

the violation by, among other things, paying restitution to the aggrieved party or parties. One commenter felt that the Secretary should pay all actual damages to the aggrieved parties. Another commenter recommended that the Secretary seek an amendment to the Act that would permit the Secretary to distribute collected penalties via the NAGPRA grants program. Direct payment of restitution by the United States to an aggrieved party generally requires explicit statutory authority. Absent such authority, and when appropriate, the Secretary may mitigate the penalty amount when the museum agrees to pay restitution directly to that aggrieved party. In their 1995-1997 and 1998 reports to Congress, the Native American Graves Protection and Repatriation Review Committee recommended amending the Act to provide monies collected as civil penalties to the Secretary to further enforcement activities.

One commenter requested clarification of how hardship will be defined in paragraph 10.12 (g)(3)(iii) of this section, designated paragraph 10.12 (d)(3)(iii) in the interim rule. The sentence has been rewritten to clarify that the Secretary may reduce the penalty amount if the museum is unable to pay, provided that this factor will not apply if the museum has previously failed to comply with these regulations.

One commenter requested clarification of how excessive punishment will be defined in paragraph 10.12 (g)(3)(iv) of this section, designated paragraph 10.12 (d)(3)(iv) of this section in the interim rule. The eighth amendment to the Constitution of the United States prohibits excessive fines. A civil penalty might be considered excessive if it seriously impairs the museum's capacity of gaining a business livelihood.

One commenter questioned how the funds collected from the fines and penalties would be used. Another commenter questioned whether funds collected from civil penalty fines could be directed towards helping to bring museums into compliance or channeled into an account to fund Federal actions pertaining to the Act. Under the current statutory authority, civil penalties must be paid directly to the United States Treasury.

Paragraph 10.12 (h)

This paragraph, designated paragraph 10.12 (g) in the interim rule, explains how the Secretary assesses the penalty.

One commenter recommended text acknowledging that ongoing legal proceedings would be sufficient to delay a museum's response to a notice of

failure to comply. A museum may have recourse to the Federal courts regarding the Secretary's issuance of a notice of failure to comply. However, the Secretary is not bound by the status of ongoing litigation when assessing a civil penalty on a museum for failing to comply with the Act.

One commenter recommended that written notice be required if the Secretary concludes that the museum has not failed to comply. The phrase "in writing" has been added after the phrase "the Secretary notified you" in paragraph 10.12 (h)(3) of this section.

Paragraph 10.12 (j)

This paragraph, combining two paragraphs in the interim rule designated as 10.12 (h) and (i), describes how the museum may request a hearing regarding a notice of failure to comply or a notice of assessment.

One commenter recommended adding a provision that would allow for the involvement of lineal descendants, culturally affiliated tribes, and/or the complaining party or parties in the hearing process where appropriate. The involvement of lineal descendants, tribal representatives, or the complaining person may be necessary as determined by the parties in the hearing. Participation of these and other persons can be compelled by means of a subpoena [25 U.S.C. 3007 (d)]. Agency hearings generally are open to the public.

Paragraph 10.12 (h)(4)(iv) of the interim rule, which dealt with the amount of the civil penalty assessment, has been deleted.

Paragraph 10.12 (k)

This paragraph, designated paragraph 10.12 (j) in this interim rule, explains how a hearing decision may be appealed.

Paragraph 10.12 (l)

This paragraph, designated paragraph 10.12 (k) in this interim rule, explains what constitutes a final administrative action regarding a notice of assessment.

Paragraph 10.12 (m)

This paragraph, designated paragraph 10.12 (l) in this interim rule, explains how a museum pays the civil penalty. The sentence authorizing the Secretary to start civil penalty action in U.S. District Court without the authorization of the Attorney General of the United States has been deleted. In *Mehle v. American Management Systems, Inc.*, [01-1544 (JR), D. D.C. Nov 30, 2001] the district court ruled that the Attorney General must represent the United States, an agency, or officer thereof in

litigation, unless Congress has expressly directed otherwise. NAGPRA does not confer independent litigating authority on the Secretary.

Drafting Information

This final rule was prepared by Dr. C. Timothy McKeown in consultation with the Native American Graves Protection and Repatriation Review Committee as directed by section 8 (c)(7) of the Act.

Compliance with Laws, Executive Orders, and Department Policy

Regulatory Planning and Review (Executive Order 12866)

This rule has been reviewed by the Office of Management and Budget under Executive Order 12866.

(1) This rule will not have an effect of \$100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. We expect to assess civil penalties on a small number of museums that have failed to comply with the Act. The Secretary may exercise discretion to reduce the penalty amount if it seriously impairs the museum's capacity of gaining a business livelihood.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. Section 9 of the Act delegates exclusive responsibility for implementing the civil penalty provisions to the Secretary. This rule has been reviewed by the U.S. Department of the Interior, Office of the Solicitor and the Office of Hearings and Appeals, and the U.S. Department of Justice.

(3) This rule does not alter the budgetary effects or entitlements, grants, user fees, or loan programs, or the rights or obligations of their recipients. Assessment of civil penalties under this rule is limited to museums that fail to comply with the requirements of the Act. Consistent with the legislative history of the Act, museums that have failed to comply continue to be eligible for Federal funds.

(4) This rule does not raise novel legal or policy issues. All substantive comments received on the interim rule have been addressed in the preamble and changes made in the regulatory text if necessary.

Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities