

**TOKI’S TALE: A COMPREHENSIVE ANALYSIS OF THE STATUTORY
HURDLES TO SEASIDE SANCTUARY CREATION IN THE UNITED STATES**

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1. Third-year Juris Doctor candidate, Vermont Law and Graduate School. I am very grateful to Dr. Heather Rally for her advice, expertise, and passion for this subject matter, which was evident throughout the writing process. In addition, this note is dedicated to the memory of Professor Donald Baur, who was my inspiration for writing about this topic. Don was a champion of students and a renowned advocate of marine mammals everywhere. He was a mentor to some, a friend to many, and an inspiration to all.

PRECIS

“[N]o good ever came from putting up walls. What people mistook for safety was in fact captivity. And few things thrived in captivity.” – Louise Penny²

The story at the heart of this note begins in August of 1970 on Whidbey Island, a small island just off the coast of Washington state.³ More specifically, the story begins inside of Penn Cove, a shielded area of water nestled in the northern half of the island.⁴ One day, inside the cove, a group of men rounded up more than 80 orca whales using nets, sticks, and even explosives to separate the young orcas from their mothers.⁵ The scene that day was nothing short of a tragedy: “[p]iercing, screaming vocalizations rent the air as the trapped whales thrashed and twisted in fear, confusion, and panic.”⁶ Of the young whales captured that day, six were sold to marine parks.⁷ Five of those whales failed to survive more than a year in captivity.⁸ The sixth whale managed to survive in her captive setting more than 50 years after her initial capture.⁹ Her name was Lolita.¹⁰

Originally known as Tokitae (“Toki”), Lolita lived and performed at the Miami Seaquarium for the past 52 years, all while residing in the smallest orca tank in North America.¹¹ Thankfully, Lolita was retired from performing for the Seaquarium in 2022—primarily due to mounting societal pressures.¹² Over the last several years, advocates pressed for Lolita’s release from the Seaquarium, pushing for her return back to the coast of Washington in hopes of reuniting her with her family.¹³ The battle for Lolita’s freedom even made its way to the courtroom. In 2018, People for the Ethical Treatment of Animals (PETA) sued the Seaquarium to require the

2. Louise Penny, *A TRICK OF THE LIGHT* 11 (2011).

3. Katharine Gammon, *After Half a Century in Captivity, Tokitae the Performing Orca Could Finally Go Home*, *THE GUARDIAN: THE OBSERVER* (Aug. 13, 2022, 6:00AM EDT), <https://www.theguardian.com/environment/2022/aug/13/toki-the-orca-captivity-miami-seaquarium>.

4. *Whidbey Island, Washington, GO NORTHWEST! A TRAVEL GUIDE* (Nov. 4, 2019), https://www.gonorthwest.com/Washington/puget/Whidbey/whidbeyisland_map.htm.

5. *Id.*

6. SANDRA POLLARD, *PUGET SOUND WHALES FOR SALE: THE FIGHT TO END ORCA HUNTING* 82 (2014).

7. Gammon, *supra* note 3.

8. *Id.*

9. *Id.*

10. *Id.*

11. Brittany Michelson, *Lolita the Orca Close to Going Home!*, *IN DEF. OF ANIMALS* (Mar. 25, 2022), <https://www.idausa.org/campaign/cetacean-advocacy/latest-news/lolita-the-orca-close-to-going-home/>.

12. Gammon, *supra* note 3.

13. *Id.*

Seaquarium's legal forfeiture and release of Lolita.¹⁴ Despite commitments by the Seaquarium to release her, Lolita sadly passed away in August 2023 before she could experience the freedom she once had over five decades ago.¹⁵ Her loss was one felt heavily by the animal rights community and advocates, particularly those who fought for her freedom and welfare for so many years.

Of the many issues in Lolita's case (and cases like hers), there was one that eluded a sufficient solution: if and when Lolita were released, where would she have gone? On the surface, the answer seems simple: bring her home. In reality, however, "bringing her home" is more complex than one would think. Throughout the course of this note, the answer to "where would she have gone?" will be analyzed in several steps. Part I of this note will address the most promising solution and where things currently stand in terms of their development: seaside sanctuaries. Part II will primarily address three major statutes and their relation to seaside sanctuary development: the Endangered Species Act, the Marine Mammal Protection Act, and the Animal Welfare Act. Part II will also examine relevant case law, provide insight into how those cases can provide support for the sanctuary solution, and examine other statutes that are implicated in the sanctuary creation process. Part III will discuss policy arguments and practical considerations at play for seaside sanctuaries. This note will conclude with Part IV, which discusses recommendations and possible solutions for simplifying the sanctuary creation process and how we can help those marine mammals still in captivity avoid the same tragic fate as Lolita.

I. BACKGROUND

A. *The Sanctuaries*

Animal sanctuaries have become more popular in recent years as an alternative to zoos and captive settings.¹⁶ Land-based sanctuaries exist for a wide array of animals, including species like big cats, primates, birds, and elephants, just to name a few.¹⁷ The sanctuary setting is likely going to gain more traction and appeal in the coming years, as the opposition to captive

14. See *People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 879 F.3d 1142, 1144 (11th Cir. 2018) (affirming a lower court decision holding that the condition of Lolita's tank did not amount to "harm" or "harassment" under the Endangered Species Act).

15. *Lolita, Beloved Killer Whale Who Had Been in Captivity, Has Died, Miami Seaquarium Says*, CBS NEWS MIAMI, <https://www.cbsnews.com/miami/news/lolita-beloved-killer-whale-who-had-been-in-captivity-has-died-miami-seaquarium-says/> (Aug. 19, 2023, 4:17PM EDT).

16. Catherine Doyle, *Captive Wildlife Sanctuaries: Definition, Ethical Considerations and Public Perception*, 6 ANIMAL STUD. J. 55, 76 (2017).

17. *Find A Sanctuary*, GLOB. FED'N OF ANIMAL SANCTUARIES, <https://www.sanctuaryfederation.org/find-a-sanctuary/#> (last visited Oct. 22, 2022).

settings for the public display of animals continues to steadily increase. Public attitude about animals in captivity has shifted over time in response to more of the unsavory and unfortunate living conditions coming to light.¹⁸ As interest in viewing animals in captivity decreases, and the desire to see animals in more natural settings increases, sanctuaries are poised to replace the zoo/aquarium infrastructure currently in place.

Many organizations across the globe describe themselves as “sanctuaries,” but not all of them are considered “true sanctuaries.”¹⁹ The Global Federation of Animal Sanctuaries (GFAS) is an organization committed to upholding the highest standards of care in sanctuaries. As part of its goals, the organization provides a verification system for facilities seeking GFAS certification.²⁰ The verification process is rigorous, but for good reason. For an organization to earn a GFAS certificate, it must be a nonprofit and abide by several conditions, including: no captive breeding, no commercial trade of animals or their parts, no non-guided tours, no removing animals from the sanctuary for exhibition, and no public access to the animals.²¹ The organizations must also demonstrate adherence to specific standards of animal care and facility maintenance, high ethical practices, limited research, and possession of a contingency plan.²² Together, these requirements ensure an organization’s facilities are of the highest quality and that the animals in them are receiving the best care. For the purposes of this note, the term “sanctuary” will refer to a true sanctuary that satisfies the requirements of GFAS.

Establishing a sanctuary is easier said than done, as an astronomical number of issues need addressing before the animals even arrive. Considerations like location, staffing, funding, insurance, permitting, and containment all need to be dealt with early on in the planning process.²³ Furthermore, once all of those issues are addressed, and the sanctuary is approved and created, the problem of continuity remains an ongoing challenge.²⁴ Once the animals are placed into the sanctuary, the operators and staff must simultaneously ensure that the sanctuary runs efficiently and that

18. Laure Boissat, *How the Documentary Blackfish Negatively Impacted Marine Park Seaworld*, WORLD ANIMAL PROT.: ANIMALS IN THE WILD BLOG (Jun. 17, 2021), <https://www.worldanimalprotection.org/blogs/how-documentary-blackfish-negatively-impacted-marine-park-seaworld>.

19. *Accreditation*, GLOB. FED’N OF ANIMAL SANCTUARIES, <https://www.sanctuaryfederation.org/accreditation/> (last visited Jan. 11, 2023).

20. *Id.*

21. *Who Can Apply*, GLOB. FED’N OF ANIMAL SANCTUARIES, <https://www.sanctuaryfederation.org/accreditation/definitions/> (last visited Jan. 11, 2023).

22. *Id.*

23. *How to Start an Animal Sanctuary*, BEST FRIENDS ANIMAL SOC’Y, <https://resources.bestfriends.org/article/how-start-animal-sanctuary> (last visited Oct. 22, 2022).

24. *Id.*

the animals are prioritized, and at the same time bring in enough funding to keep the lights on.²⁵ The funding issue is one that can increase exponentially, depending on the size of the sanctuary and how many animals are being cared for within it—the larger the sanctuary, the more it costs to operate.²⁶ If that process does not sound daunting enough already, imagine all those considerations, but for an aquatic setting rather than a terrestrial one. Despite the overwhelming number of challenges an aquatic sanctuary poses, an organization known as the Whale Sanctuary Project decided it was up to the task.

Founded in 2016, the Whale Sanctuary Project (WSP) is a nonprofit organization that molded its entire mission around creating a whale retirement sanctuary.²⁷ They have taken on the challenge to be the “first organization focused solely on creating seaside sanctuaries in North America for whales and dolphins who are being retired from entertainment facilities or have been rescued from the ocean and need rehabilitation or permanent care.”²⁸ The organization worked tirelessly to find the correct location for a potential whale sanctuary, and in February 2020, it announced Port Hilford Bay, Nova Scotia, as its desired location.²⁹ The anticipated cost to create the sanctuary is 12 to 15 million dollars and caring for the whales will cost approximately two million dollars annually.³⁰ Since announcing the site selection, WSP has been conducting environmental assessments of the area and complying with all permits and laws required to begin construction.³¹ Dealing with the permitting and legal process has slowed down creation of the sanctuary for the time being, and in the words of the WSP: “The whale sanctuary is a first-of-its-kind project in North America and there is no existing documentation that would outline all the necessary steps.”³² The anticipated opening of the sanctuary is tentatively scheduled for late 2023, but that may change depending on how quickly the administrative hurdles can be cleared in the coming months.³³

While the Whale Sanctuary Project is perhaps the most well-known, it is not the only organization working towards creating and utilizing sanctuaries

25. *Id.*

26. *Id.*

27. *History of The Whale Sanctuary Project*, THE WHALE SANCTUARY PROJECT, <https://whalesanctuaryproject.org/history-whale-sanctuary-project/> (last visited Oct. 24, 2022).

28. *Frequently Asked Questions About the Sanctuary*, THE WHALE SANCTUARY PROJECT, <https://whalesanctuaryproject.org/faq-sanctuary/> (last visited Oct. 24, 2022).

29. *What Makes an Ideal Sanctuary Site?*, THE WHALE SANCTUARY PROJECT, <https://whalesanctuaryproject.org/what-makes-ideal-sanctuary-site/> (last visited Oct. 24, 2022).

30. *Frequently Asked Questions About the Sanctuary*, *supra* note 28.

31. *Update on Environmental Assessments at the Sanctuary Site*, THE WHALE SANCTUARY PROJECT (Sept. 27, 2022), <https://whalesanctuaryproject.org/updates-on-environmental-assessments-at-the-sanctuary-site/>.

32. *Id.*

33. *Id.*

for marine mammals. Baltimore's National Aquarium, for example, is currently in the process of trying to create the first dolphin sanctuary in North America.³⁴ The sanctuary would exclusively house dolphins and would provide a completely natural outdoor setting for the dolphins to live out the remainder of their days.³⁵ While encouraging, the National Aquarium's efforts have stalled because of difficulties that climate change poses to their site selection.³⁶ The goal is for the sanctuary to be located either off the coast of Florida or in the Caribbean, but the unique environmental characteristics of the region are making the creation process exceptionally difficult.³⁷

North America is not the only continent with organizations trying their hand at seaside sanctuaries. Located in Iceland, Sea Life Trust (a nonprofit branch of the European organization Merlin Inc.) operates a marine mammal sanctuary specifically for beluga whales.³⁸ Located in the Vestmannaeyjar islands off the south coast of Iceland, the sanctuary consists of large-netted enclosures inside of a natural sea inlet in Klettsvik Bay, along with a nearby land-based care center and visitor center.³⁹ The inlet is enclosed with netting that spans from the seafloor to the surface (roughly 30 feet) to protect the whales.⁴⁰ The sanctuary is currently home to two beluga whales, Little White and Little Grey, who were transported 6,000 miles via air transport from a water park in Shanghai, China.⁴¹ The sanctuary can hold up to 10 beluga whales, so the managers of the sanctuary are open to receiving more, should the opportunity arise.⁴²

B. The Model

The idea of transporting a roughly 7,000-pound orca whale thousands of miles to another country sounds like a fantasy, but it is far from fiction. The reality is that a similar relocation effort was attempted in the recent past—and done so successfully. In 1979, the orca whale known as Keiko, the actual

34. *Dolphin Sanctuary*, THE NAT'L AQUARIUM, <https://aqua.org/support/donate/blueprint/dolphin-sanctuary#sanctuary-updates> (last visited Oct. 24, 2022).

35. *Id.*

36. See Dana Cronin, *At Baltimore's National Aquarium, Climate Change Presents Challenges Both Inside and Out*, NPR (May 5, 2019, 7:37 AM EDT), <https://www.npr.org/2019/05/05/720041305/at-the-baltimore-aquarium-climate-change-presents-challenges-both-inside-and-out> (explaining that none of the 50 sites surveyed to this point have been deemed safe from violent storms and algal blooms, both of which will only become worse with rising temperatures).

37. *Id.*

38. *The Sanctuary*, SEA LIFE TR., <https://belugasanctuary.sealifetrust.org/en/about-us/the-sanctuary/> (last visited Oct. 24, 2022).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

orca seen in the popular movie *Free Willy*, was captured from Klettsvik Bay in Iceland, the same bay currently used for Sea Life Trust's beluga sanctuary.⁴³ Following the release of *Free Willy* in 1993, Keiko generated a large amount of interest from the public, who were dismayed to learn that Keiko did not share the same pleasant fate that the whale from the movie enjoyed—freedom.⁴⁴ Keiko had been confined to a tank in the Reino Aventura theme park in Mexico City for several years, during which time his health had deteriorated and led to him contracting a concerning skin disease.⁴⁵ In combination with several organizations and the theme park's cooperation, Keiko was airlifted from Mexico City to the Oregon Coast Aquarium, which created a state-of-the-art facility to house Keiko and serve as a checkpoint for him to regain his strength.⁴⁶ After two years at the Oregon Coast Aquarium facility, Keiko was again airlifted and transported to his final destination, Klettsvik Bay.⁴⁷ In the summer of 2002, Keiko left the Bay and swam more than a thousand miles towards the coastline of Norway, where he made his home around a nearby fishing village.⁴⁸ He went on to thrive for another year in the area as a free whale before he succumbed to a pneumonia-like infection and passed away.⁴⁹

While the idea of living in captivity is unpleasant enough, orcas are especially susceptible to negative impacts from confinement.⁵⁰ Orca brains share similar structures with human brains that are linked with complex intelligence.⁵¹ In proportion to their bodies, orca brains are much larger than expected and have more brain tissue available, which serves elaborate cognitive functions such as self-awareness, culture, and language capabilities.⁵² Evidence shows orca brains have evolved in a way that matches, or even surpasses, human brain capacity in certain areas.⁵³ Orca brains contain spindle-shaped cells known as *von Economo neurons*, which are found in parts of the brain that are involved in high-level cognition as

43. *Long Synopsis – The Untold Story*, JOSHUA RECORDS, LLC, <https://www.keikotheuntoldstory.com/about/keiko/thestory/> (last visited Oct. 25, 2022).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Michael Mountain, *Keiko the Orca's Legacy*, THE WHALE SANCTUARY PROJECT (Dec. 17, 2020), <https://whalesanctuaryproject.org/keiko-legacy>. Keiko passed at the age of approximately 27, and there is no indication that the illness was not a result of natural causes, *id.*

50. *A Summary of the Effects of Captivity on Orcas*, PETA, <https://www.peta.org/wp-content/uploads/2021/06/SeaWorldCruelty.pdf> (last visited Jan. 12, 2023).

51. Bob Jacobs et al., *Putative Neural Consequences of Captivity for Elephants and Cetaceans*, 33 REVS. NEUROSCIENCES 439, 439–41 (2022).

52. Lori Marino, *A Comparison of Encephalization Between Odontocete Cetaceans and Anthropoid Primates*, 51 BRAIN, BEHAV. & EVOLUTION 230 (1998).

53. PETA, *supra* note 50, at 4.

well as social and emotional cognition.⁵⁴ The physical confines of an artificial “tank” or similar structure stymie the opportunity for captive orcas to exercise, escape conflicts, and engage in typical behavior like high-speed swimming or diving, leading to extreme stress and irritation.⁵⁵ This stress can show itself in a number of ways, including abnormal behavior, unresponsiveness, self-inflicted physical injury, and excessive aggression, among others.⁵⁶ Therefore, the need to find a workable alternative to current living situations for countless orcas worldwide is paramount, particularly given their vulnerability to suffering in captivity.

C. The Law

The Animal Welfare Act, the Marine Mammal Protection Act, and the Endangered Species Act were all created to serve as protection for animals that we as a society hold tremendous value and admiration for. Each statute serves its respective function in its own ways, but they share a common principle: the protection and preservation of animal life. Over time, however, the statutes have developed in a way that reflects what the American people value and supports the notion that wildlife is more important than ever.

The Animal Welfare Act (AWA) was created in 1966, but Congress has amended the statute several times over the years to make it what it is today.⁵⁷ Initially, the 1966 Act was designed to cover only “dogs, cats, and certain other animals,” but the 1970 amendments by Congress changed the language to cover more animals and renamed the statute to its current title.⁵⁸ The purpose of the AWA is to allow for regulation and protection of animals that are used for purposes including research, exhibition, testing, and transport, among several others.⁵⁹ At the moment, the AWA is the only federal law in the United States that regulates animals in settings like testing facilities, exhibitions/displays, and in transportation.⁶⁰ The AWA was amended again in 1976, which altered the language of the statute even further to “increase the protection afforded animals in transit and to assure humane treatment of certain animals, and for other purposes.”⁶¹ The AWA serves as a useful tool for protecting captive animals in the United States, but it is not the only statute in the toolbox.

54. Camilla Butti et al., *Total Number and Volume of Von Economo Neurons in the Cerebral Cortex of Cetaceans*, 515 J. COMP. NEUROLOGY 243, 244 (2009).

55. PETA, *supra* note 50.

56. *Id.*

57. *Animal Welfare Act*, NAT'L AGRIC. LIBR., <https://www.nal.usda.gov/animal-health-and-welfare/animal-welfare-act> (last visited Oct. 27, 2022).

58. Animal Welfare Act of 1966, 7 U.S.C. § 2131(1) (amended 1970).

59. NAT'L AGRIC. LIBR., *supra* note 57.

60. *Id.*

61. Animal Welfare Act of 1970, 7 U.S.C. § 2131 (amended 1976).

Congress enacted the Marine Mammal Protection Act (MMPA) in 1972 to combat the growing fear that human activities were contributing to decreasing populations of marine mammals.⁶² Language from the opening section of the statute demonstrates how Congress views marine mammals as having “great international significance [and] esthetic and recreational as well as economic” value and how their protection is paramount to managing the marine ecosystem.⁶³ The MMPA was a groundbreaking piece of legislation because it mandated an ecosystem-based approach to management of marine resources, as opposed to using a species-based format, the typical approach at the time.⁶⁴ In order to prioritize ecosystem health, the statute also did away with the notion of “maximum sustainable yield,” which is a species management program primarily focused on maximizing annual harvest.⁶⁵ The MMPA was an ambitious congressional effort to minimize human impacts on marine mammals and demonstrates that our legislators are not afraid to enact laws that prioritize marine mammal conservation in a variety of ways.

A year after the MMPA’s creation, Congress passed the Endangered Species Act (ESA) to “provide for the conservation of endangered and threatened species of fish, wildlife, plants, and for other purposes.”⁶⁶ More specifically, the purposes of the ESA are to:

[P]rovide a means whereby the ecosystems upon which endangered species and threatened species may depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.⁶⁷

The statute is divided into 17 sections that each address a separate issue, which include matters like how to determine when a species is endangered, prohibited acts, exceptions to the statute, and enforcement.⁶⁸ Importantly, the final section explicitly references the MMPA.⁶⁹ The section explains that

62. NAT’L OCEANIC & ATMOSPHERIC ASS’N: FISHERIES, *Laws & Policies: Marine Mammal Protection Act*, <https://www.fisheries.noaa.gov/topic/laws-policies/marine-mammal-protection-act> (last visited Oct. 26, 2022).

63. Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361(2), 1361(6).

64. Nat’l Oceanic and Atmospheric Admin. Fisheries, *supra* note 62.

65. *Id.* “Maximum sustainable yield” is defined as the maximum amount of a species that can be taken from a given stock annually without hindering the stock’s ability to replenish itself for the subsequent harvest the following year.

66. Endangered Species Act of 1973, 16 U.S.C. § 1531(a)(1).

67. *Id.* § 1531(b).

68. *Id.* §§ 1531–1540.

69. *Id.* § 1543.

nothing in the ESA is to supersede any more restrictive conflicting component of the MMPA, demonstrating a congressional intent to be over-protective, particularly when it comes to marine mammals.⁷⁰

II. CLEARING THE HURDLES

A. *Endangered Species Act*

The ESA is one of the most well-known and conservation-focused statutes Congress has ever enacted. The broad provisions of the statute provide avenues for conserving species considered endangered or threatened with extinction, as well as protecting the habitat those species rely on. The statute is subject to continuous controversy because certain protections have been used for other purposes unrelated to listed species.⁷¹ However, the ESA continues to provide a legislative foundation for species protection and habitat conservation across the nation.

The ESA contains numerous provisions, but the most substantive ones are as follows:⁷² the process for listing species as threatened or endangered, as well as for de-listing;⁷³ designation of critical habitat and preventing destruction to it;⁷⁴ consultation by federal agencies or nonfederal parties for actions requiring permits, funding, or federal approval about whether the proposed action(s) will harm or threaten a listed species;⁷⁵ and citizen suits against any person or entity, including government agencies, for violating a provision or to compel the Secretary of the Interior (“Secretary”) to comply with a nondiscretionary duty under the statute.⁷⁶ Considered the “teeth” of the ESA, these provisions are typically the most common provisions invoked during lawsuits or related matters.⁷⁷

The sanctuary creation process can invoke the ESA in a variety of ways.⁷⁸ If the sanctuary’s sole purpose is to house an endangered species (such as Southern Resident Killer Whales, like Lolita), either exclusively or among other non-endangered species, the ESA will require compliance.⁷⁹ One

70. *Id.*

71. M. LYNNE CORN & ALEXANDRA M. WYATT, CONG. RSCH. SERV., RL31654, THE ENDANGERED SPECIES ACT: A PRIMER 2 (2016) (“Tensions over the ESA have increased as species have been added to the protected list, and as the greater demands of a growing economy and human population have affected species’ habitats.”).

72. *Id.* at 7–12.

73. 16 U.S.C. § 1533 (a)(2)(B)(i).

74. *Id.* § 1533(b)(1)(A).

75. *Id.* § 1536(a)(1–4).

76. *Id.* § 1540(g)(1).

77. CORN & WYATT, *supra* note 71, at 1.

78. *See* 16 U.S.C. § 1538(a)(1)(B–D) (take provision); 16 U.S.C. § 1536(c)(1) (biological assessment provision).

79. 16 U.S.C. § 1538(a)(1)(c).

hurdle the ESA poses is the “take” provision, which makes it unlawful for anyone to:

- (B) [T]ake any such species within the United States or the territorial sea of the United States;
- (C) take any such species upon the high seas;
- (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C).⁸⁰

The term “take” is defined as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”⁸¹ In 1995, the U.S. Supreme Court held that significant habitat modification resulting in harm or death to wildlife could constitute “harm” within the definition of a “take.”⁸² Despite the seemingly all-encompassing definition of “take,” the ESA allows the Secretary to permit a take “for scientific purposes or to enhance the propagation or survival of the affected species.”⁸³ Creating a sanctuary for endangered marine mammals, like Lolita, could be viewed as a scientific purpose; access to the animals in that setting could foster behavioral studies, further medical knowledge, and promote conservation efforts elsewhere. Whether the sanctuary would enhance the survival of the entire species is unclear, but it would at the very least improve the welfare of the relocated individuals.⁸⁴ Transportation of any listed species would directly violate Section D of the take provision.⁸⁵ To that end, a permit and rigorous scientific review would be necessary to relocate individuals to a sanctuary if they are members of an ESA-listed species.⁸⁶

The biological assessment requirement under the consultation provision is another major hurdle the ESA poses to the sanctuary creation process. Under this provision, all federal agencies must consult with the Secretary to ensure any agency action funded, authorized, or carried out will not “jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.”⁸⁷ After consulting with the Secretary, if the agency learns that a

80. 16 U.S.C. § 1538(a)(1)(B–D).

81. *Id.* § 1532(19).

82. *See* *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 707 (1995) (holding that significant habitat modification resulting in death or injury to wildlife was a reasonable interpretation of the term “harm”).

83. 16 U.S.C. § 1539(a)(1)(A).

84. Lorna C. Scribner, *The Debate on Marine Mammals in Captivity* 8 (Dec. 12, 2012) (B.A. thesis, Coastal Carolina University) (on file with author).

85. 16 U.S.C. § 1538(a)(1)(B–D) (take provision)

86. *Id.* § 1539(a)(1)(A).

87. *Id.* § 1536(a)(2).

listed species is present in the agency's desired area of action, the agency must conduct a biological assessment of how the species will be impacted.⁸⁸ If the proposed action does not jeopardize the listed species or negatively impact the critical habitat, the Secretary sets forth terms and conditions for completing the action.⁸⁹ However, if the proposed action does jeopardize the species or negatively impact critical habitat, the Secretary must provide a list of reasonable and prudent alternatives that would prevent harm to the species.⁹⁰

Lolita's situation was a prime example of this scenario—relocating an endangered species into an area where other members of the endangered species are present. One of the concerns in the case of Lolita's intended relocation was the potential health risks posed to the wild Southern Resident Killer Whales (SRKWs) in the area.⁹¹ During her time at the Seaquarium, Lolita dealt with a variety of infections and health issues stemming from her living conditions and age.⁹² Thorough precautions would have been required to ensure that she could not spread potentially harmful bacteria or other infectious material to the wild SRKWs—a listed endangered species under the ESA since 2006.⁹³ Also, her presence may have led to altered behavior in the wild population, leading to changes in movement patterns, acoustic interactions, or other characteristic behaviors.⁹⁴ The question remains whether such behavioral changes constitute “harassment” under the “take” provision.⁹⁵ This situation provides only one example, but the sanctuary creation process must tackle this issue in any desired placement area that a listed species resides in or relies on.

While there are undoubtedly concerns, a sanctuary could also have big-picture benefits for the species as a whole. For one, visitors to the sanctuary would likely receive some level of educational messaging about SRKWs and would learn more about the intricacies of orcas as a species (similar to the Sea Life Trust beluga sanctuary in Iceland).⁹⁶ Second, the potential to conduct non-invasive research would allow for further insight into the species and contribute to the current body of scientific knowledge. Finally, having this infrastructure in place and these resources available offers the

88. *Id.* § 1536(c)(1).

89. *Id.* § 1536(b)(4).

90. CONG. RSCH. SERV., THE ENDANGERED SPECIES ACT: A PRIMER 19 (Sept. 8, 2016).

91. Gammon, *supra* note 3.

92. *Id.*

93. *Id.*; 50 C.F.R. § 226.206(a).

94. Chabeli Herrera, *Lolita May Never Go Free. And That Could Be What's Best for Her*, *Scientists Say*, MIAMI HERALD (Nov. 20, 2017, 08:04AM), https://www.oceanconservation.org/pdf/press-kit/2017_11_20_Lolita_Never_Go_Free.pdf.

95. 16 U.S.C. § 1538(a)(B–C).

96. *The Sanctuary*, SEA LIFE TR., <https://belugasanctuary.sealifetrust.org/en/about-us/the-sanctuary/> (last visited Oct. 24, 2022).

potential co-benefit of improved responses to emergency health issues for wild animals in critical habitats.

This problem was demonstrated by Scarlet, otherwise known as “J50.”⁹⁷ Scarlet was an SRKW born in 2014 off the coast of Washington who developed health issues early in her life and passed away in 2018, several months prior to her turning four.⁹⁸ Collaborative efforts from veterinarians and government organizations attempted to diagnose and treat Scarlet from a distance, but they were unable to determine Scarlet’s affliction or, consequently, what caused her death.⁹⁹ Had a sanctuary been in place, Scarlet could have received more in-depth care and rehabilitation, which could have possibly extended her life and the population of an already depleted species.

In sum, the ESA is a landmark piece of legislation, but it also contains dated language and policies. The last amendment to the ESA occurred in 2004, which actually weakened the statute by granting the Department of Defense an exemption from critical habitat designations pursuant to the National Defense Authorization Act.¹⁰⁰ The rise in popularity of sanctuaries since then is encouraging, but unaccounted for as far as the ESA is concerned.¹⁰¹ There is room in the statute for changes that encompass recent support for sanctuaries without compromising the fundamental aspects of the statute. Given the significant challenges the ESA currently poses to sanctuaries, amending the statute to include sanctuary language and incorporate sanctuaries into certain provisions would be a step in the right direction.

B. Marine Mammal Protection Act

Congress enacted the MMPA in response to growing concerns from scientists and the public that certain marine mammal species were facing extinction.¹⁰² The MMPA laid out the national policy that marine mammal populations should not be diminished by human activities because of the

97. Wanyee Li, ‘Spunky and Tenacious’ Orca Fighting to Keep Up with Her Endangered Family Was an Inspiration to Researchers, STARMETRO VANCOUVER (Sept. 14, 2018), <https://www.thestar.com/vancouver/2018/09/14/young-orca-declared-dead-leaving-behind-her-critically-endangered-family.html>.

98. *Id.*

99. *Id.*

100. *History of the Endangered Species Act: Principal Amendments*, U.S. FISH & WILDLIFE SERV. [https://www.fws.gov/page/endangered-species-act-amendments#:~:text=2004%20Amendment,Endangered%20Species%20Act%20\(ESA\)](https://www.fws.gov/page/endangered-species-act-amendments#:~:text=2004%20Amendment,Endangered%20Species%20Act%20(ESA)) (last visited Dec. 7, 2022).

101. *See generally* Endangered Species Act of 1973, (containing no mention of or reference to sanctuaries).

102. *Marine Mammal Protection Act*, MARINE MAMMAL COMM’N (2022), <https://www.mmc.gov/about-the-commission/our-mission/marine-mammal-protection-act/>.

importance of marine mammals to their respective ecosystems.¹⁰³ A central goal of the MMPA was to establish a nationwide moratorium on “taking” and importing marine mammals, although both actions are subject to numerous exceptions.¹⁰⁴ Similar to the ESA (enacted the year after the MMPA), the “take” prohibition creates some issues for sanctuary creation. In addition, the MMPA applies to all marine mammals, not just those listed as endangered or threatened under the ESA.¹⁰⁵ The listed exemptions, however, provide the formula for sanctuaries to comply with the MMPA.

The opening section of the MMPA establishes a moratorium on all taking and importation of marine mammals and marine mammal products.¹⁰⁶ What follows, however, is a list of exceptions to that moratorium.¹⁰⁷ The first exception allows the Secretary to issue permits for “taking, and importation for purposes of scientific research, public display, photography for educational or commercial purposes, or enhancing the survival or recovery of a species or stock, or for importation of polar bear parts. . . .”¹⁰⁸ The Secretary is authorized to issue the permits and the recipients must comply with its provisions for each permit issued.¹⁰⁹ The second exception allows for “incidental take” of marine mammals during commercial fishing operations if the Secretary issues a permit.¹¹⁰ The Secretary can also waive the requirements of the moratorium to allow taking or importation so long as the best scientific evidence is considered and the Marine Mammal Commission is consulted.¹¹¹ The remaining exceptions include those for Native Alaskans, good Samaritans, self-defense, and national defense.¹¹²

Like its ESA counterpart, the MMPA’s take provision poses an issue for sanctuary creation. Because the MMPA precedes the ESA’s enactment, the definition of “take” is not as narrowly tailored as its ESA counterpart. The MMPA defines “take” as “harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.”¹¹³ The statute goes on to also define “harassment,” which entails:

103. *Id.*

104. *Id.*

105. Marine Mammal Protection Act of 1972, 16 U.S.C. § 1371(a) (1972).

106. *Id.*

107. *Id.*

108. *Id.* § 1371(a)(1).

109. *Id.* § 1374(a).

110. *Id.* § 1371(b).

111. *Id.* § 1371(a)(3).

112. *Id.* § 1371(b–f). For example, the “take” prohibition does not apply to Native Alaskans who perform the “take” for either subsistence purposes or to make authentic native handicrafts or clothing, but both must be done in a non-wasteful manner, *id.* § 1371(b). Similarly, the “good Samaritan” exception allows for take in situations where it is imminently necessary to prevent the injury, additional injury, or death of a marine mammal tangled in fishing gear or debris, *id.* § 1371(d).

113. *Id.* § 1362(13).

[A]ny act of pursuit, torment, or annoyance which: (i) has the *potential* to injure a marine mammal or marine mammal stock *in the wild*; or (ii) has the *potential* to disturb a marine mammal or marine mammal stock *in the wild* by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.¹¹⁴

Similar to the problem posed by the ESA, the “take” provision of the MMPA encompasses impacts to the wild population of marine mammals. The MMPA, however, creates additional obstacles to sanctuary creation because the statute encompasses *all* marine mammals, not just endangered ones.¹¹⁵ In Lolita’s case, for example, the ESA would have concerned itself with the SRKW population (and any other endangered animals impacted) because of the population’s listing as endangered.¹¹⁶ In contrast, the MMPA would have covered every marine mammal that would have had their behavior impacted by the presence of Lolita and the sanctuary.¹¹⁷ The MMPA amplified the concerns of Lolita’s relocation by requiring consideration of not only SRKWs, but also the health and welfare of the other marine mammals in the area.¹¹⁸

The ESA and MMPA pose similar problems regarding take, and they have similar solutions: permits. Under the MMPA, the Secretary can grant a permit authorizing a take or importation for a variety of purposes, several of which could justify creation of a sanctuary.¹¹⁹ The most appealing justification would be for enhancing the survival of a species, but public display and scientific research may be equally (or more) viable. Those facilities currently holding public display permits for marine mammals do not need to obtain an additional permit for purposes like purchase, sale, or transfer of the animal.¹²⁰ The public display permit holders—typically sea parks and larger aquariums—are the ones that have complete discretion over how to use their permits.¹²¹ As a result, the pressure applied to permit holders to surrender their animals to sanctuaries comes largely from the public and third-party organizations. In extreme examples like Keiko’s, the pressure applied to the park in Mexico by the public and animal protection organizations was so immense due to the success of *Free Willy* that the park

114. *Id.* § 1362(18)(A) (emphasis added).

115. *Id.*

116. Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales, 70 Fed. Reg. 69,903 (Nov. 18, 2005).

117. 16 U.S.C. § 1362(18)(A).

118. *Id.*

119. *Id.* § 1371(1).

120. *Id.* § 1374(c)(2)(B).

121. *Id.* § 1374(c)(2)(B)(i)(ii).

had virtually no choice but to comply and arrange his transfer.¹²² Without the level of awareness and passion that a movie like *Free Willy* invokes, exerting enough pressure on public display permit holders to compel them to transfer their marine mammals is an uphill battle. However, the momentum continues to grow as documentaries such as *Blackfish* and *The Cove*, as well as effective animal rights campaigns, are promoted and produced more frequently.¹²³ This momentum will likely continue to influence legislation all over the world, particularly in the wake of Lolita's passing.

Similar to the ESA, there is no reference to sanctuaries anywhere in the MMPA (as of 2023). Sanctuaries are a relatively new proposition, so to not see any reference to them in either statute is not overly surprising. An amendment to the MMPA that alters the permit types and requirements would be a good start. Specifically, an amendment that replaces "public display" permits with "sanctuary" permits could be effective. Alternatively, the amendment could continue to authorize public display of marine mammals only if the display is for sanctuary purposes. Sea parks and aquariums have expressed a fair amount of resistance to removing public display permits given their financial stake in the animals, so removal or alteration of all public display language would be a difficult proposition. Incorporating sanctuary language into the statute in any capacity would be a positive thing, but for the time being, those that wish to create a sanctuary must comply with the current text, and there is space to do so.

C. Animal Welfare Act

Enacted in 1966, Congress originally created the Animal Welfare Act (AWA) to regulate the humane treatment and handling of cats, dogs, and other laboratory animals, as well as to prevent theft and sale of pets to laboratories.¹²⁴ Since then, the AWA has been amended several times to expand the types of animals and activities covered, strengthen enforcement provisions, and deter cruel practices like animal fighting.¹²⁵ The AWA requires specific standards be in place for the humane treatment, handling, care, and transportation of covered animals that licensees and registrants must follow.¹²⁶ With respect to marine mammals, the current standards

122. Long Synopsis – *The Untold Story*, JOSHUA RECORDS, LLC, <https://www.keikotheuntoldstory.com/about/keiko/thestory/> (last visited Sept. 29, 2022).

123. Elizabeth Hightower Allen, *The Outside Story Behind the Documentary 'Blackfish,'* OUTSIDE (Nov. 11, 2021), <https://www.outsideonline.com/culture/books-media/seaworld-blackfish-tilikum-killer-whale/>; *The Cove*, OCEANIC PRES. SOC'Y, <https://www.opsociety.org/our-work/films/the-cove/> (last visited Sept. 29, 2022).

124. ELENI G. BICKELL, CONG. RSCH. SERV., RL47179, THE ANIMAL WELFARE ACT: BACKGROUND AND SELECTED ISSUES 1 (2023).

125. *Id.* at 3.

126. *Id.* at 4.

address matters such as construction, lighting, temperature, and space requirements, among others.¹²⁷ Sanctuaries for marine mammals can likely satisfy all the current standards in place, but the question remains whether sanctuaries would even need to be licensed under the statute.¹²⁸

The standards under the AWA are a major aspect of the statute's legal framework, but they are also fairly dated considering they have not received a substantial update since the statute's enactment. In 1979, standards were implemented for the humane handling, care, treatment, and transportation of marine mammals.¹²⁹ Section 3.103 of the AWA's implementing regulations explains the requirements for outdoor facilities, which impose duties that address environmental temperatures, shelter provisions, and perimeter fencing.¹³⁰ Section 3.104 lays out the general space requirements necessary for each type of marine mammal, which the standards discuss in turn.¹³¹ Section 3.104(b) deals solely with cetaceans, which consist of whale species like orcas, porpoises, and dolphins.¹³² The listed standards are designed for pool settings, which is where the bulk of captive cetaceans reside, and lay out four factors for determining space requirements: minimum horizontal dimension (MHD), depth, volume, and surface area.¹³³ Each factor is determined using mathematical formulas based primarily on the average length of an adult member of the species at issue.¹³⁴ While perhaps innovative when they were promulgated, the failure to adjust the standards over time to reflect what we have learned about the social, physical, and cognitive functions of the respective species covered by the statute is disappointing.¹³⁵

The AWA primarily concerns itself with conditions in contained settings like zoos, aquariums, and sea parks—sanctuaries fall under a completely different category. Sanctuaries are built in a natural setting and do not use pools, which negates the need to comply with general spatial requirements under § 3.104.¹³⁶ For outdoor facilities, the concern with environmental temperatures under § 3.103(a) would not be an issue because the conditions of the sanctuary replicate what the animal is already biologically accustomed to (although some acclimation measures may be necessary depending on the

127. 9 C.F.R. §§ 3.100–3.104 (2022).

128. Animal Welfare Act, 7 U.S.C. § 2132(h) (1970).

129. 9 C.F.R. § 3.100 (2022). Although these regulations received minor amendments in 1999 and 2001, their function was not fundamentally altered.

130. *Id.* § 3.103.

131. *Id.* § 3.104.

132. James G. Mead, *Cetacean*, ENCYC. BRITANNICA, <https://www.britannica.com/animal/cetacean> (Oct. 23, 2023).

133. 9 C.F.R. § 3.104(b).

134. *Id.*

135. Jacobs et al., *supra* note 50, at 439–41.

136. 9 C.F.R. § 3.104.

time spent in a captive setting).¹³⁷ Section 3.103(b) deals with natural or artificial shelters and their implementation to protect the animals from climatic conditions in the region.¹³⁸ One of the most important aspects of a seaside sanctuary is the site location, so those responsible for creating the sanctuary will need to make the most informed and careful decision possible to deal with climate conditions in the area.¹³⁹ Finally, § 3.103(c) requires implementation of a perimeter fence to keep out animals and unauthorized persons.¹⁴⁰ The Whale Sanctuary Project provides a prime example of what a perimeter fence and security system would look like for a seaside sanctuary. The WSP's fence and security system uses mesh nets, anchors, and lead and steel lines to maintain the structure and safety of the fence and sanctuary.¹⁴¹ Sanctuaries can comfortably satisfy the current standards of the AWA.

One of the questions surrounding sanctuaries is whether they need to have a license under the AWA. Sections 2133 and 2144 authorize the Secretary to issue permits to “dealers and exhibitors” that comply with the requirements and standards in the statute.¹⁴² The AWA defines an “exhibitor” as:

[A]ny person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not. . . .¹⁴³

This definition raises a number of questions. Is the cost of relocation and various expenses for transport sufficient to “affect commerce” within the meaning of the definition?¹⁴⁴ Is the display of the animals to the public via camera or internet stream to encourage donations considered “compensation”?¹⁴⁵ Does the definition's inclusion of “carnivals, circuses, and zoos” create a finite list or a list subject to more examples, such as

137. *Id.* § 3.103(a).

138. *Id.* § 3.103(b).

139. *Seaside Sanctuaries: A Concept Review*, DOLPHINARIA-FREE EUROPE, <https://awionline.org/sites/default/files/uploads/documents/ML-Rose-Seaside-Sanctuaries-DFE.pdf> (last visited Dec. 7, 2022).

140. 9 C.F.R. § 3.103(c).

141. *Sanctuary Structures – Sample Plans*, THE WHALE SANCTUARY PROJECT, <https://whalesanctuaryproject.org/sanctuary-structures-plans/> (last visited Sept. 23, 2023).

142. Animal Welfare Act, 7 U.S.C. §§ 2133, 2134 (1970).

143. *Id.* § 2132(h).

144. *Id.*

145. *Id.*

sanctuaries?¹⁴⁶ These are all fair questions, each of which warrants an answer.

Based on the definition and what the goal of sanctuaries are, it is unlikely they would be deemed exhibitors under the statute. The statute's primary concern is the operation of captive settings like zoos and sea parks, so the list provided in the "exhibitor" definition could be construed as finite.¹⁴⁷ With respect to commerce, it is true that animal transportation and relocation costs could impact commerce in some way, but doing so would also be a presumably one-time endeavor. The purpose of the sanctuaries is not to generate profit or compensation through displaying animals—it is to provide these animals a forever home and high-quality living conditions for the remainder of their lives.¹⁴⁸ Although likely not required, applying for a permit would show that sanctuaries are willing to participate in the same framework of oversight and regulations as their profit-generating counterparts.

A more recent development in the legislative arena is the proposed Strengthening Welfare in Marine Settings Act of 2022, otherwise known as the SWIMS Act.¹⁴⁹ In July 2022, several representatives proposed the SWIMS Act to amend both the MMPA and AWA to reflect the importance of sanctuaries and to end public display and captive breeding of whales.¹⁵⁰ Specifically, the proposed bill would amend the MMPA to prohibit the taking, import, or export of orcas, beluga whales, pilot whales, and false killer whales except for the purpose of relocation to a sanctuary or release into the wild.¹⁵¹ The AWA would be amended to prohibit breeding of those same whales, either naturally or artificially, for the purposes of public display.¹⁵² While deliberation is ongoing, the SWIMS Act would be a great step toward government support of sanctuaries and updating two statutes that have lagged behind evolving science to this point.

The AWA is a statute that prioritizes the health and welfare of animals in captivity.¹⁵³ Unfortunately, one of its biggest drawbacks is the lack of updates to the standards of care.¹⁵⁴ Some protection for captive animals is

146. *Id.*

147. BICKELL, *supra* note 124.

148. *The Sanctuary*, THE WHALE SANCTUARY PROJECT, <https://whalesanctuaryproject.org/the-sanctuary/> (last visited Jan. 18, 2023).

149. Strengthening Welfare in Marine Settings Act, H.R. 8514, 117th Cong. (2022).

150. Courtney Fern, *Nhrp Supports New Bill to End the Capture and Breeding of Whales for Public Display*, NONHUMAN RTS. BLOG (July 26, 2022), <https://www.nonhumanrights.org/blog/nhrp-supports-swims-act/>. Representatives Adam Schiff (D-Calif.), Jared Huffman (D-Calif.), and Suzan DelBene (D-Wash.) and Senator Dianne Feinstein (D-Calif.) introduced the bill.

151. *Id.*

152. *Id.*

153. Animal Welfare Act, 7 U.S.C. § 2131 (1970).

154. *See* 9 C.F.R. §§ 3.100–3.118 (showing that the large majority of the standards regarding marine mammals have not been updated since at least 2001, and some before that).

good, but without the standards changing as we learn more about animals and their needs, the protections the AWA provides can only do so much. Sanctuaries can likely comply with the statute with no real difficulties, although seeking a permit under it would go a long way in showing their willingness to fall under government regulation. Should something like the SWIMS Act pass, outdated statutes and their corresponding regulations, like the MMPA and AWA, would finally get a much-needed facelift.

D. Other Noteworthy Statutes

While the ESA, MMPA, and AWA are crucial to sanctuary creation with respect to the animals themselves, there are other statutes that address the more logistical issues the sanctuaries must deal with. These statutes include the Clean Water Act (CWA), the Rivers and Harbors Act (RHA), and the Coastal Zone Management Act (CZMA), among others.¹⁵⁵ Enacted in 1948, the Clean Water Act (as it is known today) was created to regulate discharges into the waters of the U.S. and create water quality standards.¹⁵⁶ The CWA makes the discharge of a pollutant from a point source into a navigable water illegal without a permit.¹⁵⁷ The definition for “pollutant” includes biological materials, and “point source” is defined as a “discernible, confined, and discrete conveyance,” which poses the issue of whether sanctuaries would need a permit for the food and waste they generate.¹⁵⁸

The Rivers and Harbors Act authorizes the U.S. Army Corps of Engineers (USACE) permit program that works to protect navigable waters from construction and development projects.¹⁵⁹ Section 10 of the RHA requires a permit for “any obstruction” in navigable federal waters, including structures such as wharfs, piers, bulkheads, and jetties.¹⁶⁰ The USACE grants permits after the “public interest” review has been satisfied, which assesses a variety of factors, including “fish and wildlife.”¹⁶¹ Given that a sanctuary could be considered an “obstruction,” any proposed sanctuaries would likely need to satisfy the permit application process of the RHA.

The Coastal Zone Management Act is administered by the National Oceanic and Atmospheric Administration (NOAA) and serves as a tool to

155. Clean Water Act, 33 U.S.C. § 1251; Rivers and Harbors Act, 33 U.S.C. § 401; Coastal Zone Management Act, 16 U.S.C. § 1451.

156. *Summary of the CWA*, EPA (July 6, 2022), <https://www.epa.gov/laws-regulations/summary-clean-water-act#:~:text=The%20CWA%20made%20it%20unlawful,pipes%20or%20man%2Dmade%20ditches>.

157. *Id.*

158. Federal Water Pollution Control Act, 33 U.S.C. §§ 1362(6), 1362(14) (defining “pollutant” and “point source”).

159. Rivers and Harbors Act, 33 U.S.C. § 401.

160. *Id.* § 403.

161. *Id.*; 33 C.F.R. § 320.4.

encourage states to develop their own coastal management plans (CMPs).¹⁶² The CZMA requires that any federal action that will impact a state's CMP must be consistent with that plan "to the maximum extent possible."¹⁶³ Parties seeking a federal permit must ensure compliance with the CMP.¹⁶⁴ If a state objects to the proposal, the permit cannot be granted unless altered or appealed.¹⁶⁵ Sanctuaries will virtually always implicate this statute because of their location relative to the coastlines of states, meaning that creating a sanctuary will require compliance with a given state's CMP.

The animal aspect of sanctuaries is undeniably a large part of the process, but it is not the only part. Considering and complying with other statutes that address issues separate from animal management and care in sanctuaries is an overlooked but critical piece of the sanctuary puzzle. The legal components that require compliance are undoubtedly important, but there are policy considerations that warrant attention as well.

III. POLICY CONSIDERATIONS

In addition to the legal aspects of creating a sanctuary, there are several policy implications worth considering. First, the *PETA v. Seaquarium* case displays how the law can be followed (specifically the ESA) yet still produce unjust results.¹⁶⁶ Aside from the questionable holding, a major takeaway from *PETA v. Seaquarium* is that the standards and language of the law need to be modified to facilitate sanctuary creation and encompass sanctuaries as a whole.¹⁶⁷ The scientific community has learned so much about a variety of species, including marine mammals, since Congress enacted the first major statutes concerning animal welfare.¹⁶⁸ With that in mind, the reluctance to incorporate what the community has learned into our statutes and update them to reflect current understandings is confusing and concerning.

Another policy consideration is the relationship between the federal government and the American people. Directing federal funds to the sanctuary process would align with the sentiment of the people that no longer

162. Coastal Zone Management Act of 1972, 16 U.S.C. § 1451(i).

163. *Id.* § 1456(c)(2).

164. *Id.* § 1456(c)(3)(B).

165. *Id.* § 1456(c)(3)(A).

166. *See generally* People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium, 879 F.3d 1142 (11th Cir. 2018) (affirming grant of summary judgment for Seaquarium but rejecting the lower court's narrow interpretation of "take" under the Endangered Species Act).

167. *See generally id.* (interpreting the interpretation of "harm" under the Endangered Species Act to only apply to "serious harm" and not the type of "harm" that Lolita faced in captivity at Seaquarium).

168. *Celebrating 50 Years of the Marine Mammal Protection Act*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (July 30, 2022), <https://www.fisheries.noaa.gov/feature-story/celebrating-50-years-marine-mammal-protection-act>.

wish to see large cetaceans in captive settings.¹⁶⁹ Doing so would also echo the motivations of the Congresses that enacted the ESA, MMPA, and AWA.¹⁷⁰ Despite the shortcomings of the statutes today, Congress would give themselves an opportunity to double down on the reasons for passing those laws in the first place. Strengthening the relationship with the public and reaffirming the desires of its predecessors are both compelling reasons for Congress to provide financial aid to the sanctuary process.

A final policy argument finds support from the Indigenous communities that wanted Lolita returned to the waters of Washington state.¹⁷¹ The Lummi Nation, in particular, considered Lolita and the SRKWs to be their “relatives that live under the waves.”¹⁷² In the Lummi language, killer whales are known as Qwel lhol mechen, or “The People Who Live Under the Sea.”¹⁷³ In 2018, Lummi carvers and supporters embarked on a 7,000-mile journey from Washington state to Miami to deliver a hand-crafted totem pole to Lolita.¹⁷⁴ The journey involved stops along the way to raise awareness of Lolita’s situation, including the fact that her rightful place was with her family in the waters off of Washington state.¹⁷⁵ One of the pole’s carvers, Jewell Praying Wolf James, explained that the tribe was “on a journey to free a fellow being,” further demonstrating that the tribe considers orcas members of the tribe’s family.¹⁷⁶

The Lummi strongly believe that all life is sacred and that by saving Lolita they would not only have rescued her, but also helped “balance a part of the spiritual atmosphere, the songs of creation.”¹⁷⁷ In 2019, members of the Lummi gave Lolita the name “Sk’aliCh’elh-tenaut, which means that she is a member of Sk’aliCh’elh, the resident family of orcas who call the Salish Sea home.”¹⁷⁸ With that in mind, the Lummi and other Indigenous

169. Karin Brulliard, *Zoos Are Built for People. Animals Need Sanctuaries Instead.*, WASH. POST (July 18, 2016, 9:00 AM), <https://www.washingtonpost.com/news/animalia/wp/2016/07/08/zoos-are-built-for-people-animals-need-sanctuaries-instead/>.

170. *Supra* Section II(A) (explaining that Congress’s intent was to conserve endangered and threatened species from extinction and protect their habitats); *supra* Section II(B) (explaining that Congress was motivated to pass the MMPA because of concerns for marine mammal extinction, and because it recognized that prohibiting the “taking” of marine mammals would help achieve that goal); *supra* Section II(C) (recounting that Congress created the AWA to promote the humane treatment of animals in different settings).

171. Gammon, *supra* note 3.

172. *Id.*

173. Lynda V. Mapes, *Seeking to Free a Puget Sound Orca, Lummi Nation Launches Trek to Miami*, SEATTLE TIMES (May 13, 2019, 9:19 A.M.), <https://www.seattletimes.com/seattle-news/environment/seeking-to-free-a-puget-sound-orca-lummi-nation-launches-trek-to-miami/>.

174. *Id.*

175. *Id.*

176. *Id.*

177. Eilis O’Neill, *This Orca Was Stolen from Puget Sound. The Lummi Nation Want Her Back*, OR. PUB. BROAD. (May 9, 2018, 4:05 PM), <https://www.opb.org/news/article/orca-miami-seaquarium-lolita-tokitae-rescue-totem-pole/>.

178. Gammon, *supra* note 3.

communities should have had a more prominent voice in discussions surrounding Lolita's relocation and should have one in future SRKW relocation efforts. At the very least, there should have been an acknowledgment of society's ethical obligation to return Lolita to her home waters for the sake of reuniting her with her ancestral home and family.

IV. SOLUTIONS FOR THE PATH FORWARD

The sanctuary creation process is elaborate, expensive, and time-intensive. The process requires compliance with a variety of statutes and regulations imposed by various government bodies, but without the substantive aid of any of those bodies.¹⁷⁹ To reduce the difficulties in creating the sanctuaries, it makes sense to involve government entities in the process. To that end, there are several potential ways the U.S. government could contribute to the process.

One solution is for Congress to enact a statute that provides direct financial aid towards the cost and production of seaside sanctuaries. Over the last 50 years, Congress has enacted and amended several statutes that address species protection and animal welfare, with particular attention devoted to marine mammals.¹⁸⁰ Marine parks have served their purpose to this point by displaying the fascinating and remarkable qualities of large marine mammals. Over time, however, alternative means of viewing marine mammals and animals of all kinds have emerged that minimize the usefulness of zoos and marine parks.¹⁸¹ With options like sanctuaries arising to serve as more natural and appealing homes, streamlining the sanctuary process via government aid would coincide with the desires of the public at large. A statute providing a direct line of aid to the creation process would further the goals of the other animal-focused statutes Congress has enacted and further the desires of the American people.

A second and perhaps more amenable solution is amending the criteria of the MMPA's Prescott Grant. The Prescott Grant is a program that awards grants to "eligible stranding network participants for the recovery or treatment of marine mammals, the collection of data from living or dead marine mammals for scientific research regarding marine mammal health,

179. See *supra* Part II (discussing the ESA, MMPA, AWA, and their requirements that must be followed).

180. See, e.g., Animal Welfare Act, 7 U.S.C. § 2131(1–2) (discussing Congress's intent to address species protection and animal welfare); see also Marine Mammal Protection Act of 1970, 16 U.S.C. § 1361(2) (emphasizing the statute's intent to protect marine mammals from the effects of mankind); Endangered Species Act of 1973, 16 U.S.C. § 1531(b) (stating Congress's intent to conserve species facing extinction and create a conservation program to promote their populations).

181. Robin McKie, *Is It Time to Shut Down the Zoos?*, GUARDIAN (Feb. 2, 2020, 3:30 PM), <https://www.theguardian.com/world/2020/feb/02/zoos-time-shut-down-conservation-education-wild-animals>.

and facility operation costs directly related to those purposes.”¹⁸² Amending the MMPA and the criteria for a Prescott Grant would provide an avenue for federal aid towards seaside sanctuaries without the cumbersome process of enacting a new statute. The amount of any grant awarded cannot exceed \$100,000, so the financial burden of building a sanctuary could be lessened but not completely alleviated.¹⁸³ An amended Prescott Grant may not provide the same amount of aid that a new statute would, but building from an existing program and legislation would be faster and likely more appealing to members of Congress.

A potential solution to funding troubles can be found in the ESA as well. A provision of the statute involves land acquisition, which allows the responsible Secretary to use funds from the Land and Water Conservation Fund to “acquire land, waters, or interests therein.”¹⁸⁴ Unfortunately, the fund currently derives the majority of its revenue from oil and gas leasing in the Outer Continental Shelf, but it is authorized to receive up to \$900 million annually.¹⁸⁵ Initially created to fund federal agencies’ outdoor recreational goals, the fund’s purpose expanded in 1998 towards broader goals encompassing natural resource-related projects.¹⁸⁶ The uneven distribution of funds to various agencies and their respective goals makes a sanctuary proposition tricky. The idea of using the fund to establish and support sanctuaries under the umbrella of “natural resource-related projects” is intriguing. However, doing so would require the cooperation and interest from one or more agencies to spend some of their money provided by the fund. If more agencies are involved (and therefore the burden becomes increasingly spread out), agencies may be more willing to allot some of their funds to a sanctuary project. Determining which agencies would be willing to cough up some of their money for a sanctuary is another issue, but the potential to seek them out as a source of funding is there.

One final recommendation is to allow for expedited handling of legal cases that involve captive marine mammals originally captured from the wild, like Lolita was. Expedited handling provisions are found in a variety of fields, but they are usually found in administrative circumstances and those

182. H.R. 1934, 106th Cong. § 408(a) (1999) (listing the requirements for eligibility for the Marine Mammal Rescue Grant Program).

183. *Id.* § 408(d).

184. Endangered Species Act of 1973, 16 U.S.C. § 1534(b).

185. CAROL HARDY VINCENT, CONG. RSCH. SERV., RL33531, LAND AND WATER CONSERVATION FUND: OVERVIEW, FUNDING HISTORY, AND ISSUES 1 (June 19, 2019), <https://www.everycrsreport.com/reports/RL33531.html#:~:text=grants%2C%20among%20others.-,Introduction,and%20vitality%22%20of%20U.S.%20citizens.>

186. *Id.* at 9.

where a “compelling need” for expediting is shown.¹⁸⁷ This proposal would apply once a sanctuary is actually built and operating. With the sanctuary in place, the captive marine mammals that can survive transport and likely thrive in a natural setting would be granted faster resolution of their legal issues. There are approximately 2,360 cetaceans in captivity worldwide currently (roughly 2,000 dolphins, 227 belugas, and 53 orcas), which is a remarkable number.¹⁸⁸ If able, those animals should be granted the opportunity to return to a more hospitable environment in the time they have left. Had a completed sanctuary existed at the time of Seaquarium’s commitment to release her, Lolita would have been a prime candidate for this type of provision. The accelerated handling provision could be amended into either the ESA, MMPA, AWA, or some other statute that Congress deems appropriate.

These proposed suggestions offer solutions that are productive and, more importantly, realistic options. Each suggestion provides a way for the government to help a cause that so many people have championed for years. The public outcry and pressures placed on marine parks to release their captive animals can only do so much. At some point, there must be action that does not require the public or nonprofits like the Whale Sanctuary Project to bear the full weight of helping animals like Lolita. The actions of Congress demonstrate that they value animals—marine mammals in particular—and that listed species should be protected in a number of ways. Congress’s inaction to this point is concerning but not overly surprising. With resources and options available, our government should act and provide aid to a cause that will benefit marine mammals everywhere.

CONCLUSION

Lolita was certainly not the first marine mammal to die in captivity, but she should be the last. Her case was a uniquely challenging one, but the silver lining is that it presented an opportunity to pave a path toward a more sanctuary-friendly regulatory framework than what is currently in place. With the tools in place to establish seaside sanctuaries, our government can contribute to the creation process so that organizations are not left to their

187. *Ensuring Timely Determinations on Requests for Expedited Processing*, U.S. DEP’T OF JUST., <https://www.justice.gov/oip/oip-guidance/oip-guidance-5> (Dec. 6, 2022) (explaining expedited review provision for the Freedom of Information Act); *see generally* 9 C.F.R. §§ 2.5(3)(ii), 2.11(b)(2) (2023) (describing two provisions of the USDA Animal Welfare Regulations that allow requests for expedited hearings upon permit denials); *Availability of Expedited Processing*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/open-government-sections/5-availability-of-expedited-processing/> (last visited Jan. 20, 2023) (providing the list of states that have expedited processing provisions for records requested from agencies by the press).

188. *CFAF’s Work for Dolphins and Whales in Captivity*, CHANGE FOR ANIMALS FOUND., <https://www.change4animals.org/whales-and-dolphins-in-captivity#> (last visited Jan. 19, 2023).

own devices to acquire funding for a noble cause. The public's fleeting interest in seeing large marine mammals in captive settings and its growing desire to see them placed in more natural areas would align with such action by the federal government. Statutes like the ESA, MMPA, and AWA indicate that the government is not afraid to protect wildlife, and marine mammals specifically. The SWIMS Act would be an excellent step forward and would further the sentiments of the American people—the only step left is to ratify it. Amending the Prescott Grant to award funding to marine mammal sanctuaries would be a tremendous use of an existing program to aid the sanctuary process. Should the government decide to get involved, the path towards the removal of all large marine mammals from captive settings in the future would become that much more tangible. The pieces are in front of Congress—it just has to put them together.