-State Zoological Park in Cumberland, Maryland, to TWAS; however, the record in that case does not indicate that any other facilities were proposed. Joint Proposed Order & Plaintiff’s Brief Regarding Requested Relief Including Disposition of Defendants’ Tigers & Lion at 3, *PETA v. Tri-State*, 424 F. Supp. 3d 404 (D. Md. 2019).; *PETA*, 424 F. Supp. 3d at 434. A District Court in Indiana approved PETA’s selection of TWAS in an action against Indiana’s Wildlife in Need over the defendants’ objections; however, the court offered little justification other than noting that TWAS “currently cares for more than 600 rescued animals, and it is accredited by GFAS, so it has to comply with strict standards” and that the animals transferred from Tri-State “now are doing fine.” *PETA v. Wildlife in Need & Wildlife in Deed, Inc.*, No. 4:17-cv-00186-RLY-DML at *3, *7 (S.D. Ind. Sept. 15, 2020) (Bloomberg). Neither the court nor the defendants provided substantial support for their assertions that TWAS either is or is not an appropriate facility for defendants’ animals; therefore it is once again unclear on what basis the court made its decision. *See id.*; WIN Defendants’ Response Memorandum Objecting to the Plaintiff’s Motion for Summary Judgment at 8, *PETA v. Wildlife in Need & Wildlife in Deed, Inc.*, 476 F. Supp. 3d 765 (S.D. Ind. 2020); Declaration of Patrick Craig at ¶¶ 10–12, *PETA*, 476 F. Supp. 3d 765 (S.D. Ind. 2020). Most recently, TWAS accepted a number of cats that the federal government seized from TIGER KING’s Jeff Lowe. *See infra* note 143.

¹³⁰ Inspection Reports Search, ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP’T OF AGRIC. [hereinafter APHIS Inspection Reports Search], <https://aphis-efile.force.com/PublicSearchTool/s/inspection-reports> [<https://perma.cc/5VKP-2N8P>] (last visited Nov. 3, 2021) (type 84-C-0019 into certificate number field for TWAS, 32-C-0098 for EFRC); THE WILD ANIMAL SANCTUARY, <https://www.wildanimalsanctuary.org/> [<https://perma.cc/7269-7JJY>] (last visited Nov. 3, 2021); EXOTIC FELINE RESCUE CTR., <https://efrc.org/> [<https://perma.cc/7H6P-92TC>] (last visited Nov. 3, 2021).

2. *Kuehl v. Sellner*: Lemurs

The lemurs have their own story. Plaintiffs pushed for the lemurs to go to the Prosimian Sanctuary in Jacksonville, Florida, while CHZ advocated for the Special Memories Zoo in Greenville, Wisconsin.¹³¹ The district court selected Special Memories Zoo; as noted by the Eighth Circuit on appeal, plaintiffs' choice, the Prosimian Sanctuary, "had not been licensed or inspected by the USDA at the time of the hearing"¹³² while defendants' choice, Special Memories Zoo, was:

licensed by the USDA facility and subject to regular inspections. While inspectors have found violations from time-to-time, the Court nonetheless concludes that Special Memories is capable of meeting the animals' needs. Even *if* the Court found Special Memories incapable of meeting the lemurs' needs, because the Prosimian Sanctuary is not licensed by the USDA, Plaintiffs have not suggested a qualified alternative.¹³³

The court thus made its decision regarding lemur placement based on USDA licensing—criteria set by the court itself. Plaintiffs knowingly chose to suggest a facility without a USDA license, despite the clear mandate in the trial order—it is not clear whether plaintiffs believed the Prosimian Sanctuary was the optimal choice regardless or simply disregarded the court's instruction. On appeal, the Eighth Circuit affirmed the placement at Special Memories Zoo.¹³⁴

Although he concurred in the result, agreeing "that the district court did not ultimately abuse its discretion in relocating the lemurs to the Special Memories Zoo," Judge Goldberg nevertheless expressed some concerns in his concurring opinion:

There is little guidance for courts exercising injunctive power under the ESA to relocate privately-owned animals.

¹³¹ *Kuehl*, 887 F.3d at 854.

¹³² *Id.*

¹³³ Ruling Regarding Placement & Transp. of Endangered Animals at 6, *Kuehl v. Sellner*, 161 F. Supp. 3d 678 (N.D. Iowa 2016).

¹³⁴ *Kuehl*, 887 F.3d at 854 ("the district court did not clearly err . . . [or] abuse its discretion").

However, the express purpose of the ESA, under which this case arises, is the “conservation of endangered species.” . . . “Conservation” is defined as “all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which [ESA protections] are no longer necessary.” . . . I believe this general principal . . . should inform courts exercising their injunctive powers in cases such as these.¹³⁵

He went on to posit that giving “significant weight to relocating the lemurs to a ‘facility which is licensed by the USDA’” and accordingly rejecting the Prosimian Sanctuary as an option “may have resulted in the lemurs being relocated to the facility less responsive, on the whole, to their complex social, psychological, and environmental needs.”¹³⁶

As suggested by its name, the Prosimian Sanctuary is specifically dedicated to the care of prosimians, a suborder of primates including lemurs and lorises.¹³⁷ An Amicus Brief submitted to the court pointed out that although the AWA sets minimum standards for treatment, it does not consider the conservation goals of the ESA—in response, Judge Goldberg concluded that “USDA licensing, while certainly a valid consideration, is insufficient as a proxy for the far-reaching purpose of the ESA.”¹³⁸ Essentially, Judge Goldberg suggested that although it is not unreasonable to take the presence or lack of a USDA license into consideration, simply having a USDA license does not guarantee that a facility is the best place for an animal.

Subsequent events reinforce Judge Goldberg’s analysis. The district court selected Special Memories Zoo over the Prosimian Sanctuary because the zoo was licensed while the sanctuary was not.¹³⁹ The district court’s methodology in the CHZ was not, as the Eighth Circuit agreed, unreasonable—USDA’s licensing of Special Memories Zoo meant *some* type of oversight existed, in contrast to the Prosimian Sanctuary, which lacks (but does not need) a license or any accreditation. However, in early 2021, the ALDF successfully sued to have Special Memories Zoo

¹³⁵ *Id.* at 856 (Goldberg, J., concurring) (citations omitted).

¹³⁶ *Id.* at 856–57.

¹³⁷ PROSIMIAN SANCTUARY, <https://www.prosimiansanctuary.org/> [<https://perma.cc/32H8-CBA8>] (last visited Nov. 3, 2021); *Prosimian*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/prosimian> [<https://perma.cc/K73P-764Y>] (last visited Nov. 3, 2021).

¹³⁸ *Kuehl*, 887 F.3d at 856 (Goldberg, J., concurring).

¹³⁹ *Id.* at 854.

shut down,¹⁴⁰ alleging, *inter alia*, “squalid conditions,” “inadequate shelter,” and a lack of “fresh water and suitable food.”¹⁴¹ AWA licensing—even compared to an unlicensed facility—is therefore no guarantee that one facility is superior to another.

The Prosimian Sanctuary remains operational, and although it appears to still be both unlicensed and unaccredited, as discussed above, the AWA does not require non-exhibiting facilities to obtain a USDA license, nor does it require outside accreditation for any facility.¹⁴² The Prosimian Sanctuary remains, effectively, an unknown quantity. It is possible—but of course, not certain—that the Prosimian Sanctuary would have provided the lemurs with better welfare than either CHZ or Special Memories Zoo.

If a court determines that animals must be moved to a different facility—or is considering such an order—the existing legal framework does not give that court any meaningful guidance or direction. As *Kuehl v. Sellner* demonstrates, even relying on what little assistance there is in the form of USDA licensing does not guarantee a facility can or will provide an acceptable standard of care to the animals in question. As Judge Goldberg suggested, courts should be wary of basing their decision on any single factor—licensing, zoo or sanctuary status, or a party’s preference.¹⁴³

¹⁴⁰ Animal Legal Def. Fund v. Special Memories Zoo, LLC, No. 20-C-216, 2021 WL 101121, at *2 (E.D. Wis. Jan. 12, 2021).

¹⁴¹ Compl. for Declaratory and Injunctive Relief at ¶ 3, Animal Legal Def. Fund v. Special Memories Zoo, No. 1:20-cv-00216, 2021 WL 101121 (E.D. Wis. Jan. 12, 2021).

¹⁴² PROSIMIAN SANCTUARY, *supra* note 137; see discussion *supra* Part I.

¹⁴³ As this Note was being prepared for publication, the United States seized over 60 big cats from Jeff Lowe, of *Tiger King* fame. Press Release, U.S. Dep’t Just., U.S. Government Seizes 68 Protected Big Cats and a Jaguar from Jeffrey and Lauren Lowe (May 20, 2021), <https://www.justice.gov/opa/pr/us-government-seizes-68-protected-big-cats-and-jaguar-jeffrey-and-lauren-low> [<https://perma.cc/5VXC-V2FJ>]. Given the conditions found at the Lowes’ facility, the ongoing litigation, and the Lowes’ repeated failure to comply with court orders (resulting in a contempt finding), it seems clear that moving the animals to new facilities was clearly in those animals’ best interests. See *id.* The government dispersed the animals to at least five different facilities; however, few details are currently available regarding how the government selected facilities, other than a statement explaining that the Justice Department “will work to ensure that they go to responsible animal preserves where they can be safely maintained rather than exploited.” *Id.*; Josh Frigerio, *Seven Big Cats Rescued from Jeff Lowe’s Tiger King Park Transported to Arizona Sanctuary*, ABC 15 (May 25, 2021, 9:27 PM), <https://www.abc15.com/entertainment/events/seven-big-cats-rescued-from-jeff-lowes-tiger-king-park-transported-to-arizona-sanctuary> [<https://perma.cc/4Z9R-JW2Q>] (Keepers of the Wild Nature in Valentine, Arizona); Hicham Raache, *Arkansas-Based Wildlife Refuge Helped Rescue 68 Big Cats from Jeff Lowe’s Tiger King Park, Previously Owned by Joe Exotic*, OKLAHOMA’S NEWS 4 (June 5,

B. *The Treatment Option*

As an alternative to transfer, plaintiffs often ask that a court enjoin the alleged violations or order a facility to “remedy its treatment” of its animals.¹⁴⁴ Deciding to keep an animal in its current facility naturally

2021, 3:27 PM), <https://kfor.com/news/local/arkansas-based-wildlife-refuge-helped-rescue-68-big-cats-from-jeff-lowes-tiger-king-park-previously-owned-by-joe-exotic/> [<https://perma.cc/8MMG-E6AE>] (Turpentine Creek Wildlife Refuge in Eureka Springs, AR); Danielle Chavira, *We Have the Room’: Colorado’s Wild Animal Sanctuary Takes in 35 Wild Cats from Tiger King Park*, CBS DENVER (May 26, 2021, 1:04 PM), <https://denver.cbslocal.com/2021/05/26/colorado-wild-animal-sanctuary-tiger-king/> [<https://perma.cc/2V9X-EG76>] (TWAS); Sasha Sander, *Tiger from Infamous Park from Netflix Documentary has New Home in Missouri*, KSDK (May 25, 2021, 4:02 PM), <https://www.ksdk.com/article/news/local/missouri-tiger-sanctuary-rescues-tiger-from-tiger-king-park/63-cf323448-778c-4274-b42b-68508a3a7023> [<https://perma.cc/SN6F-683E>] (Crown Ridge Tiger Sanctuary in Missouri); WSOCTV.com News Staff, *NC Tiger Rescue Caring for 4 Big Cats Seized from “Tiger King” Park*, WSOC-TV (May 25, 2021, 12:25 PM), <https://www.wsoc.com/news/local/nc-tiger-rescue-caring-4-big-cats-seized-tiger-king-park/PYEEKQHM2FGVLK2C556DXEE4ZE/> [<https://perma.cc/Y369-HK87>] (Carolina Tiger Rescue in Pittsboro, North Carolina). Some, but not all, of the recipient facilities are GFAS accredited; all are USDA licensed. See KEEPERS OF THE WILD, <https://www.keepersofthewild.org/about-us> [<https://perma.cc/67BB-CLPP>] (last visited Nov. 3, 2021) (not accredited); *Our History*, TURPENTINE CREEK WILDLIFE REFUGE, <https://www.turpentinecreek.org/about-us/our-history/> [<https://perma.cc/UN6P-JKGE>] (last visited Nov. 3, 2021) (USDA licensed and GFAS accredited); *Mission*, CROWN RIDGE TIGER SANCTUARY, <https://crownridgetigers.com/mission> [<https://perma.cc/28EZ-YDXE>] (last visited Nov. 3, 2021) (GFAS accredited); CAROLINA TIGER RESCUE, <https://carolinatigerrescue.org/> [<https://perma.cc/KQU4-DYPS>] (last visited Nov. 3, 2021) (GFAS accredited); THE WILD ANIMAL SANCTUARY, *supra* note 130 (GFAS and ASA accredited); APHIS Inspection Reports Search, *supra* note 130 (type 84-C-0019 into certificate number field for TWAS, 86-C-0076 for Keepers of the Wild, 43-C-0291 for Crown Ridge, 55-C-0166 for Carolina Tiger Rescue). Bhagavan “Doc” Antle, also of *Tiger King* notoriety, was indicted in 2020 in Virginia for wildlife trafficking, animal cruelty, and conspiracy in connection with his facility in South Carolina; however, the facility is still open as of this writing. Press Release, Commonwealth of Va. Off. of the Att’y Gen., Owner of Myrtle Beach Safari and Owner of Virginia “Roadside Zoo” Indicted on Wildlife Trafficking Charges (Oct. 9, 2020), <https://www.oag.state.va.us/media-center/news-releases/1848-october-9-2020-owner-of-myrtle-beach-safari-and-owner-of-virginia-roadside-zoo-indicted-on-wildlife-trafficking-charges> [<https://perma.cc/GWP6-E44N>]; DOC ANTLE’S MYRTLE BEACH SAFARI, <https://myrtlebeachsafari.com/> [<https://perma.cc/DVG7-H37W>] (last visited Nov. 3, 2021).

¹⁴⁴ See, e.g., Compl. for Declaratory & Injunctive Relief at 37, *PETA v. Tri-State Zoological Park of W. Md.*, 424 F. Supp. 3d 404 (D. Md. 2019) (asking the court to “[e]njoin Defendants from continuing to violate the ESA and its implementing regulations”); Compl. for Declaratory & Injunctive Relief at ¶ 48, *Graham v. San Antonio Zoological Soc’y*, 261 F. Supp. 3d 711 (W.D. Tex. 2017) (stating that the zoo must “at a minimum, remedy its treatment” of the animal).

eliminates the various challenges associated with the transfer option. It can also provide other benefits for the animals—in this scenario the animal remains in familiar surroundings with zookeepers and (if applicable) a social group it is accustomed to.¹⁴⁵ However, the simple phrase “remedy its treatment” encompasses a range of possibilities. Two case studies illustrate how different alternatives may make this option more or less desirable. *Culp v. City of Los Angeles* represents a straightforward and relatively practicable remedy, while *Graham v. San Antonio Zoological Society* demonstrates how a “treatment” remedy can impose potentially significant burdens on both the zoo *and* the court. As before, little guidance is available to the courts.

1. Case Study: *Culp v. City of Los Angeles*

Culp v. City of Los Angeles illustrates a relatively straightforward example of the treatment option. California taxpayers brought state law claims against the Los Angeles Zoo (“LAZ”), alleging that LAZ inhumanely used bull hooks¹⁴⁶ and electric shocks on the elephants, did not give the elephants adequate space, and provided inappropriate substrate,¹⁴⁷ which gave the elephants foot and joint problems.¹⁴⁸ The plaintiffs “sought to enjoin the [LAZ] from maintaining its current elephant exhibit, and from building a new, larger elephant exhibit.”¹⁴⁹ Following a bench trial, “the court issued injunctions prohibiting the [LAZ] from using bullhooks [sic] or electric shock on zoo elephants, and requiring it to

¹⁴⁵ Some animals are naturally solitary and only come together for mating, such as polar bears. *Polar Bears and RZSS Highland Wildlife Park*, RZSS HIGHLAND WILDLIFE PARK (2017), <https://www.highlandwildlifepark.org.uk/animals-attractions/polar-bears-and-rzss-highland-wildlife-park/> [https://perma.cc/RR8D-6QZN].

¹⁴⁶ Although widely assumed to be inhumane, some within the industry believe bull hooks can be used in a way that is positive to elephants. Karin Brulliard, *Some of America's Top Zoos Still Use Bullhooks on Elephants. That's About to Change*, WASH. POST (Aug. 21, 2019), <https://www.washingtonpost.com/science/2019/08/21/some-americas-top-zoos-still-use-bull-hooks-elephants-thats-about-change/> [https://perma.cc/N7SW-EJ69]. As of 2019, AZA is phasing out the use of bull hooks in its facilities. *Id.*

¹⁴⁷ “Substrate” refers to the surface that an animal lives on, e.g., sand or soil. *Substrate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/substrate> [https://perma.cc/98B8-X243] (last visited Nov. 3, 2021).

¹⁴⁸ *Culp v. City of Los Angeles*, No. B208520, 2009 WL 3021762, at *6–7 (Cal. Ct. App. Sept. 23, 2009).

¹⁴⁹ *Id.* at *1.

exercise the elephants and rototill their enclosure regularly.”¹⁵⁰ Rototilling breaks up and “churns” soil,¹⁵¹ and was presumably intended to address concerns “that due to the exhibits’ relatively small area, the elephants walk over the same ground repeatedly, turning it into a hard, compacted surface that causes the elephants serious foot and joint problems.”¹⁵²

The Supreme Court of California ultimately overturned the case—and therefore the injunctive relief—on unrelated grounds,¹⁵³ and thus there is currently no way to assess the relative burden this injunction imposed on the court. However, the particulars of this injunction appeared to be practicable for LAZ. The zoo no longer used electric shock and stopped using bull hooks during the litigation—the court included both in the injunction because LAZ “could resume the use of both tools unless restrained from doing so,”¹⁵⁴ although California passed legislation prohibiting the use of bull hooks several years later.¹⁵⁵ Zoos frequently introduce change or variety into animals’ lives as part of enrichment or training programs;¹⁵⁶ adding or updating an exercise regime for an elephant was not only likely within the LAZ’s abilities, but because LAZ is AZA-accredited,¹⁵⁷ the zoo is required to have an exercise plan in place for its elephants.¹⁵⁸ Finally, most zoos hire horticulture staff to oversee the grounds—including animal exhibits—and LAZ itself is both a zoo and a botanical garden.¹⁵⁹ The rototilling requirement would thus presumably not impose a significant burden on the zoo, and the zoo evidently continues

¹⁵⁰ *Leider v. Lewis*, 394 P.3d 1055, 1058 (Cal. 2017). The case name changed on appeal—initial lead plaintiff Culp passed away before trial. *Id.*

¹⁵¹ *Rototilling: How to Do It Effectively*, TOPTILLERS, <https://toptillers.com/rototilling-explained/> [<https://perma.cc/TW5T-3PKN>] (last visited Nov. 3, 2021).

¹⁵² *Culp*, 2009 WL 3021762, at *2.

¹⁵³ *Leider*, 394 P.3d at 1057.

¹⁵⁴ *Id.* at 1058 n.5.

¹⁵⁵ CAL. FISH & GAME § 2128 (West 2018).

¹⁵⁶ See Eric Hamilton, *Zoo Keeps Animals Healthy, Happy with Play, Exercise*, MILWAUKEE J. SENTINEL (June 13, 2015), <http://archive.jsonline.com/news/milwaukee/zoo-keeps-animals-healthy-happy-with-play-exercise-b99518698z1-307266721.html> [<https://perma.cc/LL7Y-ZL22>]; Young et al., *supra* note 35, at 101–02.

¹⁵⁷ *Currently Accredited Zoos and Aquariums*, *supra* note 101.

¹⁵⁸ AZA ACCREDITATION STANDARDS, *supra* note 103, at 58 (Standard E.3.3.2.4: “Daily exercise”).

¹⁵⁹ Kathryn B. Baltzell, *An Analysis of the Role of Horticulture at Zoos: More Than a Place for Animals* 2, 9–10 (2011) (Master’s degree thesis, University of Delaware), <http://udspace.udel.edu/handle/19716/10116> [<https://perma.cc/4A7K-ERSQ>]; *About the Los Angeles Zoo*, L.A. ZOO, <https://www.lazoo.org/about/> [<https://perma.cc/7U7B-CXYX>] (last visited Nov. 3, 2021).

to rototill its elephant exhibit even without court oversight.¹⁶⁰ It is therefore at least theoretically possible to configure a practicable injunction relating to animal treatment.

2. Case Study: *Graham v. San Antonio Zoological Society*

Of course, ordering a zoo to change its exhibits or practices is not always as simple as a mandate to exercise, rototill, and stop using bull hooks. In 2015, several individuals supported by ALDF sued the San Antonio Zoo ("SAZ") over its alleged mistreatment of Asian elephant "Lucky."¹⁶¹ The plaintiffs:

allege[d] four ways in which the [SAZ] is harming and harassing Lucky in violation of the ESA: (1) keeping her alone without any Asian elephant companions; (2) keeping her in a small enclosure which fails to meet minimum size standards set by the [AZA]; (3) depriving her of adequate shelter from the sun; and (4) forcing her to live on a hard, unnatural, species-inappropriate substrate.¹⁶²

The plaintiffs asked the court to, "at a minimum, remedy its treatment of Lucky."¹⁶³ While a particular remedy to SAZ's treatment was not specified, based on the alleged violations, presumably the SAZ would need to: (1) provide one or more Asian elephant companions for Lucky; (2) enlarge her enclosure; (3) give Lucky a way to shelter from the sun; *and* (4) change the substrate in Lucky's exhibit. Making some of these changes is not as simple or straightforward as they appear on paper.

Expanding or updating even one exhibit represents a significant investment of both time and resources. Before this litigation concluded, SAZ completed an assortment of renovations around the zoo, including an overhaul of Lucky's habitat.¹⁶⁴ In addition to expanding the exhibit,

¹⁶⁰ *Elephants at the L.A. Zoo*, L.A. ZOO, <https://www.lazoo.org/save-wildlife/actions-we-take/at-the-zoo/animal-care-at-the-zoo/elephants-at-the-zoo/> [https://perma.cc/E5UJ-E3TE] (last visited Nov. 3, 2021).

¹⁶¹ *Graham v. San Antonio Zoological Soc'y*, 261 F. Supp. 3d 711, 716 (W.D. Tex. 2017).

¹⁶² *Id.*

¹⁶³ Compl. for Declaratory and Injunctive Relief at 48, *Graham v. San Antonio Zoological Soc'y*, 261 F. Supp. 3d 711 (W.D. Tex. 2017). The plaintiffs' apparent preferred solution was to transfer Lucky to a particular elephant sanctuary located in Tennessee. *Id.*

¹⁶⁴ Elizabeth Lepro, *Zoo Looks for Cutting-Edge Design in Multimillion-Dollar Expansion Project. Plans Include Moves Outside the Site's Borders*, SAN ANTONIO EXPRESS-NEWS

Lucky received a deeper pool, “new foliage and a new layer of soil and sand.”¹⁶⁵ Together with the other improvements, the updates took over a year and a half to finish and cost the zoo more than \$4 million.¹⁶⁶ These numbers are not unusual—the Denver Zoo spent two and a half years and over \$2 million on a new tiger exhibit,¹⁶⁷ the Philadelphia Zoo spent \$33 million over twelve years on an overhaul of its children’s zoo area,¹⁶⁸ and the National Zoo spent seven years and \$56 million on an overhaul of its elephant spaces.¹⁶⁹ Compliance with an order to renovate an exhibit could thus take years, and potentially require the ongoing involvement and oversight of the court.

As noted in Section II.A, bringing in new animals also presents challenges. The required combination of finding the right companion, acquiring the appropriate permits, and coordinating logistics to transport exotic animals can result in a transfer “process” that may take up to a year or more.¹⁷⁰ Shortly after completing its renovations in 2016, SAZ brought in a new elephant to join Lucky.¹⁷¹ SAZ’s CEO, Tim Morrow, noted at the time of Nicole’s arrival that SAZ had “been working to find Lucky a new companion since shortly after [Morrow] joined the zoo in December 2014.”¹⁷² Similar to exhibit renovations, requiring a zoo to

(June 21, 2016, 10:51 AM), <https://www.expressnews.com/news/local/article/Zoo-looks-for-cutting-edge-design-in-8313919.php> [<https://perma.cc/LR5V-Y5V6>].

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Oscar Contreras, *Denver Zoo’s The Edge: 7 Things We Learned About the New Tiger Exhibit*, THE DENVER CHANNEL (Mar. 8, 2017, 5:08 PM), <https://www.thedenverchannel.com/news/front-range/denver/denver-zoos-the-edge-7-things-we-learned-about-the-new-tiger-exhibit> [<https://perma.cc/E3HD-LHWH>].

¹⁶⁸ *KidZooU: Hamilton Family Children’s Zoo and Faris Family Education Center at the Philadelphia Zoo*, 6ABC (Apr. 8, 2013), <https://6abc.com/archive/9057259/> [<https://perma.cc/YL68-YDCW>].

¹⁶⁹ *Smithsonian’s National Zoo Opens New Home for Asian Elephants*, SMITHSONIAN’S NAT’L ZOO & CONSERVATION BIOLOGY INST. (Mar. 21, 2013), <https://nationalzoo.si.edu/news/smithsonians-national-zoo-opens-new-home-for-asian-elephants> [<https://perma.cc/VAV6-REV5>]. See also Charlotte Coates, *16 New Zoo and Aquarium Projects to Watch in 2020*, BLOOLOP (Mar. 4, 2020), <https://blooloop.com/animals/in-depth/new-zoo-aquarium-projects-2020/> [<https://perma.cc/BEU4-2UNK>] (listing details and costs of zoo and aquarium expansion and renovation projects around the world).

¹⁷⁰ Straight, *supra* note 114; see also *supra* note 114 and accompanying text (discussion of challenges associated with animal transport).

¹⁷¹ Kathleen Petty, *San Antonio Zoo Welcomes New Elephant*, SAN ANTONIO (June 27, 2016), <https://www.sanantoniomag.com/san-antonio-zoo-welcomes-new-elephant/> [<https://perma.cc/2AYM-GBNS>].

¹⁷² *Id.*

bring in one or more new animals could entangle the court in a long and complicated process.

The practical effects of such an injunction are again hypothetical. SAZ did make changes—but on its own, without a court order, and likely not *because* of the litigation. As noted, SAZ started looking for a companion for Lucky in 2014, before litigation commenced,¹⁷³ and the scale of the exhibit renovation indicates that planning likely also began well before this litigation.¹⁷⁴ Because of SAZ's changes, the court ultimately agreed to dismiss the lawsuit.¹⁷⁵ If SAZ did not make these changes and the case had progressed, however, given concerns over moving Lucky at over 50 years of age,¹⁷⁶ there was likely a real possibility of the court issuing some sort of injunction regarding Lucky's exhibit and possibly her lack of companionship, rather than ordering her transfer to a different facility.¹⁷⁷ Given the considerable time and effort required to implement such changes, the court could have found itself caught up in the case for years—something courts generally prefer to avoid.¹⁷⁸ This case demonstrates that although the treatment option may be viable in some cases, such as *Culp*, in others it may be impracticable for the zoo and undesirable for the court.

As in Section II.A, the courts in these cases did not have anything beyond the vague guidelines of the statute(s) plaintiffs invoked in each case—and the same will be true for any court facing the transfer vs. treatment decision. These cases highlight the variability within the treatment option. What such a choice will entail, and whether that choice is consequently preferable to transferring the animal(s), will clearly depend on the unique circumstances of each case.

¹⁷³ *Id.*

¹⁷⁴ See Lepro, *supra* note 164.

¹⁷⁵ Order, *Graham v. San Antonio Zoological Soc'y*, No. 5:15-CV-01054-XR (W.D. Tex. Dec. 5, 2017); San Antonio Zoo (@sanantoniozoo), INSTAGRAM (Jan. 9, 2021), https://www.instagram.com/p/CJ14Z7O1_ue/?hl=en [<https://perma.cc/3YWW-A3LN>] (Lucky still lives at SAZ—now with two companions, Nicole and Karen.)

¹⁷⁶ See *San Antonio Zoo Won't Relocate Aging Elephant*, *supra* note 114; Hernán Rozemberg, *San Antonio Zoo's Tim Morrow Addresses Lucky the Elephant Controversy*, SAN ANTONIO CURRENT (Sept. 16, 2015), <https://www.sacurrent.com/sanantonio/san-antonio-zoos-tim-morrow-addresses-lucky-controversy/Content?oid=2470395> [<https://perma.cc/S7T4-WHSR>].

¹⁷⁷ SAZ is AZA-accredited and AZA requires that elephants at accredited zoos live with other elephants; however, AZA granted SAZ a variance permitting Lucky to stay by herself. Alex Navarro, *Lucky the Elephant to Stay at SA Zoo Despite Protests*, KSAT (Nov. 2, 2014, 6:09 PM), <https://www.ksat.com/news/2014/11/03/lucky-the-elephant-to-stay-at-sa-zoo-despite-protests/> [<https://perma.cc/YVB7-RWZX>].

¹⁷⁸ See, e.g., *Lord & Taylor, LLC v. White Flint, L.P.*, 780 F.3d 211, 219 (4th Cir. 2015) (“Continuous judicial supervision . . . may place a particular strain on a district court.”).

III. THE SEA PEN OPTION

Cetaceans¹⁷⁹ present a unique challenge. As noted, release is not a viable option, and although zoos can and do move cetaceans between facilities,¹⁸⁰ compared to the possibilities available for terrestrial animals, there are fewer facilities able to take in transferred cetaceans. There are a number of facilities holding dolphins within the United States;¹⁸¹ however, only four currently house killer whales and of those, three are SeaWorld parks and the other is Miami Seaquarium (“Seaquarium”).¹⁸² Killer whales in particular therefore pose a unique problem—not only are there very few facilities even capable of housing killer whales, but PETA has also sued both SeaWorld and Seaquarium over the alleged mistreatment of the facilities’ killer whales.¹⁸³ Each SeaWorld park holds anywhere from five to ten whales;¹⁸⁴ given water volume requirements in

¹⁷⁹ Cetaceans are members of the scientific order *Cetacea*, which encompasses entirely the aquatic mammals known as whales, dolphins, and porpoises. James G. Mead, *Cetacean*, BRITANNICA, <https://www.britannica.com/animal/cetacean> [<https://perma.cc/44HD-L8HC>] (last visited Nov. 3, 2021). They are one of four groups typically classed as “marine mammals,” two of which include only fully aquatic mammals—cetaceans and “sirenians,” or manatees and dugongs. *Marine Mammals*, NAT’L OCEANIC & ATMOSPHERIC ADMIN. (Feb. 1, 2019), <https://www.noaa.gov/education/resource-collections/marine-life/marine-mammals> [<https://perma.cc/M6SQ-KESN>]. Other marine mammals split their time between land and the water, meaning they can be treated much like non-aquatic animals. *Id.* Although sirenians, as fully aquatic mammals, theoretically present many of the same challenges as cetaceans, there are more cetaceans than sirenians in human care and cetaceans appear to be a much greater source of controversy. *Viewing*, SAVE THE MANATEE, <https://www.savethemanatee.org/manatees/manatee-viewing/> [<https://perma.cc/P58V-96C2>] (last visited Nov. 3, 2021).

¹⁸⁰ See, e.g., David Elliot, *Meet the Dolphins: Mississippi Aquarium Now the Home of 4 Bottlenose Dolphins*, WLOX (Dec. 10, 2020, 9:54 AM), <https://www.wlox.com/2020/12/10/meet-dolphins-mississippi-aquarium-now-home-bottlenose-dolphins/> [<https://perma.cc/F7GG-R5ZL>].

¹⁸¹ *List of Dolphinariums*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_dolphinariums [<https://perma.cc/69EK-JP45>] (last visited Nov. 3, 2021).

¹⁸² Herrera, *supra* note 114.

¹⁸³ PETA v. Miami Seaquarium, 189 F. Supp. 3d 1332, 1332–33 n.2 (S.D. Fla. 2016); Tilikum *ex rel.* PETA v. Sea World Parks & Ent., 842 F. Supp. 2d 1259, 1260 (S.D. Cal. 2012). PETA sued Seaquarium under the ESA after successfully petitioning NMFS to recognize Seaquarium’s only killer whale as a member of an endangered subpopulation of wild orcas known as the Southern Residents, *Miami Seaquarium*, 189 F. Supp. 3d at 1332 n.2, 1333, and SeaWorld under the Thirteenth Amendment. *Tilikum*, 842 F. Supp. 2d at 1260.

¹⁸⁴ *Killer Whale Education and Conservation*, SEAWORLD, <https://seaworld.com/san-diego/commitment/killer-whales/> [<https://perma.cc/RWX2-NKGQ>] (last visited Nov. 3, 2021) (ten whales at SeaWorld San Diego); *Killer Whale Education and Conservation*, SEAWORLD, <https://seaworld.com/san-antonio/commitment/killer-whales/> [<https://perma.cc/3AX3-RUEV>]

AWA regulations, closing down even one park and sending all of its animals to another would likely be both unpopular as well as impracticable.¹⁸⁵ For many opposed to keeping killer whales in human care—or at least to SeaWorld—the solution to this apparent dilemma is simple—sea pens.

The idea of sea pens seems relatively simple. Enclose a section of coastline with nets to create a sea pen.¹⁸⁶ Marine parks can then move their whales there and the problem is solved—the whales will have more space, live in a natural environment, and no longer need to perform in shows.¹⁸⁷ PETA in particular promotes sea pens as a solution, even attempting to legitimize the concept by presenting it to the courts. In its unsuccessful effort to expand the application of the Thirteenth Amendment by suing SeaWorld on behalf of five of SeaWorld's killer whales,¹⁸⁸ PETA asked the court “to effectuate [the whales'] transfer from [SeaWorld's] facilities to a suitable habitat in accordance with each [whale's] individual needs and best interests.”¹⁸⁹ The complaint goes on to explain that another of the “next friends” in the lawsuit “has written protocols . . . including instruction on assessing whether an animal is a candidate for release to his or her native habitat or retirement to a sea pen or natural sea lagoon.”¹⁹⁰ In its case against Seaquarium, PETA specifically requested the court to order the transfer of killer whale Lolita,¹⁹¹ Seaquarium's only killer whale, to a sea pen.¹⁹²

(last visited Nov. 3, 2021) (five whales at SeaWorld San Antonio); *Killer Whale Education and Conservation*, SEAWORLD, <https://seaworld.com/orlando/commitment/killer-whales/> [<https://perma.cc/NLT7-S9EK>] (last visited Nov. 3, 2021) (five whales at SeaWorld Orlando).

¹⁸⁵ See 9 C.F.R. § 3.104(b) (2021).

¹⁸⁶ See *KILLING KEIKO*, *supra* note 14, at 125, 187.

¹⁸⁷ See Martín, *supra* note 20.

¹⁸⁸ *Tilikum ex rel. PETA v. Sea World Parks & Ent.*, 842 F. Supp. 2d 1259, 1260 (S.D. Cal. 2012).

¹⁸⁹ Compl. for Declaratory & Injunctive Relief at *12, *Tilikum ex rel. PETA v. Sea World Parks & Ent., Inc.*, 842 F. Supp. 2d 1259 (S.D. Cal. 2012).

¹⁹⁰ *Id.* at ¶ 71.

¹⁹¹ Originally captured off the coast of Washington state and British Columbia, Lolita is called “Tokitae” by members of the Lummi Nation in Washington state who consider Lolita/Tokitae to be their relative; she became Lolita upon arrival in Miami. Chad Pawson & Chris Corday, *B.C. Marine Mammal Expert Says Moving Killer Whale from Miami a Death Sentence*, CBC NEWS (May 28, 2018), <https://www.cbc.ca/news/canada/british-columbia/lummi-nation-lolita-seaquarium-miami-andrew-trites-1.4679096> [<https://perma.cc/7CLD-MLUP>]. Because she is commonly referred to as Lolita in the legal documents, news articles, and social media referenced throughout this Note, this Note will refer to her as Lolita to maintain consistency.

¹⁹² *PETA v. Miami Seaquarium*, 189 F. Supp. 3d 1327, 1335 (S.D. Fla. 2016).

As of this writing, the sea pen issue has gone largely unaddressed in court, despite PETA’s efforts. PETA lost both the Seaquarium and SeaWorld cases—lacking standing in the Thirteenth Amendment case and losing to Miami Seaquarium at summary judgment.¹⁹³ Nevertheless, activists continue to campaign against these facilities and promote sea pens.¹⁹⁴ A court may one day have to consider the issue, particularly because sea pens are not a completely hypothetical concept. Several facilities in the Florida Keys house their dolphins in natural lagoons,¹⁹⁵ a Danish research center keeps porpoises in a fenced-off harbor,¹⁹⁶ and Klettsvík Bay in Iceland housed killer whale Keiko prior to his deadly “release”¹⁹⁷ and is now the permanent home of two beluga whales.¹⁹⁸ Keiko’s story in

¹⁹³ *Tilikum ex rel. PETA v. Sea World Parks & Ent.*, 842 F. Supp. 2d at 1264 ; *PETA v. Miami Seaquarium*, 189 F. Supp. 3d at 1355, *aff’d*, 879 F.3d 1142, 1144 (11th Cir. 2018), *reh’g denied*, 903 F.3d 1307, 1308 (11th Cir.).

¹⁹⁴ *See, e.g.*, Paul Watson & Tiffany Humphrey, *How Killer Whales are Exploited for Entertainment*, ONE GREEN PLANET, <https://www.onegreenplanet.org/animalsandnature/how-killer-whales-are-exploited-for-entertainment/> [<https://perma.cc/BR4U-J4FD>] (last visited Nov. 3, 2021) (article by animal activist Paul Watson criticizing the marine mammal industry).

¹⁹⁵ *FAQs*, THEATER OF THE SEA, <https://theaterofthesea.com/known-before-you-go/faqs/#lagoon-sidebeach> [<https://perma.cc/JL43-9GKQ>] (last visited Nov. 3, 2021); *Programs*, DOLPHIN RSCH. CTR., <https://dolphins.org/programs> [<https://perma.cc/LC2F-6ND2>] (last visited Nov. 3, 2021); *Dolphin Wellbeing*, DOLPHINS PLUS, <https://www.dolphinsplus.com/about-dolphins-plus/our-pledge-to-our-dolphins> [<https://perma.cc/3YV5-6M3A>] (last visited Nov. 3, 2021).

¹⁹⁶ *See* Birgitte Svennevig, *Porpoises Aid Biologists in Protecting Marine Animals*, SDU (Dec. 9, 2020), https://www.sdu.dk/en/om_sdu/fakulteterne/naturvidenskab/nyheder-2020/2020_12_04_marsvin [<https://perma.cc/CP8A-UL92>].

¹⁹⁷ Keiko’s story is long and complicated. In short, in an attempt to fully release the star of FREE WILLY, Keiko was moved to a sea pen in Iceland, where a succession of trainers tried to rehabilitate him for life as a wild whale. *Shark Con*, *supra* note 111. However, Keiko spent the majority of his life, starting as a very young whale, with people. *Id.* He never thrived as an independent, wild whale and died off of the Norwegian coast in 2003. *Id.*

Mark Simmons worked as a SeaWorld trainer for ten years, primarily with killer whales, and joined the Keiko Release Project in 1999, serving as director of animal husbandry and behavior team lead, working on-site in Iceland. *KILLING KEIKO*, *supra* note 14, at 397. Simmons left the project before Keiko’s final “release,” *see id.* at 33, and carefully detailed his experiences on the project in *KILLING KEIKO*, providing valuable first-hand insight into the realities of keeping a killer whale in a sea pen. Simmons explains that “[e]verything I did write about in the book . . . is backed up with hard evidence, internal communications, board documents, video and eye-witness accounts from those with official involvement in the project, including my own involvement.” Mark Simmons, *When the Truth Hurts, Shoot the Messenger*, AWESOME OCEAN, <http://awesomeocean.com/whales/mark-simmons-when-the-truth-hurts-shoot-the-messenger/> [<https://perma.cc/VFE2-S3KP>] (last visited Nov. 3, 2021).

¹⁹⁸ *Two Whales Flown from Shanghai Aquarium to Sanctuary in Iceland*, GUARDIAN

particular provides valuable insight into the practical realities of sea pens, revealing that, as with other viral “fixes,” saying “move the whales to a sea pen” is neither as straightforward nor as productive a solution as it sounds.¹⁹⁹

A sea pen, as a facility with marine mammals,²⁰⁰ must adhere to both MMPA and AWA requirements.²⁰¹ Essentially, a sea pen must provide a safe, healthy environment suited to the particular marine mammal species while also ensuring their care meets AWA or AWA-equivalent standards. Moving cetaceans to a sea pen thus presents a multitude of obstacles, including siting, cost, legal restrictions, and a host of other practical considerations. These barriers make the idea at best an extremely limited solution and at worst a nearly impossible one.

A. *Siting*

There are currently no empty sea pens ready and waiting for the arrival of dolphins or killer whales. The Eleventh Circuit touched on this in its first rejection of PETA’s appeal against Seaquarium, pointing out that “counsel for PETA acknowledged the sea pen has not yet been built.”²⁰² As it turns out, finding a sea pen location suitable for either

(June 19, 2019, 7:21 PM), <https://www.theguardian.com/environment/2019/jun/20/two-whales-flown-from-shanghai-aquarium-to-sanctuary-in-iceland> [<https://perma.cc/W24X-2MFG>]. In 2002, a young wild orca was temporarily held in a sea pen as part of a successful effort to reunite him with his family; a similar attempt two years later with a different orca was unsuccessful. DANIEL FRANCIS & GIL HEWLETT, OPERATION ORCA 12–14 (2007).

¹⁹⁹ Other examples of similarly oversimplified viral fixes include both bans on plastic straws and the “Ocean Cleanup” as solutions to the ocean plastic crisis: David Shiffman, *Sunscreen, Straws, and Subtlety: The Dangers of Oversimplifying a Complex Environmental Problem*, SCUBADIVING (May 31, 2019), <https://www.scubadiving.com/sunscreen-straw-ban-issues> [<https://perma.cc/Y5RT-Y3WN>]; Rebecca Helm, *How Plastic Cleanup Threatens the Ocean’s Living Islands*, ATLANTIC (Jan. 22, 2019), <https://www.theatlantic.com/science/archive/2019/01/ocean-cleanup-project-could-destroy-neuston/580693/> [<https://perma.cc/N3MK-DKEY>]. Another overly simplified claim is that giving up meat will significantly reduce greenhouse gas emissions; see Frank Mitloehner, *The Bogus Burger Blame*, CLEAR CTR. (Feb. 12, 2021), <https://clear.ucdavis.edu/blog/bogus-burger-blame> [<https://perma.cc/L9VX-DWWK>]. As scientist Dr. David Shiffman points out, “[i]f you don’t understand basic facts about the problem, you’re unlikely to come up with a useful solution Thinking outside the box is more effective if you know where the boundaries of the box are and why they’re there.” David Shiffman (@WhySharksMatter), TWITTER (Jan. 31, 2021, 8:03 AM), <https://twitter.com/WhySharksMatter/status/1355864382916456449> [<https://perma.cc/LKH2-9KJT>].

²⁰⁰ See 9 C.F.R. § 3.101 (2021).

²⁰¹ See discussion *supra* Part I.

²⁰² PETA v. Miami Seaquarium, 879 F.3d 1142, 1144 n.2 (11th Cir. 2018).

dolphins or multi-ton killer whales²⁰³ is not easy. The search for a suitable location for Keiko required visits to Iceland, Ireland, and Scotland, including some of the remote islands off of the Scottish coast.²⁰⁴ The teams investigating possible sites explained that they had “to look at every little bay, because the next one around the corner may be the best spot You can’t pass anything up.”²⁰⁵ In addition to prioritizing colder, northern waters,²⁰⁶ the Keiko project had to consider depth, tidal flows, availability of killer whale food, staff accommodations, security, and bureaucracy.²⁰⁷ These difficulties have not disappeared with time. Even selecting Klettsvík Bay for the belugas, a decade *after* Keiko left, took four years of searching—because the belugas will definitely remain in human care, the team needed “a location that would allow for the construction of a land-side care facility.”²⁰⁸

Individual animals may impose particular restrictions on potential locations. Keiko was taken from the wild as a very young whale off the Icelandic coast.²⁰⁹ By the time release efforts began, Keiko had developed cutaneous papillomatosis, a skin disease caused by a novel papilloma-virus, which continued to occasionally flare up even after moving to Iceland.²¹⁰ Both Keiko’s origins and his medical condition resulted in certain siting limitations:

The U.S. National Marine Fisheries Service would never have permitted transfer of a papilloma-infected whale into a sea pen in American waters. Even if Keiko’s papilloma were cured, the NMFS would not have allowed him to enter a pen on the Pacific coast. He was an Atlantic whale that might exchange genes with Pacific females if he escaped.²¹¹

²⁰³ See *Killer Whale*, *supra* note 17.

²⁰⁴ KENNETH BROWER, FREEING KEIKO: THE JOURNEY OF A KILLER WHALE FROM *FREE WILLY* TO THE WILD 98–99 (2005).

²⁰⁵ *Id.* at 99.

²⁰⁶ Keiko was originally caught as a young whale in 1978 off the Icelandic coast. KILLING KEIKO, *supra* note 14, at 26. Killer whales are “most abundant in colder waters.” *Killer Whale*, *supra* note 17.

²⁰⁷ BROWER, *supra* note 204, at 85, 99–103.

²⁰⁸ Jessica Scott-Reid, *A Tale of Two Whales and the World’s First Beluga Sanctuary*, *TENDERLY* (Jan. 28, 2020), <https://tenderly.medium.com/a-tale-of-two-whales-and-the-worlds-first-beluga-sanctuary-dffdf0767ab7> [<https://perma.cc/3C6F-ZFMB>].

²⁰⁹ KILLING KEIKO, *supra* note 14, at 26.

²¹⁰ *Id.* at 27, 145.

²¹¹ BROWER, *supra* note 204, at 38.

Although Keiko ultimately went to Iceland, the decision was not without opposition from within Iceland itself, in part due to concerns not only with respect to Keiko specifically (e.g., his papilloma “disease problem”), but also regarding Iceland’s fisheries and whaling.²¹² The team ran into similar problems when Keiko found his way to Norway²¹³—most of the options for a new bay “were eliminated . . . by potential conflicts with salmon farms and commercial fishing.”²¹⁴

Geography can also present other significant challenges. During the hunt for a suitable location for Keiko, a report on the site selection process cited some concerns specific to Iceland such as the “harsh conditions most of the year . . . thirty- to fifty-foot seas that were common for extended periods, and the potential frostbite if Keiko spent time at the surface.”²¹⁵ The belugas currently in Keiko’s old home of Klettsvík Bay were moved to back to their landside holding facility in advance of the “Icelandic winter storm season” in December, 2020, after spending much of the year in Klettsvík Bay itself.²¹⁶

These impediments are not unique to orcas or belugas. The National Aquarium in Baltimore (“NAIB”) was unable to realize its plan to relocate its dolphins to an ocean sanctuary by 2020 because of the difficulty in finding a location.²¹⁷ NAIB announced its plans in 2016, and since then NAIB officials have reviewed and rejected over fifty possibilities “in part because of unclear water caused by human development or the

²¹² *Id.* at 91–95.

²¹³ Keiko became separated from his trainers on one of his many practice “walks” from his bay pen in Iceland to the open ocean beyond, and over the course of twenty-two days made his way to Norway. KILLING KEIKO, *supra* note 14, at 360–62, 369.

²¹⁴ BROWER, *supra* note 204, at 280. Keiko’s team determined that Keiko, with no other orcas in Norway to potentially join with at that time, “could not simply be let loose to wander the fiords, as there were salmon farms everywhere, and boat traffic was heavy.” *Id.*

²¹⁵ *Id.* at 109. Mark Simmons notes that although “spiteful,” the following description of Iceland was also “not entirely without justification”: “to truly experience Iceland, all one needed to do was sit inside a walk-in freezer with coffee and a newspaper while burning a one hundred dollar bill.” KILLING KEIKO, *supra* note 14, at 45.

²¹⁶ SEA LIFE Trust Beluga Whale Sanctuary (@BelugaWhaleSanctuary), FACEBOOK (Dec. 8, 2020), <https://www.facebook.com/BelugaWhaleSanctuary/posts/3530998780310225> [<https://perma.cc/HVT2-F2BB>]. Spanish marine park Loro Parque pointed to this move as an indicator of the “delusional” nature of the whale sanctuary idea. *Loro Parque Statement on the New French Law on Animal Welfare*, LORO PARQUE (Feb. 1, 2021), <https://blog.loroparque.com/comunicado-de-loro-parque-sobre-la-nueva-ley-francesa-del-bienestar-animado/?reload=971366> [<https://perma.cc/ZCK5-DADQ>].

²¹⁷ Lillian Reed, *National Aquarium’s Plan to Relocate Dolphins from Baltimore by 2020 Is Delayed by Climate Change, Pollution*, BALT. SUN (Apr. 19, 2019, 6:00 AM), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-aquarium-dolphins-20190418-story.html> [<https://perma.cc/KU2P-XWRE>].

threat posed by climate change—related events such as sea-level rise, rapid seaweed blooms in warming waters and extreme storms.”²¹⁸ As of this writing, NAIB has yet to announce a location for its proposed sanctuary. Ultimately, finding an acceptable location for a sea pen may take years, with no guarantee of success. Even when a location is found, considerable obstacles remain.

B. Cost

The Eleventh Circuit recognized a critical component of sea pen construction and operation cost. PETA’s counsel admitted to the court that no sea pen had been built but claimed that PETA had funding for it.²¹⁹ The court “asked counsel for a submission directing us to the portion of the record discussing Lolita’s proposed relocation. PETA’s response . . . cite[d] a hyperlink . . . Although the hyperlinked document describes the relocation plan, it does not demonstrate that PETA has funded the sea pen’s construction in whole or in part.”²²⁰ As noted, the point was ultimately moot; however, the court clearly understood that funding a sea pen constitutes a necessary element of such a project. The court was right to inquire about funding. The Whale Sanctuary Project (“WSP”)²²¹ has taken the first steps towards creating an orca sea pen—in 2020 the organization identified Port Hilford, Nova Scotia, Canada, as the preferred site for its sanctuary.²²² The project is still in the early development stages—WSP is actively soliciting donations,²²³ estimating that its sanctuary will require \$12–15 million to create.²²⁴ WSP’s numbers correlate with others’—NAIB also estimates \$12–15 million for its dolphin sanctuary.²²⁵ Furthermore, these numbers are only for construction²²⁶—and the costs do not end there.

²¹⁸ *Id.*

²¹⁹ PETA v. Miami Seaquarium, 879 F.3d 1142, 1144 n.2 (11th Cir. 2018).

²²⁰ *Id.*

²²¹ WSP’s goal is “to establish a model seaside sanctuary” for cetaceans. WHALE SANCTUARY PROJECT, <https://whalesanctuaryproject.org/> [<https://perma.cc/5EQS-4A3L>] (last visited Nov. 3, 2021).

²²² Charles Vinick, *We Couldn’t Have Chosen a Better Site!*, WHALE SANCTUARY PROJECT (May 6, 2020), <https://whalesanctuaryproject.org/we-couldnt-have-chosen-a-better-site/> [<https://perma.cc/84D2-DQG8>].

²²³ *Id.*

²²⁴ *About the Whale Sanctuary Project*, WHALE SANCTUARY PROJECT, <https://whalesanctuaryproject.org/our-work-2/> [<https://perma.cc/4FXA-3M9F>] (last visited Nov. 3, 2021).

²²⁵ Reed, *supra* note 217.

²²⁶ *Id.*; *About the Whale Sanctuary Project*, *supra* note 224.

WSP states that it will require \$2 million per year to care for six to eight whales.²²⁷ The Beluga Whale Sanctuary housing belugas in Klettsvík Bay reports that monthly care for its two belugas costs approximately £37,000,²²⁸ or about \$51,500—coming out to around \$309,000 per beluga per year.²²⁹ The Dolphin Research Center in Grassy Key, Florida, estimates that its animals—dolphins, sea lions, and others—cost around \$300,000 per year *without* factoring in personnel costs,²³⁰ and former killer whale trainer Mark Simmons states that even one killer whale “costs nearly US [*sic*] \$100,000 a year just to feed. This figure does not consider the cost of facility construction, preventative health care, labor, food storage or ongoing facility maintenance (extreme in an open-ocean environment).”²³¹ Furthermore, many cetaceans live several decades or more, and these facilities must be prepared to bear these costs for the animals’ lifetimes.²³² Essentially, marine mammal facilities require

²²⁷ *About the Whale Sanctuary Project*, *supra* note 224. Although WSP’s stated goal is to create a sanctuary for killer and beluga whales, the site does not specify whether the number of \$2 million per year provides for the care of belugas, orcas, or both. Belugas weigh just over 3,000 lbs. on average; *Beluga Whale*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/species/beluga-whale> [<https://perma.cc/U5Y8-HYV9>] (last visited Nov. 3, 2021), killer whales “[u]p to 11 tons,” *Killer Whale*, *supra* note 17. SeaWorld estimates that orcas and belugas eat approximately one to three percent of their body weight per day in human care. *Diet and Eating Habits*, SEAWORLD, <https://seaworld.org/animals/all-about/killer-whale/diet/> [<https://perma.cc/97L8-T5RQ>] (last visited Nov. 3, 2021); *Diet and Eating Habits*, SEAWORLD, <https://seaworld.org/animals/all-about/beluga-whales/diet/> [<https://perma.cc/FGU2-EYA4>] (last visited Nov. 3, 2021).

²²⁸ SEA LIFE Trust Beluga Whale Sanctuary (@BelugaWhaleSanctuary), FACEBOOK (Oct. 14, 2020), <https://www.facebook.com/BelugaWhaleSanctuary/posts/3382095568533881> [<https://perma.cc/6HLU-T7D8>].

²²⁹ According to currency conversion rates on June 24, 2021. *Xe Currency Converter: 37,000 GBP to USD*, XE, <https://www.xe.com/currencyconverter/convert/?Amount=37000&From=GBP&To=USD> [<https://perma.cc/Q77J-DNF3>].

²³⁰ *Care Facts*, DOLPHIN RSCH. CTR., https://dolphins.org/care_facts [<https://perma.cc/YJ38-RAUM>] (last visited Nov. 3, 2021).

²³¹ *Shocking Plans Reveal Motivation in Push for Sea Pens*, AWESOME OCEAN, <http://awesomeocean.com/top-stories/shocking-plans-reveal-motivation-in-push-for-sea-pens/> [<https://perma.cc/34AW-76E2>] (last visited Nov. 3, 2021).

²³² See *Killer Whale*, *supra* note 17 (listing killer whale lifespans as thirty to ninety years); *Common Bottlenose Dolphin*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/species/common-bottlenose-dolphin> [<https://perma.cc/GLL5-M6LT>] (last visited Nov. 3, 2021) (listing bottlenose dolphin lifespans as forty to sixty years); *Beluga Whale*, *supra* note 227 (listing beluga lifespans as up to ninety years). A 2015 peer-review study indicates that killer whales in human care now live as long as their wild counterparts, and bottlenose dolphins in human care also live as long as—and sometimes longer than—their wild counterparts. Todd R. Robeck et al., *Comparisons of Life-History Parameters*

considerable resources in order to provide for their animals at *least* in compliance with all relevant regulations.²³³ Funding is plainly a significant piece of the sea pen puzzle; however, once again, this is not the end of the story.

C. Legal Hurdles

As discussed in Part I, zoos and aquariums in the United States are not free to house or move marine mammals as they please. Marine mammal facilities must meet the MMPA’s public display requirements²³⁴ in addition to AWA regulations, which list specific requirements for outdoor facilities, such as a perimeter fence.²³⁵ NMFS granted a permit for Keiko’s transfer to Iceland, and the cetacean release criteria guided the team as they prepared Keiko for eventual release.²³⁶ Even a partial release to a sea pen requires consideration not only of the animal in question, but also that animal’s effect on the surrounding environment. Constructing and placing new animals in a sea pen could implicate the ESA or even other aspects of the MMPA if the sea pen is near protected species and/or environments.²³⁷

Export to another country is technically possible—and indeed appears to be the plan of the WSP, which aims to construct its sea pen in Canada.²³⁸ However, in 2019 the Canadian Parliament “passed legislation

Between Free-Ranging and Captive Killer Whale (Orcinus orca) Populations for Application Toward Species Management, 96 J. MAMMALOGY 1055, 1055–56, 1064 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4668992/pdf/gyv113.pdf> [<https://perma.cc/UDN9-5MEW>]. Captive-born bottlenose dolphin “Nellie” lived to be sixty-one years old; however, reports of the extreme longevity of wild orca “Granny” appear to have overestimated her age. Granny was likely between sixty-five and eighty years of age when she died, rather than one hundred or more. *Nellie’s Legacy*, MARINELAND, <https://marineland.net/nellies-legacy/> [<https://perma.cc/CYJ7-H2T8>] (last visited Nov. 3, 2021); Annemieke Podt, *Orca Granny: Was She Really 105?*, ORCAZINE (Jan. 2017), <http://orcazine.com/granny-j2/> [<https://perma.cc/JMQ2-75DZ>]; see also Todd R. Robeck et al., *Survivorship Pattern Inaccuracies and Inappropriate Anthropomorphism in Scholarly Pursuits of Killer Whale (Orcinus orca) Life History: A Response to Franks et al. (2016)*, 97 J. MAMMALOGY 899, 899–900 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6377038/pdf/gyw023.pdf> [<https://perma.cc/M8GY-RXHH>].

²³³ See discussion *supra* Part I.

²³⁴ 16 U.S.C. §§ 1374(c)(2)(A)(i)–(iii) (2018).

²³⁵ 9 C.F.R. § 3.103 (2021). See also discussion *supra* Part I.

²³⁶ KILLING KEIKO, *supra* note 14, at 28, 87–89.

²³⁷ See discussion of definitions of “take” and protections for wild animals and habitats *supra* Sections I.B–C.

²³⁸ See Vinick, *supra* note 222.

banning whales, dolphins and porpoises from being bred or held in captivity.”²³⁹ Although the legislation contains exceptions for marine mammals already in human care or those in need of rehabilitation, there is no indication that Canada will permit the *import* of marine mammals that, by the WSP’s own admission, will never be returned to the wild.²⁴⁰ Keeping cetaceans is not illegal in the United Kingdom; however, there have been no cetaceans held there since the 1990s, and public sentiment suggests that this is unlikely to change.²⁴¹ Iceland, as evidenced by the beluga transfer, represents a more realistic possibility, but this may only be an option for other belugas. The SEA LIFE Trust website claims that there is “space for 10 belugas in Klettsvík Bay and we want to see other belugas join [our whales].”²⁴² It is not clear whether there are other suitable sites in Iceland—killer whales may have to look elsewhere. Even if a suitable international location is found, the MMPA dictates that the receiving facility “must meet standards that are comparable to those required of a U.S. facility.”²⁴³ Thus, regardless of where the whales end up, they must receive the same level of care required by the AWA and MMPA.

D. *Standards of Care: Daily Operations*

Providing an equivalent level of care in a sea pen scenario presents a similar dilemma to the one in Section II.A—moving to a different place does not necessarily mean moving to a *better* place. Mark Simmons emphasizes two key aspects of this issue—taking into account the animals’ individual learning histories and “what’s familiar to them” and working in and around a marine environment.²⁴⁴ These obstacles could affect a sea pen operation’s ability—or inability—to comply with AWA or AWA-equivalent regulations.

²³⁹ Amy Held, *Canada Bans Keeping Whales and Dolphins in Captivity*, NPR (June 11, 2019, 1:27 PM), <https://www.npr.org/2019/06/11/731570415/canada-bans-keeping-whales-and-dolphins-in-captivity> [<https://perma.cc/AJ2Y-KTTF>].

²⁴⁰ *Id.*; *About the Whale Sanctuary Project*, *supra* note 224.

²⁴¹ Claire Jones, *Dolphins on Display: How UK’s ‘Seaworlds’ Sank*, BBC NEWS (Mar. 19, 2016), <https://www.bbc.com/news/uk-england-35832175> [<https://perma.cc/NKJ5-LZMU>].

²⁴² *The Sanctuary*, BELUGA WHALE SANCTUARY, <https://belugasanctuary.sealifetrust.org/en/about-the-sanctuary/the-sanctuary/> [<https://perma.cc/E4P3-XZQV>] (last visited Nov. 3, 2021).

²⁴³ *Public Display of Marine Mammals*, *supra* note 58; see also 16 U.S.C. §§ 1374(c)(2)(B), (C) (2018).

²⁴⁴ *Shark Con*, *supra* note 111.

1. History and Training

Simmons compares moving aquarium-raised animals to sea pens as “akin to saying, hey, you grew up in New York City, in a condo, you loved your life, you had a great life, and then I’m going to rip you out of that and put you in the countryside and say there you go, you’re happier now, right?”²⁴⁵ Simmons witnessed this first hand with Keiko when the team began to introduce Keiko into the whole of Klettsvík Bay from smaller pens, noting that “there was no basis for expecting the bay to be either directly or intrinsically appealing to Keiko. He had no history with such an environment which, after all, was counterbalanced by a long-standing and vast history in smaller and more familiar surroundings.”²⁴⁶ Essentially, Keiko had no reason to like or even be interested in the bay. Keiko actually had to be trained to even venture into the bay from the bay pen, and initially:

made no bones about his preference for the old familiar bay pen over that of his new playground. In the first few days . . . he would only leave the pen at our behest. Given the freedom of choice, he would nest himself in the confines of the . . . innermost sanctuary of the bay pen.²⁴⁷

This is not to say that whales cannot get used to a new environment. Keiko did ultimately adapt to the entire bay as an environment—but in large part due to the concerted efforts of his trainers.²⁴⁸ To animals with long histories in enclosed environments, a sea pen clearly does not represent an inherently superior—or even positive—alternative to life in a zoological institution.

Furthermore, life in a sea pen would not—and in some ways, could not—necessarily be as radically different as is claimed. Critics of the zoological industry frequently complain that zoos “force” whales and dolphins to “do tricks” for shows, solely for human entertainment—in sea pens, they argue, these animals will no longer need to do “tricks” or

²⁴⁵ *Id.*

²⁴⁶ KILLING KEIKO, *supra* note 14, at 194.

²⁴⁷ *Id.* at 197–203.

²⁴⁸ *Id.* at 208. It is also worth noting that when Keiko reappeared in Norway after several weeks of separation from his trainers, *see* discussion *supra* Part I, he actively sought out human interaction. Malene Simon et al., *From Captivity to the Wild and Back: An Attempt to Release Keiko the Killer Whale*, 25 MARINE MAMMAL SCI. 693, 697–98 (2009).

entertain people.²⁴⁹ These arguments, however, ignore or misunderstand the use of positive and humane training methods and do not account for the vital role that this training plays in these animals' lives.

Marine mammal trainers—as well as many zookeepers caring for other species—use positive reinforcement training, which essentially rewards desired behavior while ignoring but not punishing unwanted behavior.²⁵⁰ Positive reinforcement training is not only humane and extremely effective, but also an essential aspect of marine mammal husbandry.²⁵¹ Using positive reinforcement training, trainers ask animals to move from one space to another, present any part of its body for inspection, perform non-invasive procedures such as ultrasounds, collect blood or urine samples, give injections, and even conduct physical therapy sessions—all on a voluntary basis.²⁵² The rewards used in training are frequently

²⁴⁹ See Scott West, *Dolphin Trainer Group Makes Laughable Attempt to Justify the Unjustifiable*, SEA SHEPHERD (Sept. 29, 2013), <https://seashepherd.org/2013/09/29/dolphin-trainer-group-makes-laughable-attempt-to-justify-the-unjustifiable/> [<https://perma.cc/2VGR-8GTP>]; Melissa Hogenboom, *Why Killer Whales Should Not Be Kept in Captivity*, ASIAONE (Mar. 19, 2016, 12:00 PM), <https://www.asiaone.com/why-killer-whales-should-not-be-kept-captivity> [<https://perma.cc/5L56-6DLD>].

²⁵⁰ Rachel Garner, *How to Understand Zoo Animal Training*, WHY ANIMALS DO THE THING (Aug. 27, 2018), <https://www.whyanimalsdothething.com/how-to-understand-zoo-animal-training> [<https://perma.cc/DHN4-8PA9>]; KAREN PRYOR, DON'T SHOOT THE DOG! THE NEW ART OF TEACHING AND TRAINING 1 (1999) [hereinafter DON'T SHOOT THE DOG!]; *Animal Training Basics*, SEAWORLD PARKS & ENT., <https://seaworld.org/animals/all-about/training/animal-training-basics/> [<https://perma.cc/S96Y-HFCH>] (last visited Nov. 3, 2021). Early marine mammal trainers developed positive reinforcement training, realizing that historical methods of training, which were coercive and punishing, simply do not work on animals that live entirely in the water—"you cannot use a leash or a bridle or even your fist on an animal that just swims away." Ken Ramirez, *Marine Mammal Training: The History of Training Animals for Medical Behaviors and Keys to Their Success*, 15 VETERINARY CLINICS N. AM.: EXOTIC ANIMAL PRAC. 413, 413 (2012); DON'T SHOOT THE DOG!, *supra*, at xii ("Positive reinforcers . . . were the only tools we had."). See also CAROL J. HOWARD, DOLPHIN CHRONICLES 120 (1995) ("There is certainly no way you can make a five-hundred-pound dolphin in the water do something it doesn't want to do.").

²⁵¹ DON'T SHOOT THE DOG!, *supra* note 250, at xi–xvi; Garner, *supra* note 250. Using positive reinforcement training, people have trained not only zoo animals, *id.*, but also animals such as hermit crabs and sheep. See, e.g., KAREN PRYOR, REACHING THE ANIMAL MIND 12–13 (2009) (training a hermit crab to ring a bell); Franziska Knolle et al., *Sheep Recognize Familiar and Unfamiliar Human Faces from Two-Dimensional Images*, 4 ROYAL SOC'Y OPEN SCI. at 1, 3 (2017) (training sheep to recognize specific human faces).

²⁵² R.J. Young & C.F. Cipreste, *Applying Animal Learning Theory: Training Captive Animals to Comply with Veterinary and Husbandry Procedures*, 13 ANIMAL WELFARE 225, 226 (2004); FAQs, CLEARWATER MARINE AQUARIUM, <https://www.cmaquarium.org/visit/faqs/> [<https://perma.cc/ET9G-JKfy>] (last visited Nov. 3, 2021).

food—cetaceans typically get the majority of their diets from training sessions²⁵³ and studies have demonstrated that animals often choose to receive food via training sessions rather than simply having food freely available.²⁵⁴

Moving whales and dolphins to a sea pen will not eliminate the need for trainers to feed and provide medical care to these animals. In fact, a sea pen operation will not be able to meet AWA standards without animal training. AWA regulations include feeding and veterinary care requirements, which must consist of, *inter alia*, physical examinations and records of physical characteristics (e.g., length, weight) and any medical treatments—all requiring training.²⁵⁵ The Whale Sanctuary Project even includes plans for a “medical pool” that trainers will need to ask animals to move in and out of,²⁵⁶ and trainers in Iceland continue to provide food and training to the belugas in Klettsvík Bay.²⁵⁷ Even the supposed “show” behaviors such as jumps and flips serve a purpose beyond entertainment—used effectively, they can help an animal get into shape or keep fit.²⁵⁸ The major obstacle to providing the care and training required, however, is the environment itself.

2. The Marine Environment

In addition to dealing with the weather—particularly in places like Iceland, as discussed above—caring for animals in a sea pen naturally means dealing with the sea, which poses both maintenance and health challenges. AWA regulations set standards for water quality and sanitation of marine mammal habitats to ensure the animals’ health and

²⁵³ Sabrina Brando, *Marine Mammal Training*, in ZOO ANIMAL LEARNING AND TRAINING 197, 199 (Vicky A. Melfi et al., eds., 2020).

²⁵⁴ This is known as “contrafreeloading.” See Terry L. Maple & Valerie D. Segura, *Advancing Behavior Analysis in Zoos and Aquariums*, 38 BEHAV. ANALYST 77, 85 (2015).

²⁵⁵ 9 C.F.R. §§ 3.105, 3.110 (2021).

²⁵⁶ See Michael Mountain, *Seaside Sanctuary Concept*, WHALE SANCTUARY PROJECT (Apr. 12, 2018), <https://whalesanctuaryproject.org/concept-image-of-seaside-sanctuary/> [<https://perma.cc/DM45-84EN>]. AWA regulations specifically require a holding facility “for isolation, separation, medical treatment, and medical training of marine mammals.” 9 C.F.R. § 3.110(b) (2021).

²⁵⁷ See, e.g., Beluga Whale Sanctuary (@BelugaSanctuary), TWITTER (Jan. 5, 2021), <https://twitter.com/BelugaSanctuary/status/1346501714636132355> [<https://perma.cc/3SKU-5SB4>]; SEA LIFE Trust Beluga Whale Sanctuary (@BelugaWhaleSanctuary), FACEBOOK (Jan. 6, 2021), <https://www.facebook.com/BelugaWhaleSanctuary/posts/3599561303453972> [<https://perma.cc/AKK3-PWES>].

²⁵⁸ KILLING KEIKO, *supra* note 14, at 109, 145, 219.

safety.²⁵⁹ Saltwater environments notoriously pose a multitude of maintenance challenges.²⁶⁰ Simmons describes the ocean as “a big pool of corrosive acid . . . just trying to destroy every man-made thing that we put into it.”²⁶¹ Indeed, the feasibility of “[c]onstructing an 800-foot-long by fifty-to sixty-foot deep net across the mouth of a bay in the North Atlantic . . . was initially deemed *impossible* by more than a few engineers.”²⁶² Clearly, this project was ultimately *not* impossible; however, Simmons explains that “[e]verything about the barrier net was an exercise in overcoming obstacles. . . . it [became] a maintenance nightmare to keep in place.”²⁶³ Even after installation, which was completed in temperatures as low as thirty-six degrees Fahrenheit,²⁶⁴ “[t]hroughout its existence . . . maintenance of the barrier net was a constantly raging battle.”²⁶⁵ Furthermore, the smaller bay pen Keiko initially lived in “was very dangerous to [Keiko] . . . it was constantly undulating and moving and the nets were coming to the surface and there was [sic] lots of opportunities for jagged edges and other things for him to get stuck in.”²⁶⁶

The ocean in its current state presents additional dangers. In short, the ocean is polluted,²⁶⁷ and moving cetaceans into sea pens means exposing these animals to this pollution. Pollution in the ocean is not only “marine debris,” which ranges “from tiny microplastics, smaller than 5 mm, to derelict fishing gear,” but also contaminants such as heavy metals and toxins.²⁶⁸ This debris “can harm or kill an animal when it is ingested,” and excess nutrients can cause “red tides”—overgrowths of algae in the marine environment that can be toxic to marine life—or marine dead zones.²⁶⁹

²⁵⁹ 9 C.F.R. §§ 3.106–07 (2021).

²⁶⁰ See, e.g., *Saltwater Boat Maintenance Guide*, BOATLIFE, <https://www.boatlife.com/boatlife-blog/saltwater-boat-maintenance-guide/?cn-reloaded=1> [<https://perma.cc/B5VS-XYRP>] (last visited Nov. 3, 2021) (describing saltwater as a “unique challenge”); *Beachfront + Oceanside Home Maintenance Tips*, INSTALL-IT-DIRECT, <https://www.installitdirect.com/learn/beachfront-oceanside-home-maintenance/> [<https://perma.cc/X8EA-8K7G>] (last visited Nov. 3, 2021) (observing that “salty, coastal air is harsh on your things”).

²⁶¹ *Shark Con*, *supra* note 111.

²⁶² *KILLING KEIKO*, *supra* note 14, at 125–26.

²⁶³ *Id.* at 163–64.

²⁶⁴ *Id.* at 188.

²⁶⁵ *Id.* at 207.

²⁶⁶ *Shark Con*, *supra* note 111.

²⁶⁷ *Ocean Pollution*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., <https://www.noaa.gov/education/resource-collections/ocean-coasts/ocean-pollution> [<https://perma.cc/QJ73-4EW7>] (last visited Nov. 3, 2021).

²⁶⁸ *Id.*

²⁶⁹ *Id.*

Noise pollution is also a serious threat to marine mammals, who rely on sound to navigate and communicate.²⁷⁰ The effects of man-made noise—which comes from shipping, oil and gas operations, military activities, and other sources—“may range from minor disturbances to injury, and in some cases, death.”²⁷¹ In short, those proposing the removal of whales to sea pens must also be prepared to provide the necessary care to the animals in accordance with AWA regulations while dealing with complications caused by both Mother Nature *and* mankind.

The whales themselves could also pose a threat to their wild counterparts—and vice versa. Keiko’s papilloma—and foreign genes—prevented his release into U.S. waters.²⁷² Viruses such as the morbillivirus can spread among marine mammals—morbillivirus in particular has caused significant mortality events on multiple occasions going back decades.²⁷³ Moving cetaceans to sea pens means potentially exposing them to pathogens they have never encountered and are thus unprepared for. This danger would likely be compounded by the stresses of travel, the sudden submersion into a completely new environment, and potentially new companions.²⁷⁴

Ultimately, in addition to finding a suitable physical location, securing funding, and clearing legal hurdles, the construction of a sea pen and the need to provide at least the minimum standard of care to its inhabitants means dealing with myriad other obstacles. In a column addressing the sea pen issue, Mark Simmons summarizes the struggles of keeping Keiko in a sea pen:

I was present (more than once) when the pen was effectively destroyed by a storm. I was present when Keiko would play with (and likely swallow) foreign objects he retrieved from the seafloor. I was present, on more than one occasion, when Keiko fell ill from exposure to pathogens he would never encounter in a zoological setting. Regrettably,

²⁷⁰ NOAA FISHERIES SERV. SE. REGION, MARINE MAMMALS AND NOISE FACT SHEET, <https://www.boem.gov/sites/default/files/oil-and-gas-energy-program/GOMR/Marine-Mammals-And-Noise-Fact-Sheet.pdf> [<https://perma.cc/HYC3-VXLQ>] (last visited Nov. 3, 2021).

²⁷¹ *Id.*

²⁷² BROWER, *supra* note 204, at 38.

²⁷³ Lizette Alvarez, *Focus on Ocean’s Health as Dolphin Deaths Soar*, N.Y. TIMES (Dec. 22, 2013), <https://www.nytimes.com/2013/12/23/us/focus-on-oceans-health-as-dolphin-deaths-soar.html?from=science&fbclid=IwAR2vmnJmSkZScA0lL5lTKkXdxE3vcoP0er> [<https://perma.cc/T53H-8WZ2>].

²⁷⁴ See Herrera, *supra* note 114.

I was not present—sometimes for days at a stretch—when severe weather kept us from tending to him at all.²⁷⁵

A sea pen is not an impossible goal; however, neither is it an easy solution. Even if a suitable sea pen is constructed and funded, maintaining the pen and caring for the whales in compliance with MMPA and AWA requirements is likely to remain a considerable uphill battle for the remainder of the whales' lives. Until and unless these hurdles are overcome, moving cetaceans to a sea pen should not be considered a practicable solution—in or out of court.

CONCLUSION

As this Note demonstrates, determining what is “best” for animals is not easy. The AWA—and to an extent, the ESA—provide some guidance for how animals should be treated; however, there is little guidance to be found to assist attorneys, courts, or other interested parties in identifying the most appropriate solution in a given situation. Ideas for easy fixes go viral without consideration for whether such ideas are practicable. The transfer and treatment options in particular each present unique advantages and disadvantages, and either may be suitable depending on the specific circumstances of a case. In contrast, moving cetaceans to a sea pen requires overcoming significant hurdles, including finding an acceptable location, funding both construction and operation, navigating legal obstacles, and then ultimately providing treatment that at least meets minimum AWA standards.

The case studies and hypotheticals explored in this Note provide some insight into approaching these scenarios. When animal transfer is on the table, *Kuehl v. Sellner* illustrates the importance of considering multiple factors rather than relying on any single detail, such as USDA licensing. Judge Goldberg reminded courts that they do not need to “unnecessarily [hamstring their] broad remedial powers.”²⁷⁶ When considering the treatment option, *Culp v. City of Los Angeles* suggests that in some cases it is possible to fashion a practicable “treatment” injunction. However, *Graham v. San Antonio Zoological Society* serves as a reminder that larger changes may require a significant investment of time and

²⁷⁵ Mark Simmons, *Sea Pens for Whales Not Ideal Solution*, HARTFORD COURANT (Nov. 19, 2015, 8:00 PM), <https://www.courant.com/sdut-whales-sea-pens-keiko-2015nov19-story.html> [<https://perma.cc/EC76-8TLA>].

²⁷⁶ *Kuehl v. Sellner*, 887 F.3d 845, 856 (8th Cir. 2018) (Goldberg, J., concurring).

resources from both the facility *and* the court—and that litigation is likely not the most efficient way to effect such changes. Diving into the practical realities of keeping cetaceans in sea pens reveals the dangers of assuming a solution is practicable just because it sounds desirable and illuminates some of the complexities involved in caring for marine mammals while adhering to all relevant regulations.

There is clearly no “one-size-fits-all” answer when it comes to animals and zoological facilities—in or out of the courtroom. As Mark Simmons notes, we should remember that well-run zoos can “provide the best expertise and environments in the care of their animals.”²⁷⁷ Not all zoos are good—but not all zoos are bad, and it is not always easy to tell the difference. Anyone encountering the issues explored in this Note is urged to evaluate multiple factors and perspectives, gain an understanding of the intricacies of the zoological world, and—most importantly—put the animals first.

²⁷⁷ KILLING KEIKO, *supra* note 14, at 385.