

the Act makes it clear that assessment of a civil penalty is completely at the Secretary's discretion [25 U.S.C. 3007 (a)]. However, consistent with the Department of the Interior's continuing responsibility to keep constituents and the general public informed of its activities [43 DM 1.1], the regulations require certain investigatory steps.

Six commenters requested that the Secretary be required to provide notification if, after consideration of the allegation, no further action will be taken. Text has been added as paragraph 10.12 (d)(3) of this section requiring notification of the person making the allegation and the museum if the available evidence does not show a failure to comply.

One commenter requested clarification of how long the Secretary might take in determining whether a museum has failed to comply. Generally, a civil penalty must be assessed within five years of when facts material to the failure to comply become known, unless the assessment: 1) is founded upon a tort on behalf of a Federally recognized Indian tribe [28 U.S.C. 2415 (b)], or 2) is intended to establish title to, or right of possession of, a human remains, funerary object, sacred object, or object of cultural patrimony [28 U.S.C. 2415 (c)], in which case a longer period may apply.

#### *Paragraph 10.12 (e)*

This section explains how the Secretary notifies the museum and potentially aggrieved parties if the alleged failure to comply is verified.

One commenter recommended that written notice of failure to comply be explicitly required. The word "written" has been inserted before phrase "notice of failure to comply" in paragraph 10.12 (e)(1) of this section.

Section 9 (a) of the Act stipulates that the determination of the penalty may only occur after the museum is provided with an opportunity for an agency hearing [25 U.S.C. 3007 (a)]. Paragraph 10.12 (e)(1)(iii) of this section has been deleted and subsequent sections renumbered.

Paragraph 10.12 (e)(1)(iii) of this section, designated paragraph 10.12 (e)(1)(iv) in the interim rule, has been revised to reflect the options available in paragraph 10.12 (f) of this section.

Paragraph 10.12 (e)(2) of this section allows the Secretary, with the consent of the museum, to combine the notice of failure to comply and notice of assessment.

#### *Paragraph 10.12 (f)*

This Paragraph outlines the actions that the museum may take upon receipt

of a notice of failure to comply. Four options were outlined in the interim rule: (1) seek informal discussions with the Secretary; (2) file a petition for relief; (3) take no action and await the Secretary's notice of assessment; or (4) accept the proposed penalty.

Paragraphs 10.12 (f)(1) and (f)(3) of this section have been retained. Paragraph 10.12 (f)(2) of this section described the process for filing a petition for relief of the penalty amount. Because the Notice of Failure to Comply will not necessarily include a determination of penalty amount, paragraph 10.12 (f)(2) of this section has been deleted and replaced with the option of requesting a hearing. The process for requesting a hearing is described in paragraph 10.12 (j) of this section. Paragraph 10.12 (f)(4) of the interim rule, which also dealt with the proposed penalty, has been deleted.

#### *Paragraph 10.12 (g)*

This paragraph, designated paragraph 10.12 (d) in the interim rule, explains how the Secretary determines the penalty amount.

Section 9 (b) of the Act stipulates that the amount of a penalty assessed must be determined taking into account, in addition to other factors: (1) the archeological, historical, or commercial value of the item involved; (2) the damages suffered, both economic and non-economic, by an aggrieved party; and (3) the number of violations [25 U.S.C. 3007 (b)].

The interim rule outlined a two-stage approach to implementing these statutory criteria. The first stage, outlined in paragraph 10.12 (g)(1) of this section, designated paragraph 10.12 (d)(1) in the interim rule, stipulated that the initial assessment is based on an amount equal to .25 percent of the museum's annual budget, or \$5,000, whichever is less, plus an additional sum determined after taking into account: (1) the archeological, historical, and commercial value of the human remains, funerary object, sacred object, or object of cultural patrimony, including, but not limited to, consideration of their importance to performing traditional practices; (2) damages suffered, both economic and non-economic, by the aggrieved party or parties including, but not limited to, the costs of attorney and expert witness fees, investigations, and administrative expenses related to efforts to compel compliance with the Act; and (3) the number of violations that have occurred. The second stage, outlined in paragraph 10.12 (g)(2) of this section, designated paragraph 10.12 (d)(2) in the interim rule, provided for an additional penalty

amount of \$100 per day if the museum continues to violate the Act after the date that the final administrative decision takes effect.

Five commenters considered the base penalty amount stipulated in paragraph 10.12 (g)(1) of this section, designated paragraph 10.12 (d)(1) in the interim rule, insufficient to encourage compliance. One commenter considered the base penalty amount too severe. While the base penalty amount of \$5000 or less might be considered overly modest by some, the Secretary is authorized to assess a penalty based on the sum of the listed factors. This amount might be substantial depending on the situation.

Three commenters requested clarification of the process by which the archeological, historical, or commercial value of the human remains, funerary object, sacred object or object of cultural patrimony in paragraph 10.12 (g)(1)(i) of this section, designated paragraph 10.12 (d)(1)(i) in the interim rule, will be determined by the Secretary. In calculating civil penalties, the Secretary will consider the value to be the benefit derived by the museum through control of the particular human remains, funerary object, sacred object, or object of cultural patrimony. This value can be calculated in a variety of ways. Archeological and historical values focus on the benefits derived by the museum through the study or exhibition of the human remains, funerary object, sacred object, or object of cultural patrimony. These values might include research fees and grants obtained to study the cultural items, admission fees or donations obtained for the public display of the human remains, funerary object, sacred object, or object of cultural patrimony, and royalties obtained from publication of information related to or images of the cultural items. Commercial value means the price a willing buyer would pay, and a willing seller accept, for the human remains, funerary object, sacred object, or object of cultural patrimony in the open market.

One commenter objected to using the value of the cultural item in calculating part of the penalty amount and the subsequent assumption that, after paying such a penalty, the museum also will be forced to relinquish control of the cultural item. The Act addresses the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony with which they are affiliated. By failing to comply with the Act, the museum is depriving lineal descendants, Indian